

***REFGOV***

*Reflexive Governance in the Public Interest*

*Fundamental Rights*

**A Fundamental Rights Policy in the  
Public Interest: The Decentralized  
Implementation of Fundamental Rights in  
a Single Area.**

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# A Fundamental Rights Policy in the Public Interest: The Decentralized Implementation of Fundamental Rights in a Single Area.

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This contribution to the 'Reflexive Governance in the Public Interest' (REFGOV) project seeks to identify the main questions raised in the course of the first phase of the project, and to clarify the link to the central hypothesis of reflexive governance.

## 1. The general context

The Sub-network on fundamental rights seeks to examine how the hypothesis of reflexive governance, as understood in the present research programme, may serve to improve the coherence and efficiency of the fundamental rights policy of the Union. In the present constitutional structure, where the institutions of the Union only may exercise the powers which are attributed to them by the Member States, the implementation of fundamental rights essentially takes place at State level. Our research will analyse the limits of such a decentralized implementation of the values identified in the Charter of Fundamental Rights, and it will examine which modes of coordination may help us to move beyond these limits without implying further transferrals of powers from the Member States to the Union.

The immediate aim of the research is to contribute to the ongoing debate on the reshaping of governance of fundamental rights in the Union. A number of contemporary developments, such as the development of a methodology for a systematic monitoring of the compliance with the requirements of the Charter of Fundamental Rights of the legislative proposals of the Commission<sup>1</sup> or the adoption of a new set of guidelines for the preparation of impact assessments which include an examination of the impact on fundamental rights,<sup>2</sup> illustrate the urgency of this issue. Important proposals, such as the establishment of a European Union Agency for Fundamental Rights<sup>3</sup> or the adoption for the period 2007-2013 of a framework programme on Fundamental Rights and Justice,<sup>4</sup> are currently under discussion, in which the researchers of this Sub-network are strongly implicated.

The broader aim, however, is at a distinctly theoretical level. It is to develop the implications of the hypothesis of reflexive governance in these debates, and thus, in turn, to contribute to illustrate both the promises of the hypothesis and, perhaps, certain of its limitations, and where it might be required to develop further. The premise is that an adequate governance of fundamental rights in the Union – that is to say, a policy which ensures that fundamental rights, instead of being threatened by European integration, will instead gain from this integration – requires the organisation of a permanent learning process between the actors

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<sup>1</sup> Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005.

<sup>2</sup> SEC(2005)791, 15.6.2005.

<sup>3</sup> Commission of the European Communities, *Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union*, COM(2005)280, 30.6.2005.

<sup>4</sup> COM(2005)122 final of 6.4.2005.

involved in the protection and promotion of fundamental rights. Such collective learning should serve two complementary goals in improving the governance of fundamental rights in the Union : it should serve to identify the issues on which collective action is required at the level of the Union ; and it should serve to encourage a systematic exchange of experiences in order to contribute to a better informed and more reflexive definition of the objectives of policies pursuing fundamental rights.

This attempt – which the remainder of this note on theory seeks to clarify further – should contribute to the hypothesis of reflexive governance at two levels : first, by identifying certain developments which currently exhibit a renewed understanding of subsidiarity (rather than ‘rule-based’, a procedural understanding which we call ‘active’, as explained hereafter) in the Union and the establishment of devices which seek to foster collective learning among the institutional players, the research will force the hypothesis of reflexive governance to refine itself, and to make progress towards cataloguing a set of institutional practices which may encourage an improved reflexivity in the definition and implementation of public policies ; second, by putting forward certain institutional proposals, the research in this sub-network will identify both the potential of such proposals and the limitations they risk facing, which may lead to question certain of the presuppositions on which the hypothesis of reflexive governance is based.

## **2. The contribution of the hypothesis of reflexive governance to the governance of fundamental rights in the Union**

### *2.1. Identifying the need for collective action*

First, our proposals based on the hypothesis of reflexive governance, which consist in organizing a mechanism for collective learning at the level of the Union, should ensure that the need for collective action is identified at an early stage, where the interdependency created between the Member States of the Union – both by the establishment of the internal market and by the creation, since 1999-2000, of an area of freedom, security and justice – appears to require the harmonization or approximation of national laws or regulations, or at least an improved coordination between the Member States. Specifically, the reliance both in the internal market and in the area of freedom, security and justice on mutual recognition of national rules or judicial decisions may create certain risks, especially pressures towards the lowering of fundamental rights, as is the case in the phenomenon of ‘competitive deregulation’ in certain fields such as the regulation of services. For this reason, the establishment of some mechanism allowing for a collective and shared evaluation of the impact on fundamental rights of the pressures on national regulatory systems created by the progress of European integration, in order to arrive at a shared diagnosis about the need for collective action at the European level, would seem to be required. ‘Collective learning’ is to be understood, in this sense, as the identification of a problem as collective to the Union as a whole, rather than as a problem to be defined and solved at the level of each Member State.

