

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 .

reception and three weaker ones. The spectrum ranged from—the most significant mode in terms of legal effects—EU accession to conventions (mode 1), to reception via general principles of EU law (mode 2), reference to the title of exogenic instruments (mode 3), incorporation of the substance of exogenic norms (mode 4), to—least consequential mode of reception—sharing inspiration and *de facto* cooperation (mode 5). Judicial interpretation complements these modes of normative reception (mode 6). At all times, reception has to respect the autonomy of the EU legal order (the red line).

Situating Council of Europe standards in the schema, the EU can thus ‘acknowledge’ them (Memorandum of Understanding) on the basis of six possible modes of reception, with varying legal effects. The reception of EDC standards mostly occurs in mode 4 via partial incorporation of the substance of the norms and in mode 5 on the basis of inspiration and cooperation in the field (working in the same paradigm). Occasionally, some references to the title of EDC instruments are to be found (mode 3). Overall, the normative reception of EDC standards in the EU legal order is fragmented but convincing. As a complement to their normative reception, EDC standards produce effects when taken into account in the interpretation of EU law (mode 6; contextual and teleological interpretation, interpretation in good faith and in sincere cooperation, and consistently with international law). EDC standards fit perfectly into the landscape of EU law, since they are inextricably linked to the EU’s values of democracy, respect for fundamental rights, and the rule of law, anchored in the Treaties. However, there is a red line which must not be crossed, as appears from ECJ case law: respect for the EU’s autonomy, the specific objectives and characteristics of the EU stemming from the Treaties, and constitutional principles. In a way, this reservation is inherent in the EDC standards themselves, pursuant to the paragraph-4 principle of the Charter on EDC/HRE. It can be concluded that a combined reading of EU law provisions on citizenship, democracy and education with EDC standards is legitimate.

In Part three, the significance of EDC standards for democracy beyond the nation state will be explored. Again (just as at the end of Part one), for the sceptical reader it is not necessary to agree with all aspects of the preceding analysis. Independently of the effects which EU law assigns to EDC standards (as to form), the academic exercise of applying these widely accepted standards (as to substance) to the EU citizen, remains interesting *per se*.

146 *De lege ferenda*

Admittedly, the fact that ECJ case law shows both a converging and a diverging line of interpretation leaves the Council of Europe instruments on EDC in an uncomfortable position with regard to their effects in the EU legal order. This contrasts with the overriding importance of democracy and human rights as foundational values, and with the status of EDC as a shared priority and focal area for cooperation in the Memorandum of Understanding. In order to be effective, EDC requires a strong mode of reception.¹⁰⁰⁷ ‘Acknowledging’ Council of Europe standards, the EU concluded a convention on animal protection (mode 1), developed a general principle on access to documents (mode 2), incorporated the title of language standards (mode 3), directly copy-pasted substantive rules on trans-frontier television with a reference in the preamble (mode 4). There is no shortage of precedents, including on less important topics than EDC. EDC deserves to benefit from at least comparable efforts. Some joint programmes exist on EDC, which are valuable, but none the less very limited compared to the 500 million inhabitants of the EU.¹⁰⁰⁸ Given the close interdependence of EU Member States on each others’ democracies, the fragmented normative reception of EDC standards and their interpretative value in the EU legal order (uncertain, given the red line) are not sufficient. EDC standards may enjoy ‘great weight’ or ‘considerable importance’ in the Council of Europe legal order, but their acceptance in the EU legal order is indirect and complicated. It has taken two chapters and many pages to explain the effects of EDC standards. EU action could remedy this within its sphere of competence.

EDC standards should follow the course of other Council of Europe standards in a cascade of norm-setting.¹⁰⁰⁹ In the area of EDC/HRE, the chain of ongoing normative interaction at present probably only reaches halfway. UN instruments containing educational standards, including on education for democracy¹⁰¹⁰, have influenced Council of Europe recommendations, such as the 2002 and 2010 Recommendations on EDC, which in turn have seen their substance and inspiration influence EU instruments on education, citizenship and democracy. Given the precedents, the further course of the cascade might imply ECJ interpretations taking the Charter on EDC/HRE into account and the adoption of specific EU instru-

1007 MOU, para 14.

1008 Text to n 898.

1009 Text to n 883 ff.

1010 UNGA resolutions on education for democracy, see n 2203.

ments incorporating EDC substance while adapting EDC standards to the specific EU context (which, I will argue, is needed and possible, based on Article 165 TFEU). If democracy and human rights are to be taken seriously, one must expect the chain to be continued.

Part two provides several arguments for the adoption of a comprehensive (non-fragmented) EU legislative act on EDC for the EU citizen, i.e. EDC adapted to the EU and its Member States.¹⁰¹¹ Firstly, as to the form, it would provide a direct source on EDC in EU law. It would meet the concerns of the hesitant reader who prefers legal certainty in legal texts, rather than contextual, teleological, *effet utile*, or *bona fide* interpretations taking exogenic EDC standards into account. Secondly, as to the substance, an EU legislative act on EDC would be an opportunity to develop and adapt the Council of Europe norms specifically to the EU context, as has happened in many other fields.¹⁰¹² An EU instrument could explain how specific features of the EU impact on EDC/HRE (further analysed in Part three). Thirdly, an EU instrument could remedy the weaknesses of the Recommendation on the Charter on EDC/HRE with regard to effectiveness, encouraging Member States to seek higher quality education (Article 165(1) TFEU). The latest review cycle of the Charter on EDC/HRE shows the persisting challenges to its implementation.¹⁰¹³ The adoption of an EU instrument would not prevent further cooperation with the Council of Europe.

147 Proposal for recital

Based on Part two, the following phrase could be added as a recital in the preamble of a hypothetical EU legislative act:

Whereas EDC standards of the Council of Europe are not EU law and—as to their form—only have indirect effects in the EU legal order via partial normative reception and via an interpretation of EU law taking EDC standards into account while respecting the autonomy of the EU.

1011 Adaptation perspective in § 151. The ‘civic competence’ described in the Recommendation on key competences for lifelong learning could be developed in an EU legal act, with adequate accompanying materials and evaluation as in the Council of Europe, respecting Member States competences (Part four).

1012 Examples in RTL and Ognyanov.

1013 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, p 53.