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**Governance without government?  
Reflections on the orders of the European Union**

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Paper presented at the 1997 Conference of the European Communities Studies Association,  
Seattle, 29 May - 1 June.

### ***Abstract***

This paper argues that research into new forms of governance in the context of the European Union has been more successful in finding new vocabularies to replace the “order”-role of the state than the “justice”-role. In relation to the latter, this kind of research still remains within the traps of the modern territorial state. It is argued that a reconceptualization of European governance using some central tenets of modern systems theory can show some openings as to the possibility of addressing the problem of democratic legitimacy in elusive processes of governance.

### **1. Introduction**

“Governance without government”, “dynamic multi-level-”, “networks”, new forms of citizenship and public-private relations, post-Westphalian states etc. Not only is the European Union an ambitious yet difficult political, economic, social and cultural project; it also has to serve as *the* (sometimes it seems one and only) empirical test case for conceptual innovations in various sub-fields of the social sciences. It seems by and large accepted by now that *sui generis*-arguments are not of much help in explaining the peculiarities of the European Union and the ensuing need for peculiar conceptual constructs. *Sui generis*-arguments traditionally have been the life vests in case an argument in the realm of legal dogmatics runs into contradictions, but they have no due place in a social domain which is constituted by constant and interrelated change. Yet, resorting to this kind of *sui generis*- argument is rather tempting since it offers an easy way out of the intricate problems that occur when one tries to bundle together the various conceptual and empirical pictures of the EU and try to figure out, to put it bluntly, what this thing called EU is about. To be sure, most of the more sophisticated attempts to make sense of the unique character of the European Union in an empirically informed yet conceptually rich way have resisted the temptation to seek such easy ways out of the various kinds of puzzles. Thus, a rich literature has emerged which seeks to understand how “governing” in dynamic multi-level systems functions, thus trying to escape straightjackets imposed by a vocabulary tied too close to the notion of the state.<sup>1</sup> This literature has bundled together subtle observations of the European integration process into an account of what “governing” or “governance” might mean in the future. On the one hand, this has

enabled this strand of research to stay relatively clear of a state-centered thinking, not resorting to analytic constructions that are marked by a long tradition of being linked to some at least implicit notion about the nature of statehood. On the other hand, this was done using a highly innovative yet very difficult approach, namely trying to cut loose the ties of empirical data to their state-centered conceptual concepts while to a great extent eschewing the (post-positivist, reflexive, constructivist etc.) epistemological critiques that point to the complication that it may well be the empirical data itself that is merely constructed by these state-centered conceptual concepts. Nonetheless and certainly not to the detriment of the quality of its analyses, some of the literature on European governance has taken up some of these conceptual/epistemological issues lately. Thus, for example, various authors have emphasized the role of ideas and discursive knots in order to explain how certain social “facts” are formed and take hold (i.e. become effective factors) in the process of European integration.<sup>2</sup> While these newer contributions mark some kind of an opening towards the mostly epistemological critiques put forward by various postmodernist, reflectivist etc. contributions, in sum the literature on European governance so far has not opened itself up to explorations of the possibilities and consequences of radical epochal change, i.e. the argument that the logic and language of the state is so deeply ingrained in our ways of thinking, that in the end there is no possibility to leave the state behind, so to speak, and simply advance to a new form of language, e.g. that of “governance without government”.<sup>3</sup>

This paper is not about trying to persuade researchers that try to explore new forms of governance in a European context to enter into discussions about epochal change. Quite to the contrary, it may actually be that the insight into the radical nature of breaks between vocabularies associated with a certain epoch calls for the continuation of research that tests the limits of old vocabularies, knowing that it is simply not possible to hop from one vocabulary to another (and still be considered talking coherently).

However, this paper is about the suspicion that the limits of old vocabularies have exactly been reached in relation to the question of the *legitimacy* of new forms of governance, a question that now figures prominently on the academic as well as political agendas.<sup>4</sup> In addition, however, this paper is also to suggest that in relation to the research on “governance without government“, the difficulties relating to the question of legitimacy do not call for an outright adoption of the

discourse on epochal change and all its associated philosophical problemata - although maybe at some point they will; rather, they first call for a conceptual broadening of the research on new forms of governance and associated questions of legitimacy. "Conceptual broadening" here does not mean stretching concepts or introducing new ones. It rather suggests that the inquiry into possibilities and terms of legitimacy of non-state-centered forms of governance in the context of the European Union (and maybe elsewhere) may profit from taking seriously the consequences and underlying diagnoses of some of the concepts which are in use already. This primarily refers to the usage of modern systems theory, whose insights have been selectively introduced in the literature on European governance, yet whose potentials have not been utilized to a full extent.<sup>5</sup>

In the following, I will present a brief systematic statement of the problem that has up to now only been formulated in terms of disciplinary discourse (2.). This will be followed by a short introduction to the thoughts, assumptions and theses that one buys into - and should buy into! - once referring to some central claims of systems theory, most notably the functional differentiation of modern society (3.). It will then be illustrated how this leads to new interpretations of developments that can be seen to be of central importance to the future form of Europe and European governance, namely the unequal Europeanization of various social systems (4). This will then serve to elaborate the limits of current models of legitimacy in the context of emerging structures and processes of European integration as well as to explore possible openings towards new such models (5.).