The departure point for an exploration of this level of the debate is in the literature on the dilemma between regulatory competition and the risk of a race to the bottom in federal systems. In the three fields in which this dilemma has been most extensively discussed within the literature (environmental protection, labor rights, and taxation), the debate has been revolving around three sets of arguments. A first set of arguments is based on economic efficiency. For instance, harmonization of standards at the federal level has been justified by the need to facilitate cross-jurisdictional movement of goods and services by the removal of non-tariff barriers, which should contribute to allocative efficiency, reduce prices for the consumer, and avoid what has been called fiscal, social or environmental ‘dumping’ – i.e., a race towards welfare-reducing levels of taxation, or of environmental or social protection, which each individual jurisdiction may be tempted to resort to in order to attract investment and thus boost its economic growth, but which it might not have pursued if it had

not been facing competition for industry.<sup>5</sup> Indeed, in the United States of America, this argument – countering social dumping – has been at the core of the New Deal courts reading of the Commerce Clause in the Federal Constitution ; and it may also be identified in the case-law of the European Court of Justice, when it examines whether the reliance on Article 95 EC by the European legislator is justified. Others have countered, however, that in the absence of harmonized standards, interjurisdictional competition should produce an efficient allocation of industrial activity among the different units competing to attract industry, and should lead to the adoption of standards under each jurisdiction which match its own needs and preferences.<sup>6</sup> Under the former view, the imposition of harmonized standards at the federal level in fact overcomes the prisoner’s dilemma in which States sharing a same economic area – i.e., between which capital, goods and workers may move freely – are trapped, as a result of the absence of a coordinated effort to set common standards between the States. Thus, the adoption of such harmonized standards, while displacing the setting of standards from the local to the federal level, ensures that the local jurisdictions will not be obliged to make their regulatory choices under the threat of capital or human flight, but instead will be able to make those choices on the basis of the preferences expressed by their citizens<sup>7</sup>: where ‘the ability of state and local governments effectively to regulate multistate businesses is undermined by inadequate local administrative resources, lack of coordination among jurisdictions, and fear that corporate investment may shift away from any state or locality attempting vigorous regulation’, the adoption at the federal level of regulatory programs in fact enhances the autonomy of local jurisdictions under the appearance of restricting that autonomy.<sup>8</sup> Under the latter view instead, the imposition of harmonized standards, as it disregards the specific needs and situation of each local jurisdiction, necessarily is suboptimal, and deprives each jurisdiction from the competitive advantage it might gain from its specific situation.

A second set of arguments is based on the political values of federalism. Often invoking Madison’s *Federalist No. 10*, proponents of a harmonization of standards at the federal level identify the need to protect local minorities from oppression, and to guard against the risk of abuse of political power within each local jurisdiction. They denounce the interest-group politics at work in local settings, and the vulnerability of politicians to the pressures of their constituencies. They emphasize that a constituency is not really autonomous in implementing the values which it cherishes most, where in the presence of interjurisdictional competition certain choices (such as to subsidize welfare programs for the most needy or to offer a high level of environmental protection to its residents) will be seen as too costly, and perhaps even unaffordable.<sup>9</sup> In their rejoinder, proponents of regulatory competition insist that the federal power may be distorted precisely as much as the local power, and that a federal system, in which local jurisdictions are recognized significant powers, may provide ‘checks against the concentration of irresponsible governmental power’ at both levels.<sup>10</sup> They also remark that, for standard-setting by the federal level to equal the legitimacy of standard-setting at the level of each local jurisdiction, there should exist a *demos* at the federal level –

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<sup>5</sup> See, e.g., Richard Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196 (1977); Richard Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 Iowa L. Rev. 713 (1977).

<sup>6</sup> Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the ‘Race-to-the-Bottom’ Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210 (1992).

<sup>7</sup> Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the ‘Race-to-the-Bottom’ Rationale for Federal Environmental Regulation*, op. cit., at 1218 (‘The characterization of the problem as one of non-cooperation (...) sees federal regulation not as an intrusion on the autonomy of states, as it is often portrayed, but rather as a mechanism by which states can improve the welfare of their citizens’).

<sup>8</sup> Richard Stewart, *Federalism and Rights*, 19 Georgia L. Rev. 917, 919 (1985).

<sup>9</sup> Richard Stewart, *Federalism and Rights*, op. cit., at 926 (‘choices to aid or protect vulnerable groups through local services and welfare programs are an important aspect of community self-determination’). See also S. Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 Yale L.J. 1344 (1983) (relying on this argument to advocate for redistributive policies being conducted at the federal rather than at the local level).

<sup>10</sup> Richard Stewart, *Federalism and Rights*, op. cit., at 918.

a community of citizens sharing a sense of solidarity and thus capable of deliberating together about the common good : as long as such a *demos* does not exist, the argument goes, true democratic politics cannot emerge, and the normal locus for the democratic exercise of self-determination should therefore be seen to be that of the local jurisdiction (the nation-State, in the European Union). They add that federalism thus understood promotes citizen participation at the local level, and thus corresponds better to the values of a republican form of government. They insist, finally, that devolution to the local jurisdictions encourages diversity and experimentation, which both contribute to the richness of political life.

