

Governance and democracy in European systems: on systems theory and European integration

MATHIAS ALBERT

Abstract. The article proposes to conjoin the analysis of European integration and a modern systems theory of society. At first identifying some deficiencies in current debates on governance and democracy in Europe, it then introduces some tenets of modern systems theory relevant for the argument, focusing on the notions of ‘world society’, ‘structural coupling’, and ‘social evolution’. Using the debate on an emerging European constitution as an example, it then demonstrates how a systems-theoretical perspective can help to resituate the account of a European constitutionalism in the overall evolution of world society’s legal and political systems. In an equal fashion, it proposes to sharpen the theoretical discussion on democracy in Europe by first outlining the function of legitimacy in a functionally differentiated political system. A concluding section comments on the ‘value added’ of a modern systems-theoretical perspective which is still uncommon in European Studies and IR.

Not only is the European Union an ambitious, yet difficult, political, economic, social and cultural project. It seems to be *the*—often it seems one and only—empirical reference case for conceptual innovations in various sub-fields of the social sciences. It is used to explore the transformation of politics from hierarchical, state-based orders to dynamic, multi-level networks; it gives rise to new understandings of the concepts of citizenship and political community; for theorists of international relations it points towards the emerging structure of an international system ‘beyond Westphalia’. Still, for quite some time it remained a common feature of studies which use the European integration process to demonstrate far-reaching social change, as well as of concepts which are employed for that purpose, to treat the observed developments as phenomena *sui generis*. Thus, for example, for many students of international politics the EU constitutes a political form *sui generis* because it fails to conform to the (contemporary) ideal models of either the sovereign state or an international organisation.¹

Sui generis arguments do have their use in the realm of legal dogmatics, in case an argument runs into contradictions. However, this article is based on the conviction that such arguments have no proper place in the observation of a social domain which is characterized and indeed constituted by permanent and interrelated change. Fortunately, however, it seems as if more and more research on exploring the ‘nature of the beast’² of European integration, which attempts to account for the integration process in a conceptually rich fashion, is increasingly leaving *sui generis* arguments

¹ See John G. Ruggie, *Constructing the World Polity: Essays on International Institutionalization* (London: Routledge, 1998), p. 185.

² Thomas Risse-Kappen, ‘Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union’, *Journal of Common Market Studies*, 34 (1996), pp. 53–80.

behind. Thus, a rich literature has emerged which seeks to understand the mechanisms of governance in dynamic multi-level systems, trying to escape conceptual straightjackets imposed by a vocabulary tied too closely to concepts which were developed for studying a world of nation-states.³ This strand of research has managed to stay clear of state-centric thinking, not taking for granted even implicit notions about the nature of statehood. Yet, one would seem well-advised to always bear in mind the difficulties which are associated with trying to empirically grasp the characteristics of governance in the context of European integration, given that many indicators and vocabularies used for that purpose will be derived from analytical categories originally devised to describe a world of states. This methodological and indeed epistemological problematic has only recently been addressed with the emergence of a broad ‘constructivist’ research activity in the field of European integration studies.⁴ However, even while these contributions mark some kind of an opening towards the mostly epistemological critiques put forward by various ‘postmodernist’, ‘reflectivist’ and similar contributions, the main body of European studies has until now failed to acknowledge the quite fundamental challenge posed by these epistemological questions. What is at stake is not only the transition from one way of organizing political space to another. What is also at stake is that it will be impossible to make proper sense of the new if the conceptual tools used are indeed deeply tied up in the logic and language of the state and its territorial constitution.

In search of ways to advance a conceptually rich understanding of the integration process and not be hindered by the analytical/epistemological obstacles alluded to, this article argues for a conceptual broadening of the research on new forms of governance and associated questions of legitimacy in the European context. This first of all means to (re-)join the study of European integration with long-range social theorizing. This carries the implicit argument that the retreat to mid- and short-range theorizing in European studies, to be witnessed at least since Ernst Haas proclaimed regional integration theory dead,⁵ has not been entirely beneficial for the field. It has cut loose the ties between European integration as a macro form of social transformation on the one hand and theories of society on the other. In the limited context of the present argument, ‘conceptual broadening’ therefore means to advance some thoughts as to how European studies could be actively engaged in theorizing about social change in a broader sense. This does not involve stretching concepts or introducing entirely new ones. It rather suggests that the inquiry into the possibilities and terms of legitimacy of non-state-centred forms of governance in the context of the European Union (and in IR more generally) may profit from taking seriously the consequences and underlying diagnoses of a contemporary theory of society. It is against this background that I propose to devote some attention to

³ I will not even attempt to provide an overview of the literature; the programmatic of the research is however well developed in Markus Jachtenfuchs and Beate Kohler-Koch, ‘Einleitung: Regieren im dynamischen Mehrebenensystem’, in: Markus Jachtenfuchs and Beate Kohler-Koch (eds.), *Europäische Integration* (Opladen: Leske & Budrich, 1996), pp. 15–44; the literature is enormous in many languages; however, it is a secondary purpose of this contribution to introduce a number of German-language texts on the topics dealt with to an English-speaking audience.

