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# Education, multiculturalism and the EU Charter of Rights

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## ABSTRACT

This paper presents an argument in favour of developing a multiculturalism policy for the EU, by reference to the potential role which could be played by the Charter of Fundamental Rights in this respect. The provisions on education and culture in the Charter are analysed, with a view to examining how they might be used – in conjunction with existing EU policies on education and culture – to engage with the issues of diversity, tolerance and respect which are raised by what is called the ‘promise of multiculturalism’.

## 1. GENERAL INTRODUCTION

Traditionally, questions of education and culture have frequently been excluded from human rights instruments, because of the difficulties of definition, scope of protection and means of protection which are so commonly associated with social rights. Of course, the inclusion of economic and social rights in the Charter, alongside more traditional civil liberties and indeed political rights, was regarded as one of the great victories for the Charter and the process whereby it was elaborated – the now infamous Convention. Even so, the specific provisions on education and culture are hardly the most dynamic examples of the codificatory approach to drafting which lay at the heart of the Charter’s evolutionary process and of the intention to promote the indivisibility of the universal values of human dignity, freedom, equality and solidarity.

The provisions on education are a slightly odd little *pot pourri*. There is, first, the ‘right to education’ itself, but with the link made between education and economic development in the crudest possible way through the addition of the right of access to vocational and continuing training (Article 14(1)). This provides the most concrete linkage between these provisions and the current provisions of the EC Treaty on the promotion of policies on vocational training and education (Articles 149-150 EC). In addition, there is the requirement that the right must include the ‘possibility’ of receiving free compulsory education (a strange phrasing in English) (Article 14(2)) and finally explicit recognition of respect for the freedom to found educational establishments, including a reference to the religious, philosophical and pedagogical convictions of parents (Article 14(3)). This seems to guarantee, for example, the right to establish faith schools. These provisions should be read in the light of Article 10 (freedom of thought, conscience and religion) and Article 24 (rights of the child). In contrast, there is only one provision on culture in the Charter. Article 22 sets out a guarantee of respect by the Union for cultural diversity, along with linguistic and religious

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<sup>1</sup> Many thanks to Tammy Hervey and Robert McCorquodale for helpful comments on the draft presented at the Nottingham Workshop: *Economic and Social Rights under the EU Charter of Fundamental Rights: a legal perspective*, June 2002. This paper is to appear in T. Hervey and J. Kenner, eds, *Economic and Social Rights under the EU Charter of Fundamental Rights* (Oxford: Hart, forthcoming 2003); permission to include the paper in ConWEB is acknowledged with thanks to the editors and the publisher.

diversity, and it is located for reasons that might require a little elaboration in the Equality chapter.

Yet despite those cautionary words of introduction, we find something positive in the the very presence of provisions on education and culture in the Charter. Even though the Charter is declaratory, does not in any way develop Community competence, and has very uncertain effects *vis-à-vis* the Member States which have declined even to proclaim it as a formal instrument, these provisions are, in our view, none the less an important symbol of a developing awareness of issues such as multiculturalism and positive respect for diversity at the transnational and supranational levels, as well as the economic and cultural importance of education in modern societies.

However, when we come to muse upon these provisions and the possible interpretations which could be placed upon them as the European Union gradually develops an enhanced human rights culture, we find a dark shadow has been cast over them by a conjunction of recent events and trends. We can name these events and trends quite easily; it would be much more challenging to try to unpick their consequences and effects, and to do so is beyond the scope of this paper. We can only hint at the background conditions under which any discussion of social rights pertaining to education and culture must proceed. In the shadows the terrorist attacks of 11 September 2001, the securitisation agenda which has been taken up by the US and other states in the putative ‘war on terrorism’, as well as the more general reappraisal of policies towards foreigners, immigrants and ethnic minorities which has occurred in many western liberal states. Securitisation policies have proved in many respects popular vote winners, and appear to chime with a widespread fear of immigration and its consequences in terms of the creation of increasingly multicultural societies. To promote policies of multiculturalism, especially those which promote a critical perspective upon immigrant integration and assimilation, apparently fails to respond to a popular wave of hostility towards outsiders and the fear that they take jobs, cause unemployment and ‘swamp’ supposedly monocultural and monoethnic societies (the latter being, in general of course, a myth maintained for the purposes of sustaining a concept of national identity). Yet since there is also widespread recognition that some economic migration is necessary because of labour market gaps in many Western countries, the discourse has shifted towards drawing an increasingly sharp distinction between legal and illegal immigration. Politicians’ rhetoric now focuses on the differences between legitimate mobility for the purposes of serving globalisation by ensuring that skilled human resources move to where the demand for them is best and illegitimate ‘bogus’ mobility on the part of those who ‘claim’ to be asylum seekers or refugees, but who are actually trying to get access to the relatively privileged informal ‘grey’ labour markets of the western capitalist economies where there are large numbers of undocumented workers. Such rhetorics are widely thought to feed the attempts by far right political forces to foster hostility towards immigration, and to suggest that successful multicultural societies are simply a chimera.

The electoral success and even entry of far right populist parties into some level of government, whether national, regional and local, in almost every Member State of the European Union has shocked much mainstream political opinion. Most of these parties operate on platforms which are anti-immigration and anti-foreigner, and they are often specifically hostile towards Islam and Moslems in particular. Interestingly, while the more centrist parties seem generally agreed that the EU – in policy-making terms – is part of the solution to resolving the problems and challenges of immigration in an increasingly globalised world, more extremist forces on both the left and the right tend to see it as part of the problem, destroying the capacity of the nation state to resist destructive global forces such as unwanted population movements and to build either authentic ‘national’ futures (the right) or to check the onward march of global capital (the left). In both cases, it is the deregulatory agendas which the EU is said to promote which are put under the microscope.

It is impossible, in sum, to ignore the apparent dissonance or state of contradiction between on the one hand the assumed contribution which the proclamation of a Charter of Rights for the European Union ought to offer in terms of enhanced awareness of the promises and challenges of a human rights culture and of a policy of multiculturalism, and the current

state of politics as sketched in the last few paragraphs. The pressing question before us in this chapter is whether there is a way out of this state of contradiction.

## 2. PREMISES AND FRAMEWORK OF THE CHAPTER

### 2.1 Aims of the chapter

In this chapter, we concentrate on the possible problem-solving or conflict-reduction capacity of an instrument such as the EU Charter of Fundamental Rights in relation to some specific cases which can be linked to our general diagnosis of ‘malaise’ or worse in the heart of European societies, a malaise which appears to undermine the ‘promise’ of multiculturalism. To take the argument further, we need to define a number of crucial terms.

### 2.2 The promise of multiculturalism

Multiculturalism has become something of a political battleground. One of the themes underlying some of the political developments sketched out here has been an increasing questioning of the liberal acceptance of multiculturalism within a number of European societies – notably the United Kingdom and the Netherlands – as the most constructive and morally sustainable way for public policy to engage with the challenges posed by mass immigration especially since the second world war. Coincidentally, even in states such as France and Germany, where there has been no ‘official’ policy of multiculturalism, in practice there has been a convergence in many fields of public policy towards the types of measures (e.g. on housing, welfare or education) which would in other states such as the UK, the Netherlands or Canada, be recognised as fostering multiculturalism. In all these states, multiculturalism is encountering opposition. Most extremely, this involves the assertion that multicultural societies are inherently wrong, because they lead to the ‘dilution’ of the majority ‘race’ (which is usually perceived as superior). More subtle versions of this argument present multiculturalism, not as bad, but rather as impossible, and argue that attempting to achieve this impossible goal leads to a fragmented society, lacking in patriotism and cohesion, and ultimately giving rise to serious conflict. Within this climate, we consider it essential to reaffirm the nature and goals of multiculturalism. Whilst, as shall be seen, it may not be possible to propose an ultimate solution to the challenges which a multicultural society creates, it is nevertheless important to assert the inherent value in such a society, and consequently the urgency of continuing to search for such a solution.