A third set of arguments are knowledge-based. Those who advocate the setting of standards at the federal level remark that where regulation is technically complex, requiring a sophisticated analysis before it can be drafted, they are 'susceptible to economies of scale that might overwhelm any benefits from multiple jurisdictions competing with diverse regulatory approaches'.<sup>11</sup> This is the case especially where the regulation needs to be based on a technical analysis of facts which do not vary geographically, and which therefore it is unnecessary to replicate under each of the local jurisdictions. Moreover, 'where the issue involves a largely arbitrary choice among competing standards, a single choice for all markets can exploit all conceivable economies of scale and avoid wasteful incompatibilities'.<sup>12</sup> On the other hand however, devolution to local jurisdictions is portrayed as encouraging the search for innovative solutions, and may facilitate a process of mutual learning, as each jurisdiction will benefit from the lessons which can be drawn from the experiments of others, whether these are considered successes or failures. In a complex world, we should not expect the adequate solutions to be arrived at by one single actor, however well equipped : it is only through searching by experiment, in settings as diverse and numerous as practically feasible, that we can hope to achieve an understanding of what works and what does not. Moreover, a search thus conceived can only be performed at the local level : in order to identify why any particular solution works in setting A (and whether, therefore, the same solution might be adequate in setting B), one requires to identify the background conditions which existed in A and which made the experiment a success ; there are limits, therefore, to the extent such a search may be conducted from the centre – at the very least, to the extent it is coordinated from the centre (as indeed it should, for the lessons drawn from the experiment not to be lost on the other local jurisdictions), the search should be based on the recognition of a large autonomy to the constituent units, which should be left free to invent, test, and even take risks, in order to contribute to the collective learning enterprise. One version of this argument – perhaps the most robust theoretically and systematically developed – is that presented by Charles Sabel under the label of 'democratic experimentalism'.<sup>13</sup>

Although they may of course be combined with one another, the three arguments (economic efficiency, political self-determination, search by experimentation and the pooling of knowledge) are to be distinguished insofar as they lead to different forms of delegation of powers to the federal level.<sup>14</sup> However, this research aims, not simply to examine the

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<sup>11</sup> Daniel C. Esty and Damien Geradin, Regulatory Co-Opetition, *Journal of Int'l Econ. L.* (2000) 235-255, at 243.

<sup>12</sup> Alan O. Sykes, Regulatory Competition or Regulatory Harmonization? A Silly Question?, *Journal of Int'l Econ. L.* (2000) 257-264, at 263.

<sup>13</sup> See in particular Michael C. Dorf and Charles F. Sabel, 'A Constitution of Democratic Experimentalism', 98 *Colum. L. Rev.* 267 (1998); Charles F. Sabel and Joshua Cohen, 'Directly-Deliberative Polyarchy', 3 *European Law Journal* 313 (1997); Oliver Gerstenberg and Charles F. Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?', in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market*, Oxford Univ. Press, 2002, pp. 289-342. The background discussion in the theory of learning organisations is developed in Charles F. Sabel, 'Learning by Monitoring: The Institutions of Economic Development', in N. Smelser and R. Swedberg (eds), *Handbook of Economic Sociology* (1994) 137.

<sup>14</sup> For an attempt to connect different rationales for conferring powers upon the Union institutions to the question of the democratic requirements imposed on decision-making, see G. Majone, Europe's 'Democratic Deficit': The Question of Standards, 14 *ELJ* 17 (1998).

relevance of this debate on fundamental rights in the Union, but especially to deconstruct the shape of this debate in three different ways : first, by highlighting in which sense the opposition between harmonisation and regulatory competition is in fact fictitious ; second, by showing the many different forms collective action at the level of the Union may take ; third, and more importantly, by showing that the collective action problems highlighted (or negated) by the positions adopted in this debate result from an artificial situation where the actors concerned are not communicating with one another.

1° It is clear that the dichotomy regulatory competition vs. harmonization is not simply an oversimplification; it is misleading. The question is not whether it is desirable to define standards, in any given field, at the local level of each jurisdiction, or at the federal level. The question is which forms of coordination should be created between regulators from different jurisdictions, to the extent that each jurisdiction is not an 'island' and that certain interdependencies exist between jurisdictions which cannot be ignored.<sup>15</sup> Indeed, where the proponents of regulatory competition put forward the advantages of 'horizontal' competition between local jurisdictions, they presuppose that certain rules are common to all jurisdictions, which precisely makes competition between those jurisdictions benevolent and desirable : they presuppose, for instance, that investment, products and persons may move freely from one jurisdiction to another, thus incentivizing each jurisdiction to achieve the optimal regulatory mix – 'optimal', that is, in the sense that it would fit most precisely the characteristics of the local jurisdiction, both due to its specific endowments (in particular, those which confer upon enterprises established under that jurisdiction a comparative advantage on the market it shares with enterprises established under other jurisdictions) and due to the preferences expressed by its residents (who may have chosen to be domiciled under that jurisdiction precisely because it offers the mix of taxes and public services which best suits their preferences). This, for instance, is one of the distinctive features of the seminal article published in 1956 by Charles Tiebout, whose argument in favor of inter-jurisdictional competition was based, among other often extraordinarily bold presuppositions, on the assumption that individuals were fully mobile, and would make a choice to live in any jurisdiction exclusively on the basis of the taxes that this jurisdiction imposes on its residents and the bundle of public services that it provides.<sup>16</sup> Similarly, the – much more realistic – model presented by Wallace Oates and Robert Schwab in 1988 assumes that jurisdictions compete for a mobile stock of capital which leads them to lower taxes on capital or/and to relax environmental standards, both consequences which are presented as 'the tradeoffs inherent in interjurisdictional competition':<sup>17</sup> again, interjurisdictional competition presupposes that the jurisdictions competing against one another compete for something (scarce capital, here; in other models, wealthy residents or highly qualified workers), which in turn implies some form of agreement between these jurisdictions to set up the relevant market. Conversely, the proponents of a harmonization of standards at the federal level do not suggest that regulatory competition should be avoided altogether : where, for instance, common minimum environmental or labour standards are advocated, the argument is not that competition is not desirable, nor that all the conditions of production of goods and services should be uniformized transversally ; rather, the argument is that, in itself desirable, competition should not be 'distorted', and that competitiveness under each jurisdiction should not be achieved at the price of sacrificing certain values which, hence, should be insulated from becoming instruments of competition.