⁴ See Thomas Christiansen, Knud Erik Jørgensen, and Antje Wiener (eds.), *The Social Construction of Europe*, Special Issue of *Journal of European Public Policy*, 6 (1999).

⁵ Ernst Haas, *The Obsolescence of Regional Integration Theory*. Berkeley, CA: Institute of International Studies, University of California, 1975).

modern systems theory from within the field of European Studies.⁶ Although some insights of modern systems theory have been selectively introduced in the literature on European governance, its potential remains under-utilised.⁷ Given that the modern systems theory of society, as mainly developed by Niklas Luhmann, provides one of the few fully developed contemporary theories of society, and possibly the only one which explicitly separates the idea of society from that of the nation-state, this should provide reason enough to take a closer look as to how the process of European integration can be conceptualized from such a perspective.

In the next section, the need for conceptual innovation that has been outlined in this section will be represented briefly in relation to the notions of governance and legitimacy. The following section will introduce my reading of some basic thoughts, assumptions and theses of modern systems theory which seem to be immediately relevant for observing European integration processes. Using the issue of an emerging 'European constitution' as an example, it will then be shown how these thoughts lead to a notion of 'Europeanization' of social systems that in turn leads to a rephrasing of European integration as a process of societal evolution. 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 that might help identify the feasibility of alternative models in the future.

Governance without government

Governance beyond the state, including emerging forms of 'global governance' as much as evolving structures of governance within the European Union, cannot be reduced to interactions between hierarchically ordered institutions of the state. Equally, however, concepts of governance in and through 'networks' do not seem to provide a comprehensive alternative account of the dynamics of EU governance. It seems more likely that, although the analysis of network structures forms a necessary ingredient of any contemporary account of European governance, it is by no means sufficient for that purpose since it tends to systematically underrate the staying power of clearly bound and hierarchically ordered authoritative structures. The notion of 'dynamic multi-level governance' 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 more or less unaccountable networks of various kinds, such as the numerous technical committees on a European level ('comitology'⁸). In doing so, the concept of 'dynamic multi-level governance' contributes to devising conceptual vocabularies for describing new models of political and social order in a 'post-Westphalian' era.

⁶ For its use in a more general IR framework, see the argument in Mathias Albert, 'Observing World Politics: Luhmann's Systems Theory of Society and International Relations', *Millennium: Journal of International Studies*, 28 (1999), pp. 239–65.

⁷ See, for example, Markus Jachtenfuchs, 'Theoretical Perspective on European Governance', *European Law Journal*, 1 (1995), pp. 115–133.

⁸ See Christian Joerges and Jürgen Neyer, 'Transforming Strategic Interaction into Deliberative Problem-Solving: European Comitology in the Foodstuff Sector', *European Law Journal*, 3 (1997), pp. 273–99.

Network-like structures obviously form an important element in the emerging order of governance beyond the nation state in Europe. However, they do not provide an equally obvious point of access in relation to the problem of ensuring democratic legitimacy in authority structures beyond national boundaries. Nevertheless, the impression that theories about forms of governance in the ongoing process of European integration have advanced further than similar theories regarding the possibility of democratically legitimated political authority in the same context can be quite misleading. It may very well be that it is exactly the advances made in theorizing about governance (without government) that are part of the problem for advancing the theorizing about democracy in the European context, because it has led analysts *away from the state too soon*, trying to adopt new notions of legitimacy for new forms of governance without taking sufficient account of what can and must be legitimized democratically.

