

## CHAPTER 9 Conferral of competence to the EU

### A *The principles*

#### 280 *Conferral, subsidiarity and proportionality*

EU competences are governed by the principle of conferral: ‘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’; competences not conferred upon the Union in the Treaties remain with the Member States (Articles 4 and 5(2) TEU). When the Union uses competences which are shared with the Member States or supporting competences (thus non-exclusive competences), it must respect the principle of subsidiarity: the Union can only act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (Article 5(3) TEU). In addition, the principle of proportionality requires that the content and form of all Union action shall not exceed what is necessary to achieve the objectives of the Treaties (Article 5(4) TEU).<sup>2079</sup>

Applied to citizenship education, three main questions arise. Does the EU *have* the competence to act in the field of EDC and its EU dimension? (the conferral question). Does the EU need to *use* that competence? (the subsidiarity question). Does the EU need to use its competence in a *specific* way, or could it be used in a *less intrusive* way? (the proportionality question).<sup>2080</sup>

In education, subsidiarity is a recurrent theme. Its multiple meanings must be differentiated.

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2079 See also Protocol (No 2) and Art 352(2) TFEU.

2080 D Edward, ‘Subsidiarity as a Legal Concept’ in P Cardonnel, A Rosas and N Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012) 99–100; Presidency Conclusions of the Edinburgh European Council of 11–12 December 1992, Overall approach to the application by the Council of the subsidiarity principle and article 3b of the Treaty on European Union (Annex 1 to Part A), SN 456/1/92 REV, 13: Should the EU act? What should be the intensity or nature of EU action?

281 *Subsidiarity as a meta-constitutional concept*

In the balance of powers between the EU and the Member States, subsidiarity relates to the fundamental issue of determining ‘who does best what?’. The objective is, while creating an ever-closer union among the peoples of Europe, to take decisions as closely as possible to the citizen (Article 1 TEU). Subsidiarity thus operates at several levels. Firstly, at a meta-constitutional level, subsidiarity is the rationale underpinning the attribution of powers in the legal bases: are particular competences *conferred on the EU or not* by the Treaties? The Union can only act within the limits of conferred competences to attain the objectives set out in the Treaties. Secondly, at a legislative level, subsidiarity must be respected in the exercise of the conferred competences. The principle of subsidiarity laid down in the Treaties (Article 5(2) TEU) regulates the *use or not* of EU competences (subsidiarity in the strict sense). It is a political principle, the basis of sound multi-level governance, which is also reflected in the choice of legal instruments (no regulations where directives suffice, no directives where recommendations suffice).<sup>2081</sup> Compliance with the legal principle of subsidiarity is subject to review by the ECJ. The Treaties thus reflect the principle of subsidiarity in several ways. The principles of conferral, subsidiarity and proportionality are interrelated.

The understanding of subsidiarity as a meta-constitutional concept, the logic underpinning the conferral of competences on the Union, is highly relevant to the discussion of supporting competences, which have been spelled out in great detail in the Treaties.<sup>2082</sup> Education is a good illustration of this: within the conferral of competences, essential limits have been set, reflecting the subsidiarity concerns.<sup>2083</sup>

In the pre-Maastricht period, with no express Treaty powers for education, Community education policy developed (without being called such) as a result of the exercise of powers conferred on the Community in other

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2081 Edward, *ibid.*, 94, 96 (subsidiarity reflects a weighty principle of public morality, not to assign to a greater and higher association what lesser and subordinate organisations can do (Pope Pius XI); it is a principle of good governance); K Lenaerts and P Van Ypersele, ‘Le principe et subsidiarité et son contexte: étude de l'article 3B du Traité CE’ [1994] *Cahiers de droit européen* 3, 8–10. For the principle of proportionality and instruments, see § 314.

2082 R Schütze, ‘Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order’ (2006) 31 *ELRev* 167, 183; complementary competences associated with the principle of subsidiarity.

2083 For the example of health, see Schütze, *ibid.*

fields: a spill-over of the internal market,<sup>2084</sup> a surprising link, at the time, with the principle of non-discrimination<sup>2085</sup> and a far-reaching effect of vocational training.<sup>2086</sup> Some authors criticised the active role of the ECJ in case law such as *Gravier* (leading to ‘competence creep’).<sup>2087</sup> The ECJ paved the way for education competences in the Treaty, and maybe especially for the need to place constitutional limits on these competences in the Treaties.<sup>2088</sup>

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- 2084 See early: Case 9/74 *Casagrande* ECLI:EU:C:1975:11: removal of educational obstacles to cross-border activities (implied powers). Interesting is Council Directive 77/486 of 25 July 1977 on the education of the children of migrant workers [1977] OJ L199/32: the objective of establishing an internal market persuaded Member States to adopt EU legislation which made inroads into their educational autonomy, including the learning content for children of workers in compulsory education (note, not higher education), residing with the worker in the host State. The Directive obliged the Member States to take appropriate measures to ensure teaching of the official language(s) of the host State and the mother tongue and culture of the country of origin (Art 2). Positive action had to be taken, four years were allowed for compliance and regular reporting required (Arts 4–5). The result was not satisfactory (Commission Report on the Education of Migrants' Children in the European Union COM(94) 423).
- 2085 Broad interpretation of ‘vocational training’ in Art 128 EEC brought situations within the scope of Art 7 EEC: Case 293/83 *Gravier* ECLI:EU:C:1985:69, paras 19–31; Case 24/86 *Blaizot* ECLI:EU:C:1988:43, paras 15–21; Case 263/86 *Humbel* ECLI:EU:C:1988:451.
- 2086 Case 242/87 *Commission v Council (Erasmus)* ECLI:EU:C:1989:217 (para 29: ‘the perfectly legitimate aim that the development of a common policy should be in keeping with the general objectives of the Community, such as the achievement of a people's Europe, cannot lead to a change in the proper legal basis of measures which fall objectively under the common policy in question’); Case 56/88 *UK v CL (Petra)* ECLI:EU:C:1989:81; Joined Cases C-51/89, C-90/89 and C-94/89 *UK, France and Germany v Council* ECLI:EU:C:1991:241.
- 2087 For *Gravier*, see text to n 1377. Comments i.a. in J Field, *European Dimensions, Education, Training and the European Union* (Jessica Kingsley 1998) 56. See also J Lonbay, ‘Education and the law: the Community context (European Community)’ (1989) 14 *ELRev* 363; M Murphy, ‘Covert action? Education, social policy and law in the European Union’ (2003) 18 *Journal of Education Policy* 551; J-E Charlier and S Croché, ‘How European Integration is Eroding National Control over Education Planning and Policy’ (2005-2006) 37 *European Education* 7. Analysis also in A van den Brink, ‘De begrenzing van de bevoegdheden van de Europese Unie als een gedeelde constitutionele opdracht’ (2014) 62 *SEW - Tijdschrift voor Europees en economisch Recht* 266; and S Garben, ‘Competence Creep Revisited’ (2017) 55 *JCMS* 1.
- 2088 Shaw, ‘Education and the Law in the European Community’, 437; K Lenaerts, ‘Education in European Community Law after “Maastricht”’ (1994) 31 *CML-*

The 1992 Maastricht Treaty consolidated the *acquis communautaire* by introducing a legal basis for Community action in education.<sup>2089</sup> An important innovation was that the EU acquired competence for all types of education, including general education in primary and secondary schools.<sup>2090</sup> The 2009 Lisbon Treaty confirmed this: the EU ‘shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States’ in the area of education, vocational training, and youth (Article 6 TFEU), with a legal basis in Articles 165 (education) and 166 (vocational training) TFEU. The Treaty uses careful language to authorise EU action and at the same time limit its scope, so as to preserve the paradigm of national educational autonomy.<sup>2091</sup> The length of the provision conferring competences in education is striking. There are 321 words in Article 165 TFEU (compare, e.g., with 131 words in Article 19 TFEU).

### 282 *The legal basis in Articles 165 and 166 TFEU*

Article 165(1) TFEU states that:

The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

The general objective of ‘contributing to the development of quality education’ may include EU action to promote the EU dimension in EDC in schools. It will be argued that quality education requires EDC with an EU dimension.<sup>2092</sup> Moreover, some specific objectives listed in paragraph 2 of Article 165 TFEU add to the potential of the legal basis for the EU to contribute to the development of the EU dimension of EDC: Union action

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Rev 7, 9–10. See also B de Witte (ed) *European Community Law of Education* (Schriftenreihe Europäisches Recht 133, Nomos 1989).

2089 Art 126 EC, Art 149 EC through the Amsterdam Treaty, now Art 165 TFEU.

2090 Pépin, *The history of European cooperation in education and training. Europe in the making - an example*, 147.

2091 R Lane, ‘New Community competences under the Maastricht Treaty’ (1993) 30 CMLRev 939: ‘clearly a softly-softly approach’.

2092 See also C Ferrari-Breuer, ‘L’éducation et la formation professionnelle comme instruments de la citoyenneté européenne’ in C Philip and P Soldatos (eds), *La citoyenneté européenne* (Collection études européennes, Chaire Jean Monnet 2000) 177.

shall be aimed at ‘developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States’ (first indent) and at ‘encouraging the participation of young people in democratic life in Europe’ (fifth indent). Other specific objectives may be relevant as well.<sup>2093</sup> For vocational training, a legal basis for EU action supporting and supplementing the action of the Member States is provided in Article 166(1) TFEU.<sup>2094</sup> Here EU action to promote the EU dimension in EDC also dovetails with several of the specific aims mentioned in paragraph two of Article 166, i.a. the first, second, fourth and fifth aims.<sup>2095</sup>

Thus, in the EU legal order, providing for the EU dimension of EDC in the curriculum is first and foremost a task for the Member States. The EU only comes in to support, coordinate, or supplement.

In the period after 1992, tensions between the EU and Member State levels persisted.<sup>2096</sup> The Convention on the Future of Europe recalled that supporting measures ‘apply to policy areas where the Member States have not transferred legislative competence to the Union, unless exceptionally and clearly specified in the relevant Treaty Article’; they allow the Union

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2093 Such as ‘promoting cooperation between educational establishments’ and ‘developing exchanges of information and experience on issues common to the education systems of the Member States’ (Arts 165(2) third indent and fourth indent).

2094 Art 166 TFEU: ‘The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.’

2095 To ‘facilitate adaptation to industrial changes’, to ‘improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market’, to ‘develop exchanges of information and experience on issues common to the training systems of the Member States’. See also Regulation (EU) 2019/128 of the European Parliament and of the Council of 16 January 2019 establishing a European Centre for the Development of Vocational Training (Cedefop) and repealing Council Regulation (EEC) No 337/75 [2019] OJ L 30/90 (recital 4 refers to the needs of citizens and society). On the demarcation of Art 165 and 166 TFEU, see Ruffert, ‘AEUV Art 165’, Rn 11–12.

2096 In its White Paper, the Commission had highlighted the need to develop the European dimension in education (Commission White Paper of 29 November 1995 on education and training, Teaching and learning - towards the learning society COM(95) 590 final), but the Council expressed ‘doubts and reservations’, even about proposals concerning language learning. See Council Conclusions of 6 May 1996 on the White Paper ‘Teaching and learning: towards the learning society’ [1996] OJ C195/1, e.g. para D.

to assist and supplement national policies ‘where this is in the common interest of the Union and the Member States’.<sup>2097</sup> The Convention named the educational system among the ‘basic public policy choices and social values of a Member State’,<sup>2098</sup> an essential element of national identity. The Lisbon Treaty requires the EU to respect the national identities of Member States, inherent in their fundamental structures, political and constitutional (Article 4(2) TEU). In federal Member States, education policy is mostly reserved to the federated entities as part of their identity.<sup>2099</sup>

Member State competence in education corresponds to State responsibility for education in accordance with international agreements, such as the ICESCR and CRC, and underlined by the ECtHR.<sup>2100</sup> National educational autonomy is furthermore expressed in the paragraph-4 principle of the Charter on EDC/HRE.<sup>2101</sup>

### 283 *The no-content limit*

The EU has to respect several limits to its competence in the field of education. Firstly, Article 165(1) TFEU establishes some ‘no go’ areas: the EU can only act ‘while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity’. Secondly, Article 165(4) TFEU prohibits the adoption of incentive measures which lead to the harmonisation of the laws or regulations of the Member States (in line with Article 2(5) TFEU). Since the Treaty excludes harmonisation in education, Article 352 TFEU cannot be used as a legal basis for harmonised EU citizenship education either.<sup>2102</sup>

For EU action aiming to develop the EU dimension in national school curricula, the requirement of full respect of Member States’ responsibility for the content of teaching (the no-content limit) seems quite a significant

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2097 European Convention, Working Group V ‘Complementary Competencies, Final Report’ (4 November 2002) CONV 375/1/02 REV 1, 5.

2098 Ibid, 10–11.

2099 See also *BVerfG, 2 BvE 2/08 (Lissabon)* 30 June 2009, Absatz-Nr (1-421), para 260. In his Opinion to Case 9/74 *Casagrande* ECLI:EU:C:1975:11, AG Warner described educational policy ‘as almost the last in which the *Länder* retained any independence—so that any encroachment on them by Community law was regarded with some sensitivity’.

2100 *Valsamis v Greece* no 21787/93 (ECtHR 18 December 1996), para 28; *Folgerø and Others v Norway* no 15472/02 (ECtHR 29 June 2007), para 84 (g); text to n 687.

2101 See above § 29.

2102 Comparable in Art 166 TFEU.

hurdle to have to overcome. After 1992, there was ‘a marked decline in the Commission’s eagerness to pursue its earlier curriculum-related ambitions’.<sup>2103</sup> On the basis of Article 165(2) second indent TFEU, the Union has been successful in promoting mobility in education (Erasmus<sup>2104</sup>), which is very valuable indeed for fostering EU citizenship and mutual understanding, and strengthens the EU dimension in EDC in various ways (especially at the level of higher education).<sup>2105</sup> However, the large majority of pupils (and students in higher education) remain at home. In Part three, substantive *content* was identified which is relevant for the EU dimension of EDC in mainstream education, especially for static citizens (criterion (iv), affecting the large majority of EU citizens).<sup>2106</sup> The obvious question therefore is whether Article 165 TFEU—requiring the EU to ‘fully respect[ing] the responsibility of the Member States for the *content* of teaching’—precludes any EU initiatives to support the development of the substantive content of the EU dimension of EDC identified in Part three. Or, to put it differently, what action can the EU undertake—beyond mobility—to promote active, informed, and responsible EU citizenship in mainstream education for those who remain at home?<sup>2107</sup>

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2103 T Theiler, ‘The European union and the "European dimension" in schools: Theory and evidence’ (1999) 21 *Journal of European Integration* 307, 331 (see also n 2242).

