

## CHAPTER 5 Objective, critical and pluralistic EU learning

### 162 *Innovative learning method*

Analysing the effects of a combined reading of EDC standards and EU law as to the substance, I essentially want to demonstrate *that* an EU dimension should be included in EDC and give indications as to its content in mainstream education according to the four criteria (i-iv). In itself, this leaves open the question as to *how* to include this EU dimension in the classroom. Teachers enjoy educational freedom as to methods. They are academically trained, skilled in didactics, and experienced. Yet, the substance and methods of imparting citizenship education are closely interrelated.<sup>1077</sup> Many interlocutors responded to my thesis that EDC standards require an EU dimension to national EDC, with the question: ‘yes, ... but how?’. Therefore, to prepare for the analysis of the content of EDC in the following Chapters, I will set out a personal proposal bearing on the ‘how’ question. The proposed learning method follows from the adaptation perspective and the criteria explained in the Introduction to Part three and will be illustrated in the analysis of the rights of EU citizens in Chapters six, seven and eight. Obviously, the method proposed is not the only possible one.<sup>1078</sup> ‘Best practices’ for EDC exist in various formats and an EU dimension can be incorporated in all of them. However, this is a contribution for an innovative practice from a legal perspective.<sup>1079</sup>

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1077 Reinhardt, *Teaching Civics: A Manual for Secondary Education Teachers*.

1078 Other methods for EU learning, see i.a. <[beucitizen.eu/teaching-packages/](http://beucitizen.eu/teaching-packages/)>; <[europa.eu/teachers-corner/](http://europa.eu/teachers-corner/)>; <[www.schooleducationgateway.eu/en/pub/teacher\\_academy/teaching\\_materials/united-in-diversity/](http://www.schooleducationgateway.eu/en/pub/teacher_academy/teaching_materials/united-in-diversity/)>; <[www.europaindeklas.be/](http://www.europaindeklas.be/)>; <[www.bpb.de/internationales/europa/europaeische-union/](http://www.bpb.de/internationales/europa/europaeische-union/)>.

1079 Without making any scientific claims, the proposed method is based on limited but positive experiences in classrooms. I was able to test the method with pupils in secondary education (17–18 years old, Heilig Hartinstituut Heverlee Belgium, and European School Luxembourg), as well as in university Teacher Training and workshops with students of various faculties (KU Leuven). The response was in general enthusiastic. In a simplified version, the method was also used in primary education (11 years old, European School Luxembourg). Method discussed in workshop: Grimonprez, ‘Conflicting ideas of Europe: the role of values in citizenship education’. See call for innovative practice in Council Recommendation of 22 May 2018 on key competences for lifelong

163 *Providing the EU dimension in an objective, critical and pluralistic manner, with no aim of indoctrination*

As a balanced method for providing an EU dimension at school, the following package is proposed: on the one hand, a stable platform based on EU primary law, offering pupils an understanding of EU foundational values, objectives and principles, and on the other hand, room for dialogue and critical thinking, based on case teaching. This responds to EDC standards, as well as to the ECtHR requirement that the State, in fulfilling its educational functions, must take care to convey the information or knowledge included in the curriculum ‘in an *objective, critical and pluralistic manner*’, with no aim of indoctrination.<sup>1080</sup> Teaching must occur in an ‘unbiased and objective way, respectful of the freedoms of opinion, conscience and expression’.<sup>1081</sup> Teachers should not take advantage of their position to indoctrinate or exert improper influence in another way on pupils during lessons.<sup>1082</sup>

*Objectivity* is enhanced by an EU dimension in EDC based on EU primary law in conjunction with national constitutions (rather than based on the subjective views of educators). Educating in accordance with the tenets of EU primary law ensures respect for several interests and values, including Member State and EU interests. Law reflects the fundamental values and choices of society in an objective and neutral way. Law makes it possible to take emotion out of the debate.<sup>1083</sup> At the same time, discussing case law leaves room for *critical thinking and pluralism*, in accordance with the right to freedom of expression (Article 10 ECHR, Article 11 CFR), and empowers citizens to exercise this right.<sup>1084</sup>

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learning, Annex: A European Reference Framework, ‘Supporting the development of key competence, b(c); also Recommendation para 3: Member States should ‘facilitate the acquisition of key competences by making use of good practices to support the development of the key competences’.

1080 My emphasis. Settled case law: see n 696 and text to n 2449.

1081 CESCR General Comment No. 13, cited above, para 28.

1082 *Vogt v Germany* no 17851/91 (ECtHR 2 Sept 1996), para 60. Also n 696 and text to n 2449.

1083 See i.a. § 258 ; Nussbaum (nn 579-580).

1084 Education as an empowerment right (n 2167).

A EU primary law: objectivity

1. A European constitutional space

164 *EU primary law constitutes an objective, consensus-based foundation for the EU dimension of EDC*

The incorporation of an EU dimension into EDC should be based on the Treaties and the CFR, which are interconnected with Member State constitutions. The fact that the Treaties and CFR have been agreed to by all Member States in accordance with their constitutional requirements, confirms their soundness as a pillar for EDC. The requirement of objectivity in education postulated by the ECtHR is satisfied. This approach also ensures respect for the principles of the Beutelsbacher consensus on citizenship education: using the texts of the Treaties and the CFR in classrooms cannot be seen as overwhelming pupils, nor as presenting controversial viewpoints.<sup>1085</sup> Contesting the validity of the Treaties and the CFR as an objective and stable basis for an EU dimension of EDC would be tantamount to denying the very essence of EU membership.

Now and again, civic educators and curriculum designers invoke uncertainties about the EU and EU citizenship as an argument for not including much EU learning. Scholars outside the legal field sometimes too easily dismiss the Treaties and the CFR (my experience at citizenship education conferences, the Treaties sometimes being considered to be ‘just a document’). For readers who are less familiar with EU law, the following brief summary serves to recall how the Treaties came into being, demonstrating the fundamental consensus on which they are based. The procedures for adoption, amendment, accession, and withdrawal, all reflect the same basic principle and reality: the agreement on the Treaties is anchored in each Member State’s own constitution.<sup>1086</sup>

The Treaties were *adopted* in accordance with the Vienna Convention on the Law of Treaties.<sup>1087</sup> Each Member State voluntarily agreed to the text. To underscore the authoritative value of the Lisbon Treaty, it is recalled

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1085 § 164 . The primary law texts as such are consensus-based, yet their application and balance may be controversial (see next section, case teaching).

1086 The formula ‘in accordance with their respective constitutional requirements’ appears all over the Treaties: Arts 42, 48, 49, 54 TEU (see also Art 50); Arts 25, 218, 223, 262, 311, 357 TFEU.

1087 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 2, Art 9, Arts 11–15, Art 52.

that, firstly, the representatives of the governments of the Member States adopted the Lisbon Treaty by common accord in an Intergovernmental Conference;<sup>1088</sup> secondly, the Heads of State or Government of all the Member States signed it (Lisbon, 13 December 2007),<sup>1089</sup> and thirdly, and crucial for democratic legitimacy, all the Member States ratified the Lisbon Treaty in accordance with their respective constitutional requirements (as stipulated in the amended EU and EC Treaties, and in the Lisbon Treaty<sup>1090</sup>). Most national constitutions required the approval of the national parliament, in some cases a referendum was necessary.<sup>1091</sup> The Member States' agreement to the Treaties is a matter of fact. The instruments of ratification by the High Contracting Parties are deposited with the Government of the Italian Republic in all official languages of the EU.<sup>1092</sup> Several Member States adapted their constitutions to reflect EU membership and its implications.<sup>1093</sup> The Lisbon Treaty was challenged before some national constitutional courts, but none decided that the

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1088 Final Act (2007/C306/02), Conference of the Representatives of the governments of the Member States [2007] OJ C306/231.

1089 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007 [2007] OJ C306. The list of plenipotentiaries is not reproduced in the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202/1, but see—for evidence of the consensus—ten pages of signatures of the 2007 Final act (preceding note), p 239–248. See also preamble TEU: 'His Majesty the King of the Belgians, her Majesty the Queen of Denmark, the President of the Federal Republic of Germany, the President of Ireland' etc. (and new members since then). Comparable in TFEU.

1090 Art 6 Treaty of Lisbon; Art 54 TEU and Art 357 TFEU.

1091 After a first negative referendum in Ireland on 12 June 2008, a second referendum on 2 October 2009 was positive (after guarantees on some Irish concerns).

1092 Art 54 TEU and Art 357 TFEU (deposit), Art 55 TEU (languages).

1093 E.g. the Croatian constitution develops in Title VIII, 'European Union', the legal grounds for membership and transfer of constitutional powers (Art 143), participation in EU institutions (Art 144), EU law and the rights of EU citizens (Art 145–6). Exercise of EU rights equated with the exercise of rights under Croatian law, Croatian courts must protect subjective rights based on the EU *acquis communautaire*, and governmental agencies, bodies of local and regional self-government and legal persons vested with public authority must apply European Union law directly. Text to n 1319. See further on changes in national constitutional law resulting from EU accession: C Grabenwarter, 'National Constitutional Law Relating to the European Union' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Beck Nomos 2010).

Treaty was incompatible with the national constitutional order.<sup>1094</sup> The Lisbon Treaty entered into force on 1 December 2009,<sup>1095</sup> creating a new legal order. The three foundational documents resulting from the Lisbon Treaty are the TEU, the TFEU and the CFR.<sup>1096</sup> As is well known, the TEU sets out the fundamental principles governing the EU, while the TFEU organises the functioning of the Union and determines its competences (areas, delimitation and arrangements for exercise).<sup>1097</sup> The CFR is not incorporated into the Treaties, but the TEU explicitly provides that the Union recognises the rights, freedoms and principles therein, and states that the CFR shall have the same legal value as the Treaties.<sup>1098</sup>

The adoption of Treaty *amendments*, just like the adoption of the Treaties themselves, requires the approval of each Member State (pursuant to both the ordinary and simplified revision procedure). The unanimity rule is striking (kept by the Treaty of Lisbon), as is also the anchoring of any revision in national constitutional requirements (Article 48 TEU).<sup>1099</sup>

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1094 Czech Constitutional Court, 26 November 2008 (PL ÚS 19/08) and 3 November 2009 (Pl. ÚS 29/09); *BVerfG, 2 BvE 2/08 (Lissabon)* 30 June 2009, Absatz-Nr (1-421). For cases in Austria, Hungary and Poland, see D Edward and R Lane, *Edward and Lane on European Union Law* (Edward Elgar 2013) 26–28.

1095 Art 6(2) Treaty of Lisbon. More on the drafting history in Lenaerts and Van Nuffel, *European Union Law* 59–67.

1096 The Treaty on European Union, the Treaty on the Functioning of the European Union, the Charter of Fundamental Rights of the European Union; see Art 1(3) TEU, Art 1(2) TFEU, Art 6(1) TEU. The Protocols and Annexes form an integral part of the Treaties (Art 51 TEU). For Protocols and Declarations added to the Lisbon Treaty, see Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202/1.

1097 Art 1(1) TFEU.

1098 Art 6(1) TEU. The Charter of Fundamental Rights of the European Union of 7 December 2000 was drafted by the Praesidium of the Convention. On 12 December 2007, the European Parliament, the Council and the Commission solemnly proclaimed an adapted text, replacing it from 1 December 2009 onwards (entry into force of the Treaty of Lisbon). See G de Búrca, ‘The Drafting of the EU Charter of Fundamental Rights’ (2001) 26 *ELRev* 126.

1099 See on the unanimity rule, F-X Priollaud and D Siritzky, *Le traité de Lisbonne: Commentaire, article par article, des nouveaux traités européens (TUE et TFUE)* (La documentation française 2008). For case law on amendment procedures, see Lenaerts and Van Nuffel, *European Union Law* 83.

*Accession* of new Member States to the Union requires ‘ratification by all the contracting States in accordance with their respective constitutional requirements’.<sup>1100</sup>

Finally, Member States have the right to *withdraw* from the EU in accordance with their own constitutional requirements (Article 50 TEU).<sup>1101</sup> Belonging to the Union is an ongoing deliberate and individual choice by each Member State (as Brexit illustrates).<sup>1102</sup> Member States which have not withdrawn are presumed to agree to and are bound by EU primary law.

It can be concluded that the TEU, TFEU and CFR provide a solid basis as a starting point for formulating content for the EU dimension of EDC. Negotiated, adopted, signed, and ratified by all Member States in accordance with their own constitutional requirements, EU primary law sources

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1100 Art 49 TEU; Art 2(1) Treaty of Accession of the Republic of Bulgaria and Romania [2005] OJ L157; Art 3 Treaty of Accession of Croatia [2012] OJ L112. Consensus of all appears in full name, e.g. ‘Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union’, signed 9 December 2011, signatures pp 15–20. In accordance with Art 142 of the Croatian constitution, a referendum was held on 22 January 2012 (66% in favour of accession). The instruments of ratification were deposited with the Government of the Italian Republic by 30 June 2013. Croatia significantly adapted its constitution for EU membership (n 1093).

1101 Art 53 TEU, Art 356 TFEU (unlimited period). See J-V Louis, ‘Le droit de retrait de l’Union européenne’ (2006) 42 *Cahiers de Droit européen* 293; Lenaerts and Van Nuffel, *European Union Law*, 69.

1102 See Case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999 (a Member State can revoke unilaterally the notification of its intention to withdraw from the EU); European Council Decision (EU) 2019/584 taken in agreement with the United Kingdom of 11 April 2019 extending the period under Article 50(3) TEU [2019] OJ L 101/1. See also P Eeckhout and E Frantziou, ‘Brexit and Article 50: a constitutionalist reading’ (2017) 54 *CMLRev* 695 (reading of Art 50 informed by key constitutional features of the EU legal order); Gormley, ‘Brexit - Never Mind the Whys and Wherefores? Fog in the Channel, Continent Cut Off!’.

were created by the Member States and their peoples.<sup>1103</sup> Political philosopher Van Middelaar speaks of ‘the pact’ at the innermost sphere of the EU, legally defined, offering stability and order.<sup>1104</sup>

The first argument in favour of considering EU primary law as a pillar of the proposed learning method for the EU dimension of EDC is that EU primary law satisfies the criterion of objectivity, as it consists of texts on which there is a fundamental consensus. An important additional argument is based on the constitutional functions of EU primary law. The significance of constitutions for citizenship education in general is explained first. Then an analysis of the constitutional characteristics of the EU Treaties and CFR underscores their relevance for the EU dimension of EDC.

### 165 *Significance of constitutions for EDC/HRE*

The Member State constitutions are significant for citizenship education and the application of EDC standards in several respects.<sup>1105</sup> Member States’ practices link citizenship education with their constitutions, aiming at constitutional literacy.<sup>1106</sup> As the foundational texts on which public life and the organisation in a given society are based, constitutions clearly provide essential content for the components of EDC (c-1–2–3), i.e. exercising and defending democratic rights and responsibilities, valuing diversity and

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1103 Further text to nn 1119, 1125.

1104 L van Middelaar, *The passage to Europe: How a Continent became a Union* (L Waters tr, Yale University Press 2013) 12–24. Confronted with conceptual unclarity and the ‘extremely tricky’ question as to whether Europe exists as a political entity, the author proposes a new paradigm. He explains Europe as a set of three spheres, concentric globes, each sphere with its own principles of dynamism and order. The outermost sphere of Europe is that of the sovereign states on the continent, driven by the pursuit of their own national interests, ordered by balance of power and territorial borders, delineated in geography and history. The innermost sphere is that of the EU as created by the founding Treaty, ‘a pact’ signed by States, offering stability and order in an expanding action area of participating Member States, inspired by the idea of the ‘European project’ and legally defined. ([t]he inner sphere derives its order and footing from the pact’; ‘the treaty offers solid ground’). The intermediate sphere refers to Member States functioning sometimes in the inner and sometimes in the outer sphere, driven by national interests and by a growing consciousness of common interests.

1105 See also §§ 13 29 89 ; the para 4- principle of the Charter on EDC/HRE.

1106 See i.a. § 89 .

playing an active part in democratic life.<sup>1107</sup> Constitutions define human rights, the subject of HRE. It is not only constitutional literacy in the cognitive sense which is the aim of EDC. Constitutions reflect ethical choices, the vision of the common good, and the blueprint for the society on which the constituents have agreed.<sup>1108</sup> They are the highest legal expression of the value system.<sup>1109</sup> As constitutions thus lay down the basic choices for society, it is not only legitimate, but also necessary to educate citizens in the spirit of their constitutions, as Aristotle proclaimed in Ancient Greece.<sup>1110</sup> At present, some Member States' constitutions even explicitly limit freedom of education by requiring allegiance to the constitution.<sup>1111</sup> Yet, learning in respect for the constitution does not mean that citizens must be trained in uncritical obedience. Ensuring that the substance of EDC and HRE is in keeping with the constitution of the Member State does not exclude critical thinking.<sup>1112</sup> Constitutions are living documents and may evolve in accordance with the evolution of civil society; preferably constituted by educated citizens prepared for responsible action. A basic understanding of constitutional norms enables informed participation by citizens at moments of constitutional change. The relationship

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1107 See e.g. 'Unsere Verfassung!' in AT: [www.politik-lernen.at/site/grundlagen/politischebildung](http://www.politik-lernen.at/site/grundlagen/politischebildung) and [www.unsereverfassung.at/?lang=en](http://www.unsereverfassung.at/?lang=en).

1108 Prescriptive or constructivist function of constitutions (also n 96). See i.a. MA Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76 *The Modern Law Review* 191 (teleological aspect inherent in any constitutional discourse; '[t]he right question is not therefore "what sort of polity is the European Union?" but rather, "what sort of polity is it *becoming*?"').

1109 B de Witte, 'Community Law and National Constitutional Values' (1991) 18 *Legal Issues of Economic Integration* 1. On the crystallization of common ends and values in constitutions and amplifying effects, Walker, 'European Constitutionalism in the State Constitutional Tradition', 65. Further VC Jackson, 'Paradigms of public law: transnational constitutional values and democratic challenges' (2011) 8 *International journal of constitutional law* 517; and Callies in nn 1185 ff.

1110 Curren, 'A neo-Aristotelian account of education, justice, and the human good': 'There is no profit in the best of laws ... if the citizens themselves have not been attuned, by the force of habit and the influence of teaching, to the right constitutional temper'. Text to n 95.

