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Summary

This paper aims at providing an overview of the existing normative theories on the role of civil society participation in democratic governance. It shows how current theories on civil society do not fit well with the complexity of modern governance, in particular with multi-level governance in the European Union. Among different democratic theories, deliberative democracy may still come most close to providing an answer to the role of civil society in modern governance. While analysing the remaining weaknesses of Habermasian deliberative democracy and directly deliberative polyarchy to address this issue, the paper will propose the model of reflexive deliberative polyarchy.

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I. Introduction

The relation between civil society and European public institutions and the role of civil society organisations in European governance has become an important topic of academic interest. In particular, the legitimacy question of the European polity and of European governance has revived the idea and concept of civil society, not at least since the European institutions themselves developed a normative discourse on the role of civil society organisations as source of legitimacy (Smismans 2003). Yet, existing political theory is weak in conceiving from a normative perspective the role of civil society organisations in European governance. This deliverable aims at providing an overview of existing normative theories on the role of civil society in the perspective of linking them with the complex reality of European governance. Since all current theories show weaknesses to reply to the complexity of European governance, we propose our own normative framework.

The first section of this paper will argue that democratic theory on civil society on the one hand, and political theory on the role of interest intermediation on the other, do not provide a satisfying answer to address normatively the role of civil society organisations in governance mechanisms, in particular in context of the European polity. The second section will look whether deliberative democracy may be a more helpful guide. Yet, Habermasian deliberative democracy, deliberative supranationalism and directly deliberative polyarchy (DDP) all fall short in conceiving a clear role for civil society organisations in governance mechanisms. Therefore, reflexive deliberative polyarchy (RDP) will be proposed as a normative frame to place civil society organisations into European governance. RDP builds on DDP and on reflexive law theory. Analysing the common ground and differences of these theories, the paper will argue that RDP, which stresses the importance of civil society organisations and of reflexivity and therefore overcomes the shortcomings of DDP as a normative framework for European governance, may provide a way forward.

II. The missing answer in political theory to civil society and European governance

Although political theory has dealt extensively with civil society, it has hardly addressed complex modern governance structures where civil society organisations provide an intermediating role between the political, economic and private spheres. Theories of civil society, social capital (Putnam 1993 and 1995; Fukuyama 1995), or communitarianism (Etzioni 1998) are actually ill-suited to provide guidance on public-private relationships in today's modern governance mechanisms, precisely because they stress the independence of civil society from (public) governance. Voluntary organisations and functioning neighbourhoods revive feelings of community and generate social capital by supporting norms of reciprocity and civic engagement, building social trust and providing networks of social relations that can be mobilized for civic action. Such civic action may interact with the political sphere, but it remains always somewhere independent and 'outside' of governance mechanisms. In a comparable way, the revival of the concept of civil society in Central and Eastern Europe stressed again the independence of the democratic societal forces in opposition to the state-led communist governing structure (Carter 1998; Hirst 1997: 156), whereas in South-American and African countries the concept has been used to draw attention to traditional forms of social organisation in contrast to Western European governance structures.

Democratic theory traditionally places 'civil society' outside of governance mechanisms, and focuses its attention on the relationship between citizen and polity, in terms of individual rights and political representation on a territorial basis. One can argue that the idea of partici-

pation of civil society organisations in public governance has not really entered into the core of democratic discourse. Clearly, political theory has extensively dealt with the role of intermediary organisations. Theories of interest intermediation, like (neo) pluralism and (neo) corporatism may indeed be better placed to shed light on public-private relationships in governance. However, one should recall that both have been used, above all, as descriptive models, and have often explicitly stressed not to be democratic theories. In particular authors on neo-corporatism have stressed that they do not intend to present a normative model. Thus Schmitter (1979: 8) argues that ‘defining corporatism in terms of its praxis, the concept is liberated from its employment in any particular ideology or system of ideas.’ The early pluralists, on the other hand, called themselves ‘empirical democratic theorists’ since they would analyse how politics really worked (Held 1996: 199). Yet, neo-pluralism did develop into a normative proposal. As a normative frame, it has greatly inspired the shaping of interest intermediation in US administrative law (Shapiro 1988: 36-54; Stewart 1975; Sunstein 1985-86). Yet one still needs to understand whether neo-pluralism – also criticized in the US context – can be of normative inspiration for the European polity (see Smismans 2004: 447-455).

