

## CHAPTER 2 Effects of the Charter on EDC/HRE in the Council of Europe legal order

### 41 *Perspectives for assessing the effects of the Charter on EDC/HRE*

The effects of the Charter on EDC/HRE within the Council of Europe legal order are assessed, firstly, in the light of the case law of the ECtHR (sections A and B) and, secondly, according to criteria established by legal scholars, revealing strengths and weaknesses (section C). Section D draws on research and scholarship outside the legal field providing a context for further analysis.

### *A Relevance for the interpretation of ECHR provisions*

#### 42 *The 2002 Recommendation cited in case law*

The legal status of the Charter on EDC/HRE is that of a recommendation of the Committee of Ministers under Article 15(b) of the Statute (CM/Rec(2010)7). This recommendation is not mentioned in the case law of the ECtHR: it is not cited in any judgment, decision or opinion.<sup>321</sup> However, its predecessor is: the 2002 Recommendation of the Committee of Ministers on education for democratic citizenship (Rec(2002)12).<sup>322</sup> In *Seurot v France* (2004), a secondary school teacher was dismissed after he published an article with racist content inciting hatred in the school's newspaper ('unassimilable Muslim hordes'). In an application to the ECtHR, Seurot invoked the right to freedom of expression (Article 10 ECHR). The Court found that the dismissal did indeed interfere with his right to freedom of expression, but that that was necessary in a democratic society.<sup>323</sup> It pursued a legitimate aim of protection of the reputation and of the rights of others. The exercise of the right to freedom of expression 'carries with it duties and responsibilities' (Article 10(2) ECHR). These are of a special significance in the case of teachers, 'who are figures of authority to their

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321 <hudoc.echr.coe.int> search in October 2019.

322 Rec(2002)12 of the Committee of Ministers to member states on education for democratic citizenship (text to n 232).

323 *Seurot v France* no 57383/00 (ECtHR Decision 18 May 2004).

pupils'.<sup>324</sup> In earlier case law, the concept of special duties and responsibilities had been applied to a certain extent to the teachers' activities outside the school and—continued the Court—the same must a fortiori apply to the activities of teachers *in* school. To support its reasoning, at this point, the Court cited the 2002 Recommendation noting that ('La Cour note d'ailleurs que') in the Recommendation Rec(2002)12 on education for democratic citizenship, the Committee of Ministers recalls that 'education for democratic citizenship is fundamental to the Council of Europe's primary task of promoting a free, tolerant and just society' throughout life and at each level of education (primary, secondary, ...). The Court held that such an education for democratic citizenship, which is essential ('indispensable') to combating racism and xenophobia, requires the mobilisation of responsible actors, in particular teachers. The Court explicitly referred to the provision on the teacher training necessary for education for democratic citizenship in the Appendix to the 2002 Recommendation.<sup>325</sup> The Court found the complaint to be manifestly ill-founded and unanimously declared the application inadmissible.<sup>326</sup>

The *Seurot* decision indicates that the ECtHR recognises the essential role of EDC. It gives some effect to the 2002 Recommendation in its interpretation and application of Article 10 ECHR, striking a fair balance between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State.

Because the 2010 Recommendation builds on the 2002 Recommendation and contains similar provisions to those cited by the ECtHR,<sup>327</sup> it can be expected to produce the same effect.

In addition to this first argument militating in favour of the legal effects of the Charter on EDC/HRE, a more general argument will now be developed. Even though recommendations of the Committee of Ministers do not lead to obligations of compliance, judgments of the ECtHR show that such recommendations are not devoid of any legal effects. This second

324 Ibid; *Vogt v Germany* no 17851/91 (ECtHR 2 Sept 1996), para 60.

325 Rec(2002)12, para 4.

326 See also CoE Parliamentary Assembly, Motion for a resolution tabled by Mr Luca Volontè and other members of the Assembly, 'Respect for human rights in education for democratic citizenship in Spain' (3 June 2010): 305 parents and children lodged an application concerning compulsory 'Education for Citizenship' in Spain, in accordance with the 2002 Recommendation. Further *Motos* (n 462).

327 CM/Rec(2010)7 preamble ('Recalling the core mission... Firmly convinced'), appendix (Charter) paras 5, 6, 9.

argument will first be explained in general terms, then applied to the 2010 Recommendation on the Charter on EDC/HRE.

43 *The ECtHR takes non-binding instruments into account to interpret the ECHR and to establish common European standards*

The normative context in Chapter one has revealed a wide range of non-binding instruments on EDC adopted by various bodies of the Council of Europe. They all have potential legal relevance. Case law of the ECtHR demonstrates that non-binding instruments of the Council of Europe have been decisive in important cases.

In *Tănase v Moldova* (Grand Chamber),

[t]he Court emphasises that it has consistently held that it must take into account relevant international instruments and reports, and in particular those of other Council of Europe organs, in order to interpret the guarantees of the Convention and to establish whether there is a common European standard in the field.<sup>328</sup>

In this case, the Court interpreted the right to free elections (Article 3 Protocol 1 ECHR) in the light of various non-binding instruments of bodies of the Council of Europe.<sup>329</sup> In *Mosley*, the ECtHR confirmed even more clearly that ‘any standards set out in applicable international instruments and reports’ are relevant to the interpretation of the ECHR and to the identification of ‘any common European standard in the field’.<sup>330</sup> Indeed, throughout the case law of the ECtHR and in the context of many different ECHR rights, non-binding instruments of Council of Europe bodies

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328 *Tănase v Moldova* no 7/08 (ECtHR 24 April 2010), paras 176–77. See earlier *Demir and Baykara v Turkey* no 34503/97 (ECtHR 12 November 2008), paras 74–76, 85–86; and later *Soltysyak v Russia* no 4663/05 (ECtHR 10 February 2011), para 51.

329 *Tănase*, paras 55–60 and 124: to assess proportionality, the ECtHR took account of conclusions and reports of the European Commission against Racism and Intolerance, the Code of Good Practice in Electoral Matters of the Venice Commission, and resolutions of the Parliamentary Assembly, i.a. PA Resolution 1619(2008) on the state of democracy in Europe (25 June 2008).

330 *Mosley v UK* no 48009/08 (ECtHR 10 May 2011), para 110; also *Çam v Turkey* no 51500/08 (ECtHR 23 February 2016), para 53; *Saadi v UK* no 13229/03 (ECtHR 29 January 2008), para 62. Concrete application in *Mosley*: see paras 56–60, 124, for interpretation of Art 8 ECHR taking PA resolutions into account (i.a. Resolution 1636(2008) on indicators for media in a democracy) as well as a Declaration and Programme of action adopted by the Cracow 2000 European Ministerial Conference (A media policy for tomorrow).

are relevant. The Court relies on them to determine the scope of provisions, interference or justification, often in unprecedented cases where it formulates new standards.<sup>331</sup> As early as the 1979 *Marckx* case, in order to interpret the word ‘everyone’ in Article 8 ECHR (everyone has the right to respect for his family life), the Court took note of the Committee of Ministers’ Resolution on the social protection of unmarried mothers and their children (recommendations of the Committee of Ministers were initially called ‘resolutions’).<sup>332</sup> In *Telegraaf Media Nederland Landelijke Media*, the ECtHR used the definition of journalistic sources in the appendix of a recommendation of the Committee of Ministers in order to decide whether there was infringement of Articles 8 and 10 ECHR, and declared that ‘[p]rotection of journalistic sources is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments including the [quoted] Committee of Ministers Recommendation’.<sup>333</sup> The ECtHR thus refers to Council of Europe recommendations to stress the importance of certain general principles.<sup>334</sup> In *Shtukaturov v Russia*, Article 8 ECHR was interpreted and applied by reference to a Committee of Ministers recommendation on principles concerning the legal protection of incapable adults: ‘[a]lthough these principles have no force of law for this Court, they may define a common European standard in this area’.<sup>335</sup> The Court held that Russian legislation contrary to these principles, constituted a disproportionate restriction on the right guaranteed by Article 8 ECHR. In the landmark *Demir* case, the Court recalled that it has

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331 LR Glas, ‘The European Court of Human Rights’ use of non-binding and standard-setting Council of Europe documents’ (2017) 17 Human Rights Law Review 97, 100, 102–103, 106–108, 119. In a sample of 795 judgments between 2012 and 2015, the ECtHR used CoE documents in a minority of cases (about 230), but these cases were relatively important and formulate new standards.

332 *Marckx v Belgium* no 6833/74 (ECtHR 13 June 1979), para 31 (CM Resolution (70)15 on the social protection of unmarried mothers and their children (15 May 1970) was an argument ‘in addition’). See this and other examples in Pinto de Albuquerque (n 401). Text to n 402 on the role of soft law.

333 *Telegraaf Media Nederland Landelijke Media v the Netherlands* no 39315/06 (ECtHR 22 November 2012), paras 86 and 127 (quoting Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information).

334 Glas, ‘The European Court of Human Rights’ use of non-binding and standard-setting Council of Europe documents’, 110, with examples.

335 *Shtukaturov v Russia* no 44009/05 (ECtHR 27 March 2008), para 95. Taking into account CoE Recommendation R(99)4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults (23 February 1999).

never considered the provisions of the ECHR as the sole reference framework for interpreting the rights and freedoms therein. 'On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties'.<sup>336</sup> The Court 'has used, for the purpose of interpreting the Convention, intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly'.<sup>337</sup> Here, the Court took account of a recommendation of the Committee of Ministers on the status of public officials in Europe to interpret the right to freedom of association (Article 11 ECHR).<sup>338</sup> In several cases, European Prison Rules, featuring as an appendix to recommendations of the Committee of Ministers just like the Charter on EDC/HRE, have played an important role in the interpretation of Article 3 (prohibition of torture or inhuman or degrading treatment or punishment) or of Article 8 ECHR (right to respect for private and family life).<sup>339</sup> In *S v Switzerland*, the ECtHR recognised the right of the accused to communicate with his lawyer out of hearing of third persons as a basic condition for a fair trial in a democratic society (Article 6(3)(c) ECHR). This right had been set forth in the Standard Minimum Rules for the Treatment of Prisoners (appendix to Resolution (73)5 of the Committee of Ministers). The Court held this to be a necessary right, considering that 'the Convention is intended to guarantee rights that are practical and effective'.<sup>340</sup> In *Salduz*, the ECtHR held that Article 6(1) ECHR included the suspect's right of access to a lawyer from the time of the first police

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336 *Demir* (n 328), para 67.

337 *Demir* (n 328), paras 74–75. The Court has also supported its reasoning 'by reference to norms emanating from other CoE organs, 'even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies'. See also para 85: When 'defining the meaning of terms and notions in the text of the Convention, [the Court] can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values'.

338 *Demir* (n 328), paras 46, 76, 104, using Recommendation No R(2000)6.

339 The European Prison Rules are the minimum standards to be applied in prisons. See CoE Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (1 January 2006), and earlier CoE Recommendation R(87)3 of the Committee of Ministers to member states on the European Prison Rules (12 February 1987). See also text to n 512.

340 *S v Switzerland* no 12629/87 (ECtHR 28 November 1991), para 48.

interrogation,<sup>341</sup> and also referred to several recommendations of the Committee of Ministers and of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>342</sup> In *Murray*, interpreting Article 3 ECHR, the ECtHR found support for its decision that prisoners should be given an opportunity to rehabilitate i.a. in recommendations of the Committee of Ministers confirming the rehabilitative aim of imprisonment—notwithstanding the fact that the ECHR does not guarantee such a right—and held that States have an obligation of means to provide this.<sup>343</sup> Finally, and without seeking to provide an exhaustive list of examples,<sup>344</sup> in *Baka*, the Court considered Hungary’s alleged violation of Articles 6 and 10 ECHR in the light of ‘international and Council of Europe standards on the independence of the judiciary and the procedural safeguards applicable in cases of removal of judges’, including a Recommendation of the Committee of Ministers to member states on judges’ independence, efficiency and responsibilities (with norms in the appendix also expressed in terms of ‘should’), and in the light of other non-binding instruments of Council of Europe bodies, such as opinions of the Venice Commission.<sup>345</sup>

341 *Salduz v Turkey* no 36391/0227 (ECtHR November 2008), para 55, ‘in order for the right to a fair trial to remain sufficiently “practical and effective”’.

342 *Ibid*, paras 37–38, 54–55 (i.a. CM Res(73)5, CM Rec(2006)2). See earlier *Perez v France* no 47287/99 (ECtHR 12 February 2004), para 72 (‘the Court draws attention for information to the text of Recommendations Nos. R (83) 7, R (85) 11 and R (87) 21 of the Committee of Ministers ..., which clearly specify the rights which victims may assert in the context of -criminal law and procedure’).

343 *Murray v the Netherlands* no 10511/10 (ECtHR 26 April 2016), paras 58, 60, 66, 70, 73, 76, 99, 103–04 (taking into account European Prison Rules, also CM recommendations Rec(2003)23, Rec(2003)22, R (98)7 and Resolution 76(2)). Various other international and European materials are referred to, i.a. country reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (paras 57, 62). Other case law on prison rules with role of non-binding CoE instruments, see i.a. *Enea v Italy* no 74912/01 (ECtHR 17 September 2009), para 101; *Vinter and Others v UK* no 66069/09 et al (ECtHR 9 July 2013), paras 114, 116, 119 (i.a. a report on Switzerland of the Committee for the Prevention of Torture).

344 Other examples in Pinto de Albuquerque (n 401), and Glas, ‘The European Court of Human Rights’ use of non-binding and standard-setting Council of Europe documents’.

345 *Baka v Hungary* no 20261/12 (ECtHR 23 June 2016), paras 77–79, 82–83, 114, 117, such as Opinion no. 1 (2001) of the Consultative Council of European Judges on standards concerning the independence of the judiciary and the irremovability of judge, CoE Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on judges: independence, efficiency and

The interpretative value of Council of Europe recommendations, and recognition of their legal effect within the Council of Europe legal order, is comparable—*mutatis mutandis*—to the ECJ *Grimaldi* line of case law, acknowledging the legal effects of recommendations within the EU legal order. The ECJ stressed that recommendations cannot be regarded as having no legal effects:

*national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.*<sup>346</sup>

To conclude, in its interpretation of the ECHR, the ECtHR is mainly guided by the rules of interpretation of the Vienna Convention on the Law of Treaties.<sup>347</sup> The ECHR ‘cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law’.<sup>348</sup> When the ECtHR considers the object and purpose of ECHR provisions, it also takes account of the international law background to the legal question before it,<sup>349</sup> and relies on a wide range Council of Europe instruments: recommendations of the Committee of Ministers, resolutions or recommendations of the Parliamentary Assembly, declarations of European ministerial conferences, reports of Council of Europe bodies, etc. All

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responsibilities (17 November 2010) (norms in appendix), opinions of the Venice Commission, or the European Charter on the Statute for Judges. See also Joint Concurring Opinion of Judges Pinto de Albuquerque and Devov, paras 6 and 17: ‘The Court’s direct recourse to international-law standards on judicial independence, including soft-law sources, as a source of law in order to address the applicant’s situation is highly remarkable, and laudable.’ Further *Murray v the Netherlands* no 10511/10 (ECtHR 26 April 2016), paras 57 ff, i.a. report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Aruba and the Netherlands Antilles in 2007; and in *Vinter and Others v UK* no 66069/09 et al (ECtHR 9 July 2013), para 116, i.a. report on Switzerland of the CPT.

346 Case C-322/88 *Grimaldi* ECLI:EU:C:1989:646, para 18.

347 *Demir* (n 328), para 65, referring to Arts 31–33 Vienna Convention on the Law of Treaties.

348 *RMT v UK* no 31045/10 (ECtHR, 8 April 2014), para 76. The ECtHR consistently holds that the Convention cannot be interpreted in a vacuum; see i.a. *Al-Adsani v UK* no 35763/97 (ECtHR 21 November 2001), para 55; *Hassan v UK* no 29750/09 (ECtHR 16 September 2014), para 77.

349 *Demir and Baykara v Turkey* no 34503/97 (ECtHR 12 November 2008), para 76, also 67; *Saadi v UK* no 13229/03 (ECtHR 29 January 2008), para 63.

such instruments have featured in the normative context of the Charter on EDC/HRE and therefore have legal relevance.

44 *Taking account of the Charter on EDC/HRE and the establishment of common EDC standards*

In the light of the ECtHR case law set out above, the Charter on EDC/HRE can be seen as an instrument which is relevant for interpreting the ECHR and establishing common European EDC standards in the field of citizenship education. As stated in *Demir*:

Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.<sup>350</sup>

By the same token, the EDC standards form ‘a set of rules and principles that are accepted by the vast majority of States’ and make up ‘the common international or domestic law standards of European States’. They ‘reflect a reality that the Court cannot disregard’ in the interpretation of the Convention. In line with the *Demir*, *Tănase* and *Mosley* case law of the ECtHR, and taking into account all the relevant Council of Europe instruments on EDC which form its normative context, the Charter on EDC/HRE establishes a common European standard in the field of citizenship education.<sup>351</sup> In its definition of the EDC concept and principles, the Charter on EDC/HRE marks an important stage in a long-standing educational policy of the Council of Europe and is accepted throughout Europe as an important reference point.<sup>352</sup> Moreover, several bodies of the Council of Europe refer to the Charter on EDC/HRE as a ‘standard’.<sup>353</sup> This common European standard on EDC/HRE is part of the Council of Europe *benchmark for*

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350 *Demir* (n 328), para 76.

351 Text to n 328.

352 Explanatory memorandum para 1; Kerr, *Implementation of the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education: Final Report 1*; CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*.

353 CoE Committee of Ministers, Council of Europe Strategy for the Rights of the Child (2012-2015) (15 February 2012) CM(2011)171final, p 3 and 8 (aims at an effective implementation of children’s rights standards and works on the Charter on EDC/HRE in strategic objective 4); CoE, *Council of Europe Strategy for the Rights of the Child (2012-2015): Implementation report*, p 6 and 8; CoE Committee



*human rights, the rule of law and democracy* in Europe, which the EU has committed itself to respecting in the Memorandum of Understanding. Eurydice also states that the Council of Europe has set policy *standards* in the field of EDC and includes Council of Europe work in the basis for its reports.<sup>354</sup>

Case law on the Convention right to education (Article 2 Protocol 1 to ECHR) confirms a reading in the light of recommendations of the Committee of Ministers and of other non-binding Council of Europe instruments. At this point of the study, it is sufficient to draw attention to the use of non-binding instruments as a reference for understanding formal sources of law. The consequences of applying these instruments as to the substance will be considered in Parts three and four. In the area of education, the ECtHR regularly refers to non-binding instruments under the heading ‘relevant Council of Europe documents’ and incorporates them in the reasoning on the merits, for instance with regard to Roma children.<sup>355</sup> In *Horváth* the Court held that positive measures were to be taken to assist

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of Ministers, Council of Europe Strategy for the Rights of the Child (2016-2021): Children’s human rights (3 March 2016) CM(2015)175 final, para 40 and 62 (making the standards work, Charter in priority area 2(3)). See also CoE Secretary General, State of Democracy, Human Rights and the Rule of Law in Europe. Report 2014, p 9.

- 354 Commission/EACEA/Eurydice, *Citizenship Education at School in Europe* (2005), 7. In the 2012 report, Eurydice takes CoE studies on EDC as a basis for its work on citizenship education in national curricula, and updates and enriches it: see Commission/EACEA/Eurydice, *Citizenship Education in Europe* (2012), p 109 fn 95. Further Commission/EACEA/Eurydice, *Citizenship Education at School in Europe* (2017), 27.
- 355 Concerning Roma children, see *DH and Others v Czech Republic* no 57325/00 (ECtHR 13 November 2007), paras 54–61, 182, 216 (i.a. PA Recommendation No 1203(1993) on Gypsies in Europe; PA Recommendation No 1557(2002) on the legal situation of Roma in Europe; ECRI General Policy Recommendation No 3 and 7, with reference to definitions and explanatory memorandum); *Oršuš and Others v Croatia* no 15766/03 (ECtHR 16 March 2010), paras 65–76, 79–86, 147 (i.a. citing CoE Recommendation CM/Rec(2009)4 of the Committee of Ministers to member States on the education of Roma and Travellers in Europe (17 June 2009), with appendix; ECRI reports on Croatia; Opinions of Advisory Committee on the Framework Convention for the Protection of National Minorities; and reports of the Commissioner for Human Rights). Also in other education cases (not on Roma), non-binding CoE instruments form part of the reasoning: e.g. *Hasan and Eylem Zengin v Turkey* no 1448/04 (ECtHR 9 October 2007), paras 26–28, 52, 69, 74 (PA Recommendations 1396(1999) and 1720(2005) and ECRI General policy recommendation no 5); *Velyo Velez v Bulgaria* no 16032/07 (ECtHR 27 May 2014), paras 34–35, and para 41 (on CoE

Roma children who had difficulties following the school curriculum. The Court referred in this context to a recommendation of the Committee of Ministers according to which appropriate support structures should be put in place to enable Roma/Gypsy children to benefit from equal opportunities at school, in particular through positive action.<sup>356</sup> Like the EDC norms in the appendix to the Recommendation on the Charter on EDC/HRE, the relevant norms were set out in the appendix to the recommendation and framed in ‘should’ terms.