The discourse of multiculturalism is a relatively new arrival on the social, political and legal scene, at least in Europe.<sup>2</sup> As a consequence, it is easy to forget, and must then be reasserted, that the facts to which multiculturalism is a response are not in themselves new. Since the Roman Empire at least, governments and society have had to grapple with the question of how to ensure social stability in a situation where a population is made up of more than one cultural grouping. At this stage, it is important to specify what we mean by culture. Within the discourse of multiculturalism, cultural groups are defined solely by ethnic or religious identity or affiliation. Within contemporary cultural theory, however, a culture can be based on many types of common characteristics: gender, profession, class, political affiliation, interests and enthusiasms, and much more besides. On this second understanding, we all belong to a number of different cultures and are ourselves multicultural beings, whereas, in the culture of multiculturalism, most people (although not everyone) can be said to belong to only one culture. Within the context of this piece, the narrower meaning is used. However, the insight that we are all part of a number of different cultures is a useful one to bear in mind, as an antidote to the kind of thinking that sees ethnic and religious groups as clearly defined, discrete, and completely determinative of human behaviour. We therefore reject essentialist thinking about human identity and human behaviour. In particular, we reject the tendency, sometimes evident in perceptions of multiculturalism, to reify ethnic identity by reducing individual identity to membership of one culture and by perceiving that culture as

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<sup>2</sup> In Canada, multiculturalism has been ‘official’ policy at least since 1971, when the word was introduced into national political discourse by Pierre Trudeau, if not earlier.

hermetically sealed from outside influences. In a multicultural society more than any other kind of society, individual identity is often affected by connections with a number of different cultural groups, as well as by factors which can only be equated with culture through a tenuous stretching of the meaning of that term

If the co-existence of cultures is a long-standing fact of human society, what, then, is the novelty of multiculturalism? One, narrow, view of multiculturalism would see it as policy or a set of rights which a state enacts in order to respond to the co-existence of cultures within their national territory. A multicultural policy gives specific claims and status to different cultural groups within the society, in order to ensure that they continue as distinct cultural groups rather than being assimilated into a dominant culture.<sup>3</sup> In this paper, however, we want to take a wider view than that. Raz has described multiculturalism as, in part, ‘a heightened awareness of certain issues and certain needs people encounter in today’s political reality.’<sup>4</sup> Rather than being a discrete political theory, it is an indication of a new respect being given to diversity within society, which is itself perceived as a moral virtue. This respect given to diversity can express itself through the granting of rights or the creation of multicultural policies. However, those rights and policies are tools of multiculturalism, rather than multiculturalism itself. The distinguishing feature of multiculturalism is that the recognition of diverse cultures is seen as a good in itself, either because of the inherent value of those cultures and their existence, or, perhaps more persuasively, because respect for human dignity requires an understanding of the fact that belonging to a culture is an important part of being human.<sup>5</sup>

Our rejection of essentialism, however, should lead us to emphasise that this is only one part of being human. A criticism that can be made of multiculturalism as a political project is that it runs the risk of minimising the common humanity which individuals share, as well as the consequent possibilities of cross-cultural communication.<sup>6</sup> This criticism is linked with that which would argue that multiculturalism, in allowing for differential treatment of people according to their identification with different cultural communities, is inherently inimical to individual equality. Answering this criticism would seem to require a lengthy discussion about the concept of equality and how it is achieved; a discussion for which there is no space here. Nevertheless, it can be observed that equality is not equivalent to sameness and that even traditional, Aristotelian conceptions of equality allow for different treatment insofar as differences exist. Whether the fact that, in the EU’s Charter of Rights, Article 22 is found in the section entitled ‘Equality’ means that its drafters saw the respect for diversity as an essential part of equality, rather than opposed to it, is unclear. The implication that cultural diversity involves just another equality claim is unfortunate, but it certainly dovetails neatly with the decision to locate the ‘culture’ provision of the Charter in the Equality Chapter.

Here, a comparison with the Canadian context is instructive. The debates in Canada around the question of multiculturalism have been focused, to a large extent, on the question whether the protection of minorities is best served through the application of traditional rights and a rigid concept of equality, or through a more complex embrace of diversity, not necessarily based on rights discourse.<sup>7</sup> One of the significant problems which arises when a rights-based approach is used is the risk of clashes between different, competing rights. Looking at the list of rights contained within the Equality Chapter of the Charter, potential clashes can be identified between respect for cultural groups and the non-discrimination

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<sup>3</sup> See, for example, W Kymlicka, *Multicultural Citizenship* (Oxford, Clarendon Press, 1995).

<sup>4</sup> J Raz, ‘Multiculturalism’ (1998) 11 *Ratio Juris* 193-205 at p 197.

<sup>5</sup> For this view of culture, see, for example, C Geertz, ‘The Impact of the Concept of Culture on the Concept of Mind’ in *The Interpretation of Cultures: Selected Essays* (London, Fontana Press, 1993); JM Balkin, *Cultural Software* (New Haven, Yale University Press, 1998).

<sup>6</sup> See A Kuper, *Culture: the anthropologist’s account* (Cambridge, Mass., Harvard University Press, 1999).

<sup>7</sup> See JC Bakan and M Smith, ‘Rights, Nationalism and Social Movements in Canadian Constitutional Politics’ (1995) 4 *Social and Legal Studies* 367-390 for a discussion of the limits of rights strategies in this context.

principles concerning gender,<sup>8</sup> sexual orientation, disability,<sup>9</sup> children<sup>10</sup> and race<sup>11</sup>. Consequently, any strategy for promoting respect for cultural diversity must be able to negotiate these clashes.

Many of the debates surrounding this problem are concerned with the situation where certain groups have a level of autonomy within the State and claim that their cultural values do not allow them to respect the rights claims of some of their members: groups such as the indigenous peoples of Canada<sup>12</sup> and the US,<sup>13</sup> and, in some contexts, religious groups in Israel and India.<sup>14</sup> In general, this situation does not pose a significant problem within the EU context, in that those groups or nations with autonomy claims are not ones which are likely to reject rights-based claims on cultural grounds. It is, however, an important issue to consider in the context of education, where the right to educate within a particular cultural context and/or, perhaps more crucially, according to a particular set of religious beliefs, may carry with it a claim for a degree of autonomy on the part of the school. May a faith school refuse to admit children from outside the faith, even when to do so would be indirectly racially discriminatory. May it teach different subjects to boys and girls? May it teach that homosexual behaviour is sinful, to the potential detriment to pupils who are coming to terms with their own sexuality?

