CHAPTER 4 Weaker modes of reception of exogenic norms in the EU legal order

A Incorporation of the substantive content of exogenic norms in EU law (mode 4)

1. General

107 Normative reception of substance

In the legal landscape, in addition to a few highways and a number of marked secondary roads leading through various fields, the Council of Europe and the EU legal order are connected by well-functioning tracks and smaller paths. The fourth mode of reception does not involve incorporation of the title, but of the substantive content of the exogenic instrument, to a lesser or greater extent. With a high degree of incorporation, exogenic norms are copy-pasted into the corpus of the EU legal instrument. With a lesser degree, similarities in the substance appear, even if the wording of the norms differs. In the spectrum of modes of reception in the EU legal order, more nuanced forms thus come to the fore. Principles or definitions from Council of Europe norms may be incorporated, but the rules are adapted to the specific needs of the EU and its Member States. This mode can work openly, with a reference to the exogenic instrument in the preamble, or tacitly, the content of an exogenic norm being absorbed without any explicit reference thereto.[789] In this mode, the legal source is not the copy-pasted exogenic norm, but the EU instrument, which may become the subject of preliminary rulings on validity or interpretation. In this latter process, interestingly, the exogenic norm often comes to life. Case law amplifies the fourth mode of normative reception by giving effect to the exogenic norms at the origin of EU law by interpret-

789 E.g. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9. While the directive undoubtedly intends to comply with the rights enshrined in ESC, its preamble makes no reference to the ESC, as observed in CoE European Committee of Social Rights, The relationship between European Union law and the European Social Charter (Working Document, 2014), para 72.

ing EU law consistently with the exogenic norm, or taking it into account in a contextual, historic or teleological interpretation, or by giving *effet utile* to EU law provisions.[790]

The substantive content of Council of Europe conventions (a) as well as recommendations (b) has been incorporated—in whole or in part—in EU primary and secondary law. The following examples will raise a number of questions which fall to be answered in the following sections.

Incorporation of the substance of Council of Europe conventions

108 Transfrontier television: cases RTL and Commission v UK

The 1989 European Convention on Transfrontier Television is the object of both converging and diverging case law.[791] The EU was not party to this Convention, but adopted its own legal instrument in the same year, Council Directive 89/552, which constituted the legal framework for television broadcasting in the internal market. The Directive referred in its preamble to the Convention and had several quasi identical provisions.[792] In *RTL*, a preliminary question was referred about the interpretation of a Directive provision which had the same wording as a Convention provision. In order to interpret the term 'films made for television', having considered the wording, the Court adopted a historical and teleological interpretation.[793] To find the underlying aim, the Court referred to the explanatory report accompanying the European Convention.[794] This example of converging case law contrasts with the earlier case *Commission v UK*. The UK

790 The sixth mode of reception (interpretation) thus complements the fourth.

791 European Convention on Transfrontier Television (5 May 1989).

792 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 [1997] OJ L202/60. Art 18(1) Dir is identical to Art 12(1) Convention; Arts 11(1), (3) and (4) Dir are quasi identical to Arts 14(1), (3) and (4) Convention. See also definition in Art 6(b).

793 Art 11(3) Dir and Art 14(3) Convention: 'The transmission of audiovisual works such as feature films and films made for television (excluding series, serials, light entertainment programmes and documentaries), provided their scheduled duration is more than 45 minutes, may be interrupted once for each period of 45 minutes...'.

794 Case C-245/01 *RTL Television* ECLI:EU:C:2003:580, paras 61- 63, see also para 97. RTL claimed that 'films made for television which provide, from their con-

had argued that Council Directive 89/552—which, according to the Commission, it had failed to implement correctly—was based on the European Convention on Transfrontier Television and that rules on intra-Community broadcasting could not differ radically from those of the Convention.[795] The ECJ did not accept this argument. In the light of a comparative analysis of the wording, scheme and aims of the Directive and of the Convention,[796] the Court underlined a substantive difference. The Directive was designed to establish the internal market in television services, while the Convention aimed to facilitate the transfrontier (re)transmission of television programme services.[797] Because of the difference in purpose, the Directive rules followed a different path.[798]

It can be deduced from this case law that exogenic norms can be received into the EU legal order through incorporation of elements of their substantive content into an act of EU law. That does not, however, necessarily lead to consistent interpretation of such an act with the exogenic norms at its origin. The specific aims of the EU must be respected. Does the EU have its own agenda for democracy and human rights which would legitimise a different approach and interpretation which diverges from EDC/HRE standards?

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ception, for breaks for the insertion of advertising' do not come within the meaning of 'films made for television' in Article 11(3)'. The ECJ did not accept this view. RTL's claim did not fit with the purpose of Art 11, which was to establish 'a balanced protection of the financial interests of the television broadcasters and advertisers, on the one hand, and the interests of the rights holders, namely the writers and producers, and of consumers as television viewers, on the other'. See for earlier cases with a comparable converging reasoning: Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94 *RTI and Others* ECLI:EU:C:1996:486, para 33, and Opinion of AG Jacobs, paras 6 and 31. Also Case C-11/95 *Commission v Belgium* ECLI:EU:C:1996:316, paras 24–25 (Convention used to determine the scope of the Directive).

795 Case C-222/94 *Commission v UK* ECLI:EU:C:1996:314, paras 43–44, concerning Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 [1997] OJ L202/60.

796 Para 45, i.a. comparing Art 2(1) Dir and Art 5(2) Convention.

797 Paras 49–50.

798 Paras 52–53. See also Case C-601/14 *Commission v Italy* ECLI:EU:C:2016:759.

109 Prisoners standards: case Ognyanov

Ognyanov illustrates the autonomy of an EU legislative act vis-à-vis a Council of Europe Convention: the ECJ did not refer to the Council of Europe Convention at the origin, but interpreted by referral to a specific EU objective, namely, the principle of mutual recognition.[799] The 1983 Council of Europe Convention on the Transfer of Sentenced persons, ratified by all Member States, aimed to further the social rehabilitation of foreign prisoners by allowing them to serve their sentence in their own country.[800] In 2011, the Council of the EU adopted Framework Decision 2008/909/JHA, replacing corresponding provisions of the European Convention in the relations between the Member States.[801] The Framework Decision copied Convention norms to a great extent (it contains some *verbatim* copy-pasted fragments and some adaptations in terminology[802]). The preamble of the Framework Decision referred to Council of Europe instruments and the need to further develop cooperation on the enforcement of criminal judgments. In addition to the aim of facilitating social rehabilitation, the EU had a further objective, considering that relations between the Member States are characterised by special mutual confidence in other Member States' legal orders and thus justify recognition by the executing State of decisions taken by the issuing State.[803] In the instant case a court in Den-

799 Case C-554/14 *Ognyanov* ECLI:EU:C:2016:835. See on mutual trust, essential characteristic of the EU: EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454.

800 Convention on the Transfer of Sentenced Persons ETS No 112 (Strasbourg, opened 21 March 1983, entered into force 1 July 1985); Additional Protocol ETS 167 (Strasbourg, opened 18 December 1997, entered info force 1 June 2000), Art 3(1)(d) and Art 7.

801 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L327/27, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 [2009] OJ L81/24, Art 26.

802 E.g. 'issuing State' and 'executing State' instead of 'sentencing State' and 'administering State' in the Convention.

803 Recitals 4–5. Cp Art 6 Dec to Art 3 Convention. See, in that line, later amending legislation: Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24.

mark (issuing State) had sentenced Mr Ognyanov to 15 years imprisonment. After spending some time in a Danish prison, Mr Ognyanov was transferred to Bulgaria (executing State). The Bulgarian judge had doubts as to whether the period during which Mr Ognyanov had worked in the Danish prison could be deducted from the length of the sentence still to be served in Bulgaria. While Bulgarian law provided for such a reduction, Danish law did not. The Framework Decision stated in Article 17 that 'the enforcement of a sentence shall be governed by the law of the executing State', but did not clarify whether enforcement began at the moment of delivery of the judgment or at the moment of transferral to the executing State.[804] The ECJ decided in favour of the latter option; a reduction in the sentence by reason of work carried out before the transfer may only be granted on the basis of the law of the issuing State. Contrary to the Advocate General Bot,[805] the Court did not refer to the original Council of Europe Convention, but interpreted Article 17 autonomously, on the basis of the place of that provision in the Framework Decision (internal context) and on the objective of respect for the principle of mutual recognition, which is the 'cornerstone' of judicial cooperation in criminal matters within the European Union.[806]

110 Education of nurses: case Commission v Germany

The autonomy of the EU legal order vis-à-vis the Council of Europe also appears from case law establishing that the requirement to implement EU law cannot be replaced merely by respecting Council of Europe norms. In *Commission v Germany*, the Commission claimed that Germany had failed to implement i.a. Directive 77/452. Germany argued that its administrative practice was in conformity with the 1967 European Agreement on the instruction and education of nurses, the provisions of which were almost identical to those of Directive 77/452.[807] The ECJ ruled that in the circumstances, the incorporation of the European Agreement into national law could not replace the proper implementation of the Directive.[808]

804 Para 32.

805 Case C-554/14 *Ognyanov* ECLI:EU:C:2016:835, Opinion of AG Bot, paras 96–98.

806 Para 34 and 46.

807 Case 29/84 *Commission v Germany* ECLI:EU:C:1985:229, para 34, concerning European Agreement on the Instruction and Education of Nurses ETS No 59 (Strasbourg, opening 25 October 1967, entry into force 7 August 1969).

808 Para 38. The ECJ concluded that Germany had failed to fulfil its obligations. See also Case C-601/14 *Commission v Italy* ECLI:EU:C:2016:759: Italy failed to adopt the necessary measures under the Council Directive 2004/80/EC of 29

111 Social standards

An example of converging case law in the field of social standards is *Khalil and Others*. The ECJ had to answer a preliminary question on whether a Regulation on social security schemes was valid in so far as it included stateless persons and refugees in its personal scope. In order to do so the ECJ situated the Regulation in its historical context, recalling i.a. the European convention on social security for migrant workers. The Court pointed to Regulation provisions which 'replicated content' or were 'substantively identical'. No factors were found affecting the validity of the Regulation.[809]

In general, the standards set by the Council of Europe and the EU on social rights largely converge: the 98 paragraphs of the Revised European Social Charter can be matched with binding provisions of EU primary or secondary law.[810] Many provisions of the CFR draw on articles of the European Social Charter, as appears from the CFR preamble and the Explanations.[811] However, it is important to recognise significant inconsistencies, which make the red line appear.[812] Due regard must be had to the

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April 2004 relating to compensation to crime victims [2004] OJ L261/15. In the interpretation the Court took account 'not only of the wording of that provision, but also of the objectives pursued by that directive, and the system established by that directive of which it is part.' In the preamble, the Directive cited the European Convention of 24 November 1983 on the compensation of victims of violent crimes, but pursued its own objective of abolishing obstacle to free movement of persons and services.

809 Joined Cases C-95/99 to C-98/99 and C-180/99 *Khalil and others* ECLI:EU:C:2001:532, see paras 31, 42–43, 52–53, 58, concerning Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 [1983] OJ L230/6, and specific context of (ia) European convention on social security for migrant workers (signed 9 December 1957). Question of compatibility with Art 51 EEC.

810 CoE European Committee of Social Rights, The relationship between European Union law and the European Social Charter (Working Document, 2014), para 19.

811 See CRF Explanations to Arts 14, 15, and 23, as well as Arts 25 till 35 CFR.

812 Opinion of the Secretary General of the Council of Europe on the European Union initiative to establish a European Pillar of Social Rights (Strasbourg, 2 December 2016), p 3, and appendix p 16, with table of provisions of the Revised ESC and corresponding guarantees in primary and secondary EU legislation where they exist. See also CoE European Committee of Social Rights, The relationship between European Union law and the European Social Charter (Working Document, 2014), para 27 ff, appendixes 2 and 3.

powers and tasks of the Union and to the principle of subsidiarity (preamble CFR). The ECJ interprets CFR provisions in keeping with the European Social Charter, but differences in the finetuning require a nuanced approach.[813] Mr Jagland, the Secretary General of the Council of Europe, asked the EU to formally incorporate provisions of the European Social Charter into the European Pillar of Social Rights, launched by the European Commission as a common benchmark.[814] Given the uncertainties and reticence as to the reception of the social standards of the Council of Europe—even though they are laid down in a (binding) convention, the European Social Charter[815]—there can be no expectation of automatic reception in EU law of EDC standards, which are only set out in (non-binding) recommendations. Can EDC standards be shared in principle, but with divergences in the finetuning, having due regard to the powers and tasks of the Union and to the principle of subsidiarity?

112 Converging and diverging lines of case law

In conclusion, European conventions whose substance is incorporated in EU law may have effects in a converging line of case law, where the ECJ interprets EU law consistently with the Council of Europe standards at its origin. However, this remains an autonomous interpretation of EU law in which the red line may emerge at any moment, as i.a. *Ognyanov* illustrated. Notwithstanding far-reaching reception of the substance of exogenic norms, EU law may pursue its own objectives or manifest specific features, and the interpretation of EU law provisions may consequently diverge from the original exogenic norms. This first reflection will provide food for thought in the section on the EDC standards. Do the Council of Europe recommendations on EDC fall under the converging or the diverging line of case law, or under both, depending on the particular subject-matter considered?[816]

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813 See CoE European Committee of Social Rights, The relationship between European Union law and the European Social Charter (Working Document, 2014), appendix 2, column 4.

814 Opinion of the Secretary General of the Council of Europe on the European Union initiative to establish a European Pillar of Social Rights (Strasbourg, 2 December 2016), 4, 13. Compare Commission Communication 'Establishing a European Pillar of Social Rights' COM(2017) 250 final.

815 See n 636.

816 Further §§ 142 144 155 .

Incorporation of substance of Council of Europe recommendations

113 Blood standards: case Humanplasma

In addition to conventions, recommendations of the Committee of Ministers to the member states of the Council of Europe are received into the EU legal order by means of normative incorporation of their substance and judicial interpretation which takes them into account. A second reflection is that exogenic norms not only have effects in the interpretation of provisions incorporating their substance, but also in the broader context of EU law. Two cases will illustrate this.

In *Humanplasma*, the ECJ cited an article in the appendix to a recommendation of the Committee of Ministers (the Charter on EDC/HRE also features in the appendix of a recommendation) and used this article in the interpretation and application of the Treaty provisions on free movement of goods and the justification for restrictions on grounds of protection of health (Article 34 juncto 36 TFEU).[817] The Council of Europe standard provided additional support for the reasoning in the proportionality test.

> Austrian legislation only permits importation of blood or blood components from other Member States if blood donations have been made without any payment to the donors, even in terms of the coverage of costs. The ECJ holds this to be a measure of equivalent effect to a quantitative restriction on imports (Article 34 TFEU).[818] A restriction can be justified on grounds of the protection of human health, if it is appropriate and does not go beyond what is necessary to attain the objective (Article 36 TFEU).[819] The Court admits that the Member States have a discretion as to the level of protection of human health.[820] Yet, the fact that a number of other Member States reimburse blood donors' costs is relevant. Here, the Court refers to Council of Europe Recommendation (95)14 and an EU Directive in line with it (incorporating some substantive content).[821] Recommendation (95)14

817 Case C-421/09 *Humanplasma* ECLI:EU:C:2010:760, para 7: Art 2 of appendix to CoE Recommendation No R (95) 14 of the Committee of Ministers to the Member States of the Council of Europe on the protection of health of donors and recipients in the area of blood transfusion (12 October 1995) (Legal context, International rules). Then Art 28 EC juncto Art 30 EC.