The same problem emerges in relation to one of the few normative models that did place the role of civil society organisations at the centre of democratic theory, namely associative democracy. Contrary to much of the civil society literature, associative democracy does not reduce the role of civil society to an independent sphere that can only influence the traditional democratic institutions through parliamentary politics. Acknowledging the intermediating role of civil society organisations and their self-governing potential, associative democracy seems an interesting model to think about public-private relations in modern governance. Yet the model is particularly difficult to adjust to the EU context. Cohen and Roger’s model of associative democracy (1995), for instance, builds strongly on the potential of public authority to shape the activity of associations, and links the (re-)design of interest intermediation to the accomplishment of specific policy objectives such as distributive equity. Whereas several authors have already questioned such artifactuality of associations and put into doubt the desirability of such far-reaching state intervention from a democratic point of view (Hirst 1995: 102; Offe 1995; Schmitter 1995: 169), the feasibility of this approach is even less at the European level where public authority lacks the power for such intervention. Moreover, the social democratic redistributive agenda implied in Cohen and Roger’s model (Schmitter 1995:117; Katznelson 1995: 196) stands very far from the current integration project as (still or maybe ever more) mainly constituted as a market building and regulatory project. On the other hand, more bottom-up approaches to associative democracy, such as the model by Hirst (1994 and 1995), building up associations by political campaigning and voluntary action in civil society rather than by state crafting, tend to agree with the main civil society literature that conceptualises associative activity as rather independent from public governance.

Both the examples of neo-pluralism and associative democracy show that in addition to our first problem – namely, the lack of democratic theories that deal with the role of civil society in interaction with governance rather than as a sphere outside governance – one has to face a second problem, namely that democratic theory has strongly developed within the framework of the nation state and has a hard time adjusting to the reality of multi-level governance. This problem is well-known, but it is worth recalling that while political theory has tried to adjust to the idea of multi-level *government*, it is still in its infancy in dealing with the horizontal *governance* dimension. The idea of the European Union as a polity with multiple vertical layers is common to both lawyers and political theorists, and can be traced back to the shadow of federalist thought that has accompanied European integration from the start. The complexity of public-private relationships in European governance is only more recently a theme of academic research. The concept of ‘multi-level governance’, for instance, has for long been char-

acterised by a pre-dominant focus on the ‘multi-level’ aspect in terms of vertical relations between the territorial levels of government, rather than on the horizontal ‘governance’ component in terms of relations between public and private actors (e.g. Hooghe 1996; Pernice 2002).¹ More recently the horizontal governance dimension has acquired more academic attention, but it has mainly been approached from an analytical perspective, using for instance the conceptual lenses of policy analysis, network analysis and studies of modes of governance (e.g. Héritier 2002). Political theorists, on the other hand, contributed strongly to the ‘normative turn’ in EU studies during the 1990s, building on the democratic deficit debate and trying to make sense of the *sui generis* non-state character of the European polity –rethinking, for instance, the idea of a demos and of citizenship. But their analysis falls short of providing a normative framework for the complexity of European governance mechanisms and theorising public-private relationships in a multi-level polity. This relates obviously to our first remark regarding the shortcomings of democratic theory in general in addressing the complexity of public-private relationships.

III. Deliberative democracy and civil society

Among the democratic theories that have been debated in relation to the legitimacy of the European polity, deliberative democracy has occupied a central place. More broadly, the ‘deliberative turn’ has dominated democratic theory since the 1990s (Saward 2000: 5). In the particular context of the EU, Habermasian deliberative democracy (especially Habermas 1996), deliberative supranationalism (Joerges and Neyer 1997), and directly deliberative pol-yarchy (Cohen and Sabel 1997), have all found an important place in the normative debate. Deliberative democracy may, at first glance, seem as an attractive alternative to conceive of the role of civil society organisations in European governance,. The ‘deliberative turn’ would allow us to go beyond existing models of interest representation, such as neo-pluralism and neo-corporatism, which treat ‘interests’ as a given, and to look at interest intermediation as a participatory sphere in which actors will adjust to each other by rational argument. Habermas’s writings appear attractive since they stress both the importance of deliberation and of civil society.