1111 Germany Art 5(3) Basic law, Greece Art 16(1), Cyprus Art 20(1). See n 672 and text.

1112 Cf JW Müller, 'A general theory of constitutional patriotism' (2007) 6 *International Journal of Constitutional Law* 72: 'The object of patriotic attachment is a specific constitutional culture that mediates between the universal and the particular, while the mode of attachment is one of critical judgment.'

between constitutions and education is dynamic and dialectical: the constitution influences education, and, in the long term, education may influence the constitution.<sup>1113</sup> Beaumont writes that ‘the complex intersections between education and the Constitution have helped define the contours of American governance, citizenship, civil liberties, and civil society in every era’.<sup>1114</sup>

### *166 Constitutional features of EU primary law*

Are the EU Treaties and CFR the constitution of the EU? The significance of being called a constitution<sup>1115</sup> reaches into the field of citizenship education. As citizenship education and constitutions are concepts traditionally associated with states, transposing them to the level of the EU raises questions pertinent for both. Recognising the constitutional nature of the Treaties and CFR may affect opinions on the need for citizenship education of EU citizens.

While many scholars recognise the constitutional character of the EU Treaties and CFR, the persistence of debate must be acknowledged.<sup>1116</sup> The EU treaties and CFR display constitutional features to a certain extent. To the extent that they fulfil a constitutional role, they are an essential basis for all EDC of citizens. Yet, lacking the full constitutional weight of a state constitution, their suitability as pillar for an EU dimension of EDC may be criticised.

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1113 Cf evolutionary, deliberative constitutionalism, see i.a. M Vargova, ‘Democratic Deficits of a Dualist Deliberative Constitutionalism: Bruce Ackerman and Jürgen Habermas’ (2005) 18 *Ratio Juris* 365, on Habermas’ discursive constitution, open to new social and historical circumstances.

1114 E Beaumont, ‘Education and the Constitution: Defining the Contours of Governance, Rights, and Citizenship’ in M Tushnet, MA Graber and S Levinson (eds), *The Oxford Handbook of the US Constitution* (2015) 968. See also E Reilly, ‘Education and the Constitution: Shaping Each Other & the Next Century’ (2000-2001) 34 *Akron Law Review* 1; J Haubenreich, ‘Education and the Constitution’ (2012) 87 *Peabody Journal of Education* 436; FH Pina, ‘Constitution, Education and Research’ (2013) 12 *EERJ* 34. Cp Crick, ‘The Presuppositions of Citizenship Education’, 346 (sceptical as to constitution learning, because of focus on active citizenship); also Commission/EACEA/Eurydice, *Citizenship Education at School in Europe* (2017).

1115 Cf M Póiares Maduro, ‘The importance of being called a constitution: Constitutional authority and the authority of constitutionalism’ (2005) 3 *International Journal of Constitutional Law* 332 (on functions of constitutionalism as a normative theory of power in the EU).

1116 See overview of the debate in Calliess, ‘EU-Vertrag (Lissabon) Art 1’, Rn 51 ff.

The founding Treaties and CFR can be considered from two angles: the angle of the *instrumentum*—a treaty—and the angle of the *negotium*—the substance (this distinction appears clearly in the ‘*Treaty establishing a Constitution for Europe*’). There are no doubts about the *instrumentum* insofar as the Treaties have been ratified and *pacta sunt servanda*. This is the minimalist view. Some scholars plead in favour of viewing the founding Treaties and CFR as a contractual constitution as far as genesis is concerned (taking the form of treaties) and as a functional constitution as far as substance is concerned.<sup>1117</sup> Calliess speaks of a ‘Verfassungsvertrag’.<sup>1118</sup> The EU Treaties and CFR do not satisfy some of the traditional conditions for constitutionalism. The EU missed its ‘constitutional moment’ and has an uncertain ‘demos’. Whereas the constitutional moment is significant for a constitution's integrative and identity-building force, as emphasised by Ackerman,<sup>1119</sup> the Treaty establishing a Constitution for Europe was rejected. After this failure, the Intergovernmental Conference omitted several too state-like provisions, dropping the terminology ‘constitution’, as well as ‘European law’, ‘European framework law’, or ‘Union Minister for Foreign Affairs’, and deleting references to the symbols of the Union (flag, anthem and Europe day).<sup>1120</sup> As Kirchhof wrote, the Member States rejected the ‘constitutionalisation’ of EU law to the extent that the term ‘constitution’ suggests the emergence of statehood.<sup>1121</sup> Pernice saw no need for an EU constitution if this implied the constitution of a European

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1117 Functions in text to n 1127.

1118 Calliess, ‘EU-Vertrag (Lissabon) Art 1’, Rn 65.

1119 B Ackerman, ‘Revolution on a Human Scale (Moments of Change: Transformation in American Constitutionalism)’ (1999) 108 *Yale Law Journal* 2279, 2341. See further BA Ackerman, *We the People*, vol 2: Transformations (Harvard University Press 1998); N Walker, ‘The Legacy of Europe's Constitutional Moment’ (2004) 11 *Constellations* 368; D Grimm, ‘Integration by constitution’ (2005) 3 *International Journal of Constitutional Law* 193, 200–201; N Walker, ‘Europe's constitutional momentum and the search for polity legitimacy’ (2005) 3 *International Journal of Constitutional Law* 211.

1120 Presidency Conclusions of the Brussels European Council of 21–22 June 2007, Annex I: IGC Mandate: the European Council asked to amend the existing EU and EC treaties, instead of adopting one single Treaty text, and to drop the constitutional character. The amendments provide instead for ‘legislative acts’ (legislative procedure, now Art 289(3) TFEU) and a ‘High Representative of the Union for Foreign Affairs and Security Policy’ (now Art 18 TEU).

1121 Kirchhof, ‘The European Union of States’ 737.

federal State.<sup>1122</sup> Weiler emphasises that the *content* of a constitution and a treaty may be identical (a functional constitution), but suggests that the *form* of a ‘true’ constitution depends on two hallmarks: amendment by a (privileged) majority and approval by a (growing) demos.<sup>1123</sup> A recurrent argument against a constitutional label for the EU Treaties is that there is not a ‘people’ of Europe sufficiently homogenous to form a democratic will.<sup>1124</sup> The EU has no constitutional authority in the sense of a *pouvoir constituant*, the power of a polity to define its own destiny.<sup>1125</sup>

Several scholars see the rejection of the Constitution of Europe as the rejection of formal constitutionalism. The substantive constitution remains, a ‘functional constitution’.<sup>1126</sup> The Treaties and CFR fulfil the *constitutive* function of constitutions, establishing the institutions of a

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- 1122 I Pernice, ‘Does Europe need a Constitution?’ in *Arnulf A and others (eds), A Constitutional Order of States: Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) 77 (however, in another sense a constitution may be necessary).
- 1123 JHH Weiler, ‘A Constitution for Europe? Some hard choices’ (2002) 40 *JCMS* 563, 565–569: contrary to a constitutional treaty, a ‘true’ constitution (first) does not require unanimity for amendments (unanimity is typical for internationalism, majority is sign of a polity) and (second) is approved by the peoples of Europe not in their status as national communities, but as such (demos). Further JHH Weiler, *The constitution of Europe: do the new clothes have an emperor? and other essays on European integration* (reprint edn, Cambridge University Press 2004).
- 1124 D Grimm, ‘Does Europe Need a Constitution?’ (1995) 1 *ELJ* 282; P Craig, ‘Constitutions, Constitutionalism, and the European Union’ (2001) 7 *ELJ* 125, 136–139 (the *no-demos* thesis); Grimm, ‘Integration by constitution’, 208. Cp Calliess, ‘EU-Vertrag (Lissabon) Art 1’, Rn 43, considering the establishment of EU citizenship in the Maastricht Treaty as an important step (also seen Arts 22, 23 TFEU).
- 1125 Much commented, see i.a. Poiarés Maduro, ‘The importance of being called a constitution: Constitutional authority and the authority of constitutionalism’, 356; Vargova, ‘Democratic Deficits of a Dualist Deliberative Constitutionalism: Bruce Ackerman and Jürgen Habermas’; C Möllers, ‘Pouvoir Constituant-Constitution-Constitutionalisation’ in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, vol 8 (2 edn, Hart Beck Nomos 2010); Calliess, ‘EU-Vertrag (Lissabon) Art 1’, Rn 56–57. See also D Grimm, ‘The Democratic Costs of Constitutionalisation: The European Case’ (2015) 21 *ELJ* 460 (lack of public sphere, lack of legitimacy, overconstitutionalisation of the EU).
- 1126 Weiler, ‘A Constitution for Europe? Some hard choices’ (p 569: ‘Europe, of course, has a Constitution—in the same way that, say, the United Kingdom has one’); K Lenaerts, ‘A Community Based on a “Constitutional Charter”: Community Law as a Complete and Coherent Constitutional System’ in MP Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 298 (the

political society; the *attributive* function, empowering these institutions; and the *regulative* function, regulating and limiting the exercise of public

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Treaty has ‘the classical functions of a constitution, in terms of the horizontal division of powers between the European institutions, the vertical division of powers between the Community and the Member States and the protection of fundamental rights’; Pernice, ‘Does Europe need a Constitution?’, 75–76, 92; Calliess, ‘EU-Vertrag (Lissabon) Art 1’, 64. See also C Reh, ‘The Lisbon Treaty: De-Constitutionalizing the European Union?’ (2009) 47 *JCMS* 625, 629. On EU constitutionalism or constitutional characteristics, see further: J Gerkrath, *L'émergence d'un droit constitutionnel pour l'Europe* (Ed de l'Université de Bruxelles 1997); P Eleftheriadis, ‘Begging the Constitutional Question’ (1998) 36 *JCMS* 255; Craig, ‘Constitutions, Constitutionalism, and the European Union’; J Habermas, ‘Why Europe needs a constitution’ (2001) *New Left Review* 5; Poiars Maduro, ‘The importance of being called a constitution: Constitutional authority and the authority of constitutionalism’; R Bellamy, ‘The European Constitution is Dead, Long Live European Constitutionalism’ (2006) 13 *Constellations* 181; K Lenaerts, ‘La constitutionnalisation de l'ordre juridique de l'Union européenne’ in *Mélanges en l'honneur du Professeur Francis Delpérée: Itinéraires d'un constitutionnaliste* (Bruylant 2007); J Shaw, ‘One or Many Constitutions: The Constitutional Future of the European Union in the 2000s from a Legal Perspective’ (2007) 52 *Scandinavian Studies in Law* 393; F Amtenbrink, ‘The multidimensional constitutional legal order of the European Union - A successful case of cosmopolitan constitution building?’ (2008) 39 *Netherlands Yearbook of International Law* 3; KH Ladeur, ‘“We, the European People...” - Relâche?’ (2008) 14 *ELJ* 147; N Walker, ‘Not the European Constitution’ (2008) 15 *Maastricht journal of European and comparative law* 135; T Christiansen and C Reh, *Constitutionalizing the European Union* (Palgrave MacMillan 2009); J Wouters, L Verhey and P Kiiver (eds), *European Constitutionalism beyond Lisbon* (Intersentia 2009); A Arnulf and others (eds), *A Constitutional Order of States: Essays in EU Law in Honour of Alan Dashwood* (Hart 2011); Habermas, *Zur Verfassung Europas. Ein Essay*; TV Olsen, ‘The political constitution of the EU citizen rights regime’ (2011) 18 *Journal of European Public Policy* 35; P Cardonnel, A Rosas and N Wahl, *Constitutionalising the EU judicial systems: essays in honour of Pernilla Lindh* (Hart 2012); Habermas, ‘The Crisis of the European Union in the Light of a Constitutionalization of International Law’; P Berthelet, ‘Les fondements théoriques du droit européen à l'épreuve de la constitutionnalisation de l'ordre juridique de l'Union: Entre permanence et changement’ [2015] *Revue du droit de l'Union européenne* 529; P Craig, ‘The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility’ (2015) 22 *Indiana Journal of Global Legal Studies* 243; K Lenaerts, ‘Democracy, Constitutional Pluralism and the Court of Justice of the European Union’ in L Van Middelaar and P Van Parijs (eds), *After the Storm: How to Save Democracy in Europe* (Lannoo 2015); D Grimm, *The Constitution of European Democracy* (Oxford University Press 2017) (the Treaties function as a constitution; the EU is even over-constitutionalised).

power.<sup>1127</sup> The Treaties constitute the EU: Article 1 TEU states that ‘[b]y this Treaty, the High Contracting Parties establish among themselves a European Union...’. The constituent acts of the International Labour Organisation and the World Health Organisation are also named ‘constitutions’. The Treaties attribute public powers to the EU and, together with the CFR, they limit the use of this public power (vertically and horizontally). Like many constitutions, the Treaties and CFR define rights-based limitations on governmental power.<sup>1128</sup> Such rights will provide the content of component (c-1) in EDC, i.e. exercising and defending democratic rights and responsibilities in society. Functioning as the *Grundnorm* in the EU legal order and protecting fundamental rights, the Treaties and CFR operate as a constitution. The ECJ repeatedly qualifies the Treaties as ‘the basic constitutional charter’.<sup>1129</sup> All measures adopted by the EU institutions and by the Member States when implementing EU law, must be in conformity with the Treaties and the CFR. Review of legality by the ECJ is a constitutional principle. The adjective ‘constitutional’ appears frequently in ECJ case law, e.g. constitutional charter,—principles,—significance,—

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1127 LFM Besselink, ‘The notion and nature of the European constitution after the Lisbon Treaty’ in J Wouters, L Verhey and P Kiiver (eds), *European Constitutionalism beyond Lisbon* (Intersentia 2009) 264. See also functions described in Calliess, ‘EU-Vertrag (Lissabon) Art 1’, Rn 64. Further European Parliament Committee on Constitutional Affairs, Report on the Treaty of Lisbon (29 January 2008), Explanatory Statement to European Parliament resolution of 20 February 2008 on the Treaty of Lisbon, paras 1.2–4, and 2.2 (a constitution can be defined as ‘a fundamental act governing the exercise of power in a political entity’); and European Parliament Resolution of 20 February 2008 on the Treaty of Lisbon [2009] OJ C184E/25.

1128 Craig, ‘Constitutions, Constitutionalism, and the European Union’, 141; essential constitutional feature, see Raz in n 1133.

1129 I.a. Case 294/83 *Parti écologiste ‘Les Verts’ v Parliament* ECLI:EU:C:1986:166, para 23; Case C-15/00 *Commission v European Investment Bank* ECLI:EU:C:2003:396, para 75; Joined Cases C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461, para 281 (‘the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions’); EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, para 163.

status,—guarantee,—structure.<sup>1130</sup> EU primary law expresses the ‘constitutional consensus’.<sup>1131</sup>

Constitution and constitutionalism have divergent meanings. Depending on the definition, the Treaties and CFR have some of the features of a constitution. Walker distinguishes ‘constitutional’ in juridical frame terms, in institutional terms, in authoritative terms, and in social terms.<sup>1132</sup> The Treaties and CFR are, at least, a ‘thin’ constitution as defined by Raz, i.e. the law establishing and regulating ‘the main organs of government’.<sup>1133</sup> According to some scholars, such as Pernice,<sup>1134</sup> the Treaties and CFR also possess several features of Raz’ constitution in a ‘thick’ sense: in addition to being constitutive, defining the main organs of government and their powers,<sup>1135</sup> the Treaties and CFR are intended to be stable, normally enshrined in written documents; they are superior law and justiciable;<sup>1136</sup> they are entrenched, needing special amendment procedures, thus withdrawn from normal politics and ordinary legislation;<sup>1137</sup> and they express a common ideology. Here, reference is made to norms on democracy, rule of law, and fundamental rights, which ‘express the common beliefs of the population

- 1130 *Opinion 2/94* ECLI:EU:C:1996:140, para 35 (‘constitutional significance’); 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’), para 316 (‘a constitutional guarantee’); EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, paras 158 and 177 (‘constitutional framework’), para 163 (‘basic constitutional charter’) para 165 (‘the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU’) (emphasis added).
- 1131 K Lenaerts and JA Gutiérrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’ in S Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart 2014), 142 (by contrast to the legislative consensus).
- 1132 N Walker, ‘Opening or Closure? The Constitutional Intimations of the ECJ’ in MP Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 335.
- 1133 J Raz, ‘On the Authority and Interpretations of Constitutions: Some Preliminaries’ in L Alexander (ed), *Constitutionalism* (Cambridge University Press 2001) 152–153.
- 1134 Pernice, ‘Does Europe need a Constitution?’ 88; see also Craig, ‘Constitutions, Constitutionalism, and the European Union’, 126–129.
- 1135 E.g. Arts 13–19 TEU, 223–309 TFEU.
- 1136 E.g. Arts 19 TEU; Arts 258, 260, 263, 265 TFEU; Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:462, paras 38–40.
- 1137 Art 48 TEU.

about the way their society should be governed'.<sup>1138</sup> It is worth noting the use of the word 'society', not 'state'.<sup>1139</sup>

Whether the Treaties and CFR form a 'thin' or a 'thick' constitution is not decisive for the purposes of EDC. What matters is, firstly, that an undeniable consensus exists on the adopted texts (objectivity, as discussed in §164 ) and, secondly, that the texts adopted fulfil certain of the functions of a constitution. In an approach giving the Treaties a low degree of constitutional intensity, the Treaties nevertheless retain their status as agreements binding on the Member States, consent anchored in the national constitutions, and they establish and regulate some of the main organs of government at EU level. The *instrumentum* provides a stable pillar for an EU dimension of EDC, impacting on the content of EDC components (c-1-3), e.g. on the rights and obligations of citizens and on participation in democratic life. In an approach recognising a high degree of constitutionality as to the substance of the Treaties (*negotium*), the Treaties are an even more important basis for incorporating an EU dimension into EDC. Calliess describes the Treaties as a substantive constitution, with the essential functions and content of a constitution, supplementing Member State constitutions.<sup>1140</sup> The function of the Treaties and CFR as *Grundnorm*, their status as EU *primary* law, at the top of the hierarchy of norms in the EU legal order, is relevant for citizens. EU primary law gives numerous EU rights and principles entrenched status.<sup>1141</sup> If the EU primary law sources are the basis on which the legal order of the EU is constructed, shaping the society in which EU citizens live, a fortiori they must be sufficiently strong to have educational consequences for EU citizens. Functioning as the constitutional charter for the EU (ECJ), the Treaties and CFR provide guidance for the *EU dimension* of EDC, as national constitutions do for *national EDC*, in a comparable dialectical relationship between constitution and education.<sup>1142</sup>

That the Treaties and the CFR function as a constitution is underscored by their interconnectedness with Member State constitutions.