A number of proposals have been made as to how to mediate these conflicting rights claims. One argument, typified by the work of Kymlicka, would be to take an individualist approach, arguing that self-government must always be limited by the basic rights of individuals, and that consequently cultural diversity may not be used as a justification for discriminatory policies.<sup>15</sup> At the other extreme, some writers have argued that autonomous groups must be given full rights of self-governance, even if this means them violating the fundamental rights of their members.<sup>16</sup> Both of these approaches involve automatic prioritisation of one or the other set of rights; in the first case, individual rights, and in the second, rights to group autonomy. Shachar has taken a more subtle approach, propounding an 'intersectionist joint governance approach', which would allow groups the right to define their own membership (and thus exclude people on the grounds, for example, of parentage or dogma), but require them to respect the non-discrimination rights of people acknowledged as members.<sup>17</sup> This approach, however, constitutes an uneasy compromise between competing rights, and does not always reach satisfactory results. On the one hand, it is unfortunate, to say the least, not to enforce the often hard-won rights of the individuals simply because it is cultural norms, as articulated by the leadership of the cultural group, who are denying them, rather than the State. On the other hand, cultural groups who are breaking free from oppression and marginalisation can perceive the imposition of individual rights claims as

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<sup>8</sup> The literature on this is substantial, and we draw on it for much of this analysis. The specific issue of the relationship between gender equality and cultural diversity is discussed in more detail in Costello's contribution to this volume.

<sup>9</sup> For example, Islamic attitudes towards dogs can have an impact on guide dog users. We are indebted to Anna Lawson for this point.

<sup>10</sup> For example, is it always in the child's best interests to be educated according to a set of strict religious and/or cultural values?

<sup>11</sup> Particularly in the education context, the desire of a cultural group to educate their children separately can be construed as racially discriminatory.

<sup>12</sup> See M Deveaux, 'Conflicting Equalities? Cultural Group Rights and Sex Equality' (2000) 48 *Political Studies* 522-539.

<sup>13</sup> A Shachar, 'Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation' (1998) 6 *Journal of Political Philosophy* 285-305; J Spinner-Halev 'Feminism, Multiculturalism, Oppression, and the State' (2001) 112 *Ethics* 84-113..

<sup>14</sup> *Ibid.*

<sup>15</sup> Above, n 3.

<sup>16</sup> C Kukathas, 'Are There Any Cultural Rights?' (1992) 20 *Political Theory* 105-139; A Margalit and M Halbertal 'Liberalism and the Right to Culture' (1994) 61 *Social Research* 491-510.

<sup>17</sup> Shachar, above n 13.

further oppression. As Mernissi suggests, in the context of women in the Islamic world, any grant of women's rights can be characterised as 'concessions to the coloniser' and dismissed as cultural imperialism.<sup>18</sup>

Spinner-Halev suggests that the issue of oppression may hold the key to the problem.<sup>19</sup> The reason why multicultural policy is important, he argues, is because of the role it had in freeing cultural groups from state oppression. Therefore, any policy which is adopted must not serve to perpetuate that oppression. Oppression of an individual can take the form of a denial of individual rights, either by the State or by cultural groups. However, it can also take the form of oppression of the culture of which that individual is part. Both forms of oppression are detrimental to the individual; neither is acceptable. This complexity of individual identity is used by Eisenberg to formulate her difference approach to adjudicating cases where a respect for diversity appears to clash with individual equality. Eisenberg argues that such cases should not be dealt with in the form of a clash of rights, but rather by assessing the identity-related impact of the different claims, and choosing the claim which has the least impact on identity as a whole (understood as encompassing a broad range of characteristics including culture, gender, religion and language).<sup>20</sup> In other words, the decision is made which is least oppressive of an individual's identity.

A legal model which facilitates this idea is that of the Canadian Charter of Rights and Freedoms, which approaches cultural diversity, not as a requirement of equality, or a non-discrimination right, but rather as a general principle according to which the rest of the Charter must be interpreted.<sup>21</sup> This means that other key rights within the Charter, such as freedom of association, freedom of speech, freedom of conscience, freedom of religion, the right to fair and just working conditions and, as we shall suggest here, crucially, the right to education, must be interpreted in a way which respects the multicultural nature of the EU.

This approach is effective for two reasons. Firstly, as Eisenberg suggests, it avoids the difficulties and conflicts inherent in mediating a clash of rights. Secondly, it recognises that multiculturalism should only require different treatment in situations where it is necessary to avoid oppression. As Kuper reminds us, the politics of difference represented in multiculturalism can give rise to extreme separatist – and consequently discriminatory and oppressive – policies such as apartheid.<sup>22</sup> Further, it is at least arguable that, even in the West, fundamental rights claims were often originally counter-cultural in nature, in that they gave rights to groups who had traditionally not had those rights. While genuine cultural difference should be respected, it is essential that it is not used as a mask for conservative resistance to reform, and individual rights must continue to be available to members of all cultures as a weapon against oppression, whatever its source. In this way, multiculturalism at its best can reflect our common humanity, not only through the respect of fundamental rights for all, but also through the acknowledgment that cultures are part of our common humanity. Further, multiculturalism can, at its best, facilitate cross-cultural communication and co-operation by providing the context of an informed understanding of and respect for the different cultures concerned.<sup>23</sup>

### 2.3 Multiculturalism and EU policy

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<sup>18</sup> F Mernissi, *Beyond the Veil: Male-Female Dynamics in a Modern Muslim Society* (Cambridge, Mass., Shenkman Publishing Company, 1975) at p vii.

<sup>19</sup> Above, n 13.

<sup>20</sup> A Eisenberg, 'Diversity and Equality: Three Approaches to Cultural and Sexual Difference' Constitutionalism Web-Papers, ConWEB 1/2001 <http://les1.man.ac.uk/conweb/>.

<sup>21</sup> Article 27: 'This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.'

<sup>22</sup> Above n.6.

<sup>23</sup> This constitutes a general defence of multiculturalism. As we will argue later, there are specific reasons why multicultural policies are necessary within the EU.

Most discussion and theorising about multiculturalism assumes the existence of a state of some kind, whether unitary or federal, which has to accommodate cultural pluralism within its boundaries. Questions then arise as to the place which a policy of multiculturalism may have within the EU, that is, within an entity which cannot be equated with a state but which has political authority. The argument that the EU ought actively, for specific as well as general reasons, to foster multiculturalism will be put forward in some detail later on; for now, however, it can be assumed that we believe that the case for multiculturalism is just as persuasive, if not more so, for the EU as for states. However, there are important questions concerning the way in which multiculturalism is to be promoted within the EU, given its particular nature. In the first instance, the thorny issue of competence and the principle of subsidiarity in Article 5 EC are relevant here. While Article 13 EC gives explicit (but shared) competence to the Community to legislate against racial discrimination (*inter alia*), this is only a very small part of what is necessary for the purposes of a full range of policies fostering multiculturalism, and there are no further obvious existing competences within the Treaties. Even beyond that, to what extent is it possible to argue that the goals of multiculturalism can only be sufficiently achieved at Community level rather than the national level, as the principle of subsidiarity would seem to require? Each Member State has a different cultural make-up and history and, it could be argued, requires a different approach to ensure effective cultural pluralism. In particular, given the important role which education plays within a wider multicultural policy, the fact that Member States continue to be protective about their sovereignty in the field of primary and secondary education has to be significant. However, the important point about policy-making in areas such as rights policy or education policy where competence is shared between the Member States and the EU – and indeed where EU competence might be thought only to be complementary to that of the Member States<sup>24</sup> – is to acknowledge that an appropriate policy mix may require some goals to be set at the EU level, while the bulk of implementation measures must be carefully tailored to domestic circumstances. Even goal-setting itself may need to be flexible to take account of differing national traditions and heritages. This could be where the so-called ‘open method of coordination’ and other ‘new governance’ instruments might usefully be invoked as flexible means for encouraging the sharing of best practice between Member States and requiring the benchmarking of national policies against each other.<sup>25</sup>

Secondly, it has traditionally been the case that, within its cultural policy and its foundational frameworks, the EU has been committed, not to the respect of all the cultures which exist within the territory of the Union, but primarily to the respect of the national identities of Member States (see, for example, Article 6(3) TEU). This has to be one aspect of multiculturalism within the EU, but it is by no means the only aspect. An EU policy of multiculturalism would require not only that the EU itself respect the minority cultures within Member States, but also that the EU encourage and require that Member States respect those cultures within their own territory.