2104 I.a. Erasmus+ Regulation 1288/2013.

2105 See § 196 (the ‘locals’ also live in an area without internal frontiers) and 193 (conclusion). See i.a. Recommendation of the European Parliament and of the Council of 18 December 2006 on transnational mobility within the Community for education and training purposes: European Quality Charter for Mobility [2006] OJ L394/5. The *Erasmus* success story continues: Commission Proposal for a Regulation of the European Parliament and of the Council establishing ‘Erasmus’: the Union programme for education, training, youth and sport and repealing Regulation (EU) No 1288/2013, COM(2018) 367 final, reinforcing and extending mobility opportunities (see i.a. recital 20). See also Regulation (EU) 2019/499 of the European Parliament and of the Council of 25 March 2019 laying down provisions for the continuation of ongoing learning mobility activities under the Erasmus+ programme established by Regulation (EU) No 1288/2013, in the context of the withdrawal of the United Kingdom from the Union [2019] OJ L 85I/32.

2106 § 152 ff, § 276 .

2107 A thought-provoking, extreme hypothesis described in a fictitious, provocative story by a French novelist: M Houellebecq, *Submission: A Novel* (Flammarion 2015). Through the accidental concurrence of factors after elections, the Muslim Brotherhood becomes part of the government in France in 2022. The party is not interested in Ministries like Finance and the Interior, but absolutely insists on occupying the Ministry of Education: ‘What they care about is birth

An initial confirmation of competence is, as mentioned above, the fact that the Commission registered the European citizens' initiative 'More than education—Shaping active and responsible citizens'.<sup>2108</sup> This ECI aimed at incentive measures based on Article 165 TFEU. It reveals that the Commission considers that EU incentives to promote citizenship education do not manifestly fall outside its powers to propose legislation. In order to explore the issue of competence in greater depth, the key concepts of the conferral in Article 165 TFEU relevant to the EU dimension of EDC will now be analysed: quality education, the European dimension in education, and the participation of young people in democratic life in Europe. This analysis in sections B, C, and D will put the no-content limit in perspective.

## B *Quality education*

### 284 *What is quality education?*

Pursuant to Article 165(1) TFEU, the Union 'shall contribute to the development of quality education'. To understand what 'quality education' means in the EU legal order, normative instruments at UN level (section 1), Council of Europe level (section 2) and EU level (section 3) must be looked at, in keeping with the terms of Article 220(1) TFEU in general and Article 165(3) TFEU in particular. There is no indication that when the competence for quality education was inserted into the Treaties, the Member States (as 'Masters of the Treaties') wanted to deviate from international standards on quality education.

What does an interpretation in the light of the international agreements by which the Member States were bound when they drafted Article 165 TFEU, signify for the concept of quality education inserted into that provision? This requires a short analysis of the international right to education,

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rate and education. To them it's simple—whichever segment of the population has the highest birth rate, and does the best job of transmitting its values, wins. If you control the children, you control the future.' (Wednesday 18 May 2022). The curriculum itself would have to reflect the teachings of the Koran. They want France to withdraw from the EU. They impose school textbooks in mainstream education which are exclusively nation-state oriented and include *anti-EU* citizenship education. This hypothetical scenario may test the legal approach. To what extent is national educational autonomy framed by rights and obligations?

2108 See § 211 .

understood as a right to education directed to the aims listed in (binding) international agreements. This right relates to quality education, including human rights education and education for democracy. Quality education is relevant for all pupils, including the static ones, and it is undoubtedly linked to ‘content of teaching’. A further section will thus have to address the question as to how the EU can contribute to the development of quality education (conferred competence) ‘while fully respecting the responsibility of the Member States for the content of teaching’ (limit to the competence conferred).

## 1. Quality education at UN level

### 285 *The human rights-based approach to education*

The analysis of possible content for the components of EDC based on EU law in Part three has demonstrated the need for an EU dimension in education to empower citizens. The UN and the UNESCO abandoned the needs-based approach to education and instead adopted a human rights-based approach (HRBA) some 15 years ago.<sup>2109</sup> Focusing on needs to achieve the intended educational goals had proved inadequate, whereas focusing on rights could help break through mere rhetoric.<sup>2110</sup> The human rights-based approach to education defines rights and obligations, and works towards ‘strengthening the capacities of rights-holders to make their claims, and of duty-bearers to meet their obligations.’<sup>2111</sup> Taking a human rights-based approach inverts the top-down approach of traditional models of schooling, in which the education agenda is mostly defined from the perspective of the government, emphasising training, human capital investment, containment, and socialisation.<sup>2112</sup> The human rights-based

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2109 UNGA 2005 World Summit Outcome (24 October 2005 UNGA Res 60/1) UN Doc A/RES/60/1, para 126; 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), 3, 9; UNESCO *The Right to Education: Law and Policy Review Guidelines* (2014). See A Frankovits, *The Human Rights based approach and the United Nations system* (2006).

2110 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), 2.

2111 *Ibid.*, 116.

2112 *Ibid.*, 20.

approach starts from the individual and his or her human rights. He or she is to be empowered in a bottom-up model to participate in a free society. If education is not a privilege granted from above by governments, but a right that can be claimed from below, what does that imply for the EU citizen? Looking at education from this human rights-based perspective remains topical. In 2015, the 193 countries of the UN General Assembly adopted the 2030 Agenda for Sustainable Development, including a Global Goal on education, and recommitted to respecting rights and obligations under international law.<sup>2113</sup> The UN Human Rights Council urges States to take measures for '[e]nsuring that education is consistent with human rights standards and principles, including those laid down in the Universal Declaration of Human Rights and in international human rights treaties'.<sup>2114</sup>

286 *Reception of UN standards in the EU legal order*

For the effects of UN standards in the EU legal order, I refer to the schema of modes of reception of exogenic norms in Part two.<sup>2115</sup> In their education policy, EU institutions repeatedly refer to UN instruments by title (mode 3).<sup>2116</sup> In particular, the *Convention on the Rights of the Child* was received in the EU legal order in this mode 3: many EU legal instruments, including legislation, refer to the CRC by title.<sup>2117</sup> Article 24 CFR is based on the CRC (mode 4)

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2113 UNGA Res 70/1 'Transforming our world: The 2030 Agenda for Sustainable Development' (25 September 2015) A/RES/70/1, paras 10, 18.

2114 UNHRC Res 29/7 'The right to education' (2 July 2015) UN Doc A/HRC/RES/29/7, 2(c). See also UNGA in § 294 .

2115 See i.a. §83 § 85 (i.a. n 642), §88 §100 (i.a. text to n 831), §140 §141 § 324 (i.a. n 2410).

2116 E.g. Council Recommendation of 22 May 2018 on key competences for life-long learning, recital 13 (UN Sustainable Development Goals).

2117 E.g. Directive 2004/38, Art 28 (best interests of the child in cases of expulsion); Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1, Art 23 (non-regression). See also European Parliament Resolution of 16 January 2008: Towards an EU strategy on the rights of the child [2009] OJ C41E/24; Commission Communication 'An EU Agenda for the Rights of the Child' (15 February 2011) COM(2011) 60 final: 'The standards and principles of the UNCRC must continue to guide EU policies and actions that have an impact on the rights of the child'; European Parliament Resolution of 27 November 2014 on the 25th anniversary of the UN Convention on the Rights of the Child [2016] OJ C289/57, para 1: 'Considers that children's rights are at the heart of EU policies and that the 25th anniversary of the UN Convention on the Rights of the

and requires public authorities and private institutions to uphold the child's best interests as the primary consideration in all actions relating to children.<sup>2118</sup> Art 3(3) TEU states that the Union shall promote the protection of the rights of the child. Compliance with the rights of the child is a condition for accession to the EU.<sup>2119</sup> The ECJ takes UN and international standards into account in the interpretation of EU law (mode 6), e.g. the ICESCR in *Bressol* and the CRC in *Dynamic Medien*.<sup>2120</sup> Furthermore, no rights in the CFR shall be interpreted as restricting or adversely affecting human rights as recognised by international law and by international agreements to which the Union or all the Member States are parties (Article 53 CFR).

287 *The international right to education: an umbrella right*

*The international right to education is defined by the international human rights framework, which is an evolving body of interrelated international instruments, some binding (covenants, conventions, treaties), others non-binding (declarations, recommendations, resolutions, conclusions, principles, guidelines, ...).*<sup>2121</sup> As is well known, the 1948 Universal Declaration of Human rights

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Child is an opportunity to ensure its full implementation in policy and in practice and to take additional measures to ensure respect for the rights of every child'; the Parliament proposes accession of the EU to the CRC.

- 2118 See the Explanations to the CFR. They refer in particular to Arts 3, 9, 12 and 13. Art 13 CFR gives the child the right to freedom of expression, which includes 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers'.
- 2119 Presidency Conclusions of the Copenhagen European Council of 21-22 June 1993, Bull EC 6-1993. See R Lamont, 'Article 24: The Rights of the Child' in S Peers and others (eds), *The EU Charter of Fundamental Rights: a Commentary* (Hart 2014) 670.
- 2120 Case C-73/08 *Bressol, Chaverot and Others* ECLI:EU:C:2010:181, paras 83–8: in this case the ECJ was asked to explain the effects of Member States' obligations under Art 13(2)(c) ICESCR (access to higher education); this provision was seen as compatible with Arts 18 and 21 TFEU as it does not require nor authorise a State Party to ensure wide access to quality higher education only for its own nationals. For the CRC, see i.a. Case C-244/06 *Dynamic Medien* ECLI:EU:C:2008:85, paras 39–40.
- 2121 Apart from CADE, ICESCR, and CRC (n 628), other binding international human rights instruments which include provisions on education are: *UN Conventions* such as the Convention relating to the Status of Refugees (1951); International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); Convention on the Elimination of All Forms of Discrimination against Women (1979); International Convention on the Protection of the Rights of

(UDHR, with high moral authority) was developed further in two 1966 Covenants (binding, ratified by all Member States, not by the EU), i.e. the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>2122</sup> The 1989 Convention on the Rights of the Child (CRC, binding, ratified by all Member States, not by the EU) sets out the full range of human rights from the perspective of the child.<sup>2123</sup> Treaty bodies adopt General Comments, which are authoritative interpretations of Treaty provisions.<sup>2124</sup> Documents of the Office of the UN High Commissioner for Human Rights (OHCHR) and of the Special Rapporteur on the right to education are also authoritative. International conferences of States on education summoned by the UNESCO General Confer-

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All Migrant Workers and Members of their Families (1990); Convention on the Rights of Persons with Disabilities (2006). Further UNESCO Convention on Technical and Vocational Education (1989); and ILO Conventions such as the Convention on the minimum age for employment (1973); Convention concerning Paid Educational Leave (1974); Worst Forms of Child Labour Convention (1999); Indigenous and Tribal Peoples Convention (1989); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999); Convention concerning Decent Work for Domestic Workers (2011). The 1924 Declaration of Geneva already adverted implicitly to a right to education with a number of ‘musts’. For an understanding of the historic development of the right to education, see D Hodson, *The Human Right to Education* (Ashgate/Dartmouth 1998); and M Nowak, ‘The right to education’ in A Eide, C Krause and A Rosas (eds), *Economic, social and cultural rights: a textbook* (2nd revised edn, Nijhoff 2001). See list of international standard-setting instruments in UNESCO The Right to Education: Law and Policy Review Guidelines (2014), p 49–50.

- 2122 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 A/RES/2200 (XXI), entered into force 3 January 1976) 993 UNTS3.
- 2123 Convention on the Rights of the Child (adopted 20 November 1989 UNGA Res 44/25, entered into force 2 September 1990) 15777 UNTS 3. See Art 1: ‘a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’.
- 2124 Implementation of the ICESCR is monitored by the Committee on Economic, Social and Cultural Rights (a body of independent experts); implementation of the ICCPR by the Human Rights Committee; and of the CRC by the Committee on the Rights of the Child (Treaty-based bodies). The UN Human Rights Council is a Charter based UN Human rights body. Overview of human rights bodies in <[www.ohchr.org](http://www.ohchr.org)>.

ence adopt declarations and plans of action.<sup>2125</sup> In short, a *dégradé normatif* appears (as at Council of Europe level<sup>2126</sup>): non-binding instruments complement and specify binding norms, expressing the political commitments of States.<sup>2127</sup>

As Nowak writes, ‘the right to education is one of the most complex human rights under present international law’ as reflected in the abundance of sources.<sup>2128</sup> It encompasses several rights to which several types of obligations correspond. Scholars generally distinguish the social dimension of the right to education, including a right of equal access to education and a right to quality education, and the freedom dimension, including the right of parents to choose schools, the freedom to establish education institutions, and academic freedom.<sup>2129</sup> The right to education cannot be ranked in a single category as a civil, a political, an economic, a social, or a cultural right: ‘It embodies them all.’<sup>2130</sup> The right to education ‘epitomizes the indivisibil-

2125 Art IV(3) UNESCO Constitution.

2126 See § 51 .

2127 See further O De Schutter, *International Human Rights Law* (2nd edn, Cambridge University Press 2014) 61 ff (human rights law as part of international law). Also <[en.unesco.org/themes/education/education-standards-norms](http://en.unesco.org/themes/education/education-standards-norms)>. One of the main constitutional functions of UNESCO is standard-setting to realise the goals for which it was created.

2128 Nowak, ‘The right to education’, 268: the right is ‘based on a variety of, sometimes antagonistic, philosophical foundations’; scholars and human rights bodies have only begun to provide answers to the most fundamental questions on the right to education.

2129 Social dimension: i.a. Art 13(2) ICESCR; Freedom dimension: i.a. Art 13(3) and (4) ICESCR, Art 18(4) ICCPR. See KD Beiter, *The Protection of the Right to Education by International Law* (Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights; International Studies in Human Rights vol 82, Nijhoff 2006) 459. Other ways of categorising the substance of the right to education: see CL Glenn and J De Groof, *Balancing Freedom, Autonomy and Accountability in Education*, vol 1 (Wolf Legal Publishers 2005) 53 (diversity of contents of the right to education in various countries); M Verheyde, ‘Article 28: The Right to Education’ in A Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 2006) 1; Y Rabin, ‘The Many Faces of the Right to Education’ in D Barak-Erez and AM Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2007) 266 (distinguishing between 3 different rights: the right to receive education, to choose (a stream of) education, and the right to equal education).