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1138 Craig, 'Constitutions, Constitutionalism, and the European Union', 127. Craig adds that the EU Treaties and CFR 'contain rights of a kind that would be found in many national constitutions', such as provisions on citizenship rights (Arts 20–24 TFEU) and on prohibition of discrimination (Arts 18–19 TFEU).

1139 Further text to n 2208.

1140 Calliess, 'EU-Vertrag (Lissabon) Art 1', Rn 64–66.

1141 Entrenched, in the sense of not changeable through normal legislative processes.

1142 See nn 1113, 1114.

167 *Interconnection of EU primary law and Member State constitutions*

EU primary law and Member State constitutions are interconnected in various ways and cannot be adequately understood in isolation.<sup>1143</sup> The Treaties and CFR refer to Member State constitutions at several points,<sup>1144</sup> and most Member State constitutions contain provisions related to the EU Treaties. They refer to EU membership in diverse ways, to greater or lesser extents, for instance in structural guarantee clauses,<sup>1145</sup> procedural conditions for the transfer of public authority,<sup>1146</sup> norms on informing the national parliament on EU matters,<sup>1147</sup> provisions on European Parliament elections,<sup>1148</sup> or on rights of EU citizens (nationals of other Member States)<sup>1149</sup>. Some constitutions state that the EU Treaties and provisions of EU law form part of the internal legal order and are directly applicable; some refer to the supremacy of EU law over national law.<sup>1150</sup> Other

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- 1143 On the interdependency and reciprocal linking of constitutions, Grabenwarter, 'National Constitutional Law Relating to the European Union', 127; Calliess, 'EU-Vertrag (Lissabon) Art 1', i.a. Rn 46. See also H Bauer and C Calliess (eds), *Constitutional principles in Europe* (Bruylant 2008).
- 1144 Art 42 TEU (common Union defence policy), Arts 48, 49, 50, 54 TEU (amendment, accession, withdrawal, ratification of the TEU); Art 55 TEU (Treaty languages); Art 4 (2) TEU (national identities), Art 6 TEU and Art 52(4) CFR (fundamental rights and common constitutional traditions); Art 53 (level of protection); Art 25 TFEU (adding new citizenship rights to the list in Art 20(2) TFEU); Art 218(8) TFEU (accession to the ECHR), Art 223 (EP elections), Art 262 (ECJ jurisdiction and European intellectual property rights), Art 311 (categories of EU resources), Art 357 (ratification of the TFEU).
- 1145 E.g. Art 23(1) German Basic Law (tr 'Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law'); Art 7(5)-(6) Portuguese constitution; Art 143 Croatian constitution. Further Kirchhof, 'The European Union of States', 742–743.
- 1146 E.g. constitution of Belgium Art 168; and Sweden Ch 10 Art 6.
- 1147 E.g. constitution of Bulgaria, Art 105(3)-(4); Finland Section 97; France Art 88(4); Greece Art 70(8); Hungary Art 19; Sweden Ch 10 Art 10.
- 1148 E.g. constitution of Austria Art 23(a)(b); Belgium Art 168 bis; Sweden, Ch 8 Art 2.
- 1149 See nn 1318-1319.
- 1150 Constitutional Act on membership of the Republic of Lithuania of the EU, para 2 ('The norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithua-

national constitutions do not specifically refer to EU membership, but provide for compliance with international obligations<sup>1151</sup>, precedence over national law<sup>1152</sup>, or have concordant constitutional practices, which confirm the minimalist approach mentioned above.

The interconnectedness of the EU Treaties and CFR with Member State constitutions is reflected in the concept of ‘a European constitutional area’ formed by the Member States’ constitutions and the partial or complementary constitution in EU law.<sup>1153</sup> In a common area of constitutionalism, national and international constitutional guarantees interact to uphold common European constitutional values.<sup>1154</sup> Scholars (Pernice, Besselink) refer to the European constitutional space as a composite constitutional area, a *Verfassungsverbund*, a true compound of the EU ‘constitution’, the Member States’ constitutions, and the ECHR.<sup>1155</sup> Callies qualifies the EU

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nia’); constitution of Portugal Art 8(3) and (4) (‘The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.’) For importance, see text to n 1828 (section).

1151 E.g. constitution of Slovenia Art 8; of Spain Art 96. Member States which do not mention EU membership in their constitution may have constitutional practices consistent with the Treaties (e.g. by means of judicial interpretation in Estonia).

1152 E.g. Art 25 German Basic Act.

1153 von Bogdandy, ‘Founding Principles’ 24.

1154 See in this context, A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Beck 2015).

1155 I Pernice, ‘Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung’ in R Bieber and P Widmer (eds), *Der europäische Verfassungsraum* (Schulthess Juristische Medien 1995) 261; Besselink, ‘The notion and nature of the European constitution after the Lisbon Treaty’ 262, 279. See also LFM Besselink, *A Composite European Constitution* (Europa Law 2007); A Voßkuhle, ‘Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund’ (2010) 6 *European Constitutional Law Review* 175, von Bogdandy, ‘Founding Principles’ 38; N Walker, J Shaw and S Tierney, *Europe’s Constitutional Mosaic* (Hart 2011) (on the ‘constitutional mosaic’ metaphor, and the increasingly dense networks of constitutional authority within the European space); Lenaerts and Gutiérrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’; A Voßkuhle, ‘European Integration Through Law: The Contribution of the Federal Constitutional Court’ (2017) 58 *European Journal of Sociology* 145. On the theme of constitutional pluralism, see i.a. N Walker, ‘The Idea of Constitu-

as a 'Staaten- und Verfassungsverbund'.<sup>1156</sup> In this 'Verbund', citizens act in a dual capacity as national citizens and as EU citizens, subjects conferring legitimacy on the political system.<sup>1157</sup>

The fact that Member State constitutions and EU Treaties are inextricably interwoven, should be reflected in EDC. Education of citizens aiming at national constitutional literacy and national constitutional values should be interwoven with education for literacy with regard to the EU Treaties and the values they enshrine. In other words, national EDC needs an EU dimension. Calliess describes a paradigm shift which requires more transparency and more interest from EU citizens in EU objectives. He defines the EU as 'a federal type of multi-level constitutionalism, in which state sovereignty is reduced and the constitutional orders of the EU and its Member States are mutually interlocked'.<sup>1158</sup> Therefore, if in the Aristotelian tradition citizens are to be educated in the spirit of their constitution ('to the right constitutional temper'<sup>1159</sup>) then that should apply with regard to Member State constitutions, the Treaties and the CFR. The 'spirit of law' (*L'esprit des lois*) is also central for Montesquieu, who argued that education must relate to the principle of government.<sup>1160</sup> In a play on

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tional Pluralism' (2002) 65 *Modern Law Review* 317; R Barents, 'The Precedence of EU Law from the Perspective of Constitutional Pluralism' (2009) 5 *European Constitutional Law Review* 421; Aybelj and Komárek, *Constitutional Pluralism in the European Union and Beyond*; K Lenaerts, 'EU Values and Constitutional Pluralism: The EU System of Fundamental Rights Protection' (2014) XXXIV *Polish Yearbook of International Law* 135; Lenaerts, 'Democracy, Constitutional Pluralism and the Court of Justice of the European Union'.

1156 Calliess, 'EU-Vertrag (Lissabon) Art 1', Rn 44; Pernice's 'Verfassungsverbund' is problematic to the extent that it unifies EU and Member State levels. Member States first allow the 'Verfassungsverbund' as 'offene Verfassungsstaaten'. The 'Staaten- und Verfassungsverbund' is characterised by 'das inhaltliche Zusammenwirken, das Aufeinander-Angewiesensein und die gegenseitige Verzahnung der Ebenen'. (The alliance of States and constitutions is characterised by cooperation as to substance, consideration for one another and interlocking of levels).

1157 Calliess and Hartmann, *Zur Demokratie in Europa: Unionsbürgerschaft und europäische Öffentlichkeit* 80, 149 ('die geteilten Bürger').

1158 C Calliess, 'Europe as Transnational Law: The Transnationalization of Values by European Law' (2009) 10 *German Law Journal* 1367, 1375.

1159 N 95.

1160 Montesquieu, *De l'esprit des lois* (digital JM Tremblay 2002 edn, Barillot 1748), Livre quatrième- Que les lois de l'éducation doivent être relatives aux principes du gouvernement. I Des lois de l'éducation (...) 'Les lois de l'éducation seront

words, the EU has been said not to be a state, but a state of mind.<sup>1161</sup> Articles 1–6 TEU define the mind, the spirit.<sup>1162</sup> They give substance to the attitudes of Member States and EU citizens and, as far as the latter are concerned, relate to affective-behavioural aspects of citizenship education.<sup>1163</sup>

## 2. Foundational values, objectives and principles of the EU

### 168 *The ground rules of play: constitutional norms as EDC content*

Citizens should understand the ground rules of play of the system in which they live. EU primary law, interconnected with Member State constitutions, provides the EU dimension in the ground rules of play in the European constitutional space. If the society in which EU citizens live is based on a composite constitution, then EDC seeking to ensure constitutional literacy should correspond to the interconnected constitutional sources.<sup>1164</sup> National citizenship education linked solely with national con-

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donc différentes dans chaque espèce de gouvernement. Dans les monarchies, elles auront pour objet *l'honneur*; dans les républiques, la *vertu*; dans le despotisme, la *crainte*.' (The laws on education must relate to the principles of government. The laws of education therefore will differ for each kind of government: in monarchies they will be concerned with honour, in republics with virtue, where there is despotism, they will aim at creating fear.) Haller refers to Montesquieu in his classic 'Spirit of Laws 1748': 'it is not enough to devise ideal models of constitutions but one must also take into consideration the social conditions which make a constitution really "work"'; see M Haller, *European Integration as an Elite Project: the Failure of a Dream?* (Routledge 2008) Preface xxiv.

1161 See i.a. K Lenaerts and M Desomer, 'Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means' (2002) 27 *ELRev* 377; J Subotic, 'Europe is a State of Mind: Identity and Europeanization in the Balkans' (2011) 55 *International Studies Quarterly* 309.

1162 See also Schuman (Strasbourg, 16 May 1949), text to n 1890. Further n 1890. Cf the spirit of the Treaty, used in the interpretation in settled case law of the ECJ, e.g. Case 294/83 *Parti écologiste 'Les Verts' v Parliament* ECLI:EU:C:1986:166, para 25.

1163 See in general CoE Recommendation CM/Rec(2010)7 of the Committee of Ministers to member states on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (11 May 2010), para 5(f). On belonging and identity formation, see i.a. text to nn 1187-1191, n 1191.

1164 The fourth meaning of constitutionalism as described by Craig is particularly appropriate in the context of linking constitutionalism with citizenship education: '[Constitutionalism] is used to connote not whether a legal system has

stitutions, lacking an EU dimension, will increasingly prove to be insufficient and inadequate for preparing citizens for life in a society where public power is dispersed across several levels. If constitutionalism has become multilevel,<sup>1165</sup> EDC should correspond, highlighting the interaction between constitutions at various levels. This is consistent with the paragraph-4 principle of the Charter on EDC/HRE (objectives, principles and policies on EDC/HRE are to be applied with due respect for the constitutional structures of each member state), as well as with the constitutional red line affecting the reception of exogenic standards in the EU.<sup>1166</sup> Not educating citizens in the spirit of the composite constitutional system may backfire: in just a day a popular vote could wipe away the carefully constructed architecture of interlocking constitutional rules meticulously developed over decades.

### 169 *The DNA of the EU*

To understand the system governing the society in which they live, EU citizens need some understanding of the norms on which that system is based, especially those of Articles 1–6 TEU. These provisions set out the foundational values, objectives and principles of the EU. They are the DNA of the EU and should be central to all EU learning. EDC should—to the extent possible—relate to the ‘intrinsic nature of the EU’,<sup>1167</sup> not to superficial

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the features of a constitution, but also the extent to which it satisfies desirable precepts of good governance which go beyond those normally expressed within the constitution itself, with issues as accountability, good administration and mainstreaming of human rights. See Craig, ‘Constitutions, Constitutionalism, and the European Union’, 127–128.

1165 Callies n 1158; I Pernice, ‘Multilevel constitutionalism in the European Union’ (2002) 27 *ELRev* 511. On multilevel governance, see further C Harlow and R Rawlings, ‘Promoting Accountability in Multilevel Governance: A Network Approach’ (2007) 13 *ELJ* 542; A Lansbergen and J Shaw, ‘National membership models in a multilevel Europe. Symposium: The Evolving Concept of Citizenship in Constitutional Law’ (2010) 8 *International Journal of Constitutional Law* 50; N Bolleyer and C Reh, ‘EU legitimacy revisited: the normative foundations of a multilevel polity’ (2012) 19 *Journal of European Public Policy* 472; R Bauböck, ‘The three levels of citizenship within the European Union’ (2014) 15 *German Law Journal* 751.

1166 Text to nn 1205 ff.

1167 On the ‘intrinsic nature’, see EU Accession to the ECHR *Opinion 2/13* ECLI:EU:C:2014:2454, para 193. On the ‘DNA’ of the EU, also JHH Weiler, ‘Deciphering the Political and Legal DNA of European Integration’ in X Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

information, such as the number of Members of the European Parliament or the date of accession of Bulgaria, to be learnt by heart and then forgotten. To empower EU citizens to exercise their rights and responsibilities, to value diversity, and to participate in the democratic life of the Union, they need to understand the *raison d'être* of the EU and how their Member State participates in it. The self-perception of Member States, and of their nationals, is incomplete if it lacks an EU dimension.

For the purposes of EDC, the terminology 'values', 'objectives' or 'principles' as used in EU primary law suffices.<sup>1168</sup> The adjective 'foundational' indicates that they are drawn from EU primary law. Admittedly, to the extent that the Treaties and CFR constitute a functional or material constitution, the values, objectives and principles they lay down may very well be labelled EU 'constitutional' values, objectives and principles. Calliess argues that using the label 'constitutional' is not only legitimate but also necessary for transparency reasons and closeness to EU citizens as a matter of honest politics.<sup>1169</sup> However, to ensure a safe start for an EU dimension

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1168 Scholars consider values to be like ethical convictions, more indeterminate, while legal principles have a more defined structure, capable of producing legal effects. For legal theory, see i.a. R Alexy, 'On the Structure of Legal Principles' (2000) 13 *Ratio Juris* 294; von Bogdandy, 'Founding Principles' (p 14: 'The relationship between the principles discourse in legal philosophy and that in legal doctrine is as blurred as it is complicated'). C Hilson, 'Rights and principles in EU law: a distinction without foundation?' (2008) 15 *Maastricht journal of European and comparative law* 193; S Besson and P Pichonnaz (eds), *Les principes en droit européen/ Principles in European Law* (Schultess 2011). Formerly the Treaties referred to principles instead of 'values' (Art 6(1) TEU 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'). See also L Pech, 'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 *European Constitutional Law Review* 359, 366–367 (in the Lisbon Treaty '[a] distinction between the Union's fundamental moral values (human dignity, freedom, etc.) on which the Union is founded, and the structural constitutional principles (democracy, the rule of law, etc.) on the basis of which the Union must function, would have been more appropriate'). On rights and principles in the CFR, see S Peers and S Prechal, 'Article 52: Scope and Interpretation of Rights and Principles' in S Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart 2014); also M Van Roosmalen and others, *Fundamental rights and principles: liber amicorum Pieter van Dijk* (Intersentia 2012). See Rosas and Armata, *EU Constitutional Law: An Introduction*, for an introduction to the essential values, principles and objectives of EU integration.

1169 Calliess, 'EU-Vertrag (Lissabon) Art 1', Rn 63.

in EDC at school, I consider that it is at present more appropriate to use the expression ‘foundational’ values, objectives and principles of the EU, in order not to encroach on political sensitivities in multidisciplinary contexts, and acknowledging the debate on the constitutional nature of the EU. Outside the legal field, the word ‘constitutional’ is less frequently used with regard to the EU and it could lead to reticence on the part of national curriculum designers and citizenship educators.<sup>1170</sup> Citizenship education-ists tend to be highly sensitive to any hint of an intention to create an EU super state. The word ‘constitutional’ could—unfairly—suggest such an intention and is better avoided. The word ‘foundational’ is in line with expressions in the Treaties and ECJ case law. The TEU and TFEU are the Treaties on which the EU is ‘founded’ (Article 1 TEU, third sentence).<sup>1171</sup> ECJ case law regularly refers to ‘the very foundations’ of the Union.<sup>1172</sup> Alternative expressions to ‘foundational’ may be ‘founding’, ‘systemic’ or ‘core’ values, objectives and principles.<sup>1173</sup> At a later stage, when citizens

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1170 Searching in databases for ‘constitutional & EU’ mostly leads to law journals, legal conferences and books in the field of law.

1171 See Arts 1, 2, 10 TEU (the EU is ‘founded’ on the Treaties, on values, on representative democracy). See also earlier EEC Treaty, Part II ‘Foundations of the Community’; and ECJ case law related to it (n 1172).

1172 Joined Cases C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461, paras 282, 290, 304 (‘the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights’). Earlier settled case law repeats that ‘form part of the (very) foundations of the Community’: the common market, the principle of free movement of goods, free movement of workers, free movement of persons, or equal pay. See i.a. Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* ECLI:EU:C:2004:262, para 62; Case C-215/03 *Oulane* ECLI:EU:C:2005:95, para 16; Case 43/75 *Defrenne II* ECLI:EU:C:1976:56, para 12.

1173 See e.g. choice of terms in A von Bogdandy, ‘Founding Principles of EU Law: A Theoretical and Doctrinal Sketch’ (2010) 16 *ELJ* 95 (p 7: founding principles defined as ‘those norms of primary law which, in view of the need to legitimise the exercise of public authority, determine the general legitimacy foundations of the Union’); A von Bogdandy, ‘The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union’ (2000) 37 *CMLRev* 1307; 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 2(2)(c) (‘the core values of the Union, as enshrined in the TEU and the TFEU and in the Charter of Fundamental Rights of the European Union’); Pech, ‘A Union Founded on the Rule of Law’: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’, 362 (‘The rule of law as a foundational principle’). Further Case

are more confident about the system, the label constitutional can be introduced and discussed.