In other terms, in the regulatory competition vs. harmonization debate, proponents in both camps take for granted that a certain framework exists within which the competition between jurisdictions must be managed (even if managing may mean, in this context, favoring an

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<sup>15</sup> Alan O. Sykes, *Regulatory Competition or Regulatory Harmonization? A Silly Question?*, op. cit., at 257.

<sup>16</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416, at 419 (1956).

<sup>17</sup> Wallace E. Oates and Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 J. Pub. Econ. 333, at 338 (1988).

interjurisdictional competition as 'pure' as possible). Our aim is to unveil these presuppositions in order to move the debate one step further.

2° The presentation of the debate as being between regulatory competition and harmonization is oversimplified in another sense : it underestimates the different ways in which 'pure' regulatory competition – 'pure', that is, with the proviso which has just been made – may be managed through a variety of forms of cooperation between the local regulators. A typology presented in one of the seminars organized in this project has distinguished four main techniques of cooperation :

**(1) Coordination** consists in leaving the domestic regulations intact, but organizing their coexistence in order to facilitate the establishment of a common area between the different jurisdictions involved. Coordination thus seeks not to replace domestic regulations nor to modify them, but to define rules of cohabitation within that area. Two broad sub-categories may be distinguished : mutual recognition on the one hand, non-discrimination on the other hand.

**(1.1) Mutual recognition.** Under this technique of coexistence, each jurisdiction agrees to recognize, under a condition of reciprocity, the regulations adopted under other jurisdictions which belong to the same area. Mutual recognition may be 'pure'; it may be based on the common definition of minimum standards ; finally, it may be based on the agreement on common standards.

**(1.2) Non-discrimination.** Under this technique, local regulators are free to define their regulatory objectives and the means to fulfil them, but they are prohibited from discriminating, *de jure* or *de facto*, against foreign producers or individuals, by the imposition of disproportionate conditions not strictly related to those objectives. Thus for instance, local regulators may adopt regulatory requirements which seek to protect or promote fundamental rights, and impose those requirements on all actors under their jurisdiction, provided this does not constitute a pretext hiding unavowable, protectionist purposes.

**(2) Cooperation.** In the terminology adopted here, cooperation implies, at a minimum, that the jurisdictions concerned agree to consider as a matter of common concern the policies they pursue in particular fields. They therefore share information about their initiatives and achievements in those fields. They may or not agree on common objectives to be achieved, and thus measure the progress of each jurisdiction towards meeting those objectives.

**(2.1) Exchange of information without the definition of common objectives.** Under this technique, no common objectives are agreed upon. Each local jurisdiction freely defines the direction its regulatory regime will take. However, some form of accountability nevertheless exists, but limited to an obligation to report regularly about the measures it adopts, thus ensuring a form of transparency. As a variation under this technique, each unit may have to provide an explanation about its choices, in order to convince the other units that it is not undercutting their efforts to fulfil the objectives they have defined for themselves, or free riding on those efforts – as where, for instance, it limits its expenditures on professional training, but recruits professionals trained abroad, which results in a loss of human capital for the units which do provide such training.

**(2.2) Agreement on common objectives, leaving it to each local jurisdiction to choose the means.** Under this technique, all jurisdictions agree on the goal to be achieved, but they are left to choose the means which suit best the local conditions. The technique knows many variations. In particular, the degree of

precision with which the goals are defined may vary, in effect depriving in certain cases each individual jurisdiction from any significant choice in the implementation of the commonly agreed objective. The objectives themselves may be legally binding on the jurisdictions which must fulfil them; or they may take the form of 'recommendations', not formally binding, but which – especially when they result from a shared diagnosis of the Member States on what needs to be done – nevertheless may influence policy choices made at the local level, whether these commonly agreed targets serve as mere pretexts to bring about changes which were felt to be desirable anyway although perhaps unpopular, or whether the changes genuinely seek to respond to the pressure from the other jurisdictions, exercised through a form of peer review, to comply with the commonly agreed recommendation. Finally, this technique may or may not be combined with the setting up of a learning mechanism, ensuring that – apart from checking whether each individual jurisdiction has faithfully sought to realize the common objective – all may learn from each jurisdiction's experiences about which means of implementation have worked and which have not – and why. Indeed, it is here – where there is agreement about a general objective to be reached, but uncertainty about how best to achieve that objective – that the question of collective learning becomes most pressing.