2130 Tomaševski, *Human rights obligations: making education available, accessible, acceptable and adaptable* 9. In the same sense: Nowak, ‘The right to education’, 268; Glenn and De Groof, *Balancing Freedom, Autonomy and Accountability in Education*; Verheyde, ‘Article 28: The Right to Education’, 1.

ity and interdependence of all human rights' and its different aspects must be considered in a holistic way.<sup>2131</sup>

288 *Aims of education in binding instruments and corresponding obligations*

*In this interconnected set of rights, I will now focus on the right to quality education, especially in its relationship with the aims of education listed in international agreements (binding). These aims relate to the internal aspects of the right to education (by contrast with the external aspects, such as the right of equal access).<sup>2132</sup> The importance of educational objectives is apparent throughout the development of human rights instruments. The ICESCR and the CRC will get particular attention. The aims of education are linked to quality education, including education for democratic citizenship. When applied in the EU, they require an EU dimension to EDC.*

*A good understanding must start from the 1945 UNESCO Constitution, which connects education and peace: 'since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed' (preamble). The 'purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education (...) in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms (Article 1).<sup>2133</sup> The 1948 UDHR proclaims in Article 26 that everyone has the right to education and immediately specifies four aims to which education 'shall be directed', inter alia strengthening of respect for human rights and fundamental freedoms.<sup>2134</sup> The aims, considered to be pivotal, reflect the UN 'Purposes and Principles' cited in the 1945 UN Charter.<sup>2135</sup> During the drafting of the UDHR, the importance of setting out the aims of education was repeatedly discussed and emphasised.<sup>2136</sup> A representative of UNESCO cited 'the example of Germany, where, under the Hitler regime, education had been*

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2131 UN ComESCR 'General Comment No 11: Plans of action for primary education (article 14 ICESCR)' (1999), para 2.

2132 Beiter, *The Protection of the Right to Education by International Law* 463.

2133 Preamble and Art 1, para 1.

2134 Art 26: 'Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace'.

2135 UN Charter Arts 1 and 2.

2136 See reports of work of the Commission on Human Rights in the Drafting of the Universal Declaration of Human Rights, e.g. SR 67en 68 (record of the 67th and 68th meeting).

admirably organised but had, nevertheless, produced disastrous results.<sup>2137</sup> Other fascist countries had also respected the right to education for everyone, yet ‘the doctrines on which that education had been founded had led to two world wars. If the [UDHR] failed to define the spirit in which future generations were to be educated, it would lose its value as a guide for humanity.’<sup>2138</sup> Outlining the objectives of education was necessary to prevent some governments pursuing anti-social aims.<sup>2139</sup>

The aims of education set out in the UDHR were confirmed in subsequent international agreements, giving them a binding character. A strong affirmation of the right to education is contained in the 1960 UNESCO Convention Against Discrimination in Education (CADE).<sup>2140</sup> It stipulates that the term ‘education’ includes ‘access to education, the standard and quality of education, and the conditions under which it is given’<sup>2141</sup> and repeats in Article 5(1) the aims listed in the UDHR to which education ‘shall be directed’. The CADE leads to international obligations for Member States: ‘(t)he States Parties to this Convention undertake to take all necessary measures to ensure the application of the principles enunciated in paragraph 1 of this Article’.<sup>2142</sup>

### 289 The ICESCR right to education and corresponding obligations

The 1966 ICESCR (binding) restates in Article 13(1) on the right to education the four educational aims of the UDHR<sup>2143</sup> and adds a new aim: ‘education shall enable all persons to participate effectively in a free society’.<sup>2144</sup> The *travaux préparatoires* show how in the drafting of the Covenant, ‘[s]ome doubt was expressed as to the desirability of including the definition of the aims of education (...) It was felt, however, that, in the light of the widely differ-

2137 Commission on Human Rights, meeting of 10 June 1948, UN Economic and Social Council, UN Docs. E/CN.4/SR.67, p 12.

2138 Ibid, p 13.

2139 Ibid, p 14; also UN Docs. E/CN.4/SR.68, p 12; UN Docs E/CN.4/SR.288, p 7.

2140 Convention Against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) (CADE). For ratification, acceptance, or notification of succession by EU Member States, see < treaties.un.org >.

2141 Art 2(2).

2142 Art 5(2) CADE. Disputes may be referred to the International Court of Justice (Art 8).

2143 UN ComESCR ‘General Comment No 13: The Right to Education (Art. 13)’ UN Doc E/C.12/1999/10, para 4; also the ICESCR educational aims reflect the purposes and principles of the UN Charter Arts 1–2.

2144 Also, ‘and the sense of its dignity’ is added to the aim of ensuring the full development of the human personality and ‘ethnic’ groups added to the aim of promoting understanding, tolerance and friendship.

ing ends to which education could be used, it was important to state what those ends ought to be.<sup>2145</sup> Not the ‘higher interests of the State’, but the full development of the human personality was the most fundamental aim.<sup>2146</sup>

The corollary of the right to education (as of all human rights) is an obligation to respect, to protect and to fulfil. To fulfil implies an obligation to facilitate and an obligation to provide.<sup>2147</sup> In its General Comment on Article 13, the *Committee on Economic, Social and Cultural Rights* cites among the specific legal obligations that ‘States parties are required to ensure that curricula, for all levels of the educational system, are directed to the objectives identified in Article 13 (1)’.<sup>2148</sup> They must establish a transparent and effective system to monitor this. With regard to Article 13 (2), relating i.a. to primary, secondary and higher education, ‘States have obligations to respect, protect and fulfil each of the “essential features” (availability, accessibility, acceptability, adaptability [the four A scheme]) of the right to education.’<sup>2149</sup> While the four ‘A’s are interrelated, for the EU dimension of EDC, ‘acceptability’ and ‘adaptability’ have specific relevance. The Committee emphasises that the form and *substance* of education, including *curricula* and teaching methods, must be ‘acceptable (e.g. *relevant*, culturally appropriate and of *good quality*)’, ‘this is subject to the

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2145 Annotations on the text of the draft International Covenants on Human Rights, UN Doc A/2929 (1 June 1955), p 112–113, para 37.

2146 UN ComESCR ‘General Comment No 13: The Right to Education (Art. 13)’ UN Doc E/C.12/1999/10, para 4; Beiter, *The Protection of the Right to Education by International Law* 464, 470.

2147 UN ComESCR ‘General Comment No 13: The Right to Education (Art. 13)’ UN Doc E/C.12/1999/10, paras 46–47. See also UN ComESCR ‘General comment No 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant)’ (1991), 3; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), UN Doc E/C.12/2000/13UN, paras 6–7. Typology of obligations in De Schutter, *International Human Rights Law* 279; on limited justiciability p 285. See illustration in Willems and Vernimmen, ‘The fundamental human right to education for refugees: Some legal remarks’: the question as to how to invoke the right to education against States remains delicate. On the justiciability of the right to an education adequate for citizenship under the US constitution, see class action law suit *Cook v Raimondo* (District Court of Rhode Island): MA Rebell, ‘Major Federal Right to Education Lawsuit Filed in the U.S. (OxHRH Blog, 12 December 2018)’ (2018). Also Friedman (n 2150).

2148 UN ComESCR ‘General Comment No 13: The Right to Education (Art. 13)’ UN Doc E/C.12/1999/10, para 49.

2149 *Ibid*, para 50 (see also fn 2 on adequacy).

educational objectives required by Article 13 (1) and such minimum educational standards as may be approved by the State'. Education must furthermore be 'adaptable', i.e. 'flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings'.<sup>2150</sup> In assessing acceptability and adaptability, *the best interests of the child are a primary consideration*.<sup>2151</sup> The *Committee on Economic, Social and Cultural Rights* adds that States must 'fulfil (facilitate) the acceptability of education by taking positive measures' and 'fulfil (provide) the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world'.<sup>2152</sup> Every State party has a minimum core obligation to ensure the satisfaction of minimum essential levels of each of the ICESCR rights.<sup>2153</sup> For education, the Committee on Economic, Social and Cultural Rights holds that 'this core includes an obligation ... to ensure that education conforms to the objectives set out in Article 13(1)'.<sup>2154</sup> On the basis of a systematic interpretation, the normative con-

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2150 Ibid, para 6 (emphasis added). On relevance, see UNESCO The Right to Education: Law and Policy Review Guidelines (2014) p 5, 12: 'In their effort to meet their commitments to making education for all a reality, countries are increasingly concerned with the delivery, quality and relevance of their education systems.' Also UNESCO The Dakar Framework for Action (Education for All) - Education for All: Meeting our Collective Commitments, adopted at the World Education Forum (Dakar, 26-28 April 2000), i.a. paras 44, 59 ('Providing quality education relevant to learners' needs and to the requirements of the changing society'), also p 28, 39. Further Tomaševski, *Human rights obligations: making education available, accessible, acceptable and adaptable*; Verheyde, 'Article 28: The Right to Education' 15; and application in *Three Country Audit of the lower secondary citizenship and human rights education curriculum: Reflection of the principles of the Charter on Education for Democratic Citizenship and Human Rights Education in the curricula of France, Finland and Ireland* (2013) 83 (what does education respecting the 4 'A's require; relationship with international agreements). See 'adequacy' in B Friedman and S Solow, 'The Federal Right to an Adequate Education' (2013) 81 *George Washington Law Review* 92 (authors argue the existence of a US federal constitutional right to a minimally adequate education, based on the text of the constitution, intentions, practice, and case law).

2151 UN ComESCR 'General Comment No 13: The Right to Education (Art. 13)' UN Doc E/C.12/1999/10, para 7.

2152 Ibid, para 50.

2153 UN ComESCR 'General comment No 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (1991), para 10.

2154 UN ComESCR 'General Comment No 13: The Right to Education (Art. 13)' UN Doc E/C.12/1999/10, para 57. See also UN ComESCR 'General comment

tent of Article 13(1), including its aims, must be applied to the obligations based on Article 13(2), including the 4As.<sup>2155</sup> The *Committee* considers the use of curricula inconsistent with the educational aims of Article 13(1) to be a violation of Article 13. It includes acts of commission and of omission.<sup>2156</sup>

While Article 13(2) is drafted ‘with a view of achieving the full realization of this right’,<sup>2157</sup> States have an immediate obligation ‘to take steps’, i.a. to apply Article 13(2)(b), that is, to make secondary education generally available and accessible.<sup>2158</sup> Reading paragraphs 1 and 2 of Article 13 ICESCR in conjunction with one another, immediate steps must also be taken towards achieving acceptable and adaptable education.<sup>2159</sup> Those steps must be concrete and targeted,<sup>2160</sup> assured by all appropriate means, e.g. legislation, monitoring, international cooperation, domestic judicial effective remedies, administrative, financial, educational and social measures.<sup>2161</sup> ‘Taking steps’ is an obligation as to result. No deliberately retrogressive measures can be adopted.<sup>2162</sup>

The impact of Article 13 ICESCR on the content of teaching is clear. Rights and obligations must be respected, limiting the educational auton-

No 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant)’ (1991), para 10.

2155 UN ComESCR ‘General Comment No 13: The Right to Education (Art. 13)’ UN Doc E/C.12/1999/10, para 58.

2156 *Ibid*, paras 58–59. See also The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), UN Doc E/C.12/2000/13UN, para 11, paras 14–15: example of an act of commission is the ‘adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed’ (an answer to the hypothesis of the novel *Submission*, n 2107). Acts of omission are the ‘failure to monitor the realization of economic, social and cultural rights’ (compare text to nn 2399 and 2400 on Eurydice and Chapter 11), the ‘failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations’.

2157 In line with Art 2, calling for steps to be taken by all appropriate means to achieve the progressive full realisation of the rights.

2158 UN ComESCR ‘General Comment No 13: The Right to Education (Art. 13)’ UN Doc E/C.12/1999/10, para 52.

2159 In the same sense a combined reading of Arts 28 and 29 CFR, in Verheyde, ‘Article 28: The Right to Education’ 12.

2160 UN ComESCR ‘General comment No 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant)’ (1991), para 2.

2161 *Ibid*, paras 5 and 7.

2162 *Ibid*, para 9.

omy of Member States.<sup>2163</sup> Comparable rights and obligations flow from the CRC.

### 290 *The CRC right to education*

The 1989 CRC contains a separate provision on the aims of education, i.e. Article 29. It develops the ICESCR further, agreeing that education shall be directed to (inter alia) the 'preparation of the child for responsible life in a free society'. *The international consensus on the aims of education in the CRC is broad, as the CRC is the most widely ratified human rights treaty.*<sup>2164</sup> *Significantly, the first General Comment drafted by the Committee on the Rights of the Child was devoted to Article 29.*<sup>2165</sup> *The Committee immediately underlines 'its far-reaching importance'.*<sup>2166</sup> *The aims of education are directly linked to the realisation of the child's human dignity, the core value of the CRC. Article 29(1) stresses the need to empower children. Education is an empowerment right.*<sup>2167</sup> *The 'child's right to education is not only a matter of access (art. 28) but also of content', content firmly rooted in the values of Article 29(1). The right to quality education appears: 'Article 29(1) underlines the individual and subjective right to a specific quality of education.'*<sup>2168</sup> *The Committee mentions in this context that 'the curriculum must be of direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs'. As the aims or values in Article 29(1) are formulated in fairly general terms, the Committee 'calls upon all States parties to take the necessary steps to formally incorporate these principles into their education policies and legislation at all levels' and states that '[t]he effective promotion of Article 29(1) requires the fundamental reworking of curricula to include the various aims of education and the systematic revision of*

2163 Cp the killer phrase (n 83).

2164 Convention on the Rights of the Child (adopted 20 November 1989 UNGA Res 44/25, entered into force 2 September 1990) 15777 UNTS 3: for the 196 'states parties', see <indicators.ohchr.org/>.

2165 UN ComRC 'General Comment No 1 (2001)- Article 29(1): The Aims of Education' Doc CRC/GC/2001/1. See also UN ComESCR 'General Comment No 13: The Right to Education (Art. 13)' UN Doc E/C.12/1999/10, paras 1, 4–5.

2166 UN ComRC 'General Comment No 1 (2001)- Article 29(1): The Aims of Education' Doc CRC/GC/2001/1, para 1.

2167 Ibid, paras 1- 2. See also UN ComESCR 'General Comment No 13: The Right to Education (Art. 13)' UN Doc E/C.12/1999/10, para 1; Tomaševski, *Human rights obligations: making education available, accessible, acceptable and adaptable*, p 10.