In other words, the suspicion is that a normative model of democracy is transferred or adapted to the European level without taking sufficient account of the discrepancy between this normative model and democratic practice on the nation-state level. This problematic might be exacerbated by the focus which the selection of 'governance' imposes on inquiries into possible future forms of social order. Like 'government', 'governance' pertains to the regulation and control of societal processes, however less (or not at all) reliant on a constitutionally/legally fixed monopoly on making authoritative decisions. Thus, one could argue that while the issue of effective and efficient ordering and regulation is in a way intrinsic to the problematic of governance, issues of democratic legitimacy as well as distributive fairness constitute an extrinsic, normative dimension to it. In contrast, by being rooted in a construction of a normatively integrated political community, government in the modern nation-state, and with it the very understanding of the political, always constitutively included the function of addressing issues of societal justice⁹—and dealing with the order/justice tension in this respect has arguably always rested on pragmatic adjustments as much as on principled, constitutional solutions. This is a different way of expressing the general insight that analytical vocabularies apt for the Westphalian state are unable to account for a 'polity' that can be depicted as a dynamic, multi-level system of governance, yet not as a normatively integrated political community with a common collective identity. Yet, if this latter basic assumption underlying the majority of modern political and social theorizing is discarded, it becomes clear that the imbalance between the order and the justice functions in the system of European governance cannot be remedied in a simple fashion by either prescriptively adapting structures of European governance to given models of democracy (or diagnosing the impossibility of this exercise) or by adapting models of democracy to fit the *status quo* of European governance.

Rather, any progress towards a fuller account of the legitimacy/justice dimension of the European project will first of all require a fuller understanding of its societal qualities, of what follows from the fact that it is *more* than a mechanism for providing order on the one hand, yet something *different* from the normatively integrated modern, Westphalian nation-state. Such an undertaking then necessarily requires

⁹ See R.B.J. Walker, 'From International Relations to World Politics', in J. A. Camilleri, A. Jarvis and A. J. Paolini (eds.), *The State in Transition: Reimagining Political Space* (Boulder, CO: Lynne Rienner, 1995), pp. 21–38.

embedding the study of the European integration process in a theory of society (and societal change) which is able to account for the diminished importance of the political and social structures as well as the semantics of Westphalia.

In the following, this task will be pursued by utilizing some tenets from the modern systems theory of society. This theory, as prominently developed over the last 30 or so years by Niklas Luhmann and others, has the advantage of providing one of the few fully developed contemporary theories of society. Of course, given its size and scope, any attempt to summarize modern systems theory will be deficient. The following section will therefore restrict itself to merely describing some features that can be read as being of direct relevance for reconceptualizing the process of European integration in the envisaged fashion.¹⁰

Social systems

Research on governance in the European context has developed an increased sensitivity toward the contingent nature of the state. In doing so, some parts of the relevant literature have taken up some insights from modern systems theory, although its use has been mainly confined to heuristic purposes. It therefore seems warranted to inquire into the possibility of a more systematic introduction of modern systems theory into the field of European studies.¹¹ Modern systems theory does not base its analysis on the basic unit of intentional action (or actors), nor do, for that matter, state or a nationally conceived society serve as central units of analysis. It rather operates on the basis of the observation that a *communicatively constituted social* reality must be grasped in its very complexity, that what must be explained is the continuous yet highly diverse success of a sociality based on a successful performance of communicative acts. Identifying functional differentiation as the main pattern which characterizes the contemporary stage of societal evolution, modern systems theory has shown that functionally differentiated subsystems of society exhibit a high degree of operational autonomy—they are in fact ‘operatively closed’ and autonomous. This incorporation of insights from theories of self-referentiality which were developed in the natural sciences (by Maturana, Varela and others), thereby showing that highly developed social systems are causally open, yet operationally closed, systems presents one of modern systems theory’s main conceptual advances over older, Parsonian-style theories of functional differentiation. Simplifying the argument about ‘operative closure’, it means that although all social systems 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 the political system no longer can claim supremacy over, or to be representative of other social systems, that is claim to be the prime mover/steerer/regulator that makes authoritative decisions in relation to other social systems’ domains. To have an

¹⁰ This is not to say that systems-theoretical thought has not been utilized in either European studies or IR before; yet the Luhmann-style systems theory of society differs from older, e.g. cybernetic, systems theories in such a fundamental way that introducing it to the field of IR can hardly be read as a ‘resurgence’ of systems theory: see Albert, ‘Observing’.

¹¹ See Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, 2 vols. (Frankfurt/M: Suhrkamp, 1997).

impact in another social system's domain, circumscribed by its operational autonomy, any communication emerging from the political system is dependent on being observed by the other social system in question. Thus, the most the political system can achieve is not to directly regulate other social systems, but to merely engage in influencing the environment that other systems observe. These theoretical foundations are of obvious attraction to a conceptual enterprise that seeks to move away from simplified notions of the state and seeks to address structures of governance in their complexity. However, it seems doubtful whether most governance theorists 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-restraint regarding the status of their social scientific inquiry (after all, 'science' itself is merely an operatively closed sub-system of society). Nonetheless, modern systems theory contains far-reaching implications that have as yet not been taken up by or incorporated into conceptualizing governance, although they are potentially fruitful for advancing the argument. In the following, the three conceptual strands of 'world society', 'structural coupling' and 'system evolution' will be outlined briefly before raising the question of how they can contribute to a broader conceptual perspective on governance especially in the context of the European Union.

