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University of Trento, Stijn Smismans
Author: Stijn Smismans (Cardiff University)

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Summary

In this article I will look at whether the concept of ‘reflexivity’ can be useful to refocus the model of DDP. I will argue from an analytical perspective that European governance shows regularly features of reflexivity, and I will claim that a normative use of the concept of reflexivity, mainly inspired by reflexive law theory, may help to refocus the model of DDP. I will analyse whether, given the difficulties and limits to realise direct citizen deliberation in European governance as proposed by DDP, the model of reflexive-deliberative polyarchy (RDP) may be more apt as a normative framework for European governance.

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I. Introduction

Co-writing with changing partners, Charles Sabel¹ has developed over the last decade the suggestion that directly deliberative polyarchy (DDP) may be used as a normative framework for European governance. In 2002, the suggestion that DDP could be ‘an institutional ideal for Europe’² was followed by a question mark, whereas in more recent work the examples of soft and new modes of governance that would come close to DDP are amplified, to the extent that the authors talk about ‘a new architecture of experimentalist governance in the European Union’.³

However, as will be further illustrated in this article, the normative claims on which DDP is ultimately based, namely deliberation bottom-up from the lowest level involving those concerned, stands very far from the reality of European governance. While reality will per definition always differ from the abstract ideal, there needs to be a minimum level of fit to claim that the normative model can be of guidance.

In this article I will look at whether the concept of ‘reflexivity’ can be useful to refocus the model of DDP. I will argue from an analytical perspective that European governance shows regularly features of reflexivity, and I will claim that a normative use of the concept of reflexivity, mainly inspired by reflexive law theory, may help to refocus the model of DDP. I will analyse whether, given the difficulties and limits to realise direct citizen deliberation in European governance as proposed by DDP, the model of reflexive-deliberative polyarchy (RDP) may be more apt as a normative framework for European governance. Unlike DDP, RDP takes as a starting point the premise of system theory that modern society is characterised by subsystems that tend to discursive closure and self-referentiality. The normative corollary of this – as suggested by some authors on reflexive law – is that procedural mechanisms should encourage the interaction of subsystems. Applied to European governance this means that, aware of the difficulties to realize direct citizen deliberation and of the tendency that governance occurs through auto-referential deliberation by functional actors, procedural mechanisms should encourage interaction between different communicative structures. If the amount of citizens that can be involved in deliberation over policy-making will always be limited, the encouraging of reflexive interaction between different intermediaries who normally would tend to closure within the proper language and network of specialisation may be a useful device to avoid governance in the defence of singular interests.

In this paper I will use the evidence of two policy sectors that have repeatedly been proposed by the supporters of DDP as examples of directly-deliberative governance in the EU, namely the European Employment Strategy (EES) and European occupational health and safety (OH&S) policy. These two policy sectors have been chosen since the former is a core example of a ‘new mode of governance’, whereas the latter is a traditionally regulatory policy sector of European intervention. Analysis of the two sectors shows, firstly, that the normative claims of DDP do not at all correspond with reality, and, secondly, that reflexive deliberative polyarchy may be a more useful normative guide to look at various aspects of European governance.

¹ Cohen, Joshua and Sabel, Charles (1997), ‘Directly-deliberative polyarchy’, *European Law Journal*, vol. 3, No.4; Gerstenberg and Sabel (2002), above; Sabel, Charles F. and Zeitlin, Jonathan (2008), ‘Learning from Difference: The New Architecture of Experimentalist Governance in the EU’, *European Law Journal*, Vol.14, No.3, 271-327.

² Gerstenberg and Sabel 2002, footnote 1.

³ Sabel and Zeitlin 2008, footnote 1. On the not entirely clear relation between DDP and experimentalist governance in the writing of these authors, see below.

The article is built up in four parts. In the first part, I will argue from an analytical perspective that current European governance practices can often be described as reflexive in nature, illustrating this with the examples of the EES and OH&S policy. In the second part, I will look whether DDP can be used as a normative framework for such reflexive governance. Yet, the examples of the EES and OH&S policy will show that the strong reliance of DDP on direct deliberativeness makes it an unrealistic model in relation to European governance.

Therefore, in the third part, I will analyse whether reflexivity has a normative dimension which can refocus the model of DDP in a way that it could provide a normative framework for European governance. I will proceed in two steps to reply to that question, first by distinguishing between the analytical and the normative dimension in reflexive law theory, and secondly, by clarifying how a focus on the normative dimension of reflexivity differs from the approach taken by DDP. The insights of reflexive law theory and the normative dimension of reflexivity will be used to propose the model of reflexive deliberative polyarchy (RDP). Finally, in the fourth part of the article I will look to what extent RDP could be a useful normative framework for European governance. Illustrating again with the examples of employment policy and occupational health and safety policy, I argue that RDP is a more ‘realistic’ normative guidance for European governance than DDP. In contrast to DDP that appears too far from reality, RDP allows to identify normative strengths in current European governance practices while providing normative pointers for improvement.

II. European governance as reflexive governance

In the most recent literature on (new modes of) European governance, the concept of ‘reflexivity’ appears with increasing frequency.⁴ According to the Oxford English Dictionary ‘reflexive’ means ‘that which turns back upon, or takes account of, itself or a person’s self, esp. methods that take into consideration the effect of the personality or presence of the researcher on the investigation.’ Applied to policy-making, the concept of reflexivity has above all been developed in legal theory. Gunther Teubner has proposed the concept of reflexive law to refer to a new evolutionary stage of law, in which law ‘realizes its systemic limits with respect to regulation of other social systems’⁵ and ‘becomes a system for the coordination of action within and between semi-autonomous social subsystems’.⁶ Reflexive law theory has built on the premise of systems theory, and of Luhmann’s theory of autopoiesis in particular,⁷ that

⁴ Sand, Inger-Johanne (1998), ‘Understanding the New Forms of Governance: Mutually Interdependent, Reflexive, Destabilised and Competing Institutions’, *European Law Journal*, Vol.4, No.3, p.271-293; Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?*, Bruylant: Brussels; Eriksen, E.O. (ed) (2005), *Making the European Polity. Reflexive Integration in the EU*, London: Routledge. Van der Meer, M., Visser, J., and Wilthagen, T. (2005), ‘Adaptive and Reflexive Governance: The Limits of Organized Decentralization’, *European Journal of Industrial Relations*, Vol. 11, No.3, p.347-365; Rogowski, R. (2007), ‘Flexicurity and Reflexive Coordination of European Social and Employment Policies’, in H. Jørgensen and P.K. Madsen (eds), *Flexicurity and Beyond*, Copenhagen: DJØF Publishing; Diamond Ashiagbor (2004), ‘Soft Harmonisation: The “Open Method of Coordination” in the European Employment Strategy’, *European Public Law*, Vol.10, No.2, 305-332.

⁵ R. Rogowski (2001), ‘The Concept of Reflexive Labour Law: Its Theoretical Background and Possible Applications’, in J. Příbáň and D. Nelken (eds), *Law’s New Boundaries. The consequences of legal Autopoiesis*, Aldershot: Ashgate, p. 181.

⁶ Teubner, G. (1983), ‘Substantive and Reflexive Elements in Modern Law’, *Law & Society Review*, Vol. 17, No.2, p. 242

⁷ Luhmann, Niklas (1982), *The Differentiation of Society* (translated by Stephen Holmes and Charles Larmore), New York: Columbia University Press; (1995), *Social Systems* (translated by John Bednaz Jr. with

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.⁸ As a consequence no one system can declare its world view 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 top-down substantial regulatory programmes, reflexive law would enable that the subsystems are self-regulatory without damaging the other subsystems. Law is reflexive in that it is aware of its own limits in defining substantive norms on a general basis. It is also reflexive in that it provides for procedural mechanisms that allow for the revision of norms in the light of new experience that results from its implementation.

There are many examples of European policy-making, in particular of new and soft modes of governance, that can be read in terms of reflexive governance. The Open Method of Coordination (OMC) comes immediately to mind as the most obvious example. The emergence, institutional features and functioning of the OMC in different policy fields, in the context of the wider Lisbon Strategy, has been studied extensively and this is not the place to resume that debate. I limit myself here to illustrating the reflexive nature of governance in the field of European employment policy, having as central tool the OMC, and part of the broader Lisbon Strategy. There are several aspects in the EES that allow us to identify it as reflexive governance. First and most obviously, the EES is based on a choice to refrain from command-control regulation at the European level. Instead of binding European regulation, the Employment Title of the EC Treaty (art. 125-130) provides for the adoption of non-binding Guidelines and Recommendations in the context of a guidance and reporting process based on European Council conclusions, Council and Commission and Member States reports.

