

Developing a European public sphere

The experimentalist approach assessed

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1. Developing a European public sphere

Democracy in the European Union (EU) was placed on the agenda in the wake of the Maastricht Treaty. Prior to this, the EU had rested on a permissive consensus, where democracy might have been an issue of concern but not of much debate. The public protests following the 1992 Treaty brought this era to an end, and in the years to follow, EU democracy has become a favourite object of both political discussion and academic analysis. Not everyone agrees that the EU suffers from a “democratic deficit” as some regard the Union as an intergovernmental organization or regulatory regime, where the member states’ governments represent their respective citizenries (cf. Moravcsik 1998; Majone 1996). Democratic expectations differ according to theories on what the Union is, can be and should be. As a result, some claim that a democratic EU might be attractive but unattainable (cf. Scharpf 1999), while others again attempt to construct a democratic model that is attuned to the unique character of the Union (cf. Eriksen and Fossum 2000). At the same time, the EU itself proclaims to have democratic aspirations (cf. Laeken Declaration, European Council 2001). Against the backdrop of the EU’s own ambitions, this thesis sets out to explore the development of a European public sphere, taking on the argument that without some form of a common public sphere, it will be difficult for Europeans to develop the collective opinion necessary to build a democracy (Kantner 2002).

The public sphere is an essential prerequisite for a working democracy because in large scale and complex democratic societies where citizens rely on elected representatives to administer their preferences the public sphere is the only place where everyone can meet (Eriksen 2004). Created through communicative encounters, the public sphere is a fluid structure that is constituted by private citizens mobilising around issues of general interest (Habermas 1996a). It provides an arena where citizens can gather information, supply information and exchange opinions. However, the historical exceptionality of the *political* public sphere is a result of its connection with the political decision-making complex, because it gives citizens the opportunity to scrutinise their leaders and test the quality of their positions and

decisions. As a rational, secular, state-free room, the public sphere became a “counterweight to the state” that altered the basis of legitimacy of the power holders (Eriksen and Weigård 2003). On the other hand, the public sphere is also protected by the state. In short, the public sphere is not influential solely by constituting a public space; its democratic impact is also derived from its institutional embeddedness. This refers to basic rights that entitle participation, institutions that translate public opinion into actual policy, and bodies that execute these policies and oversee the process (Schlesinger and Fossum 2007). However, the public sphere and its institutional reinforcements emerged within the context of the nation state, but in the case of the European Union it is a matter of continuous debate whether the EU will be able to develop a similar set of institutions with a similar set of functions (ibid.). Thus, my overarching research question is: *How do aspects of EU’s institutional conditions contribute to the development of a European public sphere?*

1.1 Exploring institutional conditions

The debate about the European public sphere has so far been dominated by on the one hand a normative discussion about whether or not the European citizenry has enough in common to create a European public sphere. For instance, some point to the lack of a common language, history, values and identity as arguments against a potential development of a European public sphere (Risse 2002). On the other hand, more empirically oriented studies of the European public sphere are trying to answer whether or not a European public sphere actually exists, and here are two basic approaches. One looks at the role of the media (Peters et al. 2005), and is often concerned with coverage of big happenings or crises¹. The other concentrates on civic participation, and this approach has mainly been conducting case studies of the implementation of particular programmes and the inclusion of particular groups (cf. Marks and McAdam 1999; Eising and Kohler-Koch 1999). By contrast, what I will

¹ A recent example is the debate about the ratification of the Constitutional Treaty (cf. Trenz, Conrad and Rosén 2006). Another example is the media coverage of the Haider-affair (cf. van de Steeg 2006).

try to do is to analyse the institutional prerequisites for the development of a public sphere, given the move from the national to the European level.

Thus, a second reason why it is interesting to investigate the institutional conditions of a European public sphere is that the Union may introduce new dynamics that call for changes in the traditional understandings of the public sphere. As I mentioned above, the concept of the public sphere is closely tied to the context of the nation state. Although I do not expect the features of a European public sphere to be entirely opposite to those of the nation state, in numerous aspects, the European Union is different from a nation state. Therefore, it is not necessarily fruitful to employ national criteria when trying to understand the European public sphere (van de Steeg 2002). For instance, it is questionable whether the EU has a government equivalent to the nation state. By contrast, the assumption that the EU is a system characterised by “governance without government” has fostered its own research agenda with a wide variety of contributions (Pollack 2005: 380). Governance approaches range from multi-level governance theories that are concerned with the distribution of authority between the regional, national and supranational levels, to those that emphasise the uncoupling of governance processes from authority or government (ibid.). More recently, it is the study of new modes of governance that have preoccupied a lot of scholars (Kohler-Koch and Rittberger 2006). These methods are characterised by voluntarism, subsidiarity, and inclusion of both public and private actors. Moreover, they are primarily used to ensure coordination in areas where EU legislation is difficult or unwanted (Héritier 2003a), and are claimed to be more efficient because they do not impose uniform measures on a diverse reality (cf. Scharpf 2001; Búrca and Zeitlin 2003). Although such methods may be regarded as counterproductive to the constitution of a public sphere due to their consequentialist origin, they have also been awarded democratic potential, and this provides a third reason for my choice of research question.

Advocates of ‘democratic experimentalism’ purport a form of democracy where citizens are directly involved in actual, autonomous decision-making within a

multitude of organisationally dispersed publics (Cohen and Sabel 1997; Dorf and Sabel 1998). Moreover, democratic experimentalists argue that their model to a large extent is descriptive of the European Union, and that it offers an alternative direction for EU-democracy (cf. Gerstenberg and Sabel 2002; Cohen and Sabel 2003; Eberlein and Kerwer 2004; Zeitlin 2005). Their conception of the public sphere is both decentralised and decoupled from instructions of central institutions, and as a result experimentalism stands in sharp contrast with more traditional models that emphasise the Rechtsstaat or the rule of law. Thus, the reasons why democratic experimentalism is interesting from a public sphere perspective is because it challenges the traditional understanding of the public sphere, and brings in the European context that challenges national standards. Therefore, I have chosen to use democratic experimentalism to explore my research question. Below, I will explain how I approach the question of institutional conditions from three different angles, first by assessing the democratic attributes of the experimentalist view, secondly by investigating its appliance to the EU, and thirdly by going deeper into the institutional design it proposes for the public sphere.

1.2 Understanding the public sphere in a European context

An exploration of the institutional conditions of a European public sphere may contribute to at least two things. First of all, it may help to clarify the prospects for the development of a European public sphere, secondly, by doing so it may also indicate how it should be conceptualised. Of course, my analysis is restricted by the fact that I will only be able to explore a small part of the conditions for a European public sphere, and I do it from a particular theoretical perspective. Nonetheless, my thesis will be able to shed some light on how aspects of the Union's institutional arrangements may provide for the development of a public sphere.

One important point has to be made before I explain the three angles of my approach. The particular outlook on the role and importance of the public sphere that serves as a point of departure in this thesis has deliberative democratic underpinnings, broadly defined as decision-making “issu[ing] from the public deliberation of citizens”

(Bohman and Rehg 1997: ix). This is primarily due to the fact that democratic experimentalism represents one version of deliberative democracy. What it will mean in practice is that I take for granted the democratic importance of the public sphere. More specifically, it means that I start out with a democratic idea based on the logic of arguing (Risse 2000), which assumes that this form of democracy could be able to resolve one of the flaws of aggregative arrangements by at least attempting to prevent privacy and individualism from undermining the collective (Elster 1983: 16-17). What is more, deliberative democracy may present a strong case in the study of the EU because it “claims that it is possible to reach understandings across different cultures even in situations where deep diversity threatens to destroy any hope of future co-operation” (Blichner 2000: 161)². However, this presupposes a link between society and the political system (ibid.), and one such link is the public sphere. In the words of two prominent campaigners of democratic experimentalism:

“Any plausible conception of democracy requires an interpretation of the idea of the public, as the arena in which free and equal citizens reflect on and seek to advance common aims” (Cohen and Sabel 1997: 337).

As I mentioned above, the public sphere is always embedded in an institutional framework, but there are potentially great differences between the institutional designs suggested to safeguard or promote the public sphere. Habermas provides one example of theorists who define the public sphere in opposition to the governmental realm, where government-by-law is the basis for democracy. Conversely, democratic experimentalists propose a model that eliminates this strict divide between state and society. I will go into more detail in the following chapter, but in short, experimentalists contend that economic and political institutions fail to solve contemporary problems because the debate about possible problem solving strategies is constrained by the triangular framework of state, market and civil society (Cohen

² This does not mean that my aim is to build support for the idea of European “integration through deliberation” (cf. Eriksen and Fossum 2000). Although I consider deliberative democracy to be an appealing normative ideal, I also think that in practice there are many questions that need to be elaborated. This refers e.g. to issues of manipulation (cf. Dryzek and List 2003), rhetorical action (cf. Schimmelfennig 2003). At the same time, deliberative democracy can take and has taken many directions, and this is reflected in the diversity of the debate it has generated, see for instance, Bohman and Rehg (1997), Elster (1998), Fishkin and Laslett (2003).

and Sabel 1997). Instead, they claim that a decentralised system that exploits local, relevant knowledge will be both more efficient and democratic. Local decision-makers are given autonomy to decide on both goals and means without hampering instructions from above, but are still obliged to interact with the larger society. Central institutions are not disposed of; they have new roles, primarily to provide for and supervise the processes of the local units, as well as to organize the interaction between these localities (ibid.). The crux of the difference between Habermas' version of the government-by-law model and democratic experimentalism is that the former subscribes to a hierarchical institutional design while the latter advocates horizontality.

In short, democratic experimentalism can be described as a model of democratic governance resting on autonomous, policy-making “self-organizing, interorganizational networks” that include both private and public actors (Rhodes 1996: 660). Furthermore, it is a democratic model that claims to be superior to other models of democracy, e.g. based on representation (Cohen and Sabel 1997). However, the idea that governance processes can also be democratic is controversial³, and therefore, the first question that this thesis will address is whether democratic experimentalism recognises principles of a *democratic* public sphere. In the following chapter, I will develop a baseline for a democratic public sphere that permits such an assessment. The hypothesis is that democratic experimentalism does incorporate a conception of the public sphere that is democratic. Furthermore, democratic experimentalists have recently used the new governance processes in the European Union to describe how the theory works in practice (Gerstenberg and Sabel 2002; Cohen and Sabel 2003; Zeitlin 2005). Considering that these new modes of governance are characterised by voluntarism, subsidiarity and inclusion, it is not difficult to see why they have attracted the attention of democratic experimentalists. Thus, the second question that will be addressed in this thesis is how the public

³ By contrast, others depict governance as a problem solving method that may increase efficiency and even raise the potential for legitimate output, but that cannot generate democratic legitimacy because it does not incorporate institutionalised democratic decision-making procedures (cf. Scharpf 1999).

sphere perspective of democratic experimentalism corresponds to the empirical reality of the EU. ‘New modes of governance’ refers to a variety of processes and procedures, but the one that seems to be of main interest to democratic experimentalism is the Open Method of Coordination (OMC)⁴. In short, the OMC can be described as a policy-making process that relies on broad guidelines, flexibility in national implementation, voluntary cooperation and learning (Borràs and Jacobsson 2004). The hypothesis is that the OMC is an example of a governance process that contributes to the development of a European public sphere.

Additionally, as a case of new governance, the OMC is often presented as the clearest alternative to the traditional Community method⁵ (Scott and Trubek 2002). While the former promotes subsidiarity and voluntarism, the latter is a hierarchical legislative process administering a variety of sanction mechanisms. Therefore, the choice of the OMC as a case serves two purposes. It allows an investigation of how democratic experimentalism plays out in practice, but it can also serve as an illustration of the experimentalist institutional design. After having analysed the OMC according to a set of indicators derived from democratic experimentalism, I will move on to explore the institutional conditions for a public sphere that can be deduced from the experimentalist perspective. By comparing democratic experimentalism to the government-by-law model represented by Habermas, I will continue the analysis of the democratic quality of the experimentalist public sphere. The hypothesis is that the experimentalist institutional design is a reasonable alternative to the government-by-law model. The reason for choosing Habermas’ government by law model as a comparative template is first of all that proponents of democratic experimentalists have singled out Habermas to explain why and how their theory is more democratic (cf. Cohen and Sabel 1997; Cohen 1999). Secondly, Habermas’ model is one example of hierarchical models that represents a clear contrast to democratic

⁴ Other new modes of governance include e.g. administrative partnership and new corporate governance regimes, see for instance www.eu-newgov.org.

⁵ According to the Commission’s White Paper on Governance, the Community Method is signified by the Commission in instigating and executing policies and legislation, the Council and Parliament adopting acts, and the Court guaranteeing the respect for the rule of law (2001: 8).

experimentalism, which emphasis decentralisation and local autonomy as well as radical reform of central institutions. However, since the current design does not entail a scrutiny of the government by law model, similar to that of democratic experimentalism, I will not be able to say which model contributes the most to the development of a European public sphere. Therefore, it is important to underline that the above comparison will be entirely normative.

At the same time, it is also important to point out that my intention is not to demonstrate which of the two models that is normatively superior. The aim is rather to assess what experimentalism has to offer in terms of constructing an alternative conceptualisation of the public sphere. Furthermore, the exploration of the Open Method of Coordination will indicate if and how experimentalism can aid the understanding of how a European public sphere may develop. This means that my analysis of democratic experimentalism entails assessments of both its analytical and normative value. I will try to show that although democratic experimentalism faces many challenges as a normative model, it calls attention to aspects of the EU's institutional design that may provide for a different type of public sphere. That means a public sphere that is different from a national public sphere, or at least one that requires us to consider the importance of a different set of institutional structures.

1.3 Structure of the thesis

The following chapter elaborates the analytical framework of the thesis. Chapter three will assess democratic experimentalism against a set of criteria for the public sphere. Chapter four analyses the Open Method of Coordination using a set of indicators derived from democratic experimentalism. Chapter five assesses the experimentalist institutional design of the public sphere by comparing it to Habermas' government by law model. Finally, in chapter six, I consider the conclusions of the three hypotheses taken together and look at what can be inferred with regard to the understanding of a European public sphere.

2. Analytical framework

The purpose of this thesis is to explore how aspects of the EU's institutional design contribute to the development of a European public sphere. Because democratic experimentalism offers both an alternative understanding of the public sphere and of the EU, I use this model as a point of departure, and attempt to assess what it has to offer both analytically and normatively. My approach is three-fold and corresponds to the hypotheses that were delineated above. First, the public sphere perspective of democratic experimentalism is assessed against a baseline definition of a democratic public sphere. Secondly, I investigate how the experimental institutional design performs in practice by examining a collection of secondary literature about the Open Method of Coordination (OMC). In other words, I analyse how the OMC contribute to the development of a European public sphere by examining it according to a set of experimentalist indicators. Thirdly, I assess the experimentalist institutional design for the public sphere by comparing it Habermas' version of the traditional government by law model. Taken as a whole, this approach will also allow me to explore the tension between the conceptualisation of the public sphere at the European and national level.

2.1 The public sphere

Reasons for regarding the public sphere as an important democratic arena range from views of the public sphere as an arena for citizens to debate the common good, to the conception that the public sphere is a manifestation of society's least common denominator (Benhabib 1992). Somewhat between these two understandings, Habermas has defined the public sphere as "the social space generated in communicative action" (1996a: 360). In other words, more than a background culture but without an "ethical constriction of political discourse" (1996b: 23). Furthermore, every communicative interaction that includes a speaker, an addressee, and an audience, can be considered a public. There is no predetermined agenda and no boundaries to what may be posed as a theme for discussion; that is the public's

decision at any given time, rendering the public sphere an anarchic and fluid structure (Eriksen and Weigård 2003).

2.1.1 Identifying the public sphere

Despite the fluidity and anarchic features of the public sphere, there are some components that allow the identification of a distinctly *public* sphere. Most importantly, this refers to the triangular structure described above. To attain a public character, communicative interactions, despite their different forms must always include a listener(s) because “[t]here can be no public sphere without the public” (Habermas 1996a: 364). In order to count as members of an audience, citizens must have access to information about political processes. Thus openness is reasonably a prerequisite for the formation of public opinion because people cannot be expected to form informed opinions without relevant information, and it can also be regarded as a prerequisite for the exercise of participatory rights. People will need to know about on-going processes that they might want to have an opinion about. Therefore, public decisions cannot be made in secret.