The fact that the ECtHR uses soft law instruments is often linked to the *living instrument* doctrine and the *effectiveness* ambitions of the Court. In *Leyla Şahin*, the Court notes that the substance of the right to education may vary from one time or place to another according to economic and social circumstances, and adds that

it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. Moreover, the Convention is a living instrument which must be interpreted in the light of present-day conditions.<sup>357</sup>

The Court referred to recommendations of the Committee of Ministers and of the Parliamentary Assembly on access of minorities to higher education, in which ‘the Council of Europe has stressed the key role and importance of higher education in the promotion of human rights and

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Recommendation R(89)12 of the Committee of Ministers to member states on education in prison (13 October 1989)); *Altınay v Turkey* no 37222/04 (ECtHR 9 July 2013), paras 22, 43–44 (on CoE Recommendation R(98)3 of the Committee of Ministers to member states on access to higher education (17 March 1998), and appendix).

356 *Horváth and Kiss v Hungary* no 11146/11 (ECtHR 29 January 2013), para 104, see also paras 72–75, 114 (i.a. citing CoE Recommendation R(2000)4 of the Committee of Ministers to member States on the education of Roma/Gypsy children in Europe (3 February 2000), with relevant sections of the appendix; Opinion on Hungary of the Advisory Committee on the Framework Convention for the Protection of National Minorities, and Follow-up Report on Hungary (2002–2005) of the CoE Commissioner for Human Rights, and Report on Hungary of ECRI).

357 *Leyla Şahin v Turkey* no 44774/98 (ECtHR 10 November 2005), para 136; *Mihailache v Romania* no 54012/10 (ECtHR 8 July 2019), para 91.

fundamental freedoms and the strengthening of democracy'.<sup>358</sup> The Court reads Article 2 of Protocol 1 'in its context and having regard to the object and purpose of the Convention, a law-making treaty', stating that in a democratic society, the right to education is indispensable to the furtherance of human rights.<sup>359</sup>

Not only recommendations, but also the reports of various Council of Europe and international bodies have been used by the ECtHR to interpret and apply the right to education in specific cases.<sup>360</sup> It is not impossible that, in an appropriate and comparable way, the reports for the 2012 and 2017 review cycles of the implementation of the Charter on EDC/HRE, surveying national practices, may have legal relevance. They may point to standards in the same way as national reports in ECtHR case law have done in other fields.<sup>361</sup>

#### 45 *Caution: weight of standards is to be determined by the ECtHR*

While recommendations of the Committee of Ministers may have important interpretative value and the ECtHR takes a wide array of non-binding sources of various Council of Europe bodies into account, the use of soft law instruments in the Council of Europe legal order is not straightforward. Doubts have been expressed as to whether it is appropriate that non-

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358 *Şahin*, para 136, see also paras 66, 68–69 (on CoE Recommendation R(98)3 of the Committee of Ministers to member states on access to higher education (17 March 1998), with referral to preamble, and CoE Parliamentary Assembly Recommendation 1353(1998) on the access of minorities to higher education).

359 *Şahin*, para 137. See also para 141: 'This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 2 of Protocol No 1 read in its context and having regard to the object and purpose of the Convention, a law-making treaty' (with reference to *Golder v UK* no 4451/70 (ECtHR 21 February 1975), para 36).

360 E.g. nn 355-356 (cases *DH*, *Oršuš*, and *Horvath*); *Mansur Yalçın and Others v Turkey* no 21163/11 (ECtHR 16 September 2014), para 33.

361 See nn 330, 343 and 369 (and text); further Glas, 'The European Court of Human Rights' use of non-binding and standard-setting Council of Europe documents', 101, 104 (reports of independent experts, even of one person are taken into account). Reports on EDC: CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, see e.g. 51–52: the Analytical Summary of Replies to the Questionnaire for Governments, part of the 2016 Report on the State of citizenship and Human Rights in Europe, was drawn up in a collaboration of independent experts and academics. The ultimate goal of the report is to strengthen the Charter on EDC/HRE as 'an effective support instrument for the promotion of respect and dialogue through education'.

binding Council of Europe standards become binding indirectly via interpretation, as a result of their incorporation into ECtHR case law (judgments are binding on member states and precedents are created).<sup>362</sup> The answer to this question should start with the recognition that the incorporation of non-binding Council of Europe standards is far from automatic. The judges of the ECtHR do not adopt one single approach in this matter.<sup>363</sup> In ECtHR case law, the existence of recommendations of Council of Europe bodies (such as the Committee of Ministers or the Parliamentary Assembly) does not necessarily lead to corresponding interpretations. In *Velyo Velev*, the ECtHR held that '[w]hile the Court is aware of the recommendations of the Committee of Ministers to the effect that educational facilities should be made available to all prisoners ..., it reiterates that Article 2 of Protocol 1 does not place an obligation on Contracting States to organise educational facilities for prisoners where such facilities are not already in place'.<sup>364</sup> Ultimately it is the ECtHR which decides in the spe-

362 Glas, 'The European Court of Human Rights' use of non-binding and standard-setting Council of Europe documents' 98–99, 120.

363 Compare the open-minded attitude *v* soft law of Judges Pinto de Albuquerque and Tulkens with more reticent views: e.g. Concurring Opinion of Judge Wojtyczek in *National Union of Rail, Maritime and Transport Workers v UK* no 31045/10 (ECtHR 8 April 2014), para 4 (warning for judicial activism); Dissenting Opinion of Judge Keller, joined by Judge Popovic in *Ruiz Rivera v Switzerland* no 8300/06 (ECtHR 18 February 2014), para 17. Drawing judicial inspiration from exogenic soft law can be criticised as eroding the values of democracy and the rule of law. Further: F Tulkens, S Van Drooghenbroeck and F Krenc, 'Le soft law et la Cour européenne des droits de l'homme: questions de légitimité et de méthode' (2012) 23 *Revue trimestrielle des droits de l'homme* 433, 437, on the methodology of the use of soft law; and below n 401.

364 *Velyo Velev v Bulgaria* no 16032/07 (ECtHR 27 May 2014), para 34. Not following either: *Üner v the Netherlands* no 12629/87 (ECtHR 18 October 2006), paras 35–37, 55–56; *Muršić v Croatia* no 7334/13 (ECtHR 20 October 2016), with critical reaction of Pinto de Albuquerque, para 2 ('the majority assume that they are not bound by the standards set by the Committee of Ministers, the Committee for the Prevention of Torture (the CPT) and the Council for Penological Cooperation (PC-CP) of the European Committee on Crime Problems (CDPC) of the Council of Europe'). According to Glas, 'The European Court of Human Rights' use of non-binding and standard-setting Council of Europe documents', the Court usually follows standards of other CoE organs (p 113, with more examples of exceptions). The autonomy of the Court also appears in the interpretation of certain concepts *v* domestic legislators, see e.g. C Grabenwarter, *European Convention on Human Rights: Commentary* (Beck Hart Nomos 2014) 101, 108, 112.

cific case what weight is to be given to the various sources.<sup>365</sup> *The Court has attached ‘considerable importance’ or ‘great weight’ to various recommendations of the Committee of Ministers, while acknowledging that, in se, they have no binding force for the member states,*<sup>366</sup> for instance with regard to European prison standards.<sup>367</sup> Hence the question: what is the weight of the Charter on EDC/HRE? In the absence of case law on the Recommendation on the Charter on EDC/HRE, but in line with the ECtHR’s reasoning in the cases cited above, situating the Charter in its normative context helps to appraise the weight of the EDC standards. The Charter on EDC/HRE is a standard which deserves to be given ‘considerable importance’ or ‘great weight’. It is based on an impressive body of instruments on EDC emanating from all the Council of Europe bodies and has repeatedly been recalled as an authoritative instrument since its adoption. It is anchored in the core aims and values of the Council of Europe and is informed by a persistent rationale for democratic security. That soft law and hard law are profoundly interwoven,<sup>368</sup> should not only apply to prison standards or the protection of incapable adults (case law cited above) but should be relevant a fortiori for norms concerning the foundations of our society, namely democracy, the rule of law and human rights. In line with the *Leyla Şahin* case law<sup>369</sup> and on a reading based on the context and aims of the provisions, the ECtHR would probably consider the Recommendation on the Charter on EDC/HRE to be relevant to the interpretation of the right to education (Article 2 Protocol 1 to ECHR) and a standard of great weight contributing to rendering ECHR rights ‘practical and effective, not theoretical and illusory’.<sup>370</sup> After all, EDC and HRE seek the empowerment of citizens, as appears from their definitions. Importantly, the Recommendation on the

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365 *Tănase v Moldova* no 7/08 (ECtHR 24 April 2010), paras 176.

366 See also *Rivière v France* no 33834/03 (ECtHR 11 July 2006), para 72 (‘la Recommandation du Comité des Ministres du Conseil de l’Europe relative aux aspects éthiques et organisationnels des soins de santé en milieu pénitentiaire, ... la Cour ... y attache un grand poids, même si elle admet qu’elle n’a pas en soi valeur contraignante à l’égard des Etats membres’); *Gülay Çetin v Turkey* no 44084/10 (ECtHR 5 March 2013), para 130.

367 See cases cited in Pinto de Albuquerque (n 401), para 35. While the ECtHR recognises the value of soft law instruments, it underlines at the same time the conceptually different role of the Court and the bodies drawing up soft law (preventive function, higher protection): see *Muršić v Croatia* no 7334/13 (ECtHR 20 October 2016), para 114.

368 Pinto de Albuquerque (n 401), para 18.

369 Text to nn 357-359.

370 *Şahin*, para 136.

Charter on EDC/HRE is fully in keeping with the Convention's aim of achieving 'effective political democracy' (preamble ECHR).<sup>371</sup> Former ECtHR Vice-President Françoise Tulkens underlines that the preamble's reference to effective political democracy is not rhetorical: 'In interpreting and applying the Convention, the European Court of Human Rights relies heavily on these principles not only as a source of inspiration but also as a basis for its action'.<sup>372</sup> The ECtHR frequently reiterates that democracy is a fundamental feature of the European *ordre public*,<sup>373</sup> and the only political model compatible with the ECHR.<sup>374</sup> While case law of the ECtHR on this aspect will be examined in Part four, the point may already be made that it seems highly unlikely that the Court would ignore EDC/HRE standards. EDC/HRE are basic pre-conditions for genuine democracy and respect of human rights, as recognised and reflected in the innumerable Council of Europe instruments on EDC, and in particular the Recommendation on the Charter on EDC/HRE. The Committee of Ministers, the highest decision-making body of the Council of Europe, and other bodies too, frequently repeat that the core mission of the Council of Europe is to promote human rights, democracy and the rule of law, and that they are firmly convinced that education and training play a central role in furthering this mission.

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371 Preamble: 'Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an *effective political democracy* and on the other by a common understanding and observance of the human rights upon which they depend' (emphasis added).

372 F Tulkens, 'Freedom of Religion under the European Convention on Human Rights: A Precious Asset' [2014] Brigham Young University Law Review 509. See also S Marks, 'The European Convention on Human Rights and its Democratic Society' (1996) 66 *The British Year Book of International Law* 209; P van Dijk and others (eds), *Theory and practice of the European Convention on human rights* (4 edn, Intersentia 2006) 912.

373 *United Communist Party of Turkey and Others v Turkey* no 19392/92 (ECtHR 30 January 1998), para 45; *Karácsony and Others v Hungary* no 42461/13 et al (ECtHR 17 May 2016), para 141; *Selahattin Demirtaş v Turkey* no 14305/17 (ECtHR 20 November 2018), para 227.

374 *United Communist Party of Turkey and Others v Turkey* no 19392/92 (ECtHR 30 January 1998), para 45; *Hirst v UK* no 74025/01 (ECtHR 6 October 2005), para 58.

A possible reason why the ECtHR might not follow the recommendations adopted by Council of Europe bodies is that it disagrees with them.<sup>375</sup> This can hardly be imagined in the case of EDC/HRE, given the reference to the 2002 Recommendation in *Seurot v France* and the consensus in all Council of Europe bodies on the importance of recommending EDC. Another reason for refusing to follow a recommendation might be a disparity between required *minimum* human rights standards and recommended *desirable* standards.<sup>376</sup> Certainly, the desirable standards set out in recommendations do not automatically equate with the minimum standards protected by human rights. In the case of EDC standards, however, establishing a set of human rights in the ECHR as minimum standards (including participation rights, freedom of expression, etc.) but not at the same time providing for adequate education to empower citizens to exercise such rights, may deprive those rights of their essence and effectiveness.

EDC standards can be seen as belonging to internationally recognised general principles. Education for democracy and human rights are not only protected in Council of Europe instruments, but also vigorously defended in UN instruments.<sup>377</sup>

Applying criteria proposed by academic writers (section C) will provide additional arguments for appraising the weight of EDC standards.

Taking the Charter on EDC/HRE into account as a weighty standard when interpreting ECHR provisions, is not only relevant within the Council of Europe legal order. It will have knock-on effects in the national legal orders and in the EU legal order.

## B Limitation of member states' margin of appreciation

### 46 A European consensus generally limits the margin of appreciation of member states

ECtHR case law shows that the existence of a European consensus, based on binding and/or non-binding standards, has consequences for the breadth of the margin of appreciation enjoyed by member states: 'where no consensus exists, the margin of appreciation afforded to States is gener-

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375 Glas, 'The European Court of Human Rights' use of non-binding and standard-setting Council of Europe documents' 116 (example: disagreement among CoE bodies on the blanket ban on clothing designed to conceal one's face in public).

376 *Ibid.*, 117.

377 Further text to n 442 ff and Part four § 294 .

ally a wide one'.<sup>378</sup> A contrario, finding a European consensus generally narrows the breadth of the margin of appreciation for member states.

47 *A wide European consensus on EDC*

The normative context of the Charter on EDC/HRE is evidence that the Charter on EDC/HRE is based on a wide European consensus, more particularly on the need for, the concept and the principles of EDC. The numerous legal instruments cited above adopted by the various Council of Europe actors demonstrate the political will of European leaders to bring about meaningful EDC. The main reason for the success of the EDC/HRE project is the acknowledgment by governments and other decision-makers of the crucial role of education in fostering the civic engagement of European citizens.<sup>379</sup> Over the course of 30 years work, there has been a consensus on the role of education as preparation for democracy, in other words, on the inseparable link between democratic citizenship and human rights on the one hand, and education on the other hand. EU Member States share this consensus on EDC standards. They have been continuous participants in the Council of Europe bodies which have adopted legal instruments on EDC.

The Committee of Ministers is 'the best intermediary of the European consensus': as the ECtHR has stated, it is 'through the Committee of Ministers' that 'the member states of the Council of Europe have agreed

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378 *Mosley v UK* no 48009/08 (ECtHR 10 May 2011), para 110. See also *Fretté v France* no 36515/97 (ECtHR 26 February 2002), para 41; *Evans v UK* no 6339/05 (ECtHR 10 April 2004), paras 54, 59, 77; *Lautsi and Others v Italy* no 30814/06 (ECtHR 18 March 2011), para 70; *SH and Others v Austria* no 57813/00 (ECtHR 3 November 2011), para 94; *Siebenhaar v Germany* no 18136/02 (ECtHR 3 February 2011), para 39; *Sindicatul "Păstorul cel Bun" v Romania* no 2330/09 (ECtHR 9 July 2013), para 171. See also Joint Dissenting Opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria in *SH*, para 8: 'The differences in the Court's approach to the determinative value of the European consensus and a somewhat lax approach to the objective indicia used to determine consensus are pushed to their limit here, engendering great legal uncertainty.' Other examples and discussion in *Dialogue between Judges, European Court of Human Rights* (2008), 'The role of consensus in the system of the European Convention on Human Rights', concluding that consensus in the Convention sense is not unanimity, but 'more an expression of the common ground required for the collective approach underlying the Convention system and the interaction between the European and domestic systems'.

379 Olafsdottir, 'Education for Democratic Citizenship and Human Rights: A Project by the Council of Europe' 130; Arbués, 'Civic Education in Europe: Pedagogic Challenge versus Social Reality' 229.



that ...'.<sup>380</sup> The *intergovernmental* consensus, to which several scholars refer in order to argue the importance of Council of Europe recommendations in general,<sup>381</sup> is even more marked in the case of the Recommendation on the Charter on EDC/HRE, which was not only adopted by the Ministers of Foreign Affairs (Committee of Ministers), but corresponds to declarations of the Heads of State and Government (Summits) and of the Ministers of Education or Youth (Standing Conferences). Furthermore, the consensus reaches much deeper than an *intergovernmental* consensus. The Recommendation on the Charter on EDC/HRE is embedded in several recommendations and resolutions of the *Parliamentary Assembly*, thus involving representatives of national parliaments, and other bodies of the Council of Europe. Finally, the Council of Europe has recognised EDC as a complex and multifaceted undertaking for which rule-making should not be left to official institutions alone.<sup>382</sup> The Charter on EDC/HRE is the result of wide consultations with stakeholders and experts, civil society and grassroots organisations.<sup>383</sup> In keeping with its reputation as a norm entrepreneur,<sup>384</sup> the Council of Europe took into account the wealth of information resulting from its interaction with many actors. The Council of Europe works together with international NGOs (INGOs) and has civil-society programmes with national NGOs to increase the active participation of citizens in public life.<sup>385</sup> The consensus on EDC continues to be manifest in the period since the adoption of the Charter. A key conclusion after the second review cycle (2012–2017) of the Charter on EDC/HRE was that the implementation of EDC/HRE had gained importance in Europe, that education is increasingly recognised as an essential response to the challenges that our societies are facing, and that the Charter needs to be

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380 *MC v Bulgaria* no 39272/98 (ECtHR 4 December 2003), para 162; Pinto de Albuquerque (n 401), para 40.

381 See § 55, De Vel and Markert (n 168); Benoît-Rohmer and Klebes, *Council of Europe Law - Towards a pan-European legal area*.

382 Hartley and Huddleston, *School-community-university partnerships for a sustainable democracy: Education for Democratic Citizenship in Europe and the United States of America* 15. An open-ended list of stakeholders in Charter on EDC/HRE, paras 5(b)(d)(i), 10, 15 (b)(d)(e); explanatory memorandum para 40.

383 Conferences, working groups, text drafting sessions and revisions, see text to n 261. A commonly accepted standard, see also Durr, Spajic-Vrkaš and Ferreira Martins, *Strategies of Learning Democratic Citizenship*.

384 Sasse, 'The Council of Europe as a Norm Entrepreneur: The Political Strengths of a Weak International Institution' 175–176.

385 CoE Committee of Ministers Declaration on the Code of Good Practice for Civil Participation in the Decision-Making Process (21 October 2009).

further developed as a common framework for policy dialogue among and within countries.<sup>386</sup> Governments of 40 member states (Ministries of Education, in consultation with diverse partners) and almost 100 civil society organisations from 44 countries (NGOs and youth organisations) responded to the questionnaires on the implementation of the Charter on EDC/HRE.<sup>387</sup>

Admittedly, three EU Member States did not answer (DK, IT, and PL). Yet, sporadic dissonance does not destroy the European consensus, nor its relevance in ECtHR case law. The consensus does not require unanimity in order to carry weight. In *Demir*, the Court found it sufficient ‘that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member [s]tates of the Council of Europe and show, in a precise area, that there is common ground in modern societies’.<sup>388</sup> The Court has referred in several cases to the ‘great majority’ of the member states.<sup>389</sup> Applied to EDC standards, the fact that some member states have reservations on a certain issue or at a particular time is not a contra-indication for a European consensus.<sup>390</sup> In the search for common ground among the norms on citizenship education in member states, the Charter on EDC/HRE is undoubtedly a widely accepted reference point, as confirmed in 2017: ‘Although the charter is a non-binding legal instrument, it

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386 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 7. See also CoE Proceedings of the Conference on ‘Human Rights and Democracy in Action - Looking Ahead: The Impact of the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education’ (Strasbourg, 29-30 November 2012), 12.

387 CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe.

388 See *Demir* (n 328), para 85–86, see also paras 77–78.

389 Pinto de Albuquerque (n 401), para 20: ‘As a matter of constitutional principle guiding the Council of Europe, consensus is decoupled from unanimity’, see e.g. ‘great majority’ of member states in *Tyrer* or *Marckx*. See also Discussion article ‘The role of consensus in the system of the European Convention on Human Rights’, in CoE, *Dialogue between Judges, European Court of Human Rights* (2008), concluding that consensus in the Convention sense is not unanimity, but ‘more an expression of the common ground required for the collective approach underlying the Convention system and the interaction between the European and domestic systems.’