Yet, Habermas does not provide an answer to the relationship between civil society and public institutions in contemporary complex governance (also Armstrong 2006). Habermas stresses the importance of civil society in providing a complex communication network of informally organized publics – from private associations to the mass media – constituting the ‘public sphere’ (Habermas 1996: 275) which may influence political decision-making. Yet his ‘two-track process of collective decision-making’, with, on the one hand, the spontaneous energy and informal deliberation of civil society, and, on the other hand, deliberation within the formal structures of representative democracy has been repeatedly criticised (Cohen 1998:18; Forbath 1998:273; Fine and Smith 2003). In particular, it is argued that the relationship between the two is reduced to the influence of the public sphere on traditional politics via parliamentary representation. Put differently, the link between civil society and ‘the state’ lies in ‘politics’ via territorial representation, whereas ‘administration’ retains its neutrality and

¹ For a comparable argument about the vertical focus of the multi-level governance (MLG) concept, see also: T.R. Schobben (2000: 51). Also in a more recent work, the concept’s original proponents, namely Marks and Hooghe (2002), while distinguishing two types of MLG retain mainly the vertical focus, whereas the relation between public and private actors is said to be an ‘orthogonal’ dimension of their analysis. For more detail on how these two types of MLG relate to the normative ideas of vertical and horizontal decentralism in the EU constitutional debate, see Smismans (2004b: 2).

complex public-private governance interactions are difficult to conceive. It is difficult, therefore, to use Habermasian deliberative democracy to think normatively about the role of civil society organisations in today's complex European governance structures.

To think normatively about the complexity and particularities of European governance structures, the idea of 'deliberative supranationalism' has been proposed by Joerges and Neyer (1997). They counter the dominant negative image of comitology procedures – as opaque, technocratic procedures bypassing parliamentary representation – and describe it as a deliberative structure, which, on the one hand, ensures that risk regulation in a multi-level polity takes into account 'national concerns', and on the other hand, strips the defence of national sectarian interests by replacing negotiation by a process of persuasion and argument. Yet, deliberative supranationalism focuses on comitology committees, i.e., those composed of representatives from the national administrations, and does not say much about other European governance mechanisms nor about the role of civil society organisations in it. Even in relation to comitology procedures, the legitimacy of such procedures is mainly sought in the deliberative nature of the process that is built primarily on the 'national representation' in the comitology committees and the importance of scientific argument, rather than on the involvement of civil society organisations. Although the authors acknowledge the possibility of promoting the articulation of interests at the European level via the procedure for including experts in the comitology committees (Joerges 1999: 335), the main argument goes that where the legitimacy of decision-making is sought in the deliberative and science-based nature of the decision-making procedure, there is less need for the inclusion of ever more 'interests' (Joerges 1999: 344; also Everson 1999: 307).

The correctness of risk decisions cannot be guaranteed by unmediated recourse to interest or their negotiation - or in legal terms, by extending corresponding participation rights and veto positions (...). By virtue of its feedback links to Member States [cf. Member States representatives in comitology committee], comitology can, in principle, take all social concerns and interests into account while, at the same time, links with science (seen as a social body) can be shaped so as to allow for the plurality of scientific knowledge to be brought to bear (Joerges 1999: 344).

Yet, how the representatives from national administrations in the comitology committees – who, *in principle*, can take all social concerns and interests into account – would actually do so in practice remains unclear. Moreover, deliberative supranationalism cannot tell us much about an important aspect of European governance that is out there, namely the role of civil society organisations in European policy-making.

Directly deliberative polyarchy (DDP) may then appear as a more attractive alternative. It 'decentralizes' political decision-making into lower-level units where citizens examine their choices in light of the relevant deliberations and experiences of others, upon which information on these local experiments is pooled at a more central level that will ensure monitoring and encourage mutual influence and learning and revisability of objectives and instruments. As Armstrong (2006) says, 'we move from a [Habermasian] conceptualisation of civil society as normatively "privileged locus" of critique and resistance without power to one that accounts for civil society as a potential participant in democratic experimentalism... DDP brings civil society directly into governance as a concrete political and legal actor.'