However, publicity can be burdensome, and there is good reason to suspect that if decision-makers and other administrative agencies were not inhibited by laws of publicity they would withdraw to their chambers where decisions could be made without public justifications and with greater ease. It is also reasonable to argue that the public sphere cannot endure only dependent on the state’s goodwill. Its existence must be assured in that the public sphere must be available to everyone, without censure of certain subjects or participants. This does not mean the public sphere loses its fluid and anarchic structure, nor does it mean that democracy rests exclusively on one, all-encompassing public sphere. The public sphere consists of a multitude of publics at all levels of society and is differentiated according to substance and “density of communication, organisational complexity, and range” (Habermas 1996a: 374). But at the same time, these partial publics must be open not only to an outside audience, but also to the opinions of outsiders:

“[B]oundaries inside the universal public sphere as defined by its reference to the political system remain permeable in principle” (ibid.).

Permeability means that everyone must have the opportunity to participate; however, in order for a public sphere to be democratic, public opinion must also have an influence on political processes. For instance, parliamentary representatives must bring public opinion into consideration, and provided that decision-makers will face some kind of consequences if they omit the public from the process, this also constitutes a system of accountability.

2.1.2 Core elements

Below, I sum up the elements of the above outline and assemble them in a baseline of basic features that all democratic public spheres must have. Thus, in this thesis the public sphere is recognised as constituted by the following elements:

i) Triangular structure: Without the existence of an audience, one cannot speak of a public sphere because the component that makes a debate *public* would be absent. Thus, a public sphere requires a speaker, an addressee and an audience.

ii) Openness: This also means that public processes must be open, which also requires notification about ongoing processes.

iii) Inclusiveness: Everyone that is affected by a decision must have the possibility to voice his or her opinion on the matter. This requires that the public sphere must be characterised by non-discriminatory access. It also requires that although public spheres may be multifarious, they must be permeable in principle. Thus, there must be a *potential* for participation.

iv) Influence: Finally, public opinion must be connected to decision-making, as a society is hardly democratic if issues supported by public opinion never reach the political agenda. If an issue does not acquire political salience, politicians will have to explain why in a way that is acceptable to their opponents. In other words, decisions must be made accountable.

Although these four criteria represent a baseline for a democratic public sphere, their salience may differ depending on the democratic theory implementing them. In other words, all of these elements require institutions to have a real world value.

Consequently, whether democratic experimentalism abides by these principles are assessed in chapter three, while I look at their salience in chapter five in analysing the experimentalist institutional design of the public sphere.

At the same time, the above baseline leaves open a lot of important questions. First of all, to the degree that this is at all possible, I have attempted to build a set of criteria that are disentangled from one particular democratic theory. Therefore, the core elements are too abstract to say something definite about what will guarantee the existence of the public sphere or how public opinion is connected to decision-making. Secondly, it does not say anything about other conditions for the development of a public sphere. One such condition is held to be the a priori existence of a collective identity. In the EU-context this issue forms a demarcating line between those who denounce the possibility of democracy at the European level, and those who defend the opposite. This is also relevant for my focus on institutional prerequisites because it raises the question whether institutional settings must be based on pre-existing identities to work properly. Some critics claim that it is inconceivable for the EU to develop a democratic public sphere because it lacks the proper foundation, notably a common identity (e.g. Grimm 1995, Offe 1998). They assert that the EU cannot rely on a collective identity, constituted by a common history, culture and language, and that without a collective identity, what do European citizens have in common that they can gather around? Conversely, others argue that it is possible for the EU to develop a public sphere despite hurdles of language and culture. One perspective argues that the existence of a legally integrated space that allows citizens to interact, and that these citizens recognize each other as members of the same political community, can be considered as sufficient common ground (Kantner 2004: 12). This overlaps with Habermas' conception of 'constitutional patriotism', where allegiance is a matter of political rights and principles, and not primarily of culture and history (Habermas 2004). Theories of deliberative democracy based on the merits of communication imply moreover that communicative interaction has the ability to construct identities through reflexive processes that mirrors society and its members (Eriksen and Weigård 2003).

Therefore, a development of a European public sphere needs not presuppose a collective identity; rather they may be coevolving⁶.

In this section, I have tried to spell out a baseline of the public sphere that is relatively independent of one particular democratic theory, as well as open enough to include dynamics that may be particular to the European Union. In what follows, I will explicate the experimentalist perspective of the public sphere, which will serve as a basis for three subsequent examinations of the hypotheses I outlined in chapter one. The first one assesses the democratic quality of the experimentalist public sphere, the second looks at how the theory applies to the empirical reality it purports to describe and explain. Finally, the alternative institutional design that the experimentalist public sphere perspective gives rise to, is compared to the government-by-law model.

2.2 Democratic experimentalism

Democratic experimentalism is depicted as the answer to two primary challenges in modern society, diversity and volatility. The main claim is that while decision-making under these circumstances disqualifies uniform solutions developed in a centralised hierarchy, effective government equals local government (Dorf and Sabel 1998). The logic behind the experimentalist model is inspired by Japanese business strategy and concentrated on three principles, benchmarking, simultaneous engineering, and error detection. Decision-making is decentralised in local units close to the problems that need to be solved, and hence more knowledgeable about appropriate solutions. Moreover, citizens participate directly in the problem solving process both by formulating strategy and determining why some efforts fail or break down, i.e. simultaneous engineering and error detection (ibid.).

The process of decision-making proceeds at different levels, through various “governance councils” consisting of public officials, goals set by government are administered and local units (service providers) are chosen to perform the consequent

⁶ As a result, an exploration of the institutional conditions for a European public sphere might also contribute to the study of its identitarian conditions. In this thesis however, I do not have the space to consider this particular aspect.

tasks (ibid: 316). These lower level actors⁷ link citizens to officials. The former are given autonomy to directly, and through deliberation, make decisions suit to their situation. In return, they deliver information to central units “regarding their goals as well as the progress they are making towards achieving them” (Gerstenberg and Sabel 2002: 291). This information is then pooled, benchmarked and reviewed according to performance, and subsequently distributed by the governance councils to encourage mutual learning throughout the network of actors in a process called “learning by monitoring”. In this way, service providers are held accountable to the citizens and the governance councils, while the latter are held accountable according to procedures and performances by the elected officials, who in turn must answer to the voters during elections (Dorf and Sabel 1998). Thus, democratic experimentalism envisions a network of local units, or in effect public spheres (geographical or sectoral), horizontally connected in a system constituted (and re-constituted) around common problems. This constructs an entirely new institutional framework where traditional central institutions are assigned new roles. Their main task is to provide structures and arenas for deliberation and problem solving as well as to make sure that “decision-making proceeds in a directly-deliberative way” (Cohen and Sabel 1997: 335). Practical public spheres where local actors deliberate about both apposite goals and the means to reach them constitute the core of the democratic practice. The integration of these two undertakings allegedly creates a particularly favourable basis for the construction of new solidarities, and this does not only hold for each decentralised public, because “even as they gain freedom of initiative, locales (...) remain accountable to a public informed by the doings of their peers” (Gerstenberg and Sabel 2002: 341).

Furthermore, experimentalist democracy requires that decision-making processes be exposed to the “full blast” of diverse opinions and interests in society. More particularly, the full blast implies that basic rights have to be protected, processes

⁷ “[N]ation-states or national peak organizations of various kinds within the EU; 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.” (Cohen and Sabel 2003: 291).

must be transparent to invite and inform participation, attention must be given to reasons across and within units in order for debates to have the “right content and focus”, decisions must be connected to the broader public through mechanisms of accountability, and finally individuals must have a right to contest decisions to ensure that “such accountability respects the equality of those subject to the decisions” (Cohen and Sabel 2003: 367-8).

As mentioned earlier, the experimentalist model has recently been used to analyse the Open Method of Coordination (OMC). Below, I sum up the above outline in a set of indicators that will be used to explore the OMC’s contribution to the development of a European public sphere. Indicators are:

- a deliberative policy process based on the principles of benchmarking, simultaneous engineering and error detection. The reiteration of this process ensures learning through monitoring, and a (re-)constitution of public spheres following the emergence of new problems.
- citizens directly involved in the decision-making and a process that is organised on several governance levels connected through a flow of information. Central institutions provide arenas that enable deliberation and make sure that the processes are conducted according to the principles of DDP.
- local, autonomous units that deliberate about both goals and means, only constrained by the explicit consideration of different types of reasons within and across units.
- a “full-blast” exposure to diverse opinions and interests enabled by rules of transparency, the protection of basic rights and the right to contest decisions.
- a process of coordination that constructs new solidarities.

When applying their model to the OMC, experimentalists are quick to point out that it, as of yet, does not satisfy their normative criteria (Gerstenberg and Sabel 2002; Cohen and Sabel 2003). Nevertheless, they do not forego its democratic potential. However, democratic experimentalism must also face theoretical criticism, for instance represented by defenders of more traditional political institutions. Their main argument is that democratic governance does not and cannot ensure citizens' equal opportunity to influence policy-making (Eriksen and Fossum 2005). An additional

safeguard is required that institutionalises a continuous comparison between rights of equality and contemporary political initiatives. By contrast, Habermas (1996a) underlines the need for a strict separation of the spheres of decision-making and informal opinion formation because he claims that rights can only be promoted and protected through a legislative process and legal control. What is required to preserve a democratic public sphere is a set of constitutional and institutional prerequisites as well as a political centre.

It may seem as though democratic experimentalism could be regarded as a complement rather than an alternative to the government-by-law model. However, democratic experimentalism presents a comprehensive theory for the development and preservation of political systems. For instance, traditional institutions are allocated new roles, and radical reforms of the system of rights, the separation of powers (Dorf and Sabel 1998), and the democratic system, is suggested (Cohen and Sabel 1997). The implications of these changes would be that the government-by-law model purported by theorists such as Habermas would be replaced by institutions that abide by the experimentalist rule of pragmatism, i.e. to adjust purposes to means and vice versa whether with regard to constitutional law or the distribution of powers. In sum, it is reasonable to argue that democratic experimentalism and government-by-law constitute two ideal models at a similar level of abstraction and comprehensiveness, which justifies a normative comparison between them.

In this section, I have given an account of the experimentalist public sphere and delineated a set of empirical implications. In order to illuminate the radical changes suggested by democratic experimentalism, I will spell out Habermas' government-by-law model below. I also explicate the normative dimensions along which to compare the two models.

2.3 Government by law

According to Habermas (1962/ 1989), the public sphere originated in opposition to the state apparatus and should *remain* a sphere distinct from the state. In this way, public communication will continue to be free and is less likely to turn into a game of

power (Habermas 1996a). What is more, decentralised publics cannot be expected to function as arenas for matters of general or broad normative concerns, such as constitutional issues. A centralised treatment of these matters is essential to assess the larger set of different justifications, as well as measuring the viability of solutions against available resources (*ibid.*). In other words, the public sphere must remain an arena for opinion formation for both normative and pragmatic reasons, while political institutions make decisions. However, the process of opinion formation, although it is not directed at a certain goal, it is not wholly random. The public sphere emerged against the state apparatus as a result of the possession of individual property and the rise of the bourgeoisie. To protect their private autonomy within areas such as trade and labour, the new middle class demanded that the state justified its actions that affected these “basically privatised but publicly relevant” fields of interest (Habermas 1962/ 1989: 27); and the arena that was constituted by these collectivised demands, was the public sphere.

In this way, while the public sphere does not act by making decisions, it represents the component in the decision-making process where ordinary citizens can influence policy outcome. One way of conceiving of the connection between opinion and will formation is to think of the public sphere as composed by two interconnected arenas. First, the public sphere consists of a “context of discovery” where public opinion is created and decision-makers are made aware of new political issues that require consideration. Secondly, it incorporates a “context of justification” where decision-makers must explain and defend their decisions in a broader context of needs and available resources (Habermas 1996a: 307). Although the public sphere has no formal instruments of power in a democracy, opinions formed in the public sphere are transmitted into the political institutional complex through intermediating channels of influence, generating power and inflicting will.

The emergence of the public sphere did not come about fortuitously or because a group of people suddenly realised that they had an interest in public affairs. Rather it was sustained through the institution of legal rights, in particular the rights of

expression and association (Schlesinger and Fossum 2007). In other words, the democratic muscle of the public sphere is inherent in the collection of citizens' rights and the fact that they were positivised through the justice system (Eriksen and Weigård 2003). Rights change a government's basis of authority and obligate lawmakers and administrators to explain and justify the reasons behind their positions and decisions in order to achieve legitimacy. In addition to rights, a specific set of institutions is needed to realise the democratic function of the public sphere.

Habermas depicts the political process as an interaction between core and periphery. Institutions with decision-making power, also labelled strong public spheres, make up the core. On the other hand, the periphery is weak in the sense that its activity is limited to opinion formation. Channels of political influence transmit the public opinion into the political institutional complex and connect the core with the periphery surrounding it. This process can also be described by tracing how the political process transforms public influence into political power (ibid: 191-2). At the first stage, opinions are scrutinised through public debate. Secondly, the resulting public opinion is transformed into communicative power when it is picked up by a political party or an equivalent intermediating unit. Thirdly, in being brought into the decision-making institutions, public opinion is tried against a range of other considerations, such as available resources, rights and prerogatives. In the words of Habermas (1996a: 371):

“[P]ublic influence is transformed into communicative power only after it passes through the filters of the institutional *procedures* of democratic opinion- and will-formation and enters through parliamentary debates into legitimate lawmaking”.

This last quote can also be used to describe the contrast between the public sphere perspectives of democratic experimentalism and government by law. For instance, experimentalists claim that Habermas and his followers are “defensive, self-consciously chastened”, and that Habermas in particular has “surrendered too much”. Instead of trying to transform democracy, he has limited the role of the public sphere to a “reminder” of how a democratic process should proceed. By not trusting citizens to make effective decisions without losing their ability to make just decisions, their capacity to control the administrative powers becomes miniscule (Cohen and Sabel

1997: 338). By contrast, democratic experimentalism advocates that separation of powers, division of competences and the content of rights must be worked out during the actual political processes (Dorf and Sabel 1998; Cohen and Sabel 2003).

Experimentalists suggest a radically different institutional design for the public sphere compared to government by law. Another way of seeing this is that they suggest an alternative way of institutionalising the core criteria of the public sphere that were defined above. In chapter five, I will demonstrate this by comparing the two models along two dimensions that represent institutional aspects central to implementation of the four criteria. This refers first of all to the issue of rights, and secondly to the principle of separation of powers and competences. In short, while experimentalists promote flexibility on both dimensions, government by law proscribe constitutional safeguards.

In this chapter, I have outlined the analytical framework of the thesis and described how I intend to approach the study of how aspects of the EU's institutional design contribute to the development of a European public sphere, using democratic experimentalism as a point of departure. First, I constructed a baseline against which to assess the experimentalist public sphere. This will allow me to explore the hypothesis that experimentalism incorporates a conception of the public sphere that is democratic. Secondly, I explicated the experimentalist model of the public sphere and deduced a set of indicators to explore how the theory translates to practice. Thus, I can assess the hypothesis that the Open Method of Coordination contributes to the development of a European public sphere. Finally, I depicted Habermas' government by law model that will serve as a traditional comparative template to examine the hypothesis that the experimentalist institutional design constitutes a reasonable alternative to it. Each hypothesis will be explored successively in the following three chapters, and finally, in the concluding chapter I will attempt to say something about the implication of these analyses for the development of a European public sphere.

3. Experimentalism and the public sphere

In this chapter I will examine the experimentalist perspective on the public sphere according to the core criteria that were developed above. These criteria must be fulfilled by any public sphere theory that has democratic ambitions, although there may be different degrees of fulfilment. For example, a public sphere must be open, but the degree of openness that is required may vary between different democratic models. Therefore, I will examine each criterion in turn – structure, openness, availability and permeability, and influence. The hypothesis is that that experimentalism incorporates a conception of the public sphere that is democratic.

3.1 Triangular structure

In the words of Cohen and Sabel, their “new arrangements” are (1997: 316):

“not conventionally public because, in solving problems, they operate autonomously from the dictates of legislatures or public agencies; they are not conventionally private in that they do exercise problem solving powers, and their governance works through discussion among citizens rather than the assignment of ownership rights”.

Thus, the question is, does their model include perhaps the foremost requirement for a public sphere, namely a triadic structure? Simplified, one could say that democratic experimentalism involves problem solving in local units, emphasising the epistemic benefit of gathering broad and diverse information prior to decision-making. If the local units were isolated from each other it would inhibit the development of a more comprehensive audience. However, the conditions that have to be met in order for experimentalism to enhance both democracy *and* the efficiency of problem solving include a fundamental requirement of “deliberative coordination”. This means that local units are not separated from each other, but are obliged to inform others about their performance as well as take into account the performances of other units (Cohen and Sabel 2003: 326ff). Accordingly, one could say that the experimentalist benchmarking procedure constitutes a triangular structure because the whole purpose of benchmarking is to expose jurisdictions facing similar problems to each other’s performances and arguments (Dorf and Sabel 1998).