390 A reservation of Poland has been noted in text to n 260.

provides a unique common European framework of reference and is a focus and catalyst for action in the member states'.<sup>391</sup>

#### 48 Nuancing the 'killer phrase'

In the light of the previous considerations, the phrase 'Your work is incredibly important, but education is subject to national policies', which is perceived as a 'killer phrase' in European citizenship education networks,<sup>392</sup> requires nuancing. Situating the phrase in the wider legal context largely reduces its killer potential.<sup>393</sup> It is correct that education is subject to national policies (see, for instance, the paragraph-4 principle of the Charter on EDC/HRE, as well as Article 165(1) TFEU). However, this does not imply that member states have unlimited freedom in framing their national education policies and can educate their citizens as they wish. Common objectives like EDC and HRE are widely accepted limitations on member states' freedom. By adopting recommendations and numerous other legal instruments on EDC as actors in the Council of Europe, the member states have to a certain extent limited their wide discretion to regulate education. Even if EDC standards include due respect for state constitutional structures and national priorities and needs (the paragraph-4 principle), leaving a corresponding margin of discretion, member states have nevertheless accepted the principle that they should include EDC, as understood in the Charter, in the curricula for formal education at all school levels, that they should review and update EDC to ensure its relevance, and that they should provide adequate EDC for all (paragraphs 5 and 6). Not providing for EDC and HRE would be tantamount to disavowing the weighty European standard they themselves have established as actors in the Council of Europe legal order. Member states enjoy broad autonomy as to *how* they implement EDC standards in their country; yet, *that* they should provide for EDC and HRE is a matter of established consensus. Choosing not to provide for EDC is no longer an option. The margin of appreciation enjoyed by member states based on paragraph 4 of the Charter cannot be interpreted as giving them arbitrary powers to organise education curricula as they like.<sup>394</sup> It is the duty of national authorities in a

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391 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 4.

392 Text to n 83.

393 Further nuances in Part three and four (obligations flowing from EU law and international agreements).

394 *Supra* text to n 208. See also *Fretté v France* no 36515/97 (ECtHR 26 February 2002), para 41.

democratic society to consider, within the limits of their jurisdiction, the interests of society as a whole.<sup>395</sup> The elementary EDC standards set out in the Charter on EDC/HRE reflect the interests of society as a whole and thus limit the margin of member state appreciation.

As appears from the explanatory memorandum, the intention of the authors of the Charter on EDC/HRE was to respect national differences. The authors acknowledge that education is an area where member states' systems differ widely, and that those differences—constitutional or organisational—must always be respected: '[a]ccordingly, all the policies and practices set out in the Charter are to be applied by individual states with due respect to those constitutional and structural systems'<sup>396</sup>, no less, and no more. The authors' intention was not to allow member states to silently opt out of the European consensus on EDC. Even with regard to education, a field traditionally associated with national sovereignty, limits must be respected. Interdependence in Europe and the world is too great for just any type of national education to be acceptable. As an extreme example, national policy cannot be permitted to promote the style of education favoured by the Nazi regime in Germany. When formulating national policies, member states have to respect the ECHR, interpreted by taking the weighty EDC standards into account. They also have to respect the obligations flowing from international agreements at UN level and flowing from the EU Treaties and the Charter of Fundamental Rights, as will be examined further. In addition, they have to honour, in good faith, the commitments they have made based on norms which are not always hard law, but nevertheless have a certain normative intensity.<sup>397</sup> In order to understand this normative intensity, the strengths and weaknesses of the Charter on EDC/HRE will now be analysed.

### *C Strengths and weaknesses of the Recommendation on the Charter on EDC/HRE*

#### *49 Worthy but weak?*

Given the challenges in the field of citizenship education, the purpose of Part one is to examine the Charter on EDC/HRE as the first anchor point. In order to deepen the analysis, I will now evaluate the Recommendation

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395 Ibid, para 41.

396 Explanatory memorandum para 29.

397 Continuum, see text to n 402.

on the Charter on EDC/HRE as a legal instrument on the basis of criteria put forward by a number of legal scholars.

If one applies the criterion of enforceability in court, the Charter on EDC/HRE is of course weak. That, admittedly, is in keeping with the image of the Council of Europe as a ‘worthy’ but ‘weak’ organisation, as analysed by Sasse: a valuable creator of norms but lacking the means for enforcement. In its dual capacity as a developer and enforcer of norms, the Council of Europe succeeds in the first, but has wobbly credibility with regard to the second.<sup>398</sup> According to Lenaerts and Van Nuffel, the Council of Europe ‘has not evolved any further than a forum of discussion, providing interesting ideas for European cooperation, but not affording any genuine prospects of realising them’.<sup>399</sup> So is the Charter on EDC/HRE nothing more than an interesting idea?

#### 50 Factors strengthening recommendations

Schermers and Blokker recall that it is not only the existence of a legal obligation and the possibility of sanctions which justifies observance of a rule. In international law, sanctions often prove to be illusory. These authors mention eight factors which strengthen the recommendations of international organisations: constitutional provisions, structure of the organisation, method of enactment, formal acceptance, need for a rule, application by others, moral or legitimising effect, and restatement.<sup>400</sup> To what extent do these factors apply to the Recommendation on the Charter on EDC/HRE?

#### 51 Factors hardening soft law

Pinto de Albuquerque, scholar and ECtHR judge, points to a *dégradé normatif*.<sup>401</sup> Without abandoning the formal theory of sources of law (still pre-

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398 Sasse, ‘The Council of Europe as a Norm Entrepreneur: The Political Strengths of a Weak International Institution’ 172 (exploring the tension between ‘weak’ and ‘worthy’).

399 Lenaerts and Van Nuffel, *European Union Law* 6. Further text to n 533.

400 Schermers and Blokker § 1220–1240. The factor of formal acceptance does not apply and is left aside.

401 Pinto de Albuquerque, Partly dissenting opinion in *Muršić v Croatia* no 7334/13 (ECtHR 20 Oct 2016). See also Tulkens, Van Drooghenbroeck and Krenc, ‘Le soft law et la Cour européenne des droits de l’homme: questions de légitimité et de méthode’ i.a. 469; (tr) ‘The *Tanase* ruling is not based on the binary logic of “all” or “nothing”, but on a ternary form, a gradualist logic whereby a norm set out in a source which is intrinsically non-binding may nevertheless have some normative value, and whereby, moreover, that normative value—in the sense of

vailing), the influence of soft law has to be acknowledged: ‘there is no water-tight, binary distinction between hard law and non-law, since European human rights law evolves by means of a rich panoply of sources that do not necessarily share the classic, formal features of hard international law’.<sup>402</sup> In the continuum from soft law to hard law, this author lists seven factors which may harden a text: prescriptive language or label; linguistic accuracy and content precision; the existence of *travaux préparatoires*,

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being capable of influencing the interpretation and application of Convention guarantees—may vary in intensity. It is not a question of all or nothing, but of more or less, or, to employ the terms of the *Tanase* ruling itself, of differentiated “weight” within a set of external sources acknowledged to be “worth considering”.

- 402 Pinto de Albuquerque (n 401), para 23, also para 2. There is no unique parameter to distinguish hard law from soft law. For deeper analysis of formal theory of sources of law and scholarly writing accepting or criticising soft law in the human rights field, see i.a. fns 2–4, and 40. The rich panoply includes non-ratified treaties; declarations of international organisations, e.g. UDHR; resolutions and recommendations of international organisations, e.g. of the CoE Committee of Ministers or Parliamentary Assembly; General Comments of international organisations, e.g. of UN treaties bodies; Codes of Conduct and Guidelines of international organisations, e.g. of the WHO, etc. (ibid, fn 43). Further para 24–26 on the rule of recognition of a democratic international community. See also Tulkens, Van Drooghenbroeck and Krenc, ‘Le soft law et la Cour européenne des droits de l’homme: questions de légitimité et de méthode’: that soft law is used by the ECtHR is clear, yet the question is the methodology for determining under which conditions and to what extent measures in the grey zone between law and non-law can be relied on. On soft law in EU law, see European Parliament Resolution of 4 September 2007 on institutional and legal implications of the use of ‘soft law’ instruments [2008] OJ C187E/75, recitals C and M; L Senden, *Soft Law in European Community Law* (Hart 2004); Hofmann, Rowe and Türk, *Administrative law and policy of the European Union* 566–67 (cp: ‘one can distinguish three possible types of effects of a measure (including so-called soft law), direct, indirect and factual’). EU administrative law illustrates how the complexity of institutional practice transcends the dichotomy binding/non-binding. Unilateral administrative rule-making by the European Commission can take the form of recommendations and opinions, guidelines, rules as a form of regulation by information, interpretative communications, notes, notices, and memoranda, indicators, codes of practice, internal directions, and *vademe-cums*. They may have legal effects, depending on conditions specified in case law; see ibid, 544–566, and 566–579 for analysis of the legal character of these rules). The use of soft law as a source is debated in international law. See classic (critical of soft law) and other approaches (open to greater or lesser extents) mentioned in Tulkens, Van Drooghenbroeck and Krenc, ‘Le soft law et la Cour européenne des droits de l’homme: questions de légitimité et de méthode’, 448 ff.

explanatory reports and commentaries; the complexity of the deliberation procedure, including the voting pattern; wide publicity; follow-up mechanisms and an independent third body; and subsequent practice confirming or developing the standards.<sup>403</sup> Soft law not only enriches hard law by fulfilling an interpretative function, it can also be seen independently, containing standards in its own right: 'Where there is no hard law, ... soft law may exercise alone its normative claim, in accordance with the relevant hardening factors that it puts forward'.<sup>404</sup> The greater the number of attendant factors, the greater the normative intensity of the text.<sup>405</sup> At the end of the spectrum, 'hardened soft law is an imperative constraint, the flouting of which constitutes an internationally unlawful act'.<sup>406</sup> What is the place of the Charter on EDC/HRE in the continuum? In addition to its interpretative function, can the Charter on EDC/HRE stand alone as an independent source of normativity?

### *52 Testing the anchor point*

The Charter on EDC/HRE will be tested as an anchor point by looking for the presence of the strengthening or hardening factors suggested as criteria by Schermers and Blokker, and by Pinto de Albuquerque. The criteria have been regrouped to draw attention to the strengths and weaknesses of the Charter on EDC/HRE as a legal instrument. This appraisal will deepen the understanding of this instrument in the Council of Europe legal order and provide additional arguments for considering the Recommendation on the Charter on EDC/HRE to be a European standard of 'great weight' or 'considerable importance'. At the same time, some of its weaknesses are acknowledged.

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403 Pinto de Albuquerque (n 401), para 28 (the hardening factors relate either to the rule-making procedure or to the rule-application procedure). See also Tulkens, Van Drooghenbroeck and Krenc, 'Le soft law et la Cour européenne des droits de l'homme: questions de légitimité et de méthode': as parameters to distinguish which soft law to use and to what extent, Tulkens analyses 'légitimité' (consensus among the CoE member states) and 'effectivité' (accepted and practiced by member states).

404 Pinto de Albuquerque (*ibid.*), para 33.

405 Para 24.

406 Para 27.

## 1. Strengths

### 53 *Accordance with constitutional provisions*

The first strengthening factor advanced by Schermers and Blokker relates to the constitutional provisions which underlie the powers of the body adopting the recommendation.<sup>407</sup> In this case, the Recommendation on the Charter on EDC/HRE fully conforms to the Statute of the Council of Europe. From a substantive point of view, the Recommendation directly relates to the core mission of the Council of Europe defined in Article 1 and the preamble.<sup>408</sup> From a formal point of view, the Recommendation is a *legal* act in the sense that it was issued by a competent body acting in accordance with its mandate and with respect for the procedural requirements of the Statute,<sup>409</sup> and thus correctly based on the internal rule of recognition.<sup>410</sup>

Bartsch and Jung highlight that recommendations of the Committee of Ministers are ‘Council of Europe law’, by contrast with European conventions. The latter are drafted within the ambit of the Council of Europe, but legally, they are international agreements signed by the member states as parties, not by the Council of Europe, and they have to be ratified to have a binding effect.<sup>411</sup> Recommendations of the Committee of Ministers, on the other hand, are decisions addressed to the governments of the member states which come into existence through the mere expression of the collective will of the Committee of Ministers *and* are adopted according to

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407 Schermers and Blokker § 1221–1222.

408 Text to n 163 ff (Form and Substance).

409 Arts 14–21 Statute; CoE, Rules of Procedure of the Committee of Ministers (5th revised edn 2005); CoE Committee of Ministers, Rules of Procedure for the meetings of the Ministers’ Deputies (4th revised edn 2005). See also CoE iGuide, Committee of Ministers: Procedures and working methods (24 September 2018).

410 M Desomer, *Reform of the Legal Instruments of the European Union* (Proefschrift, KUL 2008) 124.

411 Bartsch, ‘The Acceptance of Recommendations and Conventions within the Council of Europe’ 92–96.



predefined procedures.<sup>412</sup> Both are essential for determining the legal quality of Council of Europe recommendations.<sup>413</sup>

In this sense, the Charter on EDC/HRE thus has *legal* status in the Council of Europe normative system. Unfortunately, the legal status of non-binding standards of the Council of Europe gets lost in some Council of Europe documents which reflect the traditional concept of law, whereby the legal quality of a norm is essentially determined by its binding force. These documents categorise standards of the Council of Europe in terms of ‘legal standards’ (binding), and other standards (non-binding),<sup>414</sup> which may suggest to readers that they are of minor importance. If ‘legal’ is narrowly construed as only including what is binding and justiciable in court, the EDC Charter on EDC/HRE is certainly not a legal instrument. Yet, other Council of Europe documents consider both recommendations and conventions as ‘legal standards’ and cite the Charter on EDC/HRE among them.<sup>415</sup> The equation ‘legal—binding’ has also been

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412 In the present Council of Europe structure, work on EDC falls in the mandate of the Directorate General of Democracy (DGII) ‘[t]o strengthen the democratic competencies of the citizens and their willingness to engage themselves in the democratic process’). Within this DGII, the ‘Directorate of Democratic Citizenship and Participation’ is composed of an Education Department and a Youth Department. The Education Department is concerned with the work of the Standing Conference of Ministers of Education, and includes a Steering Committee for Educational Policy and Practice (CDPPE). Art 17 Statute allows the CM to set up steering committees. See for practices and procedures, also Cornu, ‘The impact of Council of Europe Standards on the European Union’.

413 Bartsch, ‘The Acceptance of Recommendations and Conventions within the Council of Europe’ 92. In the same sense: H Jung, ‘Die Empfehlungen des Ministerskomitees des Europarates: zugleich ein Beitrag zur europäischen Rechtsquellenlehre’ in JR Bröhmer and GR Gerhard (eds), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress* (Carl Heymanns Verlag 2005) 522, and Cornu, ‘The impact of Council of Europe Standards on the European Union’ 116.

414 In various documents or webpages, e.g. CoE Secretary General, State of Democracy, Human Rights and the Rule of Law in Europe. Report 2014, 9, or <[www.coe.int/children](http://www.coe.int/children)> (legal standards only include conventions). The Venice Commission categorises standards in hard law and soft law, see CoE European Commission for Democracy through Law (Venice Commission), Rule of law checklist (11-12 March 2016), p 34.

415 E.g. CoE, *Council of Europe Strategy for the Rights of the Child (2012-2015): Implementation report*, 6 and 8.

abandoned by a number of scholars.<sup>416</sup> Variations in the legal effects of instruments (as seen in ECtHR case law above) transcend the black and white distinction between legal and binding versus non-legal and non-binding. Normative realities and governance in a globalised world are more complex than this binary categorisation suggests. In this context, there is no longer any justification for dismissing recommendations of the Council of Europe as insignificant because they are non-binding.<sup>417</sup> By the way, the MOU—in which the EU recognises the Council of Europe as a standard-setting authority—refers to ‘standards’ in general.<sup>418</sup>

It must be observed that in the EU legal order as well, recommendations are listed among the ‘legal acts of the Union’ (Article 288 TFEU). They are published in the L-series of the Official Journal and are included in the Directory of European Union legislation (EUR-Lex).<sup>419</sup> Von Bogdandy, Arndt and Bast state that ‘[a] non-binding operating mode cannot be equated with legal irrelevance’.<sup>420</sup> Indeed, ‘non-binding instruments are an integral part of the legal order’.<sup>421</sup> Thus, Council of Europe recommendations are an integral part of the Council of Europe legal order. In a community based on the rule of law, they are of relevance.

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416 Leaving Kelsen’s equation *Recht-Zwang*. Also Jung, ‘Die Empfehlungen des Ministerskomitees des Europarates: zugleich ein Beitrag zur europäischen Rechtsquellenlehre’ 522–23 (‘Kleine variation über das Thema “Geltung”, “Autorität” und “Wirkung”’). This is not the place for an examination of legal theory. Further: A von Bogdandy, F Arndt and J Bast, ‘Legal instruments in European Union law and their reform: A systematic approach on an empirical basis’ (2004) 21 *Yearbook of European Law* 91, 111; Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World* 162–165 (on ‘orderly cloud’ models, i.a. pyramidal models with guaranteed consistency).

417 Jung, ‘Die Empfehlungen des Ministerskomitees des Europarates: zugleich ein Beitrag zur europäischen Rechtsquellenlehre’ 519, 523.

418 Paras 2, 16, 23, 25; exception in para 24 (standards in conventions, in the context of legal cooperation for their coherence).

419 C-series of Official Journal refers to information and notices. See overview ‘Types of documents in EUR-Lex’ (website): Sector 3 ‘Legislation’ includes recommendations, opinions, resolutions, declarations, etc.

420 von Bogdandy, Arndt and Bast, ‘Legal instruments in European Union law and their reform: A systematic approach on an empirical basis’, 93; adopting a nominalist approach, all acts present in the L-series ‘can be considered as a legal act and any adopting institution as a law-making institution’; see also 111.

421 *Ibid.*, 112.

#### 54 Structure of the organisation

A second factor strengthening recommendations relates to the structure of the organisation.<sup>422</sup> The adoption of the Recommendation on the Charter on EDC/HRE was not an isolated action by the Committee of Ministers. As is obvious from the normative context in Chapter one, several bodies within the institutional structure of the Council of Europe have been, and still are, actively engaged in the EDC project and in its implications in specific fields.

#### 55 Method of enactment

The voting pattern leading to the adoption of recommendations increases their persuasive force and influences subsequent implementation. States which have supported a particular recommendation will be more inclined to give effect to it.<sup>423</sup> What was the voting pattern for the Recommendation on the Charter on EDC/HRE? Recommendations of the Committee of Ministers to governments of member states (Article 15(b) Statute) belong to the category of 'important matters' and fall under the rule of unanimity (Article 20(a)(i) Statute).<sup>424</sup> However, as an effect of the enlargement of the Council of Europe, the Ministers' Deputies decided in 1994 on the basis of a gentleman's agreement that no delegation would block the adoption of recommendations and accepted that the two-thirds majority rule would suffice.<sup>425</sup> In return, Ministers Deputies may issue reservations about the recommendations, approving the adoption of the text but reserving the right of their government to comply or not (Article 10(2)(c) Rules

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422 Schermers and Blokker § 1223.

423 Ibid, § 1224–1230; also Pinto de Albuquerque (n 401), para 28.

424 They 'require the unanimous vote of the representatives casting a vote, and of a majority of the representatives entitled to sit on the Committee' ('Sont prises à l'unanimité des voix exprimées et à la majorité des représentants ayant le droit de siéger au Comité des Ministres les résolutions du Comité relatives aux questions importantes mentionnées ci après: i. les recommandations relevant de l'article 15.b').

425 CoE Ministers' Deputies, *Effects of enlargement of the Council of Europe, Report (4 November 1994) CM/Del/Dec(94)519bis/2.2* (1994); CoE Committee of Ministers Declaration on compliance with commitments accepted by member states of the Council of Europe (10 November 1994); CoE Committee of Ministers, Procedure for implementing the Declaration of 10 November 1994 on compliance with commitments accepted by member states of the Council of Europe (20 April 1995). Earlier CoE Committee of Ministers Statutory Resolution (93)27 on majorities required for decisions of the Committee of Ministers (14 May 1993).

of Procedure for the meetings of the Ministers' Deputies).<sup>426</sup> A quorum of two thirds of the representatives of the members is required.<sup>427</sup> In practice, the recommendations of the Committee of Ministers are adopted by consensus and 'usually cover all or nearly all member [s]tates'.<sup>428</sup> The Committee of Ministers takes care that all agree on the adoption of the recommendations and does not vote.<sup>429</sup> Thus, the adoption of recommendations constitutes 'a joint expression of European governmental opinion on a given subject, which obviously lends them considerable weight, even though they do not have the binding force of conventions.'<sup>430</sup> Admittedly, the opinion expressed is that of the government, without direct parliamentary support for the recommendations in the member states. This will be discussed in the next section.