818 Para 30.

819 Paras 31–36.

820 Paras 39–40.

821 Para 41.

> of the Committee of Ministers to the member states of the Council of Europe 'on the protection of health of donors and recipients in the area of blood transfusion' stipulates in Article 2 of its appendix that 'voluntary, non-remunerated donation' of blood is compatible with small tokens, refreshments and reimbursements of direct travel costs.[822] Directive 2002/98 of the European Parliament and of the Council setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components refers in its preamble to 'relevant recommendations of the Council of Europe', considers that the efforts of the Council of Europe in the area of voluntary and unpaid donations should be supported, and that '[t]he definition of voluntary and unpaid donation of the Council of Europe should be taken into account'.[823] The Court recalls that both the Directive and Recommendation (95)14 aim to improve the health of donors or recipients of blood, but that they do not require that donations be completely unpaid.[824] Austrian legislation goes beyond what is necessary to attain the objective of ensuring the quality and safety of the blood and of the blood components.[825]

Health, like education, is an area where Member States have discretionary powers. Even so, the ECJ took a consensus in a Council of Europe recommendation into account in the interpretation of EU law.

114 Standards for the reception of applicants for international protection: case N

In case *N*, the ECJ referred to a recommendation of the Committee of Ministers of the Council of Europe in its interpretation and application of EU primary law provisions on the right to liberty and on limitations to this right (Articles 6 juncto 52(1) and (3) CFR). The validity of a provision of the 'Reception Directive' (Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of appli-

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822 CoE Recommendation No R (95) 14 of the Committee of Ministers to the Member States of the Council of Europe on the protection of health of donors and recipients in the area of blood transfusion (12 October 1995); Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC [2003] OJ L33/30.

823 Directive 2002/98/EC, recitals 4, 23, 27.

824 Para 44.

825 Para 45.

cants for international protection) fell to be assessed in the light of the CFR Articles cited.[826] The provision in issue stated that an applicant may be detained 'when protection of national security or public order so requires'. As a limitation to the right to liberty protected by Article 6 CFR, it had to satisfy the criteria of Article 52(1) CFR, i.a. be 'necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the right and freedom of others'.[827] Moreover, limitations to the right to liberty must be '*strictly* necessary', in view of its importance.[828] To assess strict necessity, the ECJ interpreted the Directive on the basis of its wording, context and legislative history.[829] It is at that point of the reasoning that the exogenic norm came in. Looking at the explanatory memorandum to the proposal for the Directive, the Court found that the grounds for detention were based on the 2003 Recommendation of the Committee of Ministers of the Council of Europe on measures of detention of asylum seekers and on detention standards in Guidelines of the UN High Commissioner for Refugees.[830] Noting in these exogenic instruments the strictly circumscribed conditions for detention, making it an exceptional measure of last resort, the Court found no factors affecting the validity of the provision at issue. It is interesting in this case that, notwithstanding the fact that they were not mentioned in the preamble of the Directive, Council of Europe exogenic norms nevertheless were given legal effect in the EU legal order. The effects of the UN guidelines cited should be noted as well, since they are relevant for Chapter nine.[831] In her View in the case *N*, Advocate General Sharpston also put the secondary law provisions in a historical context and pointed to similarities in the scope *ratione personae* of the Reception Directive and the Recommendation of the Committee of Ministers.[832] In the earlier case *El Dridi*, the Court had already based its ruling on a historic and teleological interpreta-

826 Case C-601/15 PPU *N* ECLI:EU:C:2016:85, concerning Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96. The provision in litigation was Art 8(3)(e).
827 Para 50.
828 Para 56 (emphasis added).
829 Para 57.
830 Para 63. Repeated in Case C-18/16 *K* ECLI:EU:C:2017:680, para 46.
831 Text to n 2203.
832 Case C-601/15 PPU *N* ECLI:EU:C:2016:85, View of AG Sharpston, fn 48.

tion of Directive 2008/115, the predecessor of the Reception Directive, and had referred to guidelines of the Committee of Ministers.[833]

To sum up, the reception of exogenic norms in mode 4 unmistakably has effects in the interpretation and application of EU law. In *Humanplasma* and *N*, the exogenic norms—recommendations of the Committee of Ministers—were taken into account in the broader context of EU law in the interpretation and application of provisions relating to the internal market (Article 34 juncto 36 TFEU) and to the fundamental right to liberty (Article 6 juncto 52 CFR). Can recommendations of the Committee of Ministers containing EDC standards be taken into account in the interpretation and application of EU law provisions on citizenship and democracy in a comparable way?

The first question to be answered is: has the substantive content of EDC standards in Council of Europe instruments been received into the EU legal order?

2. Fragmented incorporation of the substantive content of EDC standards

115 Endogenic norms related to citizenship education are drawn up in the EDC paradigm

For EDC standards, the connecting routes between the Council of Europe and the EU legal order are predominantly situated in modes 4 and 5. This section will analyse the norms related to citizenship education originating within the EU legal order itself, thus endogenic (by contrast to the exogenic EDC norms of the Council of Europe). The substance of exogenic EDC standards can be identified to a significant degree within EU law. Admittedly, there is no extensive copy-pasting of the provisions of the Charter on EDC/HRE, nor any reference in the preambular provisions of EU legislation. Yet, similarities in substance and quasi identical expressions do appear. The fact that the EU embraces the Council of Europe EDC paradigm will be demonstrated in (1) EU primary law and (2) EU secondary law. To what extent this normative incorporation can be supplemented by an interpretation of EU law taking the exogenic standards into account, will be explored in mode 6.

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833 Case C-61/11 PPU *El Dridi* ECLI:EU:C:2011:268, paras 43–44, and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98, recital 3.

EU primary law: linking democracy and citizenship with education

116 A combined reading of Articles 10(3) TEU and 165(2) TFEU

In EU primary law, a clear link can be seen between citizenship and democracy on the one hand and education on the other hand. The similar wording of provisions inserted by the Lisbon Treaty in 2009 is striking. In the new Title II 'Provisions on democratic principles' in the TEU, Article 10(3) TEU provides that '[e]very citizen shall have the right to *participate in the democratic life of the Union*'. At the same time, the Lisbon Treaty added an extra sentence to Article 165(2) TFEU (which is the legal basis for EU education policy), stating that in education matters, Union action shall be aimed at 'encouraging the *participation of young people in democratic life in Europe*' (last part of fifth indent).[834] Admittedly, this extra sentence figures in an indent on youth policy, thus not on formal (school) education. Nevertheless, the comma preceding the phrase, added by the authors of the Lisbon Treaty, indicates its openness to education in general.[835] The provision is to be read in the light of Article 165 on education as a whole. On the basis of a textual interpretation, participation of young people in democratic life in Europe is undeniably an objective of EU education policy. On a contextual interpretation, reading Articles 10(3) TEU and 165(2) TFEU together, the congruence with the EDC objectives of the Council of Europe stands out. The EU norm seeking to encourage participation of young people in democratic life in Europe by education, is in substance the same as the Council of Europe concept of EDC, empowering them 'to play an active part in democratic life' (EDC component c-3).

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834 My emphasis. Also similarities in other language versions. Cp Art 10(3) TEU 'Tout citoyen a le droit de participer à la vie démocratique de l'Union', 'Iedere burger heeft het recht aan het democratisch bestel van de Unie deel te nemen', 'Alle Bürgerinnen und Bürger haben das Recht, am demokratischen Leben der Union teilzunehmen', with Art 165(2) TFEU: 'encourager la participation des jeunes à la vie démocratique de l'Europe', 'deelneming van jongeren aan het democratisch leven van Europa aan te moedigen', 'verstärkte Beteiligung der Jugendlichen am demokratischen Leben in Europa'. See in context of Convention on the Future of Europe (2003) <european-convention.europa.eu/>, 'Document du Praesidium: project de titre VI du traité constitutionnel concernant la vie démocratique de l'Union (2 avril 2003)'.

835 No comma in the Treaty establishing a Constitution for Europe.

117 Council of Europe context of drafting

The drafting of Article 10(3) TEU and of the extra sentence in Article 165(2) TFEU dates from the 2004 Treaty establishing a Constitution for Europe.[836] The context in which it was drafted was one of intense action on EDC at Council of Europe level (first and second phase of the EDC project). Concurrent action by Member States in the Council of Europe and at EU level, and the cooperation of the EU and the Council of Europe, show their effects in parallel norm-setting. In addition to an identical objective—empowerment for participation—the wording is also very similar. In 1999, the Committee of Ministers had stressed 'the fundamental role of education in promoting *the active participation of all individuals in democratic life*'.[837] Similar terms are used in the 2002 Recommendation on EDC, the forerunner of the 2010 Recommendation on the Charter on EDC/HRE.[838] The Committee of Ministers recommended that the governments of member states make EDC a priority objective of educational policy-making and reforms.[839] The fact that the authors of the EU Treaty reform included the encouragement of participation in democratic life as one of the objectives of education by inserting the extra sentence in the fifth indent, is fully in keeping with the 2002 Recommendation.

EU secondary law: various aspects of EDC standards

118 EU legislative acts, variable terminology, same paradigm

In EU secondary law, much of the substantive of EDC standards is visible (mode 4) and certainly their inspiration (explained in mode 5). Even if the expressions 'education for democratic citizenship' or 'citizenship educa-

836 Treaty establishing a Constitution for Europe [2004] OJ C310/1. In Title VI ('The Democratic life of the Union') Art I-46 on 'The principle of representative democracy', para (3) has the same wording as Art 10(3) TEU. Art III-282 (1)(e) has the same wording as Art 165(2), but without a comma before 'encouraging'. Art 165 TFEU dates from the 1992 Maastricht Treaty (then Art 126 EC). The 1997 Amsterdam Treaty had no provision encouraging participation in democratic life.

837 CoE Committee of Ministers Declaration and programme on education for democratic citizenship, based on the rights and responsibilities of citizens (Budapest, 7 May 1999), para 7. See first and second phases.

838 CoE Recommendation Rec(2002)12 of the Committee of Ministers to member states on education for democratic citizenship (16 October 2002).

839 Para 3.

tion' are rarely used as such, components of the EDC concept, EDC objectives and underlying principles are present.[840] Obviously, norms on citizenship education appear more laterally and sporadically in EU legislative acts than in Council of Europe instruments. The Council of Europe tackles the subject systematically, comprehensively, and as part of its core mission. In the EU legal order, 'citizenship education' is not a directly conferred Treaty competence. Yet, with the widening of the scope of EU competences beyond those of a mere economic project, action has been taken which can be situated in the field of citizenship education.

Remarkably, where citizenship education is referred to in legal acts of the Union, the terms used are variable and often not defined, thus contrasting with the consistent use of 'education for democratic citizenship' in the normative framework of the Council of Europe, a well-defined concept embedded in standards developed over decades. In addition to 'civic competences' (used in the plural) and 'citizenship competence' (used in the singular),[841] EU legal instruments occasionally use the expression 'citizenship education'. Other expressions adopted are 'civic education and intercultural understanding', 'civic education courses', 'civic orientation programmes', 'promotion of civic competences', or 'human rights and citizenship education'.[842] However, regardless of the disparities in terminology, what matters is that the EU clearly embraces the EDC paradigm.[843] The following examples highlight the EDC aspects in the content of EU instruments.

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840 See already early, Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 29 May 1990 on the fight against racism and xenophobia [1990] OJ C157/1 (role of education in developing 'civic-mindedness and the values of pluralism and tolerance'); Resolution of the Council and the Representatives of Member States' Governments meeting within the Council of 23 October 1995 on the response of educational systems to the problems of racism and xenophobia [1995] OJ C312/1 ('European educational systems should continue as well as enhance their efforts at promoting education in values which encourage attitudes of solidarity and tolerance, as well as respect for democracy and human rights'). Also Case C-379/87 *Groener* ECLI:EU:C:1989:599, para 20: '[t]eachers have an essential role to play' in a policy of cultural and linguistic diversity.

841 Cp the 2006 and 2018 Recommendation on key competences for lifelong learning (below).

842 Instruments in next section. See also Commission Communication 'Improving and modernising education' COM(2016) 941 final (no citizenship education, but lateral mentioning of civic competences).

843 See § 40 (conclusion normative context).

119 Recommendations on key competences for lifelong learning

In the 2006 Recommendation on key competences for lifelong learning, the European Parliament and the Council developed a Reference Framework of key competences.[844]

On 22 May 2018 this Recommendation was replaced by a Council Recommendation on key competences for lifelong learning.[845] Because the 2006 Recommendation was, for a long time, the central text on key competences and was the basis for the 2018 Recommendation, the reception of exogenic EDC norms is here analysed on the basis of the 2006 instrument.[846]

The 2006 Recommendation did not refer to the title of Council of Europe instruments, nor did it duplicate any provisions thereof, but the development of the Framework occurred in cooperation with the Council of Europe, and similar substance and wording to the EDC standards were adopted.[847] During the preparatory work explicit reference was made to the EDC project (working group on active citizenship and social cohesion):

> The contribution of education and training to the development of active citizenship promoting inclusion and social cohesion is acknowledged by everyone. The Council of Europe's project on education for democratic citizenship is, moreover, actively supported by the Member States and the European Commission. [848]

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844 Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning [2006] OJ L394/10 (Annex: Key Competencies for Lifelong Learning- A European Reference Framework).

845 Council Recommendation of 22 May 2018 on key competences for lifelong learning [2018] OJ C189/1.

846 The analysis as to the substance in Part three is based on the 2018 Recommendation.

847 Reference to cooperation with CoE in the work programme on the objectives of the education and training systems, see Commission Communication 'Education & Training 2010': The success of the Lisbon Strategy hinges on urgent reforms (Draft joint interim report on the implementation of the detailed work programme on the follow-up of the objectives of education and training systems in Europe) COM(2003) 0685 final, point 1.1.1.

848 Commission Report Implementation of the 'Education & Training 2010' programme - Supporting document for the draft joint interim report on the implementation of the detailed work programme on the follow-up of the objectives of education and training systems in Europe SEC(2003) 1250 final, heading 4 (Conclusion of the working groups), points 4.1.1 and 4.1.10 (Education and training for active citizenship).

Civic competences were identified as one of the eight key competences (together with, i.a., language, mathematical, or science and technology competences). They should be acquired before compulsory schooling ends and serve as the platform for any further learning. Competences were defined as 'a combination of knowledge, skills and attitudes appropriate to the context'. Key competences were 'those which all individuals need for personal fulfilment and development, active citizenship, social inclusion and employment'.[849] EDC components resonated in the description of social and civic competences:

> These include personal, interpersonal and intercultural competence and cover all forms of behaviour that equip individuals to participate in an effective and constructive way in social and working life, and particularly in increasingly diverse societies, and to resolve conflict where necessary. Civic competence equips individuals to fully participate in civic life, based on knowledge of social and political concepts and structures and a commitment to active and democratic participation.[850]

In a long paragraph the EU Recommendation describes the essential knowledge, skills and attitudes on which civic competences are based or which they include. 'Civic competence is based on knowledge of the concepts of democracy, justice, equality, citizenship, and civil rights (...).'[851] Skills include the ability to engage effectively with others in the public domain, to display solidarity and interest in solving problems, as well as critical and creative reflection and constructive participation in community activities and decision-making, in particular through voting.