These questions about competence, and about the extent to which the EU can interfere in the cultural policy of Member States, render problematic the possibility of a comprehensive EU policy on multiculturalism. *Legally*, it may well be difficult for the EU to justify action in that area. *Politically*, sufficient consensus for such action may be difficult to achieve. *Constitutionally*, however, we would argue that multiculturalism is an imperative for the development of an inclusive and internally and externally responsible Euro-polity.<sup>26</sup> We

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<sup>24</sup> See the careful note prepared by the Secretariat to the Convention on the Future of the Union, *Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored*, Conv 47/02 15 May 2002 which explores these issues in detail.

<sup>25</sup> See generally J Scott and D Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’, (2002) 8 *European Law Journal* 1-18.

<sup>26</sup> J Shaw, *Process, Responsibility and Inclusion in EU constitutionalism: The challenge for the Convention on the Future of the Union*, Federal Trust Constitutionalism Online Essays, [www.fedtrust.co.uk/eu\\_constitution](http://www.fedtrust.co.uk/eu_constitution), July 2002.



would therefore argue that, while the current provisions of the Charter of Rights are perhaps inadequate, the Charter itself is a useful tool for introducing a policy of multiculturalism into the EU legal order. In particular, Article 27 of the Canadian Charter of Rights and Freedoms, referred to above, which takes the form, not of a positive rule but rather of a principle according to which other, more individualistic, rights should be interpreted, could form a useful model for development of the European Charter. In this context, it is important to consider in more detail the use to which the Charter of Rights can be put in the search for a EU policy of multiculturalism.

#### 2.4 What use is a Charter of Rights?

We have begun by arguing that the recognition of cultural diversity and the promotion of a multi-cultural Europe is not only a moral good in its own right, but is also an important aspect in the development of European identity and citizenship as aspects of EU polity-building and constitutionalisation. It is now time to move back to the subject matter of this project and to consider the role that the EU Charter of Rights can play in this process. Apart from instruments in the field of external relations and enlargement (which will be returned to), the Charter is perhaps the strongest EU document in which a requirement for the respect of cultural diversity is found.<sup>27</sup> To this extent, the Charter can be contrasted with the much more limited 1989 Charter of Fundamental Social Rights of Workers, now effectively enshrined in the EC Treaty since the Treaty of Amsterdam, which failed to address the question of diversity in any way. The question remains, however, whether the Charter under scrutiny is indeed capable of offering a solution to the challenges to multiculturalism which we have identified, and of ensuring sufficient respect for diversity to provide a basis for unity within the EU.

Very obviously, the Charter has significant limitations. Its provisions are only addressed to the Union, and thus cannot affect the behaviour of Member States unless they are implementing provisions of Union law. It cannot itself extend the scope of Community or Union competence. Thus, for example, any Member State pursuing policies which are sympathetic to the securitisation agenda, or to a general hostility towards 'foreigners', cannot be prevented by the Charter from doing so unless there are specific provisions of Union law which they are implementing (although of course they might fall foul of Article 7 TEU if there were persistent breaches of fundamental rights). Even within the context of the Union, the Charter is not legally binding and thus cannot affect the normative framework of laws and legal institutions, although it has been used by the Advocates General in the Court of Justice<sup>28</sup> and by some national courts<sup>29</sup> as part of their general human rights jurisprudence or heritage. In a technical legal sense, then, the Charter has very little power and very little potential for achieving anything.

Nevertheless, the Charter can provide a useful starting point from which the Union can proceed. Its utility derives from two factors. First, the Charter was put together through a

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<sup>27</sup> Article 151(4) of the EC Treaty does require the Community to take cultural aspects in account in its action, in particular in order to respect and protect diversity. However, Article 151(1) requires the Community to 'bring the common cultural heritage to the fore'; a statement which would seem significantly to dilute the impact of Article 151(4).

<sup>28</sup> See the opinion of A-G Tizzano in Case C-173/99 *R v Secretary of State for Trade and Industry ex parte BECTU* [2001] ECR I-4881. Although the use of the Charter has usually been restricted to Advocates General, it was referred to by the Court of First Instance in Case T-54/99 *Maxmobil Telekommunikation v Commission*.

<sup>29</sup> In the English courts, for example, the Charter was referred to by the Administrative Court in *R v Wakefield MDC* [2002] 2 W.L.R. 889 (QBD (Admin Ct)), where Maurice Kay J. stated that the Charter was not a source of law in the strict sense, but could be used to interpret, and in this case, using Article 8, the data protection provision, update the ECHR. It was also referred to by the Court of Appeal in *Sepet v Secretary of State for the Home Department* [2001] Imm AR 452, where it was used as part of a long list of evidence for the existence of a fundamental international right of conscientious objection.

process which many have seen as highly positive, being open, deliberative and consensus driven. The Convention which compiled the Charter was relatively representative of the different political interests involved even though human rights lawyers did predominate amongst its members, and, while the involvement of civil society was not perfectly managed, there was some consultation with various representative groups.<sup>30</sup> Subsequently, it was in effect agreed to by all the Member States, in the sense that they actively supported its formal and solemn ‘proclamation’ by the Presidents of the three political institutions (i.e. European Parliament, Commission and Council – the latter representing the Member States) at the Nice IGC in December 2000.<sup>31</sup> At a very basic level, this will give it moral authority in circumstances where the Union or the Member States are in violation of its principles. Neil Walker describes the Charter process as maintaining a significant momentum, even after the disappointment to some of its proclamation in declaratory form at Nice.<sup>32</sup> More broadly, its very existence as an agreed set of human rights principles and thus an expression of common values may well prove to be a springboard for discussion about the way in which those rights are to be put into practice. A dialogue which takes place on the basis of an agreed set of principles and values is more likely to be productive than one where a principled starting point has not been reached. Most fundamental rights adjudication is based around a balancing of different interests, and this will still need to be negotiated. However, the existence of agreed principles according to which this process should be carried out gives it an invaluable head start. Further, strategic questions, such as those concerning problem solving through the extension of EU competence into particular areas, can also be debated on the basis of these agreed principles. As in Canada, a statement of principle within the Charter can be supported and filled out by further legislation and policy developments,<sup>33</sup> although, unlike Canada, such a development would require a specific extension of the competence of the Union.