### 170 Foundational values

There is a huge amount of literature on values and education.<sup>1174</sup> From a legal perspective, it is legitimate to focus on the values expressed in EU primary law, in particular Article 2 TEU:

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C-419/16 *Simma Federspiel* ECLI:EU:C:2017:997, Opinion of AG Wahl, para 57 ('foundational principles of EU law, including, but not limited to, direct effect and State liability'; 'principes fondamentaux du droit de l'Union'). The Oxford dictionaries define foundational as '[d]enoting an underlying basis or principle; fundamental'. The adjective 'foundational' is seldom used in EU law.

- 1174 See i.a. RM Gordon, 'Freedom of expression and values inculcation in the public school curriculum' (1984) 13 *The Journal of Law and Education* 523; TM Lorenz, 'Value Training: Education or Indoctrination? A Constitutional Analysis' (1992) 34 *Arizona Law Review* 593; H Starkey, 'Back to Basic Values: Education for Justice and Peace in the World' (1992) 21 *Journal of Moral Education* 185; RC Salomone, 'Common Schools, Uncommon Values: Listening to the Voices of Dissent' (1996) 14 *Yale Law & Policy Review* 169; T Winther-Jensen (ed) *Challenges to European Education: Cultural Values, National identities, and Global Responsibilities* (Comparative Studies Series 6, Peter Lang 1996); D Evans, H Grassler and J Pouwels (eds), *Human Rights and Values Education in Europe: Research in educational law, curricula and textbooks* (Fillibach Verlag 1997); D Rowe, 'Value pluralism, democracy and education for citizenship' in *Values, Culture & Education* (1999); Redish and Finnerty, 'What did you Learn in School Today? Free Speech, Values Inculcation, and the Democratic Educational Paradox'; S Macedo, 'School Choice, Civic Values and Problems of Policy Comparison,' in P Wolf and S Macedo (eds), *Educating Citizens: International Perspectives on Civic Values and School Choice* (Brookings Institution Press 2004); PJ Wolf and S Macedo (eds), *Educating Citizens: International Perspectives on Civic Values and School Choice* (Brookings Institution Press 2004); Halstead and Pike, *Citizenship and Moral Education: Values in Action*; K Sebart and J Krek, 'Citizenship education in educational research: description of knowledge, skills and values and their explanation in school evaluation' in B Kovzuh and others (eds), *New paradigms and methods in educational and social research* (University of California 2007); Clemitshaw, 'Citizenship without history? Knowledge, skills and values in citizenship education'; K Orlenius, 'Tolerance of intolerance: values and virtues at stake in education' (2008) 37 *Journal of Moral Education* 467; JS Hendricks and DM Howerton, 'Teaching values, teaching stereotypes: sex education and indoctrination in public schools' (2011) 13 *University of Pennsylvania Journal of Constitutional Law* 587; CJ Russo and WE Thro, 'Reflections on the Law and Curricular Values in American Schools' (2012) 87 *Peabody Journal of Education* 402; J Sayer and L Erler (eds), *Schools for the Future Europe: Values and Change beyond Lisbon* (Continuum 2012); J Arthur and T Lovat, *The Routledge international handbook of edu-*

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.<sup>1175</sup>

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*cation, religion and values* (Routledge 2013); L Blum, 'Three educational values for a multicultural society: Difference recognition, national cohesion and equality' (2014) 43 *Journal of Moral Education* 332. See also Grimonprez, 'Conflicting ideas of Europe: the role of values in citizenship education'.

- 1175 See also CFR preamble: 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law'. Fairness is another value appearing in EU primary law: it is given expression in various forms, as a horizontal aim, i.a. in CFR Arts 8, 17, 31, 41, or 47; TEU Art 3; TFEU Arts 39, 67, 79, 101, or 165. See categories of European values in C Calliess, 'Europa als Wertegemeinschaft — Integration und Identität durch europäisches Verfassungsrecht?' (2004) 59 *JuristenZeitung* 1033, 1369. Within the extensive literature on values in the EU, see further Lenaerts and Desomer, 'Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means'; F Benoît-Rohmer, 'Valeurs et droits fondamentaux dans la Constitution' [2005] *Revue trimestrielle de droit européen* 261; B de Witte, 'Non-market values in Internal Market Legislation' in N Nic Schuibhne (ed), *Regulating the Internal Market* (Edward Elgar 2006); S Besson, F Cheneval and N Levrat, *Des valeurs pour l'Europe? Values for Europe?* (Bruylant Academia 2008); M Kuisma, 'Rights or privileges? The challenge of globalization to the values of citizenship' (2008) 12 *Citizenship Studies* 613; Calliess, 'Europe as Transnational Law: The Transnationalization of Values by European Law'; P Leino and R Petrov, 'Between "Common Values" and Competing Universals — The Promotion of the EU's Common Values through the European Neighbourhood Policy' (2009) 15 *ELJ* 654; AT Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 *Oxford Journal of Legal Studies* 549; A Freyberg-Inan, 'Equity as the missing link: the values of the European Union' (2010) 10 *Romanian Journal of European Affairs* 5; AT Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge University Press 2010); Lenaerts, 'EU Values and Constitutional Pluralism: The EU System of Fundamental Rights Protection'; L Potvin-Solis (ed) *Les valeurs communes dans l'Union européenne* (Bruylant 2014); Editorial Comments, 'Safeguarding EU values in the Member States—Is something finally happening?' (2015) 52 *CMLRev* 619; P Ferreira da Cunha, *Political Ethics and European Constitution* (Springer 2015); D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart 2015); L Azoulay, 'Transfiguring European Citizenship: From Member State Territory to Union Territory' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) (see 193 ff); Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denomi-

These values, also expressed in the CFR, are not the natural qualities of individuals or of nation states. If they are to reflect more than the pathos of a Treaty text, they presuppose education as well as the persistent diligence of enlightened citizens. Active citizenship is not an objective *per se* but must be value-based.<sup>1176</sup> The EU and the Member States share a strong belief in the role of education to promote values.<sup>1177</sup> The Charter on EDC/HRE recalls that EDC overlaps with value education.<sup>1178</sup>

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nator', 40. Also, among the many reflections on values in the context of citizenship rights and EU rights in the further analysis, see on equality i.a. §§ 258 259, on solidarity questions i.a. text and n 1959.

1176 Values are an essential basis for participation of citizens: see Mascherini, Manca and Hoskins, *The characterization of Active Citizenship in Europe* (p 10: 'action alone is not considered active citizenship, the examples of Nazi Germany or Communist Europe can show mass participation without necessarily democratic or beneficial consequences'); and Hoskins concept of (value based) active citizenship in text to n 909. See underlying presuppositions of civic republicanism (n 593).

1177 See i.a. Erasmus+ Regulation 1288/2013, Art 4(f); 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); European Parliament Resolution on Follow-up of the strategic framework for European cooperation in education and training (ET2020) [2018] OJ C91/6; European Parliament Resolution of 12 April 2016 on Learning EU at school [2018] OJ C58/57, paras 2, 3, 6, 9, 13, 14, 21, 41. See also Commission Staff working document on the Application of the EU Charter of Fundamental Rights in 2016 Accompanying the document Communication from the Commission on 2016 Report on the Application of the EU Charter of Fundamental Rights SWD(2017) 162 final, 41 'Education policies are instrumental in addressing inequalities, fostering inclusion and tolerance, and promoting the common values of democracy, fundamental rights and the rule of law'; Commission Citizenship Report 'Strengthening Citizens' Rights in a Union of Democratic Change EU Citizenship Report 2017' COM(2017) 030 final/2, p 12: 'EU citizens expect more to be done to promote EU common values. They suggested that this should be done in particular through education, mobility of young people and cultural activities'; and earlier Commission Communication on Article 7 of the Treaty on European Union: Respect for and promotion of values on which the Union is based COM(2003) 606 final, 7. 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); JHH Weiler, 'The European Union belongs to its citizens: three immodest proposals' 22 ELRev 150, XIV, highlighting the need for education in the necessary *virtues*, which are a personal disposition to act to achieve *values*, the moral or ethical propositions; also JHH Weiler, 'On the Distinction between Values and

Applying the criterion of additionality for the EU dimension of EDC, the question arises as to whether the values in Article 2 TEU add content to national EDC. Admittedly, these so called ‘EU values’ have a universal vocation and national EDC already introduces pupils to them.<sup>1179</sup> The UK Department of Education, for instance, gave all schools a duty to actively promote ‘Fundamental British Values’. These ‘British’ values included democracy, the rule of law, individual liberty, and mutual respect and tolerance.<sup>1180</sup> However, even if national values are the same as the ‘EU values’ in Article 2 TEU, there are additional challenges in striving to ensure

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Virtues in the Process of European Integration’ (IILJ International Legal Theory Colloquium, The Turn to Governance: The Exercise of Power in the International Public Space, New York Law School, 3 March 2010, unpublished).

- 1178 CoE Recommendation CM/Rec(2010)7 of the Committee of Ministers to member states on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (11 May 2010), paras 5(e)(f)(j), also para 2(e) and explanatory memorandum. See also CoE Recommendation CM/Rec(2019)9 of the Committee of Ministers to member States on fostering a culture of ethics in the teaching profession (16 October 2019).
- 1179 Member State constitutions express values, often in preambles. See, e.g., for the Czech Republic, preamble mostly written by Václav Havel: ‘resolute to build, protect and develop the Czech Republic in the spirit of the inalienable values of human dignity and freedom as the home of free citizens who are aware of their obligations towards others and of their responsibility to the community, as a free and democratic State founded on respect for human rights and on *principles of civil society*, as a member of the family of European and World democracies’- emphasis added); or for Latvia: ‘Loyalty to Latvia, the Latvian language as the only official language, freedom, equality, solidarity, justice, honesty, work ethic and family are the foundations of a cohesive society. Each individual takes care of oneself, one’s relatives and the common good of society by acting responsibly toward other people, future generations, the environment and nature.’ See also Germany in Government replies to questionnaire 2016 (n 386—387), Q14: ‘Educating the individual to respect human dignity and to communicate the basic values, as stipulated in the Basic Constitutional Law, represents a key task of higher education institutions in the Federal Republic of Germany. The aim is, in addition to communicating knowledge and information, to form an understanding of the free democratic basic order of the Federal Republic and to impart consideration, tolerance and respect for other cultures, as well as a fundamental responsibility towards society’. See also n 666, and text to n 670.
- 1180 The Education (Independent School Standards) (England) Regulations 2010 contain a standard for the spiritual, moral, social and cultural development of pupils (in Part 2, Schedule 1). This standard was amended in 2014 (Education (Independent School Standards) (England) (Amendment) Regulations 2014 (come into force on 29th September 2014)): all schools, both independent and state-maintained schools, ‘have a duty to “actively promote” the fundamental

respect for these values in a single area without internal frontiers with 500 million citizens. In one space encompassing 27 Member States, 24 official languages, with great diversity of regions, cultures, traditions, religions, etc., additional EU content is needed to clarify and to understand the concrete significance of these values for EU citizens, and—importantly—to reflect on the balancing of values (value hierarchy) and objectives.<sup>1181</sup> Moreover, some values (or principles) are specifically EU related, such as equality between Member States, or mutual trust and mutual respect.<sup>1182</sup> Mutual trust between the Member States ‘is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU’.<sup>1183</sup> In *Wightman*, the ECJ recalled that ‘the European Union is composed of States which have freely and voluntarily committed themselves to those values’.<sup>1184</sup> Calliess

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British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs’. This was designed to strengthen the barriers to extremism. See UK Department of Education, Promoting fundamental British values as part of SMSC [spiritual, moral, social and cultural development] in schools: Departmental advice for maintained schools (November 2014); UK, Department of Education, Improving the spiritual, moral, social and cultural (SMSC) development of pupils: supplementary information: Departmental advice for independent schools, academies and free schools (November 2014). No mention of ‘Europe’ or ‘European’. See, e.g., para 5(b)(ii) ‘enable pupils to distinguish right from wrong and to respect the civil and criminal law of England’; (b)(iv) ‘enable pupils to acquire a broad general knowledge of and respect for public institutions and services in England’. Critical reactions followed. Members of the National Union of Teachers voted to include ‘international rights’ (‘fundamental British values’ set a tone of ‘inherent cultural supremacism’); see also H Starkey, ‘Fundamental British Values and citizenship education: tensions between national and global perspectives’ (2018) 100 *Geografiska Annaler: Series B, Human Geography* 1: ‘the obligation on schools in England since 2014 to promote FBVs [Fundamental British Values] can be read as an attempt to reinstate the national’). Cp education in France for ‘les valeurs de la République’.

- 1181 Perceptions of Europeans on values in Special Eurobarometer 451, Future of Europe (December 2016): 45% say the EU best embodies peace and freedom of opinion, 43% social equality and solidarity, 41% tolerance and openness to others.
- 1182 Equality can be seen as a value and as a principle (see § 85 ff). The same can be argued for mutual trust; the ECJ formulates it as a principle. See text to nn 1203, 1207, 1208.
- 1183 Case C-64/16 *Júizes Portugueses* ECLI:EU:C:2018:117, para 30; also EU Accession to the ECHR *Opinion* 2/13 ECLI:EU:C:2014:2454, para 168.
- 1184 Case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999, para 63.

argues that even if EU values are common to the Member States, they have independent content. This content needs elaboration and concretisation. Value interaction leads to a ‘Union of values’ (‘Werteverbund’), the basis for the EU as a ‘Union of European States and constitutionalism’ (‘europäischer Staaten- und Verfassungsverbund’).<sup>1185</sup> The establishment of common values in EU primary law is only the first step along the path to achieving a Union based on common values. For these values to have the power to effect integration, Calliess writes, the EU requires convincing institutions and effective procedures (functional and formal integration).<sup>1186</sup> It should be added that the education of citizens is also required, in keeping with EDC standards. Education is one of the shared values recognised by the Member States since the Enlightenment as being of central importance.

With shared values, a sense of a common EU identity may grow.<sup>1187</sup> However, creating a feeling of belonging is not a central objective of EDC/HRE standards, and this theme has therefore not been developed in this study.<sup>1188</sup> Words such as belonging, identity, feeling, or affective

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1185 C Calliess, ‘EU-Vertrag (Lissabon) Art 2’ in C Calliess, M Ruffert and H-J Blanke (eds), *EUV/AEUV: das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta : Kommentar* (Beck 2016), Rn 10, 14 (‘Europäische Werte haben einen selbständigen Gehalt, der im europäischen Verfassungsverbund jedoch eng mit den nationalen Wertehalten der Mitgliedstaaten verknüpft ist’).

1186 Calliess, ‘Europe as Transnational Law: The Transnationalization of Values by European Law’, 1381.

1187 Calliess, ‘Europa als Wertegemeinschaft — Integration und Identität durch europäisches Verfassungsrecht?’, 1039; Peters, ‘European democracy after the 2003 Convention’, 77; Calliess, ‘Europe as Transnational Law: The Transnationalization of Values by European Law’, 1370: identity development through differentiation, not through discrimination of a common enemy.

1188 On belonging and EU identity, see furthermore S Dufeu, *Valeurs et constitutions européennes. Une identité politique entre deux mythes: universalité et frontière* (Questions contemporaines, L’Harmattan 2005); Ross, ‘Multiple Identities and Education for Active Citizenship’; Verhaegen, Hooghe and Meeusen, ‘Opportunities to learn about Europe at school. A comparative analysis among European adolescents in 21 European member states’; Calliess, ‘EU-Vertrag (Lissabon) Art 2’, Rn 4; A Somek, ‘Europe: Political, Not Cosmopolitan’ (2014) 20 *ELJ* 142; A Ross, *Finding Political Identities: Young People in a Changing Europe* (Springer 2018); JF Ziemes, K Hahn-Laudenberg and HJ Abs, ‘From Connectedness and Learning to European and National Identity: Results from Fourteen European Countries’ (2019) 18 *Journal of Social Science Education* (3: European Citizenship Education: Business as Usual or Time for Change?) 5 (teachers should foster identity complexity).

dimension, do not feature in any central way in the Charter on EDC/HRE. In the 2006 Recommendation on key competences for lifelong learning, they are present, yet the broadly worded aspirations remain prudent: civic competences include ‘displaying both a sense of belonging to one’s locality, country, the EU and Europe in general and to the world’. Still, social competences essentially include ‘[u]nderstanding the multi-cultural and socio-economic dimensions of European societies and how national cultural identity interacts with the European identity’.<sup>1189</sup> The 2018 Council Recommendation on key competences for lifelong learning explicitly refers to a ‘vision towards a European Education Area that would be able “to harness the full potential of education and culture as drivers for jobs, social fairness, active citizenship as well as means to experience European identity in all its diversity”’.<sup>1190</sup> This connects to component (c-2) of the EDC concept, i.e. valuing diversity (c-2).<sup>1191</sup>

### *171 Foundational objectives*

The Member States established a European Union on which they conferred competences to attain objectives they have in common (Article 1 TEU). The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties ‘to attain the objectives set out therein’, objectives which they cannot sufficiently achieve alone (Article 5(2) and (3) TEU). The narrative in the Treaties is almost utopian. Among the foundational objectives are promoting peace and the well-being of the peoples, offering an area of freedom, security and justice without internal frontiers, ensuring free movement of persons, establishing an internal market, working for sustainable development, economic growth, full employment and social progress, protecting the environment, combating social exclusion and discrimination, promoting solidarity among Member States, and respecting cultural and linguistic diversity (Article 3 TEU). Together with Article 2 on Union values and the CFR, Article 3

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1189 Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning.

1190 Council Recommendation of 22 May 2018 on key competences for lifelong learning, recital 1. See also Annex: A European Reference Framework, 6: Citizenship competence: ‘Knowledge of European integration as well as an awareness of diversity and cultural identities in Europe and the world is essential. This includes an understanding of the multi-cultural and socioeconomic dimensions of European societies, and how national cultural identity contributes to the European identity’.