World society, structural coupling and social evolution

Modern systems theory performs a radical break with classical sociological thinking, for which a normative-integrative moment forms a constitutive ingredient of society.¹² In contrast, modern systems theory starts from the observation that the constitutive element for sociality and hence society is communication. If society is that which entails all communication, there can be only one society today, world society.¹³ World society thus forms the highest-order social system conceivable since it includes all communication. There is no *social* system outside world society (the system's environment is formed by biological, psychic systems, and so on). It is important to bear in mind that thus understood, world society means something considerably different from most other uses of the term 'society': it is exactly not what has traditionally been associated with the term, that is, a territorially bounded, normatively integrated realm of sociality. It is simply the highest-order social system possible.

Such a conceptualization implies that, in a way, all social systems, be they function systems, organizational systems or interaction systems, are subsystems of

¹² This is basically Luhmann's main critique of sociology from Durkheim to Parsons: see Niklas Luhmann, *The Differentiation of Society* (New York: Columbia University Press, 1982).

¹³ The concept of world society was first introduced by Luhmann in 1972 (Niklas Luhmann, 'Die Weltgesellschaft', *Archiv für Rechts- und Sozialphilosophie*, 57 (1972), pp. 1–34. Of course, it competes with many other uses 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, see World Society Research Group, 'In Search of World Society', *Law and State*, 53/54 (1996), pp. 17–41.

world society (with various subsystems of their own). Internally, world society is primarily differentiated functionally into, for example, a legal, a political, an economic system, and so on, which operate according to their own logic, using individual 'basal codes' for that purpose. Thus, for something to become an operation in the legal system, for example, it needs to be encoded through the distinction legal/illegal, for something to become an operation in the economic system, it needs to be encoded as monetary value. Importing insights from theories of self-referentiality and autopoiesis which were developed in the natural sciences by Varela, Maturana and others with reference to the social realm, modern systems theory argues that operatively closed systems can only observe their environment, including other systems in their environment, but have *no contact* with it: 'All observation of the environment must be conducted within the system itself as an internal activity, using its *own* differentiations'.¹⁴ Nothing 'enters' the system's operations other than by ways of being observed and 'operatively processed' by the system itself. 'The system reproduces itself in the imaginary space of its references; it does this by renewing the difference between self-reference and other-reference as the form of its autopoiesis in every communicative operation'.¹⁵ The *main task* and difficulty of a theory of society thus becomes to explain the relation between society and its environment if society itself cannot 'contact' its environment in its own mode of operation. The 'solution' to this problem is found in Humberto Maturana's idea of 'structural coupling':

Structural couplings limit the range of possible structures with which a system can conduct its autopoiesis. They presuppose that every autopoietic system operates as a structurally determined system, i.e. that it can determine its own operations through its own structures only. Structural coupling thus excludes that givens in the environment can according to their structures determine what is happening within the system ... [S]tructural coupling ... does not determine what is happening within the system but it must be assumed [within the system—MA] since otherwise autopoiesis would come to a standstill and the system would cease to exist.¹⁶

One prominent example of such a structural coupling can be found in the form of the 'constitution', which couples the operatively autonomous systems of law and politics which both describe this form of coupling between themselves as 'state'. Of course, in addition to the differentiation between function systems, these systems are differentiated internally, and territorial differentiation continues to play a major, though arguably declining, role in the political and legal systems. However, to assert on the basis of a continuing importance of territorial differentiation within political systems, that national political systems form subsystems of an EU political system which is but a subsystem of the international political system, does at first say nothing about the relative autonomy of these system levels or the way in which they are structurally coupled with other function systems of society. Thus, it seems to be by and large undisputed that a difference of sorts exists between the international political system and national political systems, for example, with the latter finding themselves in a more advanced evolutionary state than the former. However,

¹⁴ Luhmann, *Gesellschaft der Gesellschaft*, p. 92 [emphasis in original; translation MA].

¹⁵ *Ibid.*, p. 98 [translation MA].

¹⁶ *Ibid.*, p. 100 [translation MA].

attention has barely been given to the way that one subsystem is *inserted* into the higher-order system and how the quality of this insertion changes with the evolution of the social systems in question. Herein lies one of the most important points that systems theory can contribute in this regard: it is able to detach the notion of 'systems evolution' from materialist or interaction-centred accounts by pegging it to the respective systems' capabilities to process communication, that is, to deal with 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. However, while most major function systems of national 'societies' have been analysed in these evolutionary terms, most 'non-national' systems have not. Hence, if it is fair to assume that functional differentiation does not just stop at national borders, then there is no reason why the evolution of non-national function systems should not be assessed in a similar fashion.