Local units must demonstrate that they have taken all relevant reasons into account when making their decisions, and they have to make their considerations explicit (Cohen and Sabel 1997: 328ff). It is not enough to demonstrate afterwards that good reasons can be posited for a decision that is already made. This does not comply with the principles of democratic experimentalism, because it does not show the necessary respect for the other members of the deliberative body. Explicit argumentation obliges participants to give reasons for their views; furthermore, open argumentation provides a pool of information that makes alternative perspectives and solutions available to all decision-making units. This gives a good illustration of the simultaneous project of solving problems *and* promoting democracy. Whether for democratic or more epistemic purposes, democratic experimentalism requires an audience, and it is safe to conclude that its perception of the public sphere builds on a triangular structure. As a natural consequence of this structure, the model also has to endorse a certain degree of openness.

3.2 Openness

Experimentalism regards openness as a tool for good and efficient problem solving because only openness can assure access to the pool of information that improves decision-making. More specifically, it requires that “information provided for this purpose must be supplied by units in a way that both anticipates and reflects this use” (Cohen and Sabel 1997: 330). Benchmarking is suggested as an appropriate tool for comparison among units. Again, for benchmarking to have the intended effect of altering or improving the behaviour of units that receive a low score, openness is an essential requirement because it rests on these results to be known and displayed.

Furthermore, open deliberative processes are prerequisites for democratic control. First of all, openness, or transparency, is one of the “full-blast” conditions described above, where “deliberation and decision must proceed under a norm of transparency that invites and informs wider public participation in policy argument in order to be democratic” (Cohen and Sabel 2003: 367). Secondly, explicit provision of arguments appears in records made available for those who wish to monitor that all relevant

reasons have been considered. This is democratically important because when for instance courts review a decision-making process, they have “a record of fact and reasoning to draw on in making their decision” and if they choose to suspend a decision this will be based on fact and not “*a priori* estimates of institutional competence” (ibid: 337). Although openness is an instrument for control it does not hamper the autonomy of local units; in principle at least, they should always get a new chance of making a decision. Democratic experimentalists reject the traditional division of labour where parliaments legislate and courts control (ibid.), thus experimentalism might prevent that local problem solvers become mere advisory bodies at the mercy of the institutional hierarchy. Furthermore, the importance of direct citizens’ involvement seems to be acknowledged at all stages of the decision-making process.

3.3 Inclusiveness

Consequently, being a theory of direct and deliberative participation, democratic experimentalism would be expected to attain a high score on the criteria of inclusiveness. Direct and decentralised participation is seen as valuable because it provides for better decisions. Actors that are close to a given problem are thought to possess more relevant information about how it should be solved, and by including them in the decision-making process, solutions will be more adapt and more efficient. In addition, deliberation is *inter alia* thought to bring forth a diversity of viewpoints that offer more alternative solutions (Cohen and Sabel 1997). As was described above, access to information is also essential on a larger scale, because isolated problem solving hinders efficient problem solving. Rather, deliberative coordination among units is required to promote “learning jointly from their several experiences, and improving the institutional possibilities for such learning” (ibid: 326). Direct participation however, does not mean that all those affected must be present in order to make a democratic decision. One version of the equality principle may entail a “one person/ one vote composition of deliberative bodies”, but the principle of deliberativeness requires first and foremost that membership of a unit is assigned “in ways that foster the provision of relevant local information and the crisp articulation

of alternative views” (ibid: 333). Although experimentalists add conditions like open meetings to guarantee equality for affected parties, or opportunities for objecting to membership strategies, the model may stand in danger of introducing a divide between the ‘expert citizens’ and ‘everyday makers’ (Bang 2005)⁸. The question is whether affectedness loses ground to professionalism.

Relevant information does not equal representative information, and if “democracy becomes confined to those who possess the strategic faculties that the exercise of expert citizenship require” (ibid: 166) it will hinder the availability required of a public sphere. Moreover, deliberative theories are continuously criticised for being elitist on the grounds that the deliberative setting will favour those with higher rhetorical skills (Young 2000; Elster 1983). In the case of democratic experimentalism, if knowledge becomes a condition for participation, this criticism appears to be even more pertinent. On the other hand, everyday makers are not necessarily apathetic, instead they pursue “their own politics of the ordinary in the locality” (Bang 2005: 168), where participation is more sporadic and less idealised. The question is thus whether democratic experimentalism will generate local units that encourage the participation of everyday makers *as well as* expert citizens, as seems to be an experimentalist goal. However, when deliberation is criticised by Cohen and Sabel for too often being elitist, the actor reference is to “legislators, administrators or judges” (2003: 368). They seem to overlook that this professionalist divide might exist within the citizenry as well.

Indeed, democratic experimentalists do not advocate technocratic governance. In fact they claim to have solved the technocratic principal-agent dilemma of asymmetric information and noncompliant civil servants. Through the benchmarking procedure, informal activities are formalised and “all local purposes and performances are made public” (Dorf and Sabel 1998: 321). Thus, although the experimentalist public sphere

⁸ Expert citizens are committed to particular projects, express a cooperative attitude, and have political influence as their main goal rather than social solidarity (Bang 2005).

is organisationally dispersed, the theoretical intention is also to bring together formerly uncoupled arenas and open them up to the public. Another question however, is whether this form of access will be limited to observation, or if it is also encompasses participation.

Democratic experimentalism generates a multitude of co-existing publics that deliberate both within and between them to find the best solutions to the problems they are facing. The intention is that citizens should participate in “practical deliberations concerning the matters that affect them” (Dorf and Sabel 1998: 314). Citizens have the important appointment of helping officials form the right strategies as well as letting them know if and why some strategies fail and should be adjusted. Without a doubt, these are important tasks, and it is probable that this type of direct citizen involvement will improve the quality and efficiency of public and private services. However, the criterion of permeability entails that participation is not limited by the affectedness of a particular service. In the words of Bernhard Peters (2005: 87):

“Public communication is freely accessible communication without formal restrictions or special conditions for participation. In public communication, all interested laypersons are free to participate, to listen or to read and to speak their mind”.

Because citizens are to engage in *practical* deliberation, democratic experimentalism becomes vulnerable to the issue of scale. Experimentalists attempt to avoid this problem by arranging for citizens’ participation in local units where neither scale nor affectedness poses a problem in principle (Cohen and Sabel 1997: 322). The question is whether the theoretical assumption of localism actually solves these problems.

If a local unit is constituted by the parents of a certain school, or in the case of community policing, the question of membership may be relatively easy. Conversely, if a unit is comprised by those concerned with a specific policy area, it becomes more difficult to determine whom to include in practical deliberations. Not necessarily because people have different levels of knowledge, but because policy problems are often defined according to how it affects certain groups. When trying to proportionally include these groups, it raises the question of whether or not people

can be put into mutually exclusive, settled and one-dimensional groups (Newman 2005). In defining who should have a say within a unit, different policy areas may conflict. For instance:

“Inviting women as ‘carers’, ‘mothers’ or ‘pregnant teenagers’ to collaborate with government in addressing issues of care for the elderly, truanting behaviour or childcare may be viewed as constructive in social policy terms, but at the same time may involve the suppression of a more explicitly gender politics” (ibid: 132).

The issue at stake here is not only exclusion; it is also about who gets to establish what a problem is about, i.e. the cognitive framework that shapes both the understanding of the problem, the perception of its relevant dimensions as well as relevant arguments as to its solution. In short, the framing of a problem may affect the responsiveness to different reasons. Framing goes beyond the concern of agenda-setting, because it also denotes how topics are defined by interests, and not only how these interests may determine the salience of topics (Reese 2001).

Consequently, the existence of counterpublics is necessary, where the women from the quote above can meet and formulate views that focus on gender, instead of merely participating in forums that do not acknowledge such a perspective (Newman 2005). Moreover, it is important that there exist an arena where genderised arguments, or any other perspective that some feel have been left out during a framing process, can be expressed. In other words, not only a counterpublic, but a comprehensive public where these arguments may be stated and *then* dismissed, is necessary. If participation is conditioned by a predefined position or role, there would be a danger that “the kinds of political identity that are given legitimacy in participative governance [are delimited]” (ibid: 135). Thus, the criteria of permeability will not have been met.

The risk of professionalism following from the request for relevant information that was described above, may also lead to a situation where participants are not only picked owing to the interests or opinions they represent, but also depending on their willingness to cooperate. This means that the level of inclusion is not only impaired by a potential lack of representativeness but also by “imperatives of governability: the reluctance to include actors who are themselves not willing to “play the game””

(Papadopoulos 2006:14). However, supporters of democratic experimentalism underline that a basic premise for their model to be democratic is that it is possible to object to the norms of membership (Cohen and Sabel 1997). Thus, as long as it is possible to contest not only the selection of members but also the grounds on which they are chosen, the above contentions can be discarded. Of course, this rests on the condition that any membership objections, if reasonable, are responded to, which lead to the last criteria, namely influence.

3.4 Influence

A major achievement of democratic experimentalism is held to be its heightening of accountability through direct citizen involvement (Dorf and Sabel 1998). The background for this assertion is the “crisis” of the current constitutional systems where the increasing complexity of state affairs has led to a delegation of powers to more or less independent agencies. Faced with immense tasks, the legislators and government become incapable of controlling the actions of these agencies. As mentioned above, this familiar principal-agent dilemma is allegedly solved by instituting an experimentalist system because local units that are publicly confronted with their own malperformance replace agencies. Moreover, elected officials evaluate the bodies that administer local units according to performance, and the former are held accountable by the voters (ibid.).

Democratic experimentalism also entails that problem solving meets political principles in the form of deliberation. In other words, citizens are not only engaged in finding out how to reach targets set by governmental bodies, they define their own targets. This is the essence of simultaneous engineering. Thus, public opinion is not only connected to decision-making as the criterion of influence prescribes, public opinion making *is* decision-making. At the same time, the criterion of influence rests on the fulfilment of the four other criteria. Democratic influence depends on openness in terms of explicit reason-giving and transparency, availability and permeability that guarantee a diverse range of reason-giving, combined with a triangular structure that can provide for an accountability process.

As a consequence of this interconnectedness, the problems that have been mentioned in the previous sections also spill over on influence, and are to some extent aggravated. First of all, since arenas for participation are constituted by local units, a multitude of channels are created that link the citizens with their officials. Under permeability, the potential problem of excluded bottom-up generated publics was described as a possible consequence if the legitimacy of political identities is controlled from above. In terms of influence, this resembles what is depicted as “the myth of agency” (Newman 2005: 127). Although citizens are allowed to participate directly in decision-making, the terms for their engagement are predetermined; therefore citizens risk being reduced to governable subjects with the appearance of self-determination⁹. Thus, the question of whether publics by appointment overshadow those publics that are not assigned the task of developing public policy resurfaces. This concerns not only the counterpublics mentioned above it is also a question of the how the broader public sphere might be affected by organisational fragmentation.

Although democratic experimentalism claims to have solved the principal-agent dilemma, there is still an element of delegation that is causing troubles. Because local decision-making entails both setting goals as well as choosing the means to achieve them, one question is whether minorities that are outvoted in their own local unit will be able to align and gain influence through a higher-level arena. When national legislatures establish the broader framework, the local units are left with a large degree of discretion in chiselling out concrete aims. The problem arises once the aims and means settled on by a local unit run contrary to the preferences of the broader citizenry. Under traditional government, local authorities may also make decisions that do not make everyone happy, but come Election Day, a sufficient majority can throw them out. Even if democratic experimentalism underscores the role of the vote, the question is whether the power of the vote is equally retained. First of all, the chain

⁹ Protests have been made against a literal understanding of this dynamics, but there is less disagreement over the fact that participative governance also involves a certain top-down influence with regard to agency (cf. Newman 2005).

of delegation is longer; local units are held accountable by the governing councils who are held accountable by elected officials who are held accountable by voters. Secondly, because the chain of delegation is so long, it is not necessarily easy to identify the responsible decision makers and hold them accountable. Who are to blame, the local units themselves or the elected officials? In other words, the “external” accountability to service users may be promoted at the expense of “internal” accountability to citizens as principals (Papadopoulos 2006). Even if decisions are exposed to a wide public through benchmarking across local units, transparency is not sufficient to ensure accountability (Héritier 2003b). It has to be accompanied by a degree of sanctioning ability that induces “answerability” (Papadopoulos 2006: 4).

Some warn that by dividing society into governance projects, the formation of “wider collective identifications” is impaired (Newman 2005: 132). My question is rather; how will such a development affect the possibility of addressing a comprehensive public? What are the mechanisms that enable a broader evaluation of democratic procedures when the highest level of benchmarking has been reached? In my opinion, democratic experimentalists have as of yet not come up with a good answer, and do not seem too preoccupied with these questions. Instead the focus is on how the efficiency and quality of public policy processes can be augmented through local decision-making. Democracy seems to be more of a bonus, as considerably less room is spent on describing the activity in the wider public sphere except as an upshot of aggregated benchmarking against which to compare the performance of one’s own local unit. When these processes are opened up to a wider public, audiences appear to be reduced to spectators while central authorities control that the local procedures have followed the democratic experimentalist standards.

To conclude this assessment then, if the core problem of democracy is how to make citizens regard themselves as self-legislators, then democratic experimentalism only solves half of it. While citizens may be directly involved in shaping the policies that affect them, their ability to define the higher-level goals is not given sufficient

attention. Democratic experimentalism would probably improve the epistemic quality of public decisions, but it might also impair the democratic quality if provisions for a comprehensive framework for the making of broader policies are not made. While a prominent goal is to constitute local units that deal with the problems people face in their daily lives, my examination from a public sphere perspective has first of all shown that democratic experimentalism faces considerable challenges with regard to inclusiveness. First, access stands in danger of being conditional. Because participation is dependent on the possession of relevant information, there is the likely chance that expert organisations and citizens will be more deeply involved while non-organised participants will not have a similar “membership ticket”. Combined with demands on knowledge, deliberation may also add up to an exclusionary mechanism because of the obligation to justify one’s opinions openly to actors that one already feels inferior to (Mansbridge 1980).

However, democratic experimentalism may also encourage participation by creating units that bring politics closer to the everyday lives of citizens as well as allowing them a direct influence over the outcome of deliberations, both factors that are considered to produce more and broader contributions (Fung 2003). Active recruiting would add to this effect (*ibid.*), and help fuse the gap between the involvement of expert citizens and everyday makers. At the same time, because local units are constituted as service providers and individuals are linked to these units as service users, it would be essential that those who do not fall into these groups of service users can challenge decisions that they are affected by, elsewhere.

Service providers are held accountable by citizens through the governance councils (appointed officials) that administer the goals laid out by the elected officials. The latter also holds the governance councils accountable, and at the end of this chain, elected officials are held accountable by citizens through elections. Every step of this ladder implies benchmarking and review, from comparing results between jurisdictions to the use of these comparisons during election campaigns (Dorf and Sabel 1998). Although one may accept these dynamics, there is still the question of

how citizens may influence the primary goals at the highest level of decision-making. Before governance councils choose service providers, and before these service providers turn to the citizens for help, or just as well at the end of this entire process; how can citizens change or contribute to the creation of the larger framework, that which constrains the choice of means and ends at lower levels? The openness and provisions for transparency that is stressed through the democratic conditions of the full-blast does not amount to accountability because transparency does not contain the possibility of sanctioning a decision (Héritier 2003b). This means that in addition to exposing the outcome and procedures of local unit decision making to the larger public, this larger public must also possess the power to sanction these decisions somehow. However, as I have pointed out above, the long chain of delegation weakens “the influence of the citizenry through the vote as a mechanism of sanction” (Papadopoulos 2006).

In sum, the hypothesis that experimentalism incorporates a conception of the public sphere that is democratic is not dismissed, as experimentalism clearly adheres to all four core criteria of the public sphere. However, there are some theoretical weaknesses with the experimentalist conception, due to the elaborated delineation of the epistemic, as opposed to the democratic function of the public sphere. Furthermore, it is clear that the salience of each of these criteria depend on how they are institutionalised. Thus, in chapter five, I will go deeper into the question of what democratic experimentalism offers in terms of creating an institutional framework that can channel the influence of citizens and establish mechanisms of accountability. At the same time, several of the critical points that I have brought up are determined by the implementation of democratic experimentalism in the real world. Therefore, before I continue the theoretical discussion, I will take a look at how the experimentalist model plays out in practice.