Secondly, as de Búrca points out, the initial mandate for the Charter suggested that it was aimed primarily at the citizens, rather than at the Union or Member States.<sup>34</sup> It was an exercise in consciousness-raising, even an attempt to engage in political education – to use a very old-fashioned phrase in these days of ‘spin’ – and in making the Union’s commitment to rights more visible to citizens. As such, the very existence of provisions making evident a commitment to cultural diversity, particularly within education, may prove to be a first step along the road of unity through diversity which we have discussed. If multiculturalism is less a concrete situation and more a state of mind which is sensitive to certain issues, in principle, the demonstration of that sensitivity through the inclusion of those issues in a major document such as the Charter should, in itself, be a positive move.

### 3. CASES UNDER THE MICROSCOPE

The Charter, then, has potentially some role to play in mediating the dialogue necessary in order to move towards that unity through diversity which is an explicit goal of the EU. Some of its strengths and limitations have been outlined, in general terms, in the previous section. Here, it is time to look at the specific rights to education and to cultural diversity contained within the Charter, to see what they can and cannot achieve.

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<sup>30</sup> See G de Búrca, ‘The Drafting of the European Union Charter of Fundamental Rights’, (2001) 26 *European Law Review* 126-138; F Deloche-Gaudez, *The Convention on a Charter of Fundamental Rights: a method for the future*, Notre Europe Research and Policy Paper No 15, November 2001 <http://www.notre-europe.asso.fr/fichiers/Etud15-en>.

<sup>31</sup> OJ 2000 C364/1.

<sup>32</sup> N Walker, ‘Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism’, in T Campbell, KD Ewing and A Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford, Oxford University Press, 2001) 119 at p120.

<sup>33</sup> Such as, for example, the Canadian Multiculturalism Act 1988, which makes multiculturalism the official policy of the government of Canada and grants specific enforcement powers.

<sup>34</sup> Above n.30.

### 3.1 The Right to Education

The declaration of a right to education in Article 14 has its source in the constitutional traditions of the Member States and the Article 2 of the First Protocol of the ECHR. However, the right to education is also contained within a number of international human rights agreements, most notably Article 26 of the Universal Declaration of Human Rights (UDHR), Article 13 of the International Covenant for Economic, Social and Cultural Rights (ICESCR) and, within their specific contexts, Article 10 of the Convention to Eliminate Discrimination against Women (CEDAW) and Articles 28-30 of the Convention on the Rights of the Child (CRC). The first thing that becomes apparent on comparing the Charter provision with these provisions is that the international provisions tend to be much broader. It is common to find a general recital as to the purpose and value of education, based on Article 26(2) of the UDHR:

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.

These recitals incorporate reference to relations between cultural groups. Indeed, Article 29(1)(c) CRC states that one goal of education is:

The development of respect for ... his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.

This is, to a large extent, to be assured by allowing parents the right to have their children educated according to their convictions or culture. However, a number of international agreements contain more specific provision for the education of minority cultural and linguistic groups.<sup>35</sup> In addition, the ICESCR is ambitious in its aims to secure, eventually, free education at primary, secondary and tertiary level.

In contrast, the Charter, not unlike Protocol 1, Article 2 of the ECHR, is relatively laconic. It declares a general right to education and, unlike the ECHR, includes within this vocational and continuing education. It also improves on the ECHR in that, paragraph 2 of Article 14 explicitly lays down the principle of free compulsory education which, the explanatory notes tell us, only implies that each child in compulsory education should have the right to attend a school free of charge. This express inclusion of free compulsory education may be taken to imply that there is no right to free non-compulsory education, whether that be a continuation of compulsory education into higher levels of school, college or university, or free access to vocational and continuing training. Thus, while a right to education framed in this way can be understood as giving an entitlement to access to education, it does not give a right to equal access to education: the right to non-compulsory education may be restricted to those who can pay for it, and, even in compulsory education, those who can pay may be afforded more choice as to where their child is educated. While the latter question is not addressed by international human rights instruments, Article 13(2)(b) and (c) ICESCR require the progressive introduction of free education, notably at tertiary level. To that extent, the Charter is narrower in scope in terms of guaranteeing accessibility; presumably, at least in part, because of the political hot-potato of tuition fees in the UK.

This point is particularly significant in the context of vocational and continuing education. While, as we shall discuss later, education policy has a particular identity-forming

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<sup>35</sup> Such as, for example, Article 5(1)(c) Convention against Discrimination in Education; Article 30 CRC.

role within the EU,<sup>36</sup> it is also deeply rooted in the goal of economic development. There is an increasing emphasis within policy making on the development of a dynamic knowledge-based economy, which requires a highly trained workforce, hence the emphasis on vocational training and lifelong learning. More recently, it has also been linked to the development of the information society and the knowledge economy.<sup>37</sup> However, the failure to grant anything more than a basic right of access to such training has significant potential to exclude. This might particularly affect people historically excluded from the workforce, such as those with little previous education, or people with disabilities, who may not be in a position to pay for training, and for whom training may not be seen to be 'cost-effective' by employers or potential employers.<sup>38</sup> For such people, the right to education has a particular significance, as it provides a way into the employment market. However, equally, that right needs to be backed up by practical policies facilitating access.

Further, the Charter contains neither recitals as to the purpose of education or the reasons why such a right is important, nor a right to any particular type of education. Paragraph (3), while focused on the question of providing an education in conformity with the religious, philosophical and pedagogical convictions of the parents, does not confer such a right on parents (although it seems to be inferred, and is contained within the ECHR as well as within other international agreements) but rather grants the freedom to found education establishments, thus allowing for the foundation of schools using particular teaching methods, or teaching according to a specific religious or philosophical agenda. In the context of the ECHR rights, the European Court of Human Rights has held that this right can be guaranteed merely by permitting the existence of private schools, and that the right does not permit interference with the defined curriculum within a school, provided it is delivered objectively and there is no indoctrination.<sup>39</sup> There is a concordance between this freedom, and the (single market) freedom to provide education services and to establish educational establishments guaranteed under Articles 43 and 49 EC.<sup>40</sup> However, none of this confers a right on individuals to receive an education which conforms to their particular convictions or the convictions of their parents. That right could only be effectively exercised in situations where such an education is available, and available without charge; a situation which may prove unattainable in States with a commitment to a secular identity, such as France. As Dunbar points out, such a right granted with no guarantee of State support is a 'hollow right at best'.<sup>41</sup> Further, neither the Charter nor the ECHR provide any rights or protections for those who wish to educate their children in a particularly cultural, or linguistic, context. The European Court of Human Rights has made it clear that what is protected by Protocol 1, Article 2 is the religious or philosophical convictions of the parents, rather than their culture or language; beliefs, in other words, rather than identity.<sup>42</sup> In particular, in the *Belgian Linguistic* case, the Court stated that the Convention grants no right to education in a minority language, given that the State has an interest in preserving linguistic unity.<sup>43</sup>

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<sup>36</sup> On the background of EU education law see B de Witte (ed.), *European Community Law of Education* (Baden-Baden, Nomos, 1989).

<sup>37</sup> J Shaw, 'From the Margins to the Centre: Education and Training Law and Policy' in P Craig and G de Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999) 555 at p582 *et seq.*

<sup>38</sup> Article 5 of the Equal Treatment Dir, requiring reasonable accommodation for disabled persons might apply here, although it is open to question whether bearing the costs for training would impose a disproportionate burden on the employer.

