Report on the results of policy benchmarking

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Executive Summary

This report studies the practice of 'policy benchmarking' as an instrument to translate the EU's human rights commitment into practice.

Policy benchmarking is a relatively new tool to monitor processes and to assess the situation against continuously improving best practice worldwide or regional on an ongoing basis. Its effective use requires close consultation and joint work with all stakeholders involved in human rights policies and relies heavily on the use of empirical data to assess progress. It serves to assess not just well or poorly performing countries, institutions or policies compared with their counterparts, but also the factors that determine progress in achieving the protection of human rights. Benchmarking is based on the idea of centrally monitored 'local' performance, and the assumption is that it implies a number of elements: (i) A central monitoring agency pools information on performance and makes it available to others. (ii) This data is used to periodically reformulate and progressively refine minimum performance standards, desirable targets and preferred means to achieve them. (iii) Through constantly monitoring and evaluating performance, the model is assumed to constantly improve performance and generate learning benefits.

The assumption goes as well that benchmarking can be a promising avenue for promoting human rights in a number of contexts, and this report aims to analyze the conditions for successful benchmarking policies in relation to human rights, to review a number of initiatives which have been taken by the EU to that effect, and to engage in a prospective exercise of how the EU could set up innovative benchmarking policies. The argument develops as follows.

Section II presents benchmarking in general, its definition, its added value, but also the associated challenges of putting in place benchmarking policies. Section III reviews the EU history of benchmarking, focusing on the so-called 'open method of coordination' and related instances of experimentalist governance, and on a critical examination of past EU initiatives towards benchmarking human rights in the fields of forest management, business regulation, enlargement and trade. This section finds that, although the EU intends to rely on policy benchmarking in a number of fields, its attempts have so far suffered from a number of flaws. Section IV, on the basis of seven examples of human rights promotion initiatives by local and regional authorities (LRAs), positively assesses the potential for the EU to benchmark these initiatives so as to enhance the potential and effectiveness of LRAs in protecting and promoting human rights.

List of abbreviations

CEOOR   Centre for Equal Opportunities and Opposition to Racism

CoR   Committee of the Regions

CSE   Child sexual exploitation

CSR   Corporate Social Responsibility

EEAS   European External Action Service

ENP   European Neighbourhood Policy's

EU   European Union

EUTR   EU Timber Regulation

FLEGT   Forest Law Enforcement, Governance and Trade

FRA   EU Fundamental Rights Agency

GSP   Generalised Scheme of Preferences

HR/VP   High Representative of the European Union for foreign affairs and security policy

ILO   International Labour Association

LGBT   Lesbian, Gay, Bisexual and Transgender

LRAs   Local and regional authorities

LSCB   Local safeguarding children board

NAP   National Action Plan

NGO   Non-governmental organisation

OCC   Office of the Children's Commissioner

OECD   Organisation for Economic Cooperation and Development

OHCHR   Office of the UN High Commissioner for Human Rights

OMC   Open method of coordination

TEU   Treaty on European Union

TFEU   Treaty on the functioning of the European Union

UK   United Kingdom

UN   United Nations

VPA   Voluntary Partnership Agreements

WTO   World Trade Organization

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I.   Introduction

Over the course of its operation, FRAME has sought to study the most innovative policy devices which could be put to use for the purpose of assisting the European Union (EU) to deliver on its commitment to human rights as expressed e.g. in Art. 2 of the Treaty on European Union (TEU). Designing and implementing policies which actively protect and promote human rights is indeed a complex task, given that human rights are cross-cutting, affect different people differently and yet are universal, but also are an objective which can stand in the way of other agendas.

In spite of these challenges, the EU must always strive to find the best ways to translate its commitment to human rights into practice, and in this light, FRAME has studied a number of policy tools which can be used for that purpose, such as impact assessments, indicators, action plans, or conditionality. This report addresses what is called 'benchmarking'.

Policy benchmarking is a relatively new tool to monitor processes and to assess the situation against continuously improving best practice worldwide or regional on an ongoing basis. Its effective use requires close consultation and joint work with all stakeholders involved in human rights policies and relies heavily on the use of empirical data to assess progress. It serves to assess not just well or poorly performing countries, institutions or policies compared with their counterparts, but also the factors that determine progress in achieving the protection of human rights. Benchmarking is based on the idea of centrally monitored 'local' performance, and the assumption is that it implies a number of elements: (i) A central monitoring agency pools information on performance and makes it available to others. (ii) This data is used to periodically reformulate and progressively refine minimum performance standards, desirable targets and preferred means to achieve them. (iii) Through constantly monitoring and evaluating performance, the model is assumed to constantly improve performance and generate learning benefits.

The assumption goes as well that benchmarking can be a promising avenue for promoting human rights in a number of contexts, and this report aims to analyze the conditions for successful benchmarking policies in relation to human rights, to review a number of initiatives which have been taken by the EU to that effect, and to engage in a prospective exercise of how the EU could set up innovative benchmarking policies. The argument develops as follows.

Section II will present benchmarking in general, its definition, its added value, but also the associated challenges of putting in place benchmarking policies. Section III will review the EU history of benchmarking, focusing on the so-called 'open method of coordination' and related instances of experimentalist governance, and on a critical examination of past EU initiatives towards benchmarking human rights in the fields of forest management, business regulation, enlargement and trade. Section IV will then, on the basis of seven examples of human rights promotion initiatives by local and regional authorities (LRAs), prospectively assess the potential for the EU to benchmark these initiatives so as to enhance the potential and effectiveness of LRAs in protecting and promoting human rights. We will then close with a conclusion outlining the potential for policy benchmarking for human rights in the EU, and – based on our examination of a number of attempts – on the conditions for successful benchmarking policies.

II. Benchmarking: definition, objectives and challenges

Benchmarking was defined by the EU Commission in its 1996 Communication on Benchmarking the Competitiveness of the European Industry as a 'tool to promote better implementation of measures in key areas for competitiveness by focusing on factors and conditions that determine superior performance and exchange of information on best practices.' (European Commission, 1996: 1). By extension, policy benchmarking in general is the linking of a piece of policy or legislation to an indicator (or a set of indicators) for the purpose of evaluating the policy over time against an expected level of delivery, the assumption being that the chosen indicators reflect the evolution of the situation which the relevant piece of policy seeks to impact (Mihr 2009: 7 and 9).

Benchmarks are therefore achieved when the evolution of the indicators shows that the policy has had the desired results and therefore benchmarking is for instance used in policies intended to trigger, within an institution, reform and 'transition' from an old to a new regime. Benchmarking is for instance used to accompany democratisation processes (*infra*, and Del Sarto *et al.*, 2007, 6; Del Sarto and Schumacher 2011, 938). Likewise, benchmarking is also used to create emulation between different entities which can compare themselves to the 'best in the world', as to how they are located in terms of achieving progress towards indicators. In that sense, benchmarking is also defined as a

> tool or a means to initiate and direct continuous improvement processes. […] Benchmarking is a systematic process of comparison against the 'best in the world' aiming at exceeding that level. A benchmark (based on key performance indicators) serves as an orientation mark for improvement processes and the analysis of 'best practice' serves to understand how the benchmark has been achieved in order to direct actions targeted to upgrade one's own performance. In this sense benchmarking could also be understood as an organised way to have a collective learning process for improvement towards higher quality of output and services (European Commission 1999: 18).

The objective of policy benchmarking is therefore to provide incentives – through making monitoring and objectives explicit in the form of benchmarks – to improve behaviour and maximise policy effectiveness (Büthe 2012, 43-45). Benchmarking can be used to compare the performance of one or several units in various ways. According to Del Sarto *et al*. (2006: 14):

- '*Internal benchmarking* is an inward-looking approach that is usually applied within an organisation/polity whereby departments, production or business units are compared. Sometimes this approach is also labelled best-practices- or process benchmarking;
- *Competitive benchmarking* is an outward-oriented approach that allows for comparative studies of selected processes/actions of an organisation/actor with its competitors/rivals;
- *Functional benchmarking* enlarges the comparative focus by benchmarking, and thus comparing, similar processes within one business or industrial sector;
- *Generic benchmarking* goes beyond the method of functional benchmarking as it compares processes and operations between unrelated sectors.'

One can see that benchmarking can be used as a tool for self-improvement, but also be used by one actor to provide incentives for the improvement of other actors. Whatever the form and objective, benchmarking is a quite technical way to design a policy, and requires at least the following:

- Identification of a target issue to be improved;
- Development of one or some specific performance indicators (benchmarks) for that particular issue;
- Comparison of own performance against the best world-wide;
- Analysis of best practice and improvement potential;
- Implementation of actions to improve;
- Continuous monitoring (European Commission, 1999: 18)

Based on the list above, a number of puzzles to be solved at the time of designing a benchmarking strategy, which can be listed as follows, and which we will further analyse in Sections III and IV:

- How to select the proper indicators, those which most faithfully reflect the evolution of the context which the policy seeks to impact?
- What are the modalities of the linking of the policy and of the indicators and what are the consequences of a (non-)achievement of the benchmarks? Should they entail automatic positive or negative consequences (what could be named 'hard benchmarking'), or should they just provide indications for future decision-making (what could be named 'soft benchmarking')?[1]
- How to determine whether causality exists between the impact of the policy and the subsequent evolution of the indicators?

Whether a benchmarking strategy is successful will depend on whether these aspects are well-managed or not, as described by Del Sarto and Schumacher (2011: 936; infra):

> Any benchmarking effort presupposes clear and pre-defined indicators or benchmarks, which provide quantitative and/or qualitative measurement criteria. As benchmarking is meant to evaluate progress over time, it also necessitates detailed and transparent timetables. Furthermore, effective benchmarking must be based on ex-ante decisions with respect to the measurement and data collection methods as well as the commitment of all actors involved. The existence and strict application of this complex set of criteria determines whether the process corresponds to what is widely called 'intelligent benchmarking' or degenerates into 'naïve benchmarking', mainly characterized by intuition and superficial comparison.

For instance, Del Sarto and Schumacher (2011) identify the European Neighbourhood Policy's (ENP) approach to democratisation as an example of poor benchmarking,[2] as it lacks the above characteristics. In particular, its attempt to use benchmarks in relation to conditionality in the 2004 Action Plans for Tunisia and Jordan as a shift towards incentive-based 'positive' conditionality is characterised by a vague and superficial approach to key concepts such as democracy, rule of law and good governance, which lack any clear definition and are even used interchangeably, so that in fact, they constitute little more than

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[1] This is sometimes approximated to the processes of hard or negative conditionality v. soft or positive conditionality.
[2] So poor the authors call it 'not even close to naïve benchmarking' (946).

'pseudo-benchmarks'. Likewise, the concrete objectives were not defined based on sensible consultation with local actors. Moreover, practice has shown that progress towards or against the benchmarks was not seriously assessed, and in fact never were able to trigger the reforms and lead the powers in place to make amends (946 ff.). Benchmarking, if not designed in reference to properly defined indicators, clear objectives and a strong monitoring system, can not only prove to be useless, but also counter-productive, by allowing the parties involved to spin narratives of progress, whereas in fact very little happens. To counter these defects, the Commission and the HR/VP have recently published a Staff Working Document containing a list of indicators applicable to the ENP processes (in particular concerning Democracy, Good Governance and Human Rights), but without further elaborating how each country is considered to be faring in relation to the benchmarks (EU Commission and HR/VP 2015).

Clear and quantifiable indicators are however not always available, or several indicators may co-exist, leading to dissensus as to which one should be used, so that benchmarking can also happen on the basis of 'narratives', i.e. reporting on progress against stated objectives, as is for instance done in relation to the UN Guiding Principles on Business and Human Rights (Harrison and Sekalala 2015: 944-945). This approach to benchmarking is, as can be seen, more prone to naïve or pseudo-benchmarking than the 'hard' benchmarking against quantifiable data, and should be accompanied by strong monitoring system, as indeed the contestations regarding appropriate benchmarks and actual progress in the field of business and human rights tends to demonstrate. Here as well, the EU is linking its policies of promotion of the business and human rights agenda to five standards, but the looseness of the way these standards serve as benchmarks casts doubt on the effectiveness of EU policies in this regard (Infra and Bijlmakers, Footer and Hachez, 2015).