This does of course not only mean simply applying an analysis that utilizes some tenets of modern systems theory to a realm to which it has not been 'applied' before. It also calls for some subsequent modifications of systems theory's analytical purview. One of its main shortcomings from the perspective of IR/European studies undoubtedly consists in its strong attachment to the territorial differentiation of national political systems. After arguing convincingly that it is necessary to distinguish between various functional subsystems of society, that 'the state' does not form a proper unit of analysis 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.¹⁷ However, it is exactly this point that a growing literature on new international and European forms of governance would dispute, pointing to the changing importance of these territorial political systems. Thus, linking up systems theory to the study of new forms of European governance is not only of potential benefit to the latter, but also to the former.¹⁸

Starting from this portrayal of some central tenets of modern systems theory, it can provide a conceptual framework which allows one to link processes of functional differentiation, which have been studied mostly at the level of 'domestic' societies, to processes of globalization. In addition, it permits the bundling of these processes together in a process of global functional differentiation that is, however, characterized by a great variety in the evolutionary stages within the spectrum of social systems. The implications for such a conceptualization of social reality for the study of European integration will now be assessed by turning to a question that apparently lends itself to being explored in such a way: the question of a 'Europeanization' of functional sub-systems of society.

¹⁷ See, for example: Helmut Willke, *Ironie des Staates* (Frankfurt/M: Suhrkamp, 1995).

¹⁸ The argument that modern systems theory and IR theory can engage in a mutually beneficial and corrective dialogue is elaborated extensively in Mathias Albert, *Zur Politik der Weltgesellschaft. Identität und Recht im Kontext internationaler Vergesellschaftung* (Weilerswist: Velbrück, forthcoming 2002).

European systems: the example of a 'European constitution'

It has been observed that various functional sub-systems of society are Europeanized to varying degrees in different European countries, with the economic and legal systems exhibiting high degrees of Europeanization, yet the political and societal systems remaining strongly attached to national self-descriptions.¹⁹ It is easy to see why a modern systems theory perspective could help to address the issue of Europeanization in a markedly different way. Rather than treating isolated subsystems of 'national societies' as the referent object of analysis, and thus analytically prioritize territorial over functional differentiation, modern systems theory, through its world society approach, identifies territorial boundaries as boundaries within function systems of world society. The central question regarding Europeanization then is not one of whether operations at the national level of a function system become more and more enmeshed within operations at the European level—and thus in the end entirely subsume the issue of Europeanization under the question of a declining importance of the nation-state. Rather, the latter question is conceptually embedded in the issue of, on the one hand, how various territorially differentiated subsystems of world society's function systems are differentiated against each other, and, on the other hand, how they are coupled with each other as well as other function systems (and possibly subsystems of those respectively). Addressing the issue of a Europeanization of the national subsystems of world society's subsystems thus always requires one to simultaneously ask what constitutes the specific subsystemic boundaries (national vs. European, national vs. global, European vs. global, global vs. local, and so on) as well as to ask how these subsystems are coupled together. Bearing in mind that differentiation and integration in this respect do not address fixed states of affairs but processes, it is then possible to inquire about whether changes can be discerned in the ways in which the respective boundary-maintenance regimes and coupling processes work. This does not, however, necessarily amount to identifying an increasing or declining relative importance of one subsystem *vis-à-vis* the other. Thus, an increasing tendency of operations within national political systems to be coupled with operations within the European political system could very well, for example, go hand in hand with an increase in many of the same operations within national political systems being coupled with the international political system, or an increase in operations within national political systems not coupled to the operations of other subsystems within the same function system at all (but possibly coupled to the operations of other function systems). A possible case of the first of the aforementioned examples might very well be seen in national immigration and refugee policies, which are increasingly addressed as issues to be dealt with in the context of a European immigration policy, yet at the same time are also located as an issue which needs to be dealt with through policies at the international level. A possible case for the second example might be the structural couplings between national political and medical or national political and educational systems, which

¹⁹ Markus Jachtenfuchs, 'Democracy and Governance in the European Union', *European Integration Online Papers*, 1 (1997) (<http://leiof.or.at/leiof/textel/1997-002a.htm>), pp. 4ff.

arguably remain by and large unaffected by operations of the international or European subsystems of world society's political system.²⁰

These more general deliberations as to how some tenets of a modern systems theory of society could be translated into the analysis of the evolution of specific social systems, dealt with in the context of European integration research, will now be illustrated more specifically in relation to the 'Europeanization' of legal systems and the issue of an emerging (or possibly already existing) European constitution.