4. The Open Method of Coordination

This chapter explores the hypothesis that the Open Method of Coordination (OMC) contributes to the development of a European public sphere. It opens with a general description of the open method, and singles out a particular case to study in more detail. Next, the indicators that were delineated in chapter two are scrutinised one by one, demonstrating that democratic experimentalism draws attention to interesting European dynamics, but also that the model faces some considerable structural constraints in practice.

4.1 What is the Open Method of Coordination?

At the Lisbon summit in 2000 the Open Method of Coordination was presented as the procedural core of the Lisbon agenda, aiming to make the EU “the most competitive and dynamic knowledge-driven economy by 2010” (European Council 2000). The OMC is a policy-making process that relies on broad guidelines, flexible implementation, voluntary cooperation and peer review, as opposed to the Community method that uses hard law and regulative mechanisms backed by sanctions. Thus, the OMC is often referred to as an instance of soft law-utilization, which applies political instead of legal means to attain its goals (cf. Borràs and Jacobsson 2004). The open method does not set out to harmonise the policies of the Member States, nor does it attempt to transfer additional competences to the EU. While broad goals and subsequent indicators are defined at the European level, the Member States are free to choose *how* they are going to reach them. Hence, the term 'open' can "refer to state action, policy outcome or à la carte involvement by states" (Hodson and Maher 2001: 724). Furthermore, the OMC relies on the provision of expert knowledge and local competence from several actors, “using variable forms of partnership” (European Council 2000). In sum, it contains four main elements (ibid.):

- "fixing guidelines for the Union with specific timetables for achieving the goals (...) in the short, medium and long-terms;
- establish, where appropriate, quantitative and qualitative benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;

- translating these European guidelines into national and regional policies by setting specific targets;
- periodic monitoring, evaluation and peer review organised as mutual learning processes."

Various methods of coordination have been included in the treaties since the EEC to manage economic policies (Hodson and Maher 2001), but it was not until the middle of the 1990's that they became gradually more relevant within other policy areas.

Today the OMC is being applied within e.g. pensions, taxation, education, innovation, social inclusion and macroeconomics. Most of these areas make use of only a few mechanisms, and this use is far from systematic, but one area stands out in comparison. The European Employment Strategy (EES) utilises an almost complete range of OMC-mechanisms (Borràs and Jacobsson 2004), and it has also served as a benchmark for other OMC policy areas (de la Porte and Nanz 2004). Because it is more representative of the ideal OMC-instruments, I have chosen to use the EES as a case in this thesis. Secondly, because the EES has been in operation since 1997, it also has larger potential to render clearer results than areas subjected to the OMC more recently. Finally, since this thesis build on secondary literature, the EES has generated more studies than other OMC-areas.

4.2 The European Employment Strategy

The European Employment Strategy was established as a response to rising unemployment. Moreover, because traditional national mechanisms of job creation were weakened by the founding of the Economic Monetary Union (EMU), the social democratic governments needed "to legitimize their almost unanimous support for the EMU with their electorates and other domestic constituencies, primarily the labour movement" (Rhodes 2005: 291). One major difference between the EES and the other open method-areas is the former's legal basis (de la Porte and Pochet 2002).

The Treaty of Amsterdam included an employment chapter that denoted a high level of employment as a question of common concern. It also improved the institutional framework of the EES by deploying an advisory Employment Committee (EMCO), instituting annual guidelines and examinations (Goetschy 1999). At the Luxembourg summit that same year, the first guidelines were elaborated and grouped around four

main pillars: employability, entrepreneuring, adaptability and equal opportunities. Since then, the strategy has evolved considerably. The initial Luxembourg process designed to coordinate the member states' employment policies has been complemented by the Cardiff and Cologne processes. The former addresses economic structural policies while the latter embraces the other two into a macroeconomic dialogue (Hodson and Maher 2001). Furthermore, the EES has undergone a number of reviews that have brought about several adjustments. Following a broad impact evaluation in 2003, the guidelines were simplified and restructured according to three objectives: full employment, quality and productivity at work, cohesion and inclusion (Rhodes 2005). The EES-cycle was also streamlined in accordance with the development of economic policy guidelines (BEPGs)¹⁰. Finally, in 2005, the Lisbon strategy underwent a mid-term review, resulting in a complete alteration of the EES cycle where for instance the Employment Guidelines (EGs) were integrated with the BEPGs in order to address both growth and job creation simultaneously (COM (2005) 141 final). However, because this reform is too recent to have produced much results, let alone studies, I will have to concentrate the analysis on the process prior to 2005.

The EES-process starts each year with the Spring European Council issuing strategic guidelines. Prior to the Spring Council, a Tripartite Social Summit is arranged consisting of representatives from the social partners, the Council, Presidency, and Commission. The summit is intended to “ensure that (...) there is continuous consultation” between these actors (Council 2003). The Commission prepares a proposal of corresponding guidelines and hand these over to the Council for approval accompanied by the opinions of the European Parliament, the Economic and Social Committee, the Committee of Regions, and the EMCO¹¹. Next, the member states set down National Action Plans (NAPs) that contain targets showing how they propose to execute the guidelines as well as implementation reports to demonstrate

¹⁰ The Broad Economic Policy Guidelines are guidelines adopted by the EU Council to provide the framework for defining the economic policy objectives and orientations of the Member States and the European Community.

¹¹ Of course, the Council can also change the guidelines. Approval is by Qualified Majority Voting.

achievements. These plans are then monitored according to a set of indicators and subsequently used as a basis for peer review within the EMCO. At the end of each cycle, the Council and Commission prepares a Joint Employment Report (JER) to the European Council where they assess the total progress made within the employment arena and benchmark the member states according to best practice. Finally, it is also important to mention that the EES is closely linked, although not in a legal sense, to the provisions of the European Social Fund (ESF) aimed at combating unemployment. Their objectives are partly overlapping, which makes the ESF an important instrument for the EES (de la Porte and Pochet 2005).

Before I move on to the analysis, there are a few methodological points I would like to mention that are important to keep in mind when assessing the impact of the EES. First of all, conclusions only apply to the Employment Strategy and not the Open Method of Coordination in general, although the former is example of the latter. The EES is in many respects different from the other OMCs, e.g. through Treaty incorporation, range of mechanisms, ability to issue recommendations, etc. Thus, although the EES is a prototype for the ideal Open Method, it is not representative for the collection of other OMC processes. Secondly, by basing my analysis on secondary literature there is always the risk that the contributions I have chosen are not reliable, or that the selection is biased.

4.3 Democratic experimentalism

In what follows, I will apply the indicators of democratic experimentalism that were developed in chapter two to the European Employment Strategy, and look at how it contributes to the development of a public sphere. In chapter two, democratic experimentalism was described as a theory that combines direct and deliberative problem solving with the full blast of diverse interest and opinions in society in a democratic alternative for the modern context of volatility and diversity. The ensuing set of indicators can roughly be grouped along three dimensions: issues relating to institutional infrastructure, problem solving mechanisms and questions that concern democracy. In the following analysis, I will look at the European Employment

Strategy according to these dimensions. Because institutional design is the central focus of this thesis, as well as decisive for how the mechanisms of problem solving and the democracy of the system prevail, I will commence by exploring the EES' potential institutional innovations.

4.3.1 Institutional infrastructure

Democratic experimentalism prescribes the establishment of new institutions and the adjustment of old ones to new tasks. In short, local units comprised by affected citizens are given the autonomy to make decisions where means and ends are elaborated simultaneously. Next, these are administered and controlled by governing councils that answer to elected officials. Experimentalists have used the development of the European Employment Strategy (EES) as an example of how publics are shaped and reshaped according to the problem at hand (cf. Cohen and Sabel 2003). They claim that the EES has provided a new architecture with autonomous lower level actors that inform higher-level authorities about their goals and progresses. The entire process is coordinated by a centre, not to be understood as the top of a hierarchy but one that pools information, organizes arenas for debate and monitoring, and disciplines participants (ibid.)¹².

First of all, the EES seems equipped to promote autonomy because the open method “is compatible with both functional and territorial subsidiarity” (Jacobsson and Schmid 2002b: 3). Broad frameworks are developed at the European level, but the substantiation of these goals and how they are to be reached is left for each member state to decide. Although the formal structure is not altered, the EES introduces aspects of a new institutional design by not making policies according to the Community method. At the European level, the Commission administers the goals set by the European Council, partake in the development of guidelines and indicators, gather information about the performance of the member states, and provide arenas

¹² This existence of a centre is what separates democratic experimentalism from anarchy (Cohen and Sabel 2003: 366).

for peer review and mutual learning. In sum, the Commission appears to play the role of an organising centre as it is designated by democratic experimentalism.

Furthermore, the Employment Committee (EMCO) regularly brings together two members from each member state and two from the Commission. Its main function is to assist the Council in the EES-proceedings; it issues opinions on request from the Council, the Commission, or by its own initiative. The EMCO also comprises a set of working groups, e.g. one responsible for developing indicators. A Treaty provision (Art. 130), makes it obligatory for the EMCO to confer with the social partners, and on occasion it also holds informal meetings where NGOs and other non-state actors are invited. Processes are also coordination across policy areas. The Employment Title incorporated into the Amsterdam Treaty explicitly stated the necessity to address employment issues in context (Art. 126, par. 1). Thus, there are four committees connected to the Employment Strategy. First of all the EMCO that is mandated to coordinate the employment area with those of macroeconomic dialogue and economical reform (Council 2000). Then there is the Economic Policy Committee (EPC) that coordinates the economic policies of the member states and the Community, the Economic and Financial Committee (EFC) that is an advisory body to the Council, and the Social Protection Committee (SPC) that is designed to promote cooperation between the Commission and the Member States on social protection systems. All of these committees coordinate their work amongst each other, and it is customary to exchange agendas, circulate drafts and participate in each other's meetings (save the ESF) (Jacobsson and Vifell 2005).

The EMCO also functions as an arena for peer review by gathering member states together to compare performances. In line with the Employment Strategy, all member states prepare National Action Plans (NAPs) that establish their targets, how they intent to reach them, and the progress that has been made. The Commission assesses the NAPs according to the predetermined set of indicators and benchmark the member states accordingly. These benchmarks are then used as points of departures in the review process. In addition to the review processes in the EMCO, a Mutual

Learning Programme brings together member states and other national stakeholders to “thematic review seminars” that address broader challenges and priorities, peer review meetings that focus more on specific policies, as well as “follow up and dissemination activities” that *inter alia* are directed towards promoting the development of partnerships and networks¹³.

Hence at first glance, the institutional architecture at the EU-level seems to be captured by the indicators of democratic experimentalism. The committees pool information and function as arenas for review across units, i.e. the member states. The Commission is in a variety of ways trying to create proper arenas for the exchange of information, as well as correct procedural failures. For instance, it underlines the need to adjust the EES process to accommodate for EP participation, and it has continuously encouraged the increase of social partner, civil society, and local level inclusion (GOVECOR 2004).

At the national level, there are also signs that member states have adjusted to the infrastructure of the Employment Strategy. For instance, the different stages of the EES-procedure designate structures and time frames that discipline national course of action, causing members to “focus at the same issues at the same time” (Jacobsson 2004: 365). The EES has also generated new national structures. In France, administrative units and ministries coordinate their work through two central bodies providing “a new forum for discussion”, where the over-arching strategies connected to employment is attended to (Coron and Palier 2002: 134). However, the EES shows ambivalent results with regard to autonomy. First, the process focuses national attention, but it also narrows the autonomous realm of the nation state, e.g. because of short deadlines, adaptation may become a survival mechanism (Jacobsson 2004). Accordingly, the question is if time pressure obstructs flexibility. Furthermore, short deadlines may foster commitment to the EES but there is also the risk that they “limit

¹³ See, <http://www.mutual-learning-employment.net>

the possibility to “anchor” policy positions more broadly at the national level” (ibid: 365). This distance is aggravated by the fact that the EES-processes often run parallel to the development of employment policies at the national level (Jacobsson and Schmid 2002a). Secondly, the member states seem to use their autonomy as an opportunity to adapt to the EES as they see fit. For instance, there is a tendency that countries with preferences similar to the Employment Strategy have a higher degree of convergence (de la Porte and Pochet 2002). Without going into a discussion about the actual efficiency of the EES, some observers call attention to certain member states’ propensity to comply with the process in words but not in deeds. That is, they loyally produce their NAPs, but without following them up (Jacobsson and Schmid 2002a).

Furthermore, the adjustment to the EES-process at the national level seems to be concentrated to coordination between ministries. By contrast, a central claim is that the iterative character of the EES-process represents an opportunity for a broad range of actors to give regular input (Jacobsson 2004). However, studies of actual inclusion show variable results as well as variable satisfaction with these new opportunities. For instance, in their evaluation of the EES after the 2003 reform, the European Trade Union Confederation (ETUC) (2005) concludes that the EES has raised the political salience of employment-related issues. On the other hand, trade unions across the EU report that their lack of commitment is a result of the development of the NAPs’ being a governmental project. Optimism seems more prevalent in the new member states without a preceding record of participatory policy-making. Here, the EES has allegedly inspired a groundbreaking infrastructure (ibid.). Conversely, in the old member states, different degrees of optimism are displayed. Social partner contribution to the NAPs varies greatly between countries, and the level of involvement is reflected in satisfaction with the process among these actors (de la Porte and Nanz 2004)¹⁴. This has led some to question whether it would be more

¹⁴ In some countries social partners are merely informed (Lithuania), in others there are bodies for social dialogue but with weak links to the governments (Malta), still others make out a part of the official Brussels-delegation that present the NAPs (Luxembourg), while in Belgium and Denmark, social partner-opinions are appended to the plans (ibid.).

appropriate to rename the OMC, the “Open method of Centralization”, as the decentralisation it proscribes is deficient (Smismans 2005a: 17).

At the same time, others report that progress has been made. For instance, some assert that the EES seems to have spurred inclusion of a broader range of actors, such as regional and local actors, as well as civil society and NGOs (GOVECOR 2004). It is also argued that some of these actors have requested influence because they see themselves as affected by the EES. In other words, local actors have used the Employment Strategy to push forward their own opinions, as for instance in Sweden where a network of social NGOs demanded to be included in the preparation of the NAPs (de la Porte and Pochet 2005). As I pointed to above, the Commission encourages the inclusion of social partners and local actors, and urges the member states to improve their communication with national parliaments and citizens to “enhance understanding and contribute to greater involvement” (de la Porte and Nanz 2004: 278). In practice, the Commission has attempted to empower actors to raise their voice against governments through funding of transnational networks (Smismans 2005a). The main source of this funding is the European Social Fund (ESF), which is the “key financial instrument to support the European Employment Strategy” (COM 2003 6 final: 19). Both general programmes and specific measures initiated by local level actors have received support from the ESF and established local partnerships that address employment issues (Evers 2003). Furthermore, in the wake of the “Acting Locally for Employment” campaign in 2000, the Commission funded over 30 local projects. Several of these projects worked with the development of Local Action Plans (LAPs). Some of these projects also have had a transnational scope, for instance “Eurocities”, which is a network of large European cities that helps its members produce LAPs for employment and social inclusion (GOVECOR 2004).

In studying the Employment Strategy, it may be easy to get lost in the wild complex of empirical data, and lose sight of the factors that are not compatible with one's own theory, or to weigh the evidence accordingly. Thus, some emphasise that most member states have increased social partners' participation in the preparation of the NAPs as a result of the EES (Zeitlin 2005), while others argue that "progress is disappointing overall compared to the incentives taken to improve their participation" (de la Porte and Nanz 2004). The glass can be both half-full *and* half-empty.

However, only a few countries involve a *wide* range of actors. The general pattern is that the EES is a governmental responsibility where national parliaments are scarcely involved (de la Porte and Pochet 2005), and social partners report about being left out. For instance, a common document by the social partners have pointed to that in only three member states have social partners been directly involved in preparing the NAPs (Smismans 2005a)¹⁵. I will return to the extent and quality of participation and inclusion below when examining the indicators that pertain to democracy, but my purpose here is to indicate what may be causing some of these "deficiencies". In my opinion, a lack of compliance can at least partly be traced back to lack of sanction mechanisms available. For instance, although an increase in local level participation coincides with the EES-process this development is allegedly constrained by the lack of treaty mandate to back the inclusion of local actors, hence studies show that national governments have been reluctant to "open up the process to their subnational fellows" (GOVECOR 2004: 361). Moreover, voluntarism may also influence the outcome of the process both with regard to quality and efficiency because the invaluable knowledge of affected parties is excluded from the information pool. This will be further examined below.