III.   Benchmarking in the EU

A.   Early benchmarking and the open method of coordination

The EU has been using benchmarking in a number of policies for quite a while. For instance, the Maastricht 'convergence criteria' were deemed a form of benchmarking (EU Commission 1996: 2). The emulation potential was also used in industrial policy, to spur the effectiveness of Member States' industries, as the Commission released a Communication and appointed a high level advisory group to evaluate and compare the competitiveness of EU Member States economies, based on the study of a number of factors (EU Commission, 1996), which are shown in the below figure, and for the measurement of which indicators are routinely being used:
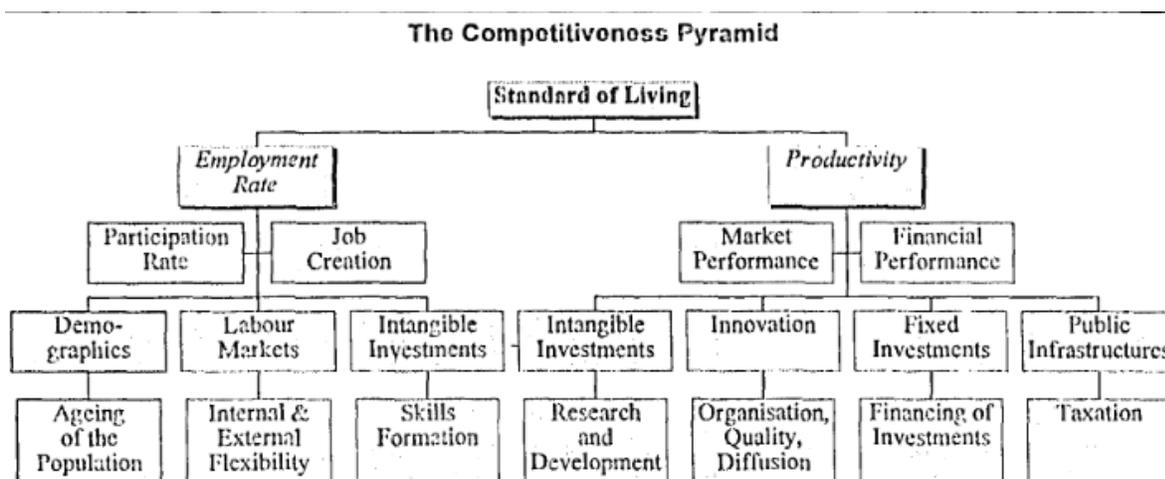

Figure 1: The Competitiveness Pyramid

This approach was deemed more interesting than simply comparing competitiveness among EU Member States because it allows to understand the reasons for competitiveness or lack thereof (European Commission 1996: 17), but also to foster emulation among Member States, as indicated above .

Next to these initiatives, a defining moment for the use of benchmarking as an EU policy-making tool was the setting up, in the 1997 of the 'Luxembourg Process', a benchmarking strategy called the 'open method of coordination' (OMC) through which, given the EU's lack of attributed of competence in the field of employment at a time when EU integration was progressing quickly, Member States would be given the opportunity to approximate their regulations not through binding EU regulation, but by striving towards common objectives (i.e. employability, entrepreneurship, adaptability, equal opportunities), the achievement of which would be constantly monitored and compared among Member States, thereby creating peer pressure. The OMC was later adopted as part of the Lisbon Strategy (2000) and the famous Commission White Paper on Governance, as one way to conduct policy in a less top-down manner (EU Commission, 2001), particularly in areas where the 'community method' of was not available, such as social inclusion or transition towards a 'knowledge-based economy' (Room 2005), although this is not a general rule (Andronico and La Faro 2005: 42-43) and the OMC has been used in areas in which the

Community Method was potentially available, but which were sensitive from the point of view of sovereignty, such as migration (de la Porte, Pochet and Room 2001: 302).

According to the Lisbon Strategy, the various phases of the OMC by which Member States will develop their own policies under the EU's impulse are the following:

- fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms;
- establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;
- translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;
- periodic monitoring, evaluation and peer review organised as mutual learning processes (European Council, 2000, para. 37).

The crucial role of the Commission is noted by commentators, as it 'play[s] a coordinating role, by presenting proposals on the European guidelines, organizing the exchange of best practices, presenting proposals on potential indicators, and providing support to the processes of implementation and peer review' (de la Porte, Pochet and Room 2001, 293).

One of the very important tools for the implementation of the OMC has been the practice of 'national action plans', by which objectives, comparisons and progress are made possible. These were used, for instance, in relation to the fight against poverty and social exclusion by member states (*Id.*, 297), and later in other fields such as business and human rights, as studied in another FRAME report (*infra* and Bijlmakers, Footer and Hachez 2015: 21).

This raises the question of the difference between 'top down' benchmarking, where objectives and indicators are centrally defined, and 'bottom up' benchmarking, where the same are defined by the actors themselves. The former, as evidenced by the objectives of the Economic and Monetary Union, which have historically been dominated by the doctrine of fiscal discipline which still prevails to this day, has the advantage of ensuring a high degree of convergence,[3] but also puts the Union firmly in the driving seat and makes it potentially vulnerable to the criticism of technocracy and democratic deficit. Conversely, a bottom-up benchmarking like the one that prevailed in social policy, renders common objectives more blurry and convergence more difficult to achieve, and the institutions' role would then be limited to generating learning through coordination, reporting and peer review, but also information provision, and would be less focused on convergence through determination, monitoring and sanction. Such bottom up approach also requires real involvement from social partners and stakeholders (de la Porte, Pochet and Room 2001: 299-300). One author opposes these two approaches in terms of authoritarian v. democratic approaches and urges caution in the use of benchmarking in public policy, as top-down approaches can negate the input of crucial stakeholders and overlook the multiplicity of factors at play, thereby leading

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[3] The same kind of top-down approach is taken, for instance, in a number of EU external policies, such as trade conditionality or the ENP.

to 'naïve' benchmarking (see above) whereas the latter represents an opportunity to strengthen democracy and is more likely to be conducive to 'intelligent' benchmarking (Papaioannou 2007: 501-502).

Aside from such legitimacy considerations, Room also highlights, in relation to top-down benchmarking, the difficulty of reconciling certain outcome indicators, such as those related to the social situation of individuals and households, with the policies put in place, given the complexity of the various processes at play and the number of potential determinants for the evolution of social conditions, especially in a global economy (Room 2005: 120).

Some authors have defined the OMC as an experimentalist approach to EU governance since it aims to reconcile the pursuit of common European concerns and objectives with respect for legitimate national diversity, while encouraging learning across the Member States through comparison of different approaches to similar problems or goals (Zeitlin 2005: 3). Experimentalist governance arguably has a broader applicability and takes a more iterative approach to benchmarking based on a learning-by-doing model. It is defined as 'an institutionalized process of participatory and multilevel collective problem-solving, in which the problems (and the means to address them) are framed in an open-ended way and subjected to periodic revisions by various forms of peer review, in the light of locally generated knowledge' (de Búrca et al., 2014: 477).

According to its ideal-type prioritisation, experimentalist regimes are based on a series of interactive, deliberation-fostering, essential steps, which are illustrated in figure 2 below.
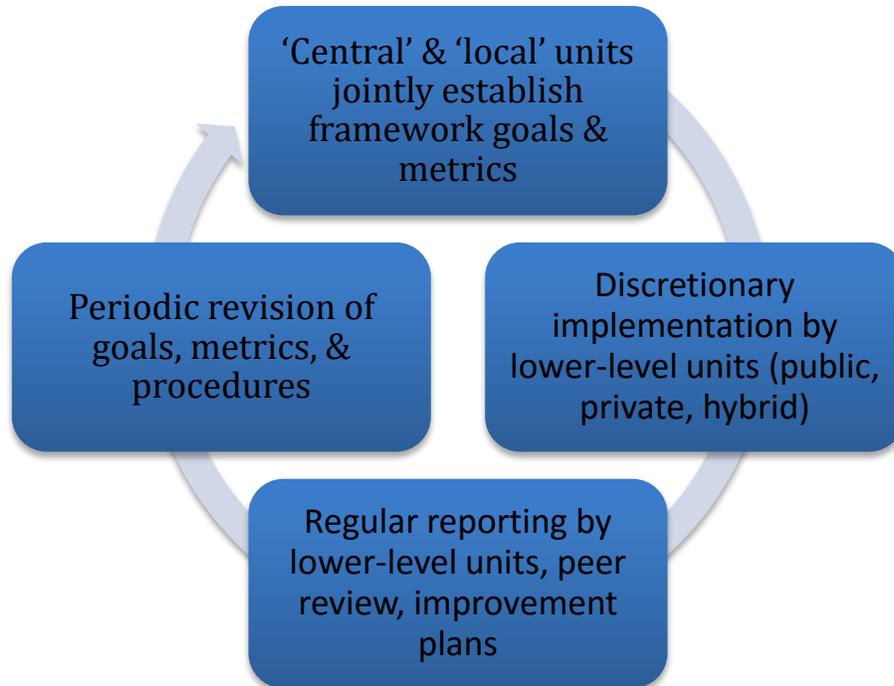
Figure 2: Architecture of experimentalist governance[4]

First, stakeholders elaborate framework goals and metrics as the foundation of the regime. These goals are open-ended and can have a provisional character since they adjust to changing circumstances, shaped by diverse experiences and local contexts. Second, lower level agents such as (sub-)national authorities, local communities and coalitions of reformist stakeholders are given discretionary mandates to implement these open-ended goals, in coordination with a center or hierarchy and in consultation with civil society. Based on such decentralised authority, lower level units are allowed and encouraged to adapt and experiment with problem-solving practices, again depending on contextual specificities and experiences. Third, in return for the relative discretion enjoyed by these local units, their performance is monitored through regular reporting mechanisms and peer reviews comparing their results to those of other local units. Such monitoring then informs possible corrective measures to ensure optimal progress against an agreed set of indicators. Fourth and finally, as a result of this feedback loop, framework goals, decision-making structures and implementation practices are regularly re-evaluated and where necessary revised, in response to the findings of lower-level review processes. In sum, experimentalist governance allows for the benchmarking of progress at the local or national level towards a set of open-ended objectives identified and revised at the supranational level based on local experiences and peer-review. (de Búrca et al., 2013: 16; Sabel and Zeitlin 2008 and 2010). Börzel and Eckert have argued that these deliberation-fostering steps of experimentalism regimes strongly resemble the OMC, yet can be applied in any policy area, irrespective of the EU's formal competences or the legal bindingness of framework goals (Börzel and Eckert, 2012: 379-380).

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[4] Source: Jonathan Zeitlin, 'Experimentalism in EU and Transnational Governance', Presentation at the University of Amsterdam, March 2016, on file with authors.

Indeed, the scoping conditions under which experimentalist approaches are most likely to be effective are precisely the opposite of those for standard regime formation. Whereas transnational regimes generally require either a convergence of interests and beliefs among actors, or a hegemonic power imposing its rules on others, experimentalist governance stems from strategic uncertainty, notably conditions of disagreement and polyarchy. Although experimentalist processes do require some degree of inter-governmental consensus about the basic principles of the problem at stake, they thrive best in policy areas where governments fail to agree on the specific rules and monitoring mechanisms to govern them. A minimal common understanding about the issue at stake is necessary however, to allow for discussion and deliberation. Where strategic obstructions are used to block or stall reform efforts however, experimentalist regimes often rely upon a 'destabilisation mechanism', a penalty default to incentivise cooperation by sanctioning non-cooperation, generally by imposing a comparatively less beneficial regime. From a global governance perspective, the main added value of experimentalist regimes is their ability to integrate pluralist regulatory initiatives with more traditional hierarchical international regimes. Whereas new pluralist approaches often emerge spontaneously and run mostly in parallel with traditional international regimes, experimentalist regimes engage with both, combining the best of both worlds by using the legally binding norms of traditional modes of governance, e.g. as penalty defaults, while institutionalising ad hoc processes of decentralisation, consultation, discretion and cooperation, which are typical of hybrid and private regimes. By assembling the interconnected bits and pieces from different types of regimes, experimentalist processes thus turn a state of regime complexity into a starting point to build a joined-up, flexible international governance framework (Armeni, 2015: 5-7; de Búrca et al., 2013: 16; Sabel and Zeitlin 2008 and 2010).