Regarding the national legal systems of EU member states and their relation to the European legal system, as well as the latter's development itself, it seems as if indeed a strong case can be made that the legal system exhibits a high degree of 'Europeanization'.²¹ Although of course it is necessary to differentiate between the various branches of law, the development of the legal system in this respect in conjunction with the political system, and the organizational framework providing coupling functions between the legal and the political system, have prompted some to diagnose that some kind of European constitution is not merely in the making, but rather exists already.²² Yet, initially some doubts remain regarding the validity of such a diagnosis. Although national legal systems in EU member countries have successfully incorporated the European legal system into their self-description, for example by regularly referring to the European legal system in legal rulings, and while certainly the body of legal rules within the European legal system tends to grow, the embeddedness of this conglomerate of a European system coupled with national legal systems in a framework of European constitutionality has first and foremost been put in doubt by the German constitutional court's 1994 decision on the Maastricht Treaty. In this, the final supremacy of national vs. European authority was asserted in that it was ruled that the competence remained on the national level.²³ Thus, *in extenso*, a constitution which serves as the final legitimacy point for the operations of the legal system could not be said to exist already. Of course, proponents of the thesis that a European constitution does exist already are well aware of the fact that there is as yet no *written* constitution—despite plans to draw up such a constitution following the European charter of basic rights. Any difference in opinion regarding the existence of a European constitution does thus seem to rest on varying conceptualizations of what actually does constitute a constitution in the first place. And it is exactly in this context that the systems-theoretical viewpoint helps to shed some light on the constitutional status of the European subsystem of the legal system.

From a systems-theoretical viewpoint, the legitimacy of national law is ensured by an intensive structural coupling between these systems through the form of a

²⁰ Although not so if 'world society' is conceived in a neo-institutionalist fashion; see John W. Meyer et al., 'World Society and the Nation-State' *American Journal of Sociology*, 103 (1997), pp. 144–181.

²¹ In overview: Christian Joerges, 'Das Recht im Prozeß der europäischen Integration', in Jachtenfuchs/Kohler-Koch (eds.), *Europäische Integration*, pp. 73–108.

²² Joseph H. H. Weiler, *The Constitution for Europe: 'Do the Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999); see also Christian Joerges et al. (eds.), *What Kind of Constitution for What Kind of a Polity* (Florence: Robert Schumann Centre, 2000).

²³ Technically 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), see Bundesverfassungsgericht, 'Urteil zum Maastricht-Vertrag'; *Entscheidungen des Bundesverfassungsgerichts*, 89 (1994), pp. 155–213.

constitution, a coupling required exactly because of the functional differentiation between, and the operative autonomy of, the legal and political systems. As a form of structural coupling, a constitution operates both within and outside of the political and legal systems respectively. For the legal system, the constitution forms the most superior law of all, yet at the same time stands outside the legal system itself. For the political system, drafting and changing a constitution is one of the most demanding operations, yet simultaneously the constitution stands outside the political system by legally binding it. This seemingly paradoxical character of a constitution becomes visible in criticisms of decisions by constitutional courts (which, as organizations, have the main function to decide; neither the legal nor the political system as such can do so), when for example a decision is being criticized as being a 'political' one—yet, as a decision relating to a form of strong structural coupling between the legal and political system, it cannot be anything else than a decision for the political as well as the legal system! This circumstance is furthermore reflected in the language employed for decisions of constitutional courts, for example: a constitutional court does not rule on something as being 'legal' or 'illegal'. Rather, it rules on something as being 'constitutional' or 'unconstitutional'. It is only within the operations of the legal system that the issue at hand is then termed as legal or illegal.

Yet such a formal, systems-theoretically inspired view of constitutions as such does not help to shed much light on the European context since it still is derived from basically national contexts in which this form of structural coupling can be observed most clearly. To inquire on the constitutional character of European legal-cum-political systems, it is necessary to take further account of the evolutionary aspect of social systems, that is, the issue of when the need for such a form of structural coupling between the political and the legal systems arises. Michael Bommes gives a concise answer to this question from a systems-theoretical point of view, according to which constitutions emerge at the point at which 'the difference and the conjunction between law and politics becomes a problem because of their advanced differentiation. Structural coupling means a mutual utilization of externally accumulated complexity in the respective system's context.'²⁴ In such an understanding, given the fact that the political and legal systems of world society are functionally differentiated against each other, there can hardly be a doubt that manifold processes of constitutionalization and constitutional forms of structural coupling between the political and legal systems can be discerned in world society, including the European context. National, written constitutions would thus form but one type of constitutionalization. However, there seems to be no reason inherent in constitutionalizing processes, understood as the evolution of forms of strong coupling between the political and legal systems, which would require these processes to follow the example of written constitutions. Thus, one could from such a perspective quite legitimately support the idea that a constitution exists even on a global level, similar to the way in which Christian Reus-Smit describes constitutional structures as 'coherent ensembles of intersubjective beliefs, principles, and norms that perform two functions in ordering international societies: they define what constitutes a legitimate actor, entitled to all the rights and privileges of statehood;