2168 UN ComRC 'General Comment No 1 (2001)- Article 29(1): The Aims of Education' Doc CRC/GC/2001/1, para 9, also para 22.

*textbooks and other teaching materials and technologies, as well as school policies*’,<sup>2169</sup>

As in the ICESCR, *rights of access and the right to quality education must be interlinked, in a systematic interpretation of Articles 28(1) and 29(1) CRC.*<sup>2170</sup>

291 *Intermediate conclusion and significance for EU citizens*

*Education directed to the aims of education listed in international agreements is an essential part of the international right to education. The binding character of the provisions on aims follows from a textual interpretation: the UDHR, CADE, ICESCR and CRC all state that education ‘shall be directed to’, not ‘should’. Other arguments in favour of their binding character, applying the rules on interpretation in the Vienna Convention on the law of Treaties, are, firstly, that the aims in Articles 5(1) CADE, 13(1) ICESCR and 29 CRC are laid down in the provisions of the body of the agreements (not in the preamble), secondly, that the *travaux préparatoires* show that including the aims was a deliberate decision, and, thirdly, that the practice of the Committee on Economic, Social and Cultural Rights and of the Committee on the Rights of the Child indicates that they perceive the aims as legally binding.*<sup>2171</sup> *In short, the right to education includes a right to quality education. Quality education requires education to be directed to the aims listed, which has a real impact on the content of teaching. Obligations flow from this right, as is confirmed by various UN bodies and scholars.*<sup>2172</sup>

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2169 Paras 17–18. ‘Every child has the right to receive an education of good quality which in turn requires a focus on the quality of the learning environment, of teaching and learning processes and materials, and of learning outputs.’ As to implementation, see CRC Art 4: ‘States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention’. Also Art 43 (the Committee calls upon States parties to develop a comprehensive national plan of action to promote and monitor realization of the objectives listed in Art 29(1)). Further UNHRC Res 26/17 ‘The right to education: follow-up to Human Rights Council resolution 8/4’ (11 July 2014) UN Doc A/HRC/RES/26/17, on the role of communications procedures to promote the justiciability of the right to education, and the entry into force of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (14 April 2014).

2170 Verheyde, ‘Article 28: The Right to Education’ 12.

2171 Beiter uses these arguments with regard to the ICESCR (Beiter, *The Protection of the Right to Education by International Law* 469); they apply to the CRC as well.

2172 I.a. UN ComESCR ‘General Comment No 13: The Right to Education (Art. 13)’ UN Doc E/C.12/1999/10, 49; UNHRC Res 29/7 ‘The right to education’ (2 July 2015) UN Doc A/HRC/RES/29/7 para 2, (c).

What do the international right to education and the compulsory aims of education mean for EU citizens and for the Member States (which all ratified the agreements cited)? To the extent that EDC (interconnected with HRE) prepares citizens for effective participation and responsible life in a free society, and to respect human rights (aims in Article 13(1) ICESCR and Article 29 CRC), and to the extent that for EU Member States EDC needs to include an EU dimension, as argued in Part three, the international right to education of citizens in Member States arguably includes a right to an EU dimension of EDC.<sup>2173</sup> Member States have obligations based on international law to provide acceptable and adaptable education, taking into account the best interests of the child.<sup>2174</sup> In the light of *the analysis in Part three, education in Member States which lacks an EU dimension cannot be considered to be acceptable (relevant and of good quality) or adapted to the needs of a changing society. The EU dimension is increasingly relevant in society. Relevant education should keep pace. Based on international law, Member States have the obligation to work towards the progressive realisation of the EU dimension of EDC and to take immediate steps. Moreover, international cooperation for the realisation of economic, social and cultural rights is an obligation on all States, in line with the UN Charter. States parties to the ICESCR and CRC have 'an obligation to ensure that their actions as members of international organizations take due account of the right to education'*.<sup>2175</sup> To fulfil their obligation of international cooperation to realise the right to education, I suggest that Member States should

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2173 In the same vein, also Walkenhorst, 'Problems of Political Education in a Multi-level Polity: explaining Non-teaching of European Union Issues in German Secondary Schooling', 366: 'Since democratic participation requires political education, the EU should be expected to be a compulsory topic in school. Since the introduction of EU citizenship rights in 1993 the absence of EU secondary education is arguably a denial of a basic democratic right.'

2174 Arts 28–29 CRC read in conjunction with Art 3 CRC.

2175 On the obligation to engage in international cooperation to realise the right to education, see Art 2(1) ICESCR; UN ComESCR 'General Comment No 13: The Right to Education (Art. 13)' UN Doc E/C.12/1999/10, paras 56, 59. See also Art 4 CRC: 'With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, *within the framework of international co-operation*' (emphasis added). Further UN ComESCR 'General comment No 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' (1991), para 11 and para 14: 'The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization

cooperate loyally with the Union when it uses its supporting competence to promote quality education (Article 165 TFEU).

292 *Contemporary interpretations of the aims of education*

The aims of education to which State parties have agreed in binding international agreements are abstract and do not define learning content precisely.<sup>2176</sup> Norm-setting and clarification comes from a range of bodies, which also adapt the aims to evolving situations.<sup>2177</sup> *The 1990 World Declaration on Education for All (Jomtien, Thailand) and the 1995 Plan of Action for the United Nations Decade for Human Rights Education* further developed the aims. In 1999, the *Committee on Economic, Social and Cultural Rights* noted that these instruments reflect a ‘contemporary interpretation’ of the aims (‘implicit’ in the listed aims), given their worldwide endorsement, and accordingly took the view that State parties are required to ensure that their education conforms to the aims of Article 13 ICESCR as interpreted in the light of the recent instruments.<sup>2178</sup>

Since 1999, many other international human rights instruments have been widely endorsed as well. Continuing the reasoning of the *Committee on Economic, Social and Cultural Rights*, they too give contemporary interpretations of the aims of the binding international agreements.<sup>2179</sup> Declarations of international conferences give guidance as to the proper interpretation of the terms of the CADE, ICESCR and CRC in the current context.<sup>2180</sup> General and specific, universal and regional human rights instruments recommit to the aims,

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of economic, social and cultural rights is an obligation of all States’; UNGA Res 71/8 ‘Education for democracy’ (17 November 2016) UN Doc A/RES/71/8, para 10; UN Doc A/RES/71/8.

2176 Tomaševski, *Human rights obligations: making education available, accessible, acceptable and adaptable*, p 11: written during the Cold War, deliberately vague and written to preclude litigation. See also Willems and Vernimmen, ‘The fundamental human right to education for refugees: Some legal remarks’, 228–9: non-committal provisions open to interpretation, leaving a large margin of appreciation for States.

2177 See also Vienna Convention on the Law of Treaties Arts 31–32.

2178 UN ComESCR ‘General Comment No 13: The Right to Education (Art. 13)’ UN Doc E/C.12/1999/10 para 5.

2179 The aims of ICESCR are somewhat outdated: Beiter, *The Protection of the Right to Education by International Law* 467.

2180 Example in UN ComESCR ‘General Comment No 13: The Right to Education (Art. 13)’ UN Doc E/C.12/1999/10, para 9: the Committee on Economic, Social and Cultural Rights used the 1990 ‘World Declaration on Education for All’ to obtain guidance to interpret the term ‘primary education’ of the ICESCR.

update and adapt them.<sup>2181</sup> *If the aims of education in binding agreements are read in the light of widely accepted international human rights instruments, the right to quality education is confirmed, and the right to human rights education and education for democracy emerge.*

### 293 *The right to quality education confirmed*

*The right to quality education—not mentioned as such in the ICESCR or the CRC—was emphasised by the Committee on the Rights of the Child<sup>2182</sup> and is frequently restated in the later human rights framework.<sup>2183</sup> While in the Council of Europe the right to education of the ECHR focuses on equal access to the existing educational facilities,<sup>2184</sup> at UN level, it is frequently reiterated that the right to education is more than just the right to enter the school gates:*

*getting children into schools is not enough; it is no guarantee of an education that enables individuals to achieve their economic and social objectives and to acquire the skills, knowledge, values and attitudes that bring about responsible and active citizenship.<sup>2185</sup>*

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2181 For an overview of aims of education in regional and specific human rights instruments, see D Hodgson, ‘The international human right to education and education concerning human rights’ (1996) 4 *The International Journal of Children's Rights* 237, 251.

2182 Text to n 2168.

2183 E.g. UNESCO *The Dakar Framework for Action (Education for All) - Education for All: Meeting our Collective Commitments*, adopted at the World Education Forum (Dakar, 26-28 April 2000), para 32: ‘All children must have the opportunity to fulfil *their right to quality education* in schools or alternative programmes at whatever level of education is considered “basic”’; UNESCO EFA Global Monitoring Report 2015. *Education for All 2000-2015: Achievements and Challenges*, p 185, reaffirming ‘the *rights of all children to a good quality education*, one which provides the foundations for the rest of their lives’ (i.a. with equality and without gender stereotypes). Emphasis added. See also various documents of UN Special Rapporteurs on the right to education, i.a. Tomaševski, *Human rights obligations: making education available, accessible, acceptable and adaptable*; and foreword of Vernor Muñoz to 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); K Singh, *Report of the Special Rapporteur on the right to education: Normative action for quality education* (2012).

2184 See text to n 685.

2185 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 27.

*Education without quality control can have nefarious consequences.*<sup>2186</sup>

In the 2000 *Dakar Framework for Action on Education for All* (World Education Forum), the right to quality education was of central importance.<sup>2187</sup> The Framework laid the basis for a concept of quality education going beyond reading, writing and arithmetic, and saw ‘competences for democratic citizenship and attitudes promoting solidarity as important outcomes.’<sup>2188</sup> In successive human rights instruments, descriptions of ‘quality education’ gradually include more objectives related to citizenship and citizenship education. UNESCO characterizes the right to quality education, as implying, *inter alia*, a broad, relevant and inclusive curriculum. Quality is defined by reference to learners’ cognitive development, but also to education’s role in promoting values and attitudes of responsible citizenship.<sup>2189</sup> Quality education requires respect for the right to education, rights in and through education.<sup>2190</sup> In 2015, the World Education Forum adopted the *Incheon Declaration ‘Education 2030: Towards inclusive*

2186 See K Tomaševski, *Removing Obstacles in the Way of the Right to Education* (Right to education Primer No 1, 2001), p 33: ‘getting all children to school is still mistaken for their right to education, although they can be brainwashed, indoctrinated, abused, harmed for life’. The Special Rapporteur recounts how many schools in Rwanda taught pupils about ‘scientific’ ethnic differences between Hutus and Tutsis. This ‘education’ reinforcing mutual prejudices was a major factor in the 1994 genocide. See also Beiter, *The Protection of the Right to Education by International Law* 21, 493: the right to education is more than a right of access; it is a right to be educated.

2187 It underlays the six goals. See UNESCO *The Dakar Framework for Action (Education for All) - Education for All: Meeting our Collective Commitments*, adopted at the World Education Forum (Dakar, 26-28 April 2000), paras 7, 32, 42–44: ‘Quality is at the heart of education (...) A quality education is one that satisfies basic learning needs’; it requires i.a. adequate facilities and learning materials, and a relevant curriculum; see especially the sixth goal: ‘improving every aspect of the quality of education, and ensuring their excellence so that recognized and measurable learning outcomes are achieved by all’. See also UNESCO *World Declaration on Education For All* (Jomtien, Thailand, 1990): quality of basic education appears as a primary objective throughout the Declaration.

2188 UNHRC Res 15/28 ‘World Plan of Action for the second phase (2010-2014) of the World Programme for Human Rights Education’ (27 July 2010) UN Doc A/HRC/15/28, para 19.

2189 UNESCO EFA Global Monitoring Report 2005, *Education for All: The Quality Imperative*, 31; 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), 32.

2190 See i.a. 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), 35. Also J De Groof, G Lauwers and K Singh,

and equitable quality education and lifelong learning for all',<sup>2191</sup> in line with UN Sustainable Development Goal 4 ('inclusive and equitable quality education').<sup>2192</sup>

#### 294 *The right to human rights education and education for democracy*

Binding and non-binding instruments at UN and UNESCO level confirm the importance of human rights education. Based on the provisions in binding international agreements that education must strengthen respect for human rights and fundamental freedoms,<sup>2193</sup> several instruments mention 'a right to human rights education'. The right to human rights education is promoted by the Office of the High Commissioner for Human Rights<sup>2194</sup> and widely supported, *inter alia* in UN General Assembly Decla-

*The right to education and rights in education* (Wolf Legal Publishers 2006); and n 1261.

2191 UNESCO World Education Forum 2015, Incheon Declaration - Education 2030: Towards inclusive and equitable quality education and lifelong learning for all.

2192 UNGA Res 70/1 'Transforming our world: The 2030 Agenda for Sustainable Development' (25 September 2015) A/RES/70/1. The SDGs replaced the 2000 MDGs, Millennium Development Goals (Goal 2: to achieve universal primary education); United Nations Millennium Declaration UNGA Res 55/2, para 19. See in particular SDG target 4.7 on sustainable development and global citizenship ('By 2030, ensure that all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship and appreciation of cultural diversity and of culture's contribution to sustainable development').

2193 Art 5(1)(a) CADE, Art 13(1) ICESCR, and Art 29(1)(b) CRC; see also Art 55 UN Charter.

2194 'The Right to Human Rights Education', the title of a publication and website of the OHCHR, is widely supported as witnessed by the flag and icons of i.a. UNESCO, CoE, EU and EU Agency for Fundamental Rights: <[www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/Listofcontents.aspx](http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/Listofcontents.aspx)>. As normative basis for this right, the OHCHR refers to a 'compilation of provisions of international and regional instruments dealing with human rights education' (they include 'treaties, covenants, conventions and protocols; charters; declarations; recommendations; decisions; resolutions; principles; guidelines; rules; final documents; commitments; and conclusions or joint communiqués of intergovernmental meetings, congresses and conferences'): 'Despite their different legal status, and the different fora in which they were adopted which bear responsibility for their content, taken together these texts outline the human rights education commitments made by States in the context of international and regional intergovernmental forums, and

rations and Human Rights Council resolutions.<sup>2195</sup> *The Human Rights Council sees human rights education as an aspect of the right to quality education*<sup>2196</sup> and asks States to respect the 2011 Declaration on Human Rights Education 'as a means to give full effect to the right to education'.<sup>2197</sup> *UN bodies, the Special Rapporteur on the right to education, World conferences on education, all emphasise the importance of human rights education.*<sup>2198</sup> *Academic writers,*

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provide the basis for the right to human rights education.' See also UN OHCHR 'Guidelines for National Plans of Action for Human Rights Education' (1997) UN Doc A/52/469/Add.1, A/52/469/Add.1/Corr.1 (20 October 1997 and 27 March 1998) para 16: 'Education in and for human rights is a fundamental human right'.