However, also DDP falls short of providing a normative framework to conceive the role of civil society organisations in European governance. DDP stresses *direct* participation and is thus not content with classic forms of consultation of stakeholders. As Magnette (2006)

rightly argues, for the same reason DDP also refuses to rely on the vigilance of the stakeholders who hold the regulators accountable. Yet, this stress on ‘directness’ impedes not only delegation to regulators made accountable to stakeholders, but makes it also difficult to conceive of ‘functional representatives’ acting on behalf of citizens rather than having individual citizens participating directly. As Armstrong says: ‘while proponents of DDP clearly have in mind an active role for civil society in governance processes, nonetheless, the dimensions of this role are somewhat under-specified’. DDP is not clear on how it conceives the role of civil society organisations. Concepts as delegation and representation hardly fit with the idea of DDP.

However, the amount of citizens participating directly in forums of deliberation and experimenting will always be limited – due to functional differentiation and complexity in society, even in a very decentralised setting. This means that most deliberation and experimenting will take place via functional representatives who relate to citizens by associative interaction and representation. In particular, in the context of a supranational polity as the EU – dealing as if often does with very technical issues, and where more centralised pooling requires knowledge of foreign languages – one needs to concede on the directness requirement. Functional representation and civil society organisations will always have a prominent role in European governance. Any normative framework for European governance should take into account this reality. Therefore, the next section will propose reflexive deliberative polyarchy as a normative framework, which builds on DDP but aims to overcome its shortcomings.

IV. Reflexive deliberative polyarchy

Reflexive deliberative polyarchy (RDP) builds on DDP and on reflexive law theory. Both theories have developed in reply to modern governance where more horizontal settings relying on procedural rather than substantial norm setting have become complementary to or replaced more hierarchical governance. In the context of European governance, for instance, political scientists have looked to the Open Method of Coordination with the lenses of DDP (Eberlein and Kerwer 2002), whereas lawyers and legal theorists (De Schutter and Deakin 2005; Lenoble 2005) have done so with the lenses of reflexive law. There is, in fact, common ground between DDP and reflexive law. However, there are also important differences. Their combined use in the model of RDP can provide us with a normative framework that helps to overcome the shortcomings of DDP. The parallels and differences between DDP and reflexive law will be analysed in the first part of this section ; and RDP will be developed as a normative framework for European governance in which civil society organisations may have a central place in the second part.

IV.1 DDP and reflexive law

DDP is a democratic ideal that is based on the idea that ‘local-, or more precisely, lower-level actors (nation state or national peak organizations of various kinds; regions, provinces or sub-national associations within these, and so on down to the level of whatever kind of neighbourhood the problem in question makes relevant) are granted autonomy to experiment with solutions of their own devising within broadly defined areas of public policy. In return, they furnish central or higher-level units with rich information regarding their goals as well as the progress they are making towards achieving them, and agree to respect in their actions framework rights of democratic procedure...’ (Gerstenberg and Sabel 2002: 291). The system is ‘directly-deliberative’ since ‘citizens must examine their own choices in the light of the relevant deliberations and experiences of others’ (Cohen and Sabel 1997: 314) in contrast to other discursive ideas of democracy of deliberation at a distance, by an administrative or po-

litical elite. The system is ‘polyarchic’ due to the permanent disequilibrium created by the grant of substantial powers of initiative to lower-level units (Gerstenberg and Sabel 2002: 292).

Reflexive law is not a democratic ideal and has, at a first glance, not much in common with DDP. Reflexive law theory has initially been proposed by Gunther Teubner as a neo-evolutionary theory of law in society. It refers to a new evolutionary stage of law, in which law ‘realizes its systemic limits with respect to regulation of other social systems’ (Rogowski 2001: 181) and ‘becomes a system for the coordination of action within and between semi-autonomous social subsystems (Teubner 1983: 242). Reflexive law theory has built on the premise of systems theory, and on Luhmann’s theory of autopoiesis in particular: that modern differentiated society is characterized by the ‘horizontal’ emergence of social subsystems like the legal, economic, scientific, political and religion subsystem. Each subsystem is self-generating and self-referential; they are normatively closed in that they recognize no norms other than those which they produce as being valid.² As a consequence no one system can declare its worldview as the only view and as binding on all others. This has important consequences for the role of law, which is supposed to ensure integration in society. Instead of providing substantial regulatory programmes, reflexive law should ensure that the subsystems are self-regulating without damaging the other subsystems.

