REFLEXIVE GOVERNANCE AND THE DILEMMAS OF SOCIAL REGULATION

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1. The object of the book

This collection of essays examines the development of new modes of governance in the European Union, and whether – and under which conditions – these new modes of governance offer a way out of the dilemmas which have plagued debates on 'Social Europe' since the very creation of the European Economic Community. We focus in particular on the open method of coordination (or 'OMC'), both as an element of the European Employment Strategy under Title VIII of the EC Treaty and as a tool in the social policy under Title XI of the EC Treaty. The open method of coordination is one of a number of new governance mechanisms which, from a theoretical point of view, are understood as performing a range of functions. These include fostering mutual learning between the Member States and avoiding or limiting the phenomenon of competitive deregulation in the internal market, while at the same time respecting the diversity of national practices and the existing division of powers between the European Community and the Member States. More precisely, we sought to confront the practice of the open method of coordination with a number of different approaches to collective action proposed within the current debate on modes of governance. Our hypothesis was that the notion of 'reflexive governance' might serve to identify existing limitations of the current model under which the open method of coordination functions, and to help us come up with possible solutions for overcoming these limitations. This hypothesis was refined and tested in a series of seminars sponsored by the European Community's 5th Framework Programme in Research and Development[1]. The seminars were held in Brussels/Louvain, Paris and Cambridge, from December 2002 to March 2004. This volume is the result of the collective effort of the scholars involved in that enterprise.

2. The guiding hypothesis

We adopted as our point of departure the apparent contradiction – or, at least, tension – between the idea of constitutionalism and the emergence of new modes of governance[2] . We have, on the one hand, shared values, which define the specificity of the European social model and which the Charter of Fundamental Rights[3] in part sought to encapsulate by identifying a list of fundamental social rights. The European Social Agenda, approved by the Nice European Council meeting of December 2000 which also proclaimed the Charter of Fundamental Rights, exemplifies the current tendency to ground social policies in particular on a rights-based discourse, whereby a dual objective is assigned to social policy: not only is it seen as a productive factor; it also must be 'more effective in the pursuit of its specific aims concerning the protection of individuals'[4]. On the other hand, we have a set of processes (the OMC and related forms) which are presented as open and deliberative, and as encouraging a search for the best practices within Europe, rather than as simply implementing a set of common values whose meaning and content are regarded as fixed in advance. We sought in

[1] The volume is the outcome of a research project (HPSE-CT-2002-50023- Democratic Governance) supported by the European Community 5th Research and Development Programme: IHP-Key Action – IHP-KAI-2001-1. Some of the research was also supported by the Belgian Science Policy Department research programme 'Inter University Attraction Pole' (P.A.I./I.A.P. V-23, Theory of the Norm and Democratic Governance) financing the Centre for Philosophy of Law (CPDR/UCL) for the period 2002-2007 and by the core ESRC grant to the Centre for Business Research –University of Cambridge.

[2] On this point, see G. de Búrca, 'The Constitutional Challenge of New Governance in the European Union', *European Law Review*, 2003, Vol. 28, p. 814.

[3] OJ C 364 of 18.12.2000, p. 1.

[4] OJ C 157 of 30.5.2001, p. 4. See para. 9.

our research to overcome this tension, and the conflicting views of the open method of coordination to which it has given rise. Thus the OMC has been criticized on the one hand as little more than a method of implementing common objectives, these objectives being still defined in the traditional (hierarchical, or top-down) fashion; or, on the other hand, as veiling a lack of political will to promote employment and social objectives at best, or at worst as a misleading idea behind which there lies a neoliberal agenda, favouring a form of market ordering. The former presentation of the OMC sees it as a new method of governance for implementing substantive values which are defined outside the process itself, and which therefore renders illusory the apparent freedom of the actors involved, whether these be the member states, the social partners, or other civil society actors. The latter presentation of the OMC sees the method as purely procedural, that is to say, a process whose objectives are defined solely in terms of whichever outcomes happen to prevail, with the risk that values constitutive of the European social model will be neglected or undermined.