- 2195 I.a. UNGA Res 66/137 'United Nations Declaration on Human Rights Education and Training' (19 December 2011), Art 1 ('Everyone has the right to know, seek and receive information about all human rights and fundamental freedoms and should have access to human rights education and training'). See repeated resolutions of the HRC, e.g. UNHRC Res 8/4 'The right to education' (18 June 2008) UN Doc A/HRC/RES/8/4, para 7(f) (i); UNHRC Res 23/4 'The right to education: follow-up to Human Rights Council resolution 8/4' (19 June 2013) UN Doc A/HRC/23/2 (2013), para 4(f). See earlier UNGA 'Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples' UNGA res 2037 (XX) (7 December 1965) UN Doc A/RES/20/2037, Principle III; and UNESCO Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms (adopted 19 November 1974), Principles 7 and 18(c).
- 2196 UNHRC Res 8/4 'The right to education' (18 June 2008) UN Doc A/HRC/RES/8/4, para 7 (f) and (i).
- 2197 UNHRC Res 23/4 'The right to education: follow-up to Human Rights Council resolution 8/4' (19 June 2013) UN Doc A/HRC/23/2 (2013), para 5.
- 2198 UNESCO Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms (adopted 19 November 1974); UNESCO World Plan of Action on Education for Human Rights and Democracy, adopted by the International Congress on Education for Human Rights and Democracy convened by the UNESCO (Montreal, 8-11 March 1993) Doc A/CONF.157/PC/42/Add.6; World Conference on Human Rights, Vienna Declaration and Programme of Action (25 June 1993) A/CONF.157/23, paras 33-34 and 78-82. The first phase of the UNGA 'World Programme for Human Rights Education' Res 59/113A (10 December 2004) A/RES/59/113 (2005-2009), focused on primary and secondary school systems. The second phase (2010-2014) focused on human rights education in higher education and i.a. in training for teachers and educators. Further: UNHRC Res 24/15 'Plan of Action for the third phase (2015-2019) of the World Programme for Human Rights Education' (8 October 2013) UN Doc A/HRC/27/28.

e.g. Nowak and Osler, refer to 'the right to human rights education', based on the UDHR and international treaties.<sup>2199</sup>

*Human rights education overlaps with education for democracy. Since the implosion of the communist regimes and the end of the Cold War,<sup>2200</sup> international human rights instruments have called for 'education for democracy'. An International Congress convened by UNESCO adopted the 1993 World Plan of Action on Education for Human Rights and Democracy (Montreal Declaration).<sup>2201</sup> Human rights are construed in their broadest sense 'to include inter alia learning about tolerance and acceptance of others, solidarity, participatory citizenship and the importance of building mutual respect and understanding.' It declares that 'education for human rights and democracy is itself a human right and a prerequisite for the realization of human rights, democracy and social justice'.<sup>2202</sup> The Human Rights Council and UN General Assembly have adopted several resolutions on 'education for democracy'.<sup>2203</sup> The Council of Europe Charter on EDC/HRE (Part one) is an example of the continua-*

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- 2199 M Nowak, 'Prioritising human rights education and training' [2004] European Human Rights Law Review 235; Osler, 'Human Rights Education: The Foundation of Education for Democratic Citizenship in our Global Age'.
- 2200 See also historic context in Arthur, Davies and Hahn, 'Introduction', 4–5.
- 2201 UNESCO World Plan of Action on Education for Human Rights and Democracy, adopted by the International Congress on Education for Human Rights and Democracy convened by the UNESCO (Montreal, 8-11 March 1993) Doc A/CONF.157/PC/42/Add.6. See earlier, pioneering citizenship education: UNESCO Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms (adopted 19 November 1974), i.a. para 13: Member States should promote at every stage of education 'an active civic training (and learning) which will enable every person to gain a knowledge of the method of operation and the work of public institutions, whether local, national or inter-national, to become acquainted with the procedures for solving fundamental problems; and to participate in the cultural life of the community and in *public affairs*.' (emphasis added). See also before: UNGA 'Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples' UNGA res 2037 (XX) (7 December 1965) UN Doc A/RES/20/2037.
- 2202 UNESCO World Plan of Action on Education for Human Rights and Democracy, adopted by the International Congress on Education for Human Rights and Democracy convened by the UNESCO (Montreal, 8-11 March 1993) Doc A/CONF.157/PC/42/Add.6.
- 2203 I.a. UNGA Res 67/18 'Education for democracy' (28 November 2012) UN Doc A/RES/67/18; UNHRC Res 19/36 'Human rights, democracy and the rule of law' (23 March 2012) UN Doc /HRC/RES/19/36; UNGA Res 69/268 'Education for democracy' (5 March 2015) UN Doc A/RES/69/268; UNHRC Res

tion of this work at regional level, transposing the aims of quality education—including human rights education and education for democracy—to the European context.<sup>2204</sup>

Interestingly, the concept of human rights education used at UN level includes components which the Council of Europe ranks under the concept of EDC (not under HRE), e.g. '[e]nabling all persons to participate effectively in a free and democratic society governed by the rule of law'.<sup>2205</sup> Human rights education clearly includes learning about political rights.<sup>2206</sup> *This shows that EDC and HRE are interlinked.*<sup>2207</sup>

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28/14 'Human rights, democracy and the rule of law ' (26 March 2015) UN Doc HRC/RES/28/14; UNGA Res 71/8 'Education for democracy' (17 November 2016) UN Doc A/RES/71/8; UNGA Res 73/134 'Education for democracy' (13 December 2018) UN Doc A/RES/73/134; and work continues, i.a. reported in Secretary-General, *Literacy for life: shaping future agendas and education for democracy* (Note, A/71/177). On the status of resolutions in the EU legal order, see i.a. text to n 831.

2204 See § 57 (a strength of the Charter on EDC/HRE).

2205 See i.a. UNHRC Res 24/15 'Plan of Action for the third phase (2015-2019) of the World Programme for Human Rights Education' (8 October 2013) UN Doc A/HRC/27/28, para 4.

2206 See UNHRC Res 19/36 'Human rights, democracy and the rule of law' (23 March 2012) UN Doc /HRC/RES/19/36, paras 1, 4 and 5. Other human rights which relate to democracy are i.a. freedom of expression, of information, of thought, of assembly and association. See e.g. *All Human Beings: A Manual for Human Rights Education* (ed K Savolainen, The Teacher's Library series, UNESCO 1998) 8–11, explained in simple words, for educators and pupils.

2207 Interlinked, see UNHRC Res 19/36 'Human rights, democracy and the rule of law' (23 March 2012) UN Doc /HRC/RES/19/36, para 14; repeated in UNHRC Res 28/14 'Human rights, democracy and the rule of law ' (26 March 2015) UN Doc HRC/RES/28/14; also UN 'Guidance Note of the Secretary-General on Democracy' (2009): 'At the World Summit in 2005, as in the Millennium declaration in 2000, Member States of the United Nations (UN) recommitted themselves to protecting and promoting human rights, the rule of law and democracy, recognizing that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.' These UN instruments show that CoE action is consistent with UN norms on education for human rights and for democracy. While the CoE usually refers to 'education for democratic citizenship', in one CoE document the expression 'education for democracy' indicates the link with action at UN level: CoE Standing Conference of European Ministers of Education, Resolution on education for democracy, human rights and tolerance (No 1) (Madrid, 23-24 March 1994).

The UN instruments on education for democracy confirm that education for democratic citizenship is not essentially linked to states,<sup>2208</sup> but rather to ‘society’, or to ‘policymaking at all levels’. Article 25 ICCPR proclaims that every citizen shall have the right and the opportunity to take part in ‘the conduct of public affairs’. The 2009 UN Secretary General Guidance Note on Democracy refers to ‘democratic values and principles in a society’.<sup>2209</sup> According to the UN General Assembly, education for democracy aims at the promotion of democratic values and democratic governance and human rights, and at facilitating ‘the empowerment of citizens and their participation in political life and policymaking at all levels’.<sup>2210</sup> UN instruments frequently restate that democracy cannot be described on the basis of a single model.<sup>2211</sup> This should lead to openness to the EU model of democracy (as work in progress).<sup>2212</sup> The aim of education to ‘enable all persons to participate effectively in a free society’ (Article 13(1) ICE-SCR) and to ensure the ‘preparation of the child for responsible life in a free society’ (Article 29 CRC) implicitly includes the aim of education for democracy. Democracy is by definition a form of government based on the participation of all persons, based on the presumption of effective participation and a free society.<sup>2213</sup>

This overview has highlighted aspects of the international right to education which are essential for quality education. The international right to education encompasses a right to education directed to the aims listed in binding agreements. This certainly has an impact on the curriculum. The requirement that education be acceptable and adaptable also relates to content of teaching. There is clearly a right to quality education comprising

2208 See §§ 150 -151 .

2209 UN 'Guidance Note of the Secretary-General on Democracy' (2009), in heading 3: “Education for democracy” is a broad concept which can help to inculcate democratic values and principles in a society, encouraging citizens to be informed of their rights and the existing laws and policies designed to protect them, as well as training individuals to become democratic leaders in their societies.’. My emphasis.

2210 UNGA Res 71/8 'Education for democracy' (17 November 2016) UN Doc A/RES/71/8, para 6; idem in UNGA Res 67/18 'Education for democracy' (28 November 2012) UN Doc A/RES/67/18, para 4; UNGA Res 69/268 'Education for democracy' (5 March 2015) UN Doc A/RES/69/268, para 4. My emphasis.

2211 I.a. UN 'Guidance Note of the Secretary-General on Democracy' (2009), p 2; UNGA Res 69/268 'Education for democracy' (5 March 2015) UN Doc A/RES/69/268, p 2 ('Recognizing that, while democracies share common features, there is no single model of democracy and that democracy does not belong to any country or region').

2212 See i.a. § 225 and 228 .

2213 See also, *All Human Beings: A Manual for Human Rights Education* 8.

human rights education and education for democracy. Rights and obligations thus frame the educational autonomy of States. The interpretation ‘quality education’ in Article 165 TFEU in the light of international agreements is relevant for all learners, including the static ones.

## 2. Quality education at Council of Europe level

### 295 *Democratic citizenship and human rights*

The right to education in the ECHR (Art 2 Protocol 1) makes no reference to quality education.<sup>2214</sup> Indications are to be found in ECtHR case law. The ECtHR considers the State to be responsible for quality education and requires that the State, in fulfilling its educational functions, takes care to convey the information or knowledge included in the curriculum in an objective, critical and pluralistic manner, with no aim of indoctrination.<sup>2215</sup>

Quality education is defined in the 2012 Recommendation of the Committee of Ministers on ensuring quality education. The definition is consistent with the UN approach to quality education, including the aims of education for human rights and for democracy. Quality education, inter alia, ‘promotes democracy, respect for human rights and social justice’ and ‘enables pupils and students to develop appropriate competences, self-confidence and critical thinking to help them become responsible citizens’.<sup>2216</sup>

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2214 Art 2 Protocol 1 ECHR: ‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’ Yet, see Art 53 ECHR (no limitation or derogation of ‘human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a part’). Arts 13(1) ICESCR and 29 CRC are thus indirectly relevant.

2215 See text to nn 693 and 696; and i.a. *Folgerø and Others v Norway* no 15472/02 (ECtHR 29 June 2007), para 84 (g), (h).

2216 CoE Recommendation CM/Rec(2012)13 of the Committee of Ministers to member States on ensuring quality education (12 December 2012), para 6: ‘For the purposes of this recommendation, “quality education” is understood as education which: (a) gives access to learning to all pupils and students, particularly those in vulnerable or disadvantaged groups, adapted to their needs as appropriate; (b) provides a secure and non-violent learning environment in which the rights of all are respected; (c) develops each pupil’s and student’s personality, talents and mental and physical abilities to their fullest potential

The 2012 Recommendation refers to the 2010 Charter on EDC/HRE.<sup>2217</sup> Later instruments confirm this concept of quality education. In 2016, the Standing Conference of the Ministers of Education agreed on the strategic objective:

To make the preparation for lifelong active democratic citizenship of all learners in education and training a hallmark of the quality of European education systems and an essential part of our response to the challenges Europe is facing.<sup>2218</sup>

Reinforced cooperation with EU institutions is sought, in particular to promote education for democratic citizenship and fundamental values,

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and encourages them to complete the educational programmes in which they enrol; (d) promotes democracy, respect for human rights and social justice in a learning environment which recognises everyone's learning and social needs; (e) enables pupils and students to develop appropriate competences, self-confidence and critical thinking to help them become responsible citizens and improve their employability; (f) passes on universal and local cultural values to pupils and students while equipping them also to make their own decisions; (g) certifies outcomes of formal and non-formal learning in a transparent way based on fair assessment enabling acquired knowledge and competences to be recognised for further study, employment and other purposes; (h) relies on qualified teachers who are committed to continuous professional development; (i) is free of corruption.' See also preambular paras 25–6. Earlier: CoE Standing Conference of European Ministers of Education, Building a more humane and inclusive Europe: role of education policies, Resolution on the 2008-2010 programme of activities (Istanbul, 4-5 May 2007), paras 7–8 (asking, i.a., to reinforce work on indicators (with the European Commission) on quality assurance in the field of EDC/HRE); CoE Standing Conference of European Ministers of Education, Final Declaration on 'Education for Sustainable Democratic Societies: the Role of Teachers' (Ljubljana, 4-5 June 2010); and the 'Wroclaw Declaration on 50 Years of Cultural Cooperation', text to n 241.

2217 Recital 14 (having regard to).

2218 CoE Standing Conference of Ministers of Education, Securing Democracy through Education: The development of a Reference Framework of Competences for Democratic Culture (Brussels, 11-12 April 2016), para 13; also paras 20 and 31. See before: CoE Standing Conference of Ministers of Education, Governance and Quality Education (Helsinki, 26 -27 April 2013), paras 6, 15, 18 (1)-(2), 21(4).

fostering social and civic competences and intercultural understanding.<sup>2219</sup> The RFCDC is a means of responding to the call for quality education.<sup>2220</sup>

### 3. Quality education at EU level

#### 296 *Quality education directed to key competences, including citizenship competence*

EU law provides several indications as to how to understand ‘quality education’ in Article 165 TFEU.