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849 Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning [2006] OJ L394/10 (Annex: Key Competencies for Lifelong Learning- A European Reference Framework).

850 Annex, heading 6.

851 Knowledge: 'Civic competence is based on knowledge of the concepts of democracy, justice, equality, citizenship, and civil rights, including how they are expressed in the Charter of Fundamental Rights of the European Union and international declarations and how they are applied by various institutions at the local, regional, national, European and international levels. It includes knowledge of contemporary events, as well as the main events and trends in national, European and world history. In addition, an awareness of the aims, values and policies of social and political movements should be developed. Knowledge of European integration and of the EU's structures, main objectives and values is also essential, as well as an awareness of diversity and cultural identities in Europe.'.

Attitudes include respect for human rights, including equality as a basis for democracy, understanding differences in value systems or religions, and demonstrating a sense of responsibility.[852]

The similarity of the Council of Europe concept of EDC and the EU concepts of civic and social competences is not surprising, given the recognition by the EU of the longstanding expertise of the Council of Europe in education and the involvement of all Member States in the genesis of the 2002 Council of Europe Recommendation on education for democratic citizenship adopted four years earlier.[853] The mutual influence of the Council of Europe and the EU can also be detected in later instruments. True, the authors of the 2010 Charter on EDC/HRE preferred not to adopt the term 'competences' (a cluster of skills, knowledge and attitudes focusing on outcomes) and continued to refer to the 'curriculum' (generally understood as focusing on learning objectives).[854] Yet the underlying principles remain the same. A comparison of the 2006 Recommendation with the 2010 Charter on EDC/HRE reveals the same central objective of the 'empowerment' of citizens and similar components. Component (c-2)—valuing diversity—appears *expressis verbis* as part of social competence in

852 Values, attitudes and participation: 'Full respect for human rights including equality as a basis for democracy, appreciation and understanding of differences between value systems of different religious or ethnic groups lay the foundations for a positive attitude.' Also 'a willingness to participate in democratic decision-making at all levels' and 'demonstrating a sense of responsibility, as well as showing understanding of and respect for the shared values that are necessary to ensure community cohesion, such as respect for democratic principles. Constructive participation also involves civic activities, support for social diversity and cohesion and sustainable development, and a readiness to respect the values and privacy of others'.

853 CoE Recommendation Rec(2002)12 of the Committee of Ministers to member states on education for democratic citizenship (16 October 2002), see, i.a., paras 2 and 3: some identical terms (knowledge, attitudes and skills) and certainly the same ideas (e.g. critical approach).

854 Explanatory memorandum para 43. See also CoE Reference Framework of Competences for Democratic Culture, Vol 3: Guidance for implementation (2018), 14: in Europe, the three main curriculum approaches are the knowledge-based curriculum (traditional), the objectives-based curriculum and the competence-based curriculum. Each approach determines which central element structures the curriculum, the remaining curriculum components follow from the central one; the competence-based curriculum is a further development of the objectives-based curriculum. Most curricula combine the three approaches. See also Commission Communication 'Empowering businesses and citizens in Europe's single market: An Action Plan for boosting Your Europe in cooperation with the Member States' COM(2013) 636 final.

the EU Recommendation on key competences.[855] Component (c-3)—playing an active part in democratic life—goes with equipping citizens 'to fully participate in civic life' and the 'commitment to active and democratic participation' in the EU Recommendation.

In the public consultations to review the 2006 Recommendation, a broad acceptance of the provisions on civic competences could be observed. Several contributors proposed better alignment with the EDC standards. One observer found that the definition of civic competence in the 2006 Recommendation lagged behind the better EDC/HRE standards of the Council of Europe.[856]

The 2018 Recommendation defines 'citizenship competence' as follows:

> Citizenship competence is the ability to act as responsible citizens and to fully participate in civic and social life, based on understanding of social, economic, legal and political concepts and structures, as well as global developments and sustainability.[857]

Components similar to those in the EDC standards continue to appear in the 2018 Council Recommendation on key competences for lifelong learning. Moreover, in the preamble the Council explicitly refers to the Council of Europe RFCDC (which further implements the Charter on EDC/HRE) and confirms that it took this into account when updating the Reference Framework on key competences.[858]

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855 'Individuals … should value diversity and respect others, and be prepared both to overcome prejudices and to compromise.'.

856 Support of the stakeholder consultation in the context of the Key Competences Review: Report on the results of the stakeholder consultation EAC/2017/0150, pp 27, 51, 58, 59, 64, 72 (i.a. referring to Council of Europe model for Competences for Democratic Culture').

857 See Annex 4 to this study: EU Recommendation on key competences for lifelong learning (2018) for the description of essential knowledge, skills and attitudes related to the citizenship competence.

858 Council Recommendation of 22 May 2018 on key competences for lifelong learning, recital 15: 'the Council of Europe's Reference Framework of Competences for Democratic Culture presents a comprehensive set of values, skills and attitudes for an appropriate participation in democratic societies. All of these have been taken into due consideration when updating the Reference Framework.'.

120 Other EU instruments

There are other legal acts of the EU which are consistent with the EDC standards of the Council of Europe. While not necessarily referring to those standards, they encompass aspects of them.

In the 2012 *Decision on the European Year of Citizens (2013)*, Parliament and Council recognised the leading role of the Council of Europe and recalled that social and civic competences equip Union citizens to participate fully in civic life and 'empower them to exercise their rights' (words of the 2010 Council of Europe Charter on EDC/HRE). While the expressions 'citizenship education' and 'education for democratic citizenship' are absent, the three components (c-1–3) appear.[859]

In the *2013 Erasmus+ Regulation*, Parliament and Council state that cooperation with the Council of Europe in the field of education should be strengthened.[860] As to the substance (not the words), the definitions of formal, non-formal or informal education are similar to those in the Charter on EDC/HRE.[861] The Regulation does not use the expressions 'citizenship education' or 'education for democratic citizenship' either, but it recognises the role of education in promoting active citizenship, participation in democratic life, and European values (comparable objectives to the EDC standards).[862]

In the 2013 *Regulation establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020*, the Parliament and the Council seek to improve the exercise of citizens' rights and pursue this objective by 'enhancing awareness and knowledge of Union law and policies as well as

859 Decision 1093/2012/EU of the European Parliament and of the Council of 21 November 2012 on the European Year of Citizens (2013) [2012] OJ L325/1, recitals 14 and 19 ('equip them to fully participate in civic life and empower them to exercise their rights'), applying components (c-3) and (c-1) of the EDC concept, see also recital 19 ('Education policy plays an important role in informing citizens, particularly young people'); and Art 2 Objectives, i.a. Art 2(1) on rights and responsibilities and (2)(c) on valuing diversity.

860 Regulation 1288/2013 of the European Parliament and of the Council of 11 December 2013 establishing 'Erasmus+': the Union programme for education, training, youth and sport and repealing Decisions 1719/2006, 1720/2006 and 1298/2008 [2013] OJ L347/50, recital 20.

861 Compare Erasmus+ Regulation 1288/2013, Art 2 and Charter on EDC/HRE, para 2.

862 Arts 4, 11(1)(a), 14(1)(a), recitals 16,19 and 20. See also Strategic objective 3: Promoting equity, social cohesion and active citizenship, in Council Conclusions on the role of education and training in the implementation of the 'Europe 2020' strategy [2011] C70/1.

of the rights, values and principles underpinning the Union'. The types of actions envisaged include training and learning activities.[863] Exercising its budgetary powers, the Parliament labels these actions 'Ensuring the protection of rights and *empowering* citizens'.[864] Even if the Regulation does not mention the Council of Europe, or use the same wording, EDC standards underlie its provisions, in particular component (c-1) on citizens' rights.

The 2014 *Council Regulation establishing the 'Europe for citizens' programme for the period 2014–2020* is not directly targeted at education, but it includes awareness raising activities with similar objectives to EDC. Educational organisations do have access to the programme.[865] The aims are to enable and encourage citizens to participate in democratic life, to contribute to their understanding of the EU, and its values, politics, and history.[866] The expression 'citizenship education' is not used, nor was it in the previous instruments for the 'Europe for Citizens' programme.[867]

In the 2015 *Action Plan on Human Rights and Democracy* adopted by the Council in the external action field, 'human rights and civic education' are supported to invigorate civil society in third countries so as to strengthen the capacity to hold governments accountable.[868] In a 2012 Resolution on EU external action (human rights in the world), the European Parliament

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863 Regulation 1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020 [2013] OJ L354/62, Arts 4(2)a and Art 5(1)(b)(c).

864 Definitive adoption (EU, Euratom) 2017/292 of the European Union's general budget for the financial year 2017 [2017] OJ L51/1, Chapter 33 02 01 (my emphasis).

865 Listed in Art 6 among 'all stakeholders promoting European citizenship and integration'.

866 Council Regulation (EU) No 390/2014 of 14 April 2014 establishing the 'Europe for Citizens' programme for the period 2014-2020 [2014] OJ L115/3, Arts 1–3, recitals 1, 3, 4, and 19.

867 Citizenship education is not mentioned in Decision 1904/2006 of the European Parliament and of the Council of 12 December 2006 establishing for the period 2007 to 2013 the programme 'Europe for Citizens' to promote active European citizenship [2006] OJ L378/32, amended by Decision 1358/2008 [2008] L350/58, nor in Council Regulation (EU) No 390/2014 of 14 April 2014 establishing the 'Europe for Citizens' programme for the period 2014-2020 [2014] OJ L115/3.

868 Council Conclusions on the Action Plan on Human Rights and Democracy 2015-2019 (20 July 2015), 9, para 7(b). Other institutions are involved, see para 5 for the role of the High Representative, Commission and European Parliament. See also Council, EU Strategic Framework and Action Plan on Human Rights and Democracy (Luxembourg, 25 June 2012) 11855/12, 'Working with bilateral partners'. Furthermore, Joint Communication by the European Commission and the High Representative of the European Union for Foreign Affairs and

referred to the aim of 'building a real culture of human rights and democracy, particularly through *education for democratic citizenship and human rights*'[869] (an aim important in EU internal action as well[870]). This Resolution is one of the rare examples of an EU legal instrument using the expression 'education for democratic citizenship' *verbatim*.[871] Another example is a 2007 Resolution where the Parliament 'calls upon the Member States to develop policies of *education for democratic citizenship* based on citizens' rights and responsibilities' (c-1).[872]

A 2015 *Council resolution on encouraging political participation of young people in democratic life in Europe* refers to 'citizenship education' without defining it but reflects the same objectives and principles as EDC.[873]

In the 2016 *European Parliament resolution on Learning EU at school*, all the components of the EDC concept are present, some of them literally.[874] The Parliament does not refer to the Council of Europe. The expression 'education for democratic citizenship' does not appear, but 'citizenship education' does.[875]

The 2017 *European Pillar of Social Rights*, solemnly proclaimed by the European Parliament, the Council and the Commission, devotes its very first provision to education: 'Everyone has the *right to quality and inclusive*

Security Policy, Action Plan on Human Rights and Democracy (2015-2019) Keeping human rights at the heart of the EU agenda JOIN(2015) 16 final, para 41.

869 European Parliament Resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy [2013] OJ C258E/8, para 155 (emphasis added).

870 See also text to n 989.

871 See also reference in Opinion of the Committee of the Regions on the 'EU Citizenship Report 2010' [2011] OJ C166/3, para 12.

872 European Parliament Resolution of 13 December 2007 on combating the rise of extremism in Europe [2008] OJ C323E/494. Thus even before 2015, the Parliament was calling for citizenship education to combat extremism.

873 Council Resolution on encouraging political participation of young people in democratic life in Europe [2015] OJ C417/10, paras 18 and 34. Same underlying ideas in Council Resolution on the Structured Dialogue and the future development of the dialogue with young people in the context of policies for European cooperation in the youth field, post 2018 [2017] OJ C189/1 (education for active citizenship, values, and critical thinking).

874 European Parliament Resolution of 12 April 2016 on Learning EU at school [2018] OJ C58/57, para 15.

875 Para 10. See also European Parliament Resolution of 12 December 2017 on the EU Citizenship Report 2017: Strengthening Citizens' Rights in a Union of Democratic Change (2017/2069(INI)), para 32.

education, training and life-long learning in order to maintain and acquire skills that *enable* them *to participate fully in society* and manage successfully transitions in the labour market'.[876] Enabling full participation in society is consistent with the EDC-aim of empowerment for participation (c-3) and, moreover, echoes the aim of education in Article 13 of the International Covenant on Economic, Social and Cultural Rights ('education shall enable all persons to participate effectively in a free society').

In the 2018 *Recommendation on promoting common values, inclusive education, and the European dimension of teaching*, the Council states that Member States should make effective use of existing tools to promote citizenship education.[877]

It must be finally be noted that in various Opinions, the Committee of the Regions and the European Economic and Social Committee vigorously advocate citizenship education. The 'role of education in promoting active citizenship among young people' is emphasised.[878] Among 'the conditions for effectiveness of citizenship', the need for measures ensuring 'education and training in citizenship' is highlighted.[879] The Erasmus programme should support democratic citizenship and common European values.[880]

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876 Commission Recommendation (EU) 2017/761 of 26 April 2017 on the European Pillar of Social Rights [2017] OJ L113/56, Chapter I 'Equal opportunities and access to the labour market', para 01 'Education, training and life-long learning'. See also Commission Communication 'Establishing a European Pillar of Social Rights' COM(2017) 250 final; Commission staff working document Report of the public consultation Accompanying the document Commission Communication Establishing a European Pillar of Social Rights SWD(2017) 206 final; Commission Staff working document Accompanying Commission Communication 'Establishing a European Pillar of Social Rights' SWD(2017) 201 final.

877 Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching [2018] OJ C195/1; see also recitals 10 and 13.

878 Opinion of the Committee of the Regions on 'Strengthening EU citizenship: promotion of EU citizens' electoral rights' [2013] OJ C62/26, paras 38–42. See also Opinion of the Committee of the Regions 'Strengthening European Identity through Education and Culture' [2018] OJ C 361/19, Policy recommendations point 3.

879 Opinion of the Committee of the Regions on the 'EU Citizenship Report 2010' [2011] OJ C166/3, para 37 (emphasis added).

880 Opinion of the EESC on 'Proposal for a regulation of the European Parliament and of the Council establishing "Erasmus": the Union programme for education, training, youth and sport and repealing Regulation (EU) No 1288/2013' [2019] OJ C 62/194, point 3.4.