We suggest that neither of these conflicting views attaches sufficient importance to the analysis of the background conditions on which the success or the failure of the open method of coordination will depend. Indeed, the hypothesis of our research has been that the open method of coordination constitutes a genuinely new mode of regulation, but that this originality requires, for it to be effective, certain conditions to be satisfied. More specifically, the hypothesis of *reflexive governance* holds that *the conditions under which a deliberative process may succeed can be identified, and once identified, must be affirmatively created, rather than taken for granted*. A form of institutional constructivism is therefore implicit in the reflexive governance hypothesis: we seek to reshape the context in which the actors operate. Indeed, the hypothesis also considers that the understanding the actors have of their interests and of the constraints under which they operate is a product of the institutions which they inhabit, rather than being exogenous of or independent from those institutions. Therefore the kind of institutional constructivism which we require is one which will make it possible for the actors to redefine their interests through a process of collective learning, by arriving at a new perception of the problem they are seeking to resolve. As Jacques Lenoble argues in his introductory chapter, neither these interests, nor this perception, are given: instead, they are shaped by the context in which the actors are located, and any renewed understanding of that context will result in a redefinition by the actors concerned of their positions.

What we have sought to contribute to the current debate on the promises and limitations of the open method of coordination is, therefore, a reflection on the conditions of success of this new mode of governance, if it is indeed to encourage mutual learning by an ongoing deliberative process in which the actors involved accept that no-one has privileged access to the best solution. By making a 'detour' via the *theory of action* we have been able to address questions which the current debate on the open method of coordination mostly ignores. It is the failure to consider the theoretical underpinnings of the practice of governance which results in the tendency to denounce new modes of governance as either regulation 'in disguise' – as a thinly-disguised attempt to expand the competences of the Union under the pretext of merely 'coordinating' the exercise by the Member States of their competences in fields such as employment policies, pension reform or social policies – or to dismiss them as a justification for inaction in the face of deregulatory strategies threatening the distinctive social model of the Union. We believe neither of these views to be accurate. Both remain silent on the question of the precise background conditions which need to be satisfied before the open method of coordination can fulfil its professed objectives. Our research has focused on these conditions. Because they currently have the status of being *implicit* presuppositions in the

public discourse on the OMC, our work has consisted of drawing out these latent tendencies, clarifying their meaning, and locating them by reference to a wider theoretical framework.

Thus our hypothesis is that *central among the conditions of success for the OMC and related processes are mechanisms which function as incentives for the actors to reflect upon the extent to which their understanding of the problem which is to be overcome and their own position may be context-dependent, and therefore may be open to revision in the light of experience* [5]. The research therefore cannot be said to adopt a sceptical view towards the open method of coordination, but nor does it idealize this form of governance as offering the most developed example to date of a policy process built on the idea of deliberation: rather, the research seeks to identify the current shortcomings of the open method of coordination, and to propose means to make it conform better to a truly reflexive form of governance.

In particular, certain tools need to be created to encourage *deliberation* between actors. Deliberation means that rather than simply defending existing positions, they should reflect on the beliefs and presuppositions on which their positions are based, and examine whether these positions should not be revised in the light of other, competing beliefs or presuppositions. The purpose is to build a common perception of the problem which is to be solved before debating the solutions which the problem calls for: before they can adequately identify such solutions and agree on their desirability, the actors should confront their perceptions of where the problem precisely resides, and mutually correct those perceptions. It is the absence, in practice, of processes for arriving at a common perception of the problem which is at the basis of claims that re-regulation (resort to traditional command-and-control regulation) or deregulation are the only viable policy alternatives to solving these issues.

This guiding hypothesis should not be confused with the idea that the actors concerned do not know where their 'real interests' reside, because they are caught in institutional and epistemological frames which bias their perceptions. Our hypothesis does take into account the possibility that such frames influence the understanding of the problem to be solved. But it is also based on the conviction that not all institutional settings are equivalent. On the contrary, certain institutional frameworks facilitate reflexivity, while others discourage it. One of the aims of the research has therefore been to identify the most promising institutional devices by which the actors involved in the open method of coordination or similar, developing modes of governance, could be encouraged to question their initial representation of the issues which they confront, and even more precisely, to reconstruct the definition of those issues with the other actors implicated.

Thus conceived, reflexive governance – of which the open method of coordination as it is currently developing merely constitutes a tentative approach – proposes a *procedural* approach to questions of governance. The specificity of this approach is that it seeks to draw conclusions from the fact that we are guided in our judgments by representations

[5] See for this: J. Lenoble and M. Maesschalck, *Toward a Theory of Governance: The Action of Norms*, Kluwer Law International, The Hague/New York/London, 2003; M. Dorf and Ch. F. Sabel, 'A Constitution of Democratic Experimentalism', in *Columbia Law Review*, 1998, Vol. 98, No. 2, pp. 267-473; M. Dorf and Ch. F. Sabel, *A Constitution of Democratic Experimentalism*, Harvard University Press, Cambridge (MA), 2002; Ch. F. Sabel, *Learning by* Monitoring, Harvard University Press, Cambridge, (MA), 2002; J. E. Innes and D. E. Booher, 'Collaborative Policymaking: Governance Through Dialogue', in M. Hajer and H. Wagenaar, *Deliberative Policy Analysis: Understanding Governance in the Network Society*, Cambridge University Press, Cambridge, 2003, pp. 33-59.

(epistemological frames) which cannot be presupposed to be identical for all, but instead may explain the irreconcilable character of certain disputes. However, the procedural character of reflexive governance confronts us with the question of the compatibility of our approach with the emergence of certain values within the European policy discourse, as manifested in particular by the emphasis on fundamental rights. Indeed, the question of the relationship of reflexive governance to certain constitutive values, such as those of particular fundamental rights, has central to our research project. In the course of the project, it was approached from different angles. The procedural/substantive distinction concerns the direction of the discourse on European constitutionalism: the debate concerning the place of fundamental social rights in the open method of coordination as implemented in the European Employment Strategy or in the field of social policy is simply one example of a wider debate on the coexistence of different forms of governance within the Union. It relates to different understandings of the open method of coordination, as a means of achieving certain results which are deemed to be desirable, or instead as a search mechanism for discovering which results we should seek to achieve. It is also central to the debate concerning 'reflexive law' in general: as argued in particular in the chapter authored by Stijn Smismans, certain understandings of reflexive law which have their premises in systems theory, because of their 'normative closure', would seem to require supplementation by the democratic values of deliberation. Moreover, the 'reflexive law' approach to issues of regulation puts its faith in self-regulation within subsystems, raising the question of which safeguards need to be imposed – not excluding the imposition from above of substantive standards – to limit the risk of abuse in power relationships.

3. The structure of the book

A Theoretical Introduction

Using the hypothesis laid out above as our departure point, we have pursued a range of theoretical and empirical investigations designed to test the validity of our diagnosis and to identify normative proposals which may be derived from the idea of reflexive governance. The structure of the book reflects this dual objective. In an introduction to the book, Jacques Lenoble shows how, although the open method of coordination is not bound to be either 'regulation in disguise', or lacking any normative force, the critiques which it is facing – for example from Fritz Scharpf[6] or Adrienne Héritier[7] – are to a large extent justified. Where these critiques fail, Lenoble argues, is in the solutions they propose: the open method of coordination must affirmatively seek to create the background conditions it requires for it to be successful as a collective learning process, or its pretence to being a novel form of governance will, indeed, be too easily dismissed.

Part I – The Open Method of Coordination as a Form of Reflexive Governance

After the theoretical introduction by Jacques Lenoble, the book is divided into three parts. The contributions in Part I, by Alberto Andronico and Antonio LoFaro and by Stijn Smismans, locate the specificity of reflexive governance approach with regard to the open method of

[6] F. Scharpf, 'La diversité légitime: nouveau défi de l'intégration européenne', *Revue française de science politique*, 2002, Vol. 52, Nos. 5-6, 606-639.

[7] A. Héritier, 'New Modes of Governance in Europe: Policy-Making without Legislating?', in A. Héritier (ed.), *Common Goods. Reinventing European and International Governance*, Lanham-New York-Oxford, Rowman & Littlefield Publ., 2002, pp. 185-206.

coordination, and draw out contrasts with other theories of regulation. Alberto Andronico and Antonio Lo Faro contrast two views of the OMC. According to a 'pure proceduralist' account, the OMC is to be distinguished both from traditional command and control regulation and from regulation by the market. Another interpretation sees the OMC as a means to channel certain substantive values, and is therefore a mechanism by which objectives set out for employment and social policy can be more effectively achieved (a 'substantive' version of OMC). From this perspective, fundamental rights play an important role in limiting any potentially deregulatory tendencies of OMC. Processes of learning and experimentation may develop 'in the shadow' of fundamental rights, in particular if certain interpretations of the possible horizontal effect of the Charter of Fundamental Rights and Freedoms become widely accepted. Building on the directly-deliberative polyarchical approach of Sabel et al., and developing further its links to Habermas's theory of communicative action, these authors argue for a form of regulation which operates by expanding the 'reflexive capacity' of those actors in civil society to whom general norms are addressed.

Andronico and LoFaro therefore forcefully argue in favour of an understanding of the open method of coordination which, they claim, differs from that proposed in the White paper of the European Commission on *Governance in the European Union*, which – while praising the method for renouncing a naive approach to regulation 'from above' – still sees it as simply a means to be utilized with a view to reaching a pre-established objective. Instead, they argue, OMC should be seen as a means of 'governing complexity through mechanisms of deliberative democracy, within which the moment of decision-making is no longer separated from the moment of implementation; in other words, this is a form of governance capable of overcoming the ill-fated trade-off between legitimacy and effectiveness. It is relevant to recall here that the OMC arises precisely from the need to overcome those very same regulatory models based on hierarchy which a 'substantive' conception of fundamental rights would inevitably bring back into the picture'. Stijn Smismans offers to meet this challenge by proposing a theoretical model, which he labels 'reflexive deliberative polyarchy', overcoming the limitations of both the directly-deliberative polyarchy and the theory of reflexive law. While reflexive deliberative polyarchy favours the decentralized, bottom-up deliberation of directly-deliberative polyarchy, it also acknowledges the difficulties of making direct participation by citizens effective. It therefore enriches directly-deliberative polyarchy not only by reinstalling electoral competition and parliamentary representation within polyarchy itself, but also by encouraging reflexivity, understood as more effective communication between sub-systems – that is to say, more effective coordination between them, but without this leading to the subordination of one sub-system to another.

The theoretical proposal which is advanced by Smismans is particularly timely. Two lines of theoretical development have, up to this point, been used to explain the OMC and its related forms. The idea of 'directly deliberative polyarchy' ('DDP'), developed by Cohen and Sabel[8] and Gerstenberg and Sabel[9], offers a model of democratic governance according to which lower-level actors (in a federal or transnational context, state governments, or, more generally, local and regional-level administrations, the social partners, and other actors in civil society) are granted autonomy to experiment with solutions of their own to common problems, within broadly defined parameters. In return, they furnish 'rich information'

[8] J. Cohen and Ch. F. Sabel, 'Directly-Deliberative Polyarchy', *European Law Journal*, 1997, 4: p. 314.
[9] O. Gerstenberg and Ch. F. Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?', in C. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Market*, Oxford University Press, Oxford, 2002.

concerning solutions to the central bodies. The process is 'directly deliberative' in the sense that citizens are directly involved in decision making processes, in the course of which they have to examine their own choices in the light of the choices of others. The process involves 'polyarchy' because it entails a 'permanent disequilibrium' brought about by the devolution of rule making to lower levels.

The second strand, 'reflexive law' (RL), offers a theory of law which explains the emergence of regulatory techniques which aim to achieve their goals through stimulating 'second order effects' on the part of actors, in contrast to more traditional forms of 'command and control' regulation[10]. This can be understood in terms of the recognition, by the legal system, of its own self-referential nature, and hence of the limits of legal regulation with regard to other social sub-systems such as the economy and the political system. At the same time, to varying degrees, writers on reflexive law recognize the potential for public policy goals to be achieved through mechanisms of 'structural coupling' between systems, involving the 'translation' into different contexts of alternative cognitive frames. Thus reflexive law is a theory, which, in recognizing the limits of regulatory law, also holds out the prospect of a more complete understanding of its potential as an instrument of policy. The theory also has a normative dimension, which stresses the importance of diversity and plurality for the sustainability of systems, and which presupposes the existence of democratic and discursive mechanisms at the level of sub-systems. However, this element of the theory has arguably not been very far developed.

In his contribution to this volume, Stijn Smismans argues for a synthesis of these two approaches which, he claims, helps to overcome their respective limitations. His theory of 'reflexive deliberative polyarchy' aims to provide RL theory with 'the normative democratic dimension it was lacking' while at the same time highlighting 'the role of law as a tool to realize the democratic ideal of DDP'. He uses this theoretical framework to evaluate the European Employment Strategy. The EES, he argues, is in danger of failing as a mechanism of directly deliberative polyarchy, because of the limited role played by the social partners and other civil society actors in the drafting of national action plans. In addition, the benchmarks contained in the employment guidelines tend to be centrally imposed rather than being derived from a de-centred, learning process. Thus 'the formulation of such a normative framework, without the guarantee of decentralized participation, and largely beyond the scope of parliamentary and public debate, cannot do other than place a question mark over claims that the OMC provides a democratic governance procedure'. Conversely, the EES scores well by reference to the criteria of reflexive law, since it takes into account the existence of alternative mechanisms for governing the economy. However, 'the EES lacks '*reflexion*' in so far as it does not provide the coherent institutional framework that can encourage decentralized self-regulation in an accountable and democratic way and that can ensure interaction between subsystems without subordination of one to the other'. As a result, two particular problems arise with the EES: one, that the process of policy-making is de-politicized; and second, that 'social objectives are entirely subordinated to economic ones and substantive rights lose their place in policy frames'.

Smismans then draws a number of normative conclusions from his analysis. He recommends, firstly, that more attention should be paid to putting in place institutions at European level which encourage decentralized participation: for example, mechanisms to strengthen the role

[10] See on this point G. Teubner, *Law as an Autopietic System*, Blackwell, Oxford, 1993; R. Rogowski and T. Wilthagen (eds.), *Reflexive Labour Law*, Kluwer, Deventer, 1994.

of the social partners in formulating benchmarks by which national action plans (NAPs) are evaluated. Secondly, forms of local deliberation could be strengthened by involving a wider range of civil society actors in drawing up the NAPs. Thirdly, the requirement for decentralized participation should be recognized at the constitutional level. From a legal perspective, the issue is how to strike an appropriate balance between procedural and substantive rights:

> 'RPD as a normative frame for the EES does not just envisage a role for law in providing the procedures that would create the conditions for polyarchy, decentralized deliberation and *'reflexion'*. If law were reduced to pure proceduralism that abandoned the language of substantive rights, it would lose its autonomy in society, and consequently any normative claim on regulatory intervention. Therefore, the EES should not only provide for the procedural frame of the OMC, but should allow European social policy to (re-)build its own referential frame around social citizenship, rights and quality of jobs'.

Part II – Promises and Problems of the Open Method of Coordination

The contributions in Part II, by Joëlle Affichard and Antoine Lyon-Caen and by Nicole Kerschen, are more empirical in ambition: they propose an analysis of the actual functioning of the open method of coordination, focussing on the use of indicators in the European Employment Strategy and proposing an interpretation of the choices revealed by the indicators selected (Antoine Lyon-Caen and Joëlle Affichard), and on the role of social partners in the elaboration and implementation of the National Action Plans (NAPs) (Nicole Kerschen). Antoine Lyon-Caen and Joëlle Affichard discuss the critical perspective of certain authors who argue that the current indicators currently tend to dilute social rights and subordinate social objectives to economic ones. Statistical indicators are indeed highly sensitive to the context in which they are applied, and there is a danger that the OMC could be used as a covert form of centralization. Statistics shape policy, so that the definitions of 'employment' and 'unemployment' used by Eurostat may come to have an importance beyond their apparently technical significance. However, the authors argue that all indicators are to some degree ambiguous. They also defend the goal of an increased employment rate against charges that it represents a neoliberal agenda; a better way of thinking about it is in terms of a compromise between traditional welfare state approaches, and a deregulatory neoliberal policy agenda. The important issue, they argue, is the potential of OMC to develop common cognitive frames of reference through a critical '*reflexion'* on the role of the statistical indicators used to express the concept of an increased employment rate. In sum, Affichard and Lyon-Caen highlight the naïveté of the view according to which, indicators, especially quantitative ones, being 'neutral' in nature, could simultaneously respect the diversity of national practices while ensuring a certain form of 'centralization' or 'coordination' by a medium other than the market. This, they argue, ignores the complexities involved in the choice of the indicators and the modes of collecting the corresponding statistical data. A truly reflexive method of coordination, they conclude, should extend the notion and process of reflexivity to the indicators themselves.

In her chapter, Nicole Kerschen compares two countries – France and Luxembourg – presenting strongly different traditions of the relations between the State and social partners, and compares the role which, in each country, the social partners have played in the elaboration and implementation of the National Action Plans. She points out that while the concept of 'employability', among others, is extensively defined in the employment

guidelines (it formed one of the original 'pillars') and NAPs, the concept of 'partnership' between labour and management is nowhere defined in the relevant materials. The social partners have a complex and ambiguous role in the EES: they are given some responsibility for designing the EES model at central level, but they also an element in its implementation at national level. Her analysis studies in detail the way in which conceptions of social dialogue have developed over time as part of the evolution of the EES, and how a 'cascade' effect has seen the gradual accumulation of institutional innovations. At the same time, her work demonstrates the extent to which national-level differences remain highly significant: thus the separate national traditions of tripartism in France and Luxembourg have been reflected in the different experience of these two countries in developing their NAPs, and in the recommendations addressed to them by the Commission.

Part III – Ensuring Coordination in a Single Economic (and Social?) Area

Finally, the contributions in Part III offer an analysis of the open method of coordination as a form of reflexive harmonization, conceived as an alternative to the dilemma between regulation from the centre and pure decentralization – or regulatory competition – a dilemma which is the result of the establishment of an internal market, a single economic area, with no corresponding transfer of competences to the federal level. Catherine Barnard, Simon Deakin and Richard Hobbs analyze the stages through which the regulation of working time in the United Kingdom has gone. This evolution clearly illustrates the challenges presented by the phenomenon of regulatory competition in the Union[11]. It also highlights the diversity of national traditions which the Union legislator must take into account when proposing certain minimal safeguards to limit the risk of the 'race to the bottom'. They adapt the theory of reflexive law to argue in favour of a model of regulatory competition which seeks to preserve diversity and experimentation at local level[12]. From this perspective, Directive 93/104/EEC can be understood by reference to the idea that self-regulation by the actors involved in different settings should be preferred to the across-the-board imposition of uniform solutions. Their analysis brings about the links between the Directive and the development of OMC via the employment strategy and, more recently, the beginnings of a debate about corporate social responsibility as a mechanism for the implementation of social standards. Their empirical study, however, shows how this approach is at risk of being instrumentalized by certain actors, whose understanding of their role may not correspond to what was envisaged when a 'reflexive law' approach was chosen to favour diversity of approaches to certain problems. They suggest that the right institutional mechanisms are not yet in place which would enable the overall policy goals of the Directive to be implemented at a local level in the UK; in particular, the regulatory environment is not conducive to the kinds of collective '*reflexion*' and learning which this strategy requires:

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[11] See on this: C. Barnard, 'Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?', *European Law Review*, 2000, Vol. 25, p. 57; C. Barnard and S. Deakin, 'Market Access and Regulatory Competition', in C. Barnard and J. Scott (eds.), *The Law of the Single Market: Unpacking the Premises*, Oxford, Hart, 2002, pp.197-224; Lord Wedderburn, 'Inderogability, Collective Agreements and Community Law', *Industrial Law Journal*, 1992, Vol. 21, p. 245.

[12] See also: S. Deakin, 'Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonization. A Law and Economics Perspective on *Centros*', *Cambridge Yearbook of European Legal Studies*, 1999, 2: pp. 231-260; C. Barnard and S. Deakin, 'Market Access and Regulatory Competition', in C. Barnard and J. Scott (eds.), *The Law of the Single Market: Unpacking the Premises*. Oxford, Hart, 2002, pp.197-224.

> 'For the majority of UK employers and employers' organizations, the conduct of HRM is an issue for managerial prerogative, on which 'soft law' and corporate governance mechanisms barely impinge. Under such circumstances, it is not surprising that trade unions have difficulty in convincing their own members to accept the complex trade-offs involved in moving away from reliance on overtime to supplement basic earnings.'

The case study of the regulation of working time therefore points to the need not to idealize the context in which 'open' methods of regulation are resorted to: rather, part of the task of any regulatory power should be to examine what the conditions are in that context, and if necessary, create devices to ensure that the conditions under which a 'reflexive law' approach can function will indeed come into existence. Among these preconditions, there is, in particular, a need to consider the self-representations of the actors, and above all their self-understanding of their role.

The two final studies, which are highly complementary with one another, are more normative and forward looking in their approach. Gráinne de Búrca offers a fascinating study of the potential for the European Union becoming a 'human rights organization', in the sense put forward by Armin von Bogdandy[13], through the development of certain mechanisms, in particular reports on the observance of fundamental rights by the member States of the Union,[14] which may seek inspiration from the open method of coordination as developed in other fields of application. Thus De Búrca examines the extent to which an OMC for human rights has developed alongside the debate over the Charter, in the context, above all, of the enlargement of the Union:

> 'if the moves towards something like an open method of coordination in the area of protection and implementation of human rights are as yet embryonic, they present a real way forward for an EU human rights policy which avoids the circular disputes on the division of competences, and the exaggerated dichotomy of justiciability and non-justiciability which have characterized the constitutional-level debate on the Charter of Rights'.

What is required is, therefore, not simply to ensure that fundamental rights are more fully taken into account in the current functioning of the open method of coordination in employment and social policies, but to ensure, in addition, that recourse to the open method of coordination is extended, insofar as this method ensures a particular form of coordination and mutual surveillance which discourages free riding by the Member States. The aim should be to create a policy environment in which decentralized action by each Member State, affecting all the other member states sharing one common area, is possible, without giving rise to the need to transfer all supplementary powers to the Community/Union. But a condition for the extension of the open method of coordination is that its mechanisms should be revised, and in particular should be made to conform better to the promises of the reflexive form of governance which we are calling for.

