

*PART II Education for Democratic Citizenship and the European Union*



## Introduction: The schema of modes of reception of exogenic norms

### 77 *EDC standards meet EU law*

Part two brings together the first and the second anchor point of this study (the concepts of EDC and EU citizenship) from the perspective of EU law. It contains an analysis *as to the form*: what are the legal status and effects of Council of Europe standards on EDC in the EU legal order? Whereas Part one concerned the Council of Europe legal order, Parts two, three and four address the question of citizenship education of EU citizens within the EU legal order.

EU citizenship and the associated rights are set out in the EU Treaties and the Charter of Fundamental Rights of the European Union (hereafter CFR). While the latter is a 'Charter' like the Charter on EDC/HRE, the difference between these legal sources is obvious: the CFR is EU primary law, a binding instrument in the EU legal order with the same legal value as the Treaties (highest-ranked norms); the Charter on EDC/HRE is a non-binding instrument in the Council of Europe legal order. The analysis of the legal status and effects of EU citizenship within the EU legal order is a story which has been told many times. The added value of the study will lie in a combined reading, as to form and substance, of EU law on EU citizenship, democracy and education with Council of Europe standards on EDC. Is this combined reading legitimate from a legal point of view? Part one examined the legal status and potential legal effects of the Charter on EDC/HRE for the EU Member States as member states of the Council of Europe. Part two answers the question of the normative value of Council of Europe standards for the Member States *as* EU Member States. Should the Recommendation on the Charter on EDC/HRE be taken into account in the EU legal order?

Readers with a particular interest in teaching content for EU learning at school could turn immediately to Part three. That Part will analyse the meaning of EDC for EU citizens *as to the substance*, starting with the Treaties which state that every national of an EU Member State is an EU citizen and that EU citizenship is additional to, and does not replace, national citizenship (Articles 9 TEU and 20(1) TFEU).

78 Council of Europe standards on EDC are exogenic to the EU

From the viewpoint of the EU, the Charter on EDC/HRE contains norms which are 'exogenic' to the EU since this instrument originates in another normative system.<sup>600</sup> Twins separated at birth, the EU and the Council of Europe have highly different legal orders.<sup>601</sup> None of the legal instruments adopted by the Council of Europe Committee of Ministers, the Parliamentary Assembly, the European Heads of State and Government, or the Ministers of Education, which form the normative context of the Charter on EDC/HRE in Part one, are part of the EU legal order. They do not belong to 'the law' of which the ECJ ensures observance (Article 19 TEU). In *Câmpean*, the referring court asked questions involving the interpretation of recommendations of the Committee of Ministers and resolutions of the Parliamentary Assembly of the Council of Europe. The ECJ declined jurisdiction.<sup>602</sup> This also applies to binding exogenic instruments. It is settled case law that 'the Court has no jurisdiction under Article 267 TFEU to rule on the interpretation of provisions of international law which bind Member States outside the framework of EU law', such as the European Social Charter.<sup>603</sup> The ECHR, a prime example, is not EU law. A fortiori, the Council of Europe Recommendation on the Charter on EDC/HRE does not have this status either, irrespective of its hardened soft law place in *le dégradé normatif* (as argued in Part one). The ECHR is binding for member states which have ratified it as a matter of public international law but is (as such) not binding on EU Member States as a matter of EU law. In *Kamberaj*, an Italian court asked whether it should directly disapply domestic law in the case of conflict with the ECHR, without first asking the Italian Constitutional Court. The ECJ held that the fundamental rights guaranteed by the ECHR constitute general principles of EU law (Article 6(3) TEU), but that 'Article 6(3) TEU does not govern the relationship between the ECHR and the legal orders of the Member States and nor does it lay down the consequences to be drawn by a national court in case of conflict

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600 Exogenic norms defined in § 23 .