Second, the OMC procedure in employment, as described in article 128 EC, is reflexive since it provides a cyclical process that ensures the revisability of norms based on experience with implementation. On the basis of the conclusions of the European Council, the Council adopts guidelines ‘which the Member States shall take into account in their employment policies’ (art 128). Member States have to draft a National Action Plan (NAP) setting out their initiatives and report annually to the Council and Commission on the implementation of the guidelines, on the basis of which these institutions will prepare an annual report to the European Council. The assessment by the Community institutions can imply the redrafting of the guidelines and the formulation of recommendations addressed to the Member States individually, which is then the starting point for a new annual cycle of implementation and assessment.

Third, the EES is not only reflexive in that it allows to revise annually the guidelines and recommendations in the light of decentralised experience, it is equally reflexive in that the procedure itself is open to permanent evaluation and can be revised when considered necessary in the light of efficiency or policy priorities. One can identify three phases in the changing na-

Dirk Baecker, from *Soziale Systeme* 1984), Stanford: Stanford University Press; (2004), *Law as a social system* (translated by Klaus A. Ziegert and edited by Fatima Kastner, from ‘Das Recht der Gesellschaft 1993), Oxford: Oxford University Press.

⁸ The catch-phrase in autopoietic theory states that subsystems are ‘operatively closed’ but ‘cognitively open’ (Teubner, G. (1993), ‘Law as an autopoietic system’, Oxford: Blackwell: 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).

ture of the EES⁹ since its inclusion in the EC Treaty¹⁰. The first phase (1997-2002) was characterised by the yearly reiteration of the employment guidelines organised around four policy priorities – employability, entrepreneurship, adaptability, and equal opportunities. The tendency was towards an increasing number of guidelines per year (up to 22), making the scope of the EES broader (including also 6 horizontal objectives), but equally more elaborated in detail and proliferating in the use of quantitative targets. The second phase (2003-2004) meant a turning point in that the experience learned that the process had become too complex.¹¹ National administrators and policy-actors complained that they needed each year to take into account a new or at least revised set of guidelines and recommendations on an increasing array of issues, which did not provide them with the time to adjust. What was needed was to focus on the implementation of the existing guidelines rather than spending time on redrafting them or inventing new ones each year. Therefore the decision was taken to keep the employment guidelines stable for the coming three years, while Member States were still required to report annually on the implementation. Moreover, the number of guidelines was reduced to ten, organised under three objectives. While the guidelines were yearly confirmed, a more intensive use was made of recommendations to individual Member States, ensuring thus more pressure for implementation. Experience with the functioning of the process had thus led to adjusting the procedure itself. The third stage and second reflexive turn of the institutional organisation of the EES occurred with the arrival of the new Barroso Commission and the mid-term review of the Lisbon Strategy in 2005. By that time, i.e. half-way the time span set out in 2000 to achieve by 2010 the objective that Europe would become the world's most competitive knowledge-based economy, it became clear that the Lisbon Strategy, and its central tool of the OMC (amongst others in the employment field) were not going to deliver the desired outcome. As Barroso's Lisbon re-launching communication stated 'progress has at best been mixed', and the Strategy's failure to deliver was said to result 'from a policy agenda which has become overloaded, failing co-ordination and sometimes conflicting priorities'.¹² The proposed solution was to streamline¹³ and simplify the Lisbon Strategy by the better coordination of policy sectors and OMCs within it, and by the reduction of multiple and dispersed detailed objectives, refocusing on the central objective of 'more growth and jobs'. This had several consequences for the institutional design of the EES. Above all, the EES disappears as a free-standing process. The Employment guidelines are now drafted and assessed in a common framework with the Broad Economic Policy Guidelines, forming together the Integrated Guidelines. The first Integrated Guidelines were adopted by the European Council in 2005 and were expected to remain 'in force' for three years. Member States do no longer adopt National Action Plans in the different policy areas, but have to adopt a triennial National Reform Programme explaining how to implement the Integrated Guidelines. They still have to report

⁹ I elaborate here on the description of the EES in three phases as provided by Kenneth Armstrong and Claire Kilpatrick (2007), 'Law, Governance, or New Governance? The Changing Open Method of Coordination', *Columbia Journal of European Law*, Vol.13, No.3, 649-678.

¹⁰ I exclude here from the analysis the pre-Treaty phase of the EES, which initiated with the Delors White Paper on Growth, Competitiveness and Employment (1993). This phase built up, through the Summits of Essen (1994) and Luxembourg (1997), towards the OMC procedure but it was only at the latter Summit and with the Amsterdam Treaty that the EES obtained its character of annual cyclical procedure of assessment and revision.

¹¹ In the Communication 'Taking stock of five years of the European Employment Strategy' (COM (2002) 416 final), the Commission reflects on five years experience with the EES and makes suggestions for its reform.

¹² Commission Communication to the Spring European Council, Working together for growth and jobs. A new start for the Lisbon Strategy, 02.02.2005, COM (2005) 24, p.4.

¹³ See below on streamlining and horizontal coordination within the EES and within the Lisbon Strategy.

annually on the implementation, but also in this case the reporting is on the combined BEPGs and employment guidelines, on which occasion individual Recommendations can be addressed to the Member States. ‘Simplification’ has also hit the EES by a further reduction of the number of guidelines, with the employment guidelines being eight out of 24 Integrated Guidelines. The end of the three year cycle of the first Integrated Guidelines in 2008 constituted a new occasion to revise substance and procedure of the Lisbon Strategy. Yet, the renewed Lisbon Strategy is said to be working relatively well (although with variations in the Member States),¹⁴ and the Community Institutions and the Member States have decided to leave the institutional infrastructure mainly untouched.¹⁵ Even regarding the substance, the Integrated Guidelines of 2005-2007 are reconfirmed for the period 2008-2010, although some new priorities (such as taking into account the EU’s external dimension in the Strategy) are mentioned in accompanying documents. One might argue that the current stability of the Guidelines undermines the initial idea of annual revision and would thus undermine the reflexive character of the process. Yet, the possibility for revision remains there, and precisely the learning curve of implementing the process has contributed to revise and redesign the procedure in a more effective way.

Reflexivity is not limited to the ‘soft modes’ sectors of European policy like the social areas in which the OMC has been deployed. Even a traditionally regulatory sector, such as occupational health and safety policy has important reflexive features. Traditionally European OH&S consisted in the adoption of European Directives. However, often these Directives have been framework directives leaving space for experimenting different solutions in their implementation. Moreover, Directives have also regularly used the technique of delegation to comitology procedures to allow for more regular adjustment of the Directive to technical change without having to revise the basic structure of the Directive or having to go through the entire legislative process. This fits well with the theory of reflexive law in which legislation will only set out general principles and leave more detailed provisions to delegated structures which can more easily adapt to context and change over time. Since the mid 1990s, European OH&S has also shifted to less binding regulatory intervention, placing the focus much more on attempts to improve implementation of the regulatory framework, in particular through agency networking. This more horizontal exchange of information and best practice again allows for reflexive adjustment to change. Actors involved in OH&S regulation can learn from each others’ experiences.

III. Reflexive governance and the normative perspective of DDP

If European governance can analytically be described as reflexive, what is the normative framework within which we can think of the legitimacy of such governance? Sabel and co-authors have repeatedly suggested that Directly-deliberative polyarchy (DDP) may be used as a normative ideal for European governance. It is argued that 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’ from the vantage point of the possibilities suggested by current governance structures, in this case those of the EU.¹⁶ DDP is a democratic ideal that is

¹⁴ The positive assessment is by the EU political leaders and Community institutions, such as expressed in the Communication from the Commission to the Spring European Council. Strategic report on the renewed Lisbon strategy for growth and jobs: launching the new cycle (2008-2010), Keeping up the pace of change. 11.12.2007, COM(2007)803 final.

¹⁵ See, though, below for some changes in relation to better streamlining.