B Inspiration and cooperation (mode 5)

1. General

121 Mutual influence, a shared paradigm

In addition to directly providing substance for EU norms, the exogenic norms of Council of Europe conventions and recommendations have—more generally—been a source of inspiration for the EU, as appears in primary and secondary law, in case law, in policies and in practice. Norm-setting does not occur in a vacuum. In the mode of reception based on inspiration, there is no incorporation of the title or of the actual substantive content of exogenic norms, but they can be recognised as a source of inspiration. Notwithstanding different wording and rules, similarities in the objectives and underlying principles is sometimes striking. Admittedly, the dividing line between modes 4 and 5 is not a sharp one, yet both modes have their place in the spectrum of mutual influence of normative systems. In particular, exogenic norms of high moral authority or expressing an international consensus may inspire the drafting of provisions in the home legal order. UN human rights instruments are at the origin of regional human rights instruments (compare the 1948 Universal Declaration of Human Rights and the 1950 ECHR). Member States' constitutions show similarities in style and substance. Cross-fertilisation of legal orders occurs in the process of norm-setting as well as in the interpretation of the norms.[881] The fact that EU law is also inspired by exogenic norms is thus perfectly natural. Moreover, the Treaties (Article 220 TFEU) and, quite regularly, secondary legislation emphasise the need for cooperation with international organisations.[882] The fifth mode of reception is a transition zone which includes the many *de facto* pathways between the Council of Europe and the EU legal order, resulting from dialogue at conferences, formal and informal meetings of politicians, judges, civil servants, or net-

881 Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World* 23. See also examples in S Breyer, *The Court and the World: American Law and the New Global Realities* (Vintage Books 2016).

882 See i.a. Council Decision of 28 February 2008 relating to the conclusion of an Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe [2008] OJ L186/6; Memorandum of Understanding between the Council of Europe and the European Union (2007), para 25: 'to the extent necessary the Council of Europe and the European Union will consult each other at an early stage in the process of elaborating standards'.

works of experts accredited by international organisations. A wide array of policy documents bear witness to this mutual inspiration. In mode 4, the EU legislator incorporates the substance of previously existing exogenic instruments; in mode 5, the same inspiration may lead to simultaneous and parallel norm-setting. Cooperation in the implementation of the norms thus shared fits into this mode. It is based on the same paradigm.

122 Cascades of norm-setting

In many fields, the Council of Europe did pioneer work before the EU acquired the competence to act. Norm-setting started at Council of Europe level and subsequently found its way into the EU legal order through the described modes of reception (accession, general principles, incorporation of title, of substance, or of inspiration). Smaller paths have become secondary roads, and sometimes highways. The cascading normative effects can take various courses. Often, Council of Europe recommendations prepare the ground, influence Council of Europe conventions, which influence interpretations in ECJ case law, which influence the drafting of new provisions in primary or secondary EU law.[883] Several provisions in the CFR (drafted in 2000) were inspired by earlier Council of Europe norms, such as the ECHR (1950) or the European Social Charter (1961, revised 1996). A good example is the right to data protection (Articles 8 CFR, 39 TEU and 16 TFEU), which was foreshadowed by recommendations of the Committee of Ministers (since 1970) and by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981).[884] The right to good administration (Article 41 CFR) is a codification (partly) of the general principle of good administration developed by the ECJ, which was preceded by Council of Europe norms dealing with

883 E.g. *European Pharmacopoeia*, see n 627. Other examples in Cornu, 'The impact of Council of Europe Standards on the European Union', i.a. p 126: 'negotiations within the Council of Europe have often facilitated the setting up of a common legal basis, including common values, on which the EU has then been able to elaborate more specific rules.' Analysis of the influence of the CoE on EU norms in various domains: Kolb, *The European Union and the Council of Europe*. See also Joris and Vandenberghe, 'The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows', 31: CoE conventions have been an important reference source for EU law in areas such as data protection, social policy and cooperation in justice and home affairs.

884 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ETS No 108 (Strasbourg, opened 28 January 1981, entered into force 1 October 1985), ratified by all the Member States and referred to in the Explanations to the CFR.

underlying principles of good administration in a recommendation dating back to 1977.[885] In the field of cooperation in criminal matters and the fight against terrorism, various EU norms have their origin in Council of Europe standards and were then developed further, both in terms of substance and procedures.[886] In the area of freedom, security and justice, UN instruments setting out standards applying to detention (detention of refugees and asylum seekers) inspired Council of Europe recommendations of the Committee of Ministers, which in turn influenced EU directives, which partly copied the substantive content or used it as a source of inspiration.[887] The *N* and *El Didri* cases cited above illustrate the cascade effect from the UN to the Council of Europe to the EU legal order.[888] Where can EDC standards be situated in this ongoing cascade of norm-setting?

885 Hofmann, Rowe and Türk, *Administrative law and policy of the European Union* 191, referring to CoE Committee of Ministers Resolution 77 (31) On the Protection of the Individuals in Relation to the Acts of Administrative Authorities (28 September 1977) (this instrument does not use the term 'good administration' explicitly but laid down its fundamental principles, such as the right to be heard, access to information, etc.). See also Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration (20 June 2007).

886 Cornu, 'The impact of Council of Europe Standards on the European Union' 126, with the example of Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism [2008] OJ L330/21, which is closely linked to CoE Convention on the Prevention of Terrorism CETS No 196 (Warsaw, opened 16 May 2005, entered into force 1 June 2007) (see Decision recital 9, and compare its Art 3 with Arts 5, 6 and 7 of this Convention). See also examples in Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World* 21, and Kolb, *The European Union and the Council of Europe*, comparing CoE standards in the fight against terrorism and EU action.

887 See, i.a., Case C-601/15 PPU *N* ECLI:EU:C:2016:85, View of AG Sharpston, para 69.

888 Other examples of EU norms influenced by CoE norms: Art 3 CFR, of which the principles were already included in the CoE Convention on Human Rights and Biomedicine (ETS 164) and additional protocol (ETS 168), as the Explanations specify; or the Community Charter of the Fundamental Social Rights of Workers (adopted by eleven of the Heads of State and Government at the European Council of Strasbourg on 8 and 9 December 1989), inspired by the ESC (but only as poor reflection of it).

2. Shared inspiration and cooperation to implement EDC standards

123 Ongoing cooperation within education policy

Article 220 TFEU in general, and Article 165(3) TFEU in particular, require that the EU and the Member States 'shall' cooperate with the Council of Europe, which is referred to as the competent international organisation in the field of education. EU legal instruments repeatedly call for reinforced cooperation and the development of synergies.[889]

The cooperation of EU institutions with the Council of Europe in setting and implementing EDC standards in practice confirms the shared EDC paradigm.

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889 I.a. Decision 1093/2012/EU of the European Parliament and of the Council of 21 November 2012 on the European Year of Citizens (2013) [2012] OJ L325/1, Art 6 and recital 24; EU Education Ministers and the Commissioner for Education, Culture, Youth and Sport, Paris Declaration on Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education (17 March 2015), last para; Erasmus+ Regulation 1288/2013, recital 20; Council Regulation (EU) No 390/2014 of 14 April 2014 establishing the 'Europe for Citizens' programme for the period 2014-2020 [2014] OJ L115/3, Art 7 (joint contributions may be supported by the programme). *De facto* cooperation takes place in the International Contact Group on citizenship and human rights education (set up in 2011), including the UN High Commissioner for Human Rights (OHCHR), UNESCO, the Council of Europe, the European Commission, and the European Union Agency for Fundamental Rights (FRA). On the relationship EU-CoE, see Quinn, 'The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?'; O De Schutter, 'The two Europes of human rights: the emerging division of tasks between the Council of Europe and the European Union in promoting human rights in Europe' (2008) 14 Columbia Journal of European Law 509; Joris and Vandenberghe, 'The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows'; Kolb, *The European Union and the Council of Europe*; T Streinz, 'Fraternal twins: the European Union and the Council of Europe' in H de Waele and J-J Kuipers (eds), *The European Union's emerging international identity: Views from the Global Arena* (Martinus Nijhoff 2013); Schmahl and Breuer, *The Council of Europe: Its Law and Policies*; and in general, Joint Declaration on co-operation and partnership between the Council of Europe and the European Commission (2001), CoE Compendium of Texts governing the relations between the Council of Europe and the European Union (2001); CoE iGuide, Committee of Ministers: Procedures and working methods (24 September 2018), IX, 5–1.

124 EU support for the implementation of the Charter on EDC/HRE

In 2012, the EU Commissioner responsible for Education, Culture, Multilingualism and Youth, Mrs. Androulla Vassiliou, wrote to 'actively support the implementation of the Charter' on EDC/HRE.[890] That year, the Commission and the Council of Europe jointly organised a conference on the implementation of the Charter (first review cycle).[891] Senior officials of the European Commission underscored its significance: Director General for Education and Culture, Mr. Jan Truszczynski, underlined that '[t]he importance of the Charter, in the EU context as well, is that it provides a solid basis for designing and implementing policies aimed at educating citizens to know, respect, and practice democratic values we cherish'.[892] For the 2017 Conference (second review cycle), Mr. Tibor Navracsics, EU Commissioner for Education, Culture, Youth and Sport, stated in his key message that cooperation with the Council of Europe is stronger than ever:

> Our values are not a given. They must be learned, understood and owned by every citizen. Democracy is more than a process. Democracy is a mentality, an ethos, a reflex. … Considering that today's education is tomorrow's society, I firmly believe there is not a better place to pro-

890 Commission/EACEA/Eurydice, Citizenship Education in Europe (2012), 3 (Foreword). Earlier, Commission Report Implementation of the 'Education & Training 2010' programme - Supporting document for the draft joint interim report on the implementation of the detailed work programme on the follow-up of the objectives of education and training systems in Europe SEC(2003) 1250 final: 'The Council of Europe's project on education for democratic citizenship is, moreover, actively supported by the Member States and the European Commission'.

891 Commission/EACEA/Eurydice, Citizenship Education in Europe (2012), 8; 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).

892 Mr Jan Truszczynski, Director General for Education and Culture in the European Commission, in 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), 20. See also Mr Pierre Mairesse, Director for Lifelong Learning in the Directorate General for Education and Culture: education for employment and education for citizenship are complementary, and both are necessary (ibid, 21).

> mote and pass on those values than families and schools—and no better vector than education to secure democracy.[893]

He cites as one of his responsibilities as Commissioner: '*Empowering* young people of all social and cultural backgrounds so that they can *participate fully in civic and democratic life*'.[894] In reports, evidence is given of the connectedness of the Council of Europe and the EU in the implementation of the Charter on EDC/HRE.[895]

Cooperating in order to implement is a form of reception of exogenic Council of Europe standards on EDC in the EU legal order, proving through action that the EU adheres to the EDC standards. The question is whether this cooperation is enough for the EU.[896]

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893 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 39 (emphasis added); in the follow-up to the Paris Declaration there is Erasmus+ funding for more than 1200 projects, setting up of a network of role models, and extending e-Twinning as the largest teachers' platform in the world to third countries.

894 <ec.europa.eu/commission/commissioners/2014–2019/navracsics_en> (emphasis added).

895 For strong EU commitment and action, see CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 39, declaration of Mr Navracsics, EU Commissioner for Education. In 2016, a huge number of member states reported to cooperate with the CoE (93%) and with the EU (90%) for the implementation of the Charter on EDC/HRE (in line with its Section IV). Reporting on joint projects, see ibid, p 73–74. Same trend earlier, Kerr, *Implementation of the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education: Final Report*, p 44. On EU-CoE cooperation on citizenship education in the eighties and nineties, see Naval, Print and Veldhuis, 'Education for Democratic Citizenship in the New Europe: context and reform' (also on the European dimension in education); B Hoskins and others, *Analytic Report: Participatory Citizenship in the European Union (Report 2)* (2012), p 20 (reference to the Charter on EDC/HRE), p 41 (the same experts are active in EU as in CoE context, the same materials used). In the EU, many good practices on education for democracy rely on Council of Europe projects, see J Krek and others, *Good Practices Report: Participatory Citizenship in the European Union (Report 3)* (2012).

896 E.g. CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, p 22, Recommendation 7 to Support and encourage international co-operation: 'Although co-operation among countries in the field of EDC/HRE has increased, opportunities for such cooperation are limited and do not meet the demand. Such co-operation ought to be further reinforced'. This is all the more true for the EU.

125 Joint programmes

Through several joint programmes of the Commission and the Council of Europe, EDC standards have become part of EU and Member States' practice. Since it has more means, the EU often contributes the larger part of the funding of the joint projects.[897] In the joint programme 'Human Rights and Democracy in Action', launched in 2013, the Charter on EDC/HRE provides a framework for this cooperation.[898] The programme supports citizenship and human rights education in participating countries and, since 2016, has also been helping to pilot the Council of Europe RFCDC, designed to implement the Charter on EDC/HRE.

126 Active citizenship: ACCI and CCCI indicators and Eurydice surveys

Questioned by an MEP on steps taken by the EU in the field of citizenship education, the Commission pointed to civic competences being a priority in the ET 2020 strategic framework, to relevant indicators and to Eurydice reports on citizenship education.[899]

The Active Citizenship Composite Indicator (ACCI) and the Civic Competences Composite Indicator (CCCI) were developed in cooperation between the EU and the Council of Europe in order to measure active citi-

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897 Kolb, *The European Union and the Council of Europe* 43 (comparing budgets and persons working for the EU and CoE). See Memorandum of Understanding between the Council of Europe and the European Union (2007), paras 7–8 (enhanced cooperation), also Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide [2014] OJ L77/85.

898 CoE/EU Joint Programme- Human Rights and Democracy in Action- Pilot Projects Scheme; also CoE Committee 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; CoE, *Council of Europe Strategy for the Rights of the Child (2012-2015): Implementation report*, p 17; CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 73. Most joint programs aim at the promotion of democracy, rule of law and respect for human rights, see Joris and Vandenberghe, 'The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows', 23–25.

899 Written questions by Members of the European Parliament and their answers given by a European Union institution [2014] OJ C208/1. Referral also to the Jean Monnet action 'Learning EU at School', the joint programme on EDC and HRE, the campaign of the European Year of Citizens 2013, and the Youth in Action programme (non of these comprehensively define citizenship education).

zenship.[900] The composite indicators confirm the complexity of citizenship and citizenship education. They add precise information to components of the EDC concept in the Charter on EDC/HRE.

The concepts which Eurydice[901] uses to study citizenship education are inspired by the EDC project of the Council of Europe. The 2005 survey refers to the 2002 Recommendation on education for democratic citizenship and defines citizenship education as:

> school education for young people, which seeks to ensure that they become active and responsible citizens capable of contributing to the development and well-being of the society in which they live. While its aims and content may be highly diversified, three key themes are of particular interest. Citizenship education is normally meant to guide pupils towards (a) political literacy, (b) critical thinking and the development of certain attitudes and values and (c) active participation.[902]

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900 See, i.a., CoE Committee of Ministers, Terms of reference of the Ad hoc Advisory Group on Education for Democratic Citizenship and Human Rights (ED-EDCHR) (5 February 2007) CM/Del/Dec(2007)985/7.2; B Hoskins and R Deakin Crick, *Learning to Learn and Civic Competences: different currencies or two sides of the same coin?* (European Commission, JRC, CRELL, 2008); B Hoskins and M Mascherini, 'Measuring Active Citizenship through the Development of a Composite Indicator' (2009) 90 Social Indicators Research 459; M Mascherini, AR Manca and B Hoskins, *The characterization of Active Citizenship in Europe* (European Commission, JRC, CRELL, 2009); Hartley and Huddleston, *School-community-university partnerships for a sustainable democracy: Education for Democratic Citizenship in Europe and the United States of America* 53; B Hoskins, M Saisana and C Harrison Villalba, *The 2011 Civic Competence Composite Indicator (CCCI-2): Measuring Young People's Civic Competence across Europe based on the IEA International Citizenship and Civic Education study* (Publications Office of the European Union, 2012). See also 4 reports of the Institute of Education, University of London, commissioned by the European Commission, Europe for Citizens Programme, 2012: Hoskins and others, *Contextual Analysis Report: Participatory Citizenship in the European Union (Report 1)*; Hoskins and others, *Analytic Report: Participatory Citizenship in the European Union (Report 2)*, pp 47, 56, 58, 60 (reference to education for democratic citizenship and suggestion of closer collaboration with the CoE to face challenges); Krek and others, *Good Practices Report: Participatory Citizenship in the European Union (Report 3)*; B Hoskins and D Kerr, *Final Study Summary and Policy Recommendations: Participatory Citizenship in the European Union (Report 4)* (2012).