In this section, I have looked at the potential innovations of the Employment Strategy following the institutional indicators derived from the perspective of democratic experimentalism. Quickly summed up, it is possible to identify an emerging structure

that complies with the basic framework of democratic experimentalism. At the European level the arenas are provided for, but the autonomy of the member states – or the local units – supersede the centre’s ability to restrict non-compliance. In other words, the EU cannot force its member states to experiment. Thus, the autonomy of the EES has ambiguous results. Next, I will take a closer look at the central mechanisms of democratic experimentalism to see how they contribute to this picture.

4.3.2 Learning through monitoring

According to democratic experimentalism, in addition to providing a basis for rational problem solving, learning also has structural significance because it is a premise for the (re-)constitution of publics. This process is indicated by benchmarking, simultaneous engineering and error detection, and in what follows I will see how these apply to the European Employment Strategy. Following the above exploration and its tentative conclusions, the EES constitutes a structure that provides for learning through monitoring, at least at the European level. Through the process of guideline-development, NAPs, peer-review, and potentially also country specific recommendations issued by the Council, the EES institutionalises a feedback-loop that promotes an exchange of information and experience, and this iterative character is highlighted as one of the strategy’s major strengths (cf. Goetschy 2003; Trubek and Mosher 2003). The EES uses different techniques to pool information. It produces common standards of evaluation and comparison through the supply of European statistics, guidelines, Joint Employment Reports, as well as by encouraging member states to streamline their interpretation of the guidelines and to participate in the Mutual Learning Programme. Through all of these procedures, information is systematised and distributed (Jacobsson 2004).

In addition to processes of benchmarking and pooling of information, there are signs that the EES also puts the principles of error detection into practice, seeing that member states also feel that they have contributed to the formation of EU-level

¹⁵ The three social partners are the European Trade Union Confederation (ETUC), the Union of Industrial and Employers’ Confederations of Europe (UNICE) and the European Centre of Entreprises with Public Participation and of Entreprises of

policies. For instance, in Denmark there is a perception of Danish ideas being transmitted to the EU, and not so much the other way around (Jacobsson and Schmid 2002a), and in France a similar opinion is prevalent (Coron and Palier 2002). This means that bottom-up information has also been taken into account, and practices have been changed accordingly. In addition, the continuous reforms and amendments of the EES serve as indicators of how the strategy is reconstituted in accordance with new problems and perspectives. In 2003 the replacements of the four pillars with three broader objectives were partly a result of complaints from member states on complexity and double work (Rhodes 2005). At the national level, some countries have succumbed to the pressure to alter the NAP time schedule so that consultations from non-governmental actors are gathered early enough to have a potential influence (GOVECOR 2004).

With regard to simultaneous engineering, member states may be bound by the guidelines to a considerable degree, thus the leverage to experiment with goals and means concurrently is restricted within the framework of the EES (Ashiagbor 2005). Although it is difficult to establish to what degree member states feel compelled to comply with the EES, it seems to have established a normative framework that has more of a long-term policy effect by changing the perception of employment and social policies. For instance, some portray the EES as a compromise between a Nordic and a liberal model, illustrated by the overweight of recommendations directed at countries other than the Nordic and Anglo-Saxon member states (Smismans 2005a: 18). The limited scope of simultaneous engineering is also added to by the governmental dominance of the process. By not including a broader range of actors such as local authorities or social partners that most likely possess valuable information, ministries and administrations prevent learning, and this enclosed character of the EES process weakens the outcome of the process.

A similar problem is caused by the lack of coordination between policy areas. Interaction between governmental ministries has improved decision-making, but social partner involvement is most often confined to the area of employment. At the European level, the macro economic dialogue was supposed to provide an arena where the Council, the Commission, the European Central Bank and the social partners could work together to improve the implementation of coordinated economic policy and thus facilitate the development of the labour market. However, the macro economic dialogue has been called the “neglected aspect of European employment policy” (Heise 2002)¹⁶. Thus, the goal of coordination between policy areas comes forward as a good intention rather than an actuality. This might improve as a result of the integration of the Employment Guidelines and the BEPGs, but at the same time, the studies I have referred to above also indicate that actors will present another obstacle.

I have already mentioned how a lack of sanction mechanisms can obstruct the development of the EES- infrastructure, and this may also present a problem to the learning through monitoring process. Because of the EES’ “soft-law” character, it is more dependent on national acquiescence than “hard-law” policy backed by sanctions. For this reason, the open method has been suggested as an ideal test-case for the “*power of deliberation*” (Jacobsson and Vifell 2005: 216)¹⁷. In one of the few studies that actually try to analyse the deliberative imprint on the OMC-process, rather than declaring its potential, Jacobsson and Vifell (2005) found that in the committees associated with the EES, quality of arguments was generally decisive, as opposed to country size or resources. However, they also found that when stakes grew, nationality became more important, for example when the EMCO discussed recommendations. These debates proceeded in a negotiating manner with focus on wording and national standpoints, as well as an increased demand for written

¹⁶ Another problem is the lack of connection between the EES and the European Social Fund (Watt 2004). They are supposed to address similar problems but end up as two isolated processes. Thus, two sets of actors work parallel with the same issues, only with occasional contact.

¹⁷ “In order to be effective, the OMC must foster *commitment* to the common goals, and not just a superficial consensus with no real obligations involved – hence, actors must be *convinced*”. (Jacobsson and Vifell 2005: 223).

statements (ibid.)¹⁸. Furthermore, even if civil servants who work directly with the procedure may express a positive attitude towards the EES' learning potential and feel convinced by a particular policy, it is not automatically translated into national policy (ibid.).

The mechanism of simultaneous engineering is intended to provide for autonomous decisions, but in the case of the Employment Strategy national engineering does not necessarily abide by the common framework. Although constrained by the EES, national processes come out as dominant vis-à-vis the EES, and the EU has no option but to trust the effect of “naming and shaming” to induce compliance. The EU can only gather and provide information to encourage learning; they cannot, however, make sure that the member states make use of this information, or that they even consider it when making their decisions. In sum, the EES is more or less based on the three central mechanisms of democratic experimentalism, benchmarking, error detection and simultaneously engineering, but if the normative framework it represents does not convince the member states to abide by the guidelines and the procedures, there is little the EU can do about it. However, the lack of coordination across units, whether it is problem solving bodies or policy areas, is not only problematic with regard to the efficiency of policy-making or the success of problem solving. Following the indicators of democratic experimentalism, it is also a democratic problem, because the crux of democratic governance is the *connection between publics*. Accordingly, in the next section, I explore the Employment Strategy using the set of experimentalist democratic indicators.

4.3.3 Accountability

What makes democratic experimentalism democratic is not direct participation or deliberation alone. Democracy requires that decision making processes are subjected to the full blast of diverse opinions and interests in society, and that they also shape

¹⁸ This tendency that sensitive issues seemingly obstruct the process of deliberation in the EES-committees corresponds to what was pointed out in the previous section about the interdependence between national ideas and compliance with the EES.

ensuing decision-making. This means that five conditions have to be fulfilled: transparency, protection of basic rights, attention to reason-giving across and within units, accountability, and the individual right to contest decisions (Cohen and Sabel 2003).

With regard to transparency, the Employment Strategy shows ambiguous results. For instance, peer review processes in the EMCO are closed (Rhodes 2005), and its members express that they consider their own committee as rather closed to the outside public and actors (Smismans 2005a). Moreover, although the EMCO's opinions are published, the preceding deliberations that would display the reasons given by different actors are not¹⁹. However, efforts have been made to improve transparency. In 2002, the Commission decided to make public their comprehensive 5-year review of the Employment Strategy. Furthermore, in 2003 a website dedicated to the EES was established that publishes guidelines, indicators, NAPs, JERs and recommendations that earlier were spread around several other sites²⁰, and this has allegedly increased the level of transparency (de la Porte and Nanz 2004).

The EES-website also describes how the strategy emerged and how it has undergone numerous changes both with regard to content and procedure. Some observers have stated that the EES is so complex that it is difficult for actors not directly involved, to grasp the policy-making process (Jacobsson and Vifell 2005: 233). Complexity may also present a transparency problem because it renders the process opaque, and makes it more difficult to allocate responsibility. Consequently, the Convention on the Future of Europe considered that an incorporation of the Open Method of Coordination into the Constitutional Treaty would make the method more transparent and democratic by clarifying the procedures and the respective roles of those involved (Working Group XI, final Report 2003: 19). Hence, in addition to the constant changes to both procedure and substance, fuzziness with regard to competence and responsibility may make it more difficult for external actors to

¹⁹ Meetings in the Economic and Financial Committee are not even documented (Jacobsson and Vifell 2005).

²⁰ http://europa.eu.int/comm/employment_social/employment_strategy/index_en.htm

follow and control the process, and hence make a contribution or criticize decisions. Evaluations of the EES conducted by the ETUC (2005) confirm this assumption, and conclude that the Employment Strategy has created favourable circumstances in terms of transparency and information to a certain degree, but that its multilevel structure presents a new obstacle. As a consequence, unions all over the EU have problems allocating actor responsibility, and on top of that, understanding their own role within the system (*ibid.*).

A lack of transparency may also impede on the other democracy conditions, notably the requirement of due consideration of opinions across, as well as within, units. Although the sections above have displayed that compliance with the structure of the EES has not led to great results in terms of policy changes, at the national level, the EU's employment policy has served as a source of affirmation and legitimation for national policy initiatives, both governmental and non-governmental. Issues like gender equality, lifelong learning, and the need for a more comprehensive approach to employment policy have benefited especially (GOVECOR 2004). There are also examples where politicians in opposition or trade unions have used the recommendations to their own country in making an argument (*ibid.*). Another example is provided by a report from France where national officials claim to have altered their original positions through participation in the EES because "it becomes an opportunity for a fresh re-reading which allows a "European version" (...) to emerge" (Coron and Palier 2002: 125). One way of conceiving these developments is that the shared standards constitute a legitimising framework that serves as a basis for, and can justify, criticism across national borders (Jacobsson 2004). In other words, despite the complexity of the process, it does constitute a frame of reference that allows for a comparison across units.

The notion that the EES has established a normative framework is quite prevalent (*cf.* Syrpis 2002; Jacobsson 2004; Smismans 2005a). However, the use of the Employment Strategy as a "window of opportunity" is not widespread. In some cases, national governments seem almost to prevent the inclusion of other actors, but

governmental dominance is also combined with a general lack of knowledge about the Employment Strategy, apart from civil servants directly involved in the procedure. It is important to note that lack of knowledge, time, resources, interest, and initiative on part of the social partners are cited as reasons for low participation (GOVECOR 2004; ETUC 2005). Public administrators, national parliamentarians, local and regional actors, social partners, and civil society as well as journalists demonstrate a lack of awareness. On top of this, the broader public is practically unacquainted with the process (GOVECOR 2004). Very few studies have been made on the public debate about the EES, but in a study of media coverage in Britain, France and Germany, Meyer (2003) found that media attention had only declined since the founding of the EES (1997 to 2001). The practical upshot is a situation where governments rarely encourage the involvement of other actors, who on their part are both reluctant, and lack sufficient capacity to engage. Furthermore, neither the “excluded actors”, nor the media, seem to be preoccupied with the European Employment Strategy. This leads to the question of accountability.

In chapter three, I assessed democratic experimentalism against four core elements of the public sphere. This examination demonstrated that experimentalism might with problems with regard to influence and accountability due to long chains of delegation and fuzzy lines of responsibility. The analysis of the EES partly confirms these concerns. Moreover, the problem is that transparency and an extensive exposure of the results of benchmarking processes through the publication of NAPs may make it easier to measure ends and means, but this does not amount to democratic accountability alone because it lacks a provision for more comprehensive citizens’ control (cf. Bovens 2006). While a lot of attention is given to procedures supposed to guarantee the exposure of member states’ performance, others actors, like the trade unions, have expressed doubts about the real goals of the EES (Watt 2004).

The Lisbon strategy expressed the double goal of fostering both higher European competitiveness and better welfare, and although the EES is placed under the heading of “European social model”, employment is tightly intertwined with macro-economic

policy placed under “competitiveness” (Borràs and Jacobsson 2004). Prior to the 2005 reform, the employment guidelines had to be consistent with the overall macroeconomic policy expressed in the BEPGs (Art. 128 par. 2), and now the two sets of guidelines are developed simultaneously. Although it is the member states themselves that set the specific targets according to their different needs (cf. Presidency Conclusions 2000), the guidelines are still concentrated around a particular understanding of what they are designed to accomplish. Thus, an effect of this normative framework is the establishment of conceptual borders “beyond which any alternative becomes increasingly more difficult to defend and even imagine” (Smismans 2005a: 18).

Democratic experimentalism proceeds from the assumption that a society basically shares the same goals, thus it is relatively unproblematic to grant local actors the autonomy to settle on both goals and means (Cohen and Sabel 1997). Lowering the unemployment rate is probably a common goal for all members of the EU. Nevertheless, in some cases the means are also goals in themselves, such as a suggestion to increase the level of unemployment benefits to increase the living standard and motivation of individuals outside the labour market. The entanglement of goals and means can also cause political conflict, not simply the means themselves. Thus, the employment guidelines are not neutral devices, benchmarks are not manifestations of scientific facts, nor are indicators deduced in a scientific manner but rather “subject to political bargaining” (de la Porte and Pochet 2002: 33). Thus, democratic experimentalism may not be adept to accommodate the type of political conflict that originates from disagreement of principles.

In addition, under the EES, citizens have little opportunity to influence the broad goals. Both the European Parliament and national parliaments are insufficiently involved, and in systems of multilevel governance, a national government can, especially in cases of opaque processes, easily play the blame game by claiming that another member state trumped its preferences (Papadopoulos 2006). Proponents of democratic experimentalism claim that elected officials will be held accountable for

the performance of both the “governing councils” and the “service providers” through election campaigns that publicise comparisons (Dorf and Sabel 1998). However, EU election campaigns are rarely committed to the comparison of performance between member states. They are nationally oriented and dominated by national actors (Hix 2005). Moreover, as I pointed to above, the EES is seldom a topic for national debate. The right to contest decisions is one of the democratic conditions spelled out by democratic experimentalism, but in the case of the EES, it may be hard to exercise because only binding measures can be annulled (Smismans 2005b). This means that it is difficult to “directly challenge the guidelines for failing to respect fundamental rights” (ibid: 8) by bringing them before the European Court of Justice (ECJ). Basic rights would probably be at less risk, as they are carefully protected by most member states, but it would be more difficult to claim a social or economic right unless the principles of the EES are adopted by national legislation or influence other policy areas where the Union has legislative competence (ibid.).

Both a long chain of delegation and lack of legal regulation make it difficult for citizens to contest decisions. In addition, the above exploration has shown that the affected parties supposed to hold their governments accountable do not seem to be bothered about the EES. With limited resources available, the most rational strategy, whether for the trade unions or civil society, would be to try and influence the most powerful processes. Consequently, because the EES is regarded as a soft law measure, several believe it to be too weak an instrument to balance the large number of economic directives deriving from the European Commission (Trubek and Trubek 2005). As a result, the lack of sanction mechanisms affects how political processes are perceived, and ultimately how well it performs both in terms of efficiency and democracy. EU institutions have no power to correct disobedience, and must rely on “naming and shaming”, but in order for this mechanism to work, the reputational cost of non-compliance must exceed the cost of conceding. The problem is, as we just have seen, that this effect is impaired by the low awareness of the EES in the member states, apart from actors directly involved. In short, there is no one to “name and shame”.

Some of the remarks above will also be discussed in the next chapter that compares the experimentalist perspective on the public sphere against that of government by law. *Inter alia*, they may serve to elaborate the point in chapter three about the core criteria acquiring different salience according to the form of institutional design they are incorporated into. First, however, I will sum up some of the main findings of this chapter, and point out the main implications for the development of a European public sphere.

4.3.4 Contributions to the development of a public sphere

By comparing the above findings to the four core elements that were elaborated in chapter two, triangular structure, openness, inclusiveness and influence, I will try to give some tentative conclusions about how the European Employment Strategy might contribute to developing a public sphere.

The communication that takes place in the arenas of the EES is no doubt of public interest. However, Europeans seem to have enough with each of their own national labour market policies; they have neither the time nor sufficient interest to challenge these issues at the European level. The media show very little interest and this may also be aggravated by the complexity of the process and its occasional opacity. Taken together, this means that the Employment Strategy has a triangular structure, but the audience is not paying attention. From a public sphere perspective, this can be considered from two different angles – the input side on the one hand, and the output side on the other.