Beyond their contribution to integrated international regimes, experimentalist processes offer both i) a normative added value by increasing stakeholder participation in transnational regimes, effectively adding to their democratic legitimacy; as well as ii) promising in-ways to deal with implementation politics and local contestation. Indeed, by using deliberative, locally-informed and adaptive problem-solving mechanisms, experimentalist processes typically open up the decision-making to new participants, which generates possibilities for responsive and effective institutional reforms, implemented in an iterative and non-hierarchical manner. Balanced stakeholder inclusion also contributes to a better understanding of, among other things, the (local) problem(s) at hand, including about why past decisions failed or generated unintended consequences. Participatory processes further help detect deception and bias among stakeholders and, if more-or-less equal opportunities for agenda setting and evaluation are maintained, they help prevent regulatory regimes from being hijacked by powerful actors and their interests. To ensure that no single actor can impose her preferred solution without taking into account the views of others, the institutional design of an experimentalist regime should thus always strive to guarantee a balanced distribution of power. Finally, involving (local) stakeholders and sectoral experts throughout the program cycle not only allows to fill information gaps in areas of uncertainty, it also renders some degree of legitimacy and local buy-in to exogenous reform initiatives (Sabel and Zeitlin, 2011: 1; de Búrca et al., 2014: 478-479).

B.   EU policy benchmarking for human rights

As already analysed in-depth in another FRAME report (Starl *et al.*, 2014), human rights indicators are not in short supply, and the OHCHR, along with a number of scholars, is recommending benchmarking strategies (Green 2001, 1080-1081). One can thus easily see the potential of the OMC for human and fundamental rights in the EU (De Búrca 2005: 277), since the EU has no direct competence to legislate in the field of human rights (save some limited exceptions such as e.g. in the field of non-discrimination, Art. 18 ff TFEU), but rather has made a 'commitment' to human rights in the sense that all its policies must respect and promote human rights, the Charter of Fundamental Rights being both the horizon and the limit of this commitment, meaning that the rights of the Charter must be realised, and that no EU policy or legislation may deviate from it (Hachez 2015).

In terms of the relation of the OMC with fundamental rights, it means, for one, that the OMC must comply with the Charter. This raises the question whether domestic measures taken as part of the OMC qualify as 'implementing EU law' under Art. 51 of the Charter, which they do not (Andronico and La Faro 2005, 60). Second, it means that the OMC could be used as a method to achieve soft implementation of fundamental rights, detached, due the abovementioned lack of competence, from the community method consisting in 'effective enforcement, infringement procedures and the full justiciability of individual rights' (*id.*, 41). However, the same authors argue that the value of the OMC in this regard lies not so much in the outcome of realising a fixed catalogue of rights, but rather in setting up a participatory process which itself respects and empowers fundamental rights (*id.*, 61-69).

In regard to the implementation of the OMC to fundamental rights, De Schutter has suggested, already in 2005, that the EU would put such benchmarking strategy in place, through the EU Fundamental Rights Agency. Such strategy would imply the monitoring of Member States to avoid that they would engage in fundamental rights dumping as a way to make competitiveness gains in the internal market. De Schutter suggests that Member States should periodically report on their progress in the area of fundamental rights, and be monitored notably by civil society (De Schutter 2005). This promising suggestion has not fully materialised, and it was already lamented that the systematic monitoring of Member States by the Network of Independent Experts on Fundamental Rights was abandoned when the EU Fundamental Rights Agency (FRA) was incepted (Hachez 2015: 30).

Additionally, as indicated above, the question of benchmarking policies for human rights raises the question of which indicators should be used to measure progress towards the benchmarks. As was evidenced by FRAME (Starl *et al.* 2014), the field of human rights suffers from a proliferation of indicators of uneven scope and quality, which do not always allow to form a reliable picture of the level of enjoyment of the right(s) they relate to. The FRA has made an important contribution to settling this debate in the EU. As is well known, the FRA's mandate is to support the EU's and Member States' decision-making processes by providing them with information and research on fundamental rights. This objective must be fulfilled, among others through the following actions:

- (a) collect, record, analyse and disseminate relevant, objective, reliable and comparable information and data […];

- (b) develop methods and standards to improve the comparability, objectivity and reliability of data at European level, in cooperation with the Commission and the Member States (Regulation (EC) No 168/2007, Art. 3, para 1) [….]

To ensure that the FRA is able to rely on qualitative and comparable data in the analyses it provides to EU institutions and Member States, the FRA increasingly adopts and refers to the so-called 'Structure-Process-Outcome' indicators developed by the Office of the High Commissioner for Human Rights (OHCHR), and which seek to provide information as to three aspects of each human right in the catalogue, namely:

- Structure, which refers to the institutional aspects of protecting human rights;
- Process, which refers to the measures (e.g. laws) taken to protect human rights;
- Outcome, which refers to the actual level of enjoyment of human rights (Starl *et al*., 78).

Figure 3: FRA representation of the OHCHR's Structure-Process-Outcome indicators (FRA 2015: 15)

Additionally, the question of benchmarking policies applicable to the human rights situation in different countries (EU Member States, but also third countries in the context of external policies) requires to strike a careful balance, namely that the benchmarks must be formulated in terms of protection and enjoyment of universal human rights standards as enshrined in international treaties, but also be relevant to each local situation, meaning to take into account the local priorities, the mode of government, the timeframe in which reforms can be incepted, etc. Inflexible benchmarking will indeed result in erroneously classifying actors as making good progress or not by ignoring enabling or hindering factors. This is why Mihr, for instance, recommends that benchmark assessment in the relevant EU external policies be conducted by a specialised team having not only knowledge of the standards and indicators, but also having the overview of the factors linked to the local situation so as to evaluate the reality of progress (Mihr 2011: 9). This, for instance, is very relevant in the context of human rights dialogues (Würth and Seidensticker 2005) and this is also why experts insist that all stakeholders and relevant local actors must show a 'high degree of commitment' to the process and notably must be associated to the definition of the objectives,

the indicators and the timetables. Failing this, authors warn, 'a lack of commitment and support on the part of those actors that define, conduct and evaluate the process, as well as of those that provide the former with the relevant data, can have a detrimental and therefore counterproductive effect on the results, and subsequently the conclusions and potential recommendations.' (Del Sarto *et al.*, 2006: 15). However, any sincere commitment to improvement towards the benchmarks must imply that 'reference to competitive sensitivity, (socio-)cultural specifics or the "we are different" syndrome must be ruled out from the very start of the process.' (*Id.*).

As indicated, human rights benchmarking in the EU is not yet a widespread practice, at least not in an advanced and mature form as described above. However, a number of initiatives have been put in place to ensure that some comparison and peer learning would occur among Member States in relation to fundamental rights. Below we examine a few.

1.   FLEGT as an example of experimentalist EU governance using benchmarking

The EU's 2003 program on Forest Law Enforcement, Governance and Trade (FLEGT) offers an illustration of a transnational experimentalist regime established by the EU. FLEGT at the time constituted the EU's response to the failure of previous attempt at tackling global deforestation through binding international agreements and unilateral trade restrictions, as well as to the limited adoption of private certification schemes in developing countries (Cashore et al. 2007). FLEGT is designed to tackle illegal timber and the associated trade by using a combination of demand- and supply-side measures. Focusing respectively on the banning of illegal timber from the EU market, and supporting forest governance reforms and law enforcement in timber-producing countries, FLEGT established a two-pronged, mutually enforcing implementation design, based on the negotiation of Voluntary Partnership Agreements (VPA) with timber producing countries on the one hand, and on a 2010 EU market access regulation on the other (COM, 2003).

VPAs are bilateral trade agreements, which frame the legal, institutional and governance reforms required to ensure that all timber exports from VPA countries to the EU can be certified as legal. Each VPA therefore centers around a legality definition which constitutes a comprehensive understanding of what can and cannot be regarded as 'legal timber' under national law. This includes references to international treaty commitments and domestic forestry law, as well as labour rights and worker health and safety regulations and the rights of indigenous communities (COM, 2007a: 1). VPAs incorporate a number of key experimentalist features since they are based on participatory deliberations and iterative monitoring and enforcement processes, rooted in peer review and recursive learning. Moreover, through its multi-stakeholder approach, and the checks and balances provided throughout the national implementation process, VPAs tend to develop a deeper understanding of the broader political economy issues at play behind the formal reform processes they intend to support (Bollen and Ozinga, 2013: 33). Once a VPA is agreed and moves into implementation, the process becomes subject to regular and systematic reviews, based on iterative benchmarking and evaluation processes. Such 'learning by doing' is to a large extent facilitated by the knowledge exchange among a broader community of national and international experts, including researchers, NGOs, consultants and policy institutions (Overdevest and Zeitlin, 2014b: 8). VPA

partner countries who successfully manage to develop a system to verify the legality of their timber exports gain 'green lane' EU market access, exclusively reserved for FLEGT licensed timber exports. As the name suggests, VPAs are entirely voluntary - and thus WTO-compliant - yet once adopted, they become legally binding to both of the contracting parties, which commits them to verify and certify the legality of timber exports to the EU (EC No. 2173/2005; COM, 2007a, b, c).[5]

In order to incentivise participation in FLEGT, as well as to encourage implementation among VPA countries, the EU in 2010 enacted the EU Timber Regulation (EUTR), which entered into force in March 2013. The aim of the EUTR is to curb the EU's imports and consumption of illegally harvested timber by demanding either FLEGT certification or elaborate due diligence procedures from operators placing wood and wood products on the common European market ((EU) No 995/2010 Art. 9). The EUTR can thus be seen as the penalty default in FLEGT's experimentalist set-up since it provides a regulatory alternative to FLEGT-participation that is so unattractive (rigid due diligence procedures in this case) that is induces the addressees to cooperate towards more palatable solutions (Overdevest and Zeitlin, 2014: 260-261).

2.   Business and human rights: a failed attempt at benchmarking?

As indicated above, the EU has formally endorsed the approach to fostering business and human rights in Member States based on peer-learning through national action plans, which itself was proposed by the UN Working Group on Business and Human Rights (UN Working Group on Business and Human Rights, 2016). This approach is very much in line with the EU's approach to this issue, which has tended to stay away from binding and top down interventions on the part of the EU, in favour of a softer and more business-driven approach (Wouters and Hachez, 2009).

The Commission (DG employment), therefore organised sessions of peer review of draft NAPs, but to date, little seems to have come out of this process, as not all Member States have even issued their NAPs,[6] but also, benchmarks are very soft and in fact, completely open-ended, even though the applicable standards have been identified by the EU as being the UN Guiding Principles on Business and Human Rights, the UN Global Compact, ISO 26000, the OECD Guidelines for Multinational Enterprises, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The result is that NAPs are now often criticised for their softness and lack of ambition, so that the benchmarking effort of the EU does not seem to be leading very far (European Coalition for Corporate Justice, 2015)

This can be analysed as a failure to develop properly the benchmarking strategy as defined above, since proper indicators linked to the standards above were not identified, objectives were not stated, and monitoring or coordination is quasi inexistent, due to a lack of political interest (Hachez 2016).

Note that of late, the EU efforts have been directed at coordinating Member States' policies in the field of business and human rights through NAPs, rather than enterprises' practices. It was not always the case,

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[5] For a detailed overview of the specifics of the six VPAs concluded so far, please see Bollen and Ozinga (2013), available online: http://www.fern.org/sites/fern.org/files/VPAComparison_internet_0.pdf

[6]   For   an   overview   of   states   having   issued   an   NAP,   see http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

and in 2006, the Commission launched the 'European Alliance for Corporate Social Responsibility', with a view to encouraging European corporations to focus on a number of themes and learn from each other:

> The Commission expects the Alliance to have a significant impact on the attitude of European enterprises to CSR and on their positive engagement with social and environmental issues. It should create new partnerships with and new opportunities for stakeholders in their efforts to promote CSR, and is therefore a vehicle for mobilising the resources and capacities of European enterprises and their stakeholders. The voluntary commitment of European business to the Alliance and the supportive role of the Commission within its policies and instruments where appropriate will strengthen the development of CSR within the EU and abroad. The results of the Alliance should be understood as a voluntary business contribution to achieving the goals of the relaunched Lisbon Strategy and the revised Sustainable Development Strategy. However these results will also depend on the engagement of stakeholders, who are invited to make full use of the opportunities the Alliance offers (European Commission, 2006: 6).

The Alliance did however not allow enterprises to make great progress in the field of CSR, since again the objectives were vague, indicators were not provided, and it was made very explicit that no monitoring would be conducted:

> The Alliance has an open nature and European enterprises of all sizes are invited to voluntarily express their support. It is not a legal instrument and is not to be signed by enterprises, the Commission or any public authority. There are no formal requirements for declaring support for the Alliance, and the European Commission will not keep a list of companies that support it (*Id.*).