What is it that makes such different theories as DDP and reflexive law contemporarily attractive as conceptual lenses to look at modern governance mechanisms as witnessed in the EU? In fact, DDP and reflexive law theory have some commonalities which may explain their attractiveness as conceptual frameworks for European multi-level governance. Both share an analysis of the ‘crisis of regulation’ in modern societies, criticising the limits of hierarchical command-control intervention in a strongly diversified society. Given these limits, they both plead for institutions and procedures that favour decentralized (Smismans 2004b) modes of governance in society. The criticism of centralized policy and legal intervention on substantive issues, the recognition of a certain autonomy of subsystems, and the favouring of decentralized governance modes while recognising the added value of more procedurally defined coordination mechanisms, may explain the attractiveness of both DDP and reflexive law as conceptual frameworks to look at the reality of European governance.

However, the two theories provide also very different perspectives. Despite their common ground, they differ strongly in their nature and objectives, and (consequently) in their focus. One can put it schematically as follows:

² The catch-phrase in autopoietic theory states that subsystems are ‘operatively closed’ but ‘cognitively open’ (Teubner 1993: 15), i.e. although subsystems are characterized by organized processes of communication and action that are structured independently from other social communications and actions, they are not entirely isolated from other subsystems. Yet, the influence from one system on another can only be understood by the latter through a translation in the proper language of that system, i.e. ‘making order from noise’. ‘The system can only deal with its own internal construct of the environment’ (Teubner 1993: 74).

Table 1: Comparison between DDP and Reflexive law theory

	DDP	Reflexive law theory
Nature of theory	Democratic theory → normative (democratic concern)	Legal theory → analytical and normative (and if normative, more focus on effectiveness than on democratic procedure)
Differentiation in society	Horizontal and vertical	Horizontal
Focus	Institutions and actors	Systems
Normative concept	Deliberation	Reflection

Directly deliberative polyarchy is a democratic theory; i.e., it provides us with normative lenses to look at how governance in society is and/or should be organized from the perspective of democratic participation and accountability. DDP does not articulate *in abstracto* a set of normative principles to deduce the institutional conclusions of them, but it tries ‘to imagine what democracy could be’ (Cohen and C. Sabel 1997: 317) from the vantage point of the possibilities suggested by current governance structures.

Reflexive law theory is a legal theory, dealing with the nature of law and its place in society. It can be analytical or normative and needs not necessarily to make any claim regarding democratic procedure. The starting point of reflexive law theory may be an analytical one, identifying in the self-referentiality of sub-systems the problems of law in regulating other sub-systems; or identifying in the increased differentiation of society the origin for the development of reflexive law as a next step in the evolution of law. Yet, even if reflexive law has initially been presented as an (analytical) evolutionary theory of law in society, the step from here to suggesting how law *should* be structured in order to be effective is a very small one. Teubner explicitly defends the dual character of the idea of reflexive law as both analytic and normative, namely as an empirical analysis and normative evaluation of the current position of law in a functionally differentiated society, and the operative consequences of this finding (Teubner 1993: 69). Obviously, the normative concern of how law should be structured in order to be *effective* does not imply a democratic concern. In particular, when reflexive law theory became increasingly built on the premises of autopoiesis, the focus became the operational closure of subsystems and the problems this creates for the effectiveness of law. The index of subjects of Teubner’s, ‘Law as an autopoietic system’, does mention neither democracy nor participation, and the core chapter of the book defining the features of reflexive law in social regulation reads as a search for more effectiveness of law (Teubner 1993: 68) -by overcoming the limits of command-control regulation - and not as a search for more democratic, participatory, legitimate governance. Where reflexive law theory becomes identified with ‘autopoietic law’ it stands far from normative democratic considerations (Rogowski 2001: 180). The theory of autopoiesis as presented by Luhmann has never claimed to provide any way to ‘a better society’ (King 2001: 126).³