901 Text to n 35.

902 Commission/EACEA/Eurydice, Citizenship Education at School in Europe (2005), p 10 (with description of attitudes and values). Several references to the CoE, i.a. p 9 (with reference to K O'Shea, 'A Glossary of terms for Education for Democratic Citizenship: Education for Democratic Citizenship 2001-2004,

The 2012 Eurydice report relies on the same conceptual framework.[903] Citizenship education encompasses the narrower concept of 'civic education', which is restricted to 'knowledge and understanding of formal institutions and processes of civic life (such as voting in elections)'.[904] Citizenship education 'is a broad concept, which encompasses not only teaching and learning in the classroom but also practical experiences gained through school life and activities in wider society.'[905] Interestingly, Eurydice observes that its 2012 report on citizenship education derives from an evolved concept of citizenship, 'acknowledging the fact that it goes far beyond the simple legal relationship between people and the state'.[906] The notion of 'active citizenship' is central, promoted at EU level by the Centre for Research on Education and Lifelong Learning.[907] Hoskins emphasises that active citizenship depends on explained citizenship: 'the evidence suggests that the main driver to enhance participatory forms of citizenship is learning'.[908] I would add, if citizenship is learned citizenship, then EU citizenship should be learned as well. Active citizenship is defined as 'partici-

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Developing a Shared Understanding' CoE DGIV/EDU/CIT (2003)29; p 17 (referral to CoE Recommendation Rec(2002)12 of the Committee of Ministers to member states on education for democratic citizenship (16 October 2002)); p 69 (tables based on All-European Study on Education for Democratic Citizenship Policies (CoE 2005), 34–42).

903 Commission/EACEA/Eurydice, Citizenship Education in Europe (2012), p 8: 'citizenship education refers to the aspects of education at school level intended to prepare students to become active citizens, by ensuring that they have the necessary knowledge, skills and attitudes to contribute to the development and well-being of the society in which they live.'.

904 Ibid, 9, with reference to W Schulz and others, *ICCS 2009 International Report: Civic knowledge, attitudes, and engagement among lower-secondary school students in 38 countries* (International Association for the Evaluation of Educational Achievement IEA, 2010), p 22. This last concept is not used as such in the ICCS 2016 framework.

905 Ibid, 9. Further 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); Commission/EACEA/Eurydice, Citizenship Education at School in Europe (2017).

906 Ibid, 8.

907 Indicator-based evaluation and monitoring of education and training systems towards the Lisbon Agenda and the EU2020 objectives (<crell.jrc.ec.europa.eu/>).

908 Hoskins and others, *Analytic Report: Participatory Citizenship in the European Union (Report 2)*, p 75. See also Hoskins and others, *Contextual Analysis Report: Participatory Citizenship in the European Union (Report 1)*; Hoskins and Kerr,

pation in civil society, community and/or political life, characterised by mutual respect and non-violence and in accordance with human rights and democracy'.[909] It is regrettable if these (indeed crucial) aspects of citizenship education were considered to fall outside any *legal* relationship. An in-depth, well understood and well grounded, legal approach to citizenship includes more aspects of active citizenship than experts in the education field sometimes presume.[910]

The 2017 Eurydice report on citizenship education continues to draw on the work of the Council of Europe and refers to EDC standards within its conceptual framework: the Charter on EDC/HRE and the RFCDC.[911]

127 Citizenship education as a crisis measure

The challenges of radicalisation leading to violent extremism have brought citizenship education to the fore. In the ensuing wave of intensified educational action by the EU, the similarities with the substance and objectives of EDC standards are even more striking than before. Several actors have adopted new instruments.

Final Study Summary and Policy Recommendations: Participatory Citizenship in the European Union (Report 4): citizenship is learnt citizenship. See comparable: Losito B and others, Young People's Perceptions of Europe in a Time of Change: IEA International Civic and Citizenship Education Study- 2016 European Report (2017).

909 B Hoskins and others, *Measuring active citizenship in Europe* (CRELL Research Paper 4, European Communities 2006), 10, developed by the research network on 'Active Citizenship for Democracy'. Confirmed in ICCS 2016 (n 550).

910 E.g. § 170 ff on foundational values and participation (Arts 2, 3, 9–11 TEU); § 176 ff. See also Introduction (a Dworkinian approach to law includes underlying principles and values).

911 Commission/EACEA/Eurydice, Citizenship Education at School in Europe (2017), 18, 23, 25, 48, 134. Citizenship education is understood 'as the subject area that is promoted in schools with the aim of fostering the harmonious coexistence and mutually beneficial development of individuals and of the communities they are part of. In democratic societies citizenship education supports students in becoming active, informed and responsible citizens, who are willing and able to take responsibility for themselves and for their communities at the local, regional, national and international level.' To reach these objectives, 'citizenship education needs to help students develop knowledge, skills, attitudes and values in four broad competence areas: 1) interacting effectively and constructively with others; 2) thinking critically; 3) acting in a socially responsible manner; and 4) acting democratically.' (p 9). 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).

In March 2015, in response to terrorist attacks, the *EU Ministers of Education and the Commissioner for Education* adopted the Paris Declaration on Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education.[912] They pointed to synergies with ongoing work in the Council of Europe 'in the area of civic education and intercultural understanding'. Inclusive education should aim to promote citizenship and critical thinking. Action for citizenship education can be supported under the Erasmus+ programme.[913] In order to prevent radicalisation, the *Council and the Commission* added new priorities to the ET 2020 strategic framework, emphasising inclusive education, equality, equity, non-discrimination and the promotion of civic competences.[914] The *Council and the Representatives of the Governments* agreed that human rights and citizenship education represent powerful means of promoting common values and invited the Member States to promote citizenship education and to enhance social and civic competences.[915] In a 2016 Communication, the *Commission* stated that in the long run, 'high-quality education

912 EU Education Ministers and the Commissioner for Education, Culture, Youth and Sport, Paris Declaration on Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education (17 March 2015).

913 Critical thinking as a skill is emphasised in the citizenship and civic competences mentioned in Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 24 February 2016 on promoting socio-economic development and inclusiveness in the EU through education: the contribution of education and training to the European Semester 2016 [2016] OJ C105/1, and Council Conclusions of 30 May 2016 on developing media literacy and critical thinking through education and training [2016] OJ C212/5. 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).

914 Council Conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training (ET 2020) [2009] OJ C119/2; Joint Report of the Council and the Commission on the implementation of the strategic framework for European cooperation in education and training (ET 2020) — New priorities for European cooperation in education and training [2015] OJ C 417/25 (see the Strategic Framework for European Cooperation on Education and Training ('ET 2020'), the renewed framework for European cooperation in the youth field (2010–2018), the EU Work Plan for Sport (2014–2017) and the Culture Work Plan (2015–2018).

915 Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the prevention of radicalisation leading to violent extremism [2016] OJ C467/3: Invitation to Member

from pre-school onward remains the best safety net against social exclusion, which can be for some a factor in radicalisation'.[916] Existing tools will be further implemented to support teachers, i.a. the RFCDC. The Commission proposed 'a Council Recommendation to enhance social inclusion and promote Europe's fundamental values through education and non-formal learning'.[917] The Commission asked for the possibility of establishing 'civic education courses in secondary schools' to be explored, in order to give third country nationals an understanding of the laws, culture and values of the receiving society. Member States are encouraged to '[o]rganise civic orientation programmes for all third country nationals as a way to foster integration into the host society and promote the understanding and respect of EU values'.[918] By a Decision of 2017, the Commission set up an Expert Group on radicalisation and referred to Council conclusions on

States to promote citizenship education. No definition, but call on Commission to work on a toolkit to develop democratic resilience, media literacy, tolerance, critical thinking, and conflict-resolution skills. Creation of a Working Group on Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education (scope of Paris Declaration), including experts of the Council of Europe, and development of online compendium of good practices. Further Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on Inclusion in Diversity to achieve a High Quality Education For All - Council Conclusions (17 February 2017).

916 Commission Communication supporting the prevention of radicalisation leading to violent extremism COM(2016) 379 final, p 9.

917 Ibid, p 11. See Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching [2018] OJ C195/1. Further on cooperation Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the prevention of radicalisation leading to violent extremism [2016] OJ C467/3; Commission Communication 'Eight progress report towards an effective and genuine Security Union' COM(2017) 0354 final: 'Education plays a key role in preventing radicalisation, and the Commission has taken a series of steps to implement the Paris Declaration'.

918 Commission Communication 'Action Plan on the integration of third country nationals' COM(2016) 377 final, point 4.1.5. Emphasis added. See already Commission Communication 'A Common Agenda for Integration - Framework for the Integration of Third-Country Nationals in the European Union' COM(2005) 389 final: 'civic orientation in introduction programmes and other activities for newly arrived third-country nationals with the view of ensuring that immigrants understand, respect and benefit from common European and national values'. See also Case C-579/13 *P and S* ECLI:EU:C:2015:369, paras 47–48 on the usefulness of a civic integration examination for third country nationals; the ECJ ruled that Dir 2003/109, which aims at the integration of third-

media literacy and critical thinking.[919] In these conclusions, the *Council* recalled Article 2 TEU and invited the Member States to '[e]ncourage sufficient attention to be paid to developing media literacy and critical thinking in education and training at all levels, including through citizenship and media education'.[920] Social and civic competences 'have a clear link to critical thinking, ensuring that people can *value diversity* and respect the views and values of others'.[921] Thus, essential components of EDC standards appear (such as c-2 and critical thinking).[922]

That crises favour increased focus on citizenship education is a matter of sociological observation.[923] Yet, this should not conceal the need to pursue citizenship education on a more permanent basis. Preparing citizens for life in a democratic society and in respect of fundamental rights should be a continuous and lasting objective.

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country nationals who are settled on a long-term basis in the Member States, does not preclude Dutch legislation imposing the obligation to pass a civic integration examination, testing language proficiency and knowledge of the Netherlands society. It was not contrary to the principle of equal treatment (nationals were not required to pass such an examination, but the situations were not comparable). See also Opinion of AG Spunar, paras 93–94: The Council adopted Common Basic Principles for Immigrant Integration Policy in 2004 (confirmed by the Stockholm Programme), stating that 'basic knowledge of the host society's language, history and institutions is indispensable to integration and enabling immigrants to acquire this basic knowledge is essential to successful integration'. Mutatis mutandis applicable to the EU citizen in the EU society? More in E Bribosia and S Ganty, 'Arrêt Dogan: quelle légalité pour les tests d'intégration civique?" (2014) 22 Journal de droit européen 378.

919 Commission Decision of 27 July 2017 setting-up the High-Level Commission Expert Group on radicalisation [2017] OJ C252/3.

920 Council Conclusions of 30 May 2016 on developing media literacy and critical thinking through education and training [2016] OJ C212/5, paras 1 and 3. See alto text to n 780 (mode 3). Further Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the role of the youth sector in an integrated and cross-sectoral approach to preventing and combating violent radicalisation of young people [2016] OJ C213/1.

921 'Against this background, also notes that'. My emphasis.

922 See i.a. CoE Recommendation Rec(2002)12 of the Committee of Ministers to member states on education for democratic citizenship (16 October 2002), appendix para 2.

923 See also questions raised in France after the *Charlie Hebdo* attacks (e.g. <eduscol.education.fr/histoire-geographie/actualites/actualites/article/attentat-contre-icharlie-hebdoi-une-attaque-contre-la-liberte-la-democratie-et-la-republi>).

128 *Intermediate conclusion: partial normative incorporation of EDC standards*

The analysis of endogenic norms related to citizenship education has shown that normative reception of EDC standards occurs essentially in modes 4 and 5. There is a link in EU primary law between democracy, citizenship and education and EU secondary law contains provisions corresponding to the essential substance of EDC standards (mode 4) or—more generally—drawing inspiration from them (mode 5). Moreover, EU education policy occurs in close cooperation with the Council of Europe, including as regards the implementation of the Charter on EDC/HRE. Finally, EDC objectives are even more prominent in more recent EU legal instruments in response to the challenges of radicalisation. To sum up, the normative reception of EDC standards in EU law is fragmented, but convincing. Endogenic provisions relating to citizenship education partially incorporate the substance of the EDC standards of the Council of Europe and are drawn up on the basis of the EDC paradigm.

Before the sixth mode of reception—interpretation of EU law in the light of exogenic standards—is examined at close quarters, the reader may have a question which I will answer first.

129 *Why has no endogenic legal instrument on citizenship education been chosen as a prism through which to look at the position of EU citizens?*

If the EU has its own endogenic norms on citizenship education, such as the 2006 or 2018 Recommendation on key competences for lifelong learning, why have the EDC standards of the Council of Europe been chosen as a prism through which to look at the position of the EU citizen in this study? What value do they add?

Firstly, the Council of Europe was established in 1949 with the core mission to promote human rights, democracy and the rule of law. EDC is an integral and central part of this mission. The Council of Europe thus has a longstanding tradition in this field (as shown by the genesis of the Charter on EDC/HRE described above) and has developed an impressive set of EDC standards and materials. In contrast, the EU was established in 1957 with a very different mission as the European Economic Community. Competences in education were only inserted into the Treaties in 1992. They are lateral and limited. As a result, EU action on citizenship education is more recent, fragmented, and peripheral.[924] The EDC aspects highlighted in the EU legal instruments cited should not create the false

924 See Part four.

impression that EU law includes a comprehensive set of instruments on citizenship education.[925] In such an important field as democracy, the rule of law and human rights, it is wise for the EU to be guided by an organisation founded with those very goals in mind (in line with Articles 222 and 165(3) TFEU).

Secondly, as set out in Part one, the Charter on EDC/HRE reflects a European consensus carrying great weight. It limits the margin of appreciation of member states and has important strengths, including the link with UN standards and the right to education in international agreements.