Jung argues that the possibility of issuing reservations enhances the binding effect of Council of Europe recommendations.<sup>431</sup> Bartsch points out that

by recording reservations in cases where they cannot fully apply a recommendation, member States implicitly recognize the quasi-legal authority of the instrument; they treat recommendations, although they are legally not bound by them, as if they contained treaty obligations; for strictly speaking, a reservation has no place in the acceptance of a non-binding instrument.<sup>432</sup>

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426 CoE Committee of Ministers, Rules of Procedure for the meetings of the Ministers' Deputies (4th revised edn 2005).

427 Art 11 CoE, Rules of Procedure of the Committee of Ministers (5th revised edn 2005); Art 7 CoE Committee of Ministers, Rules of Procedure for the meetings of the Ministers' Deputies (4th revised edn 2005).

428 De Vel and Markert (n 168), 346.

429 Benoît-Rohmer and Klebes, *Council of Europe Law - Towards a pan-European legal area* 62–63.

430 De Vel, *The Committee of Ministers of the Council of Europe* 37.

431 Jung, 'Die Empfehlungen des Ministerskomitees des Europarates: zugleich ein Beitrag zur europäischen Rechtsquellenlehre' 524: 'ein Zugewinn an Bindungswirkung', agreeing with Bartsch. Jung gives another example on p 525, illustrating that member states feel as if recommendations are binding and therefore want to use the possibility of making reservations.

432 Bartsch, 'The Acceptance of Recommendations and Conventions within the Council of Europe' 94. See also Schermers and Blokker § 1225 ('By making an official declaration that it does not wish to be affected by a recommendation, a state places itself outside the scope of the recommendation. It thus considers the recommendation as a *res inter alios acta*, as an act between other parties, which is of no concern to it.').

At the adoption of the Recommendation on the Charter on EDC/HRE no reservations were expressed.<sup>433</sup> It follows that all EU Member State governments agreed.<sup>434</sup> As a matter of fact, Mrs. Androulla Vassiliou, the EU Commissioner responsible for Education, Culture, Multilingualism and Youth, wrote that '[i]n 2010, all the Member States of the European Union adopted the Council of Europe's Charter on Education for Democratic Citizenship and Human Rights Education'.<sup>435</sup>

### 56 Complexity of the deliberation procedure

The complexity of the deliberation procedure is a factor which hardens soft law. It helps to guarantee wide acceptance of the norms, which in turn tends to legitimise the normative claims of the text.<sup>436</sup>

Admittedly, recommendations of the Council of Europe can be criticised for lacking democratic legitimacy as they have not been approved by parliament or by the citizens of the member states (referendum), unlike conventions, which need to be ratified in order to be binding for any participating state.<sup>437</sup> Recommendations are decisions of the Committee of

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433 No mention of reservations of Ministers' Deputies under Article 10(2)(c) of the Rules of Procedure (compare for instance reservations of Ireland in CoE Recommendation R(99)4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults (23 February 1999)). Pro memorie, the reservation found for Poland concerned a resolution of the Standing Conference of European Ministers of Education (n 260). In the draft annotated agenda (Ministers' Deputies CM(2010)OJ1-final) for the 120th Session of the Committee of Ministers on 11 May 2010, in view of the important role of education for the promotion of knowledge on the ECHR and the fundamental rights enshrined therein, the Ministers were invited to adopt Recommendation CM/Rec(2010)7 'without debate' (item 2, para 5). However, 'Ministers will be able to speak on items on the agenda during the formal and the informal sessions. It is recalled that national position papers containing detailed statements may be distributed' (ibid, 'General comment'). All EU Member States were present, see text to n 264 (Genesis). The Charter was also adopted as a follow-up to CoE Committee of Ministers, Declaration and Action Plan, High Level Conference on the Future of the European Court of Human Rights (Interlaken, 19 February 2010), adopted unanimously.

434 See also CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 23 : unanimous adoption.

435 Commission/EACEA/Eurydice, *Citizenship Education in Europe* (2012) 3, Foreword.

436 Pinto de Albuquerque (n 401), para 28.

437 Sasse, 'The Council of Europe as a Norm Entrepreneur: The Political Strengths of a Weak International Institution' 180, its 'institutional structure insulates the Council of Europe from direct public or democratic scrutiny'.

Ministers, thus adopted by ministers of member state governments and by their deputies, and are not directly based on a democratic parliamentary decision-making process. By way of comparison, recommendations in the EU legal order generally have greater democratic legitimacy, especially when adopted by ordinary legislative procedure, involving not only the Council (governments) but also the European Parliament and national parliaments (Title II TEU, Art 289 TFEU, Protocols Nos 1 and 2 annexed to the Treaties).

However, in particular with regard to the Recommendation on the Charter on EDC/HRE, there are several factors which increase its democratic legitimacy. As its genesis shows, this Recommendation was drafted on the basis of input from many state and non-state actors. The ministers conducting the EDC processes (Ministers of Foreign Affairs, of Education, etc.) are accountable vis-à-vis democratically elected national parliaments. The Parliamentary Assembly of the Council of Europe has at several stages recommended action on EDC and proposed guidelines, although only in consultative role (Article 22 Statute). Grassroots actors and stakeholders, NGOs, and numerous experts were involved in the drafting of the EDC standards during the three phases leading to the adoption of the Charter.<sup>438</sup> Governments continue to work with other stakeholders to implement the Charter on EDC/HRE and strong support comes from NGOs (88 per cent) and youth organisations (78 per cent).<sup>439</sup>

Compared to some European Commission recommendations or administrative rules in the EU legal order, the Recommendation on the Charter on EDC/HRE in the Council of Europe legal order withstands the test of normativity very well: it reflects a wide European consensus, is supported by wide-reaching consultation of stakeholders, and is based on a specific adoption procedure. Certain norms of the European Commission, which do have legal effects, are criticised for lacking a wide platform of support and for not being the result of standardised procedures.<sup>440</sup>

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438 Text to n 261. Pinto de Albuquerque (n 401), para 25: ‘The involvement of States and grass-roots non-State actors in the exercise of law-making powers ... reinforces the democratic nature of the process and the responsiveness of the international public policy-making system towards the European people’.

439 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 70.

440 See Hofmann, Rowe and Türk, *Administrative law and policy of the European Union* 544–45.

The Charter on EDC/HRE satisfies the Schermers and Blokker criterion of reflecting ‘the generally held view on a given matter’<sup>441</sup>, as shown by the normative context of the Charter on EDC/HRE.

### 57 *Widespread acceptance*

A particular strength of the Charter on EDC/HRE is its connection with the international right to education (third anchor point of the study) and its embeddedness in UN standards. This is clear from the preambular paragraphs to the Recommendation on the Charter on EDC/HRE.<sup>442</sup> The Charter on EDC/HRE is a regional instrument, congruent with UN action on education for democracy and human rights education, and in line with the compulsory educational aims in the ICESCR and CRC.<sup>443</sup> It is part of a contemporary interpretation of the international right to education, as will appear in Part four.<sup>444</sup> Starting from the right to education recognised in the UDHR and the post-World War rationale on non-totalitarian education, an international consensus developed on the importance of education for democracy and human rights.<sup>445</sup> The UN General Assembly adopted various resolutions on this.<sup>446</sup> Within the Council of Europe legal order, the ECtHR has held that UN General Assembly resolutions, although not legally binding, may provide an indication of the existence of an international consensus.<sup>447</sup> Education for democratic citizenship and human rights education, however they may be termed in national school curricula, have become universally accepted normative realities, goals to be

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441 Schermers and Blokker § 1226–1230.

442 Fourth, fifth and eleventh preambular paragraphs; explanatory memorandum para 8.

443 Text to nn 81– 82. Convention Against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) (CADE); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 A/RES/2200 (XXI), entered into force 3 January 1976) 993 UNTS3; Convention on the Rights of the Child (adopted 20 November 1989 UNGA Res 44/25, entered into force 2 September 1990) 15777 UNTS 3. See Case C-540/03 *Parliament v Council* ECLI:EU:C:2006:429, para 37 (the CRC and ICESCR bind each of the Member States).

444 §§ 291 292 294 .

445 Also text to n 170; explanatory memorandum para 31. Further Part four, § 285 ff.

446 § 294 nn 2203-2204.

447 *V v UK* no 24888/94 (ECtHR 16 December 1999), para 73.

pursued, yet not always reached.<sup>448</sup> That the European consensus on EDC and HRE matches an international consensus is illustrated by the links between the Council of Europe and other international actors, and this, in turn, is one of the strengths of the Council of Europe as a norm-entrepreneur.<sup>449</sup> The EDC norms were adopted principally in partnership with the UN, the EU and the Organisation for Security and Co-operation in Europe (OSCE).<sup>450</sup> The Charter review processes are part of the contribution of the Council of Europe to the UN World Programme for Human Rights Education and the 2030 Education Agenda.<sup>451</sup> Council of Europe action on EDC is internationally recognised and supported. The 2016 World Forum on Democracy recommended Council of Europe member states to ensure full implementation of the Charter on EDC/HRE.<sup>452</sup>

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- 448 Charter on EDC/HRE, para 5(j); S Bergan, T Gallagher and I Harkavy (eds), *Higher education for democratic innovation* (CoE Higher Education Series No 21, 2016). Comparable elements in concept of US Department of Education, Office of the Under Secretary and Office of Postsecondary Education, *Advancing Civic Learning and Engagement in Democracy: A Road Map and Call to Action*, Washington DC, 2012, 1: ‘By “civic learning and democratic engagement” we mean educational experiences that intentionally prepare students for informed, engaged participation in civic and democratic life by providing opportunities to develop civic knowledge, skills, and dispositions through learning and practice. These include civics and government as subjects unto themselves but also service-learning and other approaches for integrating a civic and democratic dimension into other disciplines, such as science, technology, engineering, and math’. Compared to the European concept of EDC, in the US there is more emphasis on ‘civic engagement’, see Hartley and Huddleston, *School-community-university partnerships for a sustainable democracy: Education for Democratic Citizenship in Europe and the United States of America*. See also D Feith (ed) *Teaching America: the Case for Civic Education* (Rowman & Littlefield Education 2011).
- 449 Sasse, ‘The Council of Europe as a Norm Entrepreneur: The Political Strengths of a Weak International Institution’ 196.
- 450 Paras 5(j) and 16 Charter on EDC/HRE, para 56 explanatory memorandum; yearly Memoranda CoE-UN activities.
- 451 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 6 (Target 4.7 in Education Agenda).
- 452 World Forum for Democracy 2016, *Democracy & equality: does education matter?* (Strasbourg, 7-9 November 2016), 5; Human Rights Education in the School Systems of Europe, Central Asia and North America: A Compendium of Good Practice (CoE, OSCE/ODIHR, UNESCO, OHCHR, 2009): worldwide exemplary practices of human rights education, education for democratic citizenship and education for mutual respect and understanding, i.a. reference to longstanding tradition of CoE work on EDC.



58 *Need for a rule*

Schermers and Blokker point to the need for a rule as a powerful factor strengthening recommendations of international organisations. A non-binding yet genuinely necessary rule is stronger than a binding rule which is considered obsolete. What is determining is the opinion of the participating governments as to the need.<sup>453</sup> The need for a rule on EDC follows from the core values and aims of the Council of Europe expressed in the Statute (Article 1 and preamble). In the MOU, EDC is part of the shared priorities and focal areas for cooperation. Several Heads of State and Government have underlined the urgent need for common action on EDC to ensure democratic security, first because of the political changes in Europe since 1989 and, more recently, because of the challenges of terrorism and the refugee crisis. In their individual answers to the 2016 questionnaire on the implementation of the Charter on EDC/HRE, a large number of member states said they agreed ‘to a great extent’ that citizenship and human rights education are a means of addressing violent extremism and radicalisation leading to terrorism, the integration of migrants and refugees, and the deficit in the democratic participation of both vulnerable and non-vulnerable groups in society with the overall aim of building cohesive and equitable societies.<sup>454</sup> The usefulness of international cooperation and of EDC norms at Council of Europe level appears from surveys.<sup>455</sup> Many member states consider the review process of the Charter on EDC/HRE to be a support, e.g. as encouragement and motivation for more action and better quality, as an opportunity to promote good practice, a support tool for dialogue, and as a means of access to expertise from other countries and international institutions.<sup>456</sup> Council of Europe action on EDC is expected

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453 Schermers and Blokker § 1233–1235, example: food standards of the *Codex Alimentarius* Commission. Pinto de Albuquerque (n 401), para 33: hard law should not be softened, only upgrading of soft law is possible (thus, the lack of a need cannot serve to downgrade hard law).

454 CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe, Q1, less importance to address the consequences of the economic crisis, austerity measures, or social exclusion.

455 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 22.

456 CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe, Q 24, many high ratings on various components. See also Foreword of Thorbjørn Jagland, Secretary General of the Council of Europe, to CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*: ‘edu-

to provide a shared reference framework and common standards, and member states are satisfied that this is the case.<sup>457</sup> A lesser expectation was authoritative encouragement to ensure compliance with commitments. Governments consistently marked a review of the Charter on EDC/HRE as being of high importance for formal education and more than two thirds of civil society organisations considered the Charter on EDC/HRE as useful or very useful (in non-formal educational activities).<sup>458</sup> Furthermore, the Charter on EDC/HRE is valued as the only international legal document which responds to the need to define education for democratic citizenship and human rights education in conjunction with one another.<sup>459</sup>

The fact that the 2010 Charter does not provide the last word on EDC/HRE is not a weakness. The need to respond to new challenges and to incorporate new ideas on effective implementation is inherent in the dynamic nature of citizenship education, a field ‘constantly questioned, tested, reviewed and updated’,<sup>460</sup> and is good for the health of a genuine democracy. In the meantime, the Charter remains a strong reference point.

### 59 *Legitimising effect*

In certain areas, norm-setting can be so complicated that member states prefer to use the standards of an international organisation rather than trying to formulate norms themselves and risking opposition from various parties. Recommendations of an international organisation increasingly tend to legitimise national action.<sup>461</sup> This is true of citizenship education,

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cation is increasingly recognised as a tool for tackling radicalisation leading to terrorism, for successfully integrating migrants and refugees and for tackling disenchantment with democracy and the rise of populism’.

457 CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe, Q25: of 40 respondents, 30 marked 4 or 5 on a scale 1–5 (1 not useful, 5 very useful). Overview in CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 75.

458 CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe, Q27; CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 23, 87, 94.

459 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 25.

460 See perspectives in World Forum for Democracy 2016, Democracy & equality: does education matter? (Strasbourg, 7-9 November 2016); CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 80.

461 Schermers and Blokker § 1236, 1238–39.

which can be quite a sensitive matter in certain domestic contexts. When confronted with critics or inertia in the education sector, some states will base their arguments in favour of changes in the curriculum on Council of Europe EDC recommendations. This happened in Spain, where domestic opposition was countered by referring to the implementation of the 2002 Council of Europe recommendation on EDC, the precursor of the 2010 Recommendation on the Charter on EDC/HRE.<sup>462</sup> In answer to the question about what would be needed to raise the priority of EDC and HRE, 82 per cent of the respondent governments in the 2016 survey identified ‘some political pressure from regional and international institutions’.<sup>463</sup> Many civil society organisations use the Charter on EDC/HRE as an advocacy and lobbying tool vis-à-vis national and local authorities.<sup>464</sup>

#### 60 Prescriptive language or label

Pinto de Albuquerque mentions ‘the prescriptive language adopted in a text or the label attached to the instrument’ as a factor hardening soft law. Admittedly, the provisions of the Recommendation on the Charter on EDC/HRE are framed in ‘should’ terms.<sup>465</sup>

However, some provisions take a more affirmative tone (paragraph 4 ‘are to be applied’; paragraph 5(c) ‘have a part to play in’). In particular, the label ‘Charter’ indicates the high degree of normativity which the actors wished to attach to the text, differentiating it from the usual Council of Europe recommendations. The many preambular paragraphs (recalling the core mission of the Council of Europe, firmly convinced, having regard to, etc.) are reminiscent of a convention and reinforce the formal setting of norms in the Charter on EDC/HRE.<sup>466</sup>

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462 CR Motos, ‘The Controversy over Civic Education in Spain’ (2010) 9 *European Political Science* 269, 270–71, on claims of the Catholic Church and other conservative actors that moral education was exclusively reserved for families, not for schools and government via EDC. Motos argues for a liberal democracy in which EDC stimulates critical thinking. In a political theory framework, he points to reasons justifying both content of EDC and competence of democratic government. See also n 2073.

463 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 98 (in addition to an improved awareness of relevance of EDC/HRE for meeting current challenges in society, 87%).

464 *Ibid.*, 87, 94 (41%).

465 Text to n 193.

466 Text to n 162.

61 *Travaux préparatoires, explanatory reports and commentaries*

The normative intensity of a text is further increased by the existence of *travaux préparatoires*, explanatory reports and commentaries, and by giving wide publicity to the text.<sup>467</sup> These hardening factors all apply to the Recommendation on the Charter on EDC/HRE.<sup>468</sup>

The Committee of Ministers recommends wide dissemination of the Charter to the authorities responsible for education and youth, and says member states should cooperate in ‘informing all stakeholders, including the public, about the aims and implementation of the Charter’.<sup>469</sup> Since the official languages of the Council of Europe are English and French (Article 12 Statute), the European Commission provided a translation into all the languages of the EU Member States of Recommendation Rec(2002)12 on education for democratic citizenship (precursor).<sup>470</sup> At present, almost all member states have translated the Charter on EDC/HRE into their languages and most states have published it on the website of their Ministries of Education or other relevant bodies.<sup>471</sup> However, the Charter on EDC/HRE only partially satisfies the criterion of wide publicity. It is, for instance, not available in Dutch and not published on the website of the Ministry of Education in the Netherlands.<sup>472</sup> Awareness of the Charter on EDC/HRE among young people, educationalists, and even governments, should be raised.<sup>473</sup> A key recommendation of the 2017

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467 Pinto de Albuquerque (n 401), para 28.

468 Explanatory memorandum, and huge number of comments and materials published by the CoE (mentioned after each phase in the normative context, see Genesis).

469 Fifteenth preambular para; Charter para 15(d).

470 Hartley and Huddleston, *School-community-university partnerships for a sustainable democracy: Education for Democratic Citizenship in Europe and the United States of America* 51 (the EU has more financial means than the Council of Europe).

471 CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe, Q8. CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 51–52, 64: 38 out of 40 made the Charter available in the official national language(s); 83% published it on the website of Ministries of Education or other relevant bodies; only 60% disseminated it by other means; see p 64 about minority languages).

472 See systematic ‘No’ answer on Q8. In Belgium, it does not exist ‘in Flemish’.

473 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 23 (‘according to the respondents from both governmental and civil society organisations, the charter is not well known in the countries).

Conference is to promote the Charter more widely among the stakeholders.<sup>474</sup>

62 *Subsequent practice (positive)*

This factor must be treated with caution. Schermers and Blokker note that in certain cases, ‘the application by others’ can strengthen recommendations.<sup>475</sup> Pinto de Albuquerque states that ‘subsequent practice’ confirming or developing the standards set out in the text, can reinforce the standard-setting function of the text. Of course, this does not mean that, in general, normativity depends on compliance, which would be putting the cart before the horse.<sup>476</sup>

To the extent that application by others and subsequent practice are strengthening factors, it must be acknowledged that in this respect the findings for the Charter on EDC/HRE are mixed. In 2015, the Secretary General of the Council of Europe stated that only 32 per cent of the member states provide for satisfactory EDC.<sup>477</sup> The 2017 Report on the state of citizenship and human rights education in Europe points to both achievements and gaps. It is positive that many member states provide for citizenship education in accordance with the EDC standards. All the member states (40) which replied to the 2016 questionnaire on the implementation of the Charter reported that concrete measures had been taken to promote citizenship and human rights education in accordance with the objectives and principles of the Charter (in 2012, only two thirds of respondents did). Substantial progress has been made and almost all governments foresee further action to promote it.<sup>478</sup> One of the main findings is that there is a shared working definition of EDC/HRE in 31 countries (78 per cent of the respondents).<sup>479</sup> This is an important strength of the Council of Europe

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474 Ibid, 7, 25, 52 (also increased visibility in media, and advocacy by prominent personalities are asked for).