1191 Charter on EDC/HRE, paras 2, 5(f), and 13. See also text to n 1878.

paints the vision of a society where it is good to live. If democracy and EU citizenship are to be taken seriously, the foundational EU objectives should be part of compulsory learning outcomes in mainstream education. Quality education cannot stop at describing the EU as a peace project. Every achievement starts with a dream. There is wisdom in this metaphor: if you want people to build a ship, don't give orders, don't explain which tools to use, but tell them about the wide sea.<sup>1192</sup> The EU is not a goal in itself,<sup>1193</sup> but a way of attaining common objectives, reaching added value, the wide sea. In history classes, pupils may read the Schuman Declaration of 9 May 1950. It is time to put Articles 1–6 TEU next to this Declaration. As part of school curricula, the content of Articles 2 and 3 TEU should be discussed in classrooms, as a kick off for participation in an EU civil society, enhancing the growth of a European public space.<sup>1194</sup> Only if they are made aware of the European 'project', can individuals guide the 'process' and the 'product' through democratic processes as responsible and active EU citizens. The EU is an objective driven polity and should be understood as such and monitored by Europeans.<sup>1195</sup> Moreover, a shared sense of

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1192 'If you want to build a ship, don't drum up the men to gather wood, divide the work and give orders. Instead, teach them to yearn for the vast and endless sea': quote attributed to Antoine de Saint-Exupéry, *Citadelle* (1948).

1193 K Lenaerts, 'De Europese Unie: doel of middel?' (1998) 21 *Rechtskundig Weekblad* 689.

1194 On the process towards creating a European public space, see Calliess and Hartmann, *Zur Demokratie in Europa: Unionsbürgerschaft und europäische Öffentlichkeit*.

1195 Lenaerts and Desomer, 'Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means'. Authors conclude that the real question does not concern the kind of 'constitution' we want, but what kind of Union, in terms of shared values, common objectives and means; clarifying these elements is essential to ensuring acceptance by EU citizens as a body politic. Further F Reimer, 'Ziele und Zuständigkeiten: Die Funktionen der Unionszielbestimmungen' (2003) 38 *Europarecht* 992; G Palombella, 'Whose Europe? After the constitution: A goal-based citizenship' (2005) 3 *International Journal of Constitutional Law* 357; J Schwarze, 'Die Abwägung von Zielen der europäischen Integration und mitgliedstaatlichen Interessen in der Rechtsprechung des EuGH' (2013) 48 *Europarecht* 253; J Larik, 'From specialty to a constitutional sense of purpose: on the changing role of the objectives of the European Union' (2014) 63 *International and Comparative Law Quarterly* 935 (a more far-reaching role than that related to the principle of conferral; 'the EU stands for certain values and has been endowed with powers, the exercise of which is guided by promoting these various aspects of the "common good"'); Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent

purpose is needed to respond to multiple crises in the EU.<sup>1196</sup> Education about the foundational values and objectives (the deep common interests) will enhance the social legitimacy of the EU.<sup>1197</sup>

### 172 Foundational principles

The Treaties define various systemic principles (TEU Title I Common provisions TEU) which are the backbone of the EU construction. They are essential to understanding the EU as a system, and the place of one's own Member State in it, and are thus essential to empowering EU citizens.<sup>1198</sup> A central axis in the EU constitutional construction is the principle of conferral: the EU can only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out; competences not conferred upon the EU remain with the Member States (Article 4(1) TEU, 5(2) TEU).<sup>1199</sup>

Citizens are unaware of this principle.<sup>1200</sup> The high expectations of citizens with regard to EU citizenship and the EU (and of legal writers commenting on ECJ case law) cannot always be reconciled with the principle of conferral.<sup>1201</sup> When expecting the EU to 'humanise' or remedy certain

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of the People'. See also Weiler, 'Deciphering the Political and Legal DNA of European Integration': 'political messianism' constitutes the political and legal (cultural) DNA of European integration.

- 1196 The response to the multiple crises of the EU 'should be built on a common perspective, and on the shared conviction that by coming together, each of us will be better off', see Commission White paper of 1 March 2017 on the future of Europe COM(2017) 2025 final. See also F Amtenbrink, 'Europe in Times of Economic Crisis: Bringing Europe's Citizens Closer to One Another?' in M Dougan, N Nic Schuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012) 187.
- 1197 Cf Curtin, *Executive Power of the European Union. Law, Practices, and the Living Constitution* 284.
- 1198 On the concept of 'principles', i.a. text to n 952, n 1168. Further Bauer and Callies, *Constitutional principles in Europe*; constitutional principles also in Callies, 'EU-Vertrag (Lissabon) Art 1', Rn 29 (integration); Rn 78 (closeness to citizens; transparency); Rn 90 (other, such as coherence and solidarity).
- 1199 I.a. Case C-589/15 P *Anagnostakis* ECLI:EU:C:2017:663, Opinion of AG Mengozzi, para 62. See E Neframi, *Objectifs et compétences dans l'Union européenne* (Droit de l'Union européenne Colloques, Bruylant 2013).
- 1200 See i.a. text to nn 1517, 1533 (e.g. citizens' initiative proposals not infrequently concern matters outside the EU competence sphere).
- 1201 Perceptions in civil society: the EU should act in the Spain/Catalonia crisis, should grant social rights, etc. See Commission Report under Article 25 TFEU 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final. See also academic writers in debates on wholly internal situations, reverse dis-

situations,<sup>1202</sup> citizens should keep the limits to EU action in mind. If citizens consider these limits as too constraining, they should be empowered to instigate change through democratic participation, even to ‘the pact’. The constitutional allocation of powers in the EU has either to be respected or to be adapted. If the EU is an autonomous legal order, the reverse side is that it is a limited field. Both aspects should be understood by citizens. This foundational principle should be explained in schools as a matter of elementary knowledge and is not so complicated in itself. It could reduce distrust and avoid misunderstandings and disappointment in civil society.

Other systemic principles to explain in EDC are, inter alia, subsidiarity and proportionality (Article 5(3) and (4) TEU), respect for national (constitutional) identities (Article 4(2) TEU), loyal (or sincere) cooperation (Article 4(3) TEU), and respect for fundamental rights (Article 6 TEU, CFR). Foundational principles include democratic principles (Articles 9–12 TEU), the principle of non-discrimination on grounds of nationality (Article 18 TFEU), non-discrimination based on sex, race, religion, etc. (Article 19 TFEU), free movement of citizens (Article 21 TFEU), and fundamental freedoms in the internal market (Articles 28, 45, 49, 56, 63 TFEU). The ECJ refers to principles, such as primacy, unity and effectiveness, and—of fundamental importance—the principles of mutual trust and mutual recognition.<sup>1203</sup>

Educating about EU foundational values, objectives and principles is relevant for mainstream education, as it satisfies the four criteria. It provides

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crimination, citizenship linked to the material scope of EU law, or on fundamental rights protection, i.a. Kochenov, ‘On Tiles and Pillars: EU Citizenship as a Federal Denominator’, 4: ‘How to unlock the potential of EU citizenship to make it work for the benefit of all Europeans, while strictly adhering to the principle of conferral, is the core question behind this volume.’

1202 E.g. Kochenov, ‘On Tiles and Pillars: EU Citizenship as a Federal Denominator’, 51: ‘EU citizenship is bound to assume a structural role, should the ideals of dignity, equality, democracy and the Rule of Law prevail’.

1203 EU Accession to the ECHR *Opinion* 2/13 ECLI:EU:C:2014:2454, paras 188–189 (primacy, unity and effectiveness), para 191 (mutual trust). Further K Lenaerts, ‘La vie après l’avis: Exploring the principle of mutual (yet not blind) trust’ (2017) 54 CMLRev 805; also Lenaerts, ‘“In the Union we trust”: trust-enhancing principles of Community law’, on general principles and the role of principles such as transparency, equality of arms, the precautionary principle, or sound administration. Mutual recognition in legislation, e.g. Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 [2019] OJ L 91/1.

additional (i) and significant (ii) content to EDC (knowledge, understanding, and attitudes), and provides ample food for thought (iii), preparing citizens for active participation. Foundational values, objectives and principles furthermore concern all EU citizens, mobile and static, ‘founding’ the society in which they live (iv). This will be illustrated when the EU dimension of EDC components is given more concrete form on the basis of EU primary law. Educating about EU foundational values, objectives and principles is consistent with EDC standards, with EU endogenic norms on citizenship competences, and with scholarly writing on citizenship education.<sup>1204</sup> Moreover, it respects the autonomy of the EU.

173 *Applying EDC standards respects, even upholds, the specific characteristics of the EU*

A limit to the reception of exogenic norms in the EU legal order—red line not to be crossed—was prejudice to the constitutional principles of the Treaties.<sup>1205</sup> This is not a problem when in application of EDC standards, an EU dimension is incorporated into EDC, on the contrary. Full respect for the specific characteristics of the EU is more likely when citizens are educated about them. Adding an EU dimension to EDC based on EU primary law upholds those specific characteristics since it enlightens citizens about the specificity of the EU and empowers them to exercise their rights and responsibilities, to value diversity and to participate in this system, which is not a state, yet exercises public power in conformity with the Treaties and the CFR. The following analysis will provide various examples.<sup>1206</sup>

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1204 Values of democracy, human rights and the rule of law were the essential motivating factors in the genesis of the Charter on EDC/HRE (Part one). See the EU Council Recommendation of 22 May 2018 on key competences for lifelong learning, Annex: A European Reference Framework, 6: Citizenship competence (‘involves an understanding of the European common values, as expressed in Article 2 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union’). Before: Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning, Annex 6 B. See also Sander (*Mission*), text to n 562.

1205 EU Accession to the ECHR *Opinion* 2/13 ECLI:EU:C:2014:2454, i.a. paras 164–177.

1206 E.g. learning about the principle of conferral and the right to a ECI (§ 209 ); about the right to vote for the EP and its specificity in the EU (§ 222 ); about respect for the rule of law and fundamental rights, internal market implications, concept of directives, etc. (§ 265 ).

An EU dimension to EDC will also reinforce mutual trust. The ECJ has ruled that the principle of mutual trust between the Member States is ‘of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained’.<sup>1207</sup> The shared set of common values justifies mutual trust.<sup>1208</sup> Mutual trust presupposes measures in each Member State to create a citizenship culture consistent with the fundamental values of the EU, including respect for the rule of law and fundamental rights. Mutual trust has to be deserved by public authorities and citizens.<sup>1209</sup> Recognising the autonomy of the EU and its constitutional principles requires more EDC rather than less. The Council of Europe norms on EDC and HRE are a minimum. Specific EU features and the complexity of the EU—which nevertheless aims at democracy—call for even greater attention to be paid to EDC standards and more extensive circumspection than in a traditional nation state with a long-standing history.

Making EU primary law a pillar of the EU dimension of EDC guarantees that the additional EU dimension respects the basic constitutional charter, the Treaties, and the CFR.

#### 174 *The Union ‘acquis’ culture*

Before accession, candidate States have to accept the Union *acquis*. The *acquis*, referred to in the Treaties, Acts of Accession, and in some national constitutions, is the body of rights and obligations inherent in the system of the Union and its institutional framework. Future Member States are required to accept the provisions of the Treaties, the decisions taken by the

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1207 *Opinion 2/13*, paras 191–192 (‘the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law’; ‘Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU’ (emphasis added).

1208 *Ibid*, para 168: ‘This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected’.

1209 Further in § 247 .

institutions pursuant to the Treaties, and ECJ case law, and must adopt the measures necessary to satisfy these conditions.<sup>1210</sup> It would conflict with good faith and acceptance of the Union *acquis* to reject an EU dimension of EDC based on the Treaties, or to consider such a dimension to be indoctrination.<sup>1211</sup> It is not sufficient to incorporate the *acquis* into national legislation, it must also be fashioned into a Union ‘*acquis* culture’, to be fostered and, ideally, to be incorporated into all levels of education. Consistency between national EDC and the Union *acquis* can be expected of newly acceding States, and, hopefully leading by example, of the existing Member States. Certainly, the *acquis* goes far beyond what is relevant for mainstream education, but the notion shows that EU law has a hard core which must be accepted by its Member States. Citizens should be educated in a spirit corresponding to the Union *acquis*.

175 *Counterargument: EU primary law is too complex for schools*

True, the Treaties and the CFR are not written for the neophyte who wants an easy learning tool about the EU. Ideally, a simplified version the Treaties and CFR would be made available for the EU dimension of EDC, just as some Member State constitutions are presented in simplified form for national citizenship education.<sup>1212</sup> Admittedly, nothing is more complicated than simplifying; however, there is no escape: all education starts with elementary steps, a route to more complexity later on. For teaching purposes, Homer, Shakespeare, and Balzac have been simplified, re-cast in readable booklets for pupils. The UN Convention on the Rights of the

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1210 Art 20 TEU; Presidency Conclusions of the Copenhagen European Council of 21-22 June 1993, Bull EC 6-1993 (Copenhagen criteria); Commission, Europe and the challenge of enlargement (24 June 1992) Bull EC Suppl 3-92, 11: ‘Membership implies the acceptance of the rights and the obligations, actual and potential, of the community system and its institutional framework—the Community’s *acquis*, as it is known’. Referral to the *acquis*, e.g., in Arts 9, 133, 145, 146, 152 Croatian constitution. See generally D Chalmers, A Arnulf and C Hillion, *Accession and Withdrawal in the Law of the European Union* (Oxford University Press 2015); also Lenaerts and Van Nuffel, *European Union Law* 93.

1211 See n 1080.

1212 See, i.a., simplified version of the constitution in Germany: D Hesselberger, *Das Grundgesetz: Kommentar für die politische Bildung* (13 edn, Bundeszentrale für politische Bildung 2003); or brochure *Das Grundgesetz Über den Staat* (einfach Politik, 2016, Bundeszentrale für politische Bildung); in Denmark *My Constitutional Act, with explanations* (Folketinget, 2014, 12<sup>th</sup> edn, Text Susanah Pedersen, Journalist; Adviser on legal aspects: Jens Peter Christensen, Supreme Court Judge, Professor, LLB); in Austria explanations per theme in <[www.unsereverfassung.at](http://www.unsereverfassung.at)>.

Child has been ‘translated’ into a child-friendly version for children and the ECHR exists in a simplified version for educational purposes.<sup>1213</sup> At the very least, the founding tenets of the EU as agreed in the Treaties could be formulated in understandable versions for teachers (non-lawyers) and pupils. Could the European Parliament draft—or at least support—a school-friendly version of the essential provisions of EU primary law? Foundational values, objectives and principles must be placed in the spotlight. The counterargument that foundational values, objectives and principles are too complex for EDC in schools, must be rebutted. Teachers manage to explain numerous complex subjects in formats adapted to their students. In Member States with a federal system, national EDC has to tackle complex situations anyway. Democracy requires enlightened citizenship.<sup>1214</sup> Democracy in the EU requires enlightened EU citizenship. Logically this must start at school.

### *B Case teaching: critical thinking and pluralism*

#### *176 Case teaching supports a pluralist EU dimension*

The learning method proposed for an EU dimension of EDC in the classroom is founded on two pillars: texts and stories. In addition to EU primary law (texts), which enhances objectivity, case teaching (stories) invites independent, pluralist and critical thinking. EU primary law is a stable basis for EDC, yet it must not lead to uncritical acceptance of any norm. Education should not mould EU citizens to obey the general will as understood by Rousseau. Rousseau considered law to be the expression of the general will. He advocated patriotism as the most effective method of ensuring conformity with it.<sup>1215</sup> In his view, the purpose of education (from a very early age) was to shape souls in patriotism, civic virtue, over-

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1213 See <[www.unicef.org/rightsite/files/uncrcchildfriendlylanguage.pdf](http://www.unicef.org/rightsite/files/uncrcchildfriendlylanguage.pdf)>; <[ork.lu/index.php/en/rights-of-the-child/the-convention-of-1989/simplified-version-of-the-crc](http://ork.lu/index.php/en/rights-of-the-child/the-convention-of-1989/simplified-version-of-the-crc)>; <[www.coe.int/en/web/compass/european-convention-on-human-rights](http://www.coe.int/en/web/compass/european-convention-on-human-rights)> (simplified version of selected articles, prepared by the Directorate of Communication of the CoE).

1214 Dahl, *On democracy* (text to n 565).

1215 See in general J-J Rousseau, *Emile ou de l'éducation* (1762, Flammarion ed 2009), and in particular, for Rousseau's ideas on the need and ends of citizenship education, *Discours sur l'économie politique* (1755) and *Considérations sur le gouvernement de Pologne* (1771).

coming self-interest, and thus compliance with the general will.<sup>1216</sup> In contrast to Rousseau, Condorcet argued that the end of instruction was not to instill pre-established opinions, but to submit all opinions to reason (Enlightenment).<sup>1217</sup> Reason alone should guide citizens, not beliefs (moral principles should also be based on reason) or blind feelings of love for the fatherland.<sup>1218</sup> According to Condorcet, we must embrace the law but also be capable of judging it ('Il faut qu'en aimant les lois, on sache les juger').<sup>1219</sup> The purpose of instruction is to give citizens the means of achieving a more perfect constitution, better law, and more complete freedom.<sup>1220</sup>

Today, in the light of the experience of patriotic but totalitarian education and its disastrous consequences in two world wars, independent and critical thinking has become an essential component of EDC standards, a recurrent aim in normative instruments on education.<sup>1221</sup> It is one of the compulsory aims of education, part of the development of the human per-

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1216 To the Polish government, Rousseau gave the advice: 'It is education that you must count on to shape the souls of the citizens in a national pattern and so to direct their opinions, their likes and dislikes that they shall be patriotic by inclination, passionately, of necessity' (J-J Rousseau, *The government of Poland* (W Kendall tr, Bobbs-Merrill 1972) 19); see KW Clausen, 'Alternative education versus the common will' (2010) 45 *Journal of Thought* 95, 108 (fn 5). For influence of Rousseau's ideas on education, see D Heater, *A Brief History of Citizenship* (New York University Press 2004) 67–72; Heater, *Citizenship: the Civic Ideal in World History, Politics and Education*, 40–41 (Robespierre attempted to apply his ideas during the French revolution).

1217 Condorcet, *Cinq mémoires sur l'instruction publique*, 36–37.

1218 Condorcet thus disagrees with philosophers who want citizens to become attached to the existing constitution and law of their fatherland through 'a blind feeling' and passion. See *ibid*, 44.

1219 (tr) For citizens to love the law without losing their freedom, for them to retain the power of independent thought without which the fervour for liberty is mere passion and not a virtue, they must be taught the principles of natural justice, these essential rights of man: in Condorcet, *Rapport et projet de décret relatifs à l'organisation générale de l'instruction publique, Présentation à l'Assemblée législative (20 et 21 avril 1792)* (1792).