Firstly, pursuant to Article 9 TFEU, when defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of ‘a high level of education’. In the preamble to the TFEU, Member States declare their determination to promote the development of the highest possible level of knowledge for their peoples through wide access to education and through ‘its continuous updating’. Interpreting quality education as ‘a high level of education’ and in the light of a commitment to ‘its continuous updating’, EU action should be able to support the EU dimension of EDC in the Member States.

Secondly, the right to education in the CFR (Article 14) must be interpreted in the light of the international agreements (ICESCR, CRC).<sup>2221</sup> Just like the right to education in the ECHR, the right to education in Article 14 CFR is silent about the aims of education (not present in the social dimension in paras 1 and 2).<sup>2222</sup> However, Article 53 CFR provides that no rights in the CFR ‘shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised...by international law and by international agreements to which the Union or

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2219 CoE Standing Conference of Ministers of Education, *Securing Democracy through Education: The development of a Reference Framework of Competences for Democratic Culture* (Brussels, 11-12 April 2016), para 37.

2220 CoE Reference Framework of Competences for Democratic Culture, Vol 1: Context, concepts and model (2018), p 16.

2221 See n 2115. This right is based on the common constitutional traditions of Member States and on Art 2 Protocol ECHR (according to the Explanations).

2222 Some guidance in Art 17 European Social Charter (revised) ETS No 163 (Strasbourg, opening 3 May 1996, entry into force 1 July 1999): ‘ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities’; see also the adjectives ‘sufficient and adequate’ in para 1(a).



Everyone has the right to quality and inclusive education, training and life-long learning in order to maintain and acquire skills that enable them to participate fully in society and manage successfully transitions in the labour market.<sup>2226</sup>

The reference to participating fully in society echoes the educational aim in the ICESCR of ‘effective participation in a free society’. In focusing on quality and inclusiveness, the right to education in the European Pillar of Social Rights goes further than the right to education in Article 14 CFR.<sup>2227</sup>

Thirdly, several legal acts—based on Article 165 TFEU—develop the concept of quality education further, such as the 2006 and the 2018 Recommendations on key competences for lifelong learning.<sup>2228</sup> In the 2018 Recommendation, the Council states that the Member States should ‘sup-

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2226 The European Pillar of Social Rights, solemnly proclaimed by the European Parliament, the Council and the Commission on 17 November 2017: ‘Education, training and life-long learning’.

2227 Commission Staff working document Accompanying the document Communication from the Commission Monitoring the implementation of the European Pillar of Social Rights SWD(2018) 67 final, 8.

2228 Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning [2006] OJ L394/10 (Annex: Key Competencies for Lifelong Learning- A European Reference Framework); Council Recommendation of 22 May 2018 on key competences for lifelong learning [2018] OJ C189/1. On quality education, see also Council Conclusions of 19 November 2010 on education for sustainable development [2010] OJ C327/11, paras 2–4; Commission staff working document ‘Key European action supporting the 2030 Agenda and the Sustainable Development Goals Accompanying Commission Communication Next steps for a sustainable European future: European Union action for sustainability’ SWD(2016) 390 final, heading 2.4, ‘Ensure inclusive and equitable quality education and promote life-long learning opportunities for all’ (Quality education is linked to an economic rationale: ‘The most important Commission priorities contributing to this sustainable development goal are: jobs, growth and investment; a digital single market; a deeper and fairer economic and monetary union, a deeper and fairer internal market; a stronger global actor’. But ‘[s]ince end 2015 reinforced attention is also given to inclusive education, equality, equity, non-discrimination and the promotion of civic competences’); 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); Council Conclusions on moving towards a vision of a European Education Area [2018] OJ C195/7, para 12.2 (the Council ... underlines the ‘the need to ensure high quality and inclusive education to support the development of

port the right to quality and inclusive education, training and lifelong learning' and use the European Reference Framework on key competences to do so. High quality education provides opportunities to develop the eight key competences. One of them is citizenship competence.<sup>2229</sup> That being so, adopting a measure to support the EU dimension in citizenship competence should be possible as a means to achieve quality education. Action to promote the EU dimension of EDC based on Article 165 TFEU would be consistent with present EU education policy.<sup>2230</sup>

### 297 Conclusion

Instruments at UN level indicate that quality education essentially includes education directed to the aims listed in binding international agreements (ICESCR and CRC), including enabling effective participation and responsible life in a free society and strengthening respect for human rights and fundamental freedoms. This requires education for human rights and democracy. In Council of Europe terminology, quality education includes EDC and HRE.<sup>2231</sup> This understanding of quality education is confirmed

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all learners, including by focussing on the priorities set out in the November 2017 Council conclusions on school development and excellent teaching'. See also ECJ case law on quality education invoked in the justification of restrictions to fundamental freedoms e.g. *Bressol, Lyyski, Dirextra* (text to n 2424).

- 2229 Council Recommendation of 22 May 2018 on key competences for lifelong learning, para 1; see also Annex p 12 'Supporting the development of key competences'.
- 2230 Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching [2018] OJ C195/1; Council Recommendation of 22 May 2019 on a comprehensive approach to the teaching and learning of languages [2019] OJ C189/15 (and recital 6). See also Commission Communication 'Strengthening European Identity through Education and Culture' COM(2017) 673 final; Council Recommendation of 22 May 2017 on the European Qualifications Framework for lifelong learning and repealing the recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning [2017] OJ C189/15; Council Conclusions on moving towards a vision of a European Education Area [2018] OJ C195/7. See also Council Conclusions on school development and excellent teaching (20 November 2017); Council Conclusions on moving towards a vision of a European Education Area [2018] OJ C195/7; Commission Communication 'Building a stronger Europe: the role of youth, education and culture policies' COM(2018) 268 final. Further Commission Erasmus Proposal COM(2018) 367 final.
- 2231 Academic writers also link quality education and EDC, see i.a.: Nussbaum, 'Education and Democratic Citizenship: Capabilities and Quality Education';

at EU level. The concept of quality education is relevant for all learners, including the static ones. In a human rights-based approach to education, all children have a right to quality education and states have corresponding obligations. In the light of the analysis in Part three, I conclude that EU action to support the EU dimension of EDC can be based on Article 165(1) TFEU and the concept of ‘quality education’.

The interpretation of the concept of quality education in the light of international agreements puts the no-content limit in perspective. Admittedly, it remains intriguing that Article 165 TFEU, on the one hand, confers competence on the EU to contribute to the development of quality education—which undoubtedly also relates to content of teaching—and on the other hand, in the same provision, requires the EU to fully respect the responsibility of Member States for the content of teaching.<sup>2232</sup> Another concept in the legal basis will provide further indications in this regard: the European dimension in education.

### *C Developing the European dimension in education*

#### *298 The European dimension in education sensu stricto: a European dimension in school curricula*

The European dimension in education *sensu stricto* is the first of the specific objectives of Union action for achieving quality education which appear in Article 165(2) TFEU: Union action shall be aimed at ‘developing the European dimension in education, particularly through the teaching

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D Wilson, *A Human Rights contribution to defining quality education* (Background paper prepared for the Education for All Global Monitoring Report 2005 The Quality Imperative, 2004). Further K Grimonprez, ‘EU-burgerschap en vorming voor democratie: ijkpunten voor kwaliteitsvol onderwijs’ (2019-20) *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid* 5.

2232 See Snell, ‘European Union and National Referendums: Need for Change after the Brexit Vote?’: involving schools to educate citizens to become EU citizens is proposed as a solution, yet the competence question remains a stumbling block. On uncertainties with regard to supplementary competences in general, see i.a. Schütze, ‘Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order’ (in the field of health and environment); S Garben, ‘Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers’ (2015) 35 *Oxford Journal of Legal Studies* 55, 59, 65. See further L Azoulai (ed) *The Question of Competence in the European Union* (Oxford University Press 2014).

and dissemination of the languages of the Member States' (first indent). The expression 'European dimension in education' is often used *sensu lato*, referring to the overarching aim of the whole of Article 165 TFEU: contributing to the development of quality education (paragraph 1), with the list of specific objectives (paragraph 2) as the further elaboration of this aim and thus including action to promote mobility.<sup>2233</sup> As an educational principle, the 'European dimension in education' has led to endless debates.<sup>2234</sup> As a Treaty expression, it merits a legal approach based on traditional interpretation methods. They all point in the same direction: the European dimension in education *sensu stricto* aims primarily at the insertion of 'European content' into national school curricula.<sup>2235</sup> That dimension (first indent) is not dependent on mobility (second indent).<sup>2236</sup> 'European content' includes languages and various themes for learning about

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- 2233 H Ertl, 'European Union policies in education and training: the Lisbon agenda as a turning point?' (2006) 42 *Comparative education* 5, 8; Ruffert, 'AEUV Art 165', Rn 4 (on a citizens' right to transnational education, linked with Art 14 CFR, and the political integration-potential of EU education policy), Rn 13–14.
- 2234 Lane, 'New Community competences under the Maastricht Treaty', 951 ('Orwellian Newspeak'). See DG Mulcahy, 'In Search of the European Dimension in Education' (1991) 14 *European Journal of Teacher Education* 213; R Ryba, 'Unity in diversity: The enigma of the European dimension in education' (1995) 21 *Oxford Review of Education* 25; D Barthélemy, 'Analysis of the Concept of European Dimension' (1999) 31 *European Education* 64; Keating, Ortloff and Philippou, 'Citizenship Education Curricula: The Changes and Challenges Presented by Global and European Integration', 151.
- 2235 See K Grimont, 'The European dimension in citizenship education: unused potential of article 165 TFEU' (2014) 39 *ELRev* 3, 6. Also, the European dimension 'as such': expression used in Commission Report on the implementation of the Socrates programme 1995-1999, COM(2001) 75 final.
- 2236 Ruffert, 'AEUV Art 165', Rn 15: the first indent 'European dimension in education' impacts on the content of education. See, indeed, recommendation in Germany, Beschluss der Kultusministerkonferenz vom 08.06.1978 i. d. F. vom 05.05.2008, Empfehlung der Ständigen Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland 'Europabildung in der Schule', p 7: 'Zur Erschließung der europäischen Dimension in Unterricht und Erziehung sollen grundsätzlich alle Fächer und Lernbereiche der Schule einen Beitrag leisten. Die Lehrpläne und Bildungspläne der Länder enthalten dazu in differenzierter Weise konkrete Ziele und Themen sowie Hinweise auf geeignete Lerninhalte, zweckmäßige Arbeitsformen und wünschenswerte Einstellungen' (tr In order to develop the European dimension in instruction and education, all subjects and learning areas at school must in principle make a contribution. To achieve this the various curricula and educational plans of the *Länder* contain specific objectives and themes in a differentiated manner, as well as indi-

Europe.<sup>2237</sup> Developing the European dimension in education *sensu stricto* (first indent) is directly relevant for static citizens, pupils in classrooms in their own towns or villages, who do not cross borders.

### 299 *Textual interpretation*

The use of the words ‘languages’ and ‘particularly’ in a separate indent (preceding the mobility indent) is the first strong indication of a curricular concept for the European dimension in education.<sup>2238</sup> From the word ‘particularly’ it can be inferred that other curricular action is possible as well, for instance, courses on European history,<sup>2239</sup> or—indeed—the EU dimension of EDC.

### 300 *Contextual and teleological interpretation*

The maxim of consistent interpretation requires a reading of every provision of EU law in a way that does not contradict its normative context and is in keeping with the objectives pursued.<sup>2240</sup>

Firstly, in light of the increasing importance of the *travaux préparatoires* in ECJ case law, the objectives and actions envisaged in pre-Maastricht policy documents must be examined. These (public) documents show how the original ‘European dimension in education’ concept focused on the curriculum. The 1973 Janne Report launched the European dimension in

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cations as to suitable learning content, appropriate working methods and desirable attitudes).

2237 K Lenaerts, ‘Subsidiarity and Community competence in the field of education’ [1995] *Columbia Journal of European Law* 1, 27: ‘Under the [Arts 165–166] competence, the Community and the Member States may steer their political processes in the direction of giving education a truly European dimension. They may do so not only by promoting study of the various aspects of the European “polity” (such as history, geography, culture, economy, society, and politics), but also through such means as language training taught by native speakers or exchanges of teachers and students of the different Member States. Community competence in the field of education thus clearly contributes to the achievement of one of the basic objectives of the TEU, which under Article A, paragraph 2, was to “creat[e] an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen”.’.

2238 See Council Recommendation of 22 May 2019 on a comprehensive approach to the teaching and learning of languages [2019] OJ C189/15.

2239 Example given by C Frazier, *L’éducation et la Communauté européenne* (CNRS 1995) 259, 261. See also Pépin, *The history of European cooperation in education and training, Europe in the making - an example* 148.

2240 Lenaerts and Gutiérrez-Fons, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’.

education. All proposed actions concerned the curriculum: learning about Europe; learning about other Member States in history and geography; language learning; and 'Prudent and gradual teaching of European "civics" to be based mainly on Community practices and institutions, on pluralism and on democracy'.<sup>2241</sup> The 1985 Adonnino Report *A People's Europe*, seeking to give new impetus to the European dimension in education, proposed, inter alia, appropriate school books and teaching material, under the heading 'The European Image in Education'.<sup>2242</sup> The Adonnino report, clarifying the objective of what is now Article 165(2) TFEU, has the same value as the Delors report on which the ECJ based its interpretation of Article 125 TFEU in *Pringle*.<sup>2243</sup> After 1992, the objective of a curricular European dimension in education (apart from languages) moved silently from centre to backstage.<sup>2244</sup> Mobility became the focus of the European dimension in education *sensu lato*, as reflected in successful programmes such as Erasmus. Yet, this cannot allow us to forget the meaning and potential *sensu stricto* of the first indent Treaty concept.

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2241 H Janne, *For a Community policy on education* (Report for the European Commission, Bull EC Supp 10-73, 1973) 52. The four first objectives of Art 165(2) TFEU can be traced back to this report.