¹⁶ Cohen and Sabel 1997, footnote1, 317.

based on the idea that ‘local-, or more exactly, 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...’.¹⁷ The system is ‘directly-deliberative’ since ‘citizens must examine their own choices in the light of the relevant deliberations and experiences of others’¹⁸ – in contrast to other discursive ideas of democracy of deliberation at a distance, by an administrative or political elite. The system is ‘polyarchic’ due to the permanent disequilibrium created by the grant of substantial powers of initiative to lower-level units.¹⁹

There is a strong fit between ‘reflexive governance’ as described above, and the normative model of DDP, in as far as both focus on norm-setting and policy-making not through detailed binding substantive provisions imposed top-down but on more flexible norm-definition enabled through a procedural framework in which decentralised experimenting and practice can regularly influence the redefinition of norms. Yet, DDP also argues that such governance is democratically desirable. 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.’²⁰ For Dahl democracy may be defined as rule by multiple minority oppositions, i.e. 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’.²¹ Yet, while explicitly building on Dahl’s concept of polyarchy, DDP has used the concept mainly to refer to the decentralised dispersion of power, remaining silent on how this ‘permanent disequilibrium of powers of lower-level units’ would relate to traditional representative institutions under Dahl’s interpretation of the concept.²² The democratic claims of DDP are, therefore, mainly akin to ideas of participatory democracy²³ and deliberative democracy, in its focus on direct participation and deliberation in terms of rational

¹⁷ Gerstenberg and Sabel 2002, footnote 1, 291

¹⁸ Cohen and Sabel 1997, footnote 1, 314.

¹⁹ Gerstenberg and Sabel 2002, footnote 1, 292.

²⁰ R. Dahl (1989), ‘Democracy and Its Critics’, Yale University Press, p. 221; quoted by Cohen and Sabel (1997, p. 318).

²¹ R. Dahl (1956), ‘A Preface to Democratic Theory’, Chicago: University of Chicago Press; D. Held (1987), ‘Models of Democracy’, Cambridge: Polity Press, p. 193.

²² Magnette, for instance, criticizes DDP for not having worked out the relation between direct deliberative forms of participation and representative forms of democracy, and in particular in not having acknowledged the potential of the latter in fostering civic equality and civic education. See Magnette, Paul (2006), ‘Democracy in the European Union: why and how to combine representation and participation?’, in Stijn Smismans (ed), *Civil Society and Legitimate European Governance*, Cheltenham: Edward Elgar, 23-41. In a comparable way, Rainer Schmalz-Bruns criticizes DDP for underestimating the normative force of the claim of a demos and the idea of an encompassing general public of citizens, and therefore unable to account for how the principles of democratic equality and solidarity would be realised. See Schmalz-Bruns, Rainer (2006), ‘On the political theory of the Euro-polity’, in Erik Oddvar Eriksen (ed), *Making the European Polity. Reflexive integration in the EU*, Routledge: London, 65 and 72).

²³ Pateman, Carole (1970), *Participation and Democratic Theory*, Cambridge: Cambridge University Press

argument.²⁴ DDP aims at decentralization ‘down to the level of whatever kind of neighbourhood the problem in question makes relevant’²⁵, and postulates as normative ideal ‘direct participation by and reason-giving between and among free and equal citizens’²⁶. In terms of participative membership, DDP takes as ‘the basic standard [...] that directly-deliberative arenas are to be open to providers and parties affected by the extent and manner of provision. (In the case of schools, for example, parents, teachers, and residents of community served by school)’²⁷. ‘There is a presumption in favour of equal membership for affected parties – open meetings, with equal rights to participate in discussion and decision-making for all affected parties’, although Cohen and Sabel add that ‘rights to participate might also be awarded to organizations with special knowledge that is essential to the problem area in question [...] or who are able to articulate a point of view in ways that foster deliberation among alternative solutions’.²⁸

Now, precisely on this crucial aspect of ‘direct deliberateness’ or the decentralised participatory dimension of DDP, European governance is miles away from the normative claims of DDP, to the extent that one can question whether this normative model can be used as framework for the EU. The claim of the authors of DDP that their normative framework is modelled from the vantage point of the possibilities suggested by current governance structures²⁹ appears far-fetched. I will illustrate this using again the examples of the EES and of occupational health and safety policy, two sectors I have studied in more detail elsewhere,³⁰ and which have been repeatedly proposed by the authors of DDP as illustrations of their model.

Much of the features of the EES, with the OMC as central policy tool, seem, at least in their design, to confirm with the ideal of DDP. Instead of centralised European binding regulation, the OMC leaves policy-making power at the decentralised level of the Member States, and within them encouraging further decentralised policy-making, within the framework of policy options suggested by European guidelines. The knowledge that results from different solutions experienced in the Member States is then pooled at the European level through the assessment of National Action Plans or annual reporting on the National Reform Programmes. The periodicity of that process allows for the exchange of best practice and the revision of benchmarks. So far so good in terms of DDP.

However, while the EES realises a level of decentralized learning combined with pooling of information and exchange of best practice at a higher level, it does not seem to come anywhere close to the ‘deliberate-directness’³¹ Cohen and Sabel plead for in the abstract formulation of their model. According to the Lisbon Summit the OMC procedure is characterized by ‘a fully decentralized approach [that] will be applied in line with the principle of subsidiarity

²⁴ Also Rainer Schmalz-Bruns (2006, footnote 23: 72) criticizes DDP for overtaxing the link that exists between a deliberative account of democracy and participatory politics, in that it appears to be built ‘on the presumption that a deliberative perspective should necessarily and unequivocally favour a single democratic form – that of participatory democracy’.

²⁵ Gerstenberg and Sabel 2002, footnote 1: 291

²⁶ Cohen and Sabel 1999, footnote 1: 1

²⁷ Ibid.: 15

²⁸ *ibid.*: 15.

²⁹ Cohen and Sabel 1997, footnote 1: 317

³⁰ Smismans, S. (2004) ‘EU Employment Policy: Decentralisation or Centralisation through the Open Method of Coordination?’, Working Paper European University Institute, LAW 2004/01, at <http://cadmus.iue.it/dspace/bitstream/1814/1881/1/law01-1.pdf>

³¹ Cohen, Joshua and Sabel, Charles (1999), *Directly-deliberative polyarchy*, at <http://www2.law.columbia.edu/sabel/papers/DDP.html> (accessed 11/08/2007): 6.

in which the Union, the Member States, the regional and local levels, as well as the social partners and civil society, will be actively involved, using variable forms of partnership'.³² However, the decentralized participation that would guarantee the EES to be bottom-up polyarchic and directly deliberative is scarce both in the way the EES has originally been conceived and been institutionalized, and in its actual working. The EES does not provide a (comprehensive) framework for an employment policy that would function bottom-up at the initiative of multiple local units (polyarchy) that ensure direct citizen deliberation. The Treaty provisions on the employment guidelines procedure read (mainly) as a coordination of national policies, providing no strong institutional requirements for decentralized involvement below the level of the national administrations.³³ The guidelines themselves have, with different intensity throughout the years, propagated a discourse on a fully decentralized approach in implementing employment policies. Through the annual reporting and assessment it became soon clear that realising decentralised involvement in the drafting and implementation of NAPs was one of the most problematic parts of the OMC procedure. By the end of the first phase of the EES (1997-2002), the Guidelines have tried to reply to this problem by including more explicit references to in particular the role of the social partners, providing since 2001 as a 'horizontal objective' of the EES the development of a comprehensive partnership with the social partners 'at all levels', and including references to their role in several specific guidelines. The 2002 Guidelines went most far in this, with 2 Guidelines giving exclusive responsibility to the social partners for their implementation and inviting the Member States to involve management and labour in the implementation of 5 other Guidelines.³⁴

However, with the 'simplification' of the EES in its second phase (2003-2004), also the explicit references to the social partners were reduced. While the 2003 guidelines included a final section on 'good governance and partnership',³⁵ only three guidelines still referred to the social partners. This tendency has been confirmed in the third phase of the EES, with the renewed Lisbon Strategy reducing further explicit references to the social partners. In the Integrated Guidelines (both 2005 and 2008), there is no longer a horizontal objective for social partners involvement or a detailed good governance and partnership provision. References to decentralised participation are limited to a general introductory statement suggesting that Member States 'should establish a broad partnership for change by fully involving parliamentary bodies and stakeholders, including those at regional and local levels and civil society organizations. European and national social partners should play a central role'. Only one Guideline includes a reference to the social partners, namely to their role in wage bargaining to ensure employment-friendly labour cost developments (Guideline 22).

Therefore, if we look at the Guidelines since 1997, decentralised involvement has mainly been limited to vaguely phrased statements that the 'relevant actors in the field of employment at national, regional and local level have important contributions to make'. Only with regard to the social partners – as opposed to other civil society organisations or regional and local authorities - some more detailed provisions had been included by the end of the first phase. The general references to 'partnership' have often also been combined with stressing 'respecting national traditions and practices'. While this can be positively read in terms of

³² Presidency Conclusions, Lisbon European Council, March 23-24, 2000. At <http://europa.eu.int/council/off/conclu/mar2000/index.htm>

³³ For more detail, see Smismans 2004, footnote 31..