More recent and more promising approaches to benchmarking corporations practices in this field however exist, and include the Pilot Methodology of Corporate Human Rights Benchmark (CHRB: 2016), since it includes all the elements of successful benchmarking outlined above, including:

- Objectives and expected impacts (*Id.* 15);
- Benchmarking features, including indicators suited to different 'levels of measurement' (policy level, the process and systems level, the performance level and responses to serious allegations, and transparency), against international standards (*Id.* 22-25);
- Timeframes (*Id.* 27);
- Its methodology or 'approach to scoring' against each indicator, i.e. on a scale of 0 to 2 (*Id.* 39-45).

3.   Enlargement: Benchmarks of no consequence?

The EU uses a benchmarking strategy in handling its enlargement process, as it identifies a number of criteria which candidate countries must comply with in order to join the Union. In relation to e.g. human rights, the 'Copenhagen Criteria' state that

> Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the

obligations of membership including adherence to the aims of political, economic and monetary union (European Council 1993).

The various steps of progress towards membership are defined in 35 so-called 'negotiating chapters', which each relate to a part of the *acquis communautaire* which candidate countries should absorb, and which represent benchmarks of sorts. Of relevance to the Copenhagen Criteria are chapters entitled 'judiciary and fundamental rights' (23)[7] and 'justice, freedom and security' (24).[8] The EU itself describes these chapters in terms of benchmarking, and pledges to provide substantial guidance as to how to reach them, but the overall assessment of these benchmarks is one of vagueness, mirroring the abovementioned situation of the ENP (Pech 2016: 11). In particular, the benchmarks are often not formulated in reference to precise norms because the EU does not, in many of the relevant domains, dispose of a harmonising legislative competence (*id*). Additionally, there is lack of proper conceptualisation in the chapters, and it was shown, for instance, that rule of law and democracy were often conflated, leading to uncertainty for EU officials as to the precise elements of governance on which to focus (Kochenov 2004: 23).

Next to these failures in the conceptualisation and methodology of benchmarking in the enlargement policies, FRAME has also identified a lack of depth in the implementation of the standards in relation to the local context and in their monitoring. An analysis of enlargement programmes in Serbia reveal for instance that, even though improvements are to be noted in the area of minority rights, their magnitude is difficult to establish – as is the EU's actual contribution to it – in the absence of indicators allowing an objective evaluation of the situation. Likewise, and more worryingly, even though Serbia's performance in the field of media freedom (a priority of the EU) prima facie comply with EU requirements, this still goes hand in hand with serious failures which are not matched with consequences, and the EU seems willing to overlook these negative developments for the benefit of stability and strong leadership achieving other

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[7] See the short description at European Commission, 'Chapters of the Acquis' <http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis/index_en.htm>: 'EU policies in the area of judiciary and fundamental rights aim to maintain and further develop the Union as an area of freedom, security and justice. The establishment of an independent and efficient judiciary is of paramount importance. Impartiality, integrity and a high standard of adjudication by the courts are essential for safeguarding the rule of law. This requires a firm commitment to eliminating external influences over the judiciary and to devoting adequate financial resources and training. Legal guarantees for fair trial procedures must be in place. Equally, Member States must fight corruption effectively, as it represents a threat to the stability of democratic institutions and the rule of law. A solid legal framework and reliable institutions are required to underpin a coherent policy of prevention and deterrence of corruption. Member States must ensure respect for fundamental rights and EU citizens' rights, as guaranteed by the acquis and by the Fundamental Rights Charter.'

[8] See ibid: 'EU policies aim to maintain and further develop the Union as an area of freedom, security and justice. On issues such as border control, visas, external migration, asylum, police cooperation, the fight against organised crime and against terrorism, cooperation in the field of drugs, customs cooperation and judicial cooperation in criminal and civil matters, Member States need to be properly equipped to adequately implement the growing framework of common rules. Above all, this requires a strong and well-integrated administrative capacity within the law enforcement agencies and other relevant bodies, which must attain the necessary standards. A professional, reliable and efficient police organisation is of paramount importance. The most detailed part of the EU's policies on justice, freedom and security is the Schengen acquis, which entails the lifting of internal border controls in the EU. However, for the new Member States substantial parts of the Schengen acquis are implemented following a separate Council Decision to be taken after accession.'

objectives that the EU would value more dearly, such as appeased relations with Kosovo (Fraczek, Huszka and Kortvelyesi 2016: 168). Moreover, 'human rights community is also concerned that the government can get by with partial or fake measures, by adopting unrealistic action plans that remain unimplemented because of unrealistic goals, deadlines and lack of financing. In the 2013 Progress Report the Commission gave too much credit for legal measures while it tended to neglect the question of implementation, an approach criticized by human rights NGOs.' (*Id.*: 170). Viewed in this way, a conclusion can be that human rights benchmarking is of little use if it is linked to conditionality mechanisms which are entirely soft (i.e. leading to no negative consequences), or simply disregarded to make way for other interests.

4. GSP+: The new best practice?

A third example of benchmarking for human rights by the EU is located in trade policy, namely in the so-called 'Generalised Scheme of Preferences' (GSP) by which eligible developing countries may receive trade benefits in the form of tariff cuts (for an overview, see European Commission 2014). The scheme is divided into three prongs, namely the regular scheme, GSP+ and the 'Everything but Arms' (EBA) programme for least developed countries. Although all three schemes are made conditional on the absence of gross violations of human rights and can then be lifted if those happen ('negative conditionality'), GSP+ is particularly interesting for our purposes, as it also expressly uses benchmarks as a trigger for positive policy developments ('positive conditionality'). In short, 'vulnerable developing countries' (namely countries whose economy relies on just a few products) may receive additional benefits in exchange for the commitment to ratify and 'effectively implement' 27 international conventions, among which 15 are human rights treaties (Regulation (EU) No 978/2012, art. 9 and Annex II).

In the past, GSP preferences have been lifted on three occasions: against Myanmar, Belarus and Sri Lanka, and only in the latter case was the suspension linked to a failure to meet the benchmarks of GSP+. However, the GSP, including the GSP+ has been the object of intense criticism. More in particular, the monitoring of beneficiary states commitments was deemed to be erratic, and the assessment of supposed failures was considered to be arbitrary, as for instance Sri Lanka was probably not more deserving of suspension than were other beneficiaries at the same time. Some authors in this regard suspected that Sri Lanka was probably mainly guilty of not being a particularly strategic ally of the EU, and that therefore a suspension of preferences would not cost the EU much, and the same reasoning was applied to the case of Myanmar (Vandenberghe, 2008; Orbie and Tortell, 2009; Portela, 2010).

To avoid this criticism, the 2012 reform of the GSP+, which entered into force in 2014, sought to introduce a number of improvements in the setting of the benchmarks, their monitoring, and the transparency of the entire process (Beke and Hachez, 2015). Most notable in this regard is the inception of 'scorecards' for each of the GSP+ beneficiary countries. Scorecards are a 'snapshot' of the situation of the beneficiary country in relation to the 27 conventions, which record the main shortcomings identified by the monitoring bodies of the said conventions, which the beneficiary countries should demonstrate 'serious efforts' to address. These issues are discussed and progress is assessed at least once a year through a dialogue between the Commission and the European External Action Service (EEAS) on the one hand, and the authorities of the beneficiary country, on the other hand, also relying on input brought by other stakeholders such as civil society (EU Commission 2014: 3), but also country visits.

The GSP reform, and in particular the inception of scorecards for GSP+ were positively assessed by commentators (Orbie and Martens, 2016: 78), even though they are not made public (Velluti 2016: 20). They demonstrate a renewed commitment to human rights, but one which tends more towards 'intelligent benchmarking' with a number of the determinants of success listed above, namely clearly established objective, the possibility of sanctions, but more importantly, a real attention to context and dialogue with the country concerned. Since the scorecard system is still quite recent, it is difficult to make assessments as to its actual effectiveness, but some authors are already criticising it, arguing that, when it comes to monitoring and sanctions, the EU Commission is again very reluctant to act, 'even long after it is apparent that no meaningful change in behaviour will result without the threat of enforcement action' (Vogt 2015: 287). This would go to show that, in a conditionality context, even seemingly the best benchmarking instruments are of limited use if there is no political will to draw the consequences of a failure to achieve the benchmarks and apply some form of remedial measure.

IV.   Case-study: Promoting and protecting fundamental rights by local and regional authorities in the EU[9]

In this case-study, we will examine the potential of relying on the human rights initiatives of local and regional authorities as benchmarks for creating a virtuous cycle of human rights protection in the EU and thereby tackle what has been called the 'enforcement gap' of human rights. The enforcement gap refers to the fact that many human rights treaties and conventions are signed and ratified by countries but that one can still observe significant violations of these rights in these countries.[10] In order to address this enforcement gap attention is increasingly turning to the idea of *localising fundamental rights*, i.e. strengthening local institutions for the protection of fundamental rights. Hence, the role of local and regional authorities (LRAs)[11] in ensuring 'maximum fundamental rights protection at all levels of governance'[12] in the EU has come to the forefront and has been increasingly recognised. The Committee of the Regions (CoR) has emphasised the role LRAs play in fundamental rights protection, especially as service providers of human rights-related services such as education and health care.[13] This point was reiterated in the Opinion of the CoR on the *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union* (CDR 406/2010, adopted on 11-12 October 2011).

What role can LRAs play in enforcing fundamental rights in the EU? To answer this question the article, first, takes an inductive approach. It identifies and describes some interesting examples of how LRAs within the EU may contribute to the protection of fundamental rights. Next, the article aims to develop a more general typology of the different roles LRAs can play in the protection of fundamental rights. Finally, the paper turns to the question of how the impact of these roles can be strengthened in particular through benchmarking strategies coupled with effective monitoring.

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[9] This chapter draws on the research done in conjunction with the following report of the Committee of the Regions: Marx *et al.*, 'Multilevel Protection of the Rule of Law and Fundamental Rights – the Role of Local and Regional Authorities and of the Committee of the Regions' [2014] Report for the Committee of the Regions, available at http://cor.europa.eu/en/documentation/studies/Documents/Multilevel-Protection-Rule-of-Law-Fundamental-Rights.pdf. An earlier version of this case-study was also published as Axel Marx *et al.*, 'Localizing Fundamental Rights in the European Union: What Is the Role of Local and Regional Authorities, and How to Strengthen It?' (2015) 7 Journal of Human Rights Practice 246.

[10] See for example the recommendations by the Council of Europe Commissioner for Human Rights on implementing human rights nationally (2009).

[11] LRAs consists of a group of different types of public authorities within the EU including communes, provinces, city councils, provinces and sub-national regional authorities both with and without legislative power.

[12] Committee of the Regions, Resolution on the Charter for Multilevel Governance in Europe, 106th plenary session, 2 and 3 April 2014, point 1.5) available at http://cor.europa.eu/en/activities/governance/Documents/mlg-charter/en.pdf (EN). Emphasis in original text.

[13] See Accardo, Grimheden, Starl; James Michael/Geraldine Van Bueren (CEPS), Local and Regional Cooperation to Protect the Rights of the Child in the EU, March 2010, report written for the EU Committee of the Regions; Committee of the Regions (2010), White Paper on Multi-level Governance, adopted 17/18 June 2009.

A.   The role of LRAs in protecting fundamental rights: seven examples

The following section presents seven examples of how LRAs can play a role in the protection of fundamental rights in the EU and what impact this can generate.

1.   Municipal Human Rights Council monitoring of local elections in Graz (Austria)

Since 2006-2007, the city of Graz has assigned the Municipal Human Rights Council the task to monitor the municipal election campaigns with the motto 'no election campaign at the expense of humans'. The aims of this initiative are twofold, monitoring and awareness raising. The intention of the monitoring task is to publicly oppose violations of fundamental rights. By doing this the initiative aims to raise awareness and to stimulate citizens as well as political parties to engage more actively with the fundamental rights aspects of political programmes and speech.