Of course, the open method of co-ordination is the clearest example of this technique in Union law. This method has been used in various contexts and the precise forms it takes vary accordingly. But the core of the method consists in a dialectic between aims and means which differentiates the method from more classical rules-based approaches : it takes the form of the joint definition by the Member States of certain objectives, both common and specific, which may be accompanied by guidelines relating to how to achieve those objectives ; national reports or action plans describing how these objectives are being fulfilled ; peer review of those reports or plans, which allows for mutual criticism and identification of good practices ; redefinition of the national reports or action plans in the light of the criticisms or recommendations. The most promising aspect of the open method of coordination resides in the possibility of revising the objectives which are jointly agreed by the Member States in the light of the experiences the Member States gain from seeking to achieve those objectives in different national settings.

**(3) Harmonisation or approximation of laws.** Harmonisation or approximation of laws consists in leaving different domestic regulations in place, but ensuring that they are sufficiently harmonized or drafted along similar principles, so that the coexistence in a single area of different national legislations will not constitute an obstacle to freedom of movement within that area or otherwise hamper its good functioning.

**(4) Uniform (federal) law.** The adoption of directly applicable federal law, which may be invoked by individuals without the adoption of national implementation measures, constitutes of course the most far-reaching technique through which the strategic behavior of constituent units within a single area, translating into regulatory competition, or the obstacles which would be created to the good functioning of that area of diverging standards, may be checked.

Many other such typologies could be proposed. Of course, the usefulness of any typology will depend on its ability to perform the tasks it is assigned. In the context in which it is presented here, the typology serves to show that the dichotomy regulatory competition / harmonization should give way to a much more refined distinction between different ways of managing the protection of fundamental rights under a constitutional framework which guarantees essential economic freedoms of movement. These different solutions cannot be



ranged along a continuum, from 'pure regulatory competition' to 'uniform federal law'. First, there exists no such a thing as 'pure' regulatory competition – as the very existence of a competition implies a certain common agreement between the concerned jurisdictions –, and where it develops, 'uniform federal law' still will have to rely on structures for the implementation of common rules (local administrations and courts, in the typical case) which will differ from constituent unit to constituent unit – unless of course, harmonization being complete and affecting all fields, both substantive and procedural, between the units composing the system, that system loses its distinctive federal feature –. Second, it is impossible to range these different techniques along a continuum because not one, but a number of criteria are used in order to distinguish them. The different techniques which have been highlighted differ according to the degree of discretion left to each local jurisdiction (whose autonomy will be more or less restricted). They may or may not entail certain consequences for the solution to the question of conflict of laws which the coexistence of different legal regimes may raise ; and where they have such consequences, they may differ according to the division of tasks they organize, in each case, between the *lex loci* and other potentially applicable laws. Some of these techniques rely on the adoption of formal instruments, which are to be complied with or implemented by the constituent units ; others are 'softer', and prefer to rely on the good will of these constituent units or on their sense that they are bound by a shared commitment, or on political pressure by the peers.

3° Both the idea that *what kind of cooperation must be organized* is more relevant than the question of *whether some form of cooperation must be organized* (1°), and the idea that there exists a range of techniques through which cooperation may take place without it necessarily developing into forms of harmonization or the adoption of uniform laws (2°), point to the conclusion that the debate between harmonization and regulatory competition needs to be enriched by taking into account the existence of channels of communication between the constituent units, and their capacity to arrive at a common understanding of their situation and of the diagnosis which it calls for. This is the line of inquiry we shall be pursuing. What this will require, as a first step, is to map the many networks which, in different fields (but a particular emphasis will be put on anti-discrimination policies, personal data protection, criminal law, and social law, which are the four thematic fields chosen for the second part of the research), ensure that – whether or not this may lead to further harmonization or approximation of national laws or regulations – some form of coordination is ensured between the member States when they are in a decentralized fashion. Such networks ensure a systematic exchange of information, cross-country comparisons, and various forms of peer review. They are the institutional device of what P. Calame has labeled 'active subsidiarity', in the context of the debate on the reforms of governance in the European Union which led to the July 2001 White Paper.<sup>18</sup> 'Active subsidiarity' acknowledges that, due to the growing interdependencies between the States, 'the distribution of powers [by a clear division of tasks between players or levels] will be the exception and the interlinking of powers the rule': subsidiarity is not a rule allocating powers according to some magic formula, but a process according to which the centre organizes the sharing of powers and experiences between the players and levels, and encourages the emergence of networks in which the constituent units seek to compare the different framing they make of the issues they are dealing with, and therefore are incentivized to revise their presuppositions as to the nature of the problem at stake and as to the range of solutions from which a choice has to be made in order to address the problem. In turn, as noted by Calame, evaluation loses its 'mechanistic' character, as when it is conducted by external observers, whose role it is to 'correct' the policy so that it will better attain its stated goals; instead, evaluation becomes 'constructivist',

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<sup>18</sup> P. Calame, 'Active subsidiarity : reconciling unity and diversity', in O. De Schutter, N. Lebessis and J. Paterson (eds), *Governance in the European Union*, OOPEC, Luxembourg, 2001, pp. 227-240. See also, on this procedural understanding of subsidiarity, O. De Schutter, 'The Implementation of Fundamental Rights through the Open Method of Coordination', in O. De Schutter and S. Deakin (eds.), *Social Rights and Market Forces. Is the open coordination of employment and social policies the future of social Europe?*, Bruxelles, Bruylant, 2005, pp.279-343.

it is carried out by the very people who are devising and implementing the policies under evaluation, and for whom the evaluation exercise represents an opportunity for reflexive learning by confronting their understanding with those of other policy-makers who are confronted with similar problems and dilemmas. The question is then, whether the notion of 'monitoring', which is seen as so crucial in any regime for the protection of human rights, should not be revised in this light, and whether – apart from checking the policies against the external standards of international human rights – it should not also be redefined in order to fit into this objective of collective learning.