³⁴ See Smismans 2004, footnote 31. for more detail.

³⁵ For comparison of the 2001 and 2002 'horizontal objective' of social partners involvement, with the 'good governance and partnership' provision of 2003, see Smismans 2004, footnote 31.

subsidiarity it has also the consequence that the EU can actually do very little in providing the framework for real bottom-up deliberative governance.

Looking at *de facto* participation in the EES, there is nothing that could support the argument that it is a process of deliberative governance starting bottom-up from the smallest local unit possible. While data about participation in the EES show a diverse picture according to the Member States (Homs et al. 2005), what we are dealing with in the best of cases, is a neo-corporatist style involvement of social partners rather than a bottom up learning process of direct deliberative participation of all those affected by it. The social partners are consulted (to diverse degrees according to the Member States) regarding the drafting of the NAPs or NRPs but only at the national level and without evidence of participatory processes below that level. Even in countries where tripartite structures have been set up for this purpose, the process does not seem to have generated new initiatives from the social partners or new national strategies towards unemployment.³⁶ Moreover, consultation takes mainly place at a technocratic level, which is in contrast with the experience in negotiating social pacts at national level, where top representatives of the union and employer's organizations are invariably the protagonists.³⁷ Even in those countries where the social partners expressed satisfaction with their participation in the drafting of NAPS, they describe the process as essentially governmental in nature.³⁸ Seen from the bottom up, civil society actors are not aware enough of the OMC process to mobilize on it, or they may feel that they are not gaining much from contributing to the NAPs which are seen more as a description of government policy than as an actual plan of future action.³⁹

In a study on new forms of governance in European industrial relations I co-authored recently for the European Foundation for Living and Working Conditions it resulted out of about 50 interviews with social partners and researchers in the field that the Lisbon strategy and the OMC have not been 'appropriated' by the social partners, except for the European-level elite dealing with these aspects.⁴⁰ In the same way, a survey organised by the European Trade Union Confederation amongst its member organisations on their involvement in the re-launched Lisbon Strategy in 2005 and 2006 concluded that there are no clear signs of improvement of the 'social partners' ownership' of the Lisbon Strategy.⁴¹ The picture of a process of administrative coordination involving a small circle of experts from the social partners, but not 'appropriated by the basis' stands far from the ideal of DDP based on direct deliberative participation in a locally decentralized context.

³⁶ J. Goetschy (2003), 'The European Employment Strategy, Multi-level Governance, and Policy Coordination: Past, Present and Future', in J. Zeitlin and D. M. Trubek (eds), 'Governing Work and Welfare in a New Economy. European and American Experiments', Oxford: Oxford University Press, p. 67.

³⁷ D. Foden, 'The Role of Social Partners in the European Employment Strategy', in *Transfer* Vol.5 (1999) No.4, p. 215.

³⁸ Léonard, E. (2001) 'Industrial Relations and the Regulation of Employment in Europe', in *European Journal of Industrial Relations* Vol.7 (2001), p32; Goetschy, J. (2001), 'The European employment strategy from Amsterdam to Stockholm: has it reached its cruising speed yet?', in *Industrial Relations Journal* Vol.32 p. 410.

³⁹ K. Jacobsson and A. Vifell, 'Integration by deliberation? Dynamics of Soft Regulation in the Case of EU Employment Policy', Paper presented at the ECPR Conference, 26-28 September 2002, Bordeaux, p. 23.

⁴⁰ Léonard, E., Erne, R., Marginson, P. and Smismans, S. (2007), New structures, forms and processes of governance in European Industrial Relations, European Foundation for Living and Working Conditions, p.70.

⁴¹ Homs, Oriol; Kruse, Wilfried; Lafoucrière, Céline and Tilly, Pierre (2007), European Employment Strategy and the Integrated Guidelines for Growth and Jobs, European Trade Union Confederation, p. 53.

Data regarding the involvement of regional and local actors point in the same direction.⁴² A consultation of regional and local actors, organized by the European Commission in 2001 revealed that the involvement of sub-national actors in the EES has been considered ‘largely insufficient’,⁴³ and that the EES and NAPs are not sufficiently well-known at regional and local levels.⁴⁴ A more recent survey in 2006, organised by the Committee of the Regions amongst 65 (representative) regional and local authorities, does not show improvement in the new Lisbon Strategy. The report concludes that ‘the Lisbon governance cycle is continuing to suffer from a lack of ownership, involvement and visibility at the local and regional level. NRP planning, implementation and monitoring has remained far from the ground with few formal processes having been set up by the Member States. Local and regional authorities still feel excluded from the mainstream planning and implementation cycle which is worrisome since they play a major role in delivering the Lisbon actions to people and enterprises.’⁴⁵ Illustrative of this lack of a bottom-up approach is the fact that ‘most local and regional authorities consider that few contributions to the integrated guidelines on their behalf were foreseen in the National Reform Programmes.’⁴⁶

The overall picture is thus one in which the EES may in broad terms encourage ‘decentralised’ participation but in which – with different success according to the administrative traditions in the Member States – a relatively small circle of experts is involved whereas the process is not ‘appropriated’ by the wide basis of actors concerned, and even less can be described as a bottom-up process starting from locally based deliberation.

An analogue conclusion can be drawn from the field of occupational health and safety policy (OH&S). European OH&S already attracted the attention of Gerstenberg and Sabel in 2002 (p.322) as a sector where a regulatory architecture that generates rules from the best practices of the relevant actors can explain the high safety standards, against the expectation that market-dominance would lead to a race to the bottom or at best to the lowest common denominator. In more recent work, Sabel and Zeitlin (2007) rely on my empirical research in the field of OH&S (Smismans 2004) to provide a more detailed description of this field as an example of ‘networked governance’. European OH&S policy can indeed be correctly described as ‘networked governance’ where pooling of experiences led first and until the beginning of the 1990’s to an extensive binding regulatory framework setting relatively high safety standards, and subsequently to an increased use of soft instruments in reply to bad implementation of the binding regulation. Since 1992, European OH&S policy has turned its focus from regulatory to persuasive governance. Instead of new binding legislation, networking through, amongst others, the Committee of Senior Labour Inspectors – bringing together experiences from national labour inspectorates – and the European Agency for Safety and Health Protection at Work – structured around national Focal Points with the aim to connect all actors with a stake in the field, would create exchanges of best practice leading to better policy implementation. However, I have also shown that, despite the discourse on the particularly participatory features of new modes of governance, such new modes in the field of OH&S rather focus on na-

⁴² D. Trubek and J. Mosher, ‘New Governance, EU Employment Policy, and the European Social Model’, in: J. Monnet Working Paper No.6/01, ‘Symposium: The Commission White Paper on Governance’, New York University School of Law, 2001, pp. 22-23.

⁴³ Commission Communication ‘Strengthening the local dimension of the European Employment Strategy’, COM (2001) 629 final, of 06/11/2001.

⁴⁴ Ibid, p. 9.

⁴⁵ Committee of the Regions, ‘Horizon 2010. Local and Regional Authorities for Growth and Jobs’., CoR Lisbon Monitoring Platform Analysis October 2006, CdR 365/2006 fin – Report EN/o, p.2.

⁴⁶ Ibid., p.14.

tional administrations and technical experts rather than involving successfully those with the locally based experience, namely employers and employees.⁴⁷ Even the social partners expressed more satisfaction with their involvement under the ‘old’ Community method to adopt Directives than under the new modes of governance.

As these two examples show, the reality of European governance stands far from the ideal of DDP. The EES and OH&S policy can be described as reflexive governance, or as a process of experience-driven revising of framework provisions as suggested by the authors of DDP (in particular Sabel and Zeitlin 2008), but there appears to be very little in these modes of governance that would bring it anywhere close to the direct participatory dimension the normative claims of DDP are focused on.

The misfit between reality and the normative ideal appears so strong that we can question whether the latter can ever provide real normative guidance for the former. Therefore, rather than building (nearly) exclusively on direct deliberateness as DDP tends to do, I will focus in the next section on the reflexive nature of European governance and its normative implications. Reflexive law theory, in fact, has not only dealt with reflexivity from an analytical perspective, but has also provided a more normative dimension to reflexivity. I will analyse whether this can be useful in reframing our normative perspective on European governance.