2242 P Adonnino, *Adonnino Committee, A People's Europe, Reports from the ad hoc Committee* (Bull EC 7-1985, 1985), e.g. p 24. See also Keating, Ortloff and Philippou, 'Citizenship Education Curricula: The Changes and Challenges Presented by Global and European Integration'; R Ryba, 'Toward a European Dimension in Education: Intention and Reality in European Community Policy and Practice' (1992) 36 *Comparative Education Review* 10, 24. For later action, see Commission Staff working paper, First progress report of 23 September 1991 on action undertaken by the Member States and by the European Community with a view to strengthening the European dimension in education, SEC (91) 1753 final; Conclusions of the Council and of the Ministers of Education meeting within the Council of 27 November 1992 on measures for developing the European dimension in higher education [1992] OJ C336/4 (see Annex, point 3 about European content); Lonbay, 'Education and the law: the Community context (European Community)'; Theiler, 'The European union and the "European dimension" in schools: Theory and evidence', 323; Pépin, *The history of European cooperation in education and training. Europe in the making - an example*, 293.

2243 Case C-370/12 *Pringle* ECLI:EU:C:2012:756, paras 135–6; Case C-583/11 *P Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625, paras 59, 66, 70.

2244 Some EU instruments continued to refer to the European dimension in education, see i.a. Recommendation 2006 on key competences, recital 2: 'overall need to enhance the European dimension in Education'.

Secondly, the European dimension in education is linked to EU citizenship. The first objective of the European dimension in education in the 1993 Green Paper was contributing to European citizenship, based on shared values of interdependence, democracy, equal opportunity and mutual respect.<sup>2245</sup> European citizenship must be explained through education. It is a striking and significant coincidence that the European dimension in education was inserted into the Treaties at the same moment as EU citizenship (1992). It builds on Council of Europe action to develop the European dimension in education, interlinked with EDC.<sup>2246</sup>

Thirdly, a curricular European dimension in education harmonises with the wider context of the internal market. In its 1985 White Paper 'Completing the Internal Market',<sup>2247</sup> the Commission proposed to increase support for programmes 'helping young people, in whose hands the future of the Community's economy lies, to think in European terms'. Many initiatives for a European dimension in education aimed to raise European awareness through the curriculum (particularly in languages and geography). But after 1992, as reported by Field, because the impact of the internal market turned out to be less dramatic than anticipated, short-term enthusiasm was often followed by a loss of interest.<sup>2248</sup> However, free movement rules continue to presume a minimal understanding of, and confidence in, the system on the part of citizens.<sup>2249</sup>

Fourthly, some foundational principles of EU law are relevant for an interpretation of the European dimension in education *sensu stricto*. The normative context for systemic interpretation includes the principles of

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2245 Commission Green Paper of 29 September 1993 on the European Dimension of Education COM(93) 457 final, para 13.

2246 See i.a. CoE Parliamentary Assembly Recommendation 1111(1989) 'European dimension of education'; CoE Standing Conference of Ministers of Education, Resolution on 'the European dimension of education: teaming and curriculum content' (Vienna, 16-17 October 1991); CoE Recommendation R(99)2 of the Committee of Ministers to member states on secondary education (19 January 1999). The relationship between the European dimension in education and EDC appears clearly in CoE Recommendation Rec(2002)12 of the Committee of Ministers to member states on education for democratic citizenship (16 October 2002), appendix, para 1 (text to n 236).

2247 Commission White Paper of 16 June 1986 'Completing the Internal Market' COM(85) 310 final, p.26.

2248 Field, *European Dimensions, Education, Training and the European Union*, 103-4.

2249 A Verhoeven, 'Redactionele Signalen' (2012) 60 SEW - Tijdschrift voor Europees en economisch Recht 269. For many citizens and (small) companies, the internal market is in practice still far from being a reality, not because rules are lacking, but because they are insufficiently known or trusted.

democracy, transparency and openness, access to documents and freedom of information.<sup>2250</sup> To be fully effective, these principles presuppose a minimal level of EDC for the whole population, not just for the mobile minority, as argued above.

301 *The EU dimension of EDC as part of the European dimension in education*

If the ‘European dimension in education’ in Article 165(2) first indent TFEU is read in harmony with the overall logic of the system, it implies a European dimension in education *sensu stricto* (a concept independent of learner mobility) referring essentially to European themes in the school curriculum. In its 2006 Resolution on initiatives to complement school curricula providing appropriate support measures to include the European dimension, the European Parliament recognised two different aspects of the European dimension: firstly, access to information about the EU (institutions, methods, practices, initiatives) and, secondly, knowledge of Europe’s shared history and cultural heritage, linguistic skills, and an understanding of European current events, ‘all of which may supplement national curricula’.<sup>2251</sup> The EU dimension of EDC falls mainly under the first heading, but also contributes to an understanding of European cultures and identities (second aspect). The European dimension in education thus includes the EU dimension of EDC. Compared to the European dimension in education, the EU dimension of EDC is a much more focused concept. As explained in Part three, it especially brings in additional elements with regard to the three empowerment aims (c-1–3), consistent with EU law. In the 2018 ‘Recommendation on promoting common values, inclusive education, and the European dimension of teaching’, the Council states that Member States should promote ‘the European dimension of teaching’.<sup>2252</sup> The *ratio legis* is to ‘help learners experience European identity in all its diversity and strengthen a European

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2250 TEU Arts 1, 10(1) and 11(2); TFEU Arts 1 and 15; CFR Art 42. See i.a. §§ 134–137.

2251 European Parliament Resolution of 26 September 2006 on initiatives to complement school curricula providing appropriate support measures to include the European dimension [2006] OJ C306E/100, point 4. See also Commission Communication ‘Investing efficiently in education and training: an imperative for Europe’ COM(2002) 779 final, p 21–2, for a curricular European dimension in education.

2252 Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching [2018] OJ C195/1. See in the same spirit, European Parliament resolution of 12 June

positive and inclusive sense of belonging’, in addition to promoting a better understanding of the Union and its Member States.<sup>2253</sup> The EU dimension of EDC is visible in many aspects of the European dimension of teaching (such as values, unity and diversity, and the functioning of the Union).<sup>2254</sup> This Recommendation is thus an important step. Yet, more specific action can be taken to support the development of the EU dimension of EDC.

### 302 *Exception to the no-content limit*

There seems to be a contradiction within Article 165 TFEU between the first and the second paragraphs. How can a blanket ban on content be reconciled with the EU competence to promote ‘particularly’ the teaching of languages? Languages are typically part of teaching content. As explained, the Treaty article was drafted at a time when the European dimension in education primarily had a curricular meaning. A reasonable solution to this apparent contradiction is to differentiate between the *lex generalis* and the *lex specialis*. An interpretation that gives full effect to the provisions within their context is that competence for the European dimension *sensu stricto* (second paragraph of Article 165 TFEU) is the *lex specialis* as compared with the *lex generalis* which requires full respect for Member States’ responsibility for teaching content (first paragraph). This fits in well with the underlying philosophy and ratio of the ‘no go’ area. Member States wish to preserve their own identity through their (sub)national education system. Respect for the diversity of educational systems is guaranteed (*lex generalis*), while at the same time, teaching about the EU—of which Member States are part—is encouraged or coordinated (*lex specialis*). Unity in diversity. The one does not exclude the other.

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2018 on modernisation of education in the EU (2017/2224(INI)), i.a. paras 36 and 134.

2253 Recital 18.

2254 Para 6: Promotion of a European dimension of teaching: ‘encouraging: (a) an understanding of the European context and common heritage and values and an awareness of the unity and diversity, social, cultural and historical, of the Union and the Member States of the Union; (b) an understanding of the origins, values and functioning of the Union; (c) the participation of pupils and teachers in the e-Twinning network, in cross-border mobility, and transnational projects, especially for schools; (d) grass-roots projects to raise awareness of and improve understanding of the European Union in learning settings, notably through direct interaction with young people, such as an annual celebration, on a voluntary basis, of a “Day of the European Union” in learning settings’.

303 *Illustration in the Jean Monnet programme*

In a number of legal acts adopted on the basis of Article 165 TFEU, the Jean Monnet programme of the EU illustrates the *lex specialis* competence, of relevance for static citizens. Under the 2013 Erasmus+ Regulation, Jean Monnet activities aim to ‘promote teaching and research on European integration’.<sup>2255</sup> The earlier 2006 Lifelong Learning Decision did so, too: the ‘issues relating to European integration’ which formed the core of the Jean Monnet programme are all expressions of the European dimension in education *sensu stricto*.<sup>2256</sup> In response to a request from the European Parliament,<sup>2257</sup> the Commission developed the ‘Learning EU@school’ initiative on the legal basis of the Jean Monnet programme (key activity 1) of the 2006 Lifelong Learning Decision,<sup>2258</sup> inter alia ‘to develop content for EU teachers’ or ‘pedagogical content’ and didactic material for the teaching of European integration in schools.<sup>2259</sup> This successful but limited initiative deserves broader EU support.<sup>2260</sup> Education initiatives which influence national curricula in order to promote the European dimension within the meaning of Article 165(2) *are* permitted.<sup>2261</sup>

From the Jean Monnet programme, albeit primarily aimed at higher education,<sup>2262</sup> I conclude that Article 165(2) first indent TFEU can reasonably be seen as a legal basis for action to encourage the EU dimension of

2255 Erasmus+ Regulation 1288/2013, Art 10.

2256 Decision 1720/2006 of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning [2006] OJ L327/45; amended by Decision 1357/2008 [2008] OJ L350/56, Art 35(1)a, recital 31. See also Art 35(2) and Art 34(f). The programme aimed ‘to stimulate teaching, research and reflection activities in the field of European integration studies’. See ‘issues relating to European integration’ in Arts 34–37; they can be linked to aspects of the EU dimension of EDC (knowledge, skills, attitudes, ...).

2257 See Draft General Budget 2011—Statement of revenue and expenditure COM(2010) 750 final, 397.

2258 Call for Proposals—EACEA/18/11 Jean Monnet programme: Key activity 1, Information and research activities for ‘Learning EU@school’ [2011] OJ C174/06, p.8.

2259 Learning EU@school, Call for Proposals [2011] OJ C174/06, Point 4.

2260 Jean Monnet Programme—“Learning EU@School”, Report of Project Coordinators’ Meeting, Best Practice and Cooperation, organized by EACEA (2012). New angles are explored in Innovation projects, including on Learning EU @school, in Jean-Monnet projects, Erasmus+ programme guide (2019), p 225.

2261 Yet, *ibid*: ‘bearing in mind’ p 5.

2262 Decision 1720/2006 of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong

EDC. If the EU has the competence to promote teaching and research on European integration among specialist academics, including at home in their Member State, there is no reason to invoke the no-content limit to oppose—as a matter of principle—the EU competence to promote learning about European integration in schools.

In the Proposal for a new Erasmus programme, similarly based on Articles 165–166 TFEU, Jean Monnet activities ‘will be partially refocused to target for example pupils in schools’.<sup>2263</sup> Jean Monnet actions will support ‘teaching, learning, research and debates on European integration matters’ in the field of higher education and ‘in other fields of education and training’.<sup>2264</sup>

The Proposal is cautious as to the European dimension in static situations (‘national activities with a strong European dimension’).<sup>2265</sup> Yet, strengthening European identity is one of the general objectives (Article 3).<sup>2266</sup>

#### 304 *No harmonisation*

Quality education presupposes a European dimension in education which includes the EU dimension of EDC. What is important is the term ‘dimension’. The EU or European dimension does not interfere with the no harmonisation-limit.<sup>2267</sup> Part three argues for an EU *dimension* to national EDC from an adaptation perspective. The intention is not to impose a har-

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learning [2006] OJ L327/45; amended by Decision 1357/2008 [2008] OJ L350/56, Art 34(a); Erasmus+ Regulation 1288/2013, Art 10.

2263 Commission Erasmus Proposal COM(2018) 367 final, explanatory memorandum 11.

2264 Commission Proposal for a Regulation of the European Parliament and of the Council establishing ‘Erasmus’: the Union programme for education, training, youth and sport and repealing Regulation (EU) No 1288/2013, COM(2018) 367 final, Art 7.

2265 Ibid, explanatory memorandum p 12: ‘While Member States remain responsible for the content and organisation of their policies in the fields concerned, this Programme aims to boost transnational and international mobility and cooperation projects, and to support policy developments with a European dimension’; p 13: ‘This action will also support flexible formats (generally transnational and, in exceptional cases, national activities with a strong European dimension) allowing organisations to reach out to people with fewer opportunities.’

2266 Ibid, recital 31.

2267 The prohibition of harmonisation is in my view not problematic in the context of the EU *dimension* in EDC, integrated in the variety of national forms of citizenship education. Admittedly, much is unclear about the harmonisation

monised body of knowledge as EU citizenship education, to be learned by every EU citizen. The intention is to encourage the inclusion of an EU dimension of EDC—including critical thinking—in the very diverse forms and content of national citizenship education. The analysis has demonstrated that EU law impacts in such a decisive way on the substance of the EDC components, that EDC without an EU dimension can hardly be seen as ‘quality education’. To be consistent with EU law, citizenship competences (and other key competences) as recommended by the Council in the 2018 Recommendation on key competences, should therefore include a genuine EU ‘dimension’.<sup>2268</sup>

*D Encouraging the participation of young people in democratic life in Europe*

*305 Political rights shed light on this part of the legal basis*

In addition to ‘quality education’ and ‘the European dimension in education’, there is a third concept in the legal basis in Article 165 TFEU which is relevant to the promotion of the EU dimension in EDC: Union action shall be aimed at ‘encouraging the participation of young people in democratic life in Europe’ (para 2, fifth indent). Part three has already explained the significance of participation in democratic life in Europe, based on EU law on citizenship and democracy. Here, the human rights-based approach

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restriction in the education field in general. See i.a. Garben, *EU Higher education law. The Bologna Process and harmonization by stealth*; S Garben, ‘The Case to Correct Some of Maastricht’s Mistakes: A Critical Assessment of Article 165 TFEU on Education and Suggestions for Reform’ in M De Visser and AP van der Mei (eds), *The Treaty on European Union 1993-2013: Reflections from Maastricht* (Intersentia 2013); Garben, ‘Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers’; M Dawson, ‘Integration through Soft Law: No Competence Needed? Juridical and Bio-Power in the Realm of Soft Law’ in S Garben and I Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart 2017); Garben S, ‘Restating the Problem of Competence Creep, Tackling Harmonisation by Stealth and Restating the Legislator’, in *The Division of Competences*, *ibid.*, (2017).