475 Schermers and Blokker § 1237. In the same sense Tulkens, Van Drooghenbroeck and Krenc, ‘Le soft law et la Cour européenne des droits de l’homme: questions de légitimité et de méthode’ 483–4: ‘L’instrument de soft law pèsera d’autant plus sur l’interprétation conventionnelle si la norme qu’il véhicule a d’ores et déjà reçu dans le droit interne des Etats membres une certaine effectivité.’

476 Pinto de Albuquerque (n 401), para 28, fn 55.

477 CoE Secretary General, State of democracy, human rights and the rule of law: A shared responsibility for democratic security in Europe. Report 2015, table p 87.

478 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 51–52, and conclusions p 77, 80.

479 Ibid, 52 (but only 17% of civil society respondents think the definition is shared).

norm on EDC/HRE, underscoring the legitimacy of using the EDC concept as an anchor point for this study.

It is impossible to give a comprehensive overview of the application of the Charter on EDC/HRE by the 47 member states of the Council of Europe, not even of that of the 27 EU Member States. The first difficulty is that the expression ‘education for democratic citizenship’ (EDC) is translated in many different ways and that its content is given many varied forms in the Member States. The diversity of terminology referring to ‘citizenship education’ is striking.<sup>480</sup> Citizenship education norms reach into many areas of the curriculum, for instance into history, geography, philosophy, or into topics like human rights, citizenship/civic education, democracy, intercultural education, and many—often optional—courses in social sciences. Most frequently, EDC and HRE are promoted through a cross-curricular approach and are therefore formulated in rather abstract norms.<sup>481</sup> Moreover, an overview would involve the examination of not 27 EU Member State educational systems, but in fact many more, as education policy is not centralised in every Member State. Because education is a regional competence in federal states, various regional versions of citizenship education exist (16 *Länder* in Germany, 3 communities in Belgium, etc.). Several States have also recognised devolved competences for autonomous regions, including for some aspects of education (e.g. Spain).

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480 Civic education, social sciences, life skills, state and law, individuals and society, living together, principles of civil society, ... See overview of terminology in Bírzea, ‘EDC policies in Europe - a synthesis’, appendix II; CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe. Certain names are historically charged and therefore avoided (e.g. for some, ‘citizenship education’ recalls practice in the USSR). See also Becker, ‘Politische Bildung in Europa’, fns 8 and 11: there are differences even within the same language, e.g. in Austria usually ‘politische Bildung’, in Germany ‘Demokratieerziehung’, with translation of the Charter on EDC/HRE as ‘Charta des Europarats zur Demokratie- und Menschenrechtsbildung’, in Austria as ‘Europarats-Charta zur Politischen Bildung und Menschenrechtsbildung’. But see also in Germany, the *Bundeszentrale für politische Bildung*. Political education is not necessarily the same as education for democracy (see, i.a., B Widmaier and B Overwien (eds), *Was heißt heute Kritische Politische Bildung?* (Non-Formale Politische Bildung, Band 2, Wochenschau Verlag 2013)).

481 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 67 : a crosscurricular approach (88% of the respondents), obligatory (78%), whole school approach (73%), optional (45%). See Commission/EACEA/Eurydice, *Citizenship Education at School in Europe* (2017) and Commission/EACEA/Eurydice, *Citizenship Education at School in Europe—Annexes: National Information and Websites* (2017).

Further differentiation of citizenship education norms would be necessary to reflect different levels of education (primary or secondary education), different pupil age (grades) and different programmes and educational paths (general, technical, vocational, and numerous options). On top of this, ideological or religious schools may have their own curricula, and school freedom and the autonomy of educational institutions add to the complexity. It is not only the many actors and the autonomy they enjoy which make a comprehensive overview of norms on citizenship education a quite impossible task—it is also a never-ending task because of the frequent changes over time in the educational programmes. The political context plays a part in the formulation of citizenship education aims and changes in government may lead to changing curricula.

However, a few snapshots will provide a flavour of EDC in some EU Member States, with all due reservations.<sup>482</sup> Reports indicate that subsequent practice confirms the standards set out in the Recommendation on the Charter on EDC/HRE.

In several Member States, citizenship education is currently in the process of revision, aligning it with EDC standards.<sup>483</sup> The *Irish* Government reports that the revised Civic Social and Political Education ‘incorporates all of the concepts expressed at [Council of Europe] level’, an obligatory

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482 For legislation supporting and promoting EDC/HRE mentioned by parliaments of five Member States (BE, EE, ES, FI, LT), see appendix II of CoE, Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe, 82. See also Commission/EACEA/Eurydice, Citizenship Education at School in Europe (2017), Annex 3.

483 Commission/EACEA/Eurydice, Citizenship Education at School in Europe (2017), 10. See i.a. *Three Country Audit of the lower secondary citizenship and human rights education curriculum: Reflection of the principles of the Charter on Education for Democratic Citizenship and Human Rights Education in the curricula of France, Finland and Ireland* (2013). Also CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe, i.a. in *IE* (revisions to Civic Social and Political Education, which ‘incorporates all of the concepts expressed at CoE level’), *NL* (‘in 2015, the Dutch government launched an initiative to develop a new national curriculum for primary and secondary education, with EDC/HRE as one of the priorities’); *HU* (revisions mainly occur in lower secondary education); *BE* (n 485). See also Commission/EACEA/Eurydice, Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education: Overview of education policy developments in Europe following the Paris Declaration of 17 March 2015 (2016), references to national measures.

subject at lower secondary level.<sup>484</sup> In *Belgium*, the Flemish Community hosted pilot projects for the Council of Europe RFCDC, in preparation for revision of the learning outcomes in the curricula ('eindtermen').<sup>485</sup> In various Member States, including *Bulgaria*, new curricula have been designed for more consistency with EDC standards.<sup>486</sup> The *Czech Republic* is working, for example, on participation in school governance.<sup>487</sup> In *Spain*, a new Strategic Plan for School Coexistence was drawn up by the Ministry of Education with the collaboration of autonomous communities.<sup>488</sup> The *Hungarian* Ministry of Human Capacities reports that the content of Moral Education is regulated by the National Core Curriculum and the Framework Curricula in line with the Act on Public Education, and that the New Moral and Religious Education subject is in line with EDC/HRE.<sup>489</sup>

In other Member States, the implementation of the Charter is an incentive to build further on EDC and HRE, a tool to deepen or complement certain aspects of existing citizenship education. *Austria* has done extensive

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484 CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe.

485 *Vlaamse Gemeenschap*: <onderwijs.vlaanderen.be/nl/europees-kader-voor-burgerschap-en-democratische-waarden-in-het-onderwijs-van-reykjavik-tot-athene>; 'eindtermen' are under revision: Decree 26 januari 2018 houdende wijziging van het decreet basisonderwijs van 25 februari 1997 en de Codex Secundair Onderwijs, wat de onderwijsdoelen betreft (opschrift gewijzigd door de commissie: ... tot wijziging van het decreet basisonderwijs van 25 februari 1997 en de Codex Secundair Onderwijs, wat onderwijsdoelen betreft, en tot wijziging van de decreten Rechtspositie onderwijspersoneel) BS 9 maart 2018, 2018030576; *Communauté française*: Décret relatif à l'organisation d'un cours et d'une éducation à la philosophie et à la citoyenneté (D 22-10-2015, MB 09-12-2015), inserting a number 11° in article 9 of 'décret du 24 juillet 1997 définissant les missions prioritaires de l'enseignement secondaire et organisant les structures propres à les atteindre'.

486 Reported by BG: 'The new curricula have been designed so as to target EDC/HRE to a greater extent'. See Law on Pre-School and School Education (2016); and new standard on civic, intercultural and environmental education to enact under the Educational Law (Q5).

487 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 46 (democratic administration of schools). See for PT, Decree-Law no. 139/2012, July 5, and a Reference Document 'Citizenship Education Guidelines'.

488 *Ibid*, 20, devised by the Ministry of Education, Culture and Sport, also with the Observatory for Racism and Xenophobia, the Institute for Women, and other tertiary-sector organisations.

489 See CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe, Q8 and 13.



work in the citizenship education field in accordance with the competence model.<sup>490</sup> The Workprogramme of the Federal government mentions the establishment of political education as a compulsory module, in order to prepare Austria for the future.<sup>491</sup>

In France, 'éducation à la citoyenneté' has roots in the French revolution (1789). The deep concern to educate and to form *le citoyen* according to the new constitution(s), led to the introduction of several education schemes at the end of the 18<sup>th</sup> century, i.a. by Condorcet and Talleyrand.<sup>492</sup> In the 19<sup>th</sup> century, education helped to turn 'peasants into Frenchmen'<sup>493</sup> and *l'amour pour la patrie* was (and still is) inculcated in schools.<sup>494</sup> Today, consistency with EDC standards can be seen in various legislative acts. Le Code

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490 The concept of citizenship education is based on the competence model (Krammer, Kompetenz-Strukturmodell Politische Bildung, Wien, 2008). *Lehrpläne* in <[www.politik-lernen.at/site/grundlagen/politischebildung](http://www.politik-lernen.at/site/grundlagen/politischebildung)>.

491 Work programme of the Austrian Federal Government 2013–2018, 27: Establish Political Education as a compulsory module from the 6th school grade as part of the subject History and Social Studies/Political Education.

492 Condorcet, *Cinq mémoires sur l'instruction publique*; Talleyrand-Périgord, Rapport sur l'Instruction Publique, fait au nom du Comité de Constitution à l'Assemblée Nationale, les 10, 11 et 19 Septembre 1791.

493 E Weber, *Peasants Into Frenchmen: The Modernization of Rural France, 1880–1914* (Stanford UP 1976).

494 About historic aspects of citizenship education in France, see e.g. M Lepelletier, *Plan d'Éducation Nationale, présenté à la Convention par Maximilien Robespierre au nom de la Commission d'Instruction publique, le 29 juillet 1793* (1793); F Buisson, *Dictionnaire de pédagogie et d'instruction primaire* (1911 edn, 1882-1887); G Compayré, *Histoire critique des doctrines de l'éducation en France depuis le seizième siècle* (4th edn, Hachette 1883); J Vaujany, *L'école primaire en France sous la Troisième République: les lois fondamentales, l'école nouvelle, l'évolution de l'école* (Perrin 1912); P Nora, 'Ernest Lavisse: son rôle dans la formation du sentiment national' (1962) 228 *Revue Historique* 73; A Prost, *Histoire de l'enseignement en France 1800-1967* (2nd edn, Colin 1970); M Gontard, *L'oeuvre scolaire de la Troisième République: l'enseignement primaire en France de 1876 à 1914* (2nd edn, CRDP 1976); J-F Chanet, *L'école républicaine et les petites patries* (Aubier 1996); R Grevet, 'La réforme des études en France au siècle des Lumières' (1997) 297 *Revue Historique* 85; B Baczko, *Une éducation pour la démocratie: textes et projets de l'époque révolutionnaire* (2nd edn, Droz 2000); R Grevet, *L'avènement de l'école contemporaine en France (1789-1835): laïcisation et professionnalisation de la culture scolaire* (Presses universitaires du Septentrion 2001); F Audigier, 'L'éducation civique dans l'école française' (2002) 1 *Journal of Social Science Education* 1; JF Chanet, 'Instruction publique, éducation nationale et liberté d'enseignement en Europe occidentale au XIX<sup>e</sup> siècle' (2005) 41 *Paedagogica Historica* 9; A Ferrari, 'The problem of civic cohesion and the role of the state school in France and Italy: historical, religious and secular comparisons' (2006) 35 *Journal of Moral*

de l'Éducation states that '[a]u titre de sa mission d'éducation à la citoyenneté, le service public de l'éducation prépare les élèves à vivre en société et à devenir des citoyens responsables et libres, conscients des principes et des règles qui fondent la démocratie'.<sup>495</sup> More detailed programmes set out the curriculum to be followed and the objectives to be achieved.<sup>496</sup>

In Germany, at the prompting of the Allies after World War II, huge efforts were made to counter totalitarian tendencies through re-education. The *Bundeszentrale für politische Bildung* (Federal Agency for Civic Education) was established to educate German citizens about democratic principles.<sup>497</sup> The reunification of East and West Germany was also a spur for citizenship education.<sup>498</sup> 'Democracy calls for political education' was the

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Education 533; L. Heuschling and J. Hummel, 'Le libéralisme du Vormärz : la figure du « professeur politique »' (2006) 24 *Revue Française d'Histoire des Idées Politiques* 227 (article revealing the context of the time, see also n 58).

495 Code de l'éducation, Art L121-4-1 (créé par la Loi d'orientation et de programmation pour la refondation de l'École de la République n 2013-595 du 8 juillet 2013).

496 Décret relatif au Socle commun de connaissances, de compétences et de culture: Bulletin Officiel n°17 du 23-4-2015; Circulaire n° 2016-092 du 20-6-2016 relative au parcours citoyen de l'élève; Circulaire relative aux orientations générales pour les comités d'éducation à la santé et à la citoyenneté; Arrêté fixant le programme d'enseignement moral et civique à l'école élémentaire et au collège (Arrêté du 12-6-2015, Journal officiel du 21-6-2015): Bulletin officiel spécial n° 6 du 25 juin 2015; Arrêté fixant les programmes d'enseignement moral et civique en classes de seconde générale et technologique, de première et terminale des séries générales (Arrêté du 12-6-2015, Journal officiel du 21-6-2015): Bulletin officiel n°6 du 25 juin 2015. See also overview of Féron, 'Citizenship Education in France'; and Johnson and Morris, 'Critical citizenship education in England and France: a comparative analysis'.

497 Established as Federal Agency for Homeland Services in 1952. See <www.bpb.de/die-bpb/147828/history-of-the-bpb>; <www.bpb.de/die-bpb/138853/our-mission-and-activities>; 'Considering Germany's experience with various forms of dictatorial rule down through its history, the Federal Republic of Germany bears a unique responsibility for firmly anchoring values such as democracy, pluralism and tolerance in people's minds'. Further § 319 .

498 W Sander, 'Theorie der politischen Bildung: Geschichte - didaktische Konzeptionen - aktuelle Tendenzen und Probleme' in W Sander (ed), *Handbuch politische Bildung* (Reihe Politik und Bildung 32, Bundeszentrale für politische Bildung 2005); S Reinhardt, 'The Case of (East-) Germany' (2008) 6 *Journal of Social Science Education* 67; J Bruen, 'From Dictatorship to Democracy? The Impact of the Collapse of the German Democratic Republic (GDR) on Political Education in its Schools' (2014) 10 *Journal of Political Science Education* 315.

title of the 1997 *Münchener Manifest*.<sup>499</sup> As a consequence, citizenship education in Germany builds on decades of remarkable work, based on various lines of academic research in social sciences.<sup>500</sup> German *Demokratiebildung* provides good examples of citizenship education norms for schools

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499 Public statement of the heads of the *Bundeszentrale* and the *Landeszentralen für politische Bildung* on 26 May 1997.

500 See, e.g., B Sutor, 'Politische Bildung im Streit um die "intellektuelle Gründung" der Bundesrepublik Deutschland. Die Kontroversen der siebziger und achtziger Jahre' (2002) 52 *Aus Politik und Zeitgeschichte: APuZ* 17; P Massing, 'Die Infrastruktur der politischen Bildung in der Bundesrepublik Deutschland - Fächer, Institutionen, Verbände, Träger' in W Sander (ed), *Handbuch politische Bildung* (Bundeszentrale für politische Bildung 2005); Sander, 'Theorie der politischen Bildung: Geschichte - didaktische Konzeptionen - aktuelle Tendenzen und Probleme', i.a. on 'Politikdidaktik'; G Weissenö, 'Standards für die politische Bildung' (2005) 55 *Aus Politik und Zeitgeschichte: APuZ* 32; Walkenhorst, 'Problems of Political Education in a Multi-level Polity: explaining Non-teaching of European Union Issues in German Secondary Schooling'; D Lange and G Himmelmann (eds), *Demokratiebewusstsein: Interdisziplinäre Annäherungen an ein zentrales Thema der Politischen Bildung* (VS Verlag für Sozialwissenschaften 2007); P Massing, 'Politische Bildung in der Grundschule: Überblick, Kritik, Perspektiven' in D Richter (ed), *Politische Bildung von Anfang an: Demokratie-Lernen in der Grundschule* (Schriftenreihe Band 570, Bundeszentrale für politische Bildung 2007); D Richter (ed) *Politische Bildung von Anfang an. Demokratie-Lernen in der Grundschule* (Schriftenreihe Band 570, Bundeszentrale für politische Bildung 2007); D Lange, 'Citizenship Education in Germany' in VB Georgi (ed), *The Making of Citizens in Europe: New Perspectives on Citizenship Education* (Schriftenreihe Band 666, Bundeszentrale für politische Bildung 2008); G Weissenö (ed) *Politikkompetenz. Was Unterricht zu leisten hat* (Schriftenreihe Band 645, Bundeszentrale für politische Bildung 2008); M-B Vincent, '« La Constitution doit devenir un livre populaire »: Enseigner le patriotisme constitutionnel sous la République de Weimar' (2009) *Histoire de l'éducation* 71; A Eis, 'Concepts and Perceptions of Democracy and Governance beyond the Nation State: Qualitative Research in Education for European Citizenship' (2010) 9 *Journal of Social Science Education* 35; W Edelstein, 'Education for Democracy: reasons and strategies' (2011) 46 *European Journal of Education* 127; B Löscher and A Thimmel (eds), *Kritische politische Bildung: Ein Handbuch* (Reihe Politik und Bildung, Band 54, Wochenschau Verlag 2011); B Blessing, T Grammes and H Schluss, 'Civics Courses in the German Democratic Republic: A Case Study in the History of Curriculum and Educational Research' (2012) 11 *Journal of Social Science Education* 85; G Weissenö, 'Dimensionen der Politikkompetenz' in G Weissenö and H Buchstein (eds), *Politisch Handeln Modelle, Möglichkeiten, Kompetenzen* (Schriftenreihe Band 1191, Bundeszentrale für politische Bildung 2012); K-P Hufer and D Richter (eds), *Politische Bildung als Profession: Verständnisse und Forschungen* (Schriftenreihe Band 1355, Bundeszentrale für politische Bildung 2013); Widmaier and Overwien, *Was heisst heute Kritische Politische Bildung?*; W Sander and P Steinbach

and higher education, best practices, and interaction with civil society (NGOs, networks, youth organisations, foundations<sup>501</sup>). Because education is in principle a *Länder* competence,<sup>502</sup> there are a variety of EDC/HRE policies in formal education in Germany. Yet, essential guidance is provided by resolutions of the German Standing Conference of the Ministers of Education and Cultural Affairs.<sup>503</sup> This Standing Conference recommends that education for democracy should be a central task in primary and secondary schools, and sets out content and objectives. The Education Ministers refer to the Council of Europe project on EDC/HRE, the RFCDC, and recommend the use of Council of Europe materials in schools.<sup>504</sup> The Standing Conference furthermore recommends that human rights educa-

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(eds), *Politische Bildung in Deutschland* (Schriftenreihe Band 1449, Bundeszentrale für politische Bildung 2014); A Petrik (ed) *Formate fachdidaktischer Forschung in der politischen Bildung* (Gesellschaft für Politikdidaktik und politische Jugend- und Erwachsenenbildung, Band 14, Schwalbach/Ts 2015).

- 501 E.g. Society for Civic Education Didactics and Civic Youth and Adult Education (Gesellschaft für Politikdidaktik und politische Jugend- und Erwachsenenbildung), DARE (n 83), NECE (Networking Citizenship Education in Europe), or HREYN (Human Rights Education Youth Network).
- 502 Grundgesetz für die Bundesrepublik Deutschland Arts 7, 23(6), 72, 74, 91b; see HD Jarass and B Pieroth, *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (11th edn, Beck 2011). See also H-U Evers, *Die Befugnis des Staates zur Festlegung von Erziehungszielen in der pluralistischen Gesellschaft* (Duncker und Humblot 1979); I Hochbaum, 'The Federal Structure of Member States as a Limit to Common Educational Policy: The Case of Germany' in B De Witte (ed), *European Community Law of Education* (Nomos 1989); H-P Füssel, 'Cooperative Federalism in Education: About the Work of the Conference Education Ministers and the Joint Federal and Länder Commission on Education Planning and Research Promotion' in J De Groof and others (eds), *Power Sharing in Education: Dilemmas and Implications for Schools* (Acco 1998).
- 503 Commission/EACEA/Eurydice, *Citizenship Education at School in Europe* (2017), p 32, on the unique approach in Germany: 'Although subject curricula are defined at the level of each *Land*, several official documents dealing with human rights education, intercultural education, democracy education, media literacy, and historical and political education apply to all *Länder* and therefore make citizenship education a cross-curricular feature of the whole education system'. See also p 144.
- 504 Beschluss der Kultusministerkonferenz vom 06.03.2009, *Stärkung der Demokratieverziehung* (Strengthening of democracy education, KMK Resolution of 06.03.2009): 'Demokratie ist stets aufs Neue Gefahren ausgesetzt. Dies zeigt die deutsche Geschichte mit zwei Diktaturen im 20. Jahrhundert. (...) Erziehung für die Demokratie ist eine zentrale Aufgabe für Schule und Jugendbildung. Demokratie und demokratisches Handeln können und müssen gelernt werden' (in der Grundschule und Sekundarstufe, und Ausgabe aller Fächer).

tion should be one of the primary aims of education, a common task of all subjects and all teachers, and states that ‘textbooks must take account of the content of this recommendation’.<sup>505</sup> The *Bundeszentrale für politische Bildung* also gives guidance by ‘providing citizenship education and information on political issues to all people in Germany’ in conformity with the German constitution, defining citizenship education in general as ‘educating and encouraging citizens to actively participate in society and in the democratic process’.<sup>506</sup>

To conclude, the factor ‘application by others’ is relevant and strengthens the Recommendation on the Charter on EDC/HRE to a large extent.