## **2. Governance without government**

If research on new modes of governance in the context of the European Union has shown one thing it is that governance cannot be reduced to interactions between hierarchically ordered institutions of the state. It is an entirely different and open question though if the idea of a "network" is able to provide a full account of how governance functions. It seems more likely that although the network concept is a necessary ingredient in any account of present-day European

governance, it is by no means sufficient, especially since it tends to underestimate the staying power of clearly bound and hierarchically ordered authoritative structures. The notion of “dynamic multi-level governance”<sup>6</sup> seeks to combine the insights into the staying power of the state with the undisputed reality that authoritative decisions are increasingly being taken in diffuse, democratically unaccountable networks of various kinds, be they informal structures of an “epistemic community”, be they committees on a European level (“comitology”). On the other hand, this strand of research is usually clearly aware of the necessity to avoid merely replicating models of order and ordering that perpetuate the state by thinking in its terms. Thus, the main interest of promoting the idea of “dynamic multi-level governance” is to make new such models of order and ordering imaginable in the first place. Promoters of this idea seem to be very clearly aware that the concept of the network is the most clearly visible, yet in itself not sufficient asset in constructing a more coherent idea of what this new type of governance is about. They are of course also aware of the fact that the ensuing problems for the practice and theory of democracy are yet to be solved.

I would like to put the problem in different terms however; it is exactly these “problems for the practice and theory of democracy” that are the hard nuts that any conceptual advancement towards a coherent formulation of a concept of governance has to crack. However, I suspect that most of the difficulties in cracking these nuts stem from the fact that analysts *tried to get away from the state too soon*, i.e. trying to adopt new notions of legitimacy without taking sufficient account of the existing practices of legitimacy. In part, this difficulty is self-administered by choosing “governance” as the central focus for inquiries into possible future forms of social order in the first place. As commonly understood, “governance” is about “collective problem-solving in the public sphere”, like “government” it is about regulation and control of societal processes, however less relying on a constitutionally/legally fixed monopoly of making authoritative decisions. Yet, as has been discussed in various contexts, if both governance and government address the question of how to achieve or sustain an *order* one way or another, their problem is that they are *only about order*. Or, to put it the other way round: “the state”, in whatever way it is defined could never be seen as a project of order alone. “The state”, and with it always comes a specific understanding of “the political”,<sup>7</sup> has always also entailed a project of “justice”, a project

which in relation to the modern state has usually been a specific one of “emancipation”. Of course, the tension between order and justice has never been a contradiction - an impression which could only arise if both concepts were taken as abstract, and only as abstract.<sup>8</sup> Rather, the tension has always been played out in a good deal of concrete, pragmatic interaction. Yet, looking at the process of European integration and asking “What comes after the state?” the dimension of justice, or, better: the tension between the dimensions of order and justice seemed to be curiously lacking from the analysis on new forms of governance (or the dimension of justice was in fact subsumed under the dimension of order). Only gradually has this been realized during the analysis of new forms of governance. At this point it seems clear that the legitimacy deficit of governance by and in dynamic multi-level systems can neither be reduced to the traditional question of the EU’s “democratic deficit” - a question that has usually been treated within the vocabulary of the state; it also seems clear, however, that the new vocabulary of governance/order has run way ahead of attempts to let the vocabulary of legitimacy/justice follow suit. Before addressing these issues in fuller detail, it is however necessary to further explore some of the possibilities that systems theory may open up to the research into the “new governance” in the context of European integration.

### **3. Social Systems**

If anything, this research has developed a sensitivity towards the “state”. It is clearly aware of the traps that the presence of state-centered categories leaves in various analyses. Thus, trying to move away from an all too unsophisticated or taken-for-granted notion of the state, research on new systems of governance found a source of inspiration in modern systems theory. Of course, it does not mean that all governance theorists would have wholeheartedly switched to and embraced modern systems theory; quite to the contrary, its reception seems more limited to heuristic uses. However, modern systems theory provided an attractive, far-reaching and well-developed social theory that does not operate with the notion of the state. It does not operate with the notion of the state, or, for that matter, “society” (or “state-society relations), because both terms have been