Yet, the earlier Teubner had linked the concept of reflexive law to discursive democracy. ‘Reflection within social subsystems’, it was argued, ‘is possible only insofar as processes of de-

³ Eric Orts opposes ‘the more politically optimistic Habermas, who seems to retain a faith that an enlightened political state informed by democratic discourse and deliberation can successfully “steer” the economic and other social systems’ to the autopoietic theorists like Luhmann and Teubner who are ‘less sanguine about the possibilities of modern democratic politics’. (Ort 2001: 173).

mocratization create discursive structures within these subsystems' (Teubner 1983: 273). It is the role of reflexive law to 'act at the subsystem-specific level to install, correct, and redefine democratic self-regulatory mechanisms' (Teubner 1983: 275). However, Teubner also specifies that 'the primary function of the democratization of subsystems lies neither in increasing individual participation nor in neutralizing power structures but in the internal reflection of social identity' (Teubner 1983: 273). The precise nature of 'democratising subsystems' remains unclear (J. Black 1996: 49). Teubner's argument that increasing individual participation and neutralizing power structures are 'not the primary function of democratization' from a reflexive law perspective sounds as an understatement, since the two issues are only marginally dealt with in the theory (J. Black 1996: 49; Wilthagen 1994: 350). Teubner's occasional reference to 'democratization' tends, therefore, to sound tautological: reflection in subsystems depends on democratization. Yet, democratization seems (mainly) to be understood as reflection.

As respectively a democratic theory and a legal theory, DDP and reflexive law theory have a different focus. Reflexive law theory focuses on functional subsystems, on their autonomy and (problems) of their interrelationships. Put differently, it focuses on horizontal differentiation in society. Vertical differentiation or the role of territory is (nearly) entirely absent in the theory. What is the role of reflexive law regarding the reality of territorially defined (sub)systems? In his 'Law as an autopoietic system', Teubner only occasionally touches upon the issue of territorial subsystems, asking whether one can extrapolate from conflict between territorial subsystems (as, for instance, dealt with by international private law) to conflicts between social subsystems. While this implies the recognition of territorial subsystems and a role for law to regulate their interrelations, he gives no indication on how reflexive law fits into this picture. It will not suffice to overcome this problem simply by affirming that 'historically and sociologically, it is perfectly plausible to speak of a universal shift in emphasis from territorial, political, and national conflicts to conflicts between global functional subsystems' (Teubner 1993: 107).

Contrary to reflexive law theory, DDP provides us with a focus on both horizontal and vertical differentiation, pleading in particular for local experimentation. Aiming at the direct involvement of citizens in governance structures, DDP is also actor-centred whereas reflexive law theory is system-centred (Stout and Huls 1992: 220). The core-guiding concept of DDP is deliberation, that is, the rational communicative activity among individuals taking into account each other's arguments in the search for a collective solution (Cohen and C. Sabel 1997: 329). The core-guiding concept of reflexive law theory is reflection, which is a feature of subsystems – and in particular thought through for the legal subsystem – and not of individuals. At a minimum, reflection means the acknowledgment by the (legal) subsystem of its self-referential character. From here it follows that reflection also implies the acknowledgment by the legal system of its limits in regulating other subsystems. Reflexive law, therefore, focuses on encouraging self-regulation of the social subsystems. Freed from the strait jacket of autopoiesis, reflection can also have the broader meaning of taking into account contextuality. Reflexive law abstains from uniform substantive interventions but encourages governance mechanisms that allows it to take into account contextuality (Barnard, Deakin and Hobbs 2005: 231). In its most normative version, reflexive law encourages that subsystems take into account their effects on other subsystems, that is, despite of (a certain level of) self-referentiality of subsystems, interconnections between them can be encouraged through law.⁴

⁴ The autopoietic interpretation of reflexive law theory stresses the self-referentiality and closer of the subsystems. The 'cognitive openness' of subsystems is sought in processes such as 'an hypercycle' or 'structural coupling' (Teubner 1993). Yet, the final verdict is that 'despite all "Reflexivity", law is still a closed autopoietic system' (Teubner 1993).