### 63 Restatements

One last strength of the Charter on EDC/HRE is related to the factor ‘restatement’. Schermers and Blokker explain how restatement of a recommendation of an international organisation in later recommendations strengthens the earlier one.<sup>507</sup> Pinto de Albuquerque notes that the further development of standards set out in a text hardens them.<sup>508</sup> The frequent recalling of the Charter on EDC/HRE in later instruments reinforces its authority.<sup>509</sup> One of the essential developments of the Charter on

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Confirmed in Beschluss der Kultusministerkonferenz vom 06.03.2009 i. d. F. vom 11.10.2018, 'Demokratie als Ziel, Gegenstand und Praxis—historisch-politischer Bildung und Erziehung in der Schule',<sup>13</sup>, with reference to the CoE RFCDC.

505 ‘Schulbücher müssen dem Inhalt dieser Empfehlung Rechnung tragen. Dasselbe gilt für sonstige Lehr- und Lernmittel’ para 4 in ‘Beschluss der Kultusministerkonferenz vom 04.12.1980 i.d.F. vom 14.12.2000, Empfehlung der Kultusministerkonferenz zur Förderung der Menschenrechterziehung in der Schule’ (Resolution of the Standing Conference of the Ministers of Education and Cultural Affairs of 4 December 1980 in the version of 14 December 2000, Recommendation of the Standing Conference of the Ministers of Education and Cultural Affairs on the promotion of human rights in schools). Continued importance in Beschluss der Kultusministerkonferenz vom 04.12.1980 i.d.F. vom 11.10.2018, 'Menschenrechtsbildung in der Schule'.

506 <[www.bpb.de/die-bpb/51236/the-federal-agency-for-civic-education](http://www.bpb.de/die-bpb/51236/the-federal-agency-for-civic-education)>: ‘Being an institution entrusted with providing *the kind of civic education specified in the German constitution ...*’ (emphasis added). Further § 319 .

507 Schermers and Blokker § 1240.

508 Pinto de Albuquerque (n 401), para 28. To that extent that the factor ‘subsequent practice’ of Pinto de Albuquerque means that organs of the international organisation confirm or develop the standards set out in the text, the Charter on EDC/HRE satisfies this criterion.

509 See § 36 - 39 .

EDC/HRE is the 2018 Reference Framework on Competences for Democratic Culture (RFCDC).

Thus, several factors strengthen the Recommendation on the Charter on EDC/HRE. However, its weaknesses must also be acknowledged.

## 2. Weaknesses

### 64 *Linguistic accuracy and content precision*

‘The more accurate the terminology of a text and the more precise its content, the stronger is the normative claim’, according to Pinto de Albuquerque.<sup>510</sup> This factor can probably be nuanced to the extent that some abstract norms have also proven to be powerful sources of law. Several human rights provisions are formulated as rather abstract principles and have little content precision, yet, since they are part of conventions or primary EU law, no one would call their binding, hard law character into question.<sup>511</sup> But it is true that the binding character of conventions usually goes hand in hand with the drafting of precise provisions, while the non-compulsory nature of recommendations allows for more generality.

On the one hand, it must be recognised that the Charter on EDC/HRE does not include precise provisions comparable to the European prison standards, which are considered by Pinto de Albuquerque as the prototype of hardened soft law. European prison standards can be crystal-clear, for instance, when they list the personal details to be recorded for each prisoner on admission.<sup>512</sup> By contrast, some provisions of the Charter on EDC/HRE are quite programmatic, such as paragraph 5, stating which ‘objectives and principles should guide member states in the framing of their policies, legislation and practice’. The description of one of the fundamental goals of EDC and HRE as empowering learners with ‘the readiness to take action in society in the defence and promotion of human

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510 Second hardening factor, para 28. (Abstraction is here made of the ‘should’ terminology, it concerns another factor).

511 E.g. CFR Art 3(1) or 6(1); or Art 18 TFEU (many precise applications in case law; admittedly, it is easier for negatively formulated abstract rules to be hard law).

512 E.g. CoE Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (1 January 2006), para 15(1). See Pinto de Albuquerque (n 401), para 2 (‘crystal-clear standards’); paras 34–35, citing cases where the ECtHR itself stated the ‘considerable importance’ or ‘great weight’ of prison standards.

rights, democracy and the rule of law' (paragraph 5(g)) does not excel as an example of precision.

On the other hand, while leaving an important degree of freedom to member states, EDC standards are, at the same time, sufficiently clear and precise to resolutely indicate to the member states the action they are to take. One clear aim is, for instance, to provide 'every person within their territory' with the opportunity of EDC and HRE (paragraph 5(a)). The content is sufficiently precise to make it clear that there can be no exclusion or disregard of certain social groups of (young) citizens, such as Roma, or of some categories of school pupils, such as those taking vocational training classes. The various provisions of the Charter on EDC/HRE form one coherent and meaningful set of norms, frequently expanding the principles with more concrete elements (e.g. paras 9, 11, 12, 13). The Charter unambiguously states that member states should 'include [EDC and HRE] in the curricula for formal education at pre-primary, primary and secondary school level as well as in general and vocational education and training' and that member states 'should review and update' them 'in order to ensure their relevance' (paragraph 6). It must be remembered that one of the strengths of the Charter on EDC/HRE is that its drafters had the courage to put forward a well defined concept of EDC and HRE.<sup>513</sup> Admittedly, not all elements of the definition have sufficiently precise content—for instance, the reference to empowering learners 'to value diversity'. Yet, sometimes open-ended formulations are the price to pay for establishing any standards in the delicate area of citizenship education. They provide space for national traditions and expertise, which can render EDC standards more concrete.

From a legal point of view, components of the EDC concept could be criticised as overlapping. Component (c-1) is empowerment 'to exercise and defend democratic rights and responsibilities in society'. In a democratic society all rights are 'democratic rights', in the sense of rights created by democratic institutions and respecting procedures. Strictly speaking, democratic rights (c-1) therefore include the rights relating to valuing diversity (c-2) and participation rights (c-3). However, it seems that the authors of the Charter wanted to provide specific emphasis in a context of interdisciplinary cooperation. I will therefore retain the separate components, as they reflect a specific focus which is useful for the analysis. More-

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513 Text to n 174.

over, it is crucial to respect the consensus which the Council of Europe was able to establish in the sensitive field of citizenship education.<sup>514</sup>

The relationship between EDC and HRE as defined in the Charter may also seem blurred. Rights of democratic citizenship arguably include human rights. This is true in most member states. However, in some self-proclaimed 'democratic states', human rights are eclipsed by the governmental majority which come to power after elections. The risk is that the political majority of the day will limit freedom of expression and pluralism in society, and impose 'education for democratic citizenship' on its own terms (setting aside or neglecting the constitutional rights of minorities). In these cases, democratic citizenship rights do not include human rights, and EDC deviates from HRE. Both EDC and HRE should therefore be conceptually distinguished, yet necessarily belong together. I recall that in this study, the term EDC always implies HRE as well.<sup>515</sup>

The EDC concept and principles in the Charter on EDC/HRE are sufficiently clear to form the basis for unequivocal normative claims and guide progress towards preparing young citizens for responsible life in a free and democratic society—an ideal which will never be fully reached but must constantly be worked for. In the 2016 survey, civil society organisations state that the Charter on EDC/HRE has become 'the ready-to-use instrument' for fostering EDC and HRE.<sup>516</sup>

For the purposes of this study, the EDC concept and principles are sufficiently precise in terms of their content to serve as an anchor point for examining the citizenship education of EU citizens. Where needed in the analysis, elements from other sources will complement the EDC concept, such as the descriptors of the RFCDC.<sup>517</sup>

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514 Jung, 'Die Empfehlungen des Ministerskomitees des Europarates: zugleich ein Beitrag zur europäischen Rechtsquellenlehre' 522: the frequent interdisciplinary genesis of recommendations has an impact on their terminology, but this genesis is usually beneficial for the quality of the content.

515 Text to n 184.

516 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 89. See CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe, answers to Q9: the Charter is most often considered moderately useful as a tool and resource (e.g. in AT, CZ, DE, EL, ES, FR, GR, HU, SE; while extensively useful in HR, and scarcely useful in BE, EE, IE, and LV). Publicity actions are now given more attention.

517 See CoE Reference Framework of Competences for Democratic Culture, Vol 2: Descriptors of competences for democratic culture (2018) (text to n 310).



65 *Follow-up mechanisms and an independent third body*

A hardening factor which the Charter on EDC/HRE is lacking is ‘the delegation of authority for interpretation and conflict resolution to an independent third body’. An immediately apparent weakness is that the Charter relies on a system of self-evaluation (paragraph 14). During the adoption phase, a huge majority of member states rejected a draft text providing for external supervision.<sup>518</sup> However, the Statute allows the Committee of Ministers to request information from the governments of member states on the action undertaken with regard to recommendations under Article 15(b). This follow-up potential indicates that the Statute assumes that recommendations have legal effects. It is an incentive for implementation.<sup>519</sup> Paragraph 15 of the Charter recommends cooperation in follow-up activities. In order to follow up the Charter’s implementation for the second review cycle (2012–2017), the Education Department of the Council of Europe organised a survey for governments and the Youth Department carried out a survey of civil society organisations.<sup>520</sup>

Pinto de Albuquerque mentions that for soft law to harden, non-compliance should not only have a reputational or political cost, but should lead to other negative consequences, such as an obligation of justification.<sup>521</sup> The Charter on EDC/HRE is weak in this respect. Non-compliance with the Charter leads to, at most, a reputational or political cost. As recommended after the first review cycle, government reports for the second review cycle have been made available for public scrutiny. The answers of

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518 See text to n 160.

519 On follow-up mechanisms, see CoE Committee of Ministers Declaration on compliance with commitments accepted by member states of the Council of Europe (10 November 1994); CoE Committee of Ministers, Procedure for implementing the Declaration of 10 November 1994 on compliance with commitments accepted by member states of the Council of Europe (20 April 1995); Benoît-Rohmer and Klebes, *Council of Europe Law - Towards a pan-European legal area*.

520 On the procedure and actors, see CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 57: the CoE Secretariat sent out a questionnaire to the representatives of the Steering Committee for Education Policy and Practice (CDPPE) with a copy to the EDC/HRE coordinators and Permanent Representations of the CoE member states, for completion by governments. The majority of the designated representatives worked in ministries, boards or national agencies dealing with education and youth. Many of them consulted key stakeholders in EDC/HRE.

521 Pinto de Albuquerque (n 401), para 28.

Ministries of Education are published on the Council of Europe website and were openly discussed at the 2017 conference.<sup>522</sup>

66 *Subsequent practice (negative)*

While it is positive that many member states provide for citizenship education in accordance with the EDC standards, challenges remain. The quality of EDC *de facto* provided in member states varies largely between and within the member states of the Council of Europe.<sup>523</sup> The majority of member states have not yet developed criteria for the evaluation of the effectiveness of EDC/HRE programmes (required in para 11 Charter on EDC/HRE).<sup>524</sup> Member states do not always explicitly refer to education for democratic citizenship and human rights in their education laws, policies, and strategic objectives (compare para 5 Charter on EDC/HRE). In their answers to a Council of Europe questionnaire, a significant number replied ‘none’ to ‘scarcely’ with regard to vocational education and training, and higher education.<sup>525</sup> A large majority of the respondent member states reported inconsistencies between policies (which include EDC/HRE

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522 CoE Proceedings of the Conference on 'Human Rights and Democracy in Action - Looking Ahead: The Impact of the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education' (Strasbourg, 29-30 November 2012), 14; CoE Conference, Learning to Live Together: a Shared Commitment to Democracy: Conference on the Future of Citizenship and Human Rights Education in Europe (Strasbourg, 20-22 June 2017).

523 CoE Secretary General, State of democracy, human rights and the rule of law—a security imperative for Europe. Report 2016, 97; see also CoE Conference, Learning to Live Together: a Shared Commitment to Democracy: Conference on the Future of Citizenship and Human Rights Education in Europe (Strasbourg, 20-22 June 2017); and CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 29, Greek Ombudsman for Children's Rights: 'Citizenship and human rights education is still a subject that is either taught theoretically and in fragment or is not included at all in the curriculum of many European schools'. See also Commission/EACEA/Eurydice, *Citizenship Education at School in Europe* (2017), i.a. p 45 (general guidelines, not specific), p 47 (challenges).

524 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 20, 53, 71.

525 CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe (n 520), Q11, also Q 31. CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, figure 7 on p 67, with a major concern that the trend is in decline; see also p 77, on a lack of feedback of national parliaments (about half of the countries), contrasting with the priority they say they accord to EDC/HRE policies.

in the curriculum) and practice (marginalised implementation in schools).<sup>526</sup> For Hungary, for instance, it is reported that there is not enough time for the development of the skills and attitudes needed for EDC/HRE, because the curriculum concentrates heavily on knowledge acquisition.<sup>527</sup> Governments pointed to a lack of support among education professionals, the media and the general public as the main obstacles, while civil society organisations indicated that EDC is not a priority among decision makers.<sup>528</sup> Some governments do not seem to be very aware of what goes on in schools and refer to the educational autonomy of educational institutions.<sup>529</sup> Curriculum overload is a key challenge in several member states, leading to significant inconsistencies between EDC/HRE curricula and teaching practices.<sup>530</sup> If democracy and human rights are to be taken seriously, as founding principles of our society, it is doubtful whether it is sufficient to treat EDC and HRE as residual categories, only entering into consideration if time and energy permit and after all other curricular subjects have been dealt with. Education for employability is a political priority, education for democratic citizenship is not. The 2017 Report concludes that, with a view to the long-term, EDC/HRE must be given greater political and pedagogical priority, potentially making the provision of EDC/HRE mandatory at least in formal education.<sup>531</sup> Admittedly, there is still a long way to go before EDC standards are actually met in every member state and in every school, yet the intention to achieve this is generally there.

Authors have described the Council of Europe as the place where good ideas can become ordinary ideas.<sup>532</sup> It is true that good ideas on EDC have over time become ordinary ideas, and this is an achievement in itself. Unfortunately, too often only lip service is paid to these ideas. Nevertheless, not putting the cart before the horse, as mentioned above, means that

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526 Ibid, 16–17, 64: 66% of respondents, examples i.a. in BG, HR, EE, GR, LT, CY.

527 See CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe, Q8 and 13.

528 Ibid, 18, 98.

529 CoE, Government Replies to the Questionnaire, in 2016 Report on the State of citizenship and Human Rights Education in Europe, e.g. NL, SW on Q11.

530 See *ibid*, i.a. GR; CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 52, 68. Text to n 41.

531 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 77.

532 Marcel Hicter, Belgian architect of cultural co-operation in Europe, cited in 50 years of the European Cultural Convention (2004), 7.

occasional disrespect for EDC standards should not detract from their legal status or degree of normativity. In this sense, EDC standards are more than mere ‘interesting ideas’ from ‘a forum of discussion’.<sup>533</sup>

67 *Conclusion: strong source*

Having tested the Charter on EDC/HRE according to the criteria of Schermers and Blokker and Pinto de Albuquerque, I conclude that the Recommendation on the Charter on EDC/HRE is a strong source. The Recommendation satisfies at least six of the eight factors which, Schermers and Blokker have suggested, strengthen the recommendations of international organisations: constitutional provisions, structure of the organisation, method of enactment, need for a rule, moral or legitimising effect, and restatement. The assessment of ‘application by others’ produces a mixed result, because of the remaining challenges. In the continuum of the *dégradé normatif*, the Charter on EDC/HRE displays five of the seven hardening factors proposed by Pinto de Albuquerque: prescriptive language or label; existence of *travaux préparatoires*, explanatory reports and commentaries; the complexity of the deliberation procedure, including the voting pattern; wide publicity; and further development of the standards. It is weaker as to linguistic accuracy and content precision, follow-up mechanisms and monitoring by an independent third body. Challenges under the heading of subsequent practice must also be mentioned. On the basis of the five hardening factors, the Charter on EDC/HRE can, in addition to its interpretative function, stand alone as an independent source with a relatively high degree of normativity and ‘exercise alone its normative claim’.<sup>534</sup> In spite of its weaknesses, the Charter on EDC/HRE is, as such, an important source for the EU Member States as member states of the Council of Europe, including in the light of the considerations in sections A and B.

Building on this conclusion, a final argument relates to the duty of good faith. Given that the Recommendation on the Charter on EDC/HRE is a Council of Europe standard of great weight and considerable importance, a strong source, it can be expected that member states acting in good faith will take EDC standards into account.

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533 Lenaerts and Van Nuffel, *European Union Law*, text to n 399.

534 Applying Pinto de Albuquerque (n 401), para 33.

### 3. Implications for the duty to act in good faith

#### 68 *Good faith and recommendations in general*

The duty of good faith has implications for Council of Europe recommendations in general. The principle of good faith is universally recognised.<sup>535</sup> The Statute and the ECHR, which are treaties binding upon the member states, must be performed and interpreted in good faith (Article 26 and 31 Vienna Convention).

De Vel and Markert develop a good faith argument linked to the Statute of the Council of Europe. Article 3 of the Statute states that '[e]very member state of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council'. As the Statute does not define 'the principles of the rule of law', De Vel and Markert argue that both conventions and recommendations are a privileged means of interpretation, and that even if the detail of recommendations is not binding on governments, their main principles are binding since member states have acceded to the Statute.<sup>536</sup> One might indeed question whether a member state which has approved the text of a recommendation but not adapted its domestic practice to the main principles thereof, is acting in good faith.<sup>537</sup> Even though they are not binding, recommendations do not discharge member states from the obligation of adopting a *bona fide* attitude and acting in line with the recommendation, collaborating sincerely and effectively for the aims of the Council of Europe. (A similar issue of good faith will arise in the EU legal order in the context of the principle of sincere cooperation of Article 4(3) TEU.<sup>538</sup>)

With regard to the ECHR, member states' compliance with the duty to act in good faith has been examined in ECtHR case law in various contexts, for instance when determining whether member states' limitations on freedom of expression are 'necessary in a democratic society' (Article 10 ECHR). The ECtHR checks as a minimal requirement 'whether the respondent State exercised its discretion reasonably, carefully and in good

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535 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, preamble.

536 De Vel and Markert (n 168), 353.

537 De Vel and Markert (n 168), 351.

538 §§ 138 - 139 .

faith'.<sup>539</sup> Member states discretion is thus limited by the duty to act in good faith.

### 69 *Good faith and provision of EDC*

The duty of good faith has implications for the Recommendation on the Charter on EDC/HRE in particular. The normative history has shown the close involvement of the Council of Europe member states, including the EU Member States, in the genesis of the Charter on EDC/HRE. Not once, but consistently and at regular intervals, they adopted legal instruments on EDC (recommendations, declarations, resolutions, or plans of action). The normative context and the history of EDC standard-setting are testimony to the involvement of the member states, including all EU Member States, in the adoption of EDC standards. The *Committee of Ministers* took the decisions on EDC (Article 14 Statute). The EU is an observer without a right to vote in this Council of Europe body, but the Ministers of Foreign Affairs of all the EU Member States participated and had a vote (or their representatives did). The *Parliamentary Assembly*, the deliberative body of the Council of Europe with an advisory function, made many recommendations to the Committee of Ministers (Article 22 Statute) with regard to EDC. EU Member States have seats in this Assembly, where they are represented by nationals and members of their Parliaments whom they have elected or appointed (Article 25 Statute).<sup>540</sup> *Council of Europe Summits of Heads of State and Government* adopted declarations calling for action on EDC. The EU Heads of State and Government were among them. While the Council of the EU varies in its composition of ministers or state secretaries depending on the subject under discussion (10 configurations), in the Council of Europe the practice has developed of having standing conferences of specialised ministers. The *Standing Conference of the European Ministers of Education* regularly adopted declarations on EDC and asked the Committee of Ministers to adopt measures.<sup>541</sup> All EU Ministers of Educa-

539 Settled case law, see i.a. *Jersild v Denmark* no 15890/89 (ECtHR 23 September 1994), para 31; *Lindon and Others v France* no 21279/02 et al (ECtHR 22 October 2007), para 45; *Guja v Moldova* no 14277/04 (ECtHR 12 February 2008), para 69; *Navalnyy v Russia* no 29580/12 et al (ECtHR 15 November 2018), para 143. To note, supervision goes beyond that.