<sup>39</sup> *Kjeldsen, Busk Madsen and Pedersen v Denmark* Series A, no 23 (1979-80) 1 EHRR 711.

<sup>40</sup> This is implicit from Case 305/87 *Commission v. Greece* [1989] ECR 1461 in which the Court held that the rights of non-nationals to own property were guaranteed under what were then Articles 48, 52 and 59 EEC.

<sup>41</sup> R Dunbar, 'Minority Language Rights in International Law' (2001) 50 *International and Comparative Law Quarterly* 90-120, at p 110.

<sup>42</sup> *Campbell and Cosans v United Kingdom* Series A, no 60 (1991) 13 EHRR 441.

<sup>43</sup> *Belgian Linguistic Case* Series A, no 6 (1979-80) 1 EHRR 252.

As it stands, therefore, the Charter seems to provide a very basic, and limited, right to education. However, the right to education has a much broader scope than this. In its General Comment on the Right to Education, the UN Committee on Economic, Social and Cultural Rights outlined the basic features which need to be assured in order to give meaning to any declaration of that right.<sup>44</sup> The comment begins with an important statement of the nature of education rights:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.

This statement clarifies the central role which education must have in society, and, importantly, its relationship with other rights. Education is the means of empowering individuals and groups to make full use of their rights and participate within society. However, according to the General Comment, education rights are also dependent on other factors. For education rights to be sufficiently guaranteed, they must be available, accessible to all (physically, economically, and in a non-discriminatory way), acceptable (relevant, culturally appropriate and of good quality) and adaptable to diverse social and cultural settings. Thus, while education can be instrumental in making declared rights effective within societies, education rights for all can only be *fully* operationalised in the context of wider rights of non-discrimination and of the recognition of cultural and social diversity.

Looking at it this way, a number of weaknesses can be identified, not only within Article 14 itself, but within the wider context of the Charter. Economic accessibility is limited by the failure of the Charter to make any statement about free non-compulsory or vocational education, despite the implication within the ICESCR that wealthier signatory states should be able to assure free education at all levels. Acceptability and adaptability are also compromised by the failure of the Charter explicitly to recognise any right to an education within a specific cultural or linguistic context. It is this second point which is the focus of this piece.

### **3.2 The Link Between Education and Culture**

The connection between education and culture made in this piece mirrors the fact that both areas are dealt with by the same Directorate-General in the Commission. It is important, however, to consider why that might be the case. There are important reasons why we are following this institutional lead, which are related to the interconnectedness of, and clashes between, cultural rights and educational rights.

Despite sharing a Directorate-General and indeed a common website on the *Europa* server, an examination of the latter would suggest the links between the two elements are not carried further than the D-G's mission statement. That statement has recently been rewritten, and currently gives little help in the search for common ground between the two policy areas, linking them by a mission to 'bring people together to foster respect and understanding'. A previous mission statement was more explicit about how this goal is part of both education and cultural policy. The keyword here is identity:

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<sup>44</sup> *The right to education: Article 13.* E/C.12/99/10, CESCR General Comment 13.

Education and culture in the broad sense ... not only deeply rooted in national identities but also vectors of globalisation, from the most scholarly level to the daily realities of the supermarket, the cinema and the Saturday football match.

Thus, there connotes a recognition that education and culture are areas where national sensitivities are particularly apparent. However, it is also noted that, as ‘vectors of globalisation’, education and culture are ways in which a European identity can be fostered – almost as a counterculture. Using education and culture to add a European dimension to individual identity, through policies such as educational mobility, promotion of language learning, the support of cultural co-operation projects with an European dimension, the designation of European Capitals of Culture, and the establishment of a common market in broadcasting is an important policy theme. This somewhat impoverished view of cultural policy can have significant consequences. If cultural policy is seen as a vehicle for promoting European integration and a European identity, rather than as a valid goal in itself, it is surely likely that such policy runs real dangers of emphasising the common ground that European share at the expense of the differences and, in particular, of excluding from cultural consideration those groups which do not have a long history of European identity.<sup>45</sup>

This emphasis on identity forms part of the link between education and culture. Just as education and culture are vectors of globalisation, so education can be understood as a vector for the transmission of culture. EU policy sees educational mobility not only as a way of helping individuals learn more about different EU countries, but more generally as a way of introducing an European dimension to the identities of those participating in such schemes. This is because education, particularly education for children and young people, is a prime means of transmitting wider culture. The type of school or university attended can have an important effect on the cultural background of an individual, either confirming or, in some cases, competing with, the culture absorbed through family background. Most schools, whether state-run or private, will have a role in transmitting the majority national culture, in the form of underlying values and attitudes. This will be particularly the case in States where some form of citizenship education is on the curriculum, but will happen even without such conscious motivation. Thus, in a multi-nation or immigrant State, if the minority cultures are to be respected, some way must be found of recognising those cultures within the education system.<sup>46</sup> This can be done through multicultural policies which try to ensure that schools do not focus solely on the majority national culture, or through the existence of separate schools.<sup>47</sup> Multicultural education policy is, as Raz points out, one of the most significant concrete policies of multiculturalism as a whole.<sup>48</sup>

This point is recognised to some extent in the EU by its provisions on the education of migrant children.<sup>49</sup> However, as Cullen points out, the Directive on migrants’ children is marked by policy ambivalence and limitations. First, the issue of competence referred to above means that the application of the Directive is limited to the children of migrants from other Community countries and requires Member States to take measures to promote the culture of the country of origin of the child; i.e. the dominant national culture, rather than any minority culture. Secondly, as well as promoting the language and culture of the country of

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<sup>45</sup> For discussion, in the context of citizenship and cultural policy, see NW Barber, ‘Citizenship, Nationalism and the European Union’ (2002) 27 *European Law Review* 241-259.

<sup>46</sup> See generally A-G Gagnon and J Tully (eds.), *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001).

<sup>47</sup> See, for example, Articles 12 of the Framework Convention for the Protection of National Minorities, which require States to ‘take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority’ and Article 13, which gives groups the right to set up and manage private educational and training establishments (without implying a commitment on the part of the State to finance this).

<sup>48</sup> Above n.4.

<sup>49</sup> Dir 77/486 on the education of the children of migrant workers.

origin – in order to facilitate re-integration when the parents return to their country of origin – the Directive requires measures to be taken to enable the child to integrate into the host state. There is thus as in clarity as to whether the goal of the Directive is to foster integration, or to encourage the preservation of the child’s national (rather than cultural) identity.<sup>50</sup>

As well as being linked by the complementarity of focus on identity and education as a transmitter of culture, educational and cultural rights can often limit each other. On the one hand, education policies can affect cultural rights. Generally speaking, as General Comment 13 makes clear, education rights can be understood as empowerment rights, and one of the things which education can give people is knowledge of and confidence in their cultural identity. For example, education through the medium of a minority language encourages the continuity and growth of that language and, through that, of the cultural identity expressed through that language. Education in the context of and/or which is respectful of particular cultural identity has the effect of encouraging children to feel confident within their culture and see their culture validated, rather than marginalised. On the other hand, cultural identity can affect the exercise of education rights. A good example here is the clash of rights which surround the existence of ‘faith schools’. Proponents of such schools argue that, as a religion is a fundamental part of cultural identity, it should be a right of parents to educate their children in the context of their religious faith. However, a number of other rights must also be considered. In the first place, do faith schools have the right to exclude children from a different religious background, or no religious background? This problem is particularly acute, given the connection between some religions (e.g. Islam) and particular ethnic groups. Secondly, what of the rights of the children themselves? Education rights are almost always conceptualised as parental rights, with childrens rights being limited to certain aspects of their experience within education. However, as the Convention on the Rights of the Child suggests, the right to education can be seen as a childrens’ right, as can the right to a particular approach to education or type of education. Do faith schools limit the right of children to choose not to follow the religion of their parents; a right which, in a liberal society, must be maintained? Are faith schools which insist on teaching certain subjects and refusing to teach others violating the rights of their pupils to a reasonable and broad education.<sup>51</sup>

### 3.2 Specific cases

These general debates are reflected in any number of policy issues arising right across Europe. However, current and future developments, as well as providing possible space for increased cultural conflict within the EU, also offer the potential for future developments, using the Charter provisions as a springboard.