IV. From analytical to normative: from reflexive governance to RDP

So far I have used ‘reflexivity’ at an analytical level and shown how several aspects of European governance could be defined in these terms. Yet, this does not give to ‘reflexivity’ any normative democratic value. To give to ‘reflexivity’ any normative value as part of the model of RDP, we need to take a step back and see how reflexive law theory has both given an analytical and a normative dimension to reflexivity. We will then analyse how it can ‘enrich’ DDP and provide a more apt normative model for European governance.

IV.1 The analytical and normative dimension in reflexive law theory

Reflexive law theory is not a democratic theory but a theory about the nature of law and its place in society. The starting point is an analytical one, identifying in the self-referentiality of sub-systems the problems of law in regulating other sub-systems; and 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, the step from reflexive law theory as an analytical description of the nature and evolution of law in society, to suggesting on 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.⁴⁸ Obviously, the normative concern on 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,⁴⁹

⁴⁷ Smismans (2006) ‘New Modes of Governance and the Participatory Myth’, European Governance Papers (EUROGOV), No.06-01, <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-06-01.pdf>.

⁴⁸ G. Teubner (1993), ‘Law as an autopoietic system’, Oxford: Blackwell: 69.

⁴⁹ The theory of autopoiesis as presented by Luhmann has never claimed providing any way to ‘a better society’. See M. King (2001), ‘The Construction and Demolition of the Luhmann Heresy’, in J. Přibáň and D. Nelken (eds), *Law’s New Boundaries. The consequences of legal Autopoiesis*, Aldershot: Ashgate, p. 126. 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

the focus has been on the operational closer 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 (by overcoming the limits of command-control regulation) and not as a search for more democratic, participatory, legitimate governance.⁵⁰ 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 democratization create discursive structures within these subsystems'.⁵¹ It is the role of reflexive law to 'act at the subsystem-specific level to install, correct, and redefine democratic self-regulatory mechanisms'.⁵² However, the normative implications and the democratising potential of reflexive law has never been developed comprehensively.⁵³

If freed from a too rigid interpretation of autopoiesis, reflexive law theory can provide three normative insights for democratic theory. First, at a minimum level reflexivity means the acknowledgment by the (legal) subsystem of its self-referential character. From here follows that reflexivity also implies the acknowledgement by the legal system of its limits in regulating other subsystems and therefore favours more decentralised systems of norm-definition. Freed from the strait jacket of autopoiesis, reflexivity can have the broader meaning of taking into account contextuality. Reflexive law abstains from uniform substantive interventions but encourages governance mechanisms that allow to **take into account contextuality and decentralised experience** and knowledge. This normative dimension of reflexivity strikes a chord with the democratic claims based on subsidiarity and participatory politics as suggested by DDP. Several EU law scholars have pointed to this normative dimension of reflexivity in EU law making processes. Deakin, for instance, uses the concept of 'reflexive harmonisation', to describe EU regulation by way of Directives that preserve space for autonomous governance at lower levels of government.⁵⁴

Second, reflexivity can have an additional normative dimension if one takes as a starting point and focus the insight of limited intersystem communication but stepping back from a too rigid

other social systems' to the autopoietic theorists like Luhmann and Teubner who are 'less sanguine about the possibilities of modern democratic politics'. E. W. Orts, 'Autopoiesis and the Natural Environment', in J. Přibáň and D. Nelken (eds), *Law's New Boundaries. The consequences of legal Autopoiesis*, Aldershot: Ashgate, p. 173.

⁵⁰ In the sideline Teubner mentions that 'one could couple the granting of privileges to associations with the regulation of their internal order; for instance, one could introduce limited liability, but only in cases where particular social forms and structures are accepted'. G. Teubner (1993), footnote 47, p 95.

⁵¹ Gunther Teubner (1983), footnote 6, p. 273.

⁵² Ibid, p. 275.

⁵³ For a comparable criticism on reflexive law theory, see Julia Black, who argues that democratising social sub-systems has been the stated underlying aim of reflexive law which, however, has not been developed. See, J. Black (1996), 'Constitutionalizing Self-Regulation', *Modern Law Review*, Vol.59, p. 49.

⁵⁴ S. Deakin (1999), 'Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonisation. A Law and Economics Perspective on Centros', *The Cambridge Yearbook of European Legal Studies*, Vol.2, p.231. Other examples are; Barnard, Catherine; Deakin, Simon, and Hobbs, Richard (2005), 'Reflexive law, corporate social responsibility and the evolution of labour standards: the case of working time', in Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?*, Bruylant: Brussels, 205-244; De Schutter, Olivier (2005), 'The implementation of fundamental rights through the open method of coordination', in Olivier De Schutter and Simon Deakin (eds), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?*, Bruylant: Brussels, 279-343.

interpretation of autopoiesis. The awareness of the tendency of subsystems to cognitive closure can be taken as a starting point to conceive the role of law as creating intersystem communication which cannot be taken to be a natural process. Reflexive law encourages that subsystems take into account their effects on other subsystems, i.e. despite of (a certain level of) self-referentiality of subsystems, interconnections between them can be encouraged through law.⁵⁵ 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.’⁵⁶ Such intersystem communication is desirable from a normative democratic perspective since it requires policy actors to be ‘other regarding’ and makes decision-making in the defence of particular interests more difficult. As we will see below, this system-focused awareness of reflexivity can provide additional normative guidance to the model of DDP. It implies the normative encouraging of horizontal communication among systems in addition to DDP’s focus on vertically decentralised actor-centred deliberation. I will further refer to this normative encouraging of intersystem communication with the concept of **horizontal reflexivity**.

Third, reflexive law theory increases awareness of the system-features of law. Too often this has been interpreted to reduce reflexive law to pure proceduralism. Yet, even in its autopoietic interpretation, reflexive law is not emptied of all debate on substantial norms, as it necessitates at least democratic norms in guiding procedural organisation. In a broader interpretation, reflexive law encourages **reflexivity on the particular nature of law as translating societal norms** into legal ones. Based on system theory, reflexive law acknowledges the particular nature of law as a subsystem with its own rationality and communicative structure. While the legal subsystem may be operatively closed it is cognitively open. Whatever may be the way in which ethical or social values or political maxims are translated into the legal system (and into legal constructs), the legal system would not have reason of existence if entirely cognitively closed. On the other hand, it is acknowledged that when there is too much cognitive openness this may place at risk the survival of the legal subsystem as ‘colonized’ by another one.⁵⁷ One should thus find a balance between on the one hand avoiding a colonization of the legal rationality by other value systems (and, therefore, plead for a certain restraint on trying to regulate by law in detail all aspects of contemporary differentiated society), and on the other hand avoiding the total cognitive closure of the legal system by emptying it entirely of substantive values, in which case, law would become entirely procedural and self-referentially closed, and, therefore, bypassed by other subsystems such as the economic or statistics in setting objectives and substantive values in society and politics.⁵⁸ Reflexive law thus awakens

⁵⁵ 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 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 reflexivity and reflexive law in encouraging interrelations between subsystems. See, for instance, Orts on environmental contracts; Eric W. Orts, ‘Autopoiesis and the Natural Environment’, in Jiří Příbáň and David Nelken (eds), *Law’s New Boundaries. The consequences of legal Autopoiesis*, Aldershot: Ashgate, p. 175.

⁵⁶ G. Teubner (1983), footnote 6, p. 257.

⁵⁷ The risk of endangering the formal rationality of law through the infusion into law of other value systems had already been identified by Max Weber, and is a key topic of legal theory. See Gunther Teubner (1983), footnote 6, p. 243.

⁵⁸ Even Teubner in his autopoietic period states that ‘substantive legal norms remain indispensable. It is only that the process of their production and justification has to give way to a “socially adequate” proceduralization.’ Gunther Teubner (1993), footnote 6, p. 67.

our attention for the normative role of law, which, despite its increasing focus on revisability of norms, and procedural mechanisms to allow this, it is also a communicative structure which can engage with substantive norms in a way other subsystems, like for instance the economic one, can not. Proceduralism has to be linked to a debate on substantive norms, and law more than other communicative systems can provide this interaction.

IV.2 Reflexive deliberative polyarchy

As shown above, there is common ground in the analysis of European governance in terms of reflexive law and in terms of DDP. In fact, the concept of reflexivity has occasionally been used by the authors of DDP. However, its focus has been on deliberation. This is more than an accidental different use of concepts for what would be a common reality. In what follows I will first identify the relation between reflexivity and deliberation, and will then develop how the concept of reflexivity can refocus the normative model of DDP in a way to provide a normative framework for European governance that would not stand as far from reality as DDP.