The election authority (*Wahlbehörde*) of the city of Graz assigns the Human Rights Council with the monitoring of political campaigns and provides financial resources for this task. The monitoring committee members are recruited among the Municipal Human Rights Council members who work *pro bono*. Members represent the judiciary, the children's rights ombudsperson, the women's rights ombudsperson, the foreigners' council and other stakeholders at local level.[14]

The Municipal Human Rights Council committee collects all election campaigning material, press reports and statements of all parties. Applying legal and discourse analysis, it evaluates the collected material against fundamental rights standards enshrined in relevant human rights law and developed by national and international jurisprudence, and compiles its assessment and findings in a report.[15] The report is subdivided in racism/hate speech, women rights/gender equality, children's rights, religious rights/minority rights, and rights of persons with disabilities. The report is published by the Council in a press conference and on the official website of the city.[16] This report subsequently constitutes the basis for two follow-up actions: awareness raising to the larger public and sanctioning in case of violation. Concerning awareness raising towards the public at large (city citizens), topics are marked with traffic lights: red for 'no go', yellow for problematic statements or views, and green for campaigning that

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[14] The Municipal Human Rights Council was officially established by the Mayor in 2007 (started its work in 2006). It is an advisory board for the government and the City Council on human rights related issues. It has its own statute, a president and an executive office. It decides on its work programme annually. The work programme is carried out in working groups. Its main task is to make a compilation of the city's annual human rights report. See: https://www.graz.at/cms/ziel/3722867/DE/ - reports available: https://www.graz.at/cms/ziel/3722883/DE/.

[15] On the methodology see: http://www.graz.at/cms/beitrag/10231174/3723035. The methodology is based on Jäger: 2004. A detailed description of the critical discourse-analyses of election campaigning as hegemonial discourse and the relation to legal analysis in the election campaign monitoring can be found at: http://www.wahlkampfbarometer-graz.at/cms/fileadmin/user_upload/wahlkampfbeobachtung_grundsatzdokument.pdf, IV – Methodik der Grazer Wahlkampfbeobachtung, pp 4-13.

[16] The latest report on the election campaign 2012: http://www.graz.at/cms/dokumente/10231173_3723035/adbd3ec4/Wahlkampfbeobachtung_MRBwkm2012gesamt.pdf.

respects or promotes fundamental rights. Concerning sanctioning, the findings of the report are subject to an independent arbitration committee, chaired by the president of the appellate court, which recommends an eventual impact on the subsidies of political parties (this can lead to a reduction of subsidies for the respective parties up to €30,000).[17] 'Red lights' are foreseen to be sanctioned. The final decision on sanctioning is taken by the City's parliament.

This initiative has generated an impact on four dimensions. First, monitoring has led to an improvement in political discourse. The first monitoring led to the conviction of a politician because of incitement to discrimination demonstrated by the body of evidence provided by the monitoring committee.[18] Second, the monitoring had a process-related impact on the initiative itself. The first pilot monitoring led to several amendments in the method. The sanction mechanism was introduced after the experiences of the first pilot monitoring. Third, the monitoring combined with the awareness raising led to a broad public discussion and to higher awareness of fundamental rights issues at local level. Freedom of speech was discussed in local newspapers. Furthermore, schools invited the members of the monitoring committee to present their reports and findings to share their views with students. Finally, the example is now diffusing to other cities. The example was followed by Salzburg (fully), Vienna (partly), London (similar), Botkyrka (partly), and Barcelona (where only discriminatory messages are monitored).

2.   Protection of Children's Rights in the United Kingdom

In 2011, the UK government identified the need to address the vulnerability of children and young people to sexual exploitation by outlining an Action Plan aimed at tackling this particular form of abuse – *Tackling Child Sexual Exploitation – Action Plan 2011*. The Action Plan brings together actions by the UK government and a range of national and local partners to protect children – including local safeguarding children boards (LSCBs), law enforcement agencies, criminal justice agencies, health services (sexual health services and mental health services), victim support services, schools and local authorities (including representatives from children, adult, legal, housing, education services) (Department for Education, 2011). The Action Plan emphasises the important role of LSCBs as the central focus for multi-agency initiatives to help and protect children and young people (*id.*, 3). LSCBs are statutory agencies that must be established within every local authority.[19] They are mandated to develop local safeguarding policy and procedures and to scrutinise local arrangements.

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[17] See also ECRI REPORT ON AUSTRIA (fourth monitoring cycle), adopted on 15 December 2009, para. 76: 'ECRI reiterates its call for the adoption of ad hoc measures to combat the use by political parties or their representatives of racially inflammatory or xenophobic discourse and, in particular, of legal provisions allowing for the suppression of public financing for parties which promote racism or xenophobia. In this respect, it draws the authorities' attention to the relevant provisions of its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination.'

[18] Criminal Court decision: OLG Graz 11 Bs 146/09t of 30 June 2009.

[19] Children Act 2004, sections 13-16, available at: http://www.legislation.gov.uk/ukpga/2004/31/part/2/crossheading/local-safeguarding-children-boards; The Local Safeguarding Children Boards Regulations 2006, available at: http://www.legislation.gov.uk/uksi/2006/90/contents/made; The Local Safeguarding Children Boards (Review) Regulations 2013, available at: http://www.legislation.gov.uk/uksi/2013/2299/contents/made.

In 2013, the Office of the Children's Commissioner (OCC) for England[20] developed the new *See Me Hear Me* evidence-based framework for the protection of children and young people from sexual exploitation (OCC, 2013: 6). The OCC report also stressed the importance of the role of LSCBs.[21] The OCC has issued a number of recommendations directed at LSCBs, including *inter alia*: (1) ensuring that all necessary steps are taken to be fully compliant with the current *Working Together Guidance on CSE* (2009), (2) reviewing their strategic and operational plans and procedures, (3) developing information-sharing protocols and (4) problem profiling of victims, offenders, gangs, gang-associated girls, high risk businesses and neighbourhoods (OCC, 2013: 95).

In this context, the report outlines promising practices by several LSCBs who have undertaken initiatives, in accordance with the *See Me Hear Me Framework* to better protect children. One such promising practice concerns the participation of Children and Young People in Rochdale. In 2012, a high profile CSE case led to two serious case reviews being completed by the Rochdale Borough Safeguarding Children Board (Rochdale Borough Safeguarding Children Board 2013a and 2013b). In response to the criticism of local agencies by the reviews and the need for a more appropriate response to the issue of CSE in the area, the Rochdale Council initiated a large scale awareness raising campaign of the entire community by implementing a number of CSE awareness-raising training programmes, including: (1) a face to face training workshop delivered to councils, police, schools, health and the voluntary and community sector (approx. 6,000 participants, (2) a compulsory e-learning package for all professionals working with children and families (approx. 14,000 have completed the e-learning package), (3) sessions in schools delivered to a total of 9,000 pupils using an interactive presentation, (4) specially designed parents' evenings were held in all the borough's secondary schools and (5) sessions have also been held with the Muslim community and other residents of Rochdale (Local Government Administration 2013: 7 and 8).

3.   Multi-Level Non-Discrimination Policy in Flanders (Belgium)

Transposing the EU Equality Directives, the Flemish government (a regional government with legislative powers in the Belgian federal state) elaborated the Decree of 10 July 2008 concerning a Framework for the Flemish Equal Opportunity and Equal Treatment Policy (Flemish Decree of 10 July 2008).[22]

The Flemish Decree provides an important tool to link up governmental action with discrimination problems faced by citizens: the recognition and subsidisation of equal opportunity reporting desks in Flemish cities (Art. 42 Flemish Equality Decree). As a result, 13 reporting desks have been recognised in the 13 central cities of Flanders[23] and one in Brussels. In order to be recognised, prior agreement is needed of the city council where the local reporting desks are established. The local reporting desks function thus not only under the auspices of the Flemish government, but are also embedded in the city administration

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[20] Office of the Children's Commissioner (OCC), available at: http://www.childrenscommissioner.gov.uk/.

[21] OCC inquiry research findings suggest that only 6% of all LSCBs are adhering to the guidance which leads to large unacceptable variations in local practice around the identification of/response to victims of CSE. *Id.*, p. 4.

[22] Note that the Decree also purports to implement UN treaties against racial discrimination (CERD) and discrimination against women (CEDAW), and has a scope that reaches beyond the mere transposition of the EU Directives.

[23] These are: Aalst, Antwerp, Bruges, Genk, Gent, Hasselt, Kortrijk, Leuven, Mechelen, Oostende, Roeselare, Sint-Niklaas and Turnhout.

and often also profit from city resources.[24] The main chunk of work goes to the provision of assistance to potential victims of discrimination that file a complaint. In addition, the reporting desks undertake local preventive publicity campaigns, and organise educational activities. Performing a local networking and coordination function, reporting desks often organise activities in cooperation with other local actors, including from the private sector (like civil society organisations or local business).

When dealing with complaints, the reporting desks play merely a mediating role. If complaints fall within the scope of work of other entities within the administration (for example when legal proceedings are required), the local desks refer the complainants to the competent bodies. The Centre for Equal Opportunities and Opposition to Racism (CEOOR)[25] offers expertise and support to the local reporting desks, and also links up the local desks with its central registration system ('Metis') where all Belgian discrimination complaints are filed.[26] This registration system ensures a standardised approach regarding the handling of complaints and their fluent referral, and also serves as a monitoring tool to assess structural discrimination problems. Until the end of 2013, the local registration desks functioned under the auspices of the Flemish ministry for Equal Opportunities. Since 2014, however, they have been integrated under the CEOOR that became an 'interfederal' entity, competent for discrimination matters with regard to the respective competences of the federal and regional/community governments (Art. 6 §1 Cooperation agreement).

Centrally embedded local discrimination reporting desks like those in Belgium have the potential to link up discriminative practices detected by citizens and stakeholders on the local level with policies and remedies that are often articulated at a more central level of policy-making. In the Belgian federal state, where anti-discrimination remedies are spread over many different actors, local reporting desks play an essential role in ensuring easily accessible complaint mechanisms for citizens. The cataloguing of complaints through the centralised registration system 'Metis' enables coordination and easy referral between different entities that are competent to follow-up discrimination cases. In addition, 'Metis' allows policy-makers to get a more coherent view on discrimination issues, and detect priority areas for prevention. As the local reporting desks note themselves, however, their reputation is limited;[27] while one thousand complaints on an annual basis (the number of complaints they receive on an annual basis) is a significant number, many potential cases of discrimination are not reported. Tight resources have prevented the reporting desks to substantially invest in local publicity campaigns, especially in local communities beyond the cities where the registration desks are located. The current integration of the local registration desks under the CEOOR, however, creates potential to better publicise the work of the local registration desks through a centrally steered publication campaign.

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[24] The local registration desk in Antwerp, for example, is located in the same building as the city ombudsman with which it intensely cooperates.

[25] This is the Belgian institution with a broad mandate to combat discrimination (with regard to racism, religion, disabilities, age, sex) and to promote equal opportunities.

[26] The local registration desks in Wallonia (*Les Espaces Wallonie*) are also included in the Metis registration system.

[27] See for example: Annual Report 2012 of the Antwerp Registration Desk, p. 1; Annual Report 2013 of the Leuven Registration Desk, p. 6.

With limited resources,[28] the local registration desks have been assigned a wide range of functions encompassing the handling of discrimination complaints, but also prevention, education, as well as local networking and coordination (i.e. awareness raising). Obviously, the capacity to carry out preventive and awareness-raising functions is currently rather limited, and resources are insufficient to undertake systematic activities in these areas. Notably, the registration desks look for synergies with other (public and private) actors from the local community to carry out small-size activities in these areas of competence.[29]

4. Promotion of rights of migrants to be integrated in political decision making in Dublin (Ireland)

One challenge to national and local governments is how to promote and protect migrant rights so that migrants can enjoy their political rights in their new land. The Irish Central Statistics Office reported the approximate number of migrants in Ireland at 554,500 in 2013. In Dublin County (1,273,069 inhabitants), more than 15 percent of the population is comprised of non-nationals (Dublin City Council 2008: 5). With the increased ethnic, cultural and linguistic diversity in the city come challenges for inclusion of new residents in city life. This case examines the issues of migrant rights and the right to equal treatment, focusing on how migrants are integrated into Dublin political decision-making through local voter registration initiatives led by local authorities and grassroots migrant community groups.

Within the Dublin City Council, the Office of Integration has promoted *One City One People*, an effort to empower migrant populations, including an initiative in 2014 that encouraged migrants to register for the May 2014 local and European elections. These voter registration initiatives (launched in 2009 and conducted in both 2009 and 2014), coupled with the establishment of an integration forum, an intercultural liaison of volunteers and stepped up efforts toward economic integration of migrants, are supported by the Office for the Promotion of Migrant Integration,[30] the national Irish authority that coordinates integration activities in the public sector.