- 2268 Council Recommendation of 22 May 2018 on key competences for lifelong learning: ‘Citizenship competence is the ability to act as responsible citizens and to fully participate in civic and social life, based on understanding of social, economic, legal and political concepts and structures, as well as global developments and sustainability.’ In the same vein see civic competences in Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning.

sheds extra light on this indent. The importance of the human rights-based approach to education was underlined in the context of quality education.<sup>2269</sup> As EDC is situated at the intersection of the right to education and political participation rights, the case law of the ECtHR on voting in elections and its relevance in the EU legal order is being recalled.<sup>2270</sup> A human rights-based approach requires action for effective political democracy in the EU. The political participation rights of EU citizens guaranteed by the CFR, too, give substance to the aim of ‘the participation of young people in democratic life in Europe’ in the fifth indent of Article 165(2) TFEU and underscore the importance for the EU of using this legal basis.<sup>2271</sup>

### 306 *The fundamental right to vote in elections*

Article 3 of Protocol 1 to the ECHR states that the member states ‘undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’. Article 39(2) CFR provides that ‘Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot’.<sup>2272</sup> Remarkably, the ECHR and the CFR both formulate this in terms of an obligation, and the ECtHR as well as the ECJ have interpreted the respective provisions as establishing a right.<sup>2273</sup>

2269 See § 285 .

2270 Many more fundamental rights are relevant in EDC, i.a. the right to freedom of expression and the rights of the child. See i.a. Arts 19, 24 and 25 ICCPR. For fundamental rights *to, in and through* citizenship education, see UN ComRC ‘General Comment No 1 (2001)- Article 29(1): The Aims of Education’ Doc CRC/GC/2001/1; also 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), 35; Tomaševski, *Human rights obligations: making education available, accessible, acceptable and adaptable*, 43; Verheyde, ‘Article 28: The Right to Education’ 2, 7.

2271 Including Arts 43–44 CFR (Ombudsman, petition).

2272 On correspondence in general, see Peers and Prechal, ‘Article 52: Scope and Interpretation of Rights and Principles’ 1491 ff.

2273 The ECtHR recognizes in Article 3 of Protocol No 1 a solemn commitment with a primary obligation to adopt positive measures to ‘hold’ democratic elections, and deduces a subjective right. See i.a. *Mathieu-Mohin and Clerfayt v Belgium* no 9267/81 (ECtHR 2 March 1987), paras 47–8, 50–53; also *Sitaropoulos and Giakoumopoulos v Greece* no 42202/07 (ECtHR 15 March 2012), para 67. Electoral rights in the UDHR (Art 21) and ICCPR (Art 25) are directly formulated as rights.

In *Matthews v UK*, the ECtHR decided that elections to the European Parliament fall within the scope of Article 3 Protocol 1 ECHR. The UK had not included Gibraltar in the franchise for the European Parliament elections. Ms Matthews, residing in Gibraltar, was denied any opportunity whatsoever of expressing her opinion on the choice of the members of the European Parliament.<sup>2274</sup> Firstly, the ECtHR rejected the argument of the UK that Article 3 was not applicable to elections for the European Parliament. Even though the European Parliament did not exist when Protocol 1 was drafted, the ECHR is a living instrument to be interpreted in the light of present-day conditions. In the obligation contained in Article 3, the word ‘legislature’ does not necessarily mean the national parliament.<sup>2275</sup> The ECtHR recalled that Article 3 enshrines a characteristic feature of an ‘effective political democracy’<sup>2276</sup> and that elections for the European Parliament cannot be excluded from its scope on the ground that it is a supranational, rather than a purely domestic, representative organ.<sup>2277</sup> Subsequently, the ECtHR assessed whether the European Parliament has the characteristics of the ‘legislature’ in Gibraltar. The UK had argued that the European Parliament lacked the most fundamental attributes of a legislature, i.e. the power to initiate legislation and the power to adopt it. The Court referred to the ‘the *sui generis* nature of the European Community, which does not follow in every respect the pattern common in many States of a more or less strict division of powers between the executive and the legislature’. Because the Court must ensure that effective political democracy is properly served in the territories to which the Convention applies, it had regard to the strictly legislative powers of the European Parliament *and* to its role in the overall legislative process (involving the participation of the European Parliament, the Council and the Commission).<sup>2278</sup> The Court found that

the European Parliament represents the principal form of democratic, political accountability in the Community system. The Court considers that *whatever its limitations*, the European Parliament, which derives democratic legitimation from the direct elections by universal

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2274 *Matthews v UK* no 24833/94 (ECtHR 18 February 1999), para 64.

2275 Paras 39–40.

2276 Para 42. Settled case law, see i.a. *Mathieu-Mohin and Clerfayt v Belgium* no 9267/81 (ECtHR 2 March 1987), para 47; *Sitaropoulos and Giakoumopoulos v Greece* no 42202/07 (ECtHR 15 March 2012), para 63.

2277 Para 44.

2278 Paras 48–9.

suffrage, must be seen as that part of the European Community structure which best reflects concerns as to ‘effective political democracy’.<sup>2279</sup>

The European Parliament constitutes a part of the legislature of Gibraltar for the purposes of Article 3 of Protocol 1. The UK had denied the very essence of Ms Matthews’ right to vote and to elect the legislature.<sup>2280</sup>

This reasoning of the ECtHR in *Matthews* provides an argument with regard to other participation rights of EU citizens as well. *Whatever their limitations*, the rights to participate in the democratic life of the Union form part of the EU structure reflecting concerns as to ‘effective political democracy’.<sup>2281</sup> The specific (non-statal) characteristics of these political rights in the EU do not deprive them of their relevance for democracy in the EU.<sup>2282</sup> In respect of other participation rights, too, it is necessary to bear in mind (in the words of the ECtHR) ‘the *sui generis* nature of the European Community, which does not follow in every respect the pattern common in many States’.<sup>2283</sup> In this light, all reasonable measures must be taken to ensure the effectiveness of existing democratic participation rights. One such reasonable measure is to read them in the light of EDC standards. They help to guarantee effective political democracy, which constitutes ‘one of the cornerstones of the Convention system’.<sup>2284</sup> The preamble to the ECHR affirms that fundamental human rights and freedoms are best maintained by an effective political democracy. As early as the 1987 *Mathieu-Mohin and Clerfayt* case, and ever since, the ECtHR has referred to this concept and objective.<sup>2285</sup> The ECtHR frequently reiterates that democracy is the only political model compatible with the ECHR.<sup>2286</sup> In order to establish and maintain the foundations of effective and mean-

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2279 Para 52 (emphasis added).

2280 Paras 54 and 64–5.

2281 This applies *mutatis mutandis* to participatory opportunities based on Art 11 TEU, whatever their limitations.

2282 See § 213 . See also *BVerfG, 2 BvE 2/08 (Lissabon)* 30 June 2009, Absatz-Nr (1-421), para 280 ‘measured against requirements in a constitutional state...’.

2283 *Matthews*, para 48.

2284 *Karácsony and Others v Hungary* no 42461/13 et al (ECtHR 17 May 2016), para 138.

2285 *Mathieu-Mohin and Clerfayt v Belgium* no 9267/81 (ECtHR 2 March 1987), para 47; *Matthews*, para 42.

2286 *United Communist Party of Turkey and Others v Turkey* no 19392/92 (ECtHR 30 January 1998), para 45; *Hirst v UK* no 74025/01 (ECtHR 6 October 2005), para 58.

ingful democracy governed by the rule of law, the rights guaranteed under Article 3 of Protocol 1 are of prime importance: the ECHR ‘establishes a close nexus between an effective political democracy and the effective operation of Parliament’.<sup>2287</sup> While the rights to vote and to stand for election are not absolute and member states have a wide margin of appreciation, they cannot hold elections in conditions that ‘curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness’.<sup>2288</sup> National conditions ‘must not thwart “the free expression of the opinion of the people in the choice of the legislature”’.<sup>2289</sup> Such ‘free expression’ implies freedom of expression in society.<sup>2290</sup> Free formation of the voter’s opinion presupposes a minimal understanding of the system to which the vote relates. As analysed in Chapter two, the ECtHR has interpreted the ECHR rights in the light of recommendations of the Committee of Ministers.<sup>2291</sup> It can be assumed that the ECtHR would pay particular attention to the Recommendation on the Charter on EDC/HRE of the Committee of Ministers when interpreting Article 3 of Protocol 1 to the ECHR.<sup>2292</sup> Effective political democracy is closely related to EDC standards, as appears from the normative framework of the Council of Europe.<sup>2293</sup>

It is tempting to take the last step in the reasoning, i.e. to apply Article 52(3) CFR and to bring Article 3 of Protocol 1, thus interpreted in the light of EDC standards, into the EU legal order via an interpretation of Article 39(2) CFR, which corresponds to it.<sup>2294</sup> The mechanism is that recommendations of the Committee of Ministers of the Council of Europe

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2287 *Karácsony and Others v Hungary* no 42461/13 et al (ECtHR 17 May 2016), para 141. Also *Scoppola v Italy (No 3)* no 126/05 (22 May 2012), paras 81–3.

2288 *Mathieu-Mohin and Clerfayt v Belgium* no 9267/81 (ECtHR 2 March 1987), paras 51–2; *Matthews v UK* no 24833/94 (ECtHR 18 February 1999), para 63; *Hirst v UK* no 74025/01 (ECtHR 6 October 2005), para 56.

2289 *Mathieu-Mohin and Clerfayt*, para 52; *Matthews*, para 63.

2290 I.a. *United Communist Party of Turkey and Others v Turkey* no 19392/92 (ECtHR 30 January 1998), para 45. See further van Dijk and others, *Theory and practice of the European Convention on human rights* 918; Grabenwarter, *European Convention on Human Rights: Commentary* 403: free formation of the voter’s opinion, protection against indoctrination.

2291 *Demir and Baykara v Turkey* no 34503/97 (ECtHR 12 November 2008 *ibid.*, para 76; with regard to the right to education, i.a. *Horváth and Kiss v Hungary* no 11146/11 (ECtHR 29 January 2013). See §§ 42–44, and text to n 355.

2292 Text to n 370.

2293 §§ 30–40.

2294 In *Delvigne*, the ECJ implicitly included the ECtHR protection of the electoral right for prisoners: see analysis of Gundel, ‘Der Verlust der bürgerlichen

can have legal effects in the interpretation of ECHR rights and that these rights thus interpreted have legal effects in the EU legal order via Article 52(3) CFR. However, the missing link here must be acknowledged: the Explanations to the CFR do not say that Article 39 CFR corresponds to any provision of the ECHR.<sup>2295</sup> The only authority is the application by the ECtHR of Article 3 Protocol 1 ECHR to the European Parliament in *Matthews*. The argument based on the requirement of effective political democracy in the ECHR legal order can thus not be transposed as such via Article 52(3) ECHR in conjunction with Article 39(2) CFR. However, the substance of the ECHR reasoning remains inspiring, particularly in the light of the Memorandum of Understanding.<sup>2296</sup> A reading of the right to vote for the European Parliament in the light of EDC standards—aiming at an effective political democracy—mitigates in favour of the incorporation of an EU dimension in national EDC. Moreover, the Explanations state that Article 39(2) CFR ‘takes over the basic principles of the electoral system in a democratic State’. These principles include respect for the ECHR.<sup>2297</sup>

307 *Interpretation of the right to vote in harmony with constitutional traditions*

Another interpretation rule for the right to vote in the CFR is laid down in Article 52(4) CFR. In so far as Article 39(2) CFR recognises a right resulting from the constitutional traditions common to the Member States, it must be interpreted in harmony with them. Voting rights are explicitly set out in many Member State constitutions. As analysed in Part two, EDC

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Ehrenrechte als Eingriff in die Grundrechtcharta—Neues zur Reichweite des EU-Grundrechtsschutzes gegenüber den Mitgliedstaaten und zur lex-mitior-Garantie’, 181; van Eijken and van Rossem, ‘Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship?’, 128 (Charter-centrism).

2295 For other rights, the Explanations refer to corresponding rights, e.g. Art 48 on the presumption of innocence and right of defence. It is only ‘in so far as’ (Art 52(3) CFR) there is correspondance of rights, that the meaning and scope are the same as in the ECHR (as interpreted by the ECtHR).

2296 See § 22 .

2297 Cp J Shaw, ‘Prisoner voting: now a matter of EU law’ 2015 <[eulawanalysis.blogspot.com/2015/10/prisoner-voting-now-matter-of-eu-law.html](http://eulawanalysis.blogspot.com/2015/10/prisoner-voting-now-matter-of-eu-law.html)>: The adoption in Art 39(2) of the basic principles of the electoral system in a democratic state (Explanations) is presumably a reference to ECHR case law on Art 3 Protocol 1.

can—to a certain extent—be seen as part of the common constitutional traditions (or constitutional practices) linked with voting rights.<sup>2298</sup>

As no uniform procedure has yet been laid down, the election of the Members of the European Parliament must take place in accordance with the ‘principles common to all Member States’ (Article 223 TFEU).<sup>2299</sup> The Explanations to Article 39(2) CFR provide that it ‘takes over the basic principles of the electoral system in a democratic State’. Can, on a wide interpretation, EDC standards be seen as part of these principles? All Member States are committed to the EDC principles in the Recommendation on the Charter on EDC/HRE. To prepare young voters for national elections, schools provide learning about national institutions. In the same way, schools should add an EU dimension to prepare for European Parliament elections. The elections for the European Parliament illustrate the intertwining of national and EU law (the Electoral Act states that the electoral procedure shall be governed in each Member State by its national provisions<sup>2300</sup>). This interlinking could be reflected by adding an EU dimension to national EDC on the topic of elections. It would be in line with the aim of future EU electoral law to enhance the effectiveness of the system and ‘to bring Members of the European Parliament closer to their voters, in particular the youngest amongst them’.<sup>2301</sup>

### *308 Conclusion: a sound legal basis*

The answer to the question as to whether the EU *has* the competence to act in the field of EDC and promote the EU dimension (the conferral question) is positive: Article 165 TFEU is a sound legal basis for EU action to support the EU dimension of EDC, including for static citizens, based on the general notion of quality education in paragraph 1 and on the specific objectives in paragraph 2, i.e. the European dimension in education (first indent) and the participation of young people in democratic life in Europe (fifth indent).

The next two questions are: Does the EU need to *use* that competence? (the subsidiarity question in the strict sense) and, if so, *to what extent* does it need to do so (proportionality)?

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2298 See § 89, nuanced § 94.

2299 European Parliament Resolution of 11 November 2015 on the reform of the electoral law of the European Union [2017] OJ C366/7, recital J.

2300 Art 7 Act concerning the election of the representatives of the Assembly by direct universal suffrage [1976] OJ L278/5 (Electoral Act), as amended.

2301 European Parliament Resolution of 11 November 2015 on the reform of the electoral law of the European Union [2017] OJ C366/7, recital B.