In the words of the earlier Teubner, the aim of reflexive law is ‘re-introducing the consequences of actions of social subsystems into their own reflection structure’ (Teubner 1983: 257).

IV.2 RDP as a normative framework for European governance

The different perspectives of DDP and reflexive law theory can be used in a complementary way, and building on their common ground, one can propose the model of ‘reflexive deliberative polyarchy’ as a normative framework for European governance.

RDP is a normative democratic guide that encourages governance based on:

- Polyarchy:

Polyarchy is defined in the double sense it has been given within DDP. Cohen and Sabel have built DDP on Dahl’s concept of polyarchy, namely it ‘refers to systems in which virtually all adults have rights of suffrage, political expression, association, and office-holding, as well as access to diverse sources of information; in which elected officials control public policy; and citizens choose those officials through free and fair elections’ (R. Dahl 1989: 221 as quoted in Cohen and Sabel 1997: 318). For Dahl democracy may be defined as rule by multiple minority oppositions; that is, depending on the particular decision being taken, different groups have access and power to control the decision making outcome due to a competition in an ‘open contest for electoral support’ (Dahl 1956; Held 1987: 193). Compatible but not identical with this, DDP has used the concept also to refer to ‘the permanent disequilibrium created by the grant of substantial powers of initiative to lower-level units’ (Gerstenberg and C. Sabel 2002: 292). DDP has often stressed this second dimension, while losing sight of the first. Magnette (2006) has rightly argued the limits of direct deliberative forms of participation in as far as they can only involve a limited number of actors, and has, therefore, stressed the continuing importance of traditional forms of representative democracy to realise civic equality and civic education. Polyarchy in its decentralised dimension should not, therefore, lose sight of polyarchy in more traditional terms of politics and electoral contest.

- Deliberation:

Direct citizen deliberation, based on the adjustments of each other’s positions through rational argumentation in direct interaction, climbing up from the lowest and smallest unit, as aimed at in DDP, remains part of the normative ideal of RDP. Yet, given the complexity of society and functional specialization, citizens will never be able to participate in all sorts of decision-making which influence their life. From a bottom-up democratic deliberative perspective, the ideal would be that each citizen could participate in all subsystems of which he/she bears the consequences. Such a direct-democratic ideal is obviously unrealistic in a modern globalized and communicatively diversified and functionally differentiated society. Citizens have neither the time nor the will and lack the specialized knowledge to engage in direct deliberation in the multiple subsystems of modern society. DDP appears too optimistic on the ideal of reaching direct citizen participation and tends to underestimate the complexity of different subsystems and languages in society. In particular,

etic system operating in a world of closed autopoietic systems. It is impossible to break down the barriers which result from this double closure’ (Teubner 1993: 97). However, reflexive law theory has not stuck to this strong autopoietic reading (neither to the highly abstractly defined mechanisms of hypercycle or structural coupling), and has given a more ‘optimistic’ and normative interpretation to the potential of reflection and reflexive law in encouraging interrelations between subsystems. See, for instance, Orts on environmental contracts (Orts 2001: 175).

in the supranational European Union, direct citizen participation appears very hard to realise. Sabel and Gerstenberg's suggestion (2002: 333), for instance, that the Open Method of Coordination may show the participatory features of DDP, is contradicted by empirical evidence (Zeitlin 2005: 460; Smismans 2005; Jacobsson and Vifell 2002; Léonard 2001).

Since direct citizen participation is extremely difficult to realise, 'decentralised deliberation' needs mainly to take the form of the 'second-best solution'; namely that of decentralised deliberation by functional representatives, often presented under the banner of 'the stakeholders'. This solution is second-best not only because citizens do not participate directly, but also because functional representatives tend to be part of subsystems with their own self-referentiality and limited communication with 'the outside world'. Therefore, encouraging 'reflexion' is an important additional normative device for democratic institutional design.