In this vein, an important aspect of the research has consisted in proposing, and examining the consequences of, an extension of the open method of coordination to all the rights, freedoms

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[13] A. Von Bogdandy, 'The European Union as a Human Rights Organisation? Human Rights and the core of the European Union', *C.M.L. Rev.*, 2000, Vol. 31, p. 1307.

[14] See, in particular, the Communication of the Commission to the Council and the European Parliament, 'Respect for and promotion of the values on which the Union is based', COM(2003) 606 final, of 15.10.2003.

and principles enunciated in the Charter of Fundamental Rights. A form of open method of coordination between the Member States in fundamental rights is, we believe, required to provide the European Union with the tools which it requires effectively to pursue a coherent fundamental rights policy: fundamental rights should not be simply an external limit to the development of the activities (legislative actions and policies) of the Union, they should form part of the objectives these policies should pursue, without this necessarily having to lead to the transferral of further competences to the Union. The development of such a fundamental rights policy for the EU should not be considered as superfluous to the goals of the Union, in a context where the Council of Europe and the United Nations already exercise diverse forms of monitoring the situation of fundamental rights in the Member States of the Union. Indeed, as de Búrca argues:

> 'while [these] other systems [have their] own particular strengths and weaknesses, none of them enjoys the combination of regularity and frequency of monitoring, the relative degree of institutional and political closeness and trust between participating states, and the established mechanisms, institutions and array of instruments for policy coordination and mutual learning as does the European Union system. There is no mechanism, under any of the international or regional monitoring regimes for the states to cooperate together following the provision of information, to engage in systematic peer review or to foster exchanges with a view to mutual learning, or to agreeing best practices, of the kind that is built into the OMC process. Further, in addition to the closer degree of integration between the states of the EU and the leverage which this provides, there is always … the possibility of recourse to a harder legal mechanism or to harmonization measures in a situation where a specific problem seems to merit such a solution. In this sense, the European Union, with its unmatched degree of institutional density and of legal and political integration amongst participating states, is uniquely well placed to develop an (internal) human rights system which is stronger and more effective than any of the overlapping regimes which exist on a regional or international level.'

It is this challenge that, in the final chapter to the book, Olivier De Schutter seeks to meet. He develops the functions which an open method of coordination could fulfil for the implementation of the fundamental rights enumerated in the Charter of Fundamental Rights. His chapter elaborates on three of these functions. First, in fields where competences are shared between the Member States and the Union, the open method of coordination may be seen as a search device for identifying where an initiative of the Union may be required, on the grounds of the externalities, both positive and negative, which the actions of each Member State produces on all the other States, with which they share a common area of freedom, security and justice. Secondly, the open method of coordination could be an effective means of better reconciling the requirements of those market (economic) freedoms which are constitutive of the internal market, on the one hand, with fundamental rights on the other, in particular social rights, which the Member States are bound to protect and implement within their respective, national jurisdiction. Thirdly, the open method of coordination could be seen as providing encouragement to mutual learning, since the solutions preferred in certain Member States may inspire the adoption of similar solutions in other Member States. This is particularly the case in so far as mutual observation and learning reduces the risk that the implementation of fundamental rights at the level of each State simply recreate obstacles to the operation of the internal market or impedes cooperation between the Member States in the area of freedom, security and justice.

4. Conclusions

In their different ways, each of the contributions to this book examines the tension between democratic values and the market order which is currently at the heart of debates about the evolution of the European single market and the prospects for European governance. The common argument flowing through these texts is that distinctive European solutions are emerging to the dilemmas posed when the discourse of fundamental human rights is set in the context of transnational economic integration. Above all, we argue that the successful implementation of human rights in a market setting will depend upon processes of collective learning between social and economic actors, and that a theory of 'reflexive governance' will play a key contribution in future to the understanding of the form these processes may take.