1220 'lui préparez, par une instruction générale, les moyens de parvenir à une constitution plus parfaite, de se donner de meilleures lois, et d'atteindre à une liberté plus entière': *ibid*.

1221 In chronological order: CoE Recommendation Rec(2002)12 of the Committee of Ministers to member states on education for democratic citizenship (16 October 2002), appendix para 2: key competencies include the ability to 'develop a critical approach to information, thought patterns and philosophical, religious, social, political and cultural concepts, at the same time remain-

sonality in all its aspects.<sup>1222</sup> As explained above, in accordance with ECtHR case law, the State is prohibited from pursuing an aim of indoctrin-

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ing committed to fundamental values and principles of the Council of Europe'; Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning: critical thinking is part of the fifth key competence, i.e. learning to learn, and is a theme applied throughout the Reference Framework (p 394/14); CoE Recommendation CM/Rec(2010)7 of the Committee of Ministers to member states on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (11 May 2010) (no explicit mentioning of critical thinking, yet, it is present in the skills and attitudes, which are part of the definition of EDC; as illustrated in other instruments); CoE Recommendation CM/Rec(2012)13 of the Committee of Ministers to member States on ensuring quality education (12 December 2012), appendix para 6: quality education is education which (e) 'enables pupils and students to develop appropriate competences, self-confidence and critical thinking to help them become responsible citizens and improve their employability'; 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); European Parliament Resolution of 12 April 2016 on Learning EU at school [2018] OJ C58/57, paras 6, 15; 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; Competences for democratic culture: Living together as equals in culturally diverse democratic societies (CoE 2016), scheme p 11 (analytical and critical thinking skills, knowledge and critical understanding); 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), p 5 para 2; Commission Staff working document on the Application of the EU Charter of Fundamental Rights in 2016 Accompanying the document Communication from the Commission on 2016 Report on the Application of the EU Charter of Fundamental Rights SWD(2017) 162 final, p 38 (action on media literacy and dissemination of critical thinking tools); Commission/EACEA/Eurydice, Citizenship Education at School in Europe (2017), 9 ('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'), also 10, 11, 48, 52, 55, 61, 62; CoE, Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe, 29, 30, 33, 34, 40; Council Recommendation of 22 May 2018 on key competences for lifelong learning (see n 1064).

1222 Aims in UHDR, ICESCR, CRC (see nn 81-82, § 288). See also UNESCO Recommendation concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms (adopted 19 November 1974), paras 13-14; UN ComRC 'General

nation and must take care that information or knowledge included in the curriculum is conveyed ‘in an objective, *critical and pluralistic* manner’ (interpreting Article 2 second sentence Protocol 1).<sup>1223</sup> The ECtHR has ruled that ‘one of the principal characteristics of democracy is the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression.’<sup>1224</sup> During the European Convention, the Working Group on Simplification found that the ‘ability to criticise is a key factor for democracy, citizens must be able to understand the system so that they can identify problems, criticise it, and ultimately control it’.<sup>1225</sup> Almost all Member States include critical thinking in their curricula to develop social and citizenship competence<sup>1226</sup> and numerous scholars, as well as (young) citizens point to its importance.<sup>1227</sup> Revelations of the hijacking of social media in order to influence voters point in an even

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Comment No 1 (2001)- Article 29(1): The Aims of Education’ Doc CRC/GC/2001/1, paras 4 and 9; UNESCO-UNICEF, A Human Rights-Based Approach to Education for All: A framework for the realization of children’s right to education and rights within education (2007), p 68–69.

1223 See n 1080. My emphasis.

1224 *Socialist Party and Others v Turkey* no 20/1997/804/1007 (ECtHR 25 May 1998), para 45. See also ECJ case law on freedom of expression.

1225 European Convention, Final report of Working Group IX on Simplification (29 November 2002) CONV 424/02 , 1.

1226 Commission/EACEA/Eurydice, *Citizenship Education at School in Europe* (2017), i.a. 11, 62 (see ‘Thinking critically’ and ‘Exercising judgment’ in figure 1.15).

1227 For academic writers, see Part one, i.a. third caveat (§ 73 ). See also É Dacheux, ‘La communication publique de l’Union européenne ne rapproche pas l’Europe des citoyens’ (2017) 77 *Hermès, La Revue* 45: author contrasts persuasive communication (marketing) versus deliberative communication (‘faire émerger une culture commune’); this is what the EU needs: involving citizens in the discussions on the intended solutions. For young citizens, see i.a. Flash Eurobarometer 455, *European Youth* (January 2018) (Q4): One of the three ideas for the future of Europe that young people most agree with is the promotion of critical thinking and the ability to search for information in order to combat fake news and extremism (49% agree); also Commission, *12 Ideas for The Future of Europe: New narrative for Europe Communications campaign* (2017), 7. For citizens, see Flash Eurobarometer 466, *The European Education Area* (May 2018), (Q7.5): Seven in ten respondents think increasing the teaching of creativity or of critical thinking in European schools or universities is useful for young people in the EU; Flash Eurobarometer 464, *Fake News and Disinformation Online* (March 2018): 85% think that the existence of fake news is a problem in their country, at least to some extent; 83% see this as a problem for democracy in general.

more compelling way to the importance of learning how to exercise critical and independent thinking in schools. The response to fake news must be EDC/HRE with all its components, including the EU dimension, being fully developed.<sup>1228</sup>

If one applies the principle that EDC is more than teaching top down about constitutional structures, then the EU dimension must be more than an additional layer of theoretical knowledge about EU primary law. EU primary law is consensus-based, yet (like most constitutions) its application leaves room for discussion, as witnessed by ECJ case law and academic writing. Many provisions are programmatic (certainly in the CFR). The rights of EU citizens enshrined in EU law may, moreover, collide with each other. Foundational values, objectives, and principles may compete and require balancing.<sup>1229</sup>

Case teaching is used in various fields of study all over the world (economics, medicine, ethics, psychology, law, public policy, international relations, etc.), widely commented on as to its advantages and limits.<sup>1230</sup>

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- 1228 L Jackson, "The Best Education Ever": Trumpism, Brexit, and new social learning' (2018) 50 *Educational Philosophy and Theory* 441; see also J Oelkers, 'The European Crisis and Education for Democracy' (2017) 22 *The European Legacy* 832.
- 1229 See on balancing, R Alexy, 'The Construction of Constitutional Rights' (2010) 4 *Law and Ethics of Human Rights* 21 (constitutional rights imply a debate on proportionality analysis; author argues that balancing of principles is not irrational; he develops a rational legal argument, the 'Weight Formula').
- 1230 On case teaching in the context of citizenship education, see i.a. Naylor, 'Educating for citizenship with law-related education' (1981) 20 *Theory into Practice* 194; R Coles, *The Call of Stories: Teaching and the Moral Imagination* (1990); VL Golich, 'The ABCs of Case Teaching' (2000) 1 *International Studies Perspectives* 11; C Menkel-Meadow, 'Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics' (2000-2001) 69 *Fordham Law Review* 787; S Kenney, 'Using the master's tools to dismantle the master's house: can we harness the virtues of case teaching?' (2001) 20 *Journal of policy analysis and management* 346; Nussbaum, 'Cultivating Humanity in Legal Education'; JS Lantieri, 'Ethics and Foreign Policy: Structured Debates for the International Studies Classroom' (2004) 5 *International Studies Perspectives* 17; RJ Hardy, C Rackaway and LE Sonnier, 'In the Supreme Court Justices Shoes: Critical Thinking Through the Use of Hypothetical Case Law Analyses and Interactive Simulations' (2005) 38 *Political Science and Politics* 411; Massing, 'Institutionenkundliches Lernen'; Oberreuter, 'Rechtserziehung'; Halstead and Pike, *Citizenship and Moral Education: Values in Action*; G Biesta and R Lawy, 'From teaching citizenship to learning democracy: Overcoming individualism in research, policy and practice' (2006) 36 *Cambridge Journal of Education* 63;

Ample empirical and other evidence underscores its effectiveness.<sup>1231</sup> Cases are stories which, as precisely as possible, recount real events or problems, so that learners experience the ambiguities and uncertainties which the

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McCowan, 'Approaching the political in citizenship education: The perspectives of Paulo Freire and Bernard Crick'; Nussbaum, 'Education and Democratic Citizenship: Capabilities and Quality Education'; D Eichner, 'Fallanalysen im Sachunterricht als Möglichkeit des Demokratie-Lernens' in D Richter (ed), *Politische Bildung von Anfang an: Demokratie-Lernen in der Grundschule* (Schriftenreihe Band 570, Bundeszentrale für politische Bildung 2007); Lamy, 'Challenging Hegemonic Paradigms and Practices: Critical Thinking and Active Learning Strategies for International Relations'; Zimenkova and Hedtke, 'The Talk-and-Action Approach to Citizenship Education. An Outline of a Methodology of Critical Studies in Citizenship Education'; D Hess and PG Avery, 'Discussion of Controversial Issues as a Form and Goal of Democratic Education' in J Arthur, I Davies and C Hahn (eds), *The SAGE Handbook of Education for Citizenship and Democracy* (Sage 2008); Hess, *Controversy in the Classroom: The Democratic Power of Discussion*; Z Beutler and D Lange (eds), *Schlüsselkompetenzen für aktive BürgerInnenenschaft. Handbuch für die Sekundarstufe* (Voice Agora Politische Bildung 2010); Gollob, Krapf and Weidinger, *Educating for democracy: Background materials on democratic citizenship and human rights education for teachers*; A Osler and J Zhu, 'Narratives in teaching and research for justice and human rights' (2011) 6 *Education, Citizenship and Social Justice* 223; DAJ Telman, 'Langdellian limericks (case teaching method)' (2011) 61 *Journal of Legal Education* 110; J Vandenabeele, E Vanassche and D Wildemeersch, 'Stories of/on citizenship education: a case of participatory planning' (2011) 30 *International Journal of Lifelong Education* 171; GE Fishman and E Haas, 'Beyond Idealized Citizenship Education: Embodied Cognition, Metaphors, and Democracy' (2012) 36 *Review Of Research In Education* 169; J Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights* (Council of Europe Human Rights Handbooks, 2012); G Weissenho and H Buchstein (eds), *Politisch Handeln. Modelle, Möglichkeiten, Kompetenzen* (Schriftenreihe Band 1191, Bundeszentrale für politische Bildung 2012); I Davies and others, 'Young People's Community Engagement: What Does Research-Based and Other Literature Tell us About Young People's Perspectives and the Impact of Schools' Contributions?' (2013) 61 *British Journal of Educational Studies* 1; Osler, 'Bringing Human Rights Back Home: Learning from "Superman" and Addressing Political Issues at School'; HPD Maurer and C Neuhold, 'Problem-Based Learning in European Studies' in S Baroncelli and others (eds), *Teaching and Learning the European Union: Traditional and Innovative Methods* (Springer 2014); DE Hess, *Courting Democracy: Teaching about Constitutions, Cases, and Courts* (Routledge 2016); D Duda, 'Case Teaching in der politikwissenschaftlichen Lehre' (2017) 27 *Journal of Political Science* 259. See in general also CR Christensen and AJ Hansen, *Teaching and the Case Method* (Harvard Business School 1987).

1231 Golich, 'The ABCs of Case Teaching', 11–12, 14 (long lists of references).

original participants had to face.<sup>1232</sup> Cases can be based on newspaper articles, films, literature, etc.<sup>1233</sup> For active EU learning, I propose to base case teaching on well-chosen examples of ECJ case law, as the basis for telling an ‘it really happened story’ appealing to pupils, awakening their interest in the EU dimension in concrete situations. Depending on the educational level of pupils, the stories (Eurostories) can be told in accurate detail or in a simplified version to highlight the problem and the underlying (competing) principles.

Introduced by Langdell as the core of legal education<sup>1234</sup>, the case method based on court cases is used by numerous law schools. At European universities and abroad, learning EU law is largely based on ECJ case law. At secondary school level, case-law-based teaching is less widespread, yet several models exist: it is used in several best practices in citizenship education in Member States<sup>1235</sup>, in human rights education with cases of the ECtHR (for learning about the ECHR)<sup>1236</sup> and in US secondary schools with Supreme Court cases (for learning about the US constitu-

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1232 Ibid, 12.

1233 For the importance and examples of stories based on literature, see Coles, *The Call of Stories: Teaching and the Moral Imagination*.

1234 Telman, ‘Langdellian limericks (case teaching method)’, 110–1.

1235 Human Rights Education in the School Systems of Europe, Central Asia and North America: A Compendium of Good Practice (CoE, OSCE/ODIHR, UNESCO, OHCHR, 2009), i.a. 54–5, 106–8, 119, 127, 133, 143. See also Oberreuter, ‘Rechtserziehung’ 333; Massing, ‘Institutionenkundliches Lernen’ 317–323 (learning about institutions should not be limited to formal and abstract rules; the author describes four didactical principles and applies them to learning about the German *Bundesverfassungsgericht* and its case law: *Erfahrungsorientierung, Problemorientierung, Binnenorientierung* (including play-acting) and *Handlungsorientierung*; in dimensions of polity (institution), politics (processes) and policy (contents)); Naylor, ‘Educating for citizenship with law-related education’.

1236 Attractive model in *Freedom(s) - Learning activities for secondary schools on the case law of the European Court of Human Rights* (edited by P Kirschschlaeger, G Peter, B Dumont and D Hayward, Council of Europe 2015), with Preface of Thorbjørn Jagland (these learning materials for HRE in schools were developed on the basis of cooperation between educational science and law (Glasgow Prof Jim Murdoch). See S Krüger, ‘Learning Human Rights through Landmark Decisions of the European Court of Human Rights’ (CoE Education Department, 2010). Also *Compass*, one of the most popular EDC/HRE materials provided by the CoE, working with stories, concrete experience, and taking inspiration in ECtHR cases: *Compass - Manual on human rights education with young people* (CoE, 2012). Further examples in new communication tool: <[www.coe.int/en/web/impact-convention-human-rights/about](http://www.coe.int/en/web/impact-convention-human-rights/about)>.

tion)<sup>1237</sup>. These models confirm that case teaching can be adapted to the needs of secondary schools, stimulating discussion, providing differing arguments, as well as tools for reasoning.<sup>1238</sup> A comparable method should be developed for EU learning.<sup>1239</sup>

### 177 *The importance of controversy in the classroom for exercising democracy*

Cases provide material for interesting debates in the classroom and developing competences for participation in democratic life. Learners are ‘moved to question, prepared to reason, and called to act’.<sup>1240</sup> Diane Hess, an authoritative US scholar in the field of civic education, underlines the need to include controversy in the classroom to prepare pupils for democracy.<sup>1241</sup> Her reasoning is applicable to citizens in the EU. Like US

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1237 JB Raskin, *We the Students: Supreme Court Cases for and about Students* (4th edn, Sage 2015); JB Raskin, M Ahranjani and AG Ferguson, *Youth Justice in America* (2 edn, Sage 2015). Prof Jamin Raskin founded the ‘Marshall-Brennan Constitutional Literacy Project’, ‘designed to mobilize talented upper-level law students to teach courses on constitutional law and juvenile justice in public high schools’; headquartered in Washington College of Law (Washington, DC) and with chapters in some 20 law schools (<[www.wcl.american.edu/impact/initiatives-programs/marshallbrennan/](http://www.wcl.american.edu/impact/initiatives-programs/marshallbrennan/)>). Can a comparable project be launched in the EU (an ‘EU constitutional literacy project’ or, more cautiously, an ‘EU Treaties literacy project’)? Similar practice of Prof Emily Buss in Chicago Law School; see further Supreme Court cases in <[www.icivics.org/](http://www.icivics.org/)>; Hardy, Rackaway and Sonnier, ‘In the Supreme Court Justices Shoes: Critical Thinking Through the Use of Hypothetical Case Law Analyses and Interactive Simulations’ (teachers simulate Supreme Court decision making; this equips them for later case teaching in classrooms); Hess, *Controversy in the Classroom: The Democratic Power of Discussion* (with examples).

1238 N 1265.

1239 The ‘Fonds Lenaerts-Grimonprez, voor een sterkere EU dimensie op school’ founded at KU Leuven (Belgium) works with this aim, in cooperation with the University’s Teachers training programmes <[www.allea.org/allea-prize-used-set-fund-lenaerts-grimonprez-stronger-eu-dimension-school/](http://www.allea.org/allea-prize-used-set-fund-lenaerts-grimonprez-stronger-eu-dimension-school/)>.

1240 Expression repeatedly cited at the Harvard Law School Bicentennial (October 2017).

1241 Hess, *Controversy in the Classroom: The Democratic Power of Discussion*: ‘purposeful inclusion of controversial issues in the school curriculum, when done wisely and well, can communicate by example the essence of what makes communities democratic while simultaneously building the skills and dispositions that young people will need to live in and improve such communities’; controversial political issues are issues of public policy that spark significant disagreement among a group of people. See also Hess, *Courting Democracy: Teaching about Constitutions, Cases, and Courts*: ‘Courting Democracy encourages social

Supreme Court cases, ECJ cases, too, have the potential to ‘communicate by example the essence of what makes communities democratic while simultaneously building the skills and dispositions that young people will need to live in and improve such communities’.<sup>1242</sup> ECJ cases can be used to identify EU rights or principles about which there are varying degrees of debate or controversy, and to transparently examine them. They thus comply with the requirement of critical and pluralistic education established by the ECtHR, as well as the controversy principle of ‘the Beutelsbacher consensus’ (that which is a matter of controversy in science and politics must also be presented as controversial to students).<sup>1243</sup> Case study is a means of delving into deeper layers of the EU legal order, reaching into principles and values. Dworkin analyses ‘hard cases’ and points to the principles and background morality underlying the—often complex and technical—rules.<sup>1244</sup>

Stories based on ECJ case law are tools giving pupils a good grasp of EU fundamentals (*what do the foundational texts say?*) as well as space to reflect (*what do you think?*).<sup>1245</sup> Examples in ECJ case law which invite critical thinking are not hard to find. Law can be conceived as a constant set of

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studies educators to teach civic and democratic education by harnessing the pedagogical possibilities of the controversy that permeates the legal sphere’.