Finally, the Council of Europe standards on EDC are neutral in the Eurosceptic/Europhile debate. A crucial argument in favour of using the Charter on EDC/HRE as a prism for academic analysis of EU citizenship is its objectivity as a Council of Europe standard.[926] Because it does not originate in the EU institutions, it cannot be distrusted on account of a 'pro EU' bias.[927] EU instruments do not focus on a neutral concept of citizenship education, but, as should be expected, tend to promote the EU aspects of it, such as closeness to the EU, or an EU identity.[928] When describing knowledge, skills and attitudes relating to civic competences, the 2006 Recommendation on key competences adds at a stroke in several provisions that they are applicable to local, regional, national, European and international levels.[929] The 2018 Recommendation, too, refers to 'constructive

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925 The paragraph on citizenship competence in the Annex to the 2018 Recommendation on key competences for lifelong learning is at present one of the most relevant provisions.

926 See also the ECtHR principle in n 696.

927 EU institutions promoting EU learning: see i.a. European Parliament Resolution of 12 April 2016 on Learning EU at school [2018] OJ C58/57; earlier European Parliament Resolution of 26 September 2006 on initiatives to complement school curricula providing appropriate support measures to include the European dimension [2006] OJ C306E/100, para 1: 'Considers that all education systems should ensure that their pupils have by the end of their secondary education the knowledge and competences they need, as defined by their respective educational authorities, to prepare them for their roles as citizens and as members of the European Union'.

928 See i.a. Commission Communication on 'Strengthening European Identity through Education and Culture' COM(2017) 673 final; Commission Erasmus Proposal COM(2018) 367 final, Art 3(1): to the general objectives of the Erasmus Programme belongs the strengthening of European identity. Also Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching [2018] OJ C195/1.

929 Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning, Annex (6)(B).

participation in community activities, as well as in decision-making at all levels, from local and national to the European and international level'.[930] The placing of all these levels on an equal footing has been criticised for deflating the national level and inflating the European level.[931] Comparing the Council of Europe and the EU approach to citizenship education, scholars observe that the Council of Europe concentrates on education content, while the EU focuses on clarifying the benefits of European citizenship and supportive acceptance of EU institutions.[932] Because of its widespread international acceptance, the Council of Europe Charter on EDC/HRE constitutes an external and independent standard on citizenship education, which suits an academic analysis of the issue of citizenship education for the EU citizen.

The components of the Charter are without bias and based on universal values. They will be applied as neutral parameters in Part three, to explore their significance for citizens in the EU (as to the substance). But first, to complete the analysis of the effects of the Charter on EDC/HRE in the EU legal order (as to the form), I will explore to what extent the Charter on EDC/HRE should be taken into account in the interpretation of EU law.

C Interpretation of EU law taking account of exogenic norms (mode 6)

1. General

130 Interpretation methods

In the modes of reception described so far, case law illustrates that the ECJ gives effect to exogenic norms by using them in the interpretation and application of EU law. Interpretation of EU law thus operationalises the normative reception of exogenic norms in the EU legal order. This phe-

930 Council Recommendation of 22 May 2018 on key competences for lifelong learning, Annex (6), skills for citizenship competence.

931 Debate in workshop: K Grimonprez, 'Conflicting ideas of Europe: the role of values in citizenship education' (European Conference NECE, Networking European Citizenship Education, '1914-2014: Lessons from History? Citizenship Education and Conflict Management', Vienna, 16-18 October 2014).

932 P Schreiner (ed) *'Education for Democratic Citizenship' in the Context of Europe* (CSC/CEC 2013) 24; see also HJ Abs und S Werth in R Hedtke and T Zimenkova (eds), *Education for Civic and Political Participation: A Critical Approach* (Routledge 2013).

nomenon will be examined with special emphasis on its relevance for the effects of EDC standards within the EU legal order.

To ensure that 'the law' is observed (Article 19 TEU), the first step for the ECJ is a textual interpretation of EU law, including the endogenic norms incorporating the substance of, or drawing inspiration from, EDC standards. Next, where there is no clear and precise provision in all official languages, the ECJ may use contextual and teleological methods of interpretation (classic methods in line with the Vienna Convention on the Law of Treaties[933]).

The ECJ stated in *Cilfit:*

> every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.[934]

On a historical interpretation, the *travaux préparatoires* are increasingly important.[935] They sometimes refer to exogenic norms.

Exogenic norms may furthermore play a role in ensuring interpretation in good faith and in the spirit of sincere cooperation. In general, a consistent interpretation with international law is aimed at, yet only as far as possible (red line): the autonomy of the EU legal order must be respected. In addition to converging lines of case law, diverging lines of case law are

933 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Arts 31–32. See text to n 790.

934 Case 283/81 *Cilfit* ECLI:EU:C:1982:335, para 20. See J Mertens de Wilmars, 'Réflexions sur les méthodes d'interprétation de la Cour de justice des Communautés européennes' (1986) 22 Cahiers de Droit européen 5; Lenaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice'.

935 To the extent that the wording of EU law is unclear, the ECJ analyses the decision-making process leading to EU law. E.g. Case C-370/12 *Pringle* ECLI:EU:C:2012:756, paras 135–136, 138–141; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625, paras 59, 66, 70. In line with the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 32. See Lenaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', 14, 16, 22, 24–31. Earlier: S Schenberg and K Frick, 'Finishing, Refining, Polishing: On the Use of Travaux Préparatoires as an Aid to the Interpretation of Community Legislation' (2003) 28 ELRev 149.

apparent, where interpretation differs from exogenic norms due to the specific objectives or features of EU law.[936]

What are the implications for EDC standards of these general reflections on the interpretation of EU law in the light of exogenic norms?

2. Taking account of the Charter on EDC/HRE in the interpretation of EU law

Textual, contextual and teleological interpretation

131 Interpretation in the light of Council of Europe EDC standards

Can the second anchor point of the study—'Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship' (Article 20 TFEU)—be interpreted in the light of EDC standards, taking the Charter on EDC/HRE as a reference instrument? The partial normative incorporation of EDC standards into EU law could thus be reinforced by the interpretation-based mode. The two reflections expressed in the analysis of case law in mode 4 re-emerge.[937] To what extent do Council of Europe recommendations on EDC fall under the converging or the diverging line of case law? How can EDC standards have effects in the broader context of EU law?

Several Treaty provisions on citizenship, democracy, and education are broadly drafted and textual interpretation does not suffice to determine their content (*traité cadre*).[938] Applying the ECJ's statement of principle in *Cilfit* quoted above, placing EU law provisions on citizenship, democracy, and education in their *context* and interpreting them in the light of EU law as a whole, will amplify the effects of EDC standards incorporated in EU law. The *objectives* of EU law and its state of *evolution* also justify taking account of EDC standards in the interpretation of EU law. A closer look follows now at the first two elements of the *Cilfit* citation: context and objectives. The state of evolution has been considered in the previous sections: not only the growing impact of the EU in ever more policy fields

936 See conclusion to §111 .

937 §§ 112 113 .

938 Lenaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', 16 'traité cadre', 20 'a systematic interpretation enables the EU law provision in question to be in harmony with the context in which it is placed'.

and on the daily lives of citizens,[939] but also the recent challenges of radicalisation support an interpretation in the light of EDC standards.

132 Contextual interpretation

A contextual or systematic interpretation is premised on the idea of a rational legislator who has established a consistent legal order.[940] Each provision of EU law must be interpreted in harmony with the general scheme of the Treaties and with the context in which it is placed.

The general scheme of the Treaties includes the referential role for the Council of Europe (Article 220(1) TFEU). Article 165(3) TFEU requires that in the field of education cooperation is fostered in particular with the Council of Europe, the competent international organisation. With Article 165(3) TFEU in mind, various Council of Europe instruments cited in the normative context will be pertinent, i.a. for the interpretation of EU Treaty concepts such as 'quality education' or 'the European dimension in education' (Article 165(1) and (2) TFEU).

A contextual reading must also have regard to the general scheme of the Treaties embracing the EDC paradigm. This follows from a combined reading of Articles 10(3) TEU and 165(2) TFEU (linking democracy-citizenship-education). Other EU primary law provisions on democracy (Articles 9–12 TEU) and on citizenship (Articles 20–25 TFEU and 39–46 CFR) may be interpreted in the light of this paradigm.

Next, from Article 24(1)(c) of the UN Convention on the Rights of Persons with Disabilities (an integral part of EU law after accession), it can be inferred that the EU accepts that education shall be directed to effective participation in a free society, which is precisely the aim of EDC standards.[941]

There must also be consistent interpretation with the above-mentioned secondary law which partially incorporates EDC standards. The endogenic norms drawn up in the EDC paradigm in modes 4 and 5 are part of the EU legal order and together form the context for consistent interpretation of provisions on EU citizenship and democracy.

Furthermore, the interpretation of provisions on citizenship, democracy, and education in EU law in the light of EDC standards of the Coun-

939 Introduction and Part three.

940 Difference internal-external contextual interpretation, see Lenaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', 16. See for internal consistency, Art 7 TFEU. Structure of the Treaties, as in *Cilfit*.

941 Text to n 630.

cil of Europe is consistent with the EU's commitments in the Memorandum of Understanding recognising the Council of Europe as a benchmark for democracy. The Council of Europe and the EU will cooperate in building a democratic culture in Europe, in particular through promoting EDC and HRE.[942]

It is legitimate for the judge to take the Council of Europe origins of EU norms into account when analysing the decision-making process leading to the adoption of the norm.[943] As in other fields, the Court may interpret EU law with regard to citizenship education historically, on the basis of preparatory instruments, thus taking account of EDC standards.[944]

133 The value of democracy

The EU primary law context includes the provisions on foundational values (Articles 2 and 49 TEU), values shared with the Council of Europe.

The fact that 'democracy' is one of the founding values of the EU (Article 2 TEU) has normative implications which are reflected in EDC standards. Article 2 TEU states that the values to which it refers are 'common to the Member States'. Equally 'common to the Member States' is the association between democracy and education: democracy presupposes education for democracy. Democracy cannot be seen in isolation from the wide European consensus on EDC, as evidenced in the many Council of Europe instruments. The 2002 Recommendation on EDC affirmed that EDC is fundamental to defending the values of democracy, human rights, and the rule of law.[945] If democracy and human rights belong to the core nucleus of shared values[946], the EDC and HRE associated with them belong to the core nucleus as well.

Article 49 TEU provides that only a European State which 'respects' the values of Article 2 TEU and 'is committed to promoting them', can apply to be a member of the EU. This respect for, and commitment to promoting, the values of democracy and human rights must be interpreted in the

942 Paras 10 and 36; CoE Third Summit of Heads of State and Government, The Declaration and the Action Plan (Warsaw, 16-17 May 2005), Action plan, III, 3.

943 Lenaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', 16–17.

944 Text to n 848 and 957. See i.a. *RTL* (§ 108). To define for instance 'food safety', 'public health', 'handicap' or 'public interest', the ECJ wells in non-binding sources, i.a. text to n 737 (*Codex Alimentarius*).

945 CoE Recommendation Rec(2002)12 of the Committee of Ministers to member states on education for democratic citizenship (16 October 2002), para 1.

946 Lenaerts and Gutiérrez-Fons, 'The Role of General Principles of EU Law', 1663.

light of EDC/HRE standards. Promoting the value of democracy makes no sense without providing for EDC, based on international standards. What is expected of new Member States must, logically, be expected of existing Member States. Just as the value of the rule of law in Article 2 TEU has been interpreted by the European Parliament, the Commission and the ECJ (General Court)in the light of Council of Europe standards, including a Recommendation of the Committee of Ministers on judges' independence, efficiency and responsibilities, so too should the value of democracy in Article 2 be interpreted in the light of Council of Europe standards, including the Recommendation of the Committee of Ministers to member states on the Charter on EDC/HRE.[947] The substance of the norms of the Recommendation CM/Rec(2010)12 on judges' independence, efficiency and responsibilities is set out in the appendix, like those of the Charter on EDC/HRE. Admittedly, their content is in general more precise than that of the Charter on EDC/HRE. Nevertheless, there can be no doubt as to the essential principles, which are explained in a sufficiently clear way.[948]

The legal effects of the values in Article 2 TEU are increasingly important. Article 2 TEU was cited in an Order of the Court (Grand Chamber) imposing a periodic penalty payment on Poland in the context of interim measures in infringement proceedings concerning forest management (rule of law).[949] The Commission started the procedure under Article 7 TEU for determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, as well as infringement procedures.[950] In *Wightman*, the ECJ underlined the importance of the values of liberty and democracy, part of the very foundations of the EU legal order. Not allowing a Member State (the UK) to reverse its decision to withdraw would be inconsistent with the aims and the values expressed in Article 1 and 2 TEU.[951]

134 Democratic principles pervading EU law

Title II of the TEU refers to 'democratic principles' in the plural ('Provisions on democratic principles'). In the EU legal order, these democratic principles are not limited to the codification in Articles 9–12 TEU and can-

947 Text to n 765 ff.
948 See § 64 ('On the other hand').
949 Case C-441/17 R *Commission v Poland, Order of the Court* ECLI:EU:C:2017:877, para 102. See also the crucial role of Art 2 in Case C-64/16 *Juízes Portugueses* ECLI:EU:C:2018:117; and in Case C-216/18 PPU *LM* ECLI:EU:C:2018:586.
950 Text to n 769.
951 Case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999, paras 61–63.

not be interpreted narrowly.[952] Democracy as a value is expressed in terms of democratic principles, which are further developed and codified in rules in secondary legislation. EDC standards are part of those democratic principles, giving substance to the value and contributing to its realisation. EDC standards contribute to making the democratic principles effective.[953]

The provisions of the Treaties and the CFR are to be interpreted in the light of their preambles. In the preamble to the TEU, the Member States confirm 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'. In the preamble to the CFR, they proclaim that the Union 'is based on the principles of democracy and the rule of law' and that the Union 'places the individual at the heart of its activities'. It would be contrary to the general scheme of the Treaties to leave the individual—at the heart of the activities—without EDC.

ECJ case law repeatedly confirms the importance of the principle of democracy: 'participation reflects a fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly'.[954] In *Commission v Germany*, the ECJ stated that 'the principle of democracy forms part of European Community law', expressly enshrined in the Treaty as one of the foundations of the EU; '[a]s one of the principles common to the Member States, it must be taken into consideration when interpreting acts of secondary law'.[955] In other case law, the ECJ uses the principle of democracy as a ground of

952 On the concept of 'principles', see Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value', 460: 'A principle is a norm (understood in a broad sense) that shows a certain degree of inherent structural generality in the sense of an indeterminate, abstract, programmatic, non-conclusive or orientative character. Notwithstanding subsequent codification, principles are frequently unwritten'. See also Tridimas, *The General Principles of EU Law*, 1; A von Bogdandy, 'Founding Principles' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, vol 8 (2nd edn, Hart Beck Nomos 2010).

953 Further Part three.

954 Case 138/79 *Roquette Frères* ECLI:EU:C:1980:249, para 33; Case 139/79 *Maizena v Council* ECLI:EU:C:1980:250, para 34; Case C 300/89 *Commission v Council (Titanium dioxide)* ECLI:EU:C:1991:244, para 20; Case C-155/07 *Parliament v Council* EU:C:2008:605, para 78. See also Joined Cases C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461, paras 303–304. Further K Lenaerts, 'The principle of democracy in the case law of the European Court of Justice' (2013) 62 International and Comparative Law Quarterly 271.

955 Case C-518/07 *Commission v Germany* ECLI:EU:C:2010:125, para 40, 51.

legality control of the acts of the institutions.[956] The principle of democracy pervades EU law. It should be interpreted in the light of EDC standards.