shown to be undercomplex conceptualizations of social reality. Instead, modern systems theory points towards the fact that as a result of the functional differentiation of modern societies, functional subsystems of society exhibit a high degree of operational autonomy.<sup>9</sup> This does not mean that the economic, political, cultural etc. system would not interact to a significant degree (in systems language: they are “coupled”). However, modern systems theory has made considerable conceptual advances over the older, Parsonian theory of functional differentiation by taking in some of the insights drawn from theories of self-reference that were developed in the natural sciences (by Maturana, Varela and others) and showing that highly developed social systems are open, yet operationally closed systems. Crudely simplifying the argument, this means that although they all form part of one complex social reality, they all operate according to their own “operational code”, their own “systems language”, so to speak. An important conclusion to be drawn from this, among other things, is that in modern societies it is no longer the political system which can claim supremacy over other social systems, i.e. claim to be the prime mover/regulator/steerer that makes authoritative decisions in relation to other social systems’ domains. To have an impact in another social system, any communication emerging from the political system is dependent on the observation by the other social system in question. Thus, the political system can no longer hope to be the prime representative of all social systems, but can merely engage in influencing other systems’ contexts in a decentralized manner. This obviously is a theory that is highly attractive to a conceptual enterprise that seeks to move away from simplified notions of the state and seeks to appreciate what governance is and how it is conducted by actually taking into account its full complexity. As already noted, however, governance-theory’s relation with systems theory at present does seem to have more the character of a romance than a full-fledged love-affair. Thus, for example, it appears unlikely that most governance theorists in spite of their principal sympathy with systems theory would follow through on the marginalization of the analysis of interaction in attempts to make sense of a social world comprised of systems; it also seems safe to say that most would also not underwrite the systems theorists’ sometimes highly ironical, if not cynical self-limitation regarding the status of social scientific inquiry (after all, “science” itself is merely an operatively closed sub-system of society). Rather than dwelling on the reception of modern systems theory in the research on new

forms of governance, I would rather propose, however, that systems theoretical thinking contains several more far-reaching tenets that have as yet not been taken up by/incorporated into conceptualizing governance, although they are potentially fruitful for advancing the argument. I would like to briefly outline the three tenets of “world society”, “system-subsystem-relation” and “system evolution” before raising the question of how they could contribute towards a broader conceptual perspective on governance especially in the context of the European Union.

### *World Society*

Modern systems theory performs a radical break with classical sociological thinking, for which some kind of normative-integrative concept is needed to define what a “society” is.<sup>10</sup> For modern systems theory instead, the irreducible element which marks the existence of societal relations is communication. If society is that which entails all communication, then (with the exception of some residual niche societies) there is only one society today, world society.<sup>11</sup> World society is the highest-order social system conceivable since it includes all communication; there is no *social* system outside world society; its environment is formed by biological, psychic systems etc.<sup>12</sup> The problem with the notion of “world society” is that it has experienced many uses, thus the term does not lend itself easily to “new” approaches. Yet it is important to note that world society here means something that is considerably different from most other usages of the term “society”: it is exactly not what we usually tend to associate with “society”, i.e. a bounded, normatively integrated realm of social order. It is simply the highest-order social system possible.

### *System-subsystem-relation*

The implications of this notion of world society only becomes clear, however, once thinking through its consequences for individual social systems. It basically means that “below” world society, all social systems are subsystems with various subsystems of their own etc. Of course there exist states, i.e. territorially defined “national” political systems. But these are subsystems of other, territorially or functionally defined political systems, such as the European Union’s political system or in turn the international political system. This may sound highly undramatic at first (and it is indeed very simple!). Yet to treat the European Union as a political system in its own right of



which national political systems merely constitute subsystems leads to an entirely different perspective on the developmental dynamics of these systems.

### *System evolution*

This is the point where systems theory's analysis of the evolution of modern social systems comes in.<sup>13</sup> To say, for example, that national political systems are subsystems of a EU political system which is but a subsystem of the international political system does at first say nothing whatsoever about the relative autonomy or degree of coupling between these (sub-)systems.<sup>14</sup> Thus, it seems to be by and large undisputed that a difference of sorts seems to exist between the international political systems and political systems in most countries, the latter being surely more developed than the former.

However, barely has attention been given to the way that one subsystem is inserted into the higher-order system and how the quality of this insertion changes dramatically with the evolution of the social systems in question. And herein lies the most important point that systems theory seems to be able to make in this regard: it is able to detach the notion of "systems evolution" from materialist or interaction-centered accounts and peg it to the *system's* capability to process communication, i.e. reduce complexity. Thus, the evolution of modern social systems can be explained as a sequence of new kinds of complexities becoming problematic for the system which henceforth has to devise new routine ways of processing these complexities in order not to be overwhelmed by them.<sup>15</sup> While most major functional systems of national "societies" have been analyzed in terms of their evolution, most "non-national" systems have not. If it is fair to assume that functional differentiation does not just stop at national borders, then there is no reason why non-national functional systems' evolutionary state should not be assessed in a similar fashion.

This is of course not to argue that systems theory does not exhibit limits of its own. One of the biggest of its shortcomings is undoubtedly the fact that in quite a lot of its analyses it falls back into the "territorial trap". After arguing convincingly that one has to distinguish between various functional subsystems of society, that "the state" is not a proper unit of analyses and that the political system can no longer claim to be the prime representative of either state or society, most

systems theorists would nonetheless assert that the political system is still predominantly about governance inside the boundaries of a territorial state.<sup>16</sup> It is, however, exactly this point that a growing literature on new international and European forms of governance and an “international civil society” make in regard to the changing relevance of these territorial political systems that systems theory misses in most cases. Thus, linking systems theory up with the study of new forms of European governance is not only of potential benefit to the latter, but undoubtedly also to the former.

The potential, yet under-utilized, strength of modern systems theory is that it provides a conceptual framework which allows to link together processes of functional differentiation which have been studied mostly at the level of “domestic” societies and processes of globalization. It allows to bundle these processes together into a process of global functional differentiation that is however characterized by a great variety in the evolutionary stages in the multitude of social systems. It is always important to bear this overall picture in mind when studying specific social systems, especially when taking into account the process of “generative differentiation”.

“Generative differentiation” is a means of dealing with complexity that is used by social systems at the highest order of systems evolution. At this stage, it is the system’s own complexity as a system that becomes problematic; this complexity can only be reduced by “discarding” certain system properties, so to speak. These properties cease to be included in the system’s self-description/-observation, and become observed as a part of the environment. Now these properties of course are not out of the world; they may become the (proto-)boundary for a new social system (at the lowest evolutionary stage). There is no reason whatsoever, however, why these properties should not be included in the self-description of a higher-order functional system. In order to assess the possible implications of this way of thinking for the study of new forms of governance in Europe, I will now turn to the question which apparently most easily lends itself to being explored in such a way, the question of a “Europeanization” of functional sub-systems of society.

#### 4. European systems

In a recent article, Markus Jachtenfuchs observes that in European countries various functional sub-systems of society are Europeanized to varying degrees, with the economic and legal systems highly Europeanized, yet the political and society-systems remaining at the national levels.<sup>17</sup>

Leaving aside the unclarity emerging from naming “society” as a functional sub-system of society (probably the element of communal cohesion/national identity is meant here), one can take this observation as a starting point in order to see how the perspective of modern systems theory would lead to an assessment which may not only be different, but allow for more differentiation in these matters.

Of course, nobody would claim that national legal and economic systems had been dissolved into the European legal and economic systems. It is doubtful, however, if such would be the appropriate way to address the issue at all. The question is not only whether “national” systems have become Europeanized and to what degree and whether the European system is still basically one dependent on national systems. The question rather also has to be if and how an increased coupling between social systems on a European level and its various, mostly nationally/territorially defined sub-systems has led to a predominance of the respective *independent* system on the European level. “Pre-dominance” here can be understood as being able to lay a more effective claim to process communication and interpret information. Seen in such a perspective, it is far from clear that it is the economic and legal systems which are most “Europeanized”. Regarding the economic system, it seems of course to be correct that a predominance of the system on the European level over the sub-systems at the national level has emerged, except maybe in those areas of the national economic systems that remain very strongly coupled with national social systems; however, this has to be seen against the background of the European economic system’s status in relations to the global or at least the OECD economic system. If the primary predominance for processing communication lies within the latter systems, research would first of all have to establish a case that the diminishing autonomy of national economic systems has been brought about by the evolution of the economic system on a European level in particular, or if the main driving force is to be sought in the development of an economic system on a larger scale,

such as the international financial system. Prima facie, however, it would seem as if the insertion of the European economic system and national economic systems into the international economic systems proceeded at least at the same, if not faster, pace than the insertion of national economic systems into the European economic system.<sup>18</sup>

Regarding the European legal system, it seems as if indeed a strong case could be made that here we find a good case of “Europeanization”;<sup>19</sup> of course, one has to differentiate between the various branches of law in order to find that undoubtedly it is economic law that is most advanced in this regard. The overarching question here is of course the relation between the European legal system and national legal systems in toto on the one side, and constitutional law in particular on the other. Although a good case can be made that most national legal systems have successfully incorporated the European legal system into their self-description (if sometimes only by taking into account the legitimizing by-pass of the European Convention of Human Rights), thus fostering the systemic autonomy of a European legal system, some developments have cast a shadow over the correctness of this interpretation. Of course, this first and foremost refers to the German constitutional court’s decision on the Maastricht Treaty in 1994;<sup>20</sup> However, it would be entirely premature to interpret this decision as to mark a “de-Europeanization” of the law, i.e. as a decreasing autonomy of the European legal system in face of a reassertion of national legal systems against the European legal system, or, put differently: an exclusion of the European legal system from the self-description of national legal systems. More in line with the reasoning of systems theory,<sup>21</sup> it would more seem as if single (inter-)actions, even if figuring quite prominently, are hardly able to influence the evolutionary path of a complex social system from one day to another. Thus, although it has stirred quite some discussion, it seems more or less unlikely that the German constitutional court’s decision will have any direct consequence for the way the European legal system, or even the German legal system in the context of the European legal systems operate. The important question is rather why the German constitutional court chose to take a highly political decision at this certain point in time. Although this issue still is in need of further research: taken together with the highly controversial rulings of the German constitutional court on sending German troops abroad and the issue of crucifixes in Bavarian classrooms, it is at least doubtful if the German constitutional court is properly analyzed if put

into the context of the legal system alone. Various decisions taken by the court do not seem to work according to the lawful/unlawful, just/unjust code that may be said to define the processual autonomy of the legal system. Rather, as these cases demonstrate, the German constitutional court (if not the institution “constitutional court” as such) operates on the interstice of the political and legal systems much more than other courts, even to an extent where one could argue of the constitutional court working primarily in the political system.<sup>22</sup> Be that as it may, the conclusion to be drawn from this is just a word of precaution: not to write off the European legal system too hastily after singular, though important events in national legal systems. Quite to the contrary: if we accept systems theory’s interpretation of (national) legal systems as autopoietic stems on basically the highest level of evolution of social systems, then the fact that a court deems it necessary to basically rule on the “identity” of the legal system means to form a step back in the evolution of such systems, a case of system devolution, thus serving not as an indicator of national legal systems re-asserting their autonomy against the European legal system, but rather of them desperately struggling with such a re-assertion and in the process losing out.