IV.2.1 Reflexivity and deliberation

It is not the place here to repeat the intensive debate on deliberative democracy that has dominated democratic theory since the 1990s.⁵⁹ I content myself with the definition given by Elster who defines deliberative democracy as ‘collective decision making with the participation of all who will be affected by the decision or their representatives’, and which is based on ‘arguments offered *by* and *to* participants who are committed to the values of rationality and impartiality’.⁶⁰ The concept of deliberation is actor-centred as it refers to the interaction between individuals. Yet, deliberative politics also presume elements of reflexivity. It presumes reflexivity on behalf of the individual who revises its own position in deliberative interaction with others. As Erik Eriksen puts it: ‘deliberative politics is seen as a *reflexively organized learning process* – as a problem-solving procedure that brings in knowledge and relevant normative perspectives and qualifies (or validates) them in order to establish mutual understanding and agreement.’⁶¹ The ‘organized’ character of this learning process implies a second dimension of reflexivity, namely in the sense of the revisability of norms as the outcome of permanent processes of deliberation, in particular in relation to the revisability of the constitutional norms of the game under the banner of ‘reflexive constitutionalism’.⁶²

⁵⁹ M. Saward (ed) (2000), *Democratic Innovation. Deliberation, Representation and Association*, London: Routledge: 5.

⁶⁰ Elster, Jon (1998), ‘Introduction’, in Jon Elster (ed), *Deliberative Democracy*, Cambridge: Cambridge University Press: 8.

⁶¹ Erik Oddvar Eriksen (2005), ‘Reflexive integration in Europe’, in Erik Oddvar Eriksen (ed), *Making the European Polity. Reflexive integration in the EU*, Routledge: London: 17.

⁶² As Tully (2002: 218) argues, ‘the orientation of practical philosophy should not be to reaching final agreements on universal principles or procedures, but to ensuring that constitutional democracies are always open to the democratic freedom of calling into question and presenting reasons for the renegotiation of the prevailing rules of law, principles of justice and practices of deliberation’, and hence ‘the contestable character of constitutional democracy should not be seen as a flaw that has to be overcome’. See Tully, James (2002), ‘The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy’, *The Modern Law Review*, 65 (2), 204-228. In relation to the EU, see James Bohman (2005), ‘Reflexive constitution-making and transnational governance’, in Erik Oddvar Eriksen (ed), *Making the European Polity. Reflexive integration in the EU*, Routledge: London, 32-58. In a comparable way and in relation to the EU, Lord and Magnette identify indirect, parliamentary, technocratic and procedural legitimacy as different vectors of EU legitimacy which provide a perpetual conflict that softens any tendency towards constitutional determinism

However, the literature on reflexive constitutionalism often limits itself to stating the general principle of the desirability of the revisability of constitutional norms through permanent processes of deliberation. When stated in such general terms, the risk is then to conflate ‘deliberative politics’ with ‘reflexive politics’.

However, as Tully (2002: 219) rightly argues (although himself writing in abstract terms) ‘the study of practices of democratic deliberation could not be restricted to constitutional essentials and constitutional referenda or to the genres of adversarial reasoning in the traditional legal and political institutions. To test the constitutional and democratic legitimacy of dispersed, overlapping and multi-layered regimes or constitutional democracy it is necessary to study the practices of democratic freedom – the modes of dispute conciliation – in any practice of governance in which those subject to, or affected by it, seek to reignite the embers of public autonomy and have an effective say over how their conduct is governed.’ The advantage of DDP is that it does do the effort to look at the empirics of decentralised dispersed governance mechanisms. However,

DDP tends to glorify the ‘spontaneous’ bottom-up processes of experimentation providing not much guidance on how these processes would be structured by an overarching (revisable) constitutional design or constitutional principles, and in this way still tends to conflate ‘deliberative politics’ with ‘reflexive politics’, i.e. the reflexive system seems more the outcome of a spontaneous nearly anarchic bottom-up process of deliberation, rather than the other way around in which, taking into account the problems of intersystem communication, the institutional design would encourage such communication and deliberation. DDP does not start from a systems theory that considers interaction among systems as particularly difficult. Contrasting DDP to systems theory, Gerstenberg and Sabel 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.’⁶³ However, the evidence of governance practices, in particular in the context of the EU, shows that the heterogeneity of participants⁶⁴ within local units is far 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 level centres to be created within rather than across subsystems. As the examples of the OMC and OH&S show, European governance tends to occur through auto-referential deliberation between functional actors structured by the language of each subsystem, rather than as a bottom-up process based on citizen participation and a rather spontaneous process of cross-system communication.

Therefore, taking the system-theoretic interpretation of reflexivity seriously, reflexivity can provide an additional normative guide. Reflexivity is not simply the multiplication of deliberative processes. While deliberation encourages rational argumentation by those concerned, reflexivity creates the awareness that deliberation tends naturally to evolve among functional actors within subsystems and that therefore procedural mechanisms are needed to provide in-

and can be considered a virtue insofar as it feeds a continuous process of constitutional deliberation. See Lord, C and Magnette, P. (2004), ‘E Pluribus Unum? Creative Disagreement about Legitimacy in the EU’, *Journal of Common Market Studies*, 42 (1): 188.

⁶³ O. Gerstenberg and C. Sabel (2002), footnote *, p. 340.

⁶⁴ J. Cohen and C. Sabel (1997), footnote 1, p. 333.

tersystem communication. RDP therefore aims to act as a normative guide to pay particular attention to the problem of horizontal interconnections, i.e. it requires horizontal reflexivity in addition to deliberation.

IV.2.2 From DDP to RDP

To resume; one can seriously question whether DDP can provide a normative framework for European governance since its normative claim is ultimately based on decentralized deliberation that goes until direct citizen participation, and it underestimates the difficulties of inter-system communication assuming too easily that deliberative processes would spontaneously include encompassing arguments and not be hindered by the different languages of subsystems.

In fact Sabel and co-authors have been rather ambiguous as to what extent they believe DDP fits as a normative framework for European governance. In 2002, Sabel and Gerstenberg used wisely and cautiously a question mark when suggesting that the OMC could function as a governance mechanism corresponding with the ideal of DDP. A year later, Sabel and Cohen explicitly acknowledged that it remains an open question to what extent the OMC ensures deliberation beyond the technical elite into civil society. They even no longer placed OMC within a framework of '*directly* deliberative polyarchy' but of 'deliberative polyarchy', adding that 'the democratization of deliberative polyarchy remains a project, whose precise institutional commitments have not yet been fixed.'⁶⁵ In the most recent article by Sabel and Zeitlin (2008) 'experimentalism' is the key word, and the reality described is indeed mainly one of reflexive decentralised experiencing with pooling of information at a higher level, without though much evidence of direct citizen deliberation. However, the authors remain ambiguous on their normative claims since at the start of their article they argue that DDP and experimentalism will be used interchangeable,⁶⁶ thus evoking all the normative expectations the concept of DDP had been identified with in earlier work. Yet, as far as they develop arguments on democratic accountability in the most recent article it is not about direct citizen participation, but their focus is on peer review. Now, it is in the nature of peer review that the peers speak the same language and act within the same cognitive framework. How can this be sufficient in terms of democratic accountability? How does the deliberation of these functional actors relate to other actors and the general interest?

It is here that reflexivity may provide normative guidance to redefine the ideal of DDP to RDP: Reflexivity starts from the tendency for self-referentiality of subsystems. Hence the difficulty to realise direct citizen deliberation, and hence the problem of peer review as not taking into account contextuality and other discourses. Therefore, RDP starts from the awareness of the difficulties to realise direct citizen deliberation and the tendency of cognitive closure of subsystems of functional actors, and aims at providing procedures that encourage communication among subsystems and taking into account of contextuality. RDP retains the normative desirability of decentralised deliberation by all those concerned, but as far as direct citizen deliberation can not be realised, reflexivity in terms of horizontal system communication can help to avoid that policy actors act in favour of single interests.

RDP also takes up the third normative dimension of reflexivity as identified above, namely reflexivity on the nature of law as ensuring debate on substantive norms and translating them

⁶⁵ J. Cohen and C. Sabel (2003), 'Sovereignty and Solidarity: EU and US', in J. Zeitlin and D. M. Trubek (eds), 'Governing Work and Welfare in a New Economy. European and American Experiments', Oxford: Oxford University Press, p. 369.