²⁴ Michael Bommes, *Migration und nationaler Wohlfahrtsstaat: Ein differenzierungstheoretischer Entwurf*, (Opladen: Westdeutscher Verlag, 1999), p. 106 [translation MA].

and they define the basic parameters of rightful state action'.²⁵ In that sense, a European constitution—understood as a strong constitutionalizing process—does clearly exist (in the sense advocated by Weiler, for example). Yet while, on the other hand, this constitutionalizing process could indeed be developing according to some kind of 'postnational constitutionalism', in which the principles and processes of constitutionalism are disentangled from issues such as stateness and sovereignty central to national forms of constitutionalism, recent discussions on a European charter of basic rights and, building thereupon, a European constitution, seem to have moved the process of European constitutionalization quite substantially into the direction of again following the respective national models of constitutionalization.²⁶

Does this imply, however, that the 'Europeanization' of national legal systems would be nearing completion with the final legitimacy of national legal subsystems at some point being bestowed by a European constitution? From a systems-theoretical point of view, quite clearly not. As an operatively autonomous system, the legal system is not differentiated internally according to the still predominant territorial-regional differentiation of the political system alone. Next to territorial differentiations, a differentiation between legal cultures still carries a prominent role, for example. And the evolution of law in a number of subject areas can hardly be brought into the purview of a differentiation between national and European legal systems. Thus, the evolution of a transnational *lex mercatoria* clearly bears on the shape and efficiency of national arbitration laws. Yet, given the basic non-state-based character of transnational arbitration rules, the legitimacy of many national arbitration rules could arguably be said to be based less on their embeddedness in a national constitutional framework, but on their efficiency in providing sound arbitration for the economic system.²⁷

Thus, what is entailed in the 'Europeanization' of law is not an 'either or' which could be answered to the extent that European legal systems 'are' Europeanized or that a European constitution 'does exist'. What can be witnessed is a constitutionalizing process, one of many constitutionalizing processes in world society if understood as forms of structural couplings between the political and the legal system. Yet, even if one such constitutionalizing process should take the form of a written European constitution, it would be highly mistaken to regard this as the single source of legitimacy for European and European national law. Such an assumption would still fall prey to analytic categories prescribed by the ideal model of the Westphalian state and disregard the complexities of a legal system which is functionally differentiated from the political system and cannot thus be subsumed under it in its entirety.

Of course, if it turns out that in fact the European constitutionalizing process has embarked on the same route as its national predecessors, then an emerging European state might very well bear a close resemblance to the nation-state model.

²⁵ Christian Reus-Smit, 'The constitutional structure of international society and the nature of fundamental norms', *International Organization*, 51 (1997), p. 566.

²⁶ The idea of a postnational constitutionalism in the European context is developed by Jo Shaw, 'Postnational Constitutionalism in the European Union', *Journal of European Public Policy*, 6 (1999), pp. 579–97.

²⁷ See Gunther Teubner, 'Globale Bukowina. Zur Emergenz eines transnationalen Rechtspluralismus', *Rechtshistorisches Journal*, 15 (1996), pp. 255–90.

Still, however, a systems-theoretically inspired viewpoint remains open for the development of the European Union as an agglomeration of dynamic, multi-level systems. It also implies that a comprehensive picture of the European Union as a coherent *region of governance* can only be arrived at by taking the various systems at various levels and with numerous forms of structural coupling into account, that is, addressing the social reality of the Union in its full complexity. This also makes it 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 which have to be set in the context of the basic operative closure of the various functionally differentiated systems. However, while the argument that a European constitutionalizing process is underway points to the fact that forms of legitimacy are emerging for this regional agglomeration of social (sub-)systems and their couplings, there is as yet no indication as to whether this form of legitimacy will be a *democratic* one. Quite to the contrary, despite all talk about a ‘democratic deficit’ it seems to be implied in most discussions about a European constitution that the endorsement of such a constitution, as well as the self-description of the European political system as ‘democratic’ in such a constitution, will *per se* make the European Union ‘democratic’. The following section will take a look at these claims from a systems-theoretically inspired viewpoint. Is an emergent European state on its way to losing its ‘democratic deficit’?