On the other hand, national political systems of course do not seem to be Europeanized; but, again, one has to be very careful to take into account the fact that what we are dealing with here is also not only a conglomerate of national political systems, but also a European political system. And this system clearly underwent evolution: “The European Union...is characterized by a decade-long process of institutional change which is both incremental and deep”<sup>23</sup>. In that sense, the new “variable geometries” of Europe may be nothing else but another word for systemic transformation as the system finds itself dealing with new forms of (not necessarily “more”!) complexity.

Peculiar about the future evolution of the European Union’s political system, though, is that it currently finds itself addressing issues and forms of complexity that had been routinely handled already. The project of enlargement may force it to actively deal with levels of structural and normative complexity again which it largely had been dealing with on a routine basis. This may distract system resources away from successfully processing differences at the most advanced level of evolution. Seen in this way, “deepening” and “widening” do neither mark irresolvable opposites nor are they fully compatible. Rather, the simultaneous pursuit of both strategies creates

interferences which more likely than not will produce negative outcomes, since it prevents the European political system to direct all its resources to actively deal with one certain kind of complexity. It has to reopen and actively deal with complexity that it had dealt with on a routine basis.

Of course, this diagnosis seems to fit the notion of the European Union as an agglomeration of dynamic, multi-level systems very well. A comprehensive picture of the European Union as a coherent *region of governance*<sup>24</sup> can indeed only be formed by taking all the various systems at various levels into account, i.e. addressing the social reality of the Union in its full complexity. It also makes it quite clear that governance is not one, but always many: not one complex steering mechanism for the entirety of European social systems, but many such steering mechanisms each in the context of the operative closedness of the various systems. Seen in such a way, there can never be such a thing as an advice on what effective or good governance may look like.<sup>25</sup> The most that can be is to create contexts for other systems that are favorable for increasing the degree of reflexivity in these systems.<sup>26</sup> But doesn't this mean giving up the idea of the possibility of legitimizing the European Union in a democratic fashion right away? Doesn't it suggest that democratic legitimacy remains a process that is built into the political system alone and that if governance is not a process emerging out of or being controlled by primarily the political system, there is no way of legitimizing a vast part of governance that regulates social reality? At least it seems as if research on governance in a European context had a much less harder time in establishing the intricate and complex characteristics of what governance could mean in relation to dynamic multi-level systems than advancing on the question of the possibility of its democratic governance. To be sure, as was just suggested, this may be so for systemic reasons. Can there maybe not be democratic governance outside a very narrow realm - and with the demise of the Westphalian order we may see democratic legitimacy being relegated to what is increasingly the margins of world society, i.e. territorially defined political systems?

## 5. Democracy and governance

“Legitimacy means a generalized degree of trust to the addressees of these decisions towards the political system. From this definition, it follows that democracy does not necessarily and exclusively have to be synonymous with parliamentary government”.<sup>27</sup>

For years, the practical deadlock in efforts to decrease the EU’s democratic deficit - mainly by resorting to classical tools of strengthening democratic representation as used in the context of national political systems - has led some to ask for different ways as to how the perceived gap of democratic legitimacy in the EU can be closed. Of course this is a tricky task in which great caution has to be exercised. The “democratic deficit” in the EU and of European governance in general is not only about a technical remedy to make new modes of governance look more attractive to old-fashioned adherents to state-centred vocabularies. After all, democracy seems to have provided the least worse answers to some very pressing problems, problems which after all still need to be addressed. The main point to be made in this regard: “democracy” *and* its expression in the form of parliamentary, representative government, was never only, not even mainly attractive because it provided a solution to the problem of “order”. The problem of “order” in domestic societies and the international system found its main solution in the form of the Westphalian state and its foremost characteristic: the predominance of the ordering device of territoriality. In the development of modern states and societies, democratic rule can in contrast at best be described as an abstract idea that summarizes an entire set of solutions that gradually emerged as responses to new forms of complexity that only showed up as the Westphalian system developed: the problems of resource-allocation, the emergence of stable societal structures and of norms. Thus, if the EU’s political system is correctly described as a new form of political system which is not primarily differentiated by territory but “by network”, so to speak, and if it is correct that we must find new vocabularies that are not tied to the language of the state, then the EU’s legitimacy deficit may very well have been addressed in the wrong way for quite some time. Thus, in a first step an analysis of the legitimacy of the European order would not have to ask what needs to be done in order to make European democracy like state democracy, but which *solutions to the problem of justice* the European political system *has already* developed. In a second step,

the question has to be asked what a European *polity* could look like. And it seems to be exactly at this point where a lot of analyses fall into the state's trap, even if finely attuned to the necessity of avoiding it. To assert that one needs European media, a European party system, a European public discourse, or, in short, that democracy needs a collective identity which as such does not exist in relation to Europe or the European Union<sup>28</sup>, is to get it wrong. First, it is probably rather difficult if not impossible to establish the case that the development of the collective identity par excellence in the history of modern states - national identity - preceded the establishment of democratic principles. Quite to the contrary, an argument could possibly be made that the collective identities required for the establishment of democratic principles of governance, e.g. during the French revolution, were evoked in relatively short-termed processes and instituted not in an idealized model public discourse, but with a great deal of elite involvement.<sup>29</sup> Second, one can quite to the contrary take some of the ideas of systems theory into account and argue that it was the introduction of certain institutional and processual components that nowadays become summarized as "democracy" which enabled the formation of a durable collective identity in the first place.<sup>30</sup> Thus, the most appropriate reference point in order to judge the EU's democratic legitimacy may not be the kind of democratic legitimacy prevailing in the political systems of its member states, but the institutions and processes of resource allocation, normative and structural order(ing), and identity construction which mark steps these national political systems had to take themselves. The question then becomes one not of: is a democratic deficit, but one of: is it on its way of being closed?

Though this may lead to a perspective where one does not perceive the democratic deficit in relation to the European political system to be so bad after all, it still does not address the question of how democratic legitimacy could be provided in relation to forms of governance that obviously transcend or fall entirely outside of the political system. Something which can only be described as "a bundle of different functional and territorial constituencies with overlapping and variable membership and without a clearly distinguishable center or geographical scope"<sup>31</sup> does indeed not seem to be open to classical (i.e. solely territorial) ways of achieving legitimacy through democratic control.<sup>32</sup>

Since this is really a stepping stone for further practical and conceptual advancement on the issue



of legitimacy of the Union, it seems prudent to take a step back in order to get a better perspective on the categories we are working with here and whose “fit” seems to be the problematic part. Democracy defined as the legitimacy of authority by institutionalizing the control of those who govern by those who are governed seems to be bound to a territorial definition.<sup>33</sup> The problem with a network-like form of governance that cannot be subsumed under a territorial understanding is that those who are affected by more or less authoritative decisions taken in the framework of networks barely have any kind of control over these networks. The obvious “structural problem of democracy” is that somehow the degree of participation/legitimacy of networks must be increased without them losing their distinct charter as efficient problem-solvers in functional sub-system; this means calling for solutions that are not doomed to failure from the very beginning by trying to reinstate a primacy of territorially defined political systems through the back doors.<sup>34</sup>

Of course, the state never been the ideal, hierarchical mode of organizing authority-flows that is so often juxtaposed to the idea of a network. Most visible in corporatist arrangements, national political systems to had always had some characteristics of a network too, which were not entirely under democratic control. Not every decision reached in a political system has always and everywhere been legitimized in due democratic process. Thus, before asking how democratic legitimacy can be achieved in relation to new forms of governance, the first question that has to be asked is: *what exactly it is that needs to be legitimized*. As mentioned, undoubtedly even today the ideal model of territorial democracy, in which all those affected by authoritative decisions taken in the political system retain some kind of control over it, is not more than just that: an ideal model. Its applicability in reality is challenged by at least three major developments: (1) the continuing bureaucratization of state apparatuses in modern societies; (2) the growing inability of political systems to steer and regulate the contexts in which other social systems, especially the global economic system, operate; (3) the discrepancy between those living on a territory (denizens, Herrschaftsunterworfenen) and those that are citizens. Of course, holding these developments up against an ideal model of democracy will always appear the latter’s manifestation in reality to be in bad shape. However, it is to underscore the point that what “democracy” *means* itself is changing in modern societies. Nonetheless, it seems as if more often

than not legitimacy in relation to governance in dynamic multi-level systems is seen against this ideal type; an ideal type pegged to the territorial, Westphalian form of the state that research into these new forms of governance tried to get away from in the first place. What this calls for, in other words, is to reflect about what it is that needs to be legitimized in the systems of governance in the first place.

This is the point where profitable use of systems theory can be made. To describe the development of democratic controls does require more than merely describing the things that have been removed from democratic control. It rather requires to explain why this has been the case. After all, we are not dealing with a trend that has started with the discovery and the ensuing celebration of globalization in academic and political discourse. And this is where we can refer back to systems theory in order to see that a "loss" of democratic legitimacy is not sufficiently described as a matter of the political system losing power to the markets etc., but also as a matter of the political systems' evolution itself. This is to say that any kind of democratic deficit must not only be assessed in terms of what *can* be legitimized, but what *needs* to be legitimized. And here systems theory would suggest that it is those complexities that the political system has to deal with *actively*, i.e. complexities which currently are involved in defining what it is and ways of processing these complexities which define where it is going. These are exactly not the routinized things a political system has managed to deal with on a day-to day basis and which, for example, would usually be far removed from public attention.