⁶⁶ Sabel and Zeitlin 2008, footnote 1, p. 277.

into legal norms. The role of law is not limited to providing the procedural infrastructure that ensures deliberation and reflexivity as intersystem communication. Law also provides substantive norms debated through democratic procedure and having an element of stability allowing respect of the rule of law. This brings back into a play the traditional understanding of polyarchy in Dahl's sense of representative democracy. RDP encourages the decentralised participatory features of polyarchy in Sabel's sense, and favours intersystem reflexivity in such a polyarchic setting, but it equally stresses the need for the traditional role of law in defining a fundamental set of substantive norms.

If law does not provide any substantive norms but is reduced to proceduralism, other subsystems as the economic or scientific ones will dominate public decision-making. These subsystems have never and will never be based on democratic procedure. Law, while having its own internal logic, is an unique subsystem in its relation with democratic procedure. Therefore, its role cannot be reduced to providing procedures in which the economic and scientific reasoning dictate substantive norms, but it will also have to translate societal norms into substantive legal ones.

In the next section I will look at how RDP can be used as a normative framework for European governance, paying attention to the three normative aspects of reflexivity, namely reflexivity as encouraging revisability of norms based on decentralised knowledge (much akin to DDP); reflexivity as encouraging intersystem-communication to overcome the difficulties to realise citizen deliberation and the tendency of system closure by functional actors; and reflexivity as encouraging reflection on the role of law in not only providing procedural mechanisms encouraging deliberation and reflexivity but equally translating societal debate into substantive norms.

V. RDP as normative guide for European governance?

Can RDP be used as a normative framework for European governance? I will use the examples of the EES and OH&S to show on the one hand that there is sufficient 'fit' between reality and the normative model to make the latter a useful framework, and on the other hand that it can be used to provide normative suggestions for further improvement.

V.1 The EES

The analysis above has illustrated that the EES can be analytically described in terms of reflexive governance in as far as it implies a choice to refrain from command-control regulation at the European level and a reflexive self-restraint in providing above all a procedural framework that encourages exchanges of decentralised practices. Yet, the analysis made also clear that the EES and the Lisbon Strategy do not provide the decentralised direct deliberation that DDP aims at, and there is nothing that suggests that this would be the case in any foreseeable future.⁶⁷ What emerges is a polyarchic system of policy-making involving different sets of functional actors, rather than a bottom-up process of direct deliberation ensuring participation of all those concerned.

⁶⁷ In fact, the reduction of specific guiding references to the involvement of decentralised actors in the relaunched Lisbon Strategy, as described above, may well point in the opposite direction. The new Strategy's slogan of 'partnership for growth and jobs' is mainly understood as a clarification of the partnership between the EU level and the Member States, setting out more clearly the role of the former in a Community Lisbon Programme, and a streamlined role of the latter through the Integrated Guidelines procedure, rather than a strategy to ensure 'partnership' of all those concerned at all levels.

However, RDP also allows us to identify another feature of the EES, namely its awareness of the fact that employment policy is based on several subsystems between which communication is not spontaneous but should be encouraged. The EES encourages at several levels ‘reflexivity’ understood as the horizontal taking into account of other subsystems. Such encouragement of subsystem communication should improve policy efficiency but equally ensures that decision-making cannot be based on the single narrative of one subsystem. This is obviously as such no guarantee for democratic decision-making (see below). Nevertheless, as the amount of citizens that can be involved in direct deliberation over policy-making will always be limited, and the ideal of DDP appears unrealistically far from current governance practice, the encouraging of reflexive interaction between different intermediaries and functional actors who normally would tend to closure within the proper language and network of specialisation may be a useful device to avoid governance in the defence of singular interests.

With subsystems I refer to social systems characterized by a high level of communicative and organizational self-referentiality, without necessarily to imply a rigid autopoietic interpretation of the concept.⁶⁸ The EES has increasingly encouraged reflexivity in the sense of horizontal subsystem communication at several levels.

Several examples of such reflexivity can be identified, such as the coordination of different OMC procedures within the Lisbon Strategy, and in particular the Employment OMC and the Broad Economic Policy Guidelines; the encouraging of interaction between the Employment OMC and European social policy; or between the Employment OMC and territorial politics. I will focus here on the two first examples.

Yet, while the examples show the strengths of the EES in terms of RDP as promoting inter-system communication, we can also identify particular weaknesses and risks taking into account reflexivity as acknowledging the role of law in providing both procedural mechanisms and translating substantive norms. In fact, looking at the language of the OMC guidelines and the suggestions it makes to the Member States, one finds a policy discourse focusing on policy objectives related to a variety of different policy instruments but in which the language of rights, and the definition of substantive norms by (command-control) regulation is nearly entirely absent. The OMC does provide neither a sufficiently clear procedural framework for self-regulatory processes ensuring democratic accountability nor indications on the legal instruments that could be used.

V.1.1 The Employment OMC and BEPG subsystems, towards the Integrated Guidelines

Different OMC procedures have been set up over the last years; each with its own policy cycle, proper actors, proper language and normative framework. This self-referentiality relates to the procedural features of the OMC, but relates more broadly also to the self-referentiality

⁶⁸ Which systems could be identified as autopoietic systems according to autopoietic theory has been a debated and criticized issue. Most often the legal, the economic and the political system are given as examples of self-referential, operationally closed systems. Autopoietic theory gives a less straightforward answer on whether other subsystems within or even across the legal, economic, or political systems could be autopoietic subsystems, such as formal organizations, or particular policy-field sectors. Not sticking to a strong autopoietic reading, I believe that formal organizations or policy sectors can constitute subsystems with a considerable level of communicative and organizational self-referentiality. On the difficulties to define ‘systems’ within autopoietic and reflexive law theory, see W. J. Witteveen (1992), ‘Schrijft de wet zichzelf?’, in N.J.H. Huls and H.D. Stout (eds), ‘Reflecties op reflexief recht’, Zwolle: W.E.J. Tjeenk Willink, p. 59; I. C. van der Vlies (1992), ‘Autopoiese en sociale vernieuwing: een contradictio in terminis?’, in N.J.H. Huls and H.D. Stout (eds), ‘Reflecties op reflexief recht’, Zwolle: W.E.J. Tjeenk Willink, p. 177; and T. Wilthagen (1994), ‘Reflexive Rationality in the Regulation of Occupational Safety and Health’, in R. Rogowski and T. Wilthagen (eds), *Reflexive Labour Law*, Deventer: Kluwer Law, p. 348.

of different policy sectors. Such features of self-referentiality are also present in the EES, but one can notice an increasing encouragement of ‘reflexivity’ in terms of taking into account what normally would fall out of the self-referential frame.

The Employment Title of the Amsterdam Treaty is built on the awareness that unemployment needs to be tackled by a combination of different policies, and, thus states in Article 127,2 that ‘the objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities.’ It further requires that the employment guidelines ‘be consistent with’ the broad economic policy guidelines (BEPG) (Article 128,3).

While the first years of the employment guidelines were needed to build up experience regarding this OMC procedure as such, the Lisbon European Council (March 2000) has aimed at a better articulation between employment and other policy fields, including macroeconomics, structural economic reforms, social protection, education and training, and implementation of new technologies. Yet, while providing a longer term and broader policy perspective, Lisbon has not been particularly effective in organizing reflection in operational terms – creating even additional OMC procedures without clear coordination among them. The Barcelona Council (March 2002) therefore urged for a streamlining of the various policy coordination processes at EU level. As a result, the policy coordination processes, and in particular the employment OMC and the BEPG, have been streamlined following a Communication of the European Commission,⁶⁹ and focusing around the annual Spring European Council. The Spring European Council (in March) is the defining moment in the annual policy coordination cycle. It reviews implementation and, on that basis, gives general political orientations on the main policy priorities. In preparation of the Spring Council the Commission presents the ‘Implementation Package’, including the Implementation Report of the BEPGs, the draft Joint Employment Report and the implementation report of the Internal Market Strategy. In addition the Commission presents a ‘Spring Report’ highlighting the key policy orientations on which general guidance is required from the Spring European Council. Once the Spring European Council has provided these orientations – having had the opportunity to take into account the position of the social partners formulated at the Tripartite Social Summit preceding it – the Commission will go at work to deliver the ‘Guidelines Package’, including the Commission drafts for general and country-specific policy recommendations as contained in the BEPGs, the Employment Guidelines, and the Employment Recommendations to Member States. After consultation of the EP on the Employment guidelines, and after considerations by the relevant Council formations, the Guidelines Package will be presented at the June European Council and following the latter’s considerations the relevant Council formations will adopt the BEPGs, the EGs and the Employment Recommendations, and/or endorse actions plans in their competence areas, such as the Internal Market Strategy. In Autumn the Member States should report via the NAPs on implementation and on envisaged policy action, leaving the Commission the opportunity in November-December to review implementation on basis of the information received.

The synchronization of the start of the BEPG and EG processes by the simultaneous presentation by the Commission of its input for both instruments and their subsequent discussion in relevant bodies is aimed to increase coherence. In addition, whilst maintaining annual proposals for BEPGs and EGs, substantial review of them will, in principle, only take place once every 3 years, thus creating a medium term perspective. The Commission has also proposed to

⁶⁹ Communication from the Commission on Streamlining the Annual Economic and Employment Policy Coordination Cycles, 3/9/2002, COM (2002) 487 final.

streamline the OMC in the social protection field on the same model – providing a common frame for social inclusion, pensions and health care - and to be synchronized with the (yearly and three-yearly) streamlined approach of macro-economic and employment policy.⁷⁰

The synchronization of policy cycles of different OMCs constitutes a procedural encouragement for reflection as these different policy instruments are now discussed (partially) by the same institutions at the same moment. This co-ordination of different policy sectors and subsystems (i.e. self-referential communicative social spheres) can be welcomed, in particular in relation to tackling the complex problem of unemployment. Yet, such co-ordination also entails risks, namely it may create the subordination of some policy sectors to others or the colonization of certain subsystems by others. Thus it has been argued that the OMC, as a strategy for reincarnation of the European welfare State, is subservient to the ideologies, path-dependencies and structures of Economic and Monetary Union, as institutionalized in the BEPGs.⁷¹ The Lisbon process, centred around a discourse of economic growth and competitiveness rather than around social citizenship, and the encouraging of co-ordination of social and economic policies has resulted not so much in economic policy being sensitive to social concerns, but to a colonization of the Welfare State by the economic policy-making process.⁷²

This subordination of the EES (and social OMCs) to the BEPGs is inherent in the EC Treaty. Whereas Article 128,3 requires the employment guidelines to ‘be consistent with’ the BEPGs, there is no such reciprocal requirement that the BEPGs should be consistent with the EGs. Also the Commission’s initiative to streamline the BEPGs and the EGs builds on the idea that ‘the coherence of the guidelines package [BEPGs and EGs] can be improved by specifying more clearly the contents to be covered by the respective instruments, *while maintaining the central role of the BEPGs* (my emphasis).’⁷³

The relation between different OMCs is thus a very complex one. On the one hand, the existence of subsystems of communicative processes, actors and institutions related respectively to the BEPGs and to the EES reduces the efficiency of employment policy, and, therefore, necessitates the encouragement of reflexive processes. On the other hand, co-ordination of OMC procedures entails the risk of subordinating the EES to the BEPGs. Therefore, RDP will require reflection to be encouraged in both directions.

V.1.2 The employment and the social policy subsystems

The Employment Title, with its OMC procedure, has been conceived of in large independence from the Social Policy Title of the Treaty. It does not provide any reference to the social policy provisions of Articles 136-145 EC, as if the co-ordination of national employment policies via the OMC would stand in entire independence of the policy instruments the EC disposes of under the Social Policy Title. Vice versa Article 136 mentions the promotion of employment as one of the objectives of the social policy provisions but without making a direct link to the Employment Title.

⁷⁰ Commission Communication on Strengthening the Social Dimension of the Lisbon Strategy: Streamlining Open Coordination in the Field of Social Protection, COM (2003) 261. Most of this streamlining will only start in 2006, and is partially also dependent on whether the IGC makes advances regarding the policy sector of health care.

⁷¹ D. Chalmers and M. Lodge (2003), ‘The Open Method of Coordination and the European Welfare State’, Discussion Paper ESRC Centre for Analysis of Risk and Regulation, No.11, June 2003, p. 2.

⁷² Ibid, p. 10.

⁷³ Communication from the Commission on Streamlining the Annual Economic and Employment Policy Coordination Cycles, 3/9/2002, COM (2002) 487 final, indent 13.

However, it is self-evident that European legislation, and European collective agreements, aiming at regulating the employment relation and based on the social policy provisions may influence the availability of job opportunities on the labour markets, even if not directly aiming at tackling unemployment; such as the regulation of working time and part-time work by the Directives 91/383/EEC and 97/81/EC, the latter resulting from a collective agreement based on the social dialogue provisions of Articles 138-139 EC. Put differently, while the Employment Title conceptualizes the EES as a ‘mere’ coordination of national employment policies, stressing that ‘the competencies of the Member States shall be respected’, it is clear that the policy instruments for social policy available at the European level, such as the adoption of Directives or the social dialogue, may influence employment policy. Therefore, one has seen over the last years a gradual approaching of these two ‘different worlds’. So, as mentioned above, the European social partners have been asked since 2001 to define their own contribution to the EES, taking into account (also) the options available via the social dialogue procedure. Much more broadly, though, European social policy on basis of the social policy provisions has increasingly been framed in the light of the EES, to the extent that one has even talked about a shift from social policy to employment policy: EC labour law is increasingly thought as a tool for European Employment policy, and one can see ‘a re-orientation from an approach to labour market regulation which had as its core a strong concept of employment protection and high labour standards, to an approach which prioritizes employment creation, and minimizes the role of social policy, since social policy is seen as potentially increasing the regulatory burden.’⁷⁴

Like there is a risk that the co-ordination of the BEPGS and the EGs procedures leads to a subordination of the latter to the former, the interlinking of employment and social policy tends to subordinate social policy objectives and instruments to the objectives of employment policy, which in its term is dominantly framed in the language of growth and competitiveness. To avoid such subordination, and to encourage reflection between employment and social policy in a reciprocal way, European social policy should build its own referential frame around social citizenship, rights and quality of jobs.

V.2 OH&S

The definition of regulatory norms in the field of OH&S policy at the European level can be described in terms of interaction between different types of functional actors. The legislative procedure, as well as procedure for delegated legislation via comitology ensure the interaction of different subgroups who otherwise may not be communicating. Thus the legislative process requires the interaction between political representatives and administrators, but also the representation of civil society groups, for instance via the European Economic and Social Committee. In comitology procedures, deliberation between national administrators in a comitology committee stands in procedural interaction with ‘interest based’ deliberation in the Advisory Committee on Safety and Health at Work that brings together also representatives from employers’ and trade union organisations, whereas for certain areas of technical regulation the procedure provides for the additional consultation of a Scientific Committee composed of

⁷⁴ D. Ashiagbor (2001), ‘EMU and the Shift in the European Labour Law Agenda: From “Social Policy” to “Employment Policy”’, *European Law Journal*, Vol.7, No.3, p. 311; and N. Bruun (2001), ‘The European Employment Strategy and the “Acquis Communautaire” of Labour Law’, *The International Journal of Comparative Labour Law and Industrial Relations*, Vol.17, No.3, p. 309. A good example of this evolution can be found in the changed character of Community occupational health and safety policy, for long the core of European social policy; see S. Smismans (2003), ‘Towards a new Community strategy on health and safety at work? Caught in the institutional web of soft procedures’, *The International Journal of Comparative Labour Law and Industrial Relations*, Vol.19/1, pp. 55-84.

technical experts. Three different sub-communities are thus interconnected. This obviously does not bring in directly the citizen, but it avoids that decision-making is based on the language and interests of one particular subgroup.

VI. Conclusion

In today's complex processes of multi-level governance it is difficult to think about the legitimacy of the European polity simply in terms of a delegated mandate from voter to political representation and then from the latter to a neutral administration for implementation. Modern governance is far more complex and polyarchic than this normative ideal would suggest. DDP has therefore pled for a polyarchic system in which decision-making is bottom-up through experiencing of different solutions at the lowest level and pooling of information and exchange at a higher level. The assumption is that at the lowest level one would involve citizens directly or at least all those concerned. Practice, though, shows modern governance involves functional actors rather than citizens. While the involvement of citizens directly remains normatively desirable there are serious limits in realising this. Therefore, as far as direct deliberation between citizens cannot be realised, the horizontal interaction between functional groups contributes to avoiding that decision-making is taking simply in the interest of one of them. RDP encourages such horizontal interaction between sub groups that otherwise would not communicate due to their different language.