Achieving higher levels of voter participation within migrant populations has its own unique challenges and obstacles (Groenendijk 2008). Indeed, Ireland has one of the least restrictive voting laws for non-nationals involving merely two steps – (1) completion of a standard form and (2) witnessing of the signature before a local Garda (police) officer.[31] Notwithstanding this easy procedure, participation remains rather low. In order to address this, the four local authorities of Dublin[32] have launched activities designed to 'promote inclusion, integration and to combat racism and discrimination'.[33]

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[28] The local registration desk in Antwerp, for example, has resources for 1.5 employees. Before 2012, the capacity was limited to one employee.

[29] For example: the Leuven desk created an ad hoc working group consisting (inter alia) of people from the catering sector to organise campaigns to prevent discrimination in this sector.

[30] Dublin.ie, *One City One People Campaign* 2014; Dublin.ie, *Launch of Migrant Voters Campaign 2013*.

[31] Register of Electors, *Check the Register*, http://www.checktheregister.ie/appforms/RFA_English_Form.pdf

[32] (1) the Dublin City Council, (2) Dun Laoghaire Rathdown County Council, (3) Fingal County Council, and (4) South Dublin County Council.

[33] Dublin.ie, *One City One People Campaign* 2014; Dublin.ie, *Launch of Migrant Voters Campaign 2013*.

On November 4, 2013, a voter registration campaign for migrants was launched by the Dublin City Council for the local and European elections in May 2014. The initiative relied on the active participation of local grassroots migrant groups (many organised as charitable associations under Irish law) and used several strategies to raise voter awareness, including the distribution of flyers, posters and advertisements in local newspapers, as well as the promotion of a website link to sign up to vote or to check whether an individual was already registered to vote.[34] A second initiative, organised by the South Dublin County Council in March 2014 to register migrant voters, assisted many migrants in completing voter registration forms for the 2014 elections.[35] At that event, people could do a one-stop registration because while they were being assisted in completing the form, a Garda officer was available to witness their signature.[36]

These campaigns were held in two successive local elections – 2009 and 2014 and some outcomes are available about the impact on migrant voter participation. These impacts are measured in the way the voter registration campaigns met a need to register voters (1) and in the numbers of migrants who came to register to vote (2). For the 2009 elections some results can be presented. Concerning the need to increase the number of migrants (1) that participate in political decision-making by voting in local elections can be illustrated by the proportion of migrants registered to vote. In 2009, 15 percent of Dublin's population was comprised of non-nationals. Nonetheless, of the 323,000 people registered to vote in the sector of the city served by the Dublin City Council, only 16,000 were migrants. That constitutes less than 5 percent of the population, one third (compared to 15%) of the non-nationals population of Dublin .[37]

Concerning the effective additional registrations (2) some evidence is available that it resulted in a success in 2009. One Dublin City Council official described the 2009 campaign as 'wildly successful',[38] referring to the training given to local government officials about interaction with migrant communities and training of community migrant groups on the history and culture of Ireland (New Communities Partnership 2013). The same official indicates that the city had collaborated with some 16 migrant leaders from the community and trained around 100 people in how to carry out small voter registration campaigns at the community level.[39]

There is also some evidence that the 2014 initiative held by the South Dublin County authority is working. The South Dublin County Social Inclusion officer reports that some 100 new voters were added in its one-day registration event on a Saturday in March 2014 and that newly-formed partnerships with migrants, other than those from Africa (migrants from Nepal and the Philippines), gave hope of a continued vitality

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[34] Dublin.ie, *Launch of Migrant Voters Campaign 2013*, http://www.dublin.ie/arts-culture/migrant-voters-campaign.htm .
[35] It should be noted that the 2014 campaign itself was scaled down due to budget constraints.

[36] South Dublin County Social Inclusion Officer interview 6 May 2014.
[37] Dublin.ie, *Launch of Migrant Voters Campaign 2013*, http://www.dublin.ie/arts-culture/migrant-voters-campaign.htm .
[38] Dublin City Council official interview 6 May 2014.
[39] Dublin City Council official interview 6 May 2014.

of the initiative.[40] The Social Inclusion officer also opined that the process served to foster more positive relationships between Gardaí and the migrant population.[41]

5.   Monitoring of LGBT rights via regional Basque Ombudsman's action (Spain)

In Spain, there is no national body or agency in charge of monitoring or combating discrimination on grounds of sexual orientation or gender identity, neither is there a national anti-discrimination policy, plan or strategy concerning Lesbian, Gay, Bisexual and Transgender (LGBT) rights. The lack of anti-discrimination policies and the weakness of institutional development of national protection agencies are generally considered as major drawbacks for the effective enjoyment of their rights by members of discriminated groups, in this case, LGBT persons (FELGTB and COGAM 2013).

The *Ararteko* (Basque Ombudsman Office)[42] is a delegate of the Basque Parliament in charge of defending the rights of individuals in their relations with the Basque Public Administration. The main remit of the institution consists in receiving and handling complaints, requests and enquiries regarding incorrect or irregular actions by the Basque Public Administration. Moreover, the *Ararteko* carries out diagnosis of public policies of the Basque Administrations through the elaboration of reports and recommendations in order to improve the protection of fundamental rights, especially of the most vulnerable groups in society. The *Ararteko* initiated actions in the field of discrimination on grounds of sexual orientation and gender identity with three objectives: (a) to attain that Basque public administrations mainstream respect for equality and non-discrimination on grounds of sexual orientation in all their actions; (b) to promote a culture of non-discrimination on grounds of sexual and gender diversity within Basque society; and (c) to combat any form of homophobia or transphobia in the Basque Country.

In 2011, the Basque government set up an initiative for LGBT people (called BERDINDU) and produced, together with LGBT associations, a Working Plan 2011-2013. One of the issues identified in the Working Plan was the necessity of raising social awareness and improving education from an early age so that sexual diversity regarding gender identity would be fully accepted. The *Ararteko* has contributed to this action by its participation in two European projects of DG Justice (European Commission). The projects aimed to analyse and improve the level of enjoyment of LGBT rights in an educational context. These projects were project Rainbow (2011-2012)[43] and Rainbow Has (2013-2014)[44]. The first project resulted in pedagogical tools consisting of a DVD with 8 films and one educational guidebook. This resource has been sent out to schools and associations in the whole Basque Country. The second project, coordinated by the *Ararteko*, intended to scale up the results of the previous one, by also reaching families and parents' associations in the alliance of stakeholders.

Although it is still too soon to make a balanced assessment of the impact of the projects, it can be retained that the initiative of the *Ararteko* has contributed to targeted action for the protection of LGBT rights in

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[40] South Dublin County Social Inclusion Officer interview 6 May 2014.
[41] South Dublin County Social Inclusion Officer interview 6 May 2014.
[42] Established by the Basque Parliament Act on the Ombudsman Office (Ararteko) 3/1985, of 27th February.
[43] http://www.rainbowproject.eu/.
[44] http://blog.rainbowhas.eu/about/.

the field of education, with the production and dissemination of educational materials, teachers' trainings and support and awareness raising workshops for families and school parents' associations. Moreover, the activity of the *Ararteko* in this field can also be linked to initiatives at the policy level. In 2013, the Basque Parliament[45] urged the Basque Government (Education Department) and the educational communities to integrate a gender and sexual diversity approach when planning school's activities. Following this call, the Education Department of the Basque Government has approved a Directive on co-education and prevention of gender violence in the school system.

6. Access to health care for undocumented Migrants, children and pregnant women in Helsinki (Finland)

In Finland – mainly in Helsinki and the capital area – there are approximately three thousand persons considered as undocumented migrants.[46] Due to their legal status, they constitute a group of people with very limited access to health care services. In the Finnish system, a person is subject to the administration of the municipality in which his/her residence is located[47] and municipalities are obliged to organise (i.e. arrange and fund) primary health care and specialised medical care for their residents.[48] However, undocumented migrants are only entitled to urgent medical care.[49] They still have to pay for the urgent treatment, if they do not have a municipality of residence in Finland or are not entitled to public health care services due to EU law or an international social security agreement. However, the payment is not

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[45] Institutional Declaration on 17th of May (International Day against Homophobia and Transphobia).

[46] Following Keskimäki, Ilmo; Nykänen, Eeva; Kuusio, Hannamaria. Health care services for undocumented migrants in Finland. National Institute for Health and Welfare, Report 11/2014. Helsinki 2014 (hereafter *Report 11/2014*). This Report defines an 'undocumented migrant' as a person: 1) who stays in Finland without a residence permit (person's residency permit has expired or entry/residency in the country is not legal), having arrived from a country other than an EU or EEA Member State or Switzerland; 2) who has arrived from a country other than an EU or EEA Member State or Switzerland and whose residence permit or visa is contingent or having private health insurance but whose insurance cover has expired or is not comprehensive (however, a person is not automatically considered as an undocumented migrant, if he or she does not have a residency municipality or health insurance coverage in Finland); or 3) an EU citizen whose temporary residence in Finland is legal as such but who has no health insurance or medical insurance coverage. The report is available in Finnish at: http://www.julkari.fi/bitstream/handle/10024/114941/THL_RAP2014_011web.pdf?sequence=3). Note short-term tourists or persons on business trips (max.3 months) are not considered as undocumented migrants. For more on the issue readers can consult Ministry of Social Affairs and Health, web-pages in English (health care of undocumented persons): http://www.stm.fi/en/social_and_health_services/health_services/health-care-of-undocumented-persons.

[47] Pursuant to the Municipality of Residence Act (No. 201/1994).

[48] Report 11/2014, p. 24. NB: A person insured in another EU member state is entitled to health care in Finland without discrimination.

[49] Section 50 of the Health Care Act (No. 1326/2010), available in English at: http://www.finlex.fi/fi/laki/kaannokset/2010/en20101326.pdf. Urgent cases include cases involving an injury, a sudden onset of an illness, an exacerbation of a long-term illness, or a deterioration of functional ability where immediate intervention is required and where treatment cannot be postponed without risking the worsening of the condition or further injury.

required before the urgently needed treatment has been provided and municipalities can decide to waive charging the costs of the treatment either partly or wholly.[50]

Undocumented migrants may also have a need for non-urgent health care services. According to the Finnish legislation and in spite of the binding human rights conventions,[51] an undocumented migrant is not entitled to non-urgent public health care services if he or she does not have a municipality of residence in Finland, or EU legislation or an international social security agreement does not apply. If an undocumented migrant receives non-urgent health care, he or she is obliged to pay the full costs of the given treatment.[52]

At the end of 2013, both the City of Helsinki Social Services And Health Care Committee and the Helsinki City Board decided to provide access to urgent medical care for all undocumented migrants and broader access to health care for undocumented children and pregnant women at the same client fees as for citizens of Helsinki.[53] According to the city board decision, children that are entitled to health care services are to be defined as 'every human being below the age of eighteen years' as per in the Convention on the Rights of the Child (1989).[54]

It is too early to assess the effectiveness of the above-mentioned decision and to analyse how undocumented migrants use those health care services.[55] Pursuant to a 2014 report of the National Institute for Health and Welfare, the best compliance with human rights conventions binding upon Finland and with the Finnish Constitution would be achieved by offering undocumented migrants the same health care services at the same client fees as local residents.[56]

7.   Involvement of LRAs in Constitutional review in Poland

A final example highlights the role LRAs can play in constitutional review. The Constitution of Poland establishes a general principle of decentralisation of the state (Poplawski, 2011): both legislative and executive bodies are present at each of the three decentralised levels of government (communes, counties, *voivodships*). The principle of decentralisation is reinforced by a general assumption that any

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[50] Report 11/2014, p. 24.

[51] E.g. article 12 of the International Covenant on Economic, Social and Cultural Rights (1966); articles 11 and 13 of the European Social Charter (1996).

[52] Health care of undocumented persons, Ministry of Social Affairs and Health web-page at: http://www.stm.fi/en/social_and_health_services/health_services/health-care-of-undocumented-persons.

[53] The official record of the Social Services and Health Care Committee meeting 26.11.2013 available at (in Finnish): http://www.hel.fi/static/public/hela/Sosiaali-_ja_terveyslautakunta/Suomi/Paatos/2013/Sote_2013-11-26_Sotelk_18_Pk/AA0D645C-24B1-4F09-B2A9-14D520B60A56/Sosiaali-_ja_terveyslautakunta_poytakirja_26112013.pdf .