Democracy and governance

[O]ur present theories of democracy fail to offer us conceptual instruments sufficiently complex to permit a realistic interpretation of [the] relationship [between democratic institutions and the increasing complexity of post-industrial societies].²⁸

In more policy-oriented as well as in conceptual discussions regarding a narrowing of the EU’s ‘democratic deficit’, two responses seem to prevail: one perceives the problem to be of a more technical rather than a basic nature, one which can be solved in the process of further European integration by introducing or strengthening mechanisms of representative or even direct democracy.²⁹ This model does not acknowledge a fundamental difference between national and European statehood. It is seconded by a number of analyses which see a European *demos*, a European public, to be indeed emerging, be it in the form of issue-specific communicative communities—such as in the case of BSE³⁰—or be it in the form of an ‘assembled polity’ on the European level.³¹ Numerous other contributions in the debate have argued for a normatively grounded adaptation of the idea of democratically legitimate governance to a European or other context beyond the nation-state, for

²⁸ Daniello Zolo, *Democracy and Complexity. A Realist Approach* (Cambridge: Polity, 1992), p. 54.

²⁹ See, for example, Michael Zürn, ‘Multilateral Governance: On the State and Democracy in Europe’, in Mathias Albert, Lothar Brock, and Klaus Dieter Wolf (eds.), *Civilizing World Politics: Society and Community Beyond the State* (Lanham, MD: Rowman and Littlefield, 2000), pp. 149–68.

³⁰ Klaus Eder, ‘Zur Transformation nationalstaatlicher Öffentlichkeit in Europa’, *Berliner Journal für Soziologie*, 10 (2000), pp. 167–84.

³¹ Heidrun Abromeit, *Democracy in Europe—Legitimising Politics in a Non-State Polity* (Oxford: Berghahn Books, 1998).

example by introducing moments of deliberation in a loosely conceived Habermasian fashion.³² Yet, all of these approaches arguably fail to reflect on the function of democracy in relation to the political system from a theory of society point of view. This is to say that in relation to the political system of world society as a whole, democracy is neither the only, nor necessarily the major form of achieving legitimacy. It performs this function mostly in relation to national subsystems of the political system (and of course not in even all of those). However: to pose the question of whether alternative forms of achieving legitimacy in the political subsystem other than by democratic means do exist is *not* at all to be taken as a normative question in the present context. It is rather to, first, ask for a narrower specification of the role which legitimacy plays in the political system, and, second, to ask under which conditions the political system chooses the form of democracy for achieving legitimacy. From there on it becomes possible to observe not only which forms of achieving legitimacy operate in the European context already, but also to judge which alternative ways to those outlined in the current debates might be visible.

From a systems-theoretical point of view, democracy in the first place is not challenged by processes of functional differentiation, but rather appears as a result of it, providing a new means of inclusion of persons within the political system after strata cease to define a person's place within that system.³³ Democracy is a form which produces legitimacy, thereby evoking a paradoxical character of authority as such (the people being governed by the government yet the government being governed by the governing people). Whereas, in political theory and practice, theories of natural authority require supplementary theories of representation, theories emphasizing human freedom and thus the unnatural character of authority require supplementary theories of legitimacy.³⁴ Thus, in modern societies, legitimacy forms a basic requirement for the political system.

The final rationale for the requirement of legitimization is a circumstance constitutive for politics. It lies in the necessity to utilize violence against violence, the need to counter violence by violence. Thus one can assume that this problem remains virulent regardless of which semantic forms are used to react to it. The claim of a violence to counter violence has always been a claim of legitimate violence. However, this does not determine the forms in which the claim of legitimacy can gain acceptance in specific historical societies.³⁵

To put it differently and directly transplant it into contemporary contexts: while democracy remains one of the most important ways in which—through applying a semantics of values—legitimacy is achieved within the political system, others co-exist and interact with it at the same time. Thus, legitimacy continues to be bestowed through sovereignty (in the international political system and to a more limited degree in the European political system) or *via* the expansion of the definition of the state to include the provision of welfare: ‘On the way from “representation” over “sovereignty” to “democracy” and the welfare state, the self-description of the

³² See, with further reference to the debate: Rainer Schmalz-Bruns, ‘Deliberativer Supranationalismus. Demokratisches Regieren jenseits des Nationalstaats’, *Zeitschrift für Internationale Beziehungen*, 6 (1999), pp. 185–244.

³³ See Niklas Luhmann, *Die Politik der Gesellschaft* (Frankfurt/M: Suhrkamp, 2000), pp. 96ff.

³⁴ This argument closely follows Luