

*PART I Education for Democratic Citizenship and the Council of
Europe*

Introduction: Relevance of Council of Europe norms on education for the EU and its Member States

17 *Structure of Part one*

Part one examines the Charter on EDC/HRE as an anchor point for a neutral and commonly accepted concept of citizenship education. That concept will be examined with regard to EU citizens in Parts two and three.

The Introduction to Part one provides an initial explanation as to why a Council of Europe instrument has been chosen as an anchor point and how it is relevant for the EU and its Member States.¹¹⁹

Chapter one is descriptive. The Charter on EDC/HRE is described as to its form (non-binding) and its substance (EDC concept and principles) in section A, and is then situated in its normative context in section B. The account of the genesis and the restatements of the Charter by Council of Europe bodies provides insight into the rationale and the consistency of Council of Europe action on EDC. Against this background, Chapter two assesses the effects of the Charter in the Council of Europe legal order through an analysis of case law of the ECtHR (sections A and B). The argument that EDC standards carry great weight is developed further in section C based on criteria borrowed from scholars. Strengths and weaknesses of the Charter are pointed out. The Charter on EDC/HRE has a high degree of normativity, reflecting the European consensus on the need for, the concept, and the principles of EDC and HRE. Finally, in section D, the Charter on EDC/HRE is examined in the context of some other epistemological approaches in order to establish its significance as an anchor point as to substance. Caveats about citizenship education in general should be acknowledged before addressing the question of citizenship education for the EU citizen. It will be concluded that the Charter on EDC/HRE and the EDC standards it contains, form a reliable anchor point for the analysis in the following parts of the study.

18 *An unconvincing starting point?*

One may wonder why a recommendation of the Council of Europe has been chosen as an ‘anchor point’ for this study. Recommendations are not

119 Further explained in Chapters two, three and four (see §§ 74 129 145).

binding and the Council of Europe has a relatively weak reputation.¹²⁰ Seen from the angle of EU law, where many binding norms have direct effect and primacy, causing national legislation to be set aside, this may appear to be a weak starting point. To motivate the reader for the subsequent analysis of Council of Europe instruments, I will first recall a number of provisions of the Council of Europe Statute, EU primary law, and the Memorandum of Understanding between the EU and the Council of Europe. The standards set by the Council of Europe are relevant both from the perspective of the EU Member States and from that of the EU.

19 *Members of the Council of Europe, parties to the Statute*

With regard to the EU Member States, it is recalled that all EU Member States (hereafter capitalised, as in the EU Treaties) are among the 47 member states of the Council of Europe (hereafter not capitalised, as in the Charter on EDC/HRE). They are parties to the Statute (Article 2), which is a binding international agreement.¹²¹ The analysis of the legal status and effects of the Charter on EDC/HRE is relevant for them in their capacity as member states of the Council of Europe. In that capacity, EU Member States participate in the norm-setting of the Council of Europe and are called upon to give effect to the norms in their domestic legal orders. Each member state must accept the principles of the rule of law and of the enjoyment by all persons of human rights, and must collaborate sincerely and effectively to achieve the aims of the Council (Article 3 Statute, sanctioned by Article 8).

At the same time, EU Member States are actors in the EU. Their legislative, executive and judicial authorities are involved in the adoption, implementation and enforcement of EU decisions.¹²² In that capacity, the three following arguments are also relevant for them.

120 G Sasse, 'The Council of Europe as a Norm Entrepreneur: The Political Strengths of a Weak International Institution' in N Walker, J Shaw and S Tierney (eds), *Europe's Constitutional Mosaic* (Hart 2011) 171. See also text to n 398.

121 Statute of the Council of Europe (signed in London, 5 May 1949; entry into force 3 August 1949), ETS No 001. See signatures and ratifications in <www.coe.int/en/web/conventions/full-list>. EU Member States who joined the CoE more recently are Hungary (1990); Poland (1991); Bulgaria (1992); Estonia, Lithuania, Slovenia, the Czech Republic, the Slovak Republic and Romania (1993); Latvia (1995); and Croatia (1996).

122 K Lenaerts and P Van Nuffel, *European Union Law* (R Bray and N Cambien, eds 3rd edn, Sweet & Maxwell 2011) 609 ff.

20 *Sharing foundational values*

From the perspective of the EU, three arguments stand out as a justification for an analysis of Council of Europe norms on EDC. Firstly, the Council of Europe and the EU share foundational values. Democracy, the rule of law and respect for human rights, which are at the core of the Council of Europe mission (Article 1 and 3 Statute), are also values on which the Union is founded (Article 2 TEU). Only European States which respect these values can become Member States of the Union (Article 49 TEU, and Article 7 TEU on a clear risk of a serious breach).

In the Council of Europe, as in the EU normative order, the rule of recognition is not neutral, but is value-charged.¹²³ In the preamble to the Statute, the governments of the member states of the Council of Europe reaffirm ‘their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy’.¹²⁴ Promoting these values is its core mission¹²⁵ and the Council of Europe is ‘[f]irmly convinced that education and training play a central role in furthering this mission’.¹²⁶ Democracy, the rule of law and human rights are the values at the basis of the commitment of Council of Europe member states to the EDC project and of ‘the standards they are setting themselves to achieve.’¹²⁷ Certainly, democracy and human rights are founded on law and institutions. Yet, as Mr. Thorbjørn Jagland, Secretary General of the Council of Europe observed:

123 For the CoE legal order, see Pinto de Albuquerque, Partly dissenting opinion in *Muršić v Croatia* no 7334/13 (ECtHR 20 Oct 2016), para 26.

124 Third recital.

125 Repeated over and over again in CoE instruments. All activities of the CoE must contribute to the fundamental objective of promoting human rights, democracy and the rule of law, see i.a. CoE Third Summit of Heads of State and Government, The Declaration and the Action Plan (Warsaw, 16-17 May 2005), para 1.

126 CoE Recommendation CM/Rec(2010)7 of the Committee of Ministers to member states on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (11 May 2010), second and third recital. See also CoE Recommendation Rec(2002)12 of the Committee of Ministers to member states on education for democratic citizenship (16 October 2002), para 1; and text to n 233.

127 Explanatory memorandum to CoE Recommendation CM/Rec(2010)7 of the Committee of Ministers to member states on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (11 May 2010), para 24.

While democratic institutions are crucial, they will only work if they build on a democratic culture and a culture of human rights; and in building this culture, for each generation, we need our education systems to play a key role.¹²⁸

The EU institutions, too, are convinced that education plays a central role in furthering a culture of democracy and human rights. The European Parliament, the Council and the Commission confirm the role of education in this respect.¹²⁹

21 *Cooperation of the EU with the Council of Europe, in particular in education*

Secondly, the EU 'shall' cooperate with the Council of Europe in general (Article 220 TFEU) and on education in particular (Article 165(3) TFEU). Article 220 TFEU states that the Union *shall* establish all appropriate forms of cooperation with the organs of the Council of Europe. Article 165(3) TFEU provides a specific legal basis: the Union and the Member States *shall* foster cooperation with competent international organisations in the field of education, in particular the Council of Europe.¹³⁰

While sharing values, the Council of Europe and the Union have different objectives, as appears from their constitutional documents.

For the EU, education is not a central preoccupation. Absent from the Treaty of Rome, for a long time education only appeared incidentally to Community action in the economic sphere. The first instance of Community action in the field of education dates from the 1970s (i.a. vocational training related to the single market).¹³¹ The 1992 Treaty of Maastricht

128 CoE Proceedings of the Conference on 'Human Rights and Democracy in Action - Looking Ahead: The Impact of the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education' (Strasbourg, 29-30 November 2012), p 7. See also Thorbjørn Jagland's Foreword to CoE Reference Framework of Competences for Democratic Culture, Vol 1: Context, concepts and model (2018). Further CoE Third Summit of Heads of State and Government, The Declaration and the Action Plan (Warsaw, 16-17 May 2005); in the same way CoE Report of the Group of Eminent Persons of the Council of Europe, *Living together: combining diversity and freedom in 21st century Europe* (2011) 37.

129 See adopted instruments in i.a. §§ 118 120 124 127 .

130 Emphasis added. See also Art 167(3) TFEU (culture). Cp Art 166(3) TFEU on vocational training; no specific reference to the CoE.

131 For the key stages of Community action in education, see L Pépin, *The history of European cooperation in education and training. Europe in the making - an example* (European Commission 2006) 22–35.

conferred competences on the EU with regard to education, but only supporting competences.¹³² The recent and limited nature of these competences explains why many legal instruments on education stem from outside the EU legal order.

For the Council of Europe, however, education has been part of its core mission since the very beginning. After the war, the Council of Europe was immediately seen as the appropriate forum for educational cooperation between states,¹³³ and it did pioneering work, for instance on adult education or language learning, fields in which the EU only later took an interest.¹³⁴ At present, education still constitutes a central focus of the standard-setting activities of the Council of Europe, a field in which it has developed significant expertise. Against this background of shared values but different objectives and competences, it is thus not so surprising that this study should start with Council of Europe standard-setting on EDC.

Examining the legal status and effects of Council of Europe recommendations on EDC will moreover make it possible to take a broader perspective. In the specific context of the EDC recommendations, the basic question becomes: are these recommendations appropriate as a reference framework for EU policy and how effective are they at a normative level?

22 *Recognised benchmark and shared priority*

Thirdly, the EU recognises that the Council of Europe sets the benchmark for human rights, the rule of law and democracy, and mentions EDC and HRE as a shared priority and focal area for cooperation in the Memorandum of Understanding (MOU).

The 2007 Memorandum of Understanding between the EU and the Council of Europe (MOU) was the response to a call by the Council of Europe Heads of State and Government at the 2005 Warsaw Summit ‘to create a new framework for enhanced co-operation and interaction in areas of common concern, in particular human rights, democracy and the rule of law’, as they were ‘determined to ensure complementarity of the Council of Europe and the other organizations involved in building a demo-

132 Arts 126–127 Treaty on European Union, signed at Maastricht on 7 February 1992 [1992] OJ C191/1.

133 See i.a. CoE Standing Conference of European Ministers of Education, Resolution on the activities of international organisations in the fields of education and science (No 3) and Resolution on future meetings of the Ministers of Education (No 4) (The Hague, 12–13 November 1959).

134 Pépin, *The history of European cooperation in education and training. Europe in the making - an example* 51–52, 83, with other examples.

cratic and secure Europe'.¹³⁵ The Heads of State and Government of the member states stated among their principal tasks: 'We will make full use of the Council of Europe's standard-setting potential'.¹³⁶ Several provisions of the MOU are applicable to education for democratic citizenship and human rights.

Under its first heading, the Memorandum sets out 'Purposes and principles of co-operation', seeking 'to achieve greater unity between the states of Europe through respect for the shared values'.¹³⁷ In 'all areas of common interest', the relationship between the Council of Europe and the EU will be developed.¹³⁸ Paragraph 10 states that '[t]he *Council of Europe* will remain the benchmark for human rights, the rule of law and democracy in Europe'.¹³⁹ Cooperation 'will take due account of the comparative advantages, respective competences and expertise' (avoiding duplication and fostering synergy). It 'will search for added value and make better use of existing resources'. It is understood that the Council of Europe and the EU 'will acknowledge each other's experience and standard-setting work, as

135 CoE Third Summit of Heads of State and Government, The Declaration and the Action Plan (Warsaw, 16-17 May 2005), para 10. Follow-up in J-C Juncker, *Council of Europe - European Union: 'A sole ambition for the European continent', Report to the attention of the Heads of State or Governments of the Member States of the Council of Europe* (2006). See earlier CoE Compendium of Texts governing the relations between the Council of Europe and the European Union (2001). On the cooperation, see F Benoît-Rohmer and H Klebes, *Council of Europe Law - Towards a pan-European legal area* (CoE 2005) 146 ff; T Joris and J Vandenberghe, 'The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows' (2008-2009) 15 *Columbia Journal of European Law* 1; E Cornu, 'The impact of Council of Europe Standards on the European Union' in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Asser Press 2013) 116-120.

136 CoE Third Summit of Heads of State and Government, The Declaration and the Action Plan (Warsaw, 16-17 May 2005), Action Plan, para 3, Guidelines, paras 1 and 3. See also CoE Second Summit of Heads of State and Government, Final Declaration and Action Plan (Strasbourg, 10-11 October 1997).

137 Memorandum of Understanding between the Council of Europe and the European Union (2007), paras 1 and 8.

138 Para 9, 'in particular the promotion and protection of pluralistic democracy, the respect for human rights and fundamental freedoms, the rule of law, ...'.

139 Emphasis added. Compared to previous documents, a new recognition, see M Kolb, *The European Union and the Council of Europe* (Palgrave Macmillan 2013) 153.

appropriate, in their respective activities.’¹⁴⁰ Undeniably, under these provisions of the first heading of the MOU, the Charter on EDC/HRE counts as an ‘existing resource’. If it is a Council of Europe standard and to be seen as part of ‘the benchmark for human rights, the rule of law and democracy in Europe’, it is ‘appropriate’ that the EU ‘acknowledges’ the Council of Europe’s experience and ‘standard-setting work’ in the field of EDC/HRE. It is thus relevant to examine the legal status and effects of norms on EDC and to see in what legal form the EU ‘acknowledges’ them.

