ref. REFGOV-FP6-FR-summary
15 October 2004

A Fundamental Rights policy in the Public Interest :
The Decentralized Implementation of Fundamental Rights in a single Area

What follows constitutes a summary description of the research which will concern the import of the hypothesis of reflexive governance in the area of fundamental rights, which is part of the collective research programme on "Reflexive Governance" coordinated by the CPDR as an integrated project (IP) under the 6th Community Framework Programme in Research and Development (FP 6) (2005-2009). This IP is placed under the 7th priority research area: Citizens and governance in a knowledge based society, theme 2 : Citizenship, democracy, and new forms of governance, research area 5: Articulation of areas of responsibility and new forms of governance, topic 5.1.1.: Public Interest: conception, regulation and implementation.

The partners to this project are the CPDR/UCL (prof. O. De Schutter), coordinating the project; the European University Institute at Florence (prof. G. de Búrca); the Centre for Business Research at the University of Cambridge (prof. S. Deakin); the University of Catania (prof. A. Lo Faro); the Europa Institut of the University of Leiden (prof. R. Lawson); the Institute for European Studies of the Free University of Brussels (prof. S. Gutwirth); and the Ludwig Boltzmann Institut für Menschenrechte (BIM) at Wien (prof. M. Nowak).

*

The Sub-network on fundamental rights will seek 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 problem may be briefly stated as follows. We are familiar with the arguments which either present interjurisdictional competition as benevolent and the source of efficiency gains, or instead call for harmonization in order to facilitate open markets and prevent competitiveness-driven, welfare-reducing under-regulation. On the one hand, it is argued, competition between jurisdictions may encourage innovation and the identification of solutions best suited to the local conditions ; and it is an incentiving mechanism, rewarding the jurisdictions adopting the most efficient regulations. On the other hand, others argue, creating a « market » for regulation by encouraging interjurisdictional competition may be inadequate in the presence of market failures due to the divergence of private and social costs (externalities), imperfect information, an absence of mobility between jurisdictions so that less efficient regulations are not sanctioned and not incentivized to improve themselves ; and interjurisdictional competition could lead to a « race to the bottom » and to the suboptimal provision of public goods within each jurisdiction.

These arguments have been developed especially in studies focusing on environmental regulation, social legislation, and tax policy. Our objective is to transpose these arguments into the broader area of fundamental rights, beyond rights such as the right to environmental protection, health care, or the fundamental rights of workers, to which they most immediately apply. We will ask, for instance, which « externalities » the regulation by a Member State of certain aspects of the right to a fair criminal procedure may produce, as that State shares with the other EU Member States a same area of

freedom, security and justice ; or we will ask how real the risks of a « race to the bottom » are in areas such as the protection from discrimination or the protection of private life in the processing of personal data in domains not yet harmonized at EU level. As a matter of course, neither the criterion of « efficiency » nor cost-benefit analysis are tools adequate in such matters to conclude about the desirability of certain outcomes. A normative approach is required, which shall have to be based on the idea that fundamental rights are to be fulfilled, and should simply be respected – that they are an objective to be realized, not simply a limit which may not be crossed. Nevertheless, in an area where the mobility of persons, goods and investments is guaranteed, where cross-border services may be provided without restriction, and where we are heading for the mutual recognition of criminal and civil judicial decisions, the strong interdependency of the EU Member States implies that the approaches adopted in each jurisdiction will per necessity affect the other juridictions. The mechanisms of such interdependencies and whether or not actors at the national level can take those into account without further coordination are what we intend to focus upon.

The most immediate result of the research, although the least interesting from a theoretical point of view, may be situated in the regulation of the exercise by the Union of the powers it has been attributed. Although the implementation of fundamental rights is in principle left to the member States, in many areas covered by the Charter of Fundamental Rights, the Union shares powers with the States, and it may seek to exercise these powers where it is justified in doing so under the principles of subsidiarity and proportionality. The question is posed, therefore, under which conditions an initiative of the Union may truly add value to the fundamental rights policy of the Member States – where, in other terms, it can be demonstrated (i) that the issues related to the implementation of fundamental rights cannot be satisfactorily addressed by the Member States acting individually, and (ii) that the objectives can be better achieved by an initiative adopted at the level of the Union.

More importantly however, we contend that the arguments exchanged between the partisans of competitive federalism and the supporters of further harmonization rely, implicitly or more explicitly, on a set of presuppositions concerning the conditions under which, if they are implemented at the level of the Member States, the fundamental rights will develop. We first have to uncover these presuppositions : examine under which conditions, whether explicitly mentioned or simply tacitly adopted in the models under review, the anticipated consequences of regulation at either the national or the Union level will result. Only once these presuppositions are clarified, shall it be possible to compare them with the conditions actually existing. After this is done, we may hope to be able both to shed light on the realism of certain models – for instance, of the idea that citizens will « vote with their feet » if their rights are not adequately protected in the Member State in which they reside –, and to identify whether, and how, the existing conditions should be modified in order to ensure that the predictions will be fulfilled – for instance, whether non-governmental organisations or national institutions for the promotion and the protection of human rights should not be granted more functioning capabilities at the national level, if we wish to ensure that the decentralized implementation of fundamental rights will not lead to adverse outcomes.

As these conditions presupposed by the current discussions about the adequate level of regulation in the Union relate not only to the formulation of laws and policies at different levels, but also to the modes of communication, both horizontal (between the Member States) and vertical (between the Member States and the institutions of the Union), we also shall question the adequacy of the existing mechanisms through which the decentralized implementation of fundamental rights facilitates experimentation and innovation, mutual learning, and the exchange and promotion of good practices. The open coordination of the policies pursued at national level, indeed, constitutes an alternative, in many ways promising, to the binary opposition between harmonisation and competitive federalism. One important dimension of the project will consist in examining what may be learnt from the experience of the open method of coordination in employment and social policies, and whether this constitutes a way forward for the implementation of the rights of the EU Charter of fundamental rights. Here also, however, we shall seek to avoid falling into the trap of an idealized representation of the process to which the open method of coordination has led in fact : whether or not it may constitute a viable device for ensuring the adequate mix between respect for diversity and local experimentation

and innovation on the one hand, mutual control and coordination on the other hand in order to limit the risk of free-riding and overcome the prisoners' dilemmas inherent in the absence of harmonization, will often depend on the effective devices incentivizing the implicated actors to learn from one another, and to take into account into the choices they make the possible impact of those choices on one another.

We see, thus, how the question of governance is decisive for the future evolution of fundamental rights in the European Union. Building on both a theoretical approach to the questions of externalities and the separation between private and social cost in the field of fundamental rights and on empirical studies in four fields (fundamental social rights, personal data protection, anti-discrimination, and criminal law and procedure), we shall seek to identify how better forms of coordination can be imagined in order to reconcile diversity within the Union with the need to ensure that a decentralized implementation of fundamental rights will not lead to undesirable outcomes because of the failures it may implicate. We shall seek to identify which mechanisms can incentivize the relevant actors to learn from one another's experiences and coordinate in order to overcome the risk of such failures. We postulate that the recommended incentive mechanisms can produce the desired efficiency in satisfying the requirements of the public interest only on the condition that they involve the involved actors in a collective learning process. Such a collective learning process is needed to maximize the inherent potential of any collective action to achieve a certain ideal of governance. And the reflexive capacity of "adaptation and evolution" which 'conditions' this learning process is not "given"; it requires specific incentives. These incentives should allow concerned actors to acquire a common perception of the context of the problem to be solved. The key question therefore is to define the specific conditions of possibility – and the corresponding incentives– of this operation: the building of a common perception and of the "reflexive" learning process that it requires.