Of course, in dynamic systems, there can never be a definite answer as to what the complexities are that the EU's political system has to deal with actively. But putting the question in this way can serve as a heuristic device, however. Thus, it seems clear that the European political system very much struggles with questions of its identity. Put differently: it is actively involved in dealing with complexities who whose routinely processing in national political systems has meant the development of an identity. Thus, the answer to what needs needs to be legitimized in the European political system would seem to be rather straightforward - and traditional - in this sense: decisions and discourses which deal with questions whose answers directly impinge on what the emerging identity of the European political system. And certainly a good deal of EU legislation

does not address complexities which the political system would not be able to handle on a routine basis. Still, one of the most important questions cannot be hoped to be addressed by applying such a heuristic device but remains to be answered in a more concrete fashion. How can one deal with the fact that the political systems has lost its primacy among other functional systems and hence a higher degree of legitimacy in the European political system would not necessarily mean a higher degree of legitimacy in the totality of strongly coupled mechanisms of governance?

Various answers have been tried on that question, most notably centering on ideas such as multiple citizenships and functionally different parliamentary bodies (i.e. a political parliament, and economic parliament etc.).<sup>35</sup> Though sounding good in principle, such proposals raise the question as to their feasibility given the pragmatic interest of finding ways to establish legitimacy that at least for the time being still needs to reconcile territory and function without integrating or totally disjoining them.

Some models do exist. Thus Euregio, a cross-border cooperation body among various counties and municipalities along the Dutch-German border that is often quoted as representative of new forms of governance, has a parliamentary body made up of the region's local, regional, national and European parliamentary representatives. Thus, one way to reconcile territoriality and functionality would obviously be to create functionally oriented parliamentary bodies made up of the territorial parliamentary representatives of the territorial areas affected. Another way to accommodate such a pragmatic reconciliation would, for example, consist in establishing a second chamber of the European Parliament which however would not be based on territory, but on function. As such, one could imagine the first chamber of the Parliament not dealing with a full "federal" second chamber, but rather on a case-by-case basis with the economic, the social, the cultural etc. subcommittees of this second chamber. A possible way to attain such an arrangement would obviously consist in enhancing the powers, organizationally reforming and blending together the Economic and Social Council and the Committee of the Regions.

## 6. Conclusion

The European Union forms a territory of government as well as a region of governance. In a complex social reality, the EU's political system exhibits the highest degree of such a regionality at the interstices of national political systems and the international political system. While this political system has managed to develop new solutions genuine to its level of regionality in world society, i.e. new forms of European governance, it has often been criticised for exhibiting a democratic deficit - in government as well as governance, so to speak. In this paper, I have argued that introducing some tenets of modern systems theory into thinking about these new forms of governance may be profitable and achieve two things: first, it helps to understand the embeddedness of European social systems in the context of other social systems in world society; second, it can provide further aid in trying to detach the conceptual discourse on legitimacy of new forms of governance from a normative language ultimately tied to the territorial state. That it does so without giving up on ideas of democratic legitimacy in an entirely - and maybe indeed: epochally - new political project should make it a route worthwhile of further exploration.

## Endnotes

1. I will not even attempt an overview of the literature; the programmatic of the research is however well developed in: Markus Jachtenfuchs/Beate Kohler-Koch: "Einleitung: Regieren im dynamischen Mehrebenensystem". In: Markus Jachtenfuchs/Beate Kohler-Koch (eds.), *Europäische Integration*. Opladen: Leske+Budrich 1996: 15-44.
2. See Thomas Diez, "International ethics and the project of European integration: federal state model vs. network horizon". *Alternatives* 22 (3/1997) (forthcoming).
3. See Mathias Albert, *Fallen der (Welt)Ordnung. Internationale Beziehungen und ihre Theorien zwischen Moderne und Postmoderne*. Opladen: Leske+Budrich 1996.
4. See Markus Jachtenfuchs, "Democracy and governance in the European Union". *European Integration Online Papers* 1, No 2 (1997; <http://eiop.or.at/eiop/texte/1997-002a.htm>).
5. Cf. Markus Jachtenfuchs, Markus Jachtenfuchs, "Theoretical perspective on European governance", *European Law Journal* 1 (July 1995): 115-133.
6. I do not wish to attempt a comprehensive definition of this term; given its as relative unsettled identity, I will use it and neighbouring terms liberally.
7. Cf. R.B.J. Walker, "From international relations to world politics". In: Joseph A. Camilleri/Anthony Jarvis/Albert J. Paolini (eds.), *The State in Transition. Reimagining Political Space*. Boulder: Lynne Rienner 1995: 21-38.
8. For a succinctly put summary and analysis of the tension between order/justice, eg. Ole Waever, „Governance and emancipation. The order/justice dilemma again, only worse“? Paper presented at the Annual Convention of the International Studies Association, San Diego, 16-20 April 1996.