On the input side, the inclusiveness of the EES process shows ambiguous results. Broad participation is encouraged by the Commission, but member states are hesitant to comply. The European Trade Union Confederation (ETUC) deems that it has not gained sufficient access to the process, and this outcry resonates throughout the member states, or at least the “old” ones. At the same time, lower level as well as social partner participation appears to have increased with the EES, and it has become a point of reference for organisations of both governmental and civil society-origin. It is of course an open question whether or not these shared standards are constitutive of

new solidarities as indicated by experimentalism; nevertheless, they constitute a legitimising framework that serves as a basis for, and can justify, criticism across national borders (Jacobsson 2004). In other words, it may encourage the exchange of arguments across public spheres, and thus improve permeability. At the same time, this framework may have a restrictive function, as I pointed to above, by framing issues of employment in a certain manner which may prevent the consideration of information and arguments that do not “fit the picture”. Then again, the study of deliberation in the EMCO showed that the framework loses ground when participants discuss issues that are nationally sensitive, which also corresponds with the poor coordination of policies contradicting national ideas. For instance, despite receiving three recommendations to improve social partner participation, the Greek government has not yet changed its practice (de la Porte and Nanz 2004). Consequently, as is obvious from the above analysis, the lack of sanctioning power is a recurrent problem because the alternative mechanism of “naming and shaming” works poorly without attention from the broader public.

It may seem like an overstatement to talk about threats to democracy if member states do not to comply with EES-policies, since the use of the open method is limited to particular policy areas. However, the EES has strongly influenced other parts of the EU labour law by shifting the focus from social to employment policy (Smismans 2005b). Moreover, despite an unwillingness to comply, the EES has had a significant impact on the labour market, e.g., in terms of a “process of convergence around a growth-oriented macro-economic philosophy” (Ashiagbor 2005: 300). I have already shown that the trade unions are dissatisfied with the lack of inclusion in the coordinating work of policy areas. Some have even gone so far as to warn that this absence may undermine the input that the social partners have already made in the Luxembourg process, i.e. the EES (Foden and Magnusson 2002). It would probably be unwise to dismiss the Employment Strategy because it has not managed to secure a systematic coordination of concrete policy initiatives as of yet. Still, if merely because of its framing of normative standards, the EES produces problems of accountability.

This points to the issue of output. Studies of the Employment Strategy have shown that there is a clear development towards a common understanding of the challenges facing the EU, and that this has led to shared definition of problems, and also a general accord on how to approach these problems (GOVECOR 2004). The problem is that although social partners, civil society organisations and citizens' movements were all part of producing this framework, this would not mean that the outcome is accountable. It would demonstrate a high degree of responsiveness, but that is not necessarily the same as accountability (Bovens 2006). Democratic accountability requires in addition that citizens can sanction decision-makers, and as I have just shown, there is not an abundance of effective sanctioning possibilities inherent in the EES. Thus, if the organisationally dispersed public spheres that are depicted by democratic experimentalism are to escape isolation, it has to be assured that the public sphere can gather at an aggregated level both to form comprehensive public opinion and demand justifications of broad goals.

In sum, this means that it is difficult to conclude that the hypothesis that the open method character of the EES contributes to the development of a European public sphere. The Employment Strategy is a rather well kept secret. It is also more administrative than political, and the member states seem quite content with the situation. Part of the explanation may be the soft law-character of the EES and the lack of sanction mechanisms at its disposal. At the same time, the fact that the EES appears to be challenged by different structural constraints does not mean that it has to be written off as ineffective. Democratic experimentalism calls attention to the nascent infrastructure and the development of a normative frame of reference, which demonstrates that there is a potential for the EES in generating a public sphere, assuming that the potential for a common concern represented by the Employment Strategy is perceived as such. Furthermore, the EES serves as an example of the type of institutional design for the public sphere envisioned by experimentalists. Against this backdrop, in the following chapter I will explore the particular institutional design they propose by comparing it to Habermas' government-by-law model.

5. Experimentalism and government by law

In chapter three I assessed the democratic attributes of the experimentalist public sphere. One of the things that became apparent was that the core criteria – a triangular structure, openness, inclusiveness, and influence – acquire different salience according to the institutional conditions designed to uphold them. Thus, in this chapter, I will take a closer look at the institutional design proposed by democratic experimentalism by comparing it to Habermas’ government-by-law model. The reason for doing this is that these two models represent different ideal types, especially in institutional terms. Secondly, several experimentalists have used Habermas’ model to illustrate why their democratic model is more advanced. Accordingly, the hypothesis is that the experimentalist institutional design is a reasonable alternative to the government by law model. It is important to underline that the following analysis is a normative assessment; the current design does not constitute a basis for determining which model contributes the most to the development of a European public sphere.

Both democratic experimentalism and Habermas’ more traditional conception of democracy have a similar core, namely that of deliberative democracy; they both regard that legitimate decisions issue “from the public deliberation of citizens” (Bohman and Rehg 1997: ix). Both also assign a principal role to the state apparatus and acknowledge its importance for the democratic functioning of the public sphere. This means that they recognise that central institutions are fundamental for reasons of control, sanction and organisation (cf. Habermas 1996a; Dorf and Sabel 1998). However, as I will demonstrate below, the differences between the two models are more frequent than the similarities. Moreover, these differences have implications for both the form and function of the public sphere. This rests largely on the different institutional designs represented by the theories, which can be arranged according to two dimensions. First of all, there is a divide between how they conceive of rights, defined by Habermas as the foundations of the public sphere (1962/ 1989). Democratic experimentalism depicts rights as “inevitably experimentalist”, meaning

historically contingent and linked to identity (Dorf and Sabel 1998: 452). Habermas, on the other hand, regards rights as internally connected with popular sovereignty expressed through the medium of constitutional law. Thus, while democratic experimentalism views rights as contingent on political processes, Habermas would assert that the political process itself is constituted by a system of rights that if trifled with, would eliminate the foundations of a legitimate political system (Habermas 1996a). This divergence on the conceptualisation of rights is also closely connected to the second dimension – the separation of powers and competences. To Habermas, the separation of powers is essential to the constitutionality and legitimacy of the state. It is also closely connected to the division of competences between state and society, i.e. the decision-making centre and the public sphere. Conversely, democratic experimentalism sees the traditional separation of powers as a barrier towards efficient policies because it is equivalent with the imposition of uniform measures. Instead, an idea of constitutionalism is promoted, where means and ends are decided concomitantly, unrestrained by a rigid constitution and an impeding division of competence (Cohen and Sabel 2003). In sum, these two dimensions constitute two very different designs for the public sphere. Below, I will compare democratic experimentalism to the government by law model to see what the former has to offer in constituting a reliable institutional framework for the public sphere.

5.1 Rights

Democratic experimentalism does not leave rights at the will of popular fancy. Although rights are seen as dependent on historical processes, this implies that they have demonstrated their reasonableness and survived historical changes. During debate, references to rights that are regarded as ‘constitutional’, i.e. fundamental to the democratic procedure itself, have precedence over reasons categorised as ‘political’. Constitutional reasons have a deliberative prerogative because they cannot “permissibly be denied” since they manifest the “standing of citizens as free and equal” (Cohen and Sabel 1997: 327-8). In other words, constitutional reasons make democracy manifest, while political reasons are not democratically indispensable and can therefore be legitimately contested. Furthermore, Cohen and Sabel underline that

a fundamental requirement of democratic experimentalism is that claims backed by constitutional reasons must be given “stringent protection” (ibid.). The question is *what* will be protected, *who* are going to protect these claims, and *how* they will be protected. The two latter questions will be treated in the section below on separation of powers, while the question of “what” refers to rights and will be addressed first because it serves as a background for the issue of institutional design of the public sphere. If one accepts that a theory of rights should “make possible the construction of rights-respecting institutions” (McKinnon 2003: 18), then the two approaches can be divided according to how they protect rights, but this is also interdependent with how one conceives of the status and development of rights.

To Habermas, what makes an action norm valid is its acceptance through rational discourse by all those affected by it (Habermas 1996a). Thus, the principle of popular sovereignty is the basis of legitimate law, and popular sovereignty presupposes the existence of basic rights that guarantee the private and public autonomy of citizens, i.e. guarantee their basic liberty rights, legal status, and legal protection, as well as access to political participation and hence self-legislation (ibid.). In addition to the protection and provision of living conditions that will allow citizens to utilise the above rights, this sums up Habermas’ “system of rights” that denotes the framework of legitimate regulation of collective will-formation. In other words, they express the “rights citizens must confer on one another if they want to legitimately regulate their interactions and life contexts by means of positive law” (ibid: 122). Finally, this explains why the constitutional state is inter-reliant on democracy: the former needs the latter to be valid, while the latter needs the former to be realised in a legitimate manner²¹.

21 The experimentalist divide between constitutional and political reasons appears to resemble the divide that Habermas makes between norms and values, where norms refer to some higher-order principle while values signify “more or less particular forms of life” (Eriksen and Weigård 2003: 134). However, to Habermas, moral norms depend on, and are co-original, with law, because morality is not a basis for action but only tells us what is right and just. On the other hand, morality legitimates the law because a decision is not legitimate through mere legality; it needs the legitimation of self-legislating citizens and must thus be submitted to a test of communicative reasoning to determine “whether (...) aims are in accordance with moral insights” (ibid: 137).

By contrast, according to Dorf and Sabel, it is a paradox that despite a general recognition of rights as historically contingent, this has “only served to reinforce commitments to the centrality of rights” (1998: 448). This does not mean that rights contradict the idea of experimentalism, which would be a plausible inference given that everything can be experimented with as long as decisions are justified. Because decisions are not made by rational consensus, majority decisions are unavoidable, and although the process of reason-giving is thought to sweeten the defeat and increase the level of acceptance, one could imagine a situation where one constitutional reason was trumped by another constitutional reason, resulting in a serious regress for minorities.

However, Dorf and Sabel oppose this line of criticism by explaining that although experimentalist rights are not rights in the foundational sense – they are not “real” – they still have a special status because they are “part of who we are” (1998: 448ff). Not only are rights “preconditions of humanity”, they are also developed through history, and are thus entrenched in our collective self-understanding. Moreover, the centrality of rights to “our” identity is confirmed by their persistence despite “the discovery that rights at the most abstract level are not “real” in the sense of having firm foundations”. Therefore, a phenomenon like slavery will never be reintroduced as an experiment, but only because we come to learn that “the constitutional prohibition of it rests on the interpretation (...) of certain norms (...) rather than on universal rights revealed to our forbearers and forever fixed in principle” (ibid: 458).

Featuring in democratic experimentalism, deliberation is democratic as long as it is exposed to the five full-blast conditions that inter alia include the protection of basic rights as well as the right to contest decisions. Imagine that a law has been adopted at state level that declares the equal right to adequate education. One local unit has found out that granting extra funds to schools with over 60 percent pupils of language minority background comes closer to the right to adequate education. Subsequently, it obtains the highest score on an ensuing national benchmarking process. The information is spread to other local units, but they all choose to go on as usual with

equal funding to all schools. In each of these other units, only a minority of the pupils would benefit, and as a consequence their parents who participate in decision-making processes on their behalf are also a minority. Their voices may be heard but without any practical effect. According to Dorf and Sabel, it would “defeat the purpose” if the national legislature were to impose an equal funding rule to all schools (1998: 455), because the purpose is to allow local jurisdictions to decide on goals and means appropriate to their local setting. My point here is not to argue that every problem can and should be solved by adopting a new right. Rather it is to show that the potential problem with such “framework rights”, i.e. rights that are open to extensive interpretation, is that the rights a person has may be very dependent on where she or he resides. Consequently, an arbitrary interpretation of rights may also lead to inequalities. Another example is provided by looking at the European Employment Strategy (EES), which is unlikely to protect fundamental social rights unless it is able to influence national or European law. Instead the main challenge is allegedly to incorporate the language of rights into the content of the EES so that they become a part of the benchmarking process (Smismans 2005b). Nevertheless, the success of such a rights-programming of the EES would still be susceptible to voluntary compliance.

The question is how Cohen’s democratic process, which recognises the freedom and equality of all, resolves a conflict of rights? For instance, education could be regarded as a prerequisite for the exercise of fundamental civil rights. Imagine a situation where a poor minority argues that special attention to schooling is needed to compensate for disadvantaging social background. Moreover, they could argue that it is a common good that the educational level is high; for instance, it would tend to heighten the quality of democracy, and without affirmative action, chances are high that their groups will remain low on education and consequently also on participation. Everyone appreciates this argument as relevant and acceptable. However, the majority finds that such special attention would reduce the quality of the overall education. Both reasons could claim constitutionality; the problem is which one to choose as a basis for actual policy making, and how to make that choice. A related

question is whether the divide between constitutional and political reasons as straightforward as it may seem. In the above example, imagine for the sake of argument that some claimed that affirmative action within education is not a constitutional, but a political matter. As a result, affirmative action would not require stringent protection. However, others would still claim that their reasons for supporting affirmative measures refer to constitutional rights. Without suggesting that this question is easy to resolve within a system following the principles of government-by-law, it seems to me that democratic experimentalism makes it even more complicated and considerably more arbitrary, due to its emphasis on voluntariness.

At the same time, the principles of freedom and equality are not meant to protect rights by themselves, because any rights-infringement is, as I pointed out above, protected by a historically developed identity where basic rights have come to be understood as a precondition for humanity. Moreover, a basic premise for the model of democratic experimentalism is the assumption that “citizens – despite conflicts on interest and political outlook – agree very broadly on priorities and goals” (Cohen and Sabel 1997: 326). Experimentalists claim that heterogeneity is beneficial because it increases the number of outlooks on a given issue and hence the number of possible solutions, but at the same times “the participants must (...) share a view about relevant reasons” (ibid: 333). Compared to Habermas, the development and justification of rights along the lines of democratic experimentalism merges two discourses that he describes as operating according to two different logics.

There seems to be a tension between the experimentalist deliberative procedure and the common ground conception of rights. A focus on common ground as the basis for rights would denote what Habermas (1996) describes as an ‘ethical-political discourse’ clarifying a shared form of life and self-understanding. On the other hand, constitutional reasons refer to universal standards descriptive of ‘moral discourses’. Of course, in the real world different types of discourses appear concurrently and not side by side, but in case of conflict they could yield different results. Ethical

discourse generates arguments based on “the description of identity-shaping traditions (...) combined with the normative projection of an exemplary way of life justified through reflection on, and evaluation of, its formative processes” (ibid: 161). Moral discourse, on the other hand, is based entirely on “how we can regulate our common life in the equal interest of all” (ibid.). Thus, the former is not equipped to resolve questions of rights because rights have a universal orientation.

Although democratic experimentalism does not rest on a particular version of the good life, the history of the collective appears to gain precedence over morality. This does not mean that democratic experimentalism suffers the same problems a pure republican model by “neglect[ing] the differentiated character of politics” (Eriksen and Weigård 2003: 120), as its proponents are explicit about the fact of reasonable pluralism (cf. Cohen 1999). Rather it is their pragmatist point of departure that causes trouble, because morality, in the Habermasian sense where it contributes to legitimise the law, seems reduced to a matter of consequence. In their delineation of experimentalist rights, Dorf and Sabel explain why it would be “untenable” to separate two levels of rights – one that pertains to local decision-making, and one that includes traditional constitutional safeguards (1998: 444ff). Ultimately, it is the experimentalist restructuring of the political system, and more particularly, “a new understanding of the separation of powers [that] will reshape thinking about individual constitutional rights as well”. More specifically how this comes into play will be addressed below.

The upshot of these different rights-approaches may seem predominantly theoretical. However, even if history would suffice as the ultimate rights-respecting institution, there would still be practical consequences of the rights’ emergent character. Basic rights guarantee the existence of the public sphere because they ensure citizens’ private and public autonomy. Allowing experimentalism the capability of protecting basic rights, the problem remains that rights must be regarded as constitutional in order for them to be given “stringent protection” (cf. page 57). As a consequence, the question is not whether experimentalism can assure a right to participation, but if it is

able to protect the private autonomy of citizens in a process of benchmarking. Basic rights are fundamental in the sense that they have been benchmarked “all the way up” (Cohen and Sabel 2003). However, they still have an emergent character, and even if they are not under constant revision, it is still reasonable to ask the question of how anyone can appeal to rights “in progress”.