Under a following heading, the Memorandum mentions EDC and HRE *expressis verbis* among the ‘Shared priorities and focal areas for co-operation’.¹⁴¹ In the area of common interest ‘Human rights and fundamental freedoms’, the Memorandum states that the EU ‘regards the Council of Europe as the Europe-wide reference source for human rights’, that ‘the relevant Council of Europe norms will be cited as a reference in European Union documents’ and that cooperation between the Council of Europe and the EU will include the promotion of human rights education.¹⁴² Applying the provisions of this heading, the Charter on EDC/HRE undoubtedly qualifies as a ‘relevant Council of Europe norm’ to be cited as a reference in EU documents.¹⁴³ In the area of common interest ‘Education, youth and the promotion of human contacts’, it is stated that ‘[t]he Council of Europe and the European Union will co-operate in building a knowledge-based society and a democratic culture in Europe, in particular through promoting democratic citizenship and human rights education.’¹⁴⁴ In the youth field, cooperation will aim ‘to empower young people to participate actively in the democratic process’.¹⁴⁵ The Council of Europe and the EU ‘will draw on each other’s expertise and activities to promote and strengthen democracy and good governance’ as well as ‘democratic stability’.¹⁴⁶ Applying these provisions, the relevance of an

140 Para 12. See also para 25: ‘to the extent necessary the Council of Europe and the European Union will consult each other at an early stage in the process of elaborating standards’. A difficult provision in the negotiation, *ibid*, 153.

141 Para 14.

142 Paras 17 and 21.

143 Reception of the Charter on EDC/HRE in the EU legal order is analysed in Part two.

144 Para 36. See CoE Third Summit of Heads of State and Government, The Declaration and the Action Plan (Warsaw, 16-17 May 2005), Action plan, III, 3.

145 Para 37.

146 Paras 27 and 30.

analysis of the Charter on EDC/HRE from the perspective of EU law and EU citizenship speaks for itself.

Both the EU institutions and the Council of Europe continue to refer to the 2007 Memorandum of Understanding.¹⁴⁷ In the 2010 Stockholm Programme, the European Council defines strategic guidelines for the development of an area of freedom, security and justice. It considers that the 'work of the Council of Europe is of particular importance. It is the hub of the European values of democracy, human rights and the rule of law. The Union must continue to work together with the Council of Europe based on the Memorandum of Understanding'.¹⁴⁸ In line with the MOU, the Council of Europe and the EU do indeed cooperate on EDC/HRE 'within their respective policy frameworks' and in various forms.¹⁴⁹

What is the legal value of the MOU? Admittedly, this question is the subject of discussion among academic writers.¹⁵⁰ It appears from the negotiating process that the EU did not want to create a legally binding instrument.¹⁵¹ Moreover, the terminology used in the Memorandum is that of a non-binding instrument (e.g. constant use of 'will' instead of 'shall').¹⁵² However, it cannot be denied that the MOU was signed by the EU, represented by the President of the Council and by the European Commis-

147 CoE Parliamentary Assembly Recommendation 2060(2015) 'The implementation of the Memorandum of Understanding between the Council of Europe and the European Union', para 6.

148 European Council, The Stockholm Programme — An open and secure Europe serving and protecting citizens [2010] OJ C115/1, 7(6). Further cooperation in line with the MOU: Commission Communication 'Strengthening the rule of law within the Union: A blueprint for action' COM(2019) 343 final; CoE Committee of Ministers Summary Report on co-operation between the Council of Europe and the European Union Helsinki (16–17 May 2019) CM(2019)67-final; CoE Parliamentary Assembly Recommendation 2151 (2019) 'Establishment of a European Union mechanism on democracy, the rule of law and fundamental rights'.

149 See § 124 ff.

150 See Kolb, *The European Union and the Council of Europe* 142–143, with references.

151 Ibid 152; see also 162: a main contentious issue of the MOU was its legal nature (the CoE preferred it binding, the EU was hesitant). The drafting of the text took over two years and was 'very difficult' (ibid, 146).

152 Ibid 143, 151 (only the preamble in the beginning of the document reminds of a treaty).

sion.¹⁵³ It is certainly an agreement expressing a political commitment.¹⁵⁴ It is thus relevant to examine how the Charter on EDC/HRE fits into the standard-setting work of the Council of Europe and in what way it is part of the benchmark for human rights, the rule of law, and democracy recognised by the EU. Although in EU law, most attention has been directed at the Council of Europe standards on human rights (EHCR), standards on democracy are just as important. Indeed, they belong to the shared priorities and focal areas for cooperation.

In the light of the provisions of EU primary law cited above, the Council of Europe Statute, and the MOU, it can be concluded that the analysis of the Charter on EDC/HRE which follows is relevant, both from the perspective of the Member States and that of the EU.

153 Signed in Strasbourg on 23 May 2007. Commissioner for External Relations, Benita Ferrero-Waldner, represented the European Commission. Germany had the presidency of the Council of the EU.

154 Kolb, *The European Union and the Council of Europe* 142.