135 Teleological interpretation of EU legislation on education

EDC standards should be taken into account when interpreting EU law provisions on education teleologically, especially when they share objectives and the EU provisions were drafted in the period during which the Council of Europe was taking action in the same field, following the reasoning in *RTL*, *Humanplasma* and *N* in mode 4.

On the basis of a teleological and historical interpretation, the provisions on social and civic competences in the 2006 Recommendation on key competences for lifelong learning, should be interpreted in the light of the 2002 Recommendation on education for democratic citizenship, i.a. having regard to the preparatory works.[957] It must be admitted that uncertainty may arise as to how far the autonomy of the EU plays a role. Specific EU objectives deviating from Council of Europe objectives may lead to a divergent interpretation of––at first sight––comparable norms, as in *Commission v UK* on transfrontier television.[958] Together with the general objectives shared with Council of Europe instruments on EDC, the Recommendation on key competences has its own specific objectives. It recognises education in its dual role, social and economic, but the economic objectives seem predominant: the first aim mentioned in the preamble of the Recommendation on key competences is to respond to globalisation and the shift to knowledge-based economies (Lisbon European Council of March 2000).[959] Yet, I think that these economic objectives do not imply that the norms on civic and social competences should be interpreted as being at variance with EDC standards. On the contrary, durable economic prosperity can only be achieved in a society of mature citizens, aware of their rights and responsibilities, who value diversity and participate

956 See Case C-409/13 *Council v Commission* ECLI:EU:C:2015:217, paras 37, 96, 107: the ECJ dismissed the action for annulment of the Commission's withdrawal of a proposal; the Commission had not infringed 'the principle of democracy enshrined in Art 10(1) and (2) TEU' (principle of democracy as a ground for review of legality under Art 263 TFEU). Other case law on democracy in Part three.

957 Text to n 848.

958 N 795.

959 Presidency Conclusions of the Lisbon European Council of 23 and 24 March 2000.

actively in democratic life at various levels. An interpretation which converges with Council of Europe norms is therefore appropriate. The objectives of the 2018 Recommendation on key competences for lifelong learning require an interpretation in the light of the 2010 Recommendation on the Charter on EDC/HRE. Moreover, the preamble of the 2018 Recommendation refers to the RFCDC. Nevertheless, the issue of autonomy will be kept in mind when applying the Charter on EDC/HRE to the EU citizen.

EDC standards should also be taken into account when interpreting the Erasmus+ Regulation. Again, there may be doubts about a fully convergent interpretation because of the economic rationale. The general objective of the Erasmus+ Regulation is to contribute to the achievement of the Europe 2020 strategy for growth. The focus of the ET 2020 strategic objectives (European cooperation in education and training) is not citizenship education.[960] However, in the 2015 response to radicalisation, new priorities were added which did relate to citizenship education.[961] Mostly, the Erasmus+ Regulation shares the essential objectives of the Council of Europe's norms on EDC, i.e. promoting active citizenship, participation in democratic life, and European values.[962] Respect for the specific objectives of the EU should not therefore lead to a divergent interpretation, leaving EDC standards aside as some alien element.

136 EDC standards contribute to realising several EU objectives

EDC standards are fully consistent with several EU objectives. Accordingly, and in line with *Cilfit*, it is legitimate to take them into account

960 Art 4 (a) (b) and recital 5. Strategic objective 3 is not addressed to the population in general, but focuses on early school leavers, pre-primary education, migrants and learners with special needs. Strategic and specific objectives further developed in Part four.

961 Text to n 914.

962 Text to n 862. See also Strategic objective 3: Promoting equity, social cohesion and active citizenship, in Council Conclusions on the role of education and training in the implementation of the 'Europe 2020' strategy [2011] C70/ibid. Action in education combines an economic and social rationale, see, e.g., Council Conclusions on the role of youth work in supporting young people's development of essential life skills that facilitate their successful transition to adulthood, active citizenship and working life [2017] OJ C189/30; Commission Communication 'School development and excellent teaching for a great start in life' COM(2017) 248 final. Further Part three, and Commission Erasmus Proposal COM(2018) 367 final.

when interpreting EU law in a teleological way and giving *effet utile* to provisions.[963]

EDC standards are in harmony with the first aim of the EU, namely 'to promote peace, its values [such as democracy] and the well-being of its peoples' (Article 3 in conjunction with Article 2 TEU). They are congruent with Treaty objectives such as ensuring that the Union functions as a representative and participatory democracy (Articles 10–11 TEU), developing quality education (Article 165(1) TFEU), encouraging the participation of young people in democratic life in Europe through education (Article 165(2) TFEU), or protecting the rights of the child (Article 3(3) TEU). In its relations with the wider world, the EU aims to contribute to the protection of human rights, in particular the rights of the child (Article 3(5) TEU). Logically, it can be assumed that the EU accepts the standards on which there is a consensus in the international community, such as EDC standards.[964]

In its interconnection with human rights education, EDC is consistent with the objectives of the CFR.

EDC standards also help to advance objectives pursued in secondary law, contributing to the effectiveness of essential rules, i.a. on transparency and openness.[965]

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963 See Lenaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', 16: 'The Treaties are imbued with a "purpose-driven functionalism"-their provisions provide the link between the objectives pursued by the EU and the means to attain them'; 32: 'teleological interpretation and systematic interpretation are often interlinked, since it is the latter that allows the ECJ to identify the objective pursued by the provision in question'; forms of teleological interpretation can be (1) functional, giving *effet utile*, (2) *sensu stricto*, interpreting an ambiguous provision in the light of its objectives, and (3) consequentialist, focusing on the consequences flowing from the interpretation advanced. See also M Ortino, 'A reading of the EU constitutional legal system through the meta-principle of effectiveness' [2016] Cahiers droit européen 91. On 'primacy, unity and effectiveness of EU law' see Case C-399/11 *Melloni* ECLI:EU:C:2013:107, para 60, and EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, para 188.

964 CoE Committee of Ministers, Council of Europe Strategy for the Rights of the Child (2012-2015) (15 February 2012) CM(2011)171final, p 8. EDC appears among the standards set to protect the child, part of strategic objectives. See n 285.

965 Further § 242 , examples in § 256 ff.

137 *Transparency and openness*

EDC standards can in the EU legal order be ranged under the umbrella principle of democracy, just like the principles of transparency and openness, with which they are closely interrelated.

The principles of transparency and openness follow from several primary law provisions (i.a. Articles 1, 10, 11, 16 TEU; 15 TFEU; and 42 CFR).[966] Secondary law and case law refer to them:

> Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.[967]

In this citation, the word 'openness' could be replaced by 'EDC' inasmuch as it serves the same purposes. Like the right of public access to documents, EDC standards relate to the democratic nature of the institutions. Both public access and EDC must be assured as widely as possible.

EDC standards are in harmony with the EU objective of taking decisions 'as openly and as closely as possible to the citizen' (Article 10(3) TEU and preamble). Many EU law provisions corroborate the objective of informed citizenship. If the principles of transparency and openness point by their

966 Several components are codified, see i.a. Art 16(8) TEU on public meetings of the Council acting as a legislator; Art 42 CFR on the right of access to documents, Art 298(1) TFEU on an open European administration.

967 Recital 2 in the preamble to Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43 (see also Proposal COM(2008) 229 final). The 'right of public access to documents of the institutions is related to the democratic nature of those institutions'. See i.a. Case C-41/00 P *Interporc* ECLI:EU:C:2003:125, para 39; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* ECLI:EU:C:2008:374, para 45; Case C-28/08 P *Commission v Bavarian Lager* ECLI:EU:C:2010:378, para 54; Joined Cases C-92/09 and C-93/09 *Schecke and Eifert* ECLI:EU:C:2010:662, para 68; Case C-506/08 P *Sweden v MyTravel and Commission* ECLI:EU:C:2011:496, para 72; Case C-280/11 P *Council v Access Info Europe* ECLI:EU:C:2013:671, paras 27–28; Case T-540/15 *De Capitani* ECLI:EU:T:2018:167. See also Commission Report on the application in 2018 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents COM(2019) 356 final.

very nature to the 'opposite of opaqueness, complexity or even secretiveness'[968], the EDC standards do the same, only upstream, laying the foundations from the start for a basic understanding of the EU. The EDC standards are a corollary of the principles of openness and transparency (ontological assumptions). If democracy is a chain of legitimation from those governed to those governing,[969] EDC in schools is the essential first link of this chain. EDC standards are a crucial prerequisite if democratic systems are to work. Citizens must be empowered to take action and to hold public institutions accountable.

In *Sweden and Turco*, the ECJ held that the 'possibility for citizens to find out the considerations underpinning legislative action is a *precondition for the effective exercise of their democratic rights*'.[970] By the same token, EDC is a *precondition* for the effective exercise of democratic rights. With regard to the disclosure of an opinion of the legal service of the Council, the ECJ held that openness 'contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confi-

968 S Prechal and ME de Leeuw, 'Transparency: A General Principle of EU Law?' in U Bernitz, J Nergelius and C Cardner (eds), *General Principles of EC Law in a Process of Development* (Kluwer 2008). On transparency, see i.a. Commission Communication Follow-up to the Green Paper 'European Transparency Initiative' COM(2007) 127 final, and scholars: D Curtin and AJ Meijer, 'Does transparency strengthen legitimacy?' (2006) 11 Information Polity 109; P Kostadinova, 'Improving the Transparency and Accountability of EU Institutions: The Impact of the Office of the European Ombudsman' (2015) 53 JCMS 1077. On the difference between the principles of openness and transparency: A Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' (2014) 1 ELRev 72 (openness includes transparency and participation). On the question whether transparency and openness are general principles of EU law, see K Lenaerts, '"In the Union we trust": trust-enhancing principles of Community law' (2004) 41 CMLRev 317 (it can be hardly denied that the principle of transparency has evolved into a general principle of EU law); and Prechal and de Leeuw, 'Transparency: A General Principle of EU Law?' (authors scan manifold appearances of transparency in EU law, consider transparency too vague and uncertain to serve as an overarching a general principle, but find 'sub-principles'; the function of transparency as a guiding principle for interpretation is well-established).

969 Hofmann, Rowe and Türk, *Administrative law and policy of the European Union* 146. See also J Ziller, 'European models of government: Towards a patchwork with missing pieces' (2001) 54 Parliamentary Affairs 102.

970 Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* ECLI:EU:C:2008:374, para 46 (emphasis added). See also Case C-280/11 P *Council v Access Info Europe* ECLI:EU:C:2013:671, para 33; and Case C-57/16 P *ClientEarth* ECLI:EU:C:2018:660, para 84.

dence in them by allowing divergences between various points of view to be openly debated'.[971] Access to information in documents is 'intended to enable citizens to participate in public affairs'.[972] These considerations apply equally to EDC, which has the same objective of empowering citizens. What is the real value of transparency and openness without prior citizenship education? If, in the interests of transparency, the IT man repairing a computer opens the main cover to show the customer what is inside, the customer will see the complex components, wires and chips, but be none the wiser. Without pre-knowledge and some education, transparency and openness may prove to be quasi empty principles.

EDC standards coincide naturally with the aims of participation, legitimacy, and accountability. The academic writers referred to in Part one confirm this—for instance Sander, who considers that *Mission* (values), *Legitimation* and *Mündigkeit* are the essential aims of citizenship education.[973]

Lessig provocatively pleads against transparency.[974] Public availability of all information on the Internet can add to alienation and cynicism. A requirement, he argues, is that citizens are able to use the information; so, transparency must be accompanied by other measures. Information must be incorporated into 'complex chains of comprehension', such as political campaigns. I think that EDC should be part of the chain of comprehension. Naked transparency is clearly not sufficient in itself.

It can be concluded that a contextual and teleological interpretation of EU law provisions on citizenship, democracy and education should take account of EDC standards, as this interpretation corresponds to the structure of the Treaties and contributes to achieving the Treaties' objectives.[975]

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971 Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* ECLI:EU:C:2008:374, para 59.

972 Joined Cases C-92/09 and C-93/09 *Schecke and Eifert* ECLI:EU:C:2010:662, para 31.

973 See text to n 562. In the same line other scholars, e.g. Crick, Dahl, Dewey (see § 71 ff).

974 L Lessig, 'Against transparency. The perils of openness in government' (2009) 240 The New Republic 37 (Harvard Law School).

975 Text to n 727. Some analogy with the principle of transparency: even if it is not clearly a general principle as such, it has an interpretative function: see Prechal and de Leeuw in n 968.

Interpretation in good faith and sincere cooperation

138 Good faith, universal principle

Th effects of the Charter on EDC/HRE in the EU legal order may also be felt through the principles of good faith and sincere cooperation.[976]

The universally recognised principle of good faith requires States to implement the international agreements they have concluded in good faith. Pursuant to Articles 26 and 31 of the Vienna Convention on the Law of Treaties, the EU Treaties must be performed and interpreted in good faith.[977] When interpreting and applying provisions of the EU Treaties on democracy and citizens' rights in good faith, Member States cannot deny the importance of EDC standards. Admittedly, good faith cannot function as a pathway for introducing non-binding norms into the EU legal order and conferring legally binding effect on them by means of interpretative incorporation. However, in the *dégradé normatif*, certain exogenic non-binding norms, such as recommendations, may be hardened according to the criteria set out by academic writers (who base their arguments on case law).[978] The consensus on which they rest may give them such a degree of legitimacy that good faith simply requires them to be taken into account. EDC standards are the reflection of an international consensus and have emerged as standards of great weight. The Charter on EDC/HRE represents the European *acquis* on EDC/HRE. The consistent nature of the commitments made over the course of 30 years work is too marked for Member States to be able to contest the relevance of EDC standards for EU citizens in any credible way. Member States cannot participate as members of the Council of Europe in the adoption of so many recommendations on EDC and then in good faith deny the implications of those standards for their citizens, who are—in addition to being national citizens—also EU citizens. A *bona fide* attitude means that the provisions on citizenship, democracy and education in EU law should be interpreted while taking account of Council of Europe commitments. Member States have a duty of good faith vis-à-vis one another and vis-à-vis their citizens, and citizens can legitimately expect Member States to adhere loyally to the rationale underlying EDC/HRE. If EDC standards inseparably link democracy, citizenship

976 §§ 160 and 162.

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

978 Schermers and Blokker, Pinto de Albuquerque, and Tulkens (Part one, §§ 50 51).

and education, that link does not cease to exist because another level of governance is concerned.[979] Democracy requires enlightened citizenship at any level of the exercise of public power. This must also apply in the EU context.