By contrast, Habermas’ system of rights incorporates “guaranteed legal remedies through which any person who feels that her rights have been infringed can assert her claims” (1996a: 125). Moreover, specific rights are expressed through law; thus citizens can make the claim that their rights have been violated by referring to a legal basis. Under an experimentalist regime, however, rights cannot be claimed isolated from an adjustment of goals to means. This heavily increases the burden of proof on part of the rights claimant, especially if she cannot back up her claim by asserting constitutionality, *or* that “who we are” demands the provision of policies according to rights. However, this provokes the question that I also have asked in the two preceding chapters, namely who is allowed to participate in framing certain issues or in the case of the Employment Strategy, in creating the cognitive framework it generates. This will also be further elaborated below.

In sum, even though it would be overstated to say that democratic experimentalism sustain a republican tradition equal, it seems reasonable to introduce a similar caveat, notably that individual rights stands in danger of being surrendered to the will of the majority (Habermas 1996b). In what follows, I will demonstrate that this might also be exacerbated by the emergent character of the separation of powers and division of competences.

5.2 Division of power and competence

According to democratic experimentalism, both rights and the separation of powers emerge from the actual political process. This is one of the main characteristics of the *democratic* quality of democratic experimentalism – to assure that neither structures nor content are decided prior to the consideration of goals in relations to means. In the words of Cohen and Sabel (2003: 369): “[W]ithout free expression, there is no

democracy; but the elaboration of the content of that right in light of alternative specifications is part of democracy's work". Immediately, this does not conflict with Habermas' conception of a system of rights, which is only meant as a set of principles that "justify categories of rights", but are "prior to concrete laws and rights", in the sense that they are not equivalent to positive law (Eriksen and Weigård 2003: 150-1). However, as the examination above indicated, the two theories represent divergent perspectives on the *development* of such concrete rights; due largely to the different importance allocated the rule of law. While democratic experimentalism assigns primary legitimacy to the principles that arise from actual communication within the boundaries of respect for freedom and equality, Habermas conceives of political power as legitimated by law. Law's connection to politics as well as to the state apparatus makes the use of state power "predictable, neutral and fair" (Poggi 1978, quoted in Eriksen and Weigård 2003: 179). Combined with the constitutional provision for the separation of powers and the institutionalisation of the public sphere, the law secures the principle of freedom and the exercise of popular sovereignty.

Before I move on to the comparison of experimentalism to government by law, it is important to understand Habermas' depiction of the relation between the law, the public sphere, and the division of powers. The exercise of political power is connected to law because it needs legitimating, and only the law can provide this type of legitimation because it has been adopted through legitimate procedures. The legitimacy of this procedure is based on the exposure of decisions to the public sphere, where they are subjected to the principles of communicative reason – deciding whether or not decisions are in accordance with moral insights. Furthermore, the public sphere is not only a critical player, it is also a source of legitimate power in the sense that policies should essentially emanate from communicative procedures in the public sphere. Both directly, and indirectly through mediating actors such as political parties, citizens influence decision-making through participating in the public sphere where issues can be brought up and tested with regard to whether or not they deserve public attention (Eriksen and Weigård 2003).

Finally, within the decision-making complex, policies are measured against a broader set of demands, e.g. political programmes, legal principles, established rights, precedence etc., before being implemented. Through the institution of this “political circuit”, the goal is to remedy asymmetrical powers. In other words, it checks that “resource-based power which exists in civil society is not converted into collective decisions until it has been tried by norm-testing reason” (ibid: 172-3). Against this backdrop, in what follows I will try to contextualise the above discussion about rights by focusing on two elements that conjure different institutional designs for both the form of the public sphere and its democratic function, notably the separation of powers and the division of roles between state and society.

The locus of the difference between the public sphere perspectives of Habermas and democratic experimentalism is that the latter assumes that means and ends are mutually defining, and that this should be recognised by not fixing any of them prior to an actual political process. In the words of Cohen and Sabel (2003: 368), “understanding the content of ends requires inquiring into means, and (...) understanding the content of means requires inquiring into ends”. I have previously described the institutional changes this model prescribes; nevertheless, I will give a short repetition here. Democratic experimentalists have no intention of eradicating traditional institutions like elections, legislatures, courts, executives. However, they are assigned new roles. Legislatures, through a realisation of their incapability to solve problems, take on the task of providing for *local* arenas of problem solving. More specifically, their job is to work out general goals, to assist and make resources available to local units, and afterwards review their work (Cohen and Sabel 1997). Administrative agencies become responsible for spreading information among the local units, while the courts are to make sure that the procedures advance in a democratic experimentalist way, i.e. “to require that problem-solvers themselves make policy with express reference both to constitutional and relevant policy reasons” (ibid: 335).

First of all, advocates of democratic experimentalism are well aware of the criticism they will face by suggesting that the separation of powers should emerge according to context, combined with a “fourth, administrative branch of recent pedigree and uncertain democratic legitimacy” (Dorf and Sabel 1998: 438ff). Nevertheless, they claim that their changes of the institutional architecture will not lead to tyranny, and that the administrative agencies, because they feed on direct deliberation by citizen users, are “the least dangerous branch of democratic experimentalism”. Since service units are coordinating the expertise of other units and not making policies themselves, the principal-agent problem that is a *result* of the separation of powers (ibid.) is allegedly resolved. In this manner, citizens become self-legislators directly and not indirectly through elected representatives. One intention of this particular design is thus to enhance democracy by instituting direct participation. The other side is that decisions made in these sub-jurisdictions supposedly become more rational by adapting solutions to the local perception of what the problem is. Since those participating in the decision-making process have first-hand knowledge of the problem, the information basis becomes more accurate, and because diverse information is promoted, the problem is elucidated from several angles through deliberative processes.

However, as I pointed to in the analysis of the European Employment Strategy as well as in the assessment of democratic experimentalism against the core elements of the public sphere, discarding a strict separation of powers as a principle for state rule may quickly result in problems of accountability. This is especially the case if a policy-making is not open to revision despite better arguments. Although advocates of democratic experimentalism claim that their framework promotes accountability and responsiveness (Cohen and Sabel 2003: 320), my counterclaim is that despite the best intentions, they are not able to resolve the principal-agent dilemma; instead they exacerbate the problem by not recognising the citizens’ role as *principals*. I will try to show why and how by pointing to two closely associated tensions that are inherent in democratic experimentalism, notably that between responsiveness and accountability, and that between Socratic and democratic accountability.

The need to distinguish between responsiveness and accountability has already been mentioned above, and if one accepts that accountability equals the availability of sanction mechanisms, then the disparity between responsiveness and accountability can be described as two different forms of responsibility where the former refers to standards of responsible behaviour, while the latter refers to ex-post account giving (Bovens 2006). By instituting direct deliberation in local units, democratic experimentalism would probably obtain a high score in an evaluation of responsiveness. Although they are far from indifferent to the issue of accountability – remember that this is to be obtained through the exchange of information between units – the benchmarking procedure is still only an instrument supposed to reveal different levels of performance and thus make local units adapt to best practice. If for instance an OMC-procedure were established on fundamental rights, as some have suggested (cf. Smismans 2005b), a “best practice-right” would be found on a continuum of no right to perfect compliance, contingent on the practices of the member states²². But would such a procedure not only add to the problem of arbitrariness, as rights remain the “victim” of the preferences of the member states without an institutionalised protection? Even if rights make up a separate OMC, or are incorporated into an open method-process like the Employment Strategy, it would still be difficult to contest broad goals or guidelines on the grounds that they are in breach with rights, as the European Court of Justice can only annul binding measures.

Conversely, democratic experimentalists reject uniform measures because they cannot fulfil the requirements of diversity and volatility. In a setting of organisationally dispersed public spheres connected by an accommodating centre, this begs the question of how citizens will be able to *contest* decisions. Following the experimentalist line of thought, benchmarks are elaborated by administrative agencies that administer the broad goals set by elected officials. However, as I tried to show in chapter three, the distance between the principals (the citizens), and the agents (the

²² Another question is how these benchmarks are elaborated. For instance, are quantitative or qualitative measures the best way to determine progress in employment policies?

local service providers), makes accounting and sanctioning difficult. Long chains of delegation blurs the lines of transparency, added to by the complexity of an organisationally dispersed process, whether in a vertical or horizontal sense. On the one hand, it becomes difficult for citizens to use their vote as an influential instrument, and on the other it is hard to identify the responsible actors.

The apparent precedence of broad participation over consequence is closely connected to the form of accountability that I find to hold prominence in democratic experimentalism, and which becomes apparent by distinguishing between Socratic and democratic accountability (Chambers 2004). While the former refers to the quality of the reasons that are presented to defend a certain decision, the latter refers to its legitimacy: “[w]e might say that the Socratic element stresses the rationality of public *reason* while the democratic element stresses the public nature of *public reason*” (ibid: 391). By emphasising the epistemic benefit of deliberative democracy, much weight is placed on realising the former type of accountability; thus, for instance, in a deliberative setting, reasons must be explicit, all relevant reasons must be given due consideration and so on (Cohen and Sabel 1997). Thus, both plans and procedures are benchmarked according to how they perform, and simultaneously exposed to a public. The question is whether this way of instituting deliberation can ensure that decisions are made according to public reasons, i.e. legitimately. In other words, can the experimentalist institutional architecture ensure that the preferences of citizens and groups in possession of superior resources or particular status are not transformed into policy unchecked?

By contrast, a governmental perspective on the processes in the public sphere aims to secure that public opinion is filtered through the system of legitimate law-making before being put into practice. Thereby, it constitutes a channel of democratic accountability not only because it retains a divide between state and society, as I will return to below, but because the procedures that have to be followed in order to make legitimate decisions are based on the separation of powers. Without disregarding the asymmetrical relation between principal and agents, administrative agencies are

nevertheless responsible to the legislatures because they operate within a set of rules. Of course, experimentalist service units do not act solely on their own, because their capacity to do so is constrained by the duty to supply information and have that information assessed by the court according to the principles of directness and deliberation, i.e. that decisions have taken both constitutional and political reasons properly into account. However, combined with what was just said about the lack of accountability of the overarching framework, the problem is; how can courts decide what proper consideration is without contributing to law-making themselves?

Following the principles of democratic experimentalism, rulings in the courtroom are not understood as a basis for ensuing legislation; nevertheless, courts will still give rulings on what they consider to be the best procedure. How can this ruling be made accountable to the public if parliamentary legislation is reduced to a minimum, and constitution-making is emergent? The point is that a parliament is not only a site for decision-making and control; it is also an institution with symbolic value, and its importance may be “less dependent upon its ability to initiate, modify or veto policies than upon its ability to convey signals, moods and impressions and to make others take its interpretations into account” (Olsen 1983: 39). From such a perspective, the parliament is essential to the functioning of the public sphere also because it provides principled directions.

Consider again some of the points that were stressed in the analysis of the European Employment Strategy, notably the trade unions’ scepticism towards the “real goals” of the EES. Although citizens will be able to directly influence their own everyday lives by participating in the public spheres designed by democratic experimentalism, their chances of influencing the framework that shape this activity may be smaller. Dependent on the question of how general the purposes that are decided by national legislatures are, the effect of participating in general elections nevertheless seems miniscule. Broad goals serve the purpose of allowing for local level simultaneous decisions on goals and means; however in terms of principle, these are often not easy to separate. Thus, the danger is that local autonomy results in arbitrariness because the provision and quality of services is dependent on where one lives. Moreover, the

particular services provided by a given local unit are further dependent on its performance in the benchmarking process against more or less successful projects. To a certain extent this is the case also in traditional political systems, because local and regional authorities are at liberty to set their own policies, but in most nation states, the central demands of uniformity have a much greater scope and depth. Combined with weakened abilities to contest decisions, or more specifically, the grounds for doing so, it is reasonable to ask whether the institutional design that democratic experimentalists intend to make local units take each other's opinions into account is strong enough to prevent a multitude of self-referential public spheres.

In the case of the EU, each member state has of course a greater leverage to decide its own policies, and considered as a local unit, citizens have the opportunity to appeal to their national governments to contest a decision. However, if a decision is made at the European level, the principle of democratic legitimacy requires that citizens can direct their demands to the *European* authorities, at least if one rejects the idea that European policies are sufficiently legitimised by national governments. The logic behind this constraint is that legitimacy should be awarded decisions at the same level as they are taken (Beetham and Lord 1998). Democratic experimentalism, however, is not too preoccupied with the more comprehensive form of democratic legitimacy. This is demonstrated by the analysis of the reasoning behind the emergent separation of powers, as well as by the performance of the theory in practice where the broad framework of the Employment Strategy is taken for granted and only used as a point of departure for the unfolding of experimentalist dynamics.

To sum up, as a result of the experimentalist emphasis on fluid structures and the removal of the traditional division of labour, the activities in the comprehensive public sphere change character because the flexibility of the public sphere itself borders on instability. This is not the result of a constant reconstitution, but rather of *how* it is constituted. On the one hand, it is fragmented according to functionality²³,

²³ This is not only a normative choice, but can also be seen as the result of a functionality and differentiation is a requirement of a modern state (cf. Trenz and Eder 2004).

and on the other, it surrounds a state structure stripped of most of its powers. Thus, as I have tried to show above, it becomes more difficult to know where to direct criticism and from whom to demand justification and accountability. Taken to the limit, every locally participating citizen can be held accountable. I will return to the issue of fragmentation and functionality shortly, but first this needs some explication because the problems that arise when decisions are made locally lead towards the second dimension that demarcate the experimentalist and government perspectives on the public sphere, namely that of separation between state and society. Again, my assertion is that the democratic experimentalist focus on ensuring responsiveness obstructs the role of the public sphere as a critical institution.

According to Cohen and Sabel (1997), the public sphere is heterogeneous and organisationally dispersed, and every public constituted around a common problem must be allowed to decide on both goals and means simultaneously. Conversely, Habermas argues that a strict separation must be kept between state and society where the former has both decision-making and opinion-making powers while society only retains the former. As a consequence, democratic experimentalists accuse Habermas of stripping popular sovereignty of power, while Habermas on the other hand maintains that that the public sphere must be kept distant from the corrupting power of the state (1996a). At first glance, it is an appealing thought that citizens are able to exercise direct influence on the matters that concern them the most, and subsequently put their decisions to the broader test of the entire citizenry. However, it also points back to the question posed above, namely whether experimentalism can ensure that differences in economic and class-based resources are not decisive for the outcome of a political process. I have already demonstrated that this may present a problem at an aggregated level due to problems of accountability and the potential lack of citizens' influence over broad goals, but the point I would like to make here is that with so much power allocated to local units, it increases the vulnerability of groups that possess less social power than others, either in terms of material resources and rhetorical skills.

Cohen (1989) confirms that he finds material inequalities an important cause of political inequalities and suggests initiatives like party funding to redeem the problem. However, is this consistent with the general focus on local decision-making comprising both means and principles? In short, what is the use of funding political parties if they are stripped of their main sources of powers through the weakening of governmental office? The problem of inequality is also aggravated by the functional character of the local units, i.e. the instrumentality of the public spheres. As I pointed out in chapter three, access to a decision making unit may depend on the knowledge one possesses²⁴, but also on points of view. It is surely easier to make a decision the fewer people that disagree with problem definition and premises. For instance, one could speculate that given the time-pressure that governments are put under by the European Employment Strategy, it is easier to omit actors from civil society and social partners that could generate disagreement. This necessity of “governability” is closely connected to the functional character of the public spheres that are generated by the governance process, but in addition to problems like accountability, which is problematic enough in terms of democracy, it also begets the question of whether functional public spheres permit the expression of citizens’ public autonomy. By contrast, Habermas envisions a public sphere that is sensitive to all questions precisely because it is not required to make a concrete decision (Eriksen and Weigård 2003).

As I pointed to in chapter three, “governable” public spheres may leave little room for opinions that cannot be hinged to the practical problem on the agenda. In other words, the agenda-setting powers of the public sphere could be diminished. According to Habermas, such “arranged publics” are less susceptible to “new ways of looking at problems than with justifying the selection of a problem and the choice among competing proposals for solving it” (1996a: 307). Furthermore, the comprehensive public sphere also acquires an instrumental character if its task is to

²⁴ According to democratic experimentalism, groups with special knowledge might be awarded special rights to participation (Cohen and Sabel 1997).

ensure the comparison of performance *across* units. Thus, the upshot might be that the room for addressing principal issues shrinks, as well as the opportunity for citizens to decide amongst themselves which issues that deserve public attention, and thus generate public opinion. In sum, as a result of participative empowerment of citizens, the activities of civil society and the public sphere are more focused on problem solving and less on political supervision and steering. Combined with the potentially weakened role of parliaments not only as law-makers but also as carriers of principled influence, it is difficult to understand where a principled debate will take place in an experimentalist society, not to mention the debate about whether or to what extent concrete policies match these principles.