## 2.2. Monitoring fundamental rights

A second function of collective learning in the organisation of governance of fundamental rights in the Union is to be understood in an even more literal fashion, as consisting in the exchange of experiences in order to learn from one another's successes and failures, and progressing towards the identification of the best practices to be promoted. The very notion of monitoring fundamental rights is transformed in this context, and takes another dimension. 'Monitoring' fundamental rights in the Union may have been understood, until only a few years ago, as ensuring that fundamental rights are respected by the Union institutions and the Member States: it was a task either for the judge, or for any body which, acting preventively, would see itself as behaving in the judicial mode — checking the acts which are adopted against the requirements of fundamental rights, in order to verify the compatibility of the former with the latter. Now, 'monitoring' takes on a different meaning : it may be understood, not exclusively as 'controlling', but also as 'learning' from experiments, whether these are successes and failures. The model of rule-application may have seemed sufficient in the past. What is required now, beyond that model and in addition to the form of monitoring it entailed, is the unceasing reinvention of the direction in which to protect and fulfil fundamental rights : it is the permanent redefinition of the very objectives we are to pursue in the name of realizing them.

This level of the analysis requires to identify the presuppositions which are implicit in the idea of collective learning, in order to define the mechanisms which could ensure that such collective learning occurs and in order to create the background conditions which will facilitate the idea of policy-making as proceeding by trial and error, by a constant redefinition of itself in the very process of its application. In our view, this requires in particular :

- The identification of the institutional conditions which ought to be created in order to promote collective learning between organisations. Our hope is to build on the Deweyan prescriptions on education as 'doing' rather than as 'absorbing'<sup>19</sup>: indeed, it is by cooperating within certain processes that the actors may come to understand better the context of their interaction, and thus to overcome the collective action problems which constitute an obstacle to the identification of solutions which serve better the public interest ; and it is by a process of interaction between beliefs held by the actors and their environment, in the course of applying those beliefs to the solution of certain problems, that – in the pragmatic understanding of knowledge – these beliefs can be refined, improved upon, and revised in the light of experience<sup>20</sup>. One important aspect of this is that 'monitoring' of human rights is redefined as a learning mechanism, i.e., a mechanism whose explicit purpose it is to serve to identify the strategies that work locally in order to examine their conditions of success and to make possible their duplication in other jurisdictions, through a diffusion managed at the

<sup>19</sup> See J. Dewey, *The School and Society*. Chicago: University of Chicago Press, 1915; and the texts collected on 'Education and Social Change' in John Dewey, *The Political Writings*, D. Morris and I. Shapiro (eds), Hackett Publ. Co., Indianapolis/Cambridge, 1993, pp. 97-132.

<sup>20</sup> John Dewey, *Studies in Logical Theory* (1903), in *The Middle Works of John Dewey, 1899-1924*, Carbondale, Southern Illinois University Press, 1976-1983, vol. 2, p. 333.

central level. What may have been, at first, a localized experiment, apparently linked to specific conditions, should be systematically examined for its ability to teach the other participants in the process about which innovations may be pursued further. Such a pragmatic conception of learning by trial goes beyond the opposition between decentralization (or respect for the autonomy of the constituent parts) and centralization (or restrictions imposed on the competition between the constituent parts) : it is because there exists a coordination mechanism at the central level, ensuring that the successful experiments in one jurisdiction may benefit other jurisdictions and limiting the risks of destructive competition, that decentralization not only becomes acceptable, but in many cases even will appear as desirable.

- The agreement on certain processes of evaluation : it is only by evaluating the local experiments conducted in different jurisdictions that we can draw the lessons from those experiments which could contribute to improving the protection and promotion of fundamental rights in other jurisdictions. This explains why the project includes an important discussion on indicators (both quantitative and qualitative, including indicators focusing on outcomes, on process and on structures) as tools for the evaluation of the situation of human rights. This dimension of the project builds on the work in this dynamic field of the United Nations Development Programme,<sup>21</sup> the use of indicators in the monitoring work of the UN human rights treaty bodies and the attempts to make this reliance more systematic and methodologically sound,<sup>22</sup> the important precedents of the indicators devised in the Luxemburg process (European Employment Strategy) and the Lisbon strategy (the open method of coordination for promoting social inclusion),<sup>23</sup> and the ongoing reflection on this issue in the scientific literature.<sup>24</sup> Beyond the reflection on indicators, the methods of evaluation, especially the participatory dimension of evaluation, shall be explored, and in that context the role of the stakeholders, in particular civil society organizations.