1242 Preceding note.

1243 See n 587. Cf Müller, ‘Politische Bildung (und Europa)’, about a trend to criticise ‘Educating for Europe’ (‘Erziehung zu Europa’) because incompatible with (1) The prohibition on overwhelming students with ideas (a pupil must not be pressurised to adopt a desired opinion and prevented from making his own independent judgement) and (2) The controversy principle (that which is a matter of controversy must be presented as controversial): ‘Education for Europe’ conflicts with both principles. Further Schulz and others, *IEA International Civic and Citizenship Education Study 2016: Assessment Framework* (case teaching relates to elements in various content domains, see i.a. p 21 negotiation/resolution, i.e. the concept that peaceful resolution of differences is essential to community well-being and that negotiation is the best way to attempt to reach resolutions; engagement, i.e. the ‘concept that citizens need to concern themselves with issues and information in their communities in order to participate effectively’; see p 27 empathy).

1244 R Dworkin, ‘Hard Cases’ (1975) 88 *Harvard Law Review* 1057 (author criticises positivist adjudication; resolution of hard cases should be based on arguments of principle, not of policy). See also Alexy, nn 1168 and 1229.

1245 In Raskin’s case book on citizenship education *We, the Students* (n 1237), a recurring section under each case (or sets of cases) is: ‘What do you **Think?**’ See also Youth project ‘Empowering through Storytelling’; and J Schuitema and others, ‘Guiding classroom discussions for democratic citizenship education’ (2017) 44 *Educational Studies* 377.

questions.<sup>1246</sup> Case teaching is constructed around questions, inciting pupils to think, to react, to analyse, to understand, to feel, to compare, to propose, to compromise, to evaluate.<sup>1247</sup> By way of example, in the following analysis of EU rights, some questions for discussion will be raised. Questions should preferably be such as to bring EU foundational values, objectives and principles to the fore. EU primary law does not have all the answers but provides the rules of play which must be known by those who are playing *and* those who are watching the game (active and less active citizens).

Should playing at killing be allowed in Germany because it is allowed in the UK (*Omega Spielhallen*)? Can Mr Schmidberger rely on the motorway to Italy being open or should a pro-environment demonstration be allowed to take place? Should Ms Jippes have the right to vaccinate her beloved sheep and goats, and what about EU rules on common agricultural policy and the internal market? Can a boat sail freely up and down between Helsinki and Tallin, just under another flag and with workers being paid less (*Viking*)? Should solidarity work to the advantage of Swedish workers or Latvian workers (*Laval*)? What do freedom, equality, or justice mean in the specific situation? Must Belgian universities accept all French students who are rejected under the *numerus clausus* in France (*Bressol*)?<sup>1248</sup>

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1246 See i.a. Minow, 'What the rule of law should mean in civics education: from the "Following Orders" defence to the classroom': 'The dilemma posed for the soldier who must learn both to obey orders and to resist illegal orders [leading to atrocities] offers a rich focal point for students in middle and high school settings.' Law must be questioned. Civic instruction should deepen students' abilities 'to bring their conscience to bear in many settings where obedience and conformity jeopardize adherence to law and morality'. See also B de Witte, 'Democratic Adjudication in Europe: How Can the European Court of Justice Be Responsive to the Citizens?' in M Dougan, NN Shuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012). It is interesting for the ECJ to hear the opinion of citizens if the Court is to serve their interests (Art 13(1) TEU), not only to read opinions of academic writers.

1247 For the types of questions to guide the course of discussion, see Golich, 'The ABCs of Case Teaching', 19–20.

1248 Case C-36/02 *Omega Spielhallen* ECLI:EU:C:2004:614; Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333; Case C-189/01 *Jippes* ECLI:EU:C:2001:420; Case C-438/05 *Viking* ECLI:EU:C:2007:772; Case C-341/05 *Laval* ECLI:EU:C:2007:809; Case C-73/08 *Bressol, Chaverot and Others* ECLI:EU:C:2010:181. Some stories discussed further in Chapter eight.

In my experience, such (provocative) questions awaken the class and guarantee dialogue and debate.<sup>1249</sup> Stories and issues arising in them create an EU public sphere in the classroom and lay the foundations for deliberative democracy (just counting votes does not give true legitimacy to democratic decisions). They are the start of active EU citizenship.<sup>1250</sup> Case teaching is in keeping with the EU's constitutional culture, which 'is about taming raw sovereignty, and establishing a politics of compromise, civilised confrontation and mutual learning.'<sup>1251</sup>

### *178 Multiperspectivity and coping with complexity*

The main strength of case teaching based on ECJ case law is its inherent multiperspectivity. A single story can be used to encourage pupils to look at the same problem from various angles: the opposing standpoints of the different parties, the submissions of Member States or EU institutions to the Court; the judgment of the ECJ. It is an application of structured academic controversy.<sup>1252</sup> This multiperspectivity inspires open-mindedness. Case teaching strengthens attitudes such as tolerance and respect, equality, appreciation of diversity, a sense of justice, mutual trust, responsibility, empathy and solidarity.<sup>1253</sup> Case teaching encourages a thoughtful

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1249 Using green and red cards, e. g., pupils can indicate which party in court they would support, or which arguments they find compelling.

1250 In line with, i.a., Commission recommendations to engage with citizens on European issues and to encourage participation of citizens in EU policymaking. See Commission Recommendation (EU) 2018/234 of 14 February 2018 on enhancing the European nature and efficient conduct of the 2019 elections to the European Parliament [2018] OJ L45/40, recital 7; earlier Commission Communication 'The Commission's contribution to the period of reflection and beyond - Plan-D for Democracy, Dialogue and Debate' COM(2005) 494. On deliberative democracy, see i.a. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory*; L Huyse, *De democratie voorbij* (Van Halewijck 2014). On the concept of public sphere, see n 1743.

1251 JW Müller, 'A European Constitutional Patriotism? The Case Restated' (2008) 14 ELJ 542, 552.

1252 Structured Academic Controversy (SAC): learning in small groups by considering a controversial subject from several perspectives. See i.a. Hess, *Controversy in the Classroom: The Democratic Power of Discussion*, 86.

1253 Menkel-Meadow, 'Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics', 815: 'Stories and role enactments allow multiple levels of analysis to be explored at the same time and with the different points of view of those in role (the acting "lawyers" or "clients") and those outside of role who watch, analyze, criticize and contribute to the ethical dialogue which follows'; Grammes, 'Exemplarisches Lernen' 99. Historic cases also require multiperspectivity, see CoE Education for democracy, *Tackling today's challenges*

response to the tensions inherent in daily life, in politics, within the Member State, the EU and a globalised world. ECJ case study increases pupils' awareness of complexities in real life and teaches them ways of coping with complexity. Pupils realise that situations are not one-dimensional and that problems seldom have simple solutions. They learn to consider the positive and negative aspects of the options available and to balance rights, objectives and principles. In this way case teaching can deter and shield against populism expressed in one-liners.<sup>1254</sup> Moreover, studying cases helps to understand the rationale behind EU legal frameworks. Case teaching permits a differentiated approach, learning in flexible pathways, learner centred. This is in keeping with the conclusions of the Council and the Representatives of the Governments of the Member States, who emphasised that 'education systems must move away from the traditional "one-size-fits all" mentality'.<sup>1255</sup>

Case teaching thus assumes an important place in the pedagogical toolkit of EDC, a powerful teaching tool complementing other forms of teaching such as lecturing.<sup>1256</sup> What is essential is to trigger interest and debate, not necessarily to achieve a consensus in the classroom. Even though trying to reach a consensus is an interesting exercise in taking on the role of the legislator, diverse opinions must be respected.<sup>1257</sup> The flexibility of case teaching makes it possible to inform pupils step by step about the relevant norms (EU primary law), after having initially described the facts and the issues in the story and given pupils the opportunity of brainstorming ways of solving the problem. After class debate, the decision of the ECJ can be explained, at least in its essential lines (such as the rights or

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*together: Biased history teaching.* See in this context the historic background for Case C-364/10 *Hungary v Slovakia* EU:C:2012:630.

- 1254 Golich, 'The ABCs of Case Teaching', 12, 14 ('Cases offer dramatic proof that realworld problems do not have simple, easily prescribed solutions. Working through cases gives students vital practice in confronting "messy" problems and formulating tools for analysis and resolution').
- 1255 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) ('Equal opportunities for all are crucial, but not sufficient: there is a need to pursue "equity" in the aims, content, teaching methods and forms of learning being provided for by education and training systems to achieve a high quality education for all').
- 1256 Eichner, 'Fallanalysen im Sachunterricht als Möglichkeit des Demokratie-Lernens' 343–4.
- 1257 How far does freedom of expression extend? See also § 326 .

responsibilities and foundational EU values, objectives or principles at stake). Pupils are free to discuss the ECJ's ruling.<sup>1258</sup> Finally, they can reflect on what they have learned from the case, draw possible conclusions for their own lives, and thus reinforce experiential learning.<sup>1259</sup>

### 179 *Guidelines for case teaching*

There are many resources on case teaching as a general method.<sup>1260</sup> They may be useful tools for developing teaching based on ECJ case law. Case teaching must be provided in a climate of respect for fundamental rights *in* education, such as respect for freedom of expression, freedom of thought, equality and non-discrimination, the participation rights of the child, privacy rights, best interests of the child, human dignity. Rights in the learning environment also include respect for identity, integrity, and the evolving capacities of the child.<sup>1261</sup> Fundamental rights *in* education are often distinguished from the fundamental right *to* education and fundamental rights *through* education. Case teaching as a tool also reinforces the EU dimension of fundamental rights *through* education (HRE).<sup>1262</sup>

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1258 In cases where pupils can grasp the decisive points of the judgment, they are free to disagree. In some cases, however, reservations must be expressed if the ECJ judgment cannot be explained in accurate legal terms in secondary schools. Pupils understand this. In my experience, they realise that cases are mostly an occasion to discuss and to experience the EU dimension at work.

1259 Last phase described by Kolb (renowned American educational theorist) in the process of experiential learning (concrete experience; reflection on that experience; formation of abstract concepts based on the reflection; application of the new abstract concepts): DA Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice-Hall 1984). For didactic work methods, such as discussions (small groups or classroom), role playing, simulations, written work, or creative problem solving, see Telman, 'Langdellian limericks (case teaching method)', 112, 125; also broad palette of forms in Compass (n 255).

1260 I.a. Kolb (n 1259); Golich, 'The ABCs of Case Teaching'; 'procedural values' of Crick (n 588); T Huddleston, *Teaching about controversial issues: guidance for schools* (Citizenship Foundation 2003); BP Shapiro, *Hints for case teaching* (Harvard Business 2014).

1261 Rights relevant within education: UDHR Arts 1, 2; ICCPR Arts 18, 19, 27; CRC Arts 2, 3, 5, 12–16, 19, 28, 29. See UN ComRC 'General Comment No 1 (2001)- Article 29(1): The Aims of Education' Doc CRC/GC/2001/1, paras 6 and 8; UNESCO-UNICEF, *A Human Rights-Based Approach to Education for All: A framework for the realization of children's right to education and rights within education* (2007), vii, 35.

1262 Para 2 Charter on EDC/HRE.

The Council of Europe recommends ‘safe spaces’ for handling controversial subjects in the classroom.<sup>1263</sup> Using EU primary law as a basis, it is possible to develop safe spaces for an EU dimension of EDC while respecting rights in education. When political issues arise, teachers should not promote partisan political views.<sup>1264</sup> Safe spaces can be created by linking the issues being debated to the foundational EU texts. Generally accepted reasoning techniques or schemes, such as the rule of reason or the principle of proportionality, can be suggested as tools to frame discussions and to balance principles or values.<sup>1265</sup> But the open space must be protected.

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- 1263 See T Huddleston and D Kerr, *Managing controversy: developing a strategy for handling controversy and teaching controversial issues in schools* (CoE 2017), 57 (a safe space is ‘an environment in which practitioners and participants can have rich and meaningful discussions about controversial issues, and in which young people feel safe discussing those issues’; all views can be expressed, no questions are ‘silly’ or ‘wrong’). See earlier CoE, Pilot project, Teaching controversial issues: developing effective training for teachers and school leaders (2014); and proposed action in CoE Secretary General, State of democracy, human rights and the rule of law—a security imperative for Europe. Report 2016, 104 (develop a ‘safe spaces’ project drawing up guidelines that allow teachers and pupils ‘to address difficult and controversial issues relating to faith, culture and foreign affairs, while respecting each other’s rights and upholding freedom of expression’). Such a project is applicable to EU matters to the extent that some EU matters are controversial (e.g. ‘benefit tourism’, refugee quotas, austerity measures) or are still considered to fall under ‘foreign affairs’. Guidance for lively yet respectful discussions, see DE Hess, ‘Discussions that drive democracy’ (2011) 69 *Educational Leadership* 69, 70; also Hess, *Controversy in the Classroom: The Democratic Power of Discussion*; Hess and Avery, ‘Discussion of Controversial Issues as a Form and Goal of Democratic Education’; A Heijltjes, T van Gog and F Paas, ‘Improving students’ critical thinking: Empirical support for explicit instructions combined with practice’ (2014) 28 *Applied Cognitive Psychology* 518. Further Reinhardt, *Teaching Civics: A Manual for Secondary Education Teachers*; *Compass* with guideline for educators (n 1236): ‘The young people you are working with must feel free to explore and discover, and to interact and share with each other. Be genuine, friendly, encouraging and humorous’. Also Manifesto on critical thinking education (KU Leuven, CRITINKEDU, 2019: to model, to induce, to declare and to surveil).
- 1264 Cf guidance on the teaching of controversial issues in many states, see i.a. Standard in UK (Education (Independent School Standards) (England) (Amendment) Regulations 2014 (come into force on 29th September 2014), above n 1180), para 5(c).
- 1265 Many free movement cases which offer occasions for ‘balancing’ in the classroom, are in fact based on the same reasoning scheme, highly accessible for teachers. Simply put: which right is the case about? which measure has limited this right? was there a good reason for this limiting measure (a legitimate objec-

180 *Learning outcomes of case teaching*

The learning outcomes of the proposed case teaching method relate to the EU dimension of component (b) of EDC: equipping learners with knowledge, skills and understanding and developing their attitudes and behaviour.<sup>1266</sup> Critical thinking is connected with knowledge, skills and attitudes.<sup>1267</sup> Discussion paths towards the learning objectives can be proposed while still respecting educational freedom. Triggered by a telling example in a story, chosen to advance the (EU) essentials, learning develops in an inductive way from the concrete to the abstract.<sup>1268</sup> Teachers help pupils to identify foundational EU values, objectives and principles in concrete situations. Knowledge and understanding grow—bottom up—about what it means to be an EU citizen. Stories based on case law lead to representative ‘islands’ of EU knowledge, ‘rooted’ understanding.<sup>1269</sup> Evidence shows that case teaching leads to knowledge ‘sticking’ more effectively than information given top down about rules or institutions. In addition to explicit knowledge, tacit understanding is gained from the experience of the stories and is more likely to be applied in later life.<sup>1270</sup> From real cases, pupils learn to recognise the EU dimension in situations

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tive)? was this measure a good way of achieving that objective (appropriate)? did it not do more than was necessary and was it not excessive (necessary and proportional)? The principle of proportionality can be understood on the basis of clear steps, e.g. in *Schecke* (§ 263 ). For case law on this principle, see Case C-413/99 *Baumbast* ECLI:EU:C:2002:493, paras 85–86, 91; Case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639, para 32; Joined Cases C-92/09 and C-93/09 *Schecke and Eifert* ECLI:EU:C:2010:662, para 74; Case C-165/14 *Rendón Marín* ECLI:EU:C:2016:675, para 45. See also Y Borgmann-Prebil, ‘The Rule of Reason in European Citizenship’ (2008) 14 *ELJ* 328.

1266 Charter on EDC/HRE, para 2; skills as explained in Competences for democratic culture: Living together as equals in culturally diverse democratic societies (CoE 2016), 13–14. See Council Recommendation of 22 May 2018 on key competences for lifelong learning, Annex: A European Reference Framework, i.a. concepts competence, key competence and learning to learn competence.

1267 Davies and Barnett, *The Palgrave handbook of critical thinking in higher education*.

1268 Preparation for case teaching means matching learning objectives with case facts and norms, see Golich, ‘The ABCs of Case Teaching’, 16; Grammes, ‘Exemplarisches Lernen’ 96, on ‘Elementaria und Fundamentalia’, key concepts, key problems, and learning to learn.

1269 Grammes, 95 (‘Inselbildung’, ‘Einwurzelung des Wissens’).

1270 Golich, ‘The ABCs of Case Teaching’, 15. See also D Gentner and LA Smith, ‘Analogical Learning and Reasoning’ in D Reisberg (ed), *The Oxford Handbook of Cognitive Psychology* (Oxford Handbooks Online, Oxford University Press 2013).

where they would never expect to find it: they learn which EU rights are involved, which limitations apply, and why. They learn on types of EU rules (what is a directive, a regulation) and have a greater awareness of the EU rights of others (responsibilities). They see EU institutions at work in practice and experience the interaction of EU and Member State levels of governance in concrete situations.

Case teaching sharpens several skills which empower pupils as future citizens: analysing complex problems; creative, nuanced and critical thinking; forming an independent opinion; communicating effectively; speaking clearly and persuasively; listening carefully to other arguments; interpreting; working collectively to solve problems; negotiating; evaluating solutions; summarising; compromising; building consensus and a sense of community.<sup>1271</sup> Case teaching based on ECJ case law combines EU learning with problem solving, an essential component of EDC standards.<sup>1272</sup> It corresponds to the Charter on EDC/HRE which states that member states should promote educational approaches and teaching methods which enable 'learners to acquire the knowledge and skills to promote social cohesion, value diversity and equality, appreciate differences ... and *settle disagreements and conflicts in a non-violent manner with respect for each other's rights*, as well as to combat all forms of discrimination and violence'.<sup>1273</sup> Problem-based learning and conflict resolution are a form of peace education.

Case teaching furthermore is in keeping with the 2018 Council Recommendation on key competences for lifelong learning, which states that:

Skills for citizenship competence relate to the ability to engage effectively with others in common or public interest, including the sustain-

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1271 Frequently mentioned skills. See in the same vein, i.a. CoE Recommendation Rec(2002)12 of the Committee of Ministers to member states on education for democratic citizenship (16 October 2002), appendix, 2; Council Recommendation of 22 May 2018 on key competences for lifelong learning, Annex: A European Reference Framework, 6: Citizenship competence. Also RFCDC, ICCS, and scholars in §§ 38 71 73 .