601 G Quinn, 'The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?' (2001) 46 McGill Law Journal 849.

602 Case C-200/14 *Câmpean* ECLI:EU:C:2016:494, para 34, i.a. on CoE Rec 2003(16) of the Committee of Ministers.

603 Case C-117/14 *Nistabuz Poclava v Ariza Toledano* ECLI:EU:C:2015:60, para 43, concerning ILO Convention No 158 on the Termination of Employment (Geneva, 22 June 1982) and the ESC (Turin, 18 October 1961); Case C-457/09 *Chartry* ECLI:EU:C:2011:101, para 21: 'jurisdiction of the Court is confined to considering provisions of EU law only'.

between the rights guaranteed by that convention and a provision of national law.’ Consequently, the national court was not required to directly apply the ECHR provisions, disapplying national law.<sup>604</sup> It is settled case law that the ECHR does not constitute a legal instrument formally incorporated into EU law until the EU has acceded to it.<sup>605</sup> This is not altered by the fact that two primary law provisions attach important effects to the ECHR in the EU legal order: fundamental rights recognised by the ECHR constitute general principles of EU law (Article 6(3) TEU) and the rights in the CFR which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR (Article 52(3) CFR).<sup>606</sup> These primary law provisions do not convert the ECHR into EU law, but they give the Convention legal effects in the EU legal order. They function as a pathway from one legal order to the other, allowing the reception of exogenic ECHR norms in the EU legal order. This Part will search for similar pathways in EU law permitting the reception of EDC standards of the Council of Europe and giving them legal effects in the EU legal order.

There is no doubt about the starting point for this Part: the EDC standards adopted by the Council of Europe are not EU law. EU law consists of primary law (TEU, TFEU and CFR), international agreements concluded by the EU, secondary law, and ECJ case law. The legal acts of the Union take the form of regulations, directives, decisions, recommendations and opinions, adopted by EU institutions exercising Union competences. In addition to legislative acts (adopted by the legislative procedure), delegated and implementing acts may be adopted (Article 289–291 TFEU). A search for the Charter on EDC/HRE in legal acts in EUR-Lex produces the straightforward answer: ‘no results found’.<sup>607</sup> However, that does not mean that EDC standards do not play any role in EU law.

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604 Case C-571/10 *Kamberaj* ECLI:EU:C:2012:233, paras 59–63.

605 Case C-617/10 *REC Åkerberg Fransson* ECLI:EU:C:2013:280, para 44. See also Case C-523/12 *Dirextra Alta Formazione* ECLI:EU:C:2013:831, para 20; EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, para 179; Case C-398/13 *P Inuit Tapiriit Kanatami and Others v Commission* ECLI:EU:C:2015:535, para 45; Case C-601/15 *PPU N* ECLI:EU:C:2016:85, para 45.

606 As the ECJ formulates it in the cited paras ‘whilst ...’.

607 Search for ‘Charter on Education for Democratic Citizenship and Human Rights education’ in legal acts on 15 October 2019. However, EUR-Lex found reference to the Charter in two other documents: the European Parliament Resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015 (2018/C 238/01); Council Conclusions on the role of

79 *Effects of exogenic norms in the EU legal order: the schema of modes of reception*

The following analysis will explore the ways in which exogenic norms—mainly of the Council of Europe—produce effects in the EU legal order. Based on searches in EUR-Lex and ECJ case law, the reception of exogenic norms in the EU legal order can be categorised in various ways. Advocates General quite regularly mention Council of Europe instruments, parties sometimes invoke Council of Europe instruments in observations submitted to the Court, and national judges occasionally ask preliminary questions on them (overlooking the fact that they are not part of EU law). The Court, however, seems reticent about relying on Council of Europe instruments in the grounds and operative parts of judgments. The effects of recommendations of the Committee of Ministers in ECJ case law have to be searched for with a magnifying glass. Yet, they do exist. The schema of modes of reception of exogenic norms in EU law displays a variety of forms and intensity of legal effect. I will argue that acknowledgment by the EU of Council of Europe standards (a commitment in the Memorandum of Understanding<sup>608</sup>) can occur in six modes of reception: three stronger modes (Chapter three) and three weaker ones (Chapter four). At one end of the spectrum, the EU accedes to Council of Europe conventions (mode 1). At the other end, inspiration is shared, and the two legal orders are linked by *de facto* cooperation (mode 5). In between, EU law draws on exogenic norms to construct its own general principles (mode 2), refers to the title of Council of Europe instruments (mode 3) or incorporates the substance of Council of Europe norms (mode 4). Judicial interpretation complements these modes of reception to differing extents (mode 6). The ECJ takes Council of Europe norms into account on a contextual, historical, or teleological interpretation of EU law. Yet, in addition to a converging line of case law (consistent interpretation), there is a diverging line where the ECJ's interpretation differs from the exogenic norms in order to respect the specific objectives or characteristics of EU law.