#### 3.2.1 *Minority rights, language, education and enlargement*

Minority rights have not traditionally had a place within EU rights discourse. As Schwellnus has pointed out, if any move towards minority rights can be detected, it is very recent and, to a large extent, a response to the challenges of enlargement.<sup>52</sup> This state of affairs is not atypical: within the Council of Europe, for example, minority rights are not included within the ECHR (except within the context of Article 2 of the First Protocol) and the Framework Convention for National Minorities was only signed in 1995.<sup>53</sup> However, these more recent moves within the Council of Europe towards the protection of minorities have not really been

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<sup>50</sup> H Cullen, ‘From Migrants to Citizens? European Community Policy on Intercultural Education’ (1996) 45 *International and Comparative Law Quarterly* 109.

<sup>51</sup> This issue has been brought to the fore in recent debates over the right of a Christian school to teach creationism as a scientific perspective, and continues to be visible in the issue of sex education in schools (see, for example, the case of *Kjeldsen et al*, above n 39, which concerned parental wishes that their children not be given sex education in school).

<sup>52</sup> G Schwellnus, ‘Much Ado About Nothing?’ *Minority Protection and the EU Charter of Fundamental Rights* Constitutionalism Web-Papers, ConWEB 5/2001 <http://les1.man.ac.uk/conweb/>.

<sup>53</sup> This was preceded by the 1992 European Charter for Regional and Minority Languages.

duplicated at EU level. Given the multi-national and multi-cultural nature of the EU itself, some consideration of minority rights would be helpful.

This state of affairs is all the more puzzling when we consider the extent to which the protection by accession states of minority rights has been under the microscope during the enlargement process. The 1993 Copenhagen criteria explicitly require that candidate countries should achieve ‘stability of institutions ... guaranteeing respect for and protection of minorities’. This enforcement of this principle has been a significant theme of negotiations with a number of candidate States: the treatment of Roma has been and continues to be a cause for concern in several states, as has been the position of the Turkish minority in Bulgaria and the Russian-speaking minorities in Estonia and Latvia. Provision in all states for the protection of minorities, particularly in the context of education and language rights, has been closely scrutinised under the enlargement process. This scrutiny suggests that the EU places value on minority rights, and considers them to be an essential part of the standards of democracy required of Member States of the EU.

However, once candidate States become Member States, as EU law currently stands, that scrutiny will come to an end – barring an application of Article 7 TEU, which the Member States purported, in a somewhat skewed way, to invoke against Austria’s new government incorporating Haider’s Freedom Party in 2000 and which has been significantly widened in relation to its procedures by the Treaty of Nice. The current state of law would prevent discrimination on the grounds of race, and there is some Union action combating racism and xenophobia, but there are, as yet, no binding provisions requiring States to take positive measures to ensure and support multicultural policies. Article 7 TEU could never be used to push for positive policies of this nature. Given the complex and ethnic make-up of some candidate states, and the deep-rooted divisions which can be found to exist, this inability to continue to police the situation may exacerbate problems – even though it can be anticipated that scrutiny will continue under the aegis of under international institutions including the Council of Europe, the OSCE and the Council of the Baltic States. Further, existing Member States are not, and never have been, subject to the same scrutiny as accession states. Whether this apparent double standard is based on an assumption that the same issues do not exist within existing Member States is not clear, but such an assumption cannot be borne out. Further, the EU itself must guard against the violation of minority rights and, particularly, language rights. As more national and ethnic groups enter the EU, more concerns are likely to arise, both in terms of the maintenance of their national identity, and also in terms of their ability to participate politically within the processes of governance. Ensuring that new States alone comply with minority rights standards is an inadequate way of asserting the value of such standards.

On this basis, stronger protection minority rights would seem to be an essential part of the development of the EU as a multi-national and multi-cultural polity. Schweltnus has argued that the existence of Article 22, within the context of EU cultural policy, could provide one of the bases of a more developed and coherent minority rights policy.<sup>54</sup> The same can be said about Article 14(3). In some ways, it is unfortunate that more specific minority rights were not included within the Charter; Article 22 is a rather weak provision, which appears to confer positive rights neither on individuals nor groups. Article 14(3) only grants rights to education providers, rather than the recipients of that education and is, as we have already suggested, limited to groups with a common belief, rather than a common identity. Nevertheless, particularly when combined with the recent development of legislation outlawing race discrimination and a broadening policy on the elimination of racism and xenophobia,<sup>55</sup> Articles 14 and 22 could be a way of opening a dialogue which could lead to the creation of positive rights for minorities.

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<sup>54</sup> Above n.52.

<sup>55</sup> For the connection between race legislation and minority protection, see D Chalmers, ‘The Mistakes of the Good European?’, in S Fredman (ed), *Discrimination and Human Rights. The Case of Racism*, (Oxford: Oxford University Press, 2001).



### 3.2.2 Education, culture and citizenship

A second area to be considered is the eternal question of citizenship. If citizenship is understood as having two aspects – a citizenship of identity, and a citizenship of political rights – education and culture have central roles to play in both of those aspects. In terms of identity, we have already argued that education has an important role to play in the developing of common cultural identity. However, the question of European identity remains contested. One of the explicit roles of EU education and cultural policy is to help in the development of that European identity, through, by and large, initiatives which promote that which is common amongst Europeans, rather than that which divides us. It could be argued, indeed, that this aspect of EU cultural policy tends towards the assimilation of the different national cultures into an abstract ideal of what it is to be Europe, at the expense of their individual cultural identities.