[54] The official record of the Helsinki City Board meeting 9.12.2013 available at (in Finnish): http://www.hel.fi/static/public/hela/Kaupunginhallitus/Suomi/Paatos/2013/Halke_2013-12-09_Khs_44_Pk/9E97E676-C7F2-435E-8B5E-F383BA638BB2/Kaupunginhallitus_poytakirja_09122013-44_julkinen_.pdf.

[55] Phone interview with chief medical administrator Jukka Pellinen on the 9th of May 2014.

[56] Report 11/2014, p. 63–64.

public tasks fall within communal competence, unless stated otherwise, whereas the other levels have attributed competences.

Decentralisation in Poland notably aims to empower local communities and to avoid power accumulation by central state authorities as experienced during the communist era. In order to safeguard this balance of power and ultimately the rule of law, LRAs have the power to bring acts of law for constitutional review before the Constitutional Tribunal of Poland when such laws are considered to infringe on LRAs' legal status and competences (Art. 191 sec.1 subs. 3 of the Constitution).

This power is vested exclusively in LRAs' legislative bodies at every level and the laws challenged must be relevant to the status or competences of the LRA at hand (Zubik 2012). This criterion allows to litigate issues related to the rule of law and the division of powers within the state. Concerning fundamental rights, the Constitutional Tribunal has clearly stated that LRAs cannot initiate constitutional review in cases of individual human rights violations.[57] However, several explicit areas of LRAs' competences directly relate to human rights (e.g. health care, education, legal oversight over associations and assemblies) and hence may be subject to judicial review. For example, in one case fusing issues both regarding rule of law and fundamental rights within the sphere of LRAs, the City Council of Gorzow Wielkopolski was able to successfully challenge, for breach of the constitutional division of competences, a piece of central legislation allowing for the revocation of subsidies aimed to compensate for communal income loss due to tax breaks enjoyed by disabled persons.[58]

The competence of LRAs to submit legislative acts to constitutional review in Poland is employed frequently, primarily by communes given the scope and importance of their activities. In the years 1997-2013, the Constitutional Tribunal has delivered over 150 rulings on merits in such cases, making LRAs one of the most active constitutional review initiators in Poland. The sheer variety and importance of cases brought forth by LRAs, indicates that vesting them with a power to bring laws concerning their status and activity for judicial review is both warranted and in principle, effectively implemented. As such, it adds a very important layer of protection to the legal order, rule of law and, indirectly, fundamental rights. Specifically, the narrow focus of such review, combined with the sheer number of LRA units in Poland, results in a relatively high probability that laws encroaching on division of powers will be challenged before the Constitutional Tribunal.

Several issues however stymie the effectiveness of this mechanism. Firstly, the standing limited to laws directly relevant to LRAs causes many cases to be declared inadmissible by the Constitutional Tribunal. This requirement has so far been strictly interpreted, notably where competences of LRAs and central authorities intersect, or where the default assumption of communes' competences is brought into question. A second issue is of economic nature. Legal expertise necessary for Constitutional cases is scarce and costly, and only few LRAs may afford an extensive in-house legal department, with smaller communes often relying upon as much as a single person. Furthermore, the relatively low income of LRA employees

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[57] L. Garlicki *Komentarz do art. 191 Konstytucji RP* [in:] L. Garlicki (ed.) *Konstytucja Rzeczypospolitej Polskiej. Komentarz, tom V* Wydawnictwo Sejmowe 2007.

[58] Judgement of the Constitutional Tribunal dated 30 April 2009, file reference U 2/08, publ. *OTK* ZU nr 4/A/2009

discourages lawyers from pursuing this career. As a result, many LRAs are poorly equipped to exercise their Constitutional review prerogative.[59] Possible solutions to this issue include actions (trainings, courses) aimed at providing specialised legal knowledge and skills in the field of constitutional law to employees and officers of LRAs.

B.   The role of LRAs in protecting fundamental rights: towards a typology

What can we learn from these examples? What distinctive roles do LRAs play (this section) and how, if desirable, can they be strengthened (next section). Building on these examples we identify four more general roles LRAs can play in the protection of fundamental rights[60].

1. **LRAs as rule-maker and rule-enforcer.** LRAs are important actors in the enforcement process of international human rights and European fundamental rights and integrating fundamental rights in local policies. These roles are captured in figure 4. Figure 4 shows that in the governance process of the protection, respect, fulfilment and promotion of fundamental rights, from a governance perspective, several roles can be identified. First there are rule-makers (i.e. international, European and national human rights law) and rule-takers (i.e. those who have to abide by the rules as individuals, organisations, states). In between, other roles are identified, which focus on translating international and national rules into local rules and standards (local rule-makers, i.e. operationalising the implementation of human rights law) and enforcing rules (rule intermediaries). Concerning the latter, two types are distinguished, namely monitors and complaint bodies.

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[59] One peculiar example of issues faced by the local self-government in ensuring professional legal representation was the case K 24/10 which arose from an application by the City Council of Twardogora. The Constitutional Tribunal was forced to discontinue the proceeding when the representative of City Council failed to physically appear at a hearing.
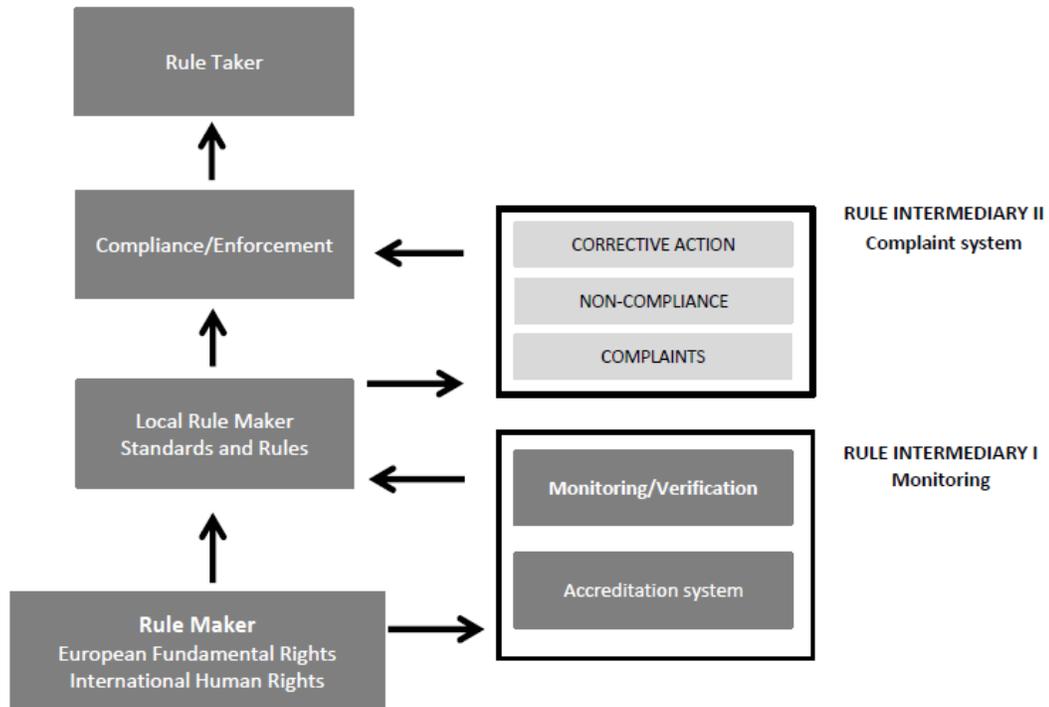
[60] For a another approach see Starl *et al*. 2014.

Figure 4: Roles in the governance process of fundamental rights

a. **Rule-maker**: LRAs are rule-makers (legally binding rules). There is a huge diversity in this competence across LRAs, but all do share some degree of rule-making capacity. In their capacity as rule-makers LRAs can strengthen the protection of fundamental rights. Putting fundamental rights as a priority in policy-making can further strengthen their enforcement potential. For example, the Regional Government of Flanders (Belgium) has put the protection of human/fundamental rights as a transversal theme in its policy declaration, mainstreaming the protection of fundamental rights across *all sectors* of Flemish policy making.

b. **Rule Intermediary**: LRAs typically enforce higher order human/fundamental rights. Due to their close proximity to the local level they perform an important role in ***monitoring*** and in interpreting the application of rules (i.e. ***handling complaints***). Concerning monitoring, LRAs can develop several initiatives to monitor the enforcement of fundamental rights which can feed into other higher-level monitoring instruments. Concerning complaint systems, LRAs can create mechanisms enabling citizens to notify fundamental rights violations.

These roles are described in the examples of the fundamental rights council monitoring in Graz, the discrimination reporting desks in Flanders, the monitoring of LGBT rights in Spain and the involvement of LRA's in constitutional review in Poland.

2. **LRAs service provision role.** Besides making rules, LRAs have a second strong policy instrument with which they can influence the protection of fundamental rights. Through budget allocation and service provision they can encourage initiatives and actors to strengthen the protection of fundamental rights. LRAs provide several services which are directly relevant in the context of fundamental rights such as housing, health care, education, etc. Through service provision LRAs can promote or inhibit the protection of fundamental rights and promote respect for fundamental rights such as the promotion of equality. In addition, LRAs can support and fund non-governmental organisations, human rights defenders and human rights campaigns. This role is illustrated by the example of health care provision in Finland, children's protection in the UK and support for voting registration in Ireland.

3. **LRAs policy supporting role.** Fundamental rights are a quintessential example of a cross-cutting, complex and multilevel policy objective. As a result, an '**awareness gap'** may emerge. Accardo, Grimheden and Starl (2012) note that often several issues which are related to fundamental rights violations are not recognised as such since citizens are not aware that they constitute fundamental rights violations. The latter is not surprising since the Charter covers a lot of different (broad) rights. **In awareness raising**, education and provision of information LRAs can play an important role, especially since they are often providers of many services which directly relate to fundamental rights issues ranging from housing to political rights such as participation in elections. This role relates to what the FRA identifies as understanding fundamental rights and communicating fundamental rights in their fundamental rights policy toolbox[61]. This role is exemplified by the examples of the human rights council monitoring in Graz, the protection of children's rights in the UK, the discrimination reporting desks in Flanders, the promotion of political rights of migrants in Ireland and the monitoring of LGBT rights in Spain. All examples develop strategies and campaigns to promote the understanding of fundamental rights.

4. **LRAs policy coordination role.** On the local and regional level several public and private actors are involved in the protection of fundamental rights. These include ombudspersons, NGO's, individual human rights defenders, academics, etc. LRAs can play a coordinating role to bring these actors together in order to ensure a stronger enforcement of fundamental rights, pooling of resources, sharing of knowledge and mediating between actors. This role is described in the examples of the protection of children's rights in the UK, the discrimination reporting desks in Flanders and the promotion of political rights of migrants in Ireland.

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[61] FRA has established a specific project, in 2010, called the *Joined-Up Governance project* which aims to analyse and develop methods to enhance fundamental rights implementation across various levels of governance. This project launched in November 2013 a toolbox which focuses on strengthening the capacity of LRAs.

C.   How to Strengthen the Role of LRAs in the protection of fundamental rights

The examples show that LRAs can play an important role in protecting fundamental rights in a multi-level governance system within the EU. In this section we further explore how the role of LRAs can be strengthened in the further enforcement of fundamental rights. We concentrate on four points which can all be viewed as elements of an 'intelligent' benchmarking strategy as defined above. First, we argue that these isolated initiatives should be integrated in a more overall policy framework. Second, we highlight the importance of mainstreaming fundamental rights in all policies and roles of LRAs. Third, we investigate how LRAs can learn from one another and strengthen the enforcement of fundamental rights through a process of benchmarking inspired by the OMC. Finally, we look at how to specifically strengthen monitoring and awareness-raising initiatives.

1.   From isolated initiatives to a coherent legal and policy framework

As underlined in the 2014 Annual Report of the FRA, fundamental rights are a matter of multilevel governance. This is also recognised in the Charter for Multilevel Governance in Europe. Right now, this too often means that the different levels of government will take 'initiatives' to address specific issues of direct interest to them, in isolation of other initiatives and outside of any clear and coherent legal, policy or budgetary framework. However laudable these initiatives are, they suffer from weaknesses as a result of this isolation. First, their authoritativeness can be limited by the lack of a clear legal mandate explicitly defining their role in the protection of fundamental rights and the strengthening of the rule of law. Second, their impact can be limited by the lack of mutual reinforcement and synergies with the initiatives taken by other levels of government or by a lack of budget and expertise.