Furthermore, it is important to ask whether democratic experimentalism may be overburdening its citizens. They are taking over the role of professional politicians who on the one hand might be vulnerable to the accusations of detachment, but on the other are in positions that allow a comprehensive consideration of reasons and resources. Direct democracy demands a lot from citizens, and may aggravate inequalities rather than balance interests if access to decision-making is conditioned on knowledge or opinions, as I mentioned above, or even through self-selection. One could probably remedy this latter aspect by actively recruiting participants from certain groups, but this also brings about the question of *administrative* overburdening. Courts, legislatures and agencies are awarded the difficult task of providing for local problem solving and supervising this procedure in detail. Thus, the question is whether democratic experimentalism actually implies a larger and more complex administrative system than the one it starts out criticising.

Of course, I do not mean to suggest that democratic experimentalists are wholly naive and unrealistic, but my impression is that there are a lot of challenges, especially with regard to democracy, that are left unanswered. On the whole, I think it is safe to say that democratic experimentalists have spent more time on working out the possible benefits of problem solving of experimentalism, than on how it can be realised through actual, democratic institutions, hence the focus on responsiveness and

Socratic accountability. As a result, the hypothesis that democratic experimentalism is a reasonable alternative to the government-by-law model, is not strengthened by the above analysis. At the same time, it is equally important to underline that I am not suggesting that Habermas' perspective on the public sphere is superior in all respects or flawless as an analytical instrument or normative model. In fact, the above comparison also calls attention to some of its weaker points, e.g. with depicting the public sphere as an arena with no formal powers surrounding the governmental decision-making complex. These last points will be elaborated below.

In this chapter, I have focused mainly on the challenges that the public sphere perspective of democratic experimentalism faces due to an institutional design that seems to generate arenas for fragmented rather than comprehensive communication. In the following, concluding chapter, I will sum up the assessment of what experimentalism has to offer in the study of the European public sphere both from an analytical and normative perspective, and then say something about how institutional aspects of the EU may contribute to the development of a European public sphere.

6. Conclusion

In this thesis, I have used the democratic experimentalist model to explore how institutional aspects of the EU contribute to the development of a European public sphere. My approach has been threefold. First, I assessed the democratic quality of the experimentalist public sphere concept. Secondly, I looked at how the model applies in practice by analysing the European Employment Strategy (EES). Thirdly, I went deeper into the normative framework by comparing the experimentalist institutional design for the public sphere to Habermas' government by law model. Below, I will try sum up the findings by looking at what experimentalism has to offer in both analytical and normative terms. In other words, what is the particular contribution of democratic experimentalism to the understanding the European public sphere, and secondly, how can one assess its normative added value? My goal is to show that while democratic experimentalism may have significant shortcomings with regard to democratic safeguards, it nevertheless directs attention to the peculiar dynamics of the EU.

6.1 Analytical assessment

In chapter four, I analysed the European Employment Strategy (EES) – the prototype of the Open Method of Coordination (OMC) – using a set of indicators derived from democratic experimentalism. My conclusions are probably rather dismal seen from the perspective of democratic experimentalism because few of its indicators gave a thorough rendering of the EES. However, the analysis did point towards some promising, although embryonic, tendencies concerning institutional architecture, encouragement of broad participation and frame of reference.

First of all, chapter four showed that although the Employment Strategy cannot boast an infrastructure that would comply with the normative requirements of democratic experimentalism, the logic of the EES process embraces the idea of central preparation of arenas for exchanging information, as well as subsidiary decision-making. This is probably more visible at the European than the national level, and it

is of course a grave problem that the European citizens do not seem interested. However the design creates a window of opportunity for both a broader array of participants as well as for the observing public. Although transparency is still a problem, the performances of the member states are exposed. The fact that European citizens are able to observe the same political processes is a necessary, albeit not sufficient, prerequisite for the development of a public sphere. To be democratic, citizens must also be able to participate in and control the decision-making process.

This does not mean that a low degree of inclusion is the biggest problem for the EES. Rather, broad consultation is another necessary but not sufficient democratic condition. The actual problem is dual; one side is the lack of public influence on the processes that decide on the broad framework goals, another is that at the national levels the EES infrastructure deviates from the European pattern. Because the political processes in the European Council are closed, a European audience is effectively blocked out. Moreover, post-justifications become more vulnerable to the blame-game when participants do not have to disclose their own actions. However, I would like to focus on the latter point, namely that subsidiarity becomes an excuse for governmental dominance. The EES process rarely coincides with the national processes. Thus, it may not seem that there is a great need to pay attention to what is happening at the European level, because the important decisions are made in each national parliaments. This inference largely depends on the effect that is awarded the EES, and as I have pointed out earlier, the concrete effects seem to be dependent on the direction of each national policy programme. However, this does not mean that the Employment Strategy does not represent a difference. If governments refer to the EES process as a restraint on political choice, then it is important for citizens and civil society to be preoccupied with the EES as well as national processes. Consequently, the fact that the former runs parallel with the latter may overburden actors with less resources than the state authorities.

At the same time, the exploration of the EES showed that broader participation is encouraged both by the Commission, through the guidelines, and through financial

mechanisms like the European Social Fund. To a certain extent, this encouragement has shown some results. Transnational networks have developed, local partnerships have been established, civil society has used the EES to demand greater involvement and local actors have expressed the need for stronger structures (COM 2001 629 final). However, the process has not activated the national parliaments, the broader public or the media, who are unfamiliar with the process. Thus, one structural prerequisite for the public sphere might be in place, but the majority of the actors who are actually affected by the Employment Strategy do not pay attention. By contrast, the infamous Service Directive stimulated a huge debate, and even European level demonstrations.

Given that one main effect of the EES is the development of a normative framework, one could also say that there is a principled debate taking place at the European level, not entirely out of reach, but certainly outside the scope of attention of the European citizenry. This means that the EES has contributed to the development of a European public sphere in the sense that it has built up nascent cognitive and material structures for debating employment issues, but at the same time, these structures do not connect to the larger public. For the development of a public sphere this is a larger problem than the lack of inclusion in deciding on guidelines or preparing National Action Plans, because it means that the audience is not listening. Again, the point is that it does not suffice to create opportunity structures for observation and participation if there is no interest from the side of the people that are supposed to constitute the audience; whether it is the citizens, media or civil society.

At the same time, despite the disparity between the democratic experimentalists' ideal and how the EES actually functions, the above analysis of the EES calls attention to two important things. First that the normative framework constitutes something common, of general interest, and in effect an arena where it can be discussed, regardless of the lack of attention it actually receives. Secondly, the member states appear less active than the European level in encouraging public engagement. In my opinion, this shows that a well-functioning public sphere at the European level must

be manifested in the Europeanization of existing national publics, i.e. must be able to launch lively public debates at the national level. Conversely, if the EES process in the member states is reduced to technocracy, it is not a big surprise that the process at the European level is described as “transgovernmental” (Jacobsson 2001: 9). Thus, it would be interesting to find out whether, and to what extent, national governments use obligations to their European cooperative partners as arguments for policy decisions.

In sum, despite the numerous structural constraints, as well as an alarming lack of public attention, I still think it is possible to conclude that the Employment Strategy has the potential to generate a public sphere. However, the question is whether its lack of achievement as of yet can be explained by failures of institutional design or other preconditions such as lack of collective identity. Of course, I will not attempt to answer this here, but the theoretical considerations below may at least shed light on a few related questions.

6.2 Normative assessment

One main question is whether the exploration in this thesis leads to the conclusion that democratic experimentalism stimulates a new conceptualisation of the European public sphere. To answer this, I will draw on the findings of all three analytical chapters. However, I will start by pointing out how democratic experimentalism, more or less explicit, tries to replace the weaknesses of Habermas’ model with an alternative that allegedly is more in tune with a modern condition of diversity and volatility and realises a fuller potential of democracy (Cohen and Sabel 1997).

As I mentioned in the chapter two, experimentalists have criticised Habermas for restraining the public sphere by promoting justice at the expense of effectiveness (ibid.). Thus, they point to a problem that has also been criticised by others notably that by insisting on a strict separation between the functions of the state and the public sphere, it becomes difficult to see how the public consists of self-legislators, i.e. how they affect political decisions (Bohman 1996; Eriksen and Weigård 2003). Furthermore, Habermas’ core-periphery model relies on the existence of channels of

influence that link opinion-formation in the public sphere to will-formation in political institutions, such as the political parties, as well as on media as a central arena (1996a). In an EU context, there are few European-wide media (Eriksen 2004), and as I pointed to in the analysis of the Employment Strategy, the national media do not necessarily pay much attention to every type of activity at the EU-level. With regard to the parties, they do not play the same role in the EU as at the national level. For instance, some assert that European party activity is confined to the European Parliament and that there is only a very weak electoral connection between the MEPs and the voters (Kreppel 2002), while others go as far as to say that parties are no different from other types of actors in the European governance process (Ladrech 1998). Furthermore, Gerstenberg claims that the autonomous legal system advanced by Habermas will quickly turn into legal domination because the European public sphere does not have the capacity to control and criticise the European Court of Justice, and as a result, this view “exempts citizens and social actors (...) from the task of taking into account and interpreting constitutional reasons” (Gerstenberg 2002: 356).

Consequently, one interesting supposition is that governance processes such as the EES, can play a more important role in the EU than in each of the member states due to the special case of the European Union. In other words, such processes could also be seen potential substitutes for, or at least constructive accompaniments to, the lack of European party politics. To establish this for certain would of course require a thorough comparison, but at the same time, it is an important consideration to make in discussions about the development of the public sphere. And democratic experimentalism may actually be of some help here. My point is that by downplaying the role of central institutions, democratic experimentalism avoids some of the problems that arise when a national structure is transferred to the European level. The question is whether democratic experimentalism also presents a convincing case for an alternative understanding of the European public sphere. The conclusions above demonstrate that although democratic experimentalism brings out some interesting features of the Employment Strategy, it also shows that the EES does not activate a

public sphere. Moreover, I believe that the exploration of the EES point to some of the more normative problems that experimentalists encounter by operating with an institutional design that depicts an organisationally dispersed public sphere.

The assessment of the public sphere perspective of democratic experimentalism against a baseline definition indicated that the structure posited by experimentalists is perhaps too flexible to provide for stable processes. Put differently, this means that while the ideal model clearly denotes a triangular structure with emphasis on openness, it does not provide sufficient structures for inclusiveness and influence. Although citizens, or at least representative groups of citizens, are allowed to participate directly in local decision-making processes, what is lacking is a specification of when and how other actors, not belonging to the particular local unit, may participate. Decisions that have indirect consequences, i.e. consequences to persons besides those deciding on them, could be used to define public issues (Dewey 1927). Of course whoever feels affected by a decision-making process cannot participate in it, but this begs the question of how citizens *can* affect issues that they perceive as common concerns. The role of representative institutions such as parliaments is curtailed in the experimentalist model, but a reasonable alternative is not presented.

It would be a misconception to say that a person is a self-legislator if her ability to influence a decision-making process is restricted to what goes on within the local units that she belongs to. Precisely because public issues have indirect consequences, citizens will be affected by decisions made elsewhere. Democratic experimentalists' offer of direct participation cannot compensate for the apparent overthrow of the citizens' role as principal²⁵. Admittedly, the new political architecture institutes a continuous comparison of performance and procedures *across* units as well as within – this is one of the conditions for democracy. However, the question is if principles should be put to practice on basis of a benchmarking procedure. Against the backdrop

that the development and safeguard of rights are part of a continuous process where rights are evaluated in the context of goals adjusted to means, minorities may have a harder time voicing their concerns. The reason is that a comparison among local units will not necessarily include their apprehensions if it is not a benchmark or part of a local unit strategy. In a political system with a clearer division of labour and a separation of powers, minorities who feel neglected could for instance appeal to the national legislature. But since democratic experimentalism removes parliament's power to instruct, except for deciding on very broad goals, it would not be of much help. Appealing to the court could be a similarly disillusioning exercise because the court does not rule on a set of given laws, but on its own assessment of constitutional and political reasons. One could also add to this that it may become harder to create powerful counterpublics or gain influence with opinions that have no direct connection to functionality when the parliaments are also consigned to assist local units. In short, what is at stake is the public sphere's character as a critical institution.

In my opinion, democratic experimentalism is not capable of correcting the fragmentation that is caused by allocating more power to autonomous local units, partly because by removing the separation between powers, the filtering of power is weakened, and partly because the redistribution of competence makes it more difficult to hold decision-makers accountable. Regarding the former, it seems to be the local units that are supposed to provide a form of filter through the benchmarking procedure, and in effect check themselves by being exposed to better performances. But the problem is that the main purpose of this process is to benchmark performance, and as I have just pointed out, it is uncertain whether principles should be decided on according to best practice. With regard to accountability, the question is who to hold responsible if one believes that a decision has violated an important right.

²⁵ In addition, there is the problem of affectedness, that is also challenges Habermas' government by law model. If the principle of affectedness is taken to the extreme, then citizens in other countries would have the right to participate in decision-making bodies all over the world if they were, or perceived themselves to be affected by a given law.

If what experimentalists claim is true, that societies basically share the same goals or rest on some common ground, then it is probably more understandable that deciding on rights according to best practice would produce fair results, because they would be safeguarded by a form of historical collective identity, although not necessarily confined to territory. But at least in the case of the European Union, which could not be viewed as consolidated in this sense, such a common ground is not to be expected. Admittedly, the European Union represents a special context, but I believe that it also would be important to keep this in mind when applying the experimentalist ideal to the nation state.

To sum up, the public sphere perspective of democratic experimentalism does not seem to present a very convincing case as a normative model for the European public sphere. However, the explorations in this thesis have called attention to aspects of the EU's institutional design that are important for its development, both from an empirical and normative perspective. First of all, the normative analyses have shown that it is important to be aware of the problems inherent in theories that suggest governance processes as a democratic alternative, especially in the case of the EU where these processes tend to be applied in sensitive areas such as employment and social policy that historically have been exempted from European legislation because they have not met with political support (Jacobsson 2001). Thus, this thesis has suggested that the promise of inclusion and increased participation that is incorporated in democratic experimentalism must not be confused with the development of a comprehensive, not to mention accessible, public sphere that is able to criticise and influence decisions. Furthermore, as an analytical model, experimentalism draws attention to new structures that may provide for the development of a European public sphere if it is able to activate the European citizenry. Moreover, this becomes all the more interesting because the institutional prerequisites that are derived from a governmental model face huge challenges at the European level. While the latter presents dismal prospects, the former might represent an interesting proxy.

Secondly, the exploration of the Employment Strategy illustrated that the EU cannot take the entire responsibility for the lack of activation of a European public. It is at the national level that the infrastructure of the EES meets most resistance, and this may indicate that without an effort from national governments to generate a Europeanised public debate, or if coordination strategies like the EES continue to be dominated by governmental actors, a viable European public sphere will have a hard time developing. Thus, it would be interesting take a closer look at the reasons for the lack of inclusion of other actors, as well as the reasons for failure to coordinate the European and national employment policy processes.

This means that a conceptualisation of the European public sphere and its institutional conditions must also include an understanding of its institutional design at the national level, i.e. of the subpublics. Transnational networks are important, and some have indeed been constituted in response to the European Union and at the European level²⁶. Nevertheless, I believe that it is likewise important to focus on the national levels and national actors. At this moment, the Employment Strategy has produced a cognitive framework that also affects other policy areas. This framework generated by the EES shapes employment policies all over Europe, but as long as governments and technocracy continue to dominate, the real impact of the EES will remain vague, regardless of its actual effect. As a consequence, it becomes less clear why anyone should respond to the EU as a decision-making centre because it is not obvious what effect it actually has. And judging by the member states' reluctance to respond to the Commission's encouragement of broader participation, this situation seems to suit the governments just fine. Accordingly, the problem of inclusiveness and influence must be addressed at both the European, but also at each national level. In other words, because of the multi-level structure of the European Union, in order to create a European public sphere, national public spheres must be Europeanised in

²⁶ See for instance www.anothereuropeispossible, for one of the initiatives that has developed in response to the European constitutional process.

the sense that non-governmental actors are allowed, and invited, to participate in European processes at the *national* level.

Democratic experimentalism shows that the European Employment Strategy could contribute to the creation of a common communicative space in the EU. The structures are there and a collective frame of reference is developing. However, a broader range of actors and the entire European citizenry must also take part in the process of defining the principles for the direction a European employment policy, if not directly at the European level, than at least within their own home countries. A European public sphere cannot consist of 25 national publics that do not overlap; however, it is important to remember that it probably cannot exist without them either, and that this has to be taken into account when trying to understand how a European public sphere develops.

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