540 For number of seats at present, see fn 6 to Art 26 Statute.

541 The first was CoE Standing Conference of European Ministers of Education, Resolution on the activities of international organisations in the fields of education and science (No 3) and Resolution on future meetings of the Ministers of Education (No 4) (The Hague, 12-13 November 1959). Overview in <[www.coe.int/en/web/education-minister-conference/previous-conferences](http://www.coe.int/en/web/education-minister-conference/previous-conferences)>.

tion participated in these Conferences. EU Member States were involved in many other ways as well, for example in the *Congress of Local and Regional Authorities*, in the *Conference of International Non-Governmental Organisations (INGOs)* of the Council of Europe, or through the participation of national experts and practitioners in the wide consultations and common action on EDC.<sup>542</sup> This consistent involvement of member states throughout the process of Council of Europe standard-setting for EDC, including in the period after adoption of the Charter, shows an unmistakable commitment to EDC, i.e. to the education-democracy-citizenship-human rights link. This commitment is not only a political one but has legal implications. A combined reading of the Statute and the Recommendation on the Charter on EDC/HRE in the light of the principle of good faith leads to a legitimate expectation that member states will take EDC standards into account. The EDC standards of the Charter on EDC/HRE can in this way permeate domestic legal orders of Council of Europe member states via the principle of good faith. In the domestic legal orders, constitutional provisions on democracy and education cannot be interpreted and applied in good faith without taking EDC standards into account given that their Heads of State, Ministers or other members of government, parliamentary representatives, etc. have participated actively in EDC standard-setting in Council of Europe bodies for more than 30 years, advocating EDC and setting EDC norms in general and specific contexts.<sup>543</sup> Good faith is undermined if member states' national public authorities contest EDC standards, or pay lip service to EDC but neglect to provide it in practice. In a system based on the rule of law and honouring good faith, provisions in national constitutions on democracy, citizenship, human rights and education should be read in conjunction with the Council of Europe Statute and the Charter on EDC/HRE, because it is a European standard of great weight, based on a wide European consensus. In this sense, the margin of discretion of member states in the field of education is

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542 Acting in their own capacity. See also members of ECRI, one per member state but independent from their government: Art 2(1) and (3) in CoE Committee of Ministers Resolution Res(2002)8 on the statute of the European Commission against Racism and Intolerance (13 June 2002).

543 In the context of the adoption of treaties, Heads of State or Government, Ministers for Foreign Affairs, heads of diplomatic missions, and representatives accredited by States to an international conference or to an international organisation or one of its organs, may all represent the State for the purpose of expressing the consent of the State (Art 7 Convention on the law of Treaties). For recommendations in the CoE, see i.a. Statute Arts 14, 15.

limited by their duty to act in good faith. This reasoning will be underscored by a reading in conjunction with international agreements such as the ICESCR and the CRC.<sup>544</sup> The human rights-based approach will highlight ‘the international nature of human rights values and obligations and the common principles underpinning democracy and the rule of law’.<sup>545</sup>

*D Law in context—some caveats*

*70 Complementary sources as to the substance of citizenship education*

The effects of the EDC standards must be understood in the context of research and scholarly work in non-legal fields. Taking the Charter on EDC/HRE as an anchor point does not mean ignoring the contributions of academics, research associations, networks, or organisations operating best practices. These sources do not have the normative authority, legal status and effects of the Charter on EDC/HRE of the Council of Europe. Yet, they corroborate the concept of EDC in its essential components and add clarification and precision, possibly remedying certain weaknesses of the Charter itself. As law does not function in a vacuum, courts may take scientific knowledge into account. In order to evaluate the weight of Council of Europe standards, some ECtHR judges and judgments have placed them ‘in the context of the knowledge gathered by social sciences’.<sup>546</sup> Moreover, beyond the possible legal value, the intention of this (too) short section is to honour multidisciplinary approaches to citizenship education and to draw attention to the rich perspectives they offer, informing the legal ones. These perspectives add depth to legal norms and to cardinal legal principles (such as democracy or equality). They may even identify critical pitfalls and stumbling blocks. Awareness of some of the ongoing debates in the citizenship education field in general is important, because—in my experience—the arguments used to contest a possible *EU dimension* in citizenship education, are often the same as those used to contest *citizenship education* itself. Such arguments and reservations are reflected in scholarly work on national citizenship education. The arguments used

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544 § 285 ff.

545 Para 5(j) Charter on EDC/HRE. Further § 285 ff.

546 E.g. *Muršić v Croatia* no 7334/13 (ECtHR 20 October 2016), Joint partly dissenting opinion of Judges Sajó, López Guerra and Wojtyczek, para 5. Reference to social sciences in various judgments, i.a. *MC v Bulgaria* no 39272/98 (ECtHR 4 December 2003), para 146.



against the EU dimension in citizenship education may even reach into philosophical debate on *education* as such. Therefore, I will not only briefly discuss research on the assessment of citizenship education, but also some thought-provoking reflections and caveats advanced by non-legal scholars. The debates will not be resolved but are presented here in a nutshell in order to enhance understanding of *citizenship education in general* before tackling the subject of *EU citizenship education* in the following parts of the study.

### 71 *International Civic and Citizenship Education Study (ICCS)*

A widely recognised assessment of citizenship education is provided by the International Civic and Citizenship Education Study (hereafter ICCS). International research shows that in spite of national differences in the content and provision of citizenship education,<sup>547</sup> common patterns can be found. The International Association for the Evaluation of Educational Achievement (IEA) is an independent, international cooperative of national research institutions and governmental research agencies.<sup>548</sup> It regularly examines how young people are prepared for their roles as citizens. It operates worldwide, with 38 participating countries, including 14 EU Member States.<sup>549</sup> The conceptual underpinning of the 2016 International Civic and Citizenship Education Study (hereafter ICCS 2016) is

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547 Ainley, Schulz and Friedman, *ICCS 2009 Encyclopedia: Approaches to civic and citizenship education around the world* 9 ('content and conduct of civic and citizenship education within and across countries varies considerably') and 20 (cross-curricular or as a separate subject, compulsory or not, at each educational level or not).

548 Schulz and others, *IEA International Civic and Citizenship Education Study 2016: Assessment Framework*. Much scholarly work has been done based on IEA or ICCS findings, i.a. Torney-Purta and others, *Citizenship and education in twenty-eight countries: Civic knowledge and engagement at age fourteen*; J Torney-Purta, 'The School's Role in Developing Civic Engagement: A Study of Adolescents in Twenty-Eight Countries' (2002) 6 *Applied Developmental Science* 203; J Torney-Purta and C Barber, 'Democratic School Engagement and Civic Participation among European Adolescents: Analysis of Data from the IEA Civic Education Study' (2005) 4 *Journal of Social Science Education* 13; Verhaegen, Hooghe and Meeusen, 'Opportunities to learn about Europe at school. A comparative analysis among European adolescents in 21 European member states'.

549 Participating Member States in the ICCS 2016 were BE-Flanders, BG, DE-North Rhine-Westphalia, DK, EE, FI, HR, IT, LT, LV, MT, NL, SE, and SI (from 2 MS only one federal entity), plus Chili, Hong Kong, Mexico, the Russian Federation, etc.

based on broad expertise and scholarly work.<sup>550</sup> The civic and citizenship framework defines ‘those aspects of cognitive and affective-behavioral content that should be considered important learning outcomes of civic and citizenship education’.<sup>551</sup> The field of civic and citizenship education includes ‘cognitive aspects of learning as well as the development of attitudes towards aspects of civic life and dispositions to participate actively in the life of communities’.<sup>552</sup> One of the important contributions of the IEA was the emphasis on the role of cognitive skills:

in order to participate effectively as citizens, young people need to possess a knowledge base and the capacity to reason about the institutions, events, actions and processes that exist in their civil and civic communities, as well as to develop and justify views and attitudes towards those things.<sup>553</sup>

To assess the cognitive domains, two categories are distinguished: ‘knowing’ (remembering or recalling information, and understanding) and ‘reasoning and applying’ (to new situations). To assess the affective-behavioural domains, ‘attitudes’ (including value beliefs) are differentiated from ‘engagement’. Both the cognitive and affective-behavioural domains are applied to four content domains for ‘civics and citizenship’. The first, ‘civic society and systems’, relates to citizens, including their roles, rights, responsibilities and opportunities for civic engagement, to State institutions and to civil institutions. The second content domain, ‘civic principles’, refers to the shared ethical foundations of civic societies (equity, freedom, sense of community and rule of law). The third content domain, ‘civic participation’, relates to decision-making, exercising influence and community participation (active citizenship). The fourth domain ‘civic identities’, concerns ‘the personal sense an individual has of being an agent of civic action with connections to multiple communities’, with civic self-image and civic connectedness as sub-domains.

Establishing an internationally accepted, overarching concept of citizenship and citizenship education for the ICCS was not an easy task. The identification of different domains (dimensions) and sub-domains testifies to

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550 Schulz and others, *IEA International Civic and Citizenship Education Study 2016: Assessment Framework*, references to scholars from pages 67 to 82.

551 *Ibid.*, 11. Cognitive and affective-behavioral ‘domains’ are also called ‘dimensions’.

552 *Ibid.*, 11.

553 *Ibid.*, 11.

the richness of the concepts, but at the same time reveals their complexity. When comparing and weighing up the use of concepts in different national contexts, experts in the education field discuss and sometimes criticise distinctions with regard to their empirical relevance, validity and reliability.<sup>554</sup> I will not engage in these debates and am not qualified to do so. For the purpose of this study, it is sufficient to recognise the components of the ICCS concepts and note convergences with the Council of Europe concept. The EDC definition, for instance, inasmuch as it refers to ‘knowledge, skills and understanding and developing their attitudes and behaviour’, includes the cognitive and affective-behavioural domains pointed to in the ICCS concepts. I will use some of the specific ICCS elements mentioned to complement the EDC concept when examining the situation of the EU citizen in the following chapters.

## 72 Scholars

How do the reflections of academic writers relate to the EDC standards in the legal instruments of the Council of Europe? Much scholarly work is consistent with the consensus reflected in the Charter on EDC/HRE and confirms the essential components of the EDC concept. In the themes analysed by scholars, several elements of the EDC and HRE concepts and principles can be recognised, although they are sometimes worded or categorised differently.<sup>555</sup> Key themes include the foundations of citizenship education,<sup>556</sup> tensions between diversity and unity,<sup>557</sup>

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554 S De Groof and others, *Burgerschap bij 14-jarigen. Vlaanderen in internationaal perspectief. Vlaams eindrapport van de International civic and citizenship education study* (Vlaams Ministerie van Onderwijs en Vorming, 2010) 23, 28.

555 See Commission/EACEA/Eurydice, *Citizenship Education at School in Europe* (2017), 23 (e.g. scholars about compositions of competences: knowledge, skills, attitudes, values, reflections), 24 (typology of approaches).

556 Discussed below.

557 A Osler and H Starkey, ‘Citizenship Education and National Identities in France and England: Inclusive or exclusive?’ (2001) 27 *Oxford Review of Education* 287; A Osler and H Starkey, ‘Education for Citizenship: Mainstreaming the Fight against Racism?’ (2002) 37 *European Journal of Education* 143; JA Banks and others, *Democracy and diversity: principles and concepts for educating citizens in a global age* (University of Washington 2005). There is an international consensus on key principles for citizenship education: ‘students should learn about the complex relationships between unity and diversity in their local communities, the nation and the world’; ‘they should study the ways in which people in their community, nation and region are increasingly interdependent with others around the world’; ‘the teaching of human rights should underpin citizenship education in multicultural nation states’ and ‘students should be taught knowl-

democratic school culture,<sup>558</sup> teacher training,<sup>559</sup> and curriculum development.<sup>560</sup> Citizenship education topics for the classroom also feature,

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edge about democracy and democratic institutions', thus related in Osler and Starkey, 'Education for democratic citizenship: a review of research, policy and practice 1995–2005', 442. Further: A Osler and H Starkey, *Changing citizenship : democracy and inclusion in education* (A Osler and H Starkey eds, Open University Press and McGraw-Hill Education 2005); JA Banks, 'Diversity, Group Identity, and Citizenship Education in a Global Age' (2008) 37 *Educational Researcher* 129; JA Banks, 'Educating citizens in diverse societies' (2011) 22 *Intercultural Education* 243 (challenging assimilationist conceptions of citizenship education, pleading for citizenship education that enables students 'to acquire the knowledge, skills, and commitments needed to become effective civic participants in their communities, nation-state, and the world.').

558 N 571.

559 Osler, 'European Citizenship and Study Abroad: student teachers' experiences and identities'; A Osler and H Starkey, *Teachers and Human Rights Education* (Trentham 2010); P Dusi, M Steinbach and G Messetti, 'Citizenship Education in Multicultural Society: Teachers' Practices' (2012) 69 *Procedia - Social and Behavioral Sciences* 1410; AJ Castro, 'What Makes a Citizen? Critical and Multicultural Citizenship and Preservice Teachers' Understanding of Citizenship Skills' (2013) 41 *Theory & Research in Social Education* 219; U Niens, U O'Connor and A Smith, 'Citizenship education in divided societies: teachers' perspectives in Northern Ireland' (2013) 17 *Citizenship Studies* 128; CL Hahn, 'Teachers' perceptions of education for democratic citizenship in schools with transnational youth: A comparative study in the UK and Denmark' (2015) 10 *Research in Comparative and International Education* 95.

560 E.g. WC Parker, A Ninomiya and J Cogan, 'Educating World Citizens: Toward Multinational Curriculum Development' (1999) 36 *American Educational Research Journal* 117; W Parker, 'Diversity, globalization and democratic education: Curriculum possibilities' in JA Banks (ed), *Diversity and citizenship education: Global perspectives* (2004); D Kerr and others, *Vision versus Pragmatism: Citizenship in the Secondary School Curriculum in England. Citizenship Education Longitudinal Study* (5th Annual Report, National Foundation for Educational Research, 2007); A Ross, 'Organizing a Curriculum for Active Citizenship Education' in J Arthur, I Davies and C Hahn (eds), *The SAGE Handbook of Education for Citizenship and Democracy* (Sage 2008); H Starkey, 'Diversity and citizenship in the curriculum' (2008) 6 *London Review of Education* 5; T McCowan, *Rethinking Citizenship Education: a Curriculum for Participatory Democracy* (Continuum 2009); M Print and D Lange (eds), *Schools, Curriculum and Civic Education for Building Democratic Citizens* (Series Civic and Political Education 2, Sense 2012); Curriculum Development and Review for Democratic Citizenship and Human Rights Education (prepared by Felisa Tibbits for UNESCO/CoE/Office for Democratic Institutions and Human Rights/Organization of American States, 2016).

such as peace, racism, extremism, feminism, sustainable development, or global citizenship.<sup>561</sup>

Many scholars emphasise the need for citizenship education, mirroring the Council of Europe EDC project. In his analysis of the aims of citizenship education throughout history, Wolfgang Sander, the educational scientist, finds three patterns: the aims of *Legitimation*, of *Mission* and of *Mündigkeit* (empowerment). He argues that in a democracy built on the premise of freedom for all citizens, *Mündigkeit* should be the central aim of education for democratic citizenship,<sup>562</sup> which echoes the empowerment of citizens, the central aim of the Charter on EDC/HRE.<sup>563</sup> James Arthur, Ian Davies and Carole Hahn (educationalists) conclude in a comparative perspective that international authors on citizenship education have this concept in common: citizenship education of young people aims to instil the knowledge, skills, attitudes, dispositions and values that will enable them to participate meaningfully in society, in the communities of which they are a part, locally, nationally, and globally (EDC components (b) and (c) appear).<sup>564</sup> Empowerment for participation is a recurring central aim of citizenship education discussed by scholars (EDC component c-3). In 1989, renowned political scientist Robert Dahl described ‘enlightened understanding’ by citizens as one of the five criteria for democracy. If civic education did not exist, he claimed, it would have to be invented in order to enlighten citizens.<sup>565</sup> Earlier, philosopher John Dewey had already argued for the crucial role of schools for democracy. He stated that the need for

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561 M Nussbaum, ‘Education for Citizenship in an Era of Global Connection’ (2002) 21 *Studies in Philosophy and Education* 289; A Osler and H Starkey, ‘Education for Cosmopolitan Citizenship’ in VB Georgi (ed), *The Making of Citizens in Europe: New Perspectives on Citizenship Education* (Schriftenreihe Band 666, Bundeszentrale für politische Bildung 2008); N Hodgson, ‘Educational research, governmentality and the construction of the cosmopolitan citizen’ (2009) 4 *Ethics and Education* 177; W Sander and A Scheunpflug (eds), *Politische Bildung in der Weltgesellschaft. Herausforderungen, Positionen, Kontroversen. Perspektiven politischer Bildung* (Schriftenreihe Band 1201, Bundeszentrale für politische Bildung 2011); A Keating, ‘Are cosmopolitan dispositions learned at home, at school, or through contact with others? Evidence from young people in Europe’ (2016) 19 *Journal of Youth Studies* 338. On specific themes, see also contributions in Richter, *Politische Bildung von Anfang an. Demokratie-Lernen in der Grundschule* 120–260.

562 Sander, *Handbuch politische Bildung* 13–17.

563 Central in the definitions of EDC and HRE.

564 Arthur, Davies and Hahn, ‘Introduction’ 5–6, 8–9.

565 RA Dahl, *Democracy and its critics* (Yale University Press 1989) 108–114; RA Dahl, *On democracy* (first edn 1998, Yale University 2000).

formal or intentional teaching and learning increases with the growing complexity of society's structures and resources (it might be observed that this is all the more true today in the EU). An often-cited quotation from John Dewey is 'Democracy has to be born anew every generation, and education is its midwife'.<sup>566</sup> In 1992, Czech writer and former dissident Václav Havel wrote:

A moral and intellectual state cannot be established through a constitution, or through law, or through directives, but only through complex, long-term, and never-ending work involving education and self-education.<sup>567</sup>

He emphasised that schools 'must ... lead young people to become self-confident, participating citizens', people capable of thinking.<sup>568</sup> In the same vein, Chicago philosopher Martha Nussbaum writes that education is crucial to the health of democracy. Narrowly focusing on education in science and technology, or on internalising information, is dangerous for democracy's future. Rather than concentrating on utilitarian, profit-orientated training, education should focus on human development and should aim at three key abilities: critical thinking (critical examination of oneself and one's traditions), seeing oneself as a member of a heterogeneous nation and world, and 'narrative imagination' (empathy and understanding of others' stories).<sup>569</sup>

### 73 *Caveats for further reflection on EU citizenship education*

In addition to confirming EDC standards in general, scholarly work includes specific critical reflections which will complement the use of the Charter on EDC/HRE as a substantive source. Here I briefly draw attention to four caveats which must be borne in mind in the analysis which follows. They do not undermine the consensus on the EDC standards of the Charter on EDC/HRE, but they indicate that caution is needed.

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566 J Dewey, *Democracy and education: an introduction to the philosophy of education* (Macmillan 1916), especially 9.

567 V Havel, *Summer Meditations* (P Wilson tr, Vintage Books 1992) 20.

568 Ibid, 117–118: 'The most basic sphere of concern is schooling. Every else depends on that.'

569 M Nussbaum, 'Education for Profit, Education for Freedom' (2009) 95 *Liberal Education* 6; M Nussbaum, 'Education and Democratic Citizenship: Capabilities and Quality Education' (2006) 7 *Journal of Human Development* 385. For the three abilities applied in legal education, see M Nussbaum, 'Cultivating Humanity in Legal Education' (2003) 70 *University of Chicago Law Review* 265.

Scholars differ in the weight they attach to certain components of EDC/HRE and debate continues as to ways of proceeding. The Charter on EDC/HRE leaves the member states freedom and space to vary the emphasis.

The *first ongoing discussion* concerns the role of formal education (school education). Some scholars advocate citizenship education outside school in a non-formal or informal setting, for instance in the context of community involvement and volunteering.<sup>570</sup> One argument is that citizenship education should include the exercise of skills such as critical thinking, which can be problematic in an authoritative school climate.<sup>571</sup> The general question as to which institutions should provide citizenship education is a lasting source of conflict.<sup>572</sup> To what extent should the state, schools, civic society organisations, media, religious institutions, or the family, decide how to form the young citizen?<sup>573</sup> The Charter on EDC/HRE clearly expects schools to play a part, provided that they are democratically governed. At the same time, the Charter leaves room for all the other actors (paragraphs 5(i), 6, and 8).<sup>574</sup> This study will focus on schools (formal education), since the aim is to prepare *all* pupils for democratic participation, not only young people who engage in optional extra-curricular courses or occasional activities outside school.<sup>575</sup>

The *second caveat* concerns the role of citizenship education in forming identities. While acknowledging Council of Europe work on EDC/HRE, some scholars point to persisting ambivalence with regard to forms of citizenship education which instil national identities and (unconditional) loyalty to the nation.<sup>576</sup> History provides many examples. The 1965 German ‘Gesetz über das einheitliche sozialistische Bildungswesen der DDR’ stated:

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570 Concepts of formal, non-formal and informal education, see n 1041. See also Annex 5 to this study.

571 S Macedo, ‘Community, Diversity, and Civic Education: toward a Liberal Political Science of Group Life’ [1996] Social Philosophy and Policy Foundation 240, argues for less citizenship education via the school curriculum. See other authors referred to in Osler and Starkey, ‘Education for democratic citizenship: a review of research, policy and practice 1995–2005’, 445–446.

572 E Callan, ‘The Great Sphere: Education against Servility’ (1997) 31 Journal of Philosophy of Education 221.

573 See i.a. debates in Spain (n 462): Motos, ‘The Controversy over Civic Education in Spain’ (role of church and family versus state).

574 N 196.

575 § 152.

576 Osler, ‘European Citizenship and Study Abroad: student teachers’ experiences and identities’; J Sprogøe and T Winther-Jensen (eds), *Identity, education and citi-*

Die Schüler, Lehrlinge und Studenten sind zur Liebe zur Deutschen Demokratischen Republik und zum Stolz auf die Errungenschaften des Sozialismus zu erziehen, um bereit zu sein, alle Kräfte der Gesellschaft zur Verfügung zu stellen, den sozialistischen Staat zu stärken und zu verteidigen.<sup>577</sup>

Today, instilling love for one's country is present in school education in many countries.<sup>578</sup> Martha Nussbaum pleads for patriotic education. She argues that patriotic political emotions are needed to give citizens a sense of duty vis-à-vis others and the common good even where that involves sacrificing self-interest. However, excesses must be prevented, given the unreliability of majority sentiment. Therefore, she continues, citizenship education should aim at critical thinking, and law and institutional structures are essential. One factor in obtaining 'the good out of patriotic education without the bad' is awareness of the constitutional rights of minorities.<sup>579</sup>

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*zenship - multiple interrelations* (Comparative studies series 13 Peter Lang 2006); A Ross, 'Multiple Identities and Education for Active Citizenship' (2007) 55 British Journal of Educational Studies 286; S Freire and others, 'Identity Construction through Schooling: listening to students' voices' (2009) 8 EERJ 80; A Ross, *A European Education. Citizenship, identities and young people. European issues in Children's Identity and Citizenship* (Trentham Books, CiCe 2009); J Zajda, H Daun and L L. Saha (eds), *Nation-building, identity and citizenship education* (Springer 2009); A Osler, 'Teacher interpretations of citizenship education: national identity, cosmopolitan ideals, and political realities' (2011) 43 Journal of Curriculum Studies 1; A Ross, 'Controversies and Generational Differences: Young People's Identities in Some European States' (2012) 2 Education Sciences 91. See also work done in the 'Children's Identity and Citizenship in Europe Thematic Network' (CiCe).

- 577 In para 5(2). See Sander, 'Theorie der politischen Bildung: Geschichte - didaktische Konzeptionen - aktuelle Tendenzen und Probleme' 15. Other examples in 18<sup>th</sup> century French 'catéchismes', see AEX La Chabeaussière, *Catéchisme français, ou Principes de philosophie, de morale et de politique républicaine, à l'usage des écoles primaires* (L'An IV de la République, Chez Du Pont 1795). At present, softer forms, eg. preamble to Latvian Constitution: 'Loyalty to Latvia, the Latvian language as the only official language, freedom, equality, solidarity, justice, honesty, work ethic and family are the foundations of a cohesive society.'
- 578 See i.a. research in Keating, Ortloff and Philippou, 'Citizenship Education Curricula: The Changes and Challenges Presented by Global and European Integration'. On identity and belonging, see i.a. text to n 1188.
- 579 M Nussbaum, 'Teaching patriotism: love and critical freedom' (2012) 79 University of Chicago Law Review 213, 227: 'So, we turn many things over to institutions and laws. Nonetheless, these institutions and laws will not sustain themselves in the absence of love directed at one's fellow citizens and the nation as a



This gives law additional importance within citizenship education, including in the EU dimension.<sup>580</sup>

The *third caveat* relates to the foundations and presuppositions of citizenship education. An important strand of literature highlights the significance of critical thinking in citizenship education, in line with normative instruments.<sup>581</sup> There is consensus on the necessary non-consensus within citizenship education. But how far does non-consensus go—or the personal autonomy and freedom of (young) citizens to think what they like? A liberal model for citizenship only allows ‘thin’ citizenship education. No

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whole ..., it isn't sufficient to create good institutions and then run away and hide. We have to get our hands dirty by entering the feared emotional terrain'. However, '[l]aw and institutional structure are essential props to the good in patriotism'. See, further, M Nussbaum and J Cohen, *For love of country: debating the limits of patriotism* (Beacon 1996); M Nussbaum, 'Political Soul-Making and the Imminent Demise of Liberal Education' (2006) 37 *Journal of Social Philosophy* 301; M Nussbaum, 'Toward a globally sensitive patriotism' (2008) 137 *Daedalus* 78; Nussbaum, *Political Emotions: Why Love Matters for Justice*. On the affective dimension, also A Osler and H Starkey, 'Fundamental Issues in Teacher Education for Human Rights: a European perspective' (1994) 23 *Journal of Moral Education* 349; T Zimenkova, 'Citizenship Through Faith and Feelings: Defining Citizenship in Citizenship Education. An Exemplary Textbook Analysis' (2008) 7 *Journal of Social Science Education* 81. On the irrational in the crowd, G Le Bon, *The Crowd. A Study of the Popular Mind* (tr 'La psychologie des foules' 1895, Dover 2002).

580 See i.a. §§ 258 259 .

581 For normative instruments, see i.a. n 1064. Numerous scholars emphasise critical thinking: i.a. Dewey, *Democracy and education: an introduction to the philosophy of education*; PJM Costello, 'Education, citizenship and critical thinking' (1995) 107 *Early Child Development and Care* 105; H Mintrop, 'The Old and New Face of Civic Education: expert, teacher, and student views' (2003) 2 *EERJ* 446; G Ten Dam and M Volman, 'Critical thinking as a citizenship competence: Teaching strategies' (2004) 14 *Learning and Instruction* 359; T Grammes, 'Kontroversität' in W Sander (ed), *Handbuch politische Bildung* (Reihe Politik und Bildung 32, Bundeszentrale für politische Bildung 2005); SE Cuypers and I Haji, 'Education for Critical Thinking: Can it be non-indoctrinative?' (2006) 38 *Educational Philosophy and Theory* 723; SL Lamy, 'Challenging Hegemonic Paradigms and Practices: Critical Thinking and Active Learning Strategies for International Relations' (2007) 40 *APSC Political Science Politics* 112; DE Hess, *Controversy in the Classroom: The Democratic Power of Discussion* (Routledge 2009); Lösch and Thimmel, *Kritische politische Bildung: Ein Handbuch*; JW Munnix, 'Thinking Critically about Critical Thinking' (2012) 44 *Educational Philosophy and Theory* 464; Widmaier and Overwien, *Was heisst heute Kritische Politische Bildung?*; G Biesta, *The Beautiful Risk of Education* (Paradigm 2014); M Davies and R Barnett (eds), *The Palgrave handbook of critical thinking in higher education* (Palgrave Macmillan 2015). Also authors in following notes.

prescriptive blueprint can be imposed by the state, no ‘good citizen’ mould for a predefined society. Scholars in the liberal tradition criticise the civic republican model, which aims to educate for the common good in the Aristotelian tradition.<sup>582</sup> Ute Frevert, the historian from Yale University, does not flinch from defining the Good European Citizen (GEC): a person of unblemished democratic convictions and attitudes, with both national and European sentiments, actively participating, informed, and with strong views on solidarity. The GEC model serves as a visionary goal and is founded on ethical assumptions.<sup>583</sup> Is Ute Frevert’s GEC a reprehensible mould, limiting personal freedom? How can liberal and civic republican views be balanced? The consensus on EDC standards formulated in Council of Europe legal instruments leaves room for both the ‘thin or ‘thick’ interpretations and implementations of citizenship education, in either a more liberal tradition or more civic republican tradition. Balancing the approaches, the following fundamental question for citizenship education emerges: how does one plan for citizenry with civic competences while respecting individual freedom?<sup>584</sup> This question relates to the more general educational paradox exposed by Immanuel Kant: there is a ‘tension

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- 582 E.g. P van der Ploeg and L Guérin, ‘Questioning Participation and Solidarity as Goals of Citizenship Education’ (2016) 28 *Critical Review* 248. On models of citizenship (liberal, communitarian, civic republican and critical) and implications for citizenship education, see Hoskins and others, *Contextual Analysis Report: Participatory Citizenship in the European Union (Report 1)* 9–17; and M Tarozzi, F Rapanà and L Ghirotto, ‘Ambiguities of Citizenship. Reframing the Notion of Citizenship Education’ (2013) 8 *Ricerche di Pedagogia e Didattica - Journal of Theories and Research in Education* 201.
- 583 U Frevert, ‘How to become a Good European Citizen: Present Challenges and Past Experiences’ in VB Georgi (ed), *The Making of Citizens in Europe: New Perspectives on Citizenship Education* (Schriftenreihe Band 666, Bundeszentrale für politische Bildung 2008) 41. See also F Galichet, ‘La citoyenneté comme pédagogie: réflexions sur l’éducation à la citoyenneté’ (2002) 28 *Revue des sciences de l’éducation* 105, i.a. 113 (liberal versus republican democracy, corresponding to human rights versus citizens’ rights; a minimal level of citizenship education centres on education of human rights; the author proposes a higher level of citizenship, promoting mutual interest and mutual responsibility between citizens). Contextual reading: RD Putnam, ‘Bowling Alone: America’s Declining Social Capital’ (1995) 6 *Journal of Democracy* 65; TH Sander and RD Putnam, ‘Still Bowling Alone? The Post-9/11 Split’ (2010) 21 *Journal of Democracy* 9.
- 584 Callan, ‘Citizenship and Education’ 81. See also, i.a., Macedo, ‘Community, Diversity, and Civic Education: toward a Liberal Political Science of Group Life’, 242; Nussbaum, ‘Political Soul-Making and the Imminent Demise of Liberal Education’; M Papastephanou, ‘Philosophical Presuppositions of Citizen-

between necessary educational influence and unacceptable restriction of the child's individual development and freedom of education in liberal democratic societies'.<sup>585</sup> On the one hand, liberalism demands respect for individual freedom and has thus to tolerate a diversity of views in order to preserve pluralism. In this context, it is easy to see citizenship education as 'despotism over the mind' (and quickly dismiss it as propaganda). Liberalism demands educational restraint. On the other hand, liberal democracy has to reproduce the civic virtues and skills necessary to sustain the liberal democratic society. This calls for citizenship education, planning for citizens with the necessary civic competences, with reasonable constraints on liberal ideas, for instance mitigating the personal views of (young) citizens who seek to propagate limits on democratic rights or on the freedom of minorities.<sup>586</sup> Despotism over the mind can also be prevented by applying the principles of the 'Beutelsbacher consensus'. As a result of debate in a party-political context and polarisation of views on citizenship education, German experts gathering in Beutelsbach (in the 1970s) reached a consensus on essential principles. The *Beutelsbacher Konsens* sets out three basic principles as the foundation of good political education: a prohibition on overwhelming the pupil (*Indoktrinationsverbot*), treating controversial subjects as controversial (*Gebot der Kontroversität*) and giving weight to the personal interests of pupils (*Prinzip der Schülerorientierung*).<sup>587</sup> An interesting framework for guaranteeing 'free citizenship education' is, further-

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ship Education and Political Liberalism' in J Arthur, I Davies and C Hahn (eds), *The SAGE Handbook of Education for Citizenship and Democracy* (Sage 2008). Further reflections in § 325.

- 585 See MH Redish and K Finnerty, 'What did you Learn in School Today? Free Speech, Values Incultation, and the Democratic Educational Paradox' (2002-2003) 88 *Cornell Law Review* 62; B Schaffar, 'Changing the Definition of Education. On Kant's Educational Paradox Between Freedom and Restraint' (2014) 33 *Studies in Philosophy and Education* 5.
- 586 E Callan, 'Beyond sentimental civic education' (1994) 102 *American Journal of Education* 190; E Callan, 'Liberal Legitimacy, Justice, and Civic Education' (2001) 111 *Ethics: an international journal of social, political, and legal philosophy* 141. See also n 1180 ('Actively promoting the values means challenging opinions or behaviours in school that are contrary to fundamental British values') and n 1257 (Popper).
- 587 H-G Wehling, 'Der Beutelsbacher Konsens: Entstehung und Wirkung' *Landeszentrale für politische Bildung Baden-Württemberg* (1977) <[www.lpb-bw.de/wiebeutelsbacherkonsensentstand.html](http://www.lpb-bw.de/wiebeutelsbacherkonsensentstand.html)>. See also Sander, 'Theorie der politischen Bildung: Geschichte - didaktische Konzeptionen - aktuelle Tendenzen und Probleme' 13, 18; Grammes, 'Kontroversität' 126, 128; S Reinhardt, 'The Beutelsbacher Konsensus' (2016) 15 *Journal of Social Science Education* 11 (at the

more, proposed by Bernard Crick, the English political theorist. He describes five presuppositions on which free citizenship education, as distinguished from education which indoctrinates, must be based: freedom, toleration, fairness, respect for truth, and respect for reasoning. Only when these five ‘procedural values’ are respected, can differences in substantive values be discussed and free critical thinking and (endless) debate be possible.<sup>588</sup> Belgian philosopher Patrick Loobuyck argues in the same vein for the need for citizenship education to respect, and aim to realise, the values of freedom, equality and solidarity. These values form an overlapping consensus.<sup>589</sup> It is philosopher John Rawls who describes the ‘Overlapping Consensus’ as one of the main ideas of political liberalism.<sup>590</sup> However, freedom as a value in itself leads to the fourth caveat. How free is the—democratic—majority of the day to decide on the content of citizenship education?

The *fourth caveat* concerns the dangers of the expression ‘education for democratic citizenship’. Bernard Crick warns that unduly stressing ‘democracy’ in citizenship education ‘can lead to definitional dogmatics about multiple meanings of the term’. Democracy is necessary, but not sufficient. Observing a risk of citizenship education which only accommodates the majorities, Audrey Osler and Hugh Starkey emphasise the essential role of human rights education.<sup>591</sup> They note within scholarly work ‘a growing international consensus on human rights as the underpinning principles of EDC’.<sup>592</sup> As already explained, Martha Nussbaum also adjusts her idea of

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40th anniversary of the consensus, it still has a big importance). Also citizenship education in Austria applies these Beutelsbacher consensus principles; see <[www.politik-lernen.at/site/grundlagen/politischebildung/allgemeines](http://www.politik-lernen.at/site/grundlagen/politischebildung/allgemeines)>.

588 B Crick, ‘The Presuppositions of Citizenship Education’ (1999) 33 *Journal of Philosophy of Education* 337.

589 P Loobuyck, *Samenleven met gezond verstand* (Polis 2017). On citizenship education, see P Loobuyck, *Meer LEF in het onderwijs: levensbeschouwing, ethiek en filosofie voor iedereen* (Paul Verbracken Lezing, VUBPress 2014).

590 J Rawls, *Political Liberalism* (2005 edn, Columbia University Press 1993), Part II (IV) on the Overlapping Consensus. Applied to the EU: an overlapping consensus on values in Art 2 TEU, see §§ 170 251 .

591 Osler, ‘Human Rights Education: The Foundation of Education for Democratic Citizenship in our Global Age’; Osler and Leung, ‘Human rights education, politics and power’; A Osler, ‘Bringing Human Rights Back Home: Learning from “Superman” and Addressing Political Issues at School’ (2013) 104 *The Social Studies* 67. Also Osler and Starkey, ‘Fundamental Issues in Teacher Education for Human Rights: a European perspective’.

592 Osler and Starkey, ‘Education for democratic citizenship: a review of research, policy and practice 1995–2005’, 440. See text to nn 186 and 515.

patriotic citizenship education to include the constitutional rights of minorities. Bernard Crick aims at a form of democracy in which citizenship education concerns civic virtues and leads to participation (based on an underlying presupposition of civic republicanism).<sup>593</sup> Citizenship education should not aim to create a merely law abiding citizen, versed in the constitution and respectful of the rule of law, the law made by the majority. Citizenship education should seek to form the *active* citizen. When he introduced citizenship education in the English National Curriculum, he wrote in 1998 this (later frequently recited) paragraph:

We aim at no less than a change in the political culture of this country both nationally and locally: for people to think of themselves as active citizens, willing, able and equipped to have an influence in public life and with the critical capacities to weigh evidence before speaking and acting; to build on and to extend radically to young people the best in existing traditions of community involvement and public service, and to make them individually confident in finding new forms of involvement and action among themselves.<sup>594</sup>

Bernard Crick emphasises that ‘an education that creates a disposition to active citizenship is a necessary condition of free societies’.<sup>595</sup> Later UK governments took other approaches to citizenship education.

These caveats and critical reflections advanced by scholars with regard to citizenship education in general form the background for further reflection on citizenship education of citizens *as* EU citizens.<sup>596</sup>

Section D has shown that taking the Charter on EDC/HRE as an anchor point leaves room for clarifications and caveats from other sources, such as the ICCS and scholarly work.<sup>597</sup> These complementary sources on citizenship education display comparable elements to those of the Charter on

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593 B Crick, ‘Citizenship: the political and the democratic’ (2007) 55 *British Journal of Educational Studies* 235, 243. See also text to n 1176.

594 Advisory Group on Citizenship, *Education for citizenship and the teaching of democracy in schools: the Crick Report*, para 1(5).

595 Crick, ‘The Presuppositions of Citizenship Education’, 343. See also B Crick, ‘Education for Citizenship: the Citizenship Order’ (2002) 55 *Parliamentary Affairs* 488; and G Biesta, *Learning Democracy in School and Society: Education, Lifelong Learning, and the Politics of Citizenship* (Sense 2011), on the promotion of democratic agency.

596 Especially when proposing a learning method (Chapter five).

597 Complementary EU sources, as the 2006 and 2018 Recommendation on key competences for lifelong learning and Eurydice 2017 are integrated in Parts two and three.

EDC/HRE, even if they do not always label, describe or categorise them in the same way. The Charter on EDC/HRE remains particularly attractive for my further analysis—as to the substance—because the consensual EDC standards include respect for the autonomy of member states, yet clearly and concisely set out the aims of citizenship education by isolating different components in the last part of the definition (c-1–2–3 in paragraph 2(a)). The Charter also defines the relationship between EDC and HRE.

*Conclusion to Part one*

*74 The Charter on EDC/HRE is a reliable anchor point*

The first challenge when analysing the issue of ‘EU citizenship education’ was to find a neutral and commonly accepted concept of citizenship education in general. The EDC concept and principles of the Charter on EDC/HRE have responded well to this challenge and proven to be a reliable and neutral anchor point. The legal status of the Charter on EDC/HRE is that of a recommendation of the Committee of Ministers of the Council of Europe. While not legally binding, it has potential legal effects for member states within the Council of Europe legal order. It can fulfil an interpretative function as a common European standard of great weight and is an indication of a wide European consensus which may limit the member states’ margin of appreciation in line with ECtHR case law. While the weaknesses of the Charter on EDC/HRE as a formal source have been acknowledged, it also has many strengths. Several factors give it a high degree of normativity. It is legitimate to expect that member states acting in good faith will take EDC standards into account within their domestic legal order. As a substantive source, the Charter is attractive in various ways, and complementary sources have been designated as well.

In this study, ‘EDC standards’ refer to the elements of the Charter on EDC/HRE which have been described, i.e. the definition of EDC closely interlinked with HRE, its objectives and principles (including respect for member states’ responsibilities, constitutions and priorities),<sup>598</sup> as further developed in other instruments of the Council of Europe normative framework.

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598 See § 27 .