1272 On the need to exercise problem solving skills see i.a. UN ComRC 'General Comment No 1 (2001)- Article 29(1): The Aims of Education' Doc CRC/GC/2001/1, (9) 'Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner'; Charter on EDC/HRE, para 13 ('settle disagreements and conflicts in a non-violent manner with respect for each others' rights').

1273 Para 13 (emphasis added). For differences between faith and ethnic groups in particular, see e.g. text to n 1946.

able development of society. This involves critical thinking and integrated problem solving skills, as well as skills to develop arguments and constructive participation in community activities, as well as in decision-making at all levels, from local and national to the European and international level.<sup>1274</sup>

Case teaching on the EU dimension of EDC can be seen as good practice consistent with a competence-oriented approach. It allows for cross-discipline learning and underlines the connectivity between different subjects. It develops knowledge, skills and positive attitudes in several key competences.<sup>1275</sup>

Beyond and interlinked with the cognitive dimension, case teaching reaches the affective and behavioural dimensions of citizenship and citizenship education.<sup>1276</sup> Stories trigger feelings, which are an essential part of citizenship.<sup>1277</sup> As Shaw wrote on social citizenship, ‘the affective dimension of the European project is critical to the Union’.<sup>1278</sup>

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1274 Council Recommendation of 22 May 2018 on key competences for lifelong learning, Annex: A European Reference Framework, 6: Citizenship competence.

1275 Council Recommendation of 22 May 2018 on key competences for lifelong learning [2018] OJ C189/1, Annex: A European Reference Framework, ‘Supporting the development of key competences’, a.(a). See below Stories for case teaching, strengthening digital, social and citizenship key competences through cases on EU equality rights, privacy rights, rights in the digital single market, etc.

1276 See i.a. text to n 551 ff. See also in Germany the Resolution of the Standing Conference of the Ministers of Education and Cultural Affairs of 4 December 1980 in the version of 14 December 2000, Recommendation of the Standing Conference of the Ministers of Education and Cultural Affairs on the promotion of human rights in schools: human rights education cannot be limited to the transmission of knowledge; it must include emotional and behavioural components.

1277 See i.a. n 1215, 1216, Nussbaum (n 579).

1278 Shaw, ‘The many pasts and futures of citizenship in the European Union’, 555, 557 (on ‘social citizenship’). On the interaction of cognition and emotion, see text to n 1450.

181 *Experiential learning about values and EU citizenship*

Cases lead to imaginative experiencing of the EU within the classroom.<sup>1279</sup> Cases and stories give contextual knowledge.<sup>1280</sup> The extra-legal conditions for a functioning democracy include the cognitive and ethical capacities of citizens.<sup>1281</sup> Democracy cannot be learned in books but has to be experienced in society. Cases bring society into the classroom. Pupils will sympathise with one party but must be encouraged to consider the opponent's situation (e.g. through role playing or simulations). Many citizenship educators agree that the 'most powerful way of learning is through participation and experience'.<sup>1282</sup> Case teaching is a bridge between formal education in schools and the experience of informal learning.<sup>1283</sup> Stories based on ECJ case law are a form of experiential learning, providing a path from the theory of EU primary law to practice, turning EU citizenship into 'a tangible reality'.<sup>1284</sup> Pupils recognise the relevance of the EU for their daily life. EU foundational values, objectives and principles do not remain vague, abstract academic truths, but acquire real significance and are often decisive in conflict resolution.

182 *Active learning prepares for active citizenship*

An important advantage of the case method is active learning. Cases make it possible to switch from a knowledge-based approach to a competence-based approach, and encourage teachers and pupils to take action.<sup>1285</sup> The stories of individuals who have stood up for their rights create a disposi-

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1279 'Tell me, and I will forget. Show me, and I may remember. Involve me, and I will understand.' (Confucius); 'A child is not a vase to be filled, but a fire to be lit.' (Francois Rabelais, quoted in <changingthepresent.org>).

1280 Menkel-Meadow, 'Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics', 793: perhaps the strongest argument for the use of stories and real cases is the value placed on contextual knowledge and decision-making, preferably in 'thick descriptions'. Who did what, how, why, and what can be done?

1281 Peters, 'European democracy after the 2003 Convention', 77.

1282 CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 29 (yet, a lot remains to be done).

1283 Applying the model used by Kolb (n 1259).

1284 Cf the priority set by European Council, The Stockholm Programme — An open and secure Europe serving and protecting citizens [2010] OJ C115/1: 'European citizenship must become a tangible reality.'

1285 World Forum for Democracy 2016, *Democracy & equality: does education matter?* (Strasbourg, 7-9 November 2016), 4, Conclusions and recommendations.

tion for active citizenship.<sup>1286</sup> As a result of debate, simulation, or role playing, pupils feel more able to approach the relevant authorities in their later civic life. Beyond personal interest and the empowerment to exercise one's own rights, cases also provide an understanding of the societal choices which must be made in accordance with the Treaties and CFR and national constitutions. Learning based on cases prepares for participation in democratic processes. To be fully effective, case teaching based on ECJ case law requires teachers to explain that the case is more than a story about two parties (a precedent, with incorporation of judicial interpretation in the meaning and scope of the rule<sup>1287</sup>). Starting from apparently insignificant stories, case teaching may thus demonstrate the power of the active citizen and amplify the political interest of pupils and teachers.<sup>1288</sup> The (educated) citizen has the last word. As Lenaerts formulates it: *cogito ergo civis europaeus sum*.<sup>1289</sup> Independent and critical thinking are an essential part of being an EU citizen.

### 183 *Choice of cases*

There is no shortage of books on ECJ case law.<sup>1290</sup> Yet, appropriate cases for study in secondary schools will not necessarily be the classics of EU law

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1286 See n 594, 595 (Crick report 'We aim at no less than...').

1287 Joined Cases C-581/10 and C-629/10 *Nelson and TUI Travel* ECLI:EU:C:2012:657, para 88.

1288 As asked by Co-creating European Union Citizenship: A Policy review (European Commission, 2013), 46: 'Professionals in the education sector should focus on amplifying the political interest of young people. Educational programmes in civic/citizenship education should be aimed primarily at enabling young people to acquire an interest in political and civic affairs; fostering their knowledge and understanding of political and civic matters; and supporting the development of the skills which they require to participate effectively in the political and civic life of their community and country.'

1289 K Lenaerts, 'Cogito ergo civis europaeus sum: Discours à l'occasion de l'attribution du titre de docteur honoris causa de l'Université de Poitiers' (10 October 2016). For reflection with pupils.

1290 I.a. J Boulouis and R-M Chevallier, *Grands arrêts de la Cour de justice des Communautés européennes* (6 edn, Dalloz 1994); *Het recht van de Europese Unie in 50 klassieke arresten* (Juridische Uitgevers 2010); D Chalmers, G Davies and G Monti, *European Union Law: cases and materials* (2 edn, Cambridge University Press 2011); Craig and de Búrca, *EU Law: Text, Cases, and Materials*; J Meeusen, *Recht van de Europese Unie: basisjurisprudentie* (3 edn, Intersentia 2015); MQM Karpenschif and CQC Nourissat, *Les grands arrêts de la jurisprudence de l'Union européenne* (PUF 2016); F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).

(*Van Gend en Loos*, *Costa v Enel*, and similar cases<sup>1291</sup>). To achieve the aims of EDC, cases should be chosen on a different basis.

Firstly, in the concern for objectivity, the selection of cases should be guided by EU primary law. In the general debate on case teaching in classrooms, academic writers point to the risks of non-neutral selection of cases.<sup>1292</sup> Admittedly, the choice of particular ECJ cases can influence pupils' opinions. Yet, the same concern exists when choosing literature for schools (and literature is not excluded from the curriculum just for that reason). Cases for the EU dimension of education based on the Treaties and CFR have to illustrate foundational values, objectives and principles, and provide content to EDC components (c-1–3), e.g. entrenched EU rights.<sup>1293</sup>

Next, cases should preferably satisfy all the criteria for relevance to the EU dimension of EDC (additional content to that of national EDC, significant, inviting critical thinking and affecting the large majority of citizens).<sup>1294</sup>

Furthermore, because subjective involvement is an important factor for successful EDC,<sup>1295</sup> it is best if cases relate to real life situations of pupils or to their field of interest. European dilemmas in concrete conflicts between

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1291 M Poiars Maduro and L Azoulaï (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010).

1292 Menkel-Meadow, 'Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics', 794, 796 ('the on-going debate about the validation of stories, with the question of who decides whether a story is true/accurate/representative? Is the story valid on its own terms for teaching or some other reason?... Who decides which stories we teach from?'); Reinhardt, *Teaching Civics: A Manual for Secondary Education Teachers* 119.

1293 Condorcet entrusted enlightened learned societies, formed freely and independently of the State, to exercise final authority on citizenship education: see Condorcet, *Rapport et projet de décret relatifs à l'organisation générale de l'instruction publique, Présentation à l'Assemblée législative (20 et 21 avril 1792)* ('sociétés savantes librement formées').

1294 Criteria i-iv in text to nn 1053 ff.

1295 Beutelsbacher consensus, third principle: giving weight the personal interests of pupils (text to n 587); CoE, *Learning to live together: Council of Europe Report on the state of citizenship and human rights education in Europe*, 18 ('it is essential to demonstrate the relevance of democracy and human rights for everyday life').

citizens trigger interest, but conflicts between Member States, institutions, or even continents (EU versus US) also provoke lively debates.<sup>1296</sup>

Beyond their personal interest, young citizens also need to be made aware of the common good.<sup>1297</sup> Confronted with societal issues, pupils are quick to react: ‘this is not fair’. These natural reactions can be used as a basis for further critical thinking, including on the EU dimension.

Finally, the chosen cases should be amenable to simplification while keeping the essentials intact.

The cases in the following analysis will not be analysed comprehensively, yet they serve to illustrate EU rights, foundational values, objectives and principles, often in challenging constellations. They are not intended for direct use in schools. I will explore to what extent they are appropriate for EDC. If appropriate, the legal analysis can be used to underpin stories in case teaching and provide a basis for developing didactic material for pupils and for teacher training.

Rather than using the names of the parties, cases can be given more appealing titles: the story about playing at killing, the student versus Facebook, the angry farmers, the so-called princess, the lady with four sheep and two goats, the Hungarian President and the statute, the five lorries stranded on the Brenner motorway, the tourist in Paris, the Spanish businessman versus Google, the Swedish catechist on the internet, Liselotte and her vineyard, Dieter and his diploma, and (of course) the story of the stewardess. They are good (and fun) examples for incorporating the EU dimension into EDC.<sup>1298</sup>

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1296 E.g. their interest in EU/US confrontations in cases such as Case C-366/10 *Air Transport Association of America and Others* ECLI:EU:C:2011:864, or Case C-362/14 *Schrems* ECLI:EU:C:2015:650 (§ 265 ); EU/UN in Joined Cases C-402/05 P and C-415/05 P *Kadi* ECLI:EU:C:2008:461; or EU/major economic actors such as Microsoft in Case T-167/08 *Microsoft* ECLI:EU:T:2012:323 (abuse of a dominant position, refusal of the dominant undertaking to supply and authorise the use of interoperability information, and a periodic penalty payment of EUR 860 million).

1297 Reinhardt, ‘The Beutelsbach Consensus’, 12 (the third principle of the Beutelsbacher consensus, focus on students’ interests, was an appropriate choice 40 years ago, seeking to avoid subordination, yet it should not lead to ruthless defence of own interests; it should be mitigated by consideration of the interests of others and notions of the common good). This certainly applies to the EU dimension of EDC.

1298 Corresponding to ECJ cases Case C-36/02 *Omega Spielhallen* ECLI:EU:C:2004:614; Case C-362/14 *Schrems* ECLI:EU:C:2015:650; Joined Cases C-92/09 and C-93/09 *Schecke and Eifert* ECLI:EU:C:2010:662; Case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806; Case C-189/01 *Jippes* ECLI:EU:C:2001:420; Case

SOLVIT cases, containing simpler problems than those in ECJ judgments, are also an interesting source of material.<sup>1299</sup> In addition to real cases, hypothetical cases (inspired by real cases) or fictional stories can be developed.<sup>1300</sup> In its EU citizenship reports, the Commission inserts small stories as examples of citizenship rights (e.g. 'Frederico, a young cook from Portugal decided to go to Sweden to look for a new job...'<sup>1301</sup>).

#### 184 Challenges

Awareness of the limits of the case teaching method is important.<sup>1302</sup> In addition to the risk of tendentious choice of cases (answered above), there may be reticence because of the time and work involved. Compared to traditional lecturing, it demands greater intellectual and emotional energy from both pupils, who have to abandon their passive role, and teachers, who have to master the subject and direct class discussion on the basis of questions.<sup>1303</sup> Some authors raise the risk of too much teacher direction.<sup>1304</sup>

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C-364/10 *Hungary v Slovakia* ECLI:EU:C:2012:630; Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333; Case 186/87 *Cowan* ECLI:EU:C:1989:47; Joined Cases C-154/15 and C-307/15 *Gutiérrez Naranjo and Others* ECLI:EU:C:2016:980; Case C-101/01 *Lindqvist* ECLI:EU:C:2003:596; Case 44/79 *Liselotte Hauer* ECLI:EU:C:1979:290; Case C-19/92 *Dieter Kraus* ECLI:EU:C:1993:125; Case 43/75 *Defrenne II* ECLI:EU:C:1976:56 (some examples are developed below).

- 1299 Commission Recommendation of 17 September 2013 on the principles governing SOLVIT [2013] OJ L249/10; Commission Communication 'Compliance Package- Action plan on the Reinforcement of SOLVIT: Bringing the benefits of the Single Market to citizens and businesses' COM(2017) 255 final. See 'Problems solved' in <ec.europa.eu/solvit>. SOLVIT is 'a service provided by national administrations throughout the EU and the EEA. National SOLVIT centres take on board citizens' complaints and cooperate via an online database to help citizens solve their problems out of court and free of charge.' See also text to n 1904.
- 1300 As practised for HRE, see *Compass - Manual on human rights education with young people* (CoE, 2012). On the power of fictional stories, e.g. to educate for values, see Menkel-Meadow, 'Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics'; Cole (n 1233).
- 1301 Commission EU Citizenship Report 2013: EU citizens: your rights, your future COM(2013) 269, 7.
- 1302 See n 1230.
- 1303 Golich, 'The ABCs of Case Teaching' 13–14 (role of the teacher as an orchestra conductor).
- 1304 Pleading for more freedom in education, fewer pre-established learning outcomes and results, accepting uncertainty and unpredictability, see Biesta, *The Beautiful Risk of Education*. Further Hess, *Controversy in the Classroom: The*

Case teaching based on ECJ case law, in particular, is a challenging exercise. Teachers usually have no law degree, let alone a knowledge of EU law. Therefore, source materials should be developed to make their work possible (based on existing models in other fields, such as HRE<sup>1305</sup>). During their higher education and in continuing education, teachers should be taught about the fundamentals of the EU.<sup>1306</sup> Best practices can be developed, for instance allowing university students to assist teachers in case teaching in secondary schools and to write academic papers on these training sessions.<sup>1307</sup> The purpose, after all, is not to educate pupils as EU lawyers but as EU citizens. Osler and Zhu argue with regard to narratives in HRE that the advantages outweigh the challenges: they have a valuable part to play in teaching human rights and justice.<sup>1308</sup> This applies, by analogy, to narratives for teaching EU rights and justice. The challenges are considerable, but the reward is even greater. Given concerns about the gap between the EU and the citizen (and the warning of the Brexit vote), case teaching can help to move into a higher gear and prepare EU citizens for the EU dimension of a society based on democracy, fundamental rights and the rule of law—based, of course, on an understanding of foundational EU values, objectives and principles.

### 185 *Conclusion*

The proposed learning method for an EU dimension of EDC at school is based on two pillars: EU primary law (objectivity) and case teaching (critical thinking and pluralism). Using EU texts and stories corresponds to EDC standards and to the ECtHR requirement to convey education in an objective, critical and pluralistic manner, with no aim of indoctrination. It respects the Treaties and the CFR, as well as Member State constitutions. It contributes to achieving the compulsory educational aims defined in the International Covenant on Economic, Social and Cultural Rights, the

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*Democratic Power of Discussion*, p 53 ff (discussion of the extent of free speech by students, also with case law of the US Supreme Court).

1305 See i.a. n 1236.

1306 As they are also prepared for courses on chemistry, mathematics or literature. Training with regard to some ECJ cases can be included.

1307 E.g. experience discussed with Prof Emily Buss in October 2017 at the University of Chicago Law School (winwin situation for all parties, credits for students). See also J Murdoch, 'Using self- and peer assessment at honours level: bridging the gap between law school and the workplace' (2015) 49 *The Law Teacher* 73.

1308 Osler and Zhu, 'Narratives in teaching and research for justice and human rights', 233.

Convention on the Rights of the Child, in particular the aim of preparing EU citizens for responsible life and effective participation in a free society. Cases give pupils the opportunity to observe, imitate and practice critical agency in classrooms.<sup>1309</sup> They are the beginnings of a European public sphere. Classrooms are an obvious first forum in which EU citizens can make their voices heard and discuss issues together.<sup>1310</sup> If 'the source of legitimacy is not the predetermined will of individuals, but rather the process of its formation, that is deliberation itself',<sup>1311</sup> then such deliberation should be practised in education. It will enhance the social legitimacy of the Union.

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- 1309 Ten Dam and Volman, 'Critical thinking as a citizenship competence: Teaching strategies', 375 ('If education is to further the critical competence of students it must provide them with the opportunity at the level of the classroom and the school to "observe, imitate and practice" critical agency').
- 1310 Response to Smith, who points to the inadequate development of a 'European public sphere' and a lack of an obvious forum for discussion, see Smith, 'The European Citizens' Initiative: A New Institution for Empowering Europe's Citizens?', 278. See also Commission White Paper of 1 February 2006 on a European Communication Policy COM(2006) 35.
- 1311 Smith, 'The European Citizens' Initiative: A New Institution for Empowering Europe's Citizens?', 287. On deliberative democracy, also n 1250.