- Reflection:

RDP 'corrects' DDP on a different basis. It encourages, first of all, a greater awareness of the (partial) self-referentiality of subsystems. Reflexivity has not been entirely absent in DDP. DDP is not limited to encouraging decentralised deliberation but also implies the pooling of experience from such local experiments, namely 'it requires institutionalization of links among local units – in particular, the institutionalization of links that require separate deliberative units to consider their own proposals against benchmarks provided by other units' (Cohen and Sabel 1997:325). Gerstenberg (1997: 353) even argues that DDP 'institutionalizes reflexive capacities concerning society as a whole or undesired external effects of the single subsystem within the functional systems themselves'. However, DDP tends to underestimate the complexity of different languages and their legitimating narratives. DDP does not start from a systems theory that considers interaction among systems as particularly difficult. Contrasting DDP to systems theory, Gerstenberg and Sabel (2002: 340) argue that 'local knowledge is neither tacit nor fully and self-referentially systematic. Co-ordination among local collaborators is necessary because of the diversity of their views and possible because ... the exploration of the ambiguities internal to each shades into exchange with the others. But as local co-ordination yields new ambiguities of its own, there is both need and possibility for inter-local exchange through a new centre that frames discussion and re-frames it as results permit.' However, given functional differentiation in society, the heterogeneity of participants (Cohen and Sabel 1997: 333) within local units may be less spontaneous to realize than DDP seems to suggest. Moreover a new centre at a higher level that allows inter-local exchange may indeed provide opportunity to re-frame discussion, but the (partial) self-referentiality of subsystems implies that it is more likely for such higher levels centres to be created *within* rather than *across* subsystems.

This reflexive awareness of the partial self-referentiality of subsystems becomes particularly important when we have to deal with governance mechanisms where deliberation can often at best be reached by including stakeholders and representatives of civil society organisations. As one concedes on the directness of citizen deliberation and accepts functional delegation and representation, this 'democratic loss' should be compensated by encouraging interaction between languages that are otherwise too detached. Whereas, at a minimum, reflection means the awareness of the self-referential character of subsystems and the acknowledgment that there are other languages related to intertwining realities, it becomes more normatively a guide for taking into account contextuality and encouraging subsystems to consider their effects on other subsystems, i.e. 're-introducing the consequences of actions of social subsystems into their own reflection structure' (Teubner 1983: 257). RDP thus encourages reflection

in institutional terms of interconnections between subsystems and in terms of taking into account arguments ‘from outside’ (i.e. not spontaneously provided through deliberation as far as the heterogeneity of actors in deliberative fora is constrained by the self-referentiality of subsystems).

V. Conclusion

Reflexive deliberative polyarchy (RDP) is not a particularly new invention as theories of reflexive law and deliberative democracy have previously toyed with each other. As argued above, Teubner has initially linked reflexive law to discursive democracy but has not elaborated the details of what could potentially become a democratic theory. By linking DDP and reflexive law theory, one can provide the latter with the normative democratic dimension it was lacking and reply to the plea to ‘bring legal theory back in very close relation with democratic theory’ (Willke 1992: 383). Vice versa, reflexivity can help to overcome the overly optimistic assumptions of DDP. RDP encourages both decentralized deliberation (among individuals) *and* reflection (among subsystems) within a polyarchic institutional set up. Epistemologically, ‘deliberation’ stresses interpersonal interaction - it assumes the ‘we’ who deliberate - whereas ‘reflection’ stresses the relation between a subject that reflects (on) an object. Reflexive deliberative polyarchy stresses both the need for interpersonal direct deliberation and for the horizontal taking into account of what is ‘outside’.

RDP is, therefore, a better fit than DDP to address normatively the question of European governance, which, rather than being characterised by direct citizen deliberation, is based on a system of complex public-private interactions involving stakeholders and representatives of civil society organisations as functional representatives. RDP does not propose a single model of European governance, but can be used as a normative guide for different governance mechanisms where polyarchic electoral contest and/or reflexive structures – in different combinations – can compensate for the ever-unreachable ideal of direct citizen deliberation.

RDP is particularly attractive as a normative frame for European governance where both direct citizen participation and parliamentary representation are extremely difficult to realise given the supranational nature of the polity. In contrast to DDP, RDP allows for a central role for civil society organisations and stakeholders in European governance. Their less ‘direct’ nature of deliberation may be compensated by a search for reflexive taking into account of the reality beyond their own subsystem.

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