In respect of LRAs' roles and responsibilities with regard to fundamental rights, central state authorities should make sure to adopt clear legal, policy and budgetary framework so that LRAs' initiatives can find their place in a coherent pattern of multilevel governance, for example through the allocation of cascading responsibilities and specific mandates, inclusion and participation of LRAs in national plans for protecting fundamental rights and the rule of law, and the adoption of structural budgetary measures allowing LRAs to discharge their role effectively. The latter is partially illustrated by the Polish case.

2.   From piecemeal action to mainstreaming fundamental rights.

The protection of fundamental rights encompasses a wide range of 'indivisible and inter-dependent' rights and commitments which form a coherent package (Art. 2 TEU). Several LRAs are developing initiatives but often on very specific issues or some rights. Some of the examples included in this article illustrate this focused attention. A broader challenge is to integrate *all* fundamental rights in *all* aspects of policy-making in which LRAs play a role. In other words, how can we mainstream fundamental rights as transversal policy objectives in local and regional policy-making? The concept of 'mainstreaming' fundamental rights can be defined as a strategic process of incorporating fundamental rights into processes or organisations which are not explicitly mandated to deal with fundamental rights (Benoît-Rohmer *et al.* 2009: 15). A key focus can be on strengthening initiatives for 'internally' mainstreaming fundamental rights in LRAs. This includes ensuring organisational capacity and coherence through establishing standard procedures, investing in

hiring and training staff for fundamental rights and rule of law-related functions, fostering an internal 'human rights culture', etc.

3.   From Mainstreaming to Strengthening: Benchmarking and Peer Learning

Initial mainstreaming initiatives would be able to lay the ground work, i.e. set LRAs on the path to a more comprehensive integration of fundamental rights. In order to further strengthen the mainstreaming process, follow up initiatives could be developed. Enhanced mainstreaming can be followed up with continuous monitoring and peer-to-peer learning initiatives. In this context, it could be considered to develop a (voluntary) ***open method of coordination*** (OMC) on measuring the implementation of fundamental rights and strengthening the rule of law. Such a method would be able to generate (positive) dynamics to further strengthen the integration of fundamental rights in LRAs and facilitate the implementation. As indicated above, this does not in any way replace the existing legal obligations states have concerning the protection of fundamental rights but is a policy mechanism that could be used to better bridge the enforcement gap. There are several variants of the open method of coordination but key is that benchmarks concerning fundamental rights are developed on a more central level through consultations and negotiations, while competition for best practice would take place at a decentralised level. This concretely can be translated into a four step process (Tholoniat 2010).

1. A committee can be established to oversee the commitment and activities agreed upon (this could be a joint inter-institutional committee combining several institutions).

2. This committee would develop quantitative and qualitative indicators and benchmarks to compare progress and best practices.

3. Regular monitoring and joint evaluation would then take place to maintain peer pressure and mutual learning.

4. The committee would also report to LRAs on progress, best practices and facilitate peer-to-peer learning.

In this context it is important to clearly define the policy-level in which the benchmarking initiative is implemented: municipality, region, etc. This strategy can be translated in multiple initiatives for multiple levels. The process is expected to produce the following outcomes**:** (1) enhanced mutual learning and peer review between LRAs on the protection of fundamental rights and strengthening the rule of law in order to fully comply with all obligations, (2) identification of good practices and their potential of transferability and (3) development of joint policy initiatives among LRAs to further strengthen the protection of fundamental rights. One option could be to further develop the initiative in the context of the Congress of Local and Regional Authorities of the Council of Europe which adopted a resolution (334/2011) in 2011 on 'developing indicators to raise awareness of human rights at local and regional level. Another option

would be to develop the initiative in the context of the Committee of the Regions, possibly in collaboration with the Fundamental Rights Agency[62].

4.   Strengthening Monitoring and Awareness Raising

The discussion above constitutes a broad approach to strengthening the protection of fundamental rights. The specific examples also show how more particular roles can be strengthened. We focus in this context on monitoring and peer-learning.

Concerning the former (monitoring), LRAs play a specific and important role in monitoring the protection of fundamental rights. In essence one can distinguish two forms of monitoring, top-down (auditing) and bottom-up (enabling individuals to lodge complaints) throughout the examples. The example of Graz provides an illustration of top-down monitoring in which a committee audits communication (written and verbal) from political parties. Monitoring can become complex and requires very specific knowledge. The example of Graz shows that in case of monitoring for fundamental rights itself must not unduly encroach other fundamental rights, like freedom of speech. Hence, experts involved need to know exactly the point where a limitation of rights is in danger to violate the freedom of speech. This has repercussions on how one designs monitoring committees. The monitoring committee should thus involve practitioners and academics with experience in fundamental rights related issues. This can require additional training or setting up of committees for a number of municipalities in case the municipalities are small. Monitoring should be followed up with action if violations are identified. The case of Graz shows that it is important to respect the boundary line with the judiciary. The monitoring committee can analyse the discourse and evaluate it in respect to fundamental rights, but can never take a decision whether statements made by politicians would be a breach of the law, which is the task of regular courts only.

The example of local registration desks in Flanders – Belgium provides an illustration of how bottom-up systems can contribute further to monitoring. The example demonstrates that local registration desks with a broad competence regarding discrimination are vital in order to offer a comprehensive and easily accessible complaint mechanism to citizens that face discrimination. The establishment of easily accessible mechanisms at a local level is important in order to capture violations. Local reporting desks can, next, refer citizens to the appropriate mechanism when further follow-up of a case is required. Similar roles are played by ombudspersons (example 4), or local authorities in constitutional review (example 5). The Flemish initiative also shows that embedding local registration desks in a more centralised structure generates adds value. The integration of (the work of) local desks into centralised structures is important in order to enable mutual interaction between central policy-making and problems faced by local actors on the ground. In this regard, the fusion of the local registration desks in the CEOOR opens up important

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[62] This initiatives can build on previous exercises which aimed to develop indicators for such a purpose. These initiatives include the European Training and Research Centre for Human Rights and Democracy 'Study on Challenges in the Development of Local Equality Indicators – A human-rights-centered model. Commitment 2 of the Ten-Point Plan of Action', International Coalition of Cities against Racism, *Discussion Papers Series 5*, France 2010 or European Training and Research Centre for Human Rights and Democracy, 'ECAR – European cities against racism – Responsibilities of cities in counteracting racism sustainably', edited by Möstl et al, Graz 2013.

avenues to further strengthen mutually beneficial synergies. Moreover, local registration desks exist in other EU countries. It could be beneficial to establish a European cooperation network in order to exchange best practices between these local actors.[63] Hence, bottom-up monitoring via complaint systems complement top-down monitoring in order to guarantee easily accessible contact points for individuals that suffer fundamental rights violations.

Concerning the latter (awareness raising), and especially vulnerable groups in the context of fundamental rights, centrally led initiatives can complement local initiatives. The case of Dublin confirms that limited budgets can threaten the most carefully planned awareness strategies. Several initiatives were initiated in 2009. In 2013 some of these programmes came to an abrupt halt when the funding from the European Integration Fund (EIF), administered through the Irish foundation, Pobal, came to an end (New Communities Partnership, 2013). Some local authorities and their migrant network partners were unsuccessful in their application for new EIF funding in 2013.[64] In addition to the EIF funding, the Irish Office for the Promotion of Migrant Integration had also provided funding as part of the fight against racism, while matching funds were provided by the four local authorities (New Communities Partnership 2013). The resulting severe cutbacks in programmes and services translated into 2014 voter registration initiatives that were essentially only poster campaigns, a shadow of the training and capacity-building done in 2009.[65] This Dublin initiative is an interesting example of a local authority strategy to enhance and promote fundamental rights. Nevertheless, there is a related cautionary tale because continued survival of these initiatives depends upon available resources. Not all of these initiatives can be run or coordinated on a more central level or compensated by more centrally-led initiatives, but a more central-led comprehensive awareness-strategy can complement these initiatives.

D.   Conclusion

This chapter focused on the role Local and Regional Authorities can play in enforcing fundamental rights. We first extensively presented and discussed seven interesting examples of how LRAs can play a role in the protection of fundamental rights. Building on these examples we identified four key roles LRAs can play in enforcing fundamental rights: LRAs as rule enforcers through monitoring and complaint handling, LRAs as service providers with attention to fundamental rights issues, LRAs as policy coordinators and LRAs in a policy supporting role with special attention to awareness raising.

We sought to discuss on how to strengthen the role of LRAs. We concentrated on four points, namely the integration of isolated initiatives in overall policy frameworks, the importance of mainstreaming fundamental rights in all policies and roles of LRAs, the development of a process of coordination and benchmarking and the strengthening of monitoring and awareness-raising initiatives.

Finally, the paper demonstrated the potential of using a benchmarking strategy based on LRAs initiatives for closing the enforcement gap, but also opened up research questions and challenges. Most importantly, the contribution confirmed the potential of LRAs in making fundamental rights more effective. Especially

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[63] Note that the registration desk of Leuven refers to best practice examples of France and the Netherlands to enhance the reporting of complaints by citizens. See: Annual Report 2013 Registration Desk Leuven, p. 18.
[64] South Dublin County Social Inclusion Officer interview 6 May 2014.
[65] *See* http://www.integration.ie/website/omi/omiwebv6.nsf/page/managingdiversity-strategies-local-en.

in monitoring and awareness raising LRAs, due to their proximity to citizens, can play an important role. Further research can focus on different forms of monitoring and how to design local monitoring institutions most effectively and efficiently. Also the specific role of LRAs in multi-level governance can be explored further focusing on the distinctive strengths of LRAs in the multilevel fundamental rights governance system.

V.   General conclusion

After briefly discussing general issues related to policy benchmarking (definition, objectives, challenges), this report has given an overview of the various ways in which policy benchmarking could be applied by the EU to foster protection and promotion of human rights in its policies.

Section II defined policy benchmarking as the linking of a piece of policy or legislation to an indicator (or a set of indicators) for the purpose of evaluating the policy over time against an expected level of delivery, the assumption being that the chosen indicators reflect the evolution of the situation which the relevant piece of policy seeks to impact (Mihr 2009: 7 and 9), and indicated that benchmarking can be used as a tool for self-improvement, but also be used by one actor to provide incentives for the improvement of other actors.

To successfully lead to the required cycle of improvement, the report identified a number of mandatory steps:

- Development of one or some specific performance indicators (benchmarks) for that particular issue;
- Comparison of own performance against the best world-wide;
- Analysis of best practice and improvement potential;
- Implementation of actions to improve;
- Continuous monitoring (European Commission, 1999: 18)

Likewise, Section II identified a number of puzzles to be solved at the time of designing a benchmarking strategy and having to do with the selection of the proper indicators, the consequences of the non-achievement of the benchmarks, and the determination of the causality between the policy and the variation of the indicators composing the benchmark.

The report then argued, along with a significant share of the literature, that failure to properly think through these aspects would lead to 'naïve' benchmarking characterised by narratives and assumptions rather than by reliable results relating to achieved or non-achieved benchmarks. The EU's use of action plans in the ENP was presented as an example of poor benchmarking.

The report then elucidated the large potential of benchmarking strategies to create self-improvement and emulation dynamics among actors in the field of human rights, and reviewed early EU initiatives in this regard, culminating with the 'open method of coordination' which is an experimentalist governance tool which was used with some success by the EU to coordinate Member States around certain objectives typically in fields in which the community method was not available, such as social policy or health.

The report then examined several more recent instances in which the EU had sought to put in place benchmarking strategies for human rights, namely forestry management (FLEGT), business and human rights, enlargement and trade (GSP+). The study of these initiatives generally revealed that the EU was often applying defective versions of benchmarking for the following reasons:

- Lack of proper identification of indicators;
- Lack of transparency about objectives;

- Lack of involvement of local actors;
- Lack of monitoring.

Yet, the potential for benchmarking remains, especially when considering actions to foster human rights in Member States, which has been successful in the context of the open method of coordination. Section IV therefore studied the potential of applying a benchmarking strategy to the approach of 'localising human rights', that is, entrusting local and regional authorities with the responsibility of implementing or enforcing human rights. The study found many examples of instances in which LRAs could have a positive impact on human rights and where this impact could be multiplied if a proper benchmarking strategy was put in place.

In conclusion, the study supports the premise that benchmarking strategies are a promising avenue for implementing the EU's commitment to human rights, and that a number of initiatives already existed in this regard in the EU, but often suffered from poor design and monitoring.

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