9. For a good introduction into systems theory, cf. Helmut Willke, *Systemtheorie. Eine Einführung in die Grundprobleme der Theorie sozialer Systeme*. 4th ed. Stuttgart/Jena: Gustav Fischer 1993.
10. This is basically Luhmann's main critique of sociology from Durkheim to Parsons; cf. Niklas Luhmann, *The Differentiation of Society*. New York: Columbia University Press 1982.
11. The concept of world society was first introduced by Luhmann in: "Die Weltgesellschaft". *Archiv für Rechts- und Sozialphilosophie* 57 (1/1972): 1-34. Of course, it competes with many other usages of the term. For an overview of these as well as an attempt to modify the notion such as to make it more applicable to the realities of the international system, cf.: World Society Research Group, "In search of world society". *Law and State* 53/54 (1996): 17-41.
12. Cf. Niklas Luhmann, "The world society as a social system". In: R. Felix Geyer and Johannes van der Zouwen, eds., *Dependence and Inequality. A Systems Approach to the Problems of Mexico and Other Developing Countries*. Oxford: Pergamon Press 1982; however, it is important to note that "psychic systems", i.e. individuals, are also not a part of the social system; a social system is constituted by interaction, not by individuals.
13. For an overview, see Helmut Willke, *Systemtheorie*. Stuttgart: Gustav Fischer, 4th ed. 1993: 76-142.
14. See in more detail: Mathias Albert, "Toward generative differentiation? The international political system in world society". Paper presented at the Identities, Borders, Orders-workshop, Las Cruces, NM 17-19 January 1997.
15. Of course, there is no necessity for the system to be successful in doing this; there can always be system devolution.
16. See, for example: Helmut Willke, *Ironie des Staates*. Frankfurt/M.: Suhrkamp 1995.
17. Markus Jachtenfuchs, "Democracy and governance in the European Union". *European Integration Online Papers* 1, No 2 (1997; <http://eiop.or.at/eiop/texte/1997-002a.htm>) 4ff.
18. One would of course also have to analyze this in a much more differentiated fashion, i.e. taking into account the dynamics of various subsystems here again (i.e. the financial systems, trade systems etc.).
19. In overview: Christian Joerges, "Das Recht im Prozeß der europäischen Integration". In: Markus Jachtenfuchs/Beate Kohler-Koch (eds.), *Europäische Integration*. Opladen: Leske+Budrich 1996: 73-108.
20. See "Urteil zum Maastricht-Vertrag". *Entscheidungen des Bundesverfassungsgerichts* 89 (1994): 155-213; in this ruling, the German constitutional court basically derived the binding powers of European law for the national legal system solely from the order to apply the law (Rechtsanwendungsbefehl) inherent in the German parliament's ratification of the treaty (Zustimmungsgesetz).
21. On the role of the law in systems theory in general, cf.: Günther Teubner, *Recht als autopoietisches System*. Frankfurt/M.: Suhrkamp 1989.
22. Although this point cannot be elaborated further here, it seems to caution against an oversimplified argument of a "judicialization" of politics. "Judicialization" may happen, but it could be something which happens entirely *inside* the political system and not necessarily be an instance of the legal system somehow "gaining more power" of the political system".
23. Jachtenfuchs, "Democracy and governance": 5.
24. On this notion, see the various contributions in Pertti Joenniemi (ed.), *Neo-Nationalism or Regionalism? The Restructuring of Political Space around the Baltic Rim*. Copenhagen: NordRefo (forthcoming 1997).
25. Formally speaking: the "advice" belongs to the realm of interaction and can only address interaction, but not the level of emergence which could "steer" or "regulate" a complex social system, since the latter cannot be reduced to interaction any longer.
26. This is something in line with Willke's idea of a "de-centralized regulation of contexts (dezentrale Kontextsteuerung)"; cf. Willke, *Ironie des Staates*.
27. Jachtenfuchs, "Democracy and governance": 7.
28. See, for example: Peter Graf Kielmannsegg, "Integration und Demokratie". In: Markus Jachtenfuchs/Beate Kohler-Koch (eds.), *Europäische Integration*. Opladen: Leske+Budrich 1996: 47-71.
29. Cf. Hagen Schulze, *Staat und Nation in der europäischen Geschichte*. München: C.H. Beck 1994.
30. This seems to be especially visible in the USA, which very strongly relies on processual-institutional understandings associated with a democratic order of the state in order to foster a national identity.
31. Jachtenfuchs, "Democracy and governance": 10
32. Ibid.: 11
33. See William Connolly, "Democracy and territoriality". *Millennium* 20 (Winter 1991): 436-484.

34. As could be expected, for example, from various models of a “global democracy”; normatively laudable as such concepts may be, they continue to fail to confront the complexity of social reality in its complexity; see, for example: David Held, *Democracy and Global Order. From the National State to Cosmopolitan Governance*. Oxford: Polity 1995.

35. This has been proposed, for example, by Burkhard Wehner, *Nationalstaat, Solidarstaat, Effizienzstaat; neue Staatsgrenzen für neue Staatstypen*. Darmstadt: Wissenschaftliche Buchgesellschaft 1992.