139 Sincere cooperation, duty to cooperate in good faith in EU law

Good faith acquires specific definition in EU law in the principle of sincere cooperation, also called the duty to cooperate in good faith (Article 4(3) TEU).[980] In *Intertanko*, the ECJ interpreted EU law by taking an international agreement into account 'in view of the customary principle of good faith, which forms part of general international law' and of the principle of sincere cooperation.[981] The *Intertanko* principle can be applied to EU law provisions on EU citizenship, democracy and education: in the light of the principles of good faith and sincere cooperation, these provisions must be interpreted taking into account international agreements, such as the ICESCR (Article 13) or the CRC (Article 29). Is the *Intertanko* principle only valid for (binding) international agreements? To what extent can the principle of sincere cooperation be an argument for interpreting EU law taking account of Council of Europe recommendations? One could argue that EU law should be interpreted by taking the Recommendation on the Charter on EDC/HRE into account 'in view of the customary principle of good faith, which forms part of general international law', and of the EU principle of sincere cooperation. The applicability of the principles of good faith and of sincere cooperation should not necessarily stand or fall on the basis of the black and white division binding/non-binding. In accordance with *le dégradé normatif*, EU law could be

979 Council of Europe, UN and EU instruments refer to various levels, e.g. CoE Committee of Ministers Declaration and programme on education for democratic citizenship, based on the rights and responsibilities of citizens (Budapest, 7 May 1999), para 7; UNGA Res 71/8 'Education for democracy' (17 November 2016) UN Doc A/RES/71/8, para 6 (see n 2210); EU Recommendations on key competences for lifelong learning, civic and citizenship competence (nn 929, 930).

980 Principle of 'federal good faith', see Lenaerts and Van Nuffel, *European Union Law* 147; W van Gerven, 'Gemeenschapstrouw: goede trouw in E.G.-verband' [1989-90] Rechtskundig Weekblad 1158, 1159. See also J Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC' (2007-2008) 31 Fordham International Law Journal 1483.

981 Case C-308/06 *Intertanko* ECLI:EU:C:2008:312, para 52. Moreover, Dir 2005/35 expressly referred to the Marpol 73/78 Convention. Text to n 742.

interpreted as far as possible in a way consistent with commitments in international law, even if *sensu stricto* they are legally non-binding. The ECJ sees sincere cooperation as a general obligation the implications of which are to be determined in each individual case.[982] As explained in Part one, the Recommendation on the Charter on EDC/HRE has a high degree of normativity in itself.

When the EU selects *à la carte*, from the menu of Council of Europe norms, only whatever suits its own structure and purposes, can it afford to disregard the EDC standards—standards of considerable importance and possessing a high degree of normative intensity in the Council of Europe legal order, and relating to the common foundational values?

The duty of sincere cooperation has effects in both directions, from the EU to the Member States and from the Member States to the EU. The Member States gave commitments in the Council of Europe; the EU (institutions) should loyally cooperate with Member States to help them honour these commitments. The EU legal order cannot be out of kilter with Member State commitments in the Council of Europe legal order. Interpreting 'democracy' in EU law as embracing EDC standards (under the denominator of the democratic principles of Title II TEU) brings EU law into line with the commitments of EU Member States as member states of the Council of Europe. Conversely, the EU aims to uphold democracy and has—in the Memorandum of Understanding—committed itself to recognising the Council of Europe benchmark on democracy, including the EDC standards; logically, the Member States should loyally cooperate to achieve these aims. Interpreting EU law in the light of EDC standards is therefore a form of mutual sincere cooperation: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties' (Article 4(3) first subparagraph TEU). Respecting democratic principles is a task flowing from the Treaties (i.a. Articles 2, 3, 7, 49, Title II TEU, and other provisions read in the light of the preambles). The Union and the Member States must assist each other in the task of ensuring education for democracy. Interpreting provisions on citizenship, democracy

982 Case 78/70 *Deutsche Grammophon* ECLI:EU:C:1971:59, para 5. See also Case C-433/03 *Commission v Germany* ECLI:EU:C:2005:462, para 64. Further E Neframi, 'Principe de coopération loyale et principe d'attribution dans le cadre de la mise en oeuvre du droit de l'Union' (2016) 52 Cahiers droit européen 221. The human rights based approach in Part four will underscore the reasoning based on good faith and sincere cooperation by a reading in conjunction with with the ICESCR and the CRC.

and education in national and in EU law by taking EDC standards into account, is the first and most basic step. To refuse this combined reading could jeopardise the attainment of the Union's objectives, in breach of Article 4(3) third subparagraph TEU.

Article 4(3) second subparagraph TEU requires the Member States to take 'any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'. Can providing for EDC be seen as an 'appropriate' measure to ensure fulfilment of Treaty obligations such as the requirement to uphold 'democratic' values (Articles 2, 7 and 49 TEU)? The ECJ has progressively widened the interpretation of obligations arising under the principle of sincere cooperation.[983] Member States are under 'a general duty of care'. They must use their own powers, e.g. to grant nationality, in a spirit of sincere cooperation, having due regard to EU law (if they grant nationality, the person becomes an EU citizen and enjoys the associated rights throughout the EU).[984] Equally, when exercising their competences in the field of education Member States must act in a spirit of sincere cooperation. They cannot just prepare their nationals for effective participation in the nation state. If they have a duty to adopt all the measures needed 'to guarantee the full scope and effect of Union law'[985], educating their nationals (who are also EU citizens) about the EU, and thus providing an EU dimension within EDC, must be part of that duty. Part three will analyse this on the basis of specific EU law provisions.

The Treaties reiterate the principle of sincere cooperation in the area of common foreign and security policy: 'The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area' (Article 24(3) TEU). In response to the challenges of radicalisation, EDC and HRE have become part of security policy in the Council of Europe as well as in the EU.[986] To the extent that EDC and HRE concern the security of the Union, sincere cooperation is even more important.

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983 Lenaerts and Van Nuffel, *European Union Law* 149.

984 Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final, p 4.

985 Lenaerts and Van Nuffel, *European Union Law* 150, 152; EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, para 173.

986 For the CoE see § 37 . For the EU see i.a. Commission Communication 'Eight progress report towards an effective and genuine Security Union' COM(2017) 0354 final, and text to n 917 ff.

Sincere cooperation is closely related to respect by the EU of international law.

Consistent interpretation with international law, as far as possible

140 Strict observance and development of international law

EDC standards may produce effects in the EU legal order seen from the perspective of EU respect for international law. The Union aims at 'the strict observance and the development of international law, including respect for the principles of the United Nations Charter' (Article 3(5) TEU). The commitment to respect international law flows from the general scheme of the Treaty and the CFR (see, i.a., Articles 3(5), 21(1), and 42 TEU, Article 208(2) TFEU, Article 52(3) CFR). As far as possible, the ECJ interprets EU law in the light of and consistently with international law.[987] The analysis of the substance of the specific rights of citizens in Part three will make it possible to develop this reasoning further.

The Recommendation on the Charter on EDC/HRE is part of international law, in a soft law form, yet displaying several hardening factors. The EDC standards of the Council of Europe can be seen as a further development and manifestation of rights and principles in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.[988] Logically, EU law should be interpreted consistently with international law standards on education for democracy, to the extent possible. If the EU's ambition is to contribute to 'the development of international law' (Article 3(5) TEU), it should—at the very least—itself respect standards widely accepted in the international community, such as the EDC standards.

Since it aims to be an influential global player, the EU must take care to ensure consistency between its policies (Article 21(3) TEU).[989]

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987 Lenaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', 60. Klabbers, 'Straddling the Fence: The EU and International Law', 67. See, e.g., Case C-340/08 *M and Others* ECLI:EU:C:2010:232, paras 8, 11, 45, 49 ('for the purpose of interpreting Regulation No 881/2002, account must also be taken of the wording and purpose of Resolution 1390 (2002) which that regulation, according to the fourth recital in the preamble thereto, is designed to implement'). This is also an example of mode 3: incorporation of substance and preamble reference.

988 See i.a. § 57 , § 292 .

989 Craig and de Búrca, *EU Law: Text, Cases, and Materials* 378–9.

In development cooperation, the Union and the Member States 'shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations' (Article 208(2) TFEU). Citizenship and human rights education are part of the commitments and objectives (to invigorate civil society in third countries, to strengthen governments' accountability[990]). If these commitments and objectives are an obligation ('shall comply with') in (external) development cooperation, they are a fortiori valid in the (internal) policies of the EU and the Member States. The principle of consistent interpretation may thus indirectly give effect to EDC standards. However, the red line means caution is necessary.

141 Ambivalence—limits to consistent interpretation

Even in the light of the 'strict observance of international law' to which the Union 'shall contribute' (Article 3(5) TEU), the principle of consistent interpretation has limits. The ECJ has to accommodate this principle with the constitutional autonomy of EU law and the 'characteristic features' of the EU.[991] The relationship between EU law and international law is ambivalent.[992] In the early landmark cases *Van Gend & Loos* and *Costa v Enel*, the ECJ established its position with regard to the relative autonomy of EU law vis-à-vis international law, and further developed this in cases such as *Kadi* and especially in *Opinion 2/13*.[993] Vis-à-vis the Council of Europe, too, the EU demonstrates dependency and autonomy.[994] The reluctance of the ECJ to cite Council of Europe recommendations or, occa-

990 Text to nn 868 and 868.

991 Case 283/81 *Cilfit* ECLI:EU:C:1982:335, para 17. Lenaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', 7–8, 37 ff.

992 Klabbers, 'Straddling the Fence: The EU and International Law', 55, 61 (relationship 'characterised by a high degree of complexity and ambivalence'; the approach of the ECJ can 'hardly be qualified as völkerrechtsfreundlich'). See also P Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) 66 Current Legal Problems 169.

993 Case 26-62 *Van Gend & Loos* ECLI:EU:C:1963:1; Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66; Joined Cases C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461; EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454.

994 RA Wessel and S Blockmans, *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Asser Press 2013), 47. See also R McCrea, 'Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State' (2016) 5 Oxford Journal of Law and Religion 183.

sionally, other international instruments has been acknowledged.[995] EU law is protected, adjusted or finetuned in its interpretation in order to respect the autonomy of the EU legal order. This is true where EU law incorporates the substance of binding exogenic norms (*Commission v UK* and *Commission v Germany*), and a fortiori of non-binding exogenic norms. Applying the Recommendation on the Charter on EDC/HRE to the situation of EU citizens in the next part will require constant prudence and care to respect the specificity of the EU legal order.

Respect for the autonomy of the EU and its specific characteristics

142 A closer look at the red line

The ECJ operates in the five modes of normative reception and brings exogenic norms to life in case law. At the same time, however, the ECJ points to limits. In principle, unless there is a specific reason not to do so, EU law on citizenship, democracy and education should be interpreted in a way which takes account of EDC standards in general and of the Charter on EDC/HRE in particular. Yet, specific EU characteristics or objectives may lead to exceptions to the principle. What does the red line mean for the normative reception of EDC standards in the EU legal order and interpretation of EU law in their light?

143 Opinion 2/13

In *Opinion 2/13*, in the context of the intended accession of the EU to the ECHR, the ECJ explained the autonomy of the EU. The High Contracting Parties had agreed in Protocol No 8 (which has the same legal value as the Treaties) that the agreement on EU accession to the ECHR 'shall make provision for preserving the *specific characteristics of the Union and Union law*' and must not affect the competences of the Union, the powers of its institutions, or the situation of the Member States in relation to the ECHR.[996] A Declaration had clarified that the '*specific features of EU law*' were to be preserved.[997] Referring to these conditions, the ECJ briefly

995 I.a. nn 707, 773.

996 Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2012] OJ C326/273, Arts 1 and 2; in line with Art 6(2) TEU. Emphasis added.

997 Declaration on Article 6(2) TEU by the Intergovernmental Conference (emphasis added); EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, para 162. See para 159 for 'compliance with various conditions'.

described what was meant by these specific characteristics[998] and held that the ECHR accession agreement was 'liable adversely to affect the specific characteristics of EU law and its autonomy'.[999] The specific characteristics relate to the constitutional structure of the EU, i.e. the principle of conferral of powers (Arts 4(1) and 5(1)(2) TEU) and to the institutional framework (Articles 13–19 TEU). Moreover, specific characteristics arise from the very nature of EU law, stemming from the Treaties as an independent source of law, with primacy over the law of the Member States and many of its provisions having direct effect.[1000] The legal structure of the EU is based on the fundamental premise of a shared set of common values (Article 2 TEU), recognised by the Member States, and justifying the mutual trust between the Member States.[1001] At the heart of the legal structure are fundamental rights (CFR). The pursuit of the EU's objectives (Article 3 TEU) is entrusted to a series of fundamental provisions, such as those on free movement of goods, services, capital and persons, EU citizenship, or the area of freedom, security and justice. They contribute to the process of integration that is the *raison d'être* of the EU itself.[1002]

144 Respect for constitutional principles when applying EDC standards

Like the ECHR, the Recommendation on the Charter on EDC/HRE is directed to States and, as is well known, the EU is not a State.[1003] Therefore, appropriate considerations are to be taken into account if these exogenic norms are nevertheless to enjoy a form of reception in the EU legal order (reception occurring in different modes and for different reasons). Applying the considerations in *Opinion 2/13 mutatis mutandis* to the reception and interpretation of EU law in the light of EDC standards, it must be ensured that the specific characteristics of EU law are preserved. Reception and interpretation require conformity with the 'basic constitutional charter, the Treaties'.[1004] The 'constitutional principles' of the Treaties cannot

998 See paras 165–176, 179 ff (about the 'The specific characteristics and the autonomy of EU law'). See also Joined Cases C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461, para 285.

999 In several respects, see paras 200, 258 (not compatible with Art 6(2) TEU and Protocol No 8).

1000 Paras 165–166.

1001 Paras 168, 172, 191.

1002 Paras 170, 172.

1003 EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, paras 156–158, 193.

1004 Para 163.

be prejudiced.[1005] When applying EDC standards as to their substance to the situation of the EU citizen in the next Part, this constitutional red line will be constantly borne in mind. The same obviously applies in relation to Member State constitutions. Moreover, not undermining constitutional principles is part of the EDC standards themselves, in line with the paragraph-4 principle of the Charter on EDC/HRE. This paragraph requires EDC/HRE objectives, principles and policies to be applied 'with due respect for the constitutional structures of each member state, using means appropriate to those structures' and 'having regard to the priorities and needs of each member state'. If the Charter on EDC/HRE is applied to the EU citizen, the EU as structure must also benefit from the privilege of the paragraph-4 principle. Consequently, based on EU primary law, ECJ case law, as well as the EDC standards themselves, the analysis which follows will display caution with respect to the autonomy of the EU, the constitutional allocation of powers, both horizontally and vertically, and to Member States' constitutions. As long as EU primary law and Member State constitutions are respected, there is no reason to deviate from the wide European consensus on EDC standards or classify the EDC standards in the diverging line of case law.[1006]

Conclusion to Part two

145 Place of EDC standards in the schema of modes of reception

To recapitulate, in the framework of the Council of Europe and the European Cultural Convention, 50 states adopted the 2010 Recommendation on the Charter on EDC/HRE, a reference instrument setting out EDC standards. Among the 50 states are all EU Member States. For them, the Charter on EDC/HRE acquires specific meaning seen from the perspective of EU law. The question addressed in Part two was: what are the legal status and effects of the Charter on EDC/HRE in the EU legal order? The answer is that the Charter on EDC/HRE is an exogenic norm, not part of EU law, but EU law gives it effects to a certain degree. To analyse the effects, this Part has formulated a schema of modes of reception of exogenic norms in the EU legal order, comprising three stronger modes of

1005 Joined Cases C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461, para 285 ('the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights').

1006 Criterion (ii) is meant to ensure this respect, see §§ 155 169 173 .