- The identification of the conditions which have to be created within the actors of fundamental rights policies, in order to enable them to participate actively in this process of collective learning. The hypothesis of reflexive governance lays a particular emphasis on the fact that institutional processes are insufficient if they are not coupled with the active creation of the background conditions which they presuppose for their success; and among those

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<sup>21</sup> *Human Development Report 2000 – Chapter 5: Using indicators for human rights accountability*, online: UNDP [http://hdr.undp.org/reports/global/2000/en/pdf/hdr\\_2000\\_ch5.pdf](http://hdr.undp.org/reports/global/2000/en/pdf/hdr_2000_ch5.pdf)

<sup>22</sup> See A. Chapman, “Indicators and Standards for Monitoring Economic, Social, and Cultural Rights” (Paper presented at the 2<sup>nd</sup> Global Forum on Human Development, Candido Mendes University, Rio de Janeiro, Brazil, 9-10 October 2000), online: UNDP [http://hdr.undp.org/docs/events/global\\_forum/2000/chapman.pdf](http://hdr.undp.org/docs/events/global_forum/2000/chapman.pdf) (date accessed: 30 January 2006). See also *Expert Seminar on Appropriate Indicators to Measure the Realization of Economic, Social and Cultural Rights. Final Report* (Geneva, 25-29 January 1993), UN Doc. A/CONF.157/PC/73 (20 April 1993). The recommendations made at this seminar are also summarised in *Report of Other Meetings. Report of the Secretary General, World Conference on Human Rights Preparatory Committee, 4<sup>th</sup> Sess.*, UN Doc. A/CONF.157/PC/42/Add.1 (30 April 1993), online: [http://www.un.org/russian/hr/conf/docs/a\\_conf157\\_pc42add1e.pdf](http://www.un.org/russian/hr/conf/docs/a_conf157_pc42add1e.pdf) (date accessed: 30 January 2006), paras. 133-159. See also Chairpersons of the Human Rights Treaty Bodies, *Status of the Plans of Action: Establishment of Indicators/Benchmarks to Assess the Realization of Human Rights*, 12<sup>th</sup> meeting, UN Doc. HRI/MC/2000/3 (16 June 2000), online: [http://www.unhchr.ch/tbs/doc.nsf/0/fc5cbcc5e6ed773ac125692000377226/\\$FILE/G0042744.doc](http://www.unhchr.ch/tbs/doc.nsf/0/fc5cbcc5e6ed773ac125692000377226/$FILE/G0042744.doc) (date accessed: 23 January 2006), paras. 35-37.

<sup>23</sup> See, *inter alia*, on the use of indicators in the European Employment Strategy, R. Salais, “La politique des indicateurs. Du taux de chômage au taux d’emploi dans la stratégie européenne pour l’emploi”, in B. Zimmermann (ed.), *Action publique et sciences sociales*, Paris, éd. de la Maison des Sciences de l’Homme, 2004; and A. Lyon-Caen and J. Affichard, “From legal norms to statistical norms : Employment policies put to the test of coordination”, in O. De Schutter and S. Deakin (eds.), *Social Rights and Market Forces. Is the open coordination of employment and social policies the future of social Europe?*, Bruxelles, Bruylant, 2005, pp. 145-166,

<sup>24</sup> R. Malhotra, N. Fasel, “Indicators for Monitoring the Implementation of Human Rights – A Conceptual Framework” (Background paper prepared for the OHCHR expert consultation on indicators for monitoring compliance with international human rights instruments, Geneva, 29 August 2005) [unpublished].

background conditions, a particular importance is attached to the capacities of the actors to become active participants, by being provided with the resources (in particular the informational resources) which this requires.

### 3. Final remark on the relationship of the project to the theory of European integration

One note of caution may be in order. The research produced within the Sub-network emphasizes the role of fundamental rights in the construction of a European legal space. In part, the argument is that the establishment of the internal market and of the economic and monetary union – on the one hand –, the creation of the area of freedom, security and justice – on the other hand –, calls for a more active fundamental rights policy. Such a policy has a number of components. It includes tools for the monitoring of fundamental rights in the Member States in order not only to ensure that the Member States comply with the requirements of fundamental rights, but also in order to compare the performances of the Member States against one another with the broader aim of contributing to collective learning and coordinated progress towards the realization of fundamental rights in the Union. It also calls for certain legislative or policy initiatives, which may lead to an improved coordination between the Member States, or to harmonization or approximation of national rules.

However, it is important to emphasize that, by thus insisting on the need for such initiatives – to the adoption of which the Fundamental Rights Agency could make an important contribution –, we are not adopting a neo-functionalist perspective, according to which the story of European integration would be a story of a self-reinforcing development, moving smoothly towards a federal union as each even minor step would automatically and as of per necessity lead to other, perhaps bolder moves in that same direction.<sup>25</sup> This teleological and overoptimistic reading is simply oblivious of the important ideological battles over the shape of European federalism, and in particular, over the degree of positive harmonization which should accompany or complement negative harmonization, and over the sequencing between the abolishment of barriers and mutual recognition on the one hand, and the adoption of common rules on the other. It is theoretically incomplete : as noted by Andrew Moravcsik, a fundamental weakness of neofunctionalism lays in 'its aspiration to trace dynamic endogenous effects (incremental feedback, unintended consequences, and the resulting change over time) without a baseline theory of exogenous constraints (state economic interests, political constraints, and delegation) through which dynamic change must take place'.<sup>26</sup>

In contrast to the neo-functionalist perspective, this research does not obliterate the role of the actors. And it does not underestimate the decisive part played, in European integration, of power struggles between the Member States. However, it also departs from the 'rationalist' understanding of international cooperation which is now offered as the main competitor to neo-functionalism in its many guises. A. Moravcsik explains the adoption of the important steps towards European integration as a three-stage process, consisting in the formation of national preferences which the governments then convey at the bargaining table, this bargaining itself where the States who have the most to gain from certain decisions agree, in exchange, to certain concessions on other issues, and finally the choice to delegate or pool sovereignty in certain regimes in order to ensure that the other States will not defect from their commitments. Our approach is different in a number of respects :

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<sup>25</sup> See, for a nuanced presentation of the neofunctional approach, Ernst B. Haas, *Beyond the Nation State : Functionalism and International Organization*, Stanford, Stanford University Press, 1964.

<sup>26</sup> A. Moravcsik, *The Choice for Europe. Social Purpose and State Power from Messina to Maastricht*, Routledge, London & New York, 1998, repr. 2003, p. 15.

1° In examining how fundamental rights have become a constituent element of European constitutionalism and how they can make further progress in the law- and policymaking of the Union, we emphasize the role of national actors, such as national courts or, since much more recently, national and international non-governmental organizations and the national institutions for the promotion and protection of human rights. We thus consider not only the role of governments, but also that of other actors whose attitudes, in our field at least, have played a decisive role in the shaping of intergovernmental decisions themselves. We hope to highlight to which extent the networks of such national actors have influenced the definition by each government of its position when bargaining with the other States. Nor do we underestimate the influence exercised on the shaping of national preferences, and on the attitudes of governments as well as of the other actors, of the availability of certain experiences in other Member States as well as of the sense to belong to a same community of values. In the field of fundamental rights, it would be highly artificial to reduce the significant progress which has been made to the desire by each State to promote its own commercial interests and to favor its own most important economic actors. Rather, the development, in parallel to intergovernmental negotiations and dialogue, of networks of organizations and of a dialogue between courts, need to be taken into account.

2° Moreover, the specific status of fundamental rights is to be taken into account. We recognize, indeed we insist on, the ambiguity of this reference. On the one hand, there is an important *acquis* of international and European human rights. This *acquis*, which (with certain important nuances especially in the field of social rights) all the Member States in principle have in common, constitutes an obvious basis for harmonization at the level of the Union, in order to ensure that fundamental rights shall constitute the 'cement' which will hold together the building blocks of European integration. On the other hand however, the reference to this *acquis* raises a number of questions, two of which at least deserve mentioning here.

First, precisely because this *acquis* is already present, the added value of promoting fundamental rights at the level of the Union may be doubted : while few would disagree that the Union should respect fundamental rights in its activities and that it should not impose on the Member States obligations which would lead them to violate their human rights obligations, the idea that the Union should play an active role in ensuring that the Member States comply with their human rights obligations or that it should legislate in order to promote fundamental rights is, by contrast, heavily contested. Our belief that such an active role may be justified is based on the idea that the impact of European integration on the level of protection of fundamental rights in the Member States may be very indirect. Typically, such an impact will result, not from fundamental rights being clearly violated by Union law, but from the incentives which certain rules of Union law may create – for example, an incentive to relax the requirements of the international public policy exception in the application of a foreign rule in order to promote mutual recognition, an incentive to reduce the level of taxation of undertakings established under the jurisdiction of the host State in order to benefit from the mobility of capital, or an incentive to liberalize the rules regulating services in order to attract service providers. Such indirect impacts should be carefully monitored in order to ensure that, should a need to improve the coordination between States emerge, it will be identified at a sufficiently early stage.

Second, fundamental rights are not simply rules which are to be applied mechanically, as if they had always already anticipated the context of their application. On the contrary, the significance of these rules should be systematically renegotiated, the rules themselves reinvented, and the provisional conclusions arrived at in the course of their application should be constantly tested in new contexts. The collective learning this requires leads to proposing the establishment of a mechanism leading to an exchange of experiences between the Member States in order to serve that purpose.

3° Finally, while the delegation to the European Union of certain issues (and especially, within the framework of the European Community, where such delegation leads to establishing the European Commission as the guardian of the Member States' obligations, having at its disposal the tool of infringement proceedings) may of course serve to ensure that the other States comply with their commitments – such delegation thus resulting in a mutual insurance against any State defecting from the agreement –, it also may have the purpose in certain cases to bind future governments, and to insulate certain decisions from the pressures of the public opinion, i.e., to 'depoliticize' these issues by supranationalizing them. The coordination of certain aspects of social inclusion policies and of pensions reform under the Lisbon strategy may be explained essentially by this logic. Where fundamental rights are made a supranational issue, the result is that they too are 'depoliticized', and guided, not by the concerns of the public opinion in each country, but rather by guidelines or rules adopted at European level under processes where responsibilities are diluted and where democratic control is significantly weaker. The cost to national democratic process of encouraging further delegations of power should be carefully weighed in any proposal which will result from the research. Our initial response, however, is that the democratic process is reinforced, rather than weakened, by ensuring that the policy-making at the national level is adequately informed about the interdependencies which need to be taken into account (the externalities, both negative and positive, which any choice may have in the other Member States), and that it benefits from experiences (whether these are successes or failures) which have been led elsewhere.