If this is the case, it has wide implications. Cultural pluralism does not always follow the same model. A distinction needs to be made between multi-nation polity, which is comprised of a number of complete historical communities within one state; examples include the United States, Canada and Australia (where indigenous nations were colonised and conquered by the now dominant nation) and Belgium (where federalism was a much later development) and Switzerland (formed from a more or less voluntary act of federation), and pluralism caused by individual or familial immigration, where the developing immigrant communities often continue to have links with the country of origin of themselves or their ancestors. Kymlicka argues that these types of cultural pluralism need to be understood separately, as they can give rise to different challenges.<sup>56</sup> The EU, of course, is a multi-nation polity. However, it is important not to forget that immigration forms another aspect of its pluralistic character.<sup>57</sup> An emphasis within cultural policy on common European characteristics, based on a historical perception of a common European identity, can serve to exclude immigrant communities, who do not share in the whole of that history. One effect of this can perhaps be seen in the Culture 2000 project, where the scarcity of projects originating from immigrant communities which are given funding is noticeable. This latter, exclusionary tendency should be of particular concern in the light of recent events, and more broadly what has been argued to be a significant incidence of racism throughout the EU.<sup>58</sup>

The political side of citizenship also poses challenges. The development of a cohesive, consensus-based and democratic polity is precisely what is required in order to support a multicultural citizenship in Europe. Attempts to form, or identify, a sufficiently strong European identity upon which to base citizenship would seem doomed to failure. European unity itself is, to a great extent, based on diversity, as the European Parliament has recognised.<sup>59</sup> Kymlicka argues that, in general, it is extremely difficult to identify sources of

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<sup>56</sup> Above n.3. This distinction has been criticised. See, eg Y Abu-Laban, 'The Future and the Legacy: Globalization and the Canadian Settler-State' (2001) 35 *Journal of Canadian Studies* 262-276, who argues that the distinction between colonisers and immigrants is less clear than Kymlicka would seem to suggest. Further, as Kymlicka himself acknowledges, this framework does not allow for groups, such as the Roma, who fit in neither of these categories: W Kymlicka, 'Do We Need A Liberal Theory of Minority Rights? Reply to Carens, Young, Parekh and Frost' in *Politics and the Vernacular: Nationalism, Multiculturalism and Citizenship*, (Oxford, Oxford University Press, 2001). Nevertheless, for the purposes of our discussion, it is important to distinguish between immigrant and national minority groups within Europe, in order to give both types of group prominence.

<sup>57</sup> Within the specific field of language rights, this fact is often not recognised: see Dunbar, above n.41. This has been criticised: see P Keller, 'Re-thinking Ethnic and Cultural Rights in Europe' (1998) 18 *Oxford Journal of Legal Studies* 29.

<sup>58</sup> See CA Gearty, 'The Internal and External 'Other' in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe' in P Alston (ed), *The EU and Human Rights* (Oxford, Oxford University Press, 1999).

<sup>59</sup> European Parliament Resolution on cultural cooperation in the European Union, OJ(2002) C72E/142. See also M. McDonald, 'Unity in Diversities: Some Tensions in the Construction of Europe' (1996) 4 *Social Anthropology* 47.

unity such as to form the basis of a common citizenship in a multicultural society.<sup>60</sup> The only way for any multicultural polity to work is to value the diversity of the people within it. Raz takes this further, arguing that respect for cultural groups is essential to ensure the identification of members of those groups with the wider polity.<sup>61</sup> The recognition of and respect for diversity can be the source of unity of a multicultural polity. The idea of unity through diversity is the way forward.

Respect for the rights of cultural groups, however, needs to be based something other than identity politics. The challenges to multiculturalism based on the practical impossibility of the unity of diverse cultures into one must be taken seriously. It is definitely the case that, as Walzer puts it, 'the solid lines on the old cultural and political maps are turned into dotted lines.'<sup>62</sup> Cultures are being seen as less rigidly defined and exclusive. In multicultural societies, the language, customs and eating habits of each culture are being influenced by those of the others. Even within less pluralist societies, the influences of a global mass media, tourism, and returning emigrés have led to a blurring of the lines between local and more alien cultures. Nevertheless, distinct cultural groupings and identities continue to play an important part in the way in which individuals see themselves and their loyalties.

Canada again provides a useful point for discussion here. While the search for a distinctive Canadian identity has not been absent from Canadian constitutional debates, perhaps because of the tensions between the English-speaking and French-speaking populations, that identity has necessarily had to be looser in nature. Helly goes so far as to argue that multiculturalism has become part of Canada's founding ideology,<sup>63</sup> and it is certainly the case that the unity of the Canadian state is not based on a monocultural identity. In this context, *ethnos* and *demos* appear to have been uncoupled; the solution which, according to Lehning, is the only way to found a European identity which cannot be based on ethno-cultural characteristics.<sup>64</sup> Lehning goes on to suggest that it is the rights and opportunities for participation within the democratic process which can form the basis of a common European identity. In a wider context, Wheatley argues that rights of political participation are essential to ensure the inclusion of minority groups within the polity.<sup>65</sup> This view is supported by the work of Tully, who argues that a sense of belonging within a multicultural society can be engendered by the participation of different cultural groups in dialogue and deliberation about the constitutional development of that society. Such participation is important because it marks an acknowledgement of the existence and needs of minority groups, and also allows society as a whole to respond to the dynamic identities of different groups, rather than to a reified stereotype.<sup>66</sup> This needs to form part of the wider democratisation of the EU. However, education policy also has a role to play. It is through education that citizens can be taught about their citizenship and can be made aware of their rights and their identity as members of specific cultural groups who need to be heard. An education policy which is sensitive to diversity and promotes multiculturalism as a moral good, but which also embraces the need to teach about political citizenship can contribute towards wider participation of minority groups.

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<sup>60</sup> Above n.3.

<sup>61</sup> Above n.4. Raz's argument seems to be based on the idea of a number of smaller cultures being part of one wider culture. The complexity of culture may mean that a rather more fluid, multi-level model needs to be used. Nonetheless, the basic point still seems valid.

<sup>62</sup> M Walzer, 'The Politics of Difference: Statehood and Toleration in a Multicultural World' (1997) 10 *Ratio Juris* 165-176 at p 176.

<sup>63</sup> D Helly, 'The Political Regulation of Cultural Plurality: Foundations and Principles' (1993) 25 *Canadian Ethnic Studies* 15-35.

<sup>64</sup> PB Lehning, 'European Citizenship: Towards a European Identity?' (2001) 20 *Law and Philosophy* 239-282.

<sup>65</sup> S Wheatley, 'Minority Rights and Political Accommodation in the 'New' Europe' (1997) 22 *European Law Review Supp* HRS 63-81.

<sup>66</sup> J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, Cambridge University Press, 1995). The importance of dialogue is also referred to by Abu-Laban above n.56).

Here, however, we can also return to the Charter. The ideals of participation of civil society in the decision-making process and of consensus politics rather than majority decision-making are ideals which can facilitate the political integration of minority groups. They are also the ideals which informed, to a great extent, the process of drafting the Charter. It has been suggested that this process, which has been hailed as a great success, could be used for future decision-making - particularly the Convention on the Future of Europe. It may be that the biggest contribution which the Charter can make to inclusive citizenship within Europe is not the rights which it contains, but the process by which it was decided.

#### 4. CONCLUSION

This paper has begun the process of exploring the intersections between the ideals or 'promise' of multiculturalism, as a response to the challenges of diversity within modern society, and the EU's concerns regarding policies on education and culture, both in the context of the current Treaty framework and, specifically, the innovations provided by the 2000 Charter of Fundamental Rights. Quite apart from the inherent challenges in developing policies of multiculturalism within any polity, it is clear from the analysis above that there are particular difficulties attaching to any attempt to match multicultural policies to the EU's limited goals and competences. Yet as a supranational governance structure, the EU constitutes a potentially powerful venue within which the values of tolerance and diversity awareness could be effectively articulated, should the political will be present. This can be achieved, using techniques of 'new governance' without unnecessarily constraining or interfering with the autonomy of the Member States.