Visualising the modes of reception in a legal landscape, the connections between the legal order of the Council of Europe and that of the EU can take the form of highways but also of mapped secondary roads, tracks, narrow paths and borens, and even of hidden lanes and underground pas-

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young people in building a secure, cohesive and harmonious society in Europe [2018] OJ C195/13 (see n 779 and 781). See for the ECtHR n 321.

608 Text to n 140.

sages. Through the landscape runs a red line which must not be crossed: the autonomy of the EU legal order. The EU has specific features and pursues specific objectives. What then are the implications for the reception of the Charter on EDC/HRE?

### 80 *Relevance of the schema*

The schema of modes of reception of exogenic norms in the EU legal order, introduced in Part two as a second step in the reasoning of the study, is important for several reasons.

Firstly, in the analysis as to the form, the schema will clarify the effects of the Council of Europe EDC standards in the EU legal order *de lege lata*. Each mode of reception will first be explained in general terms (with examples in various fields) and thereafter analysed as to its specific relevance for EDC standards. The place of the Recommendation on the Charter on EDC/HRE in the schema will be examined. Since in the Memorandum of Understanding (MOU), the EU recognises that the ‘Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe’, the question is what form this recognition takes in the EU legal order. If the EU and the Council of Europe have committed to ‘acknowledge each other’s experience and standard-setting work, *as appropriate*, in their respective activities’,<sup>609</sup> what does the EU consider *appropriate* with regard to EDC standards? It is important to understand what legal form the ‘acknowledgment’ of EDC standards by the EU currently takes. Moreover, effectiveness calls for a strong mode of reception of EDC standards, since they are named among the shared priorities and focal area for cooperation.<sup>610</sup> The reception of Council of Europe standards in other fields may provide precedents for EDC standards, uncover options for future EU action, and suggest which avenues can be taken *de lege ferenda*.

Secondly, the schema proposed applies equally to exogenic norms originating at UN level, norms which are highly relevant for EU citizenship education, such as the international agreements including the right to education (third anchor point) and UN standards on education for democracy, and which are used in Parts three and four.<sup>611</sup> The same normative reception mechanisms and effects in the interpretation apply to different types of exogenic norms.

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609 MOU, para 12.

610 MOU, para 14.

611 Relevant for ‘quality education’ as a Treaty concept (§ 284 ).

Thirdly, the schema paves the way for the analysis of competences in Part four. Given the limited competence of the EU with regard to education and the respect for Member State autonomy, many educational norms stem from outside the EU and take the form of non-binding legal instruments. The Recommendation on the Charter on EDC/HRE is just one of many examples. EU legislative acts in the field of education frequently express a general intention to cooperate with the Council of Europe yet leave the legal effect of norms resulting from this cooperation unexplained. The proposed reception schema provides an overview of possible effects. Some modes are not mutually exclusive but overlap. Yet, distinguishing them sheds light on the relationship between the Council of Europe and the EU legal order and, importantly, shows the differing impact on Member State educational autonomy. The discretionary power of Member States to regulate education is not unlimited. According to settled case law, 'the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter'.<sup>612</sup> This settled case law applies with regard to national rules on personal names, on direct taxation, or in the sphere of criminal legislation and procedure.<sup>613</sup> It is therefore legitimate to reason that it also applies to national rules on citizenship education. The schema of modes of reception will clarify which EU law Member States must have due regard to.

Finally, the EU legal order is not a closed system operating in a vacuum, but part of a network of interacting legal orders. The schema will indicate that what matters for Member States is not the binding or non-binding character of exogenic norms on EDC in their original legal order, but rather their effects in the EU legal order.

For these reasons, the schema of modes of reception of exogenic standards in the EU legal order remains relevant throughout the study. The schema may also be of interest as a general analysis of the way

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612 Case C-135/08 *Rottmann* ECLI:EU:C:2010:104, para 41 (with cited case law in the sphere of criminal legislation and the rules of criminal procedure; law governing a person's name; national rules relating to direct taxation; national rules determining the persons entitled to vote and to stand as candidates in elections to the European Parliament; para 45 for the field of nationality). Further i.a. n 2408.

613 See § 323, Case C-650/13 *Delwigne* ECLI:EU:C:2015:648 (§ 221); AG Poiares Maduro in Case C-135/08 *Rottmann* ECLI:EU:C:2010:104, para 20, with regard to nationality.



exogenic standards are received in the EU legal order, taking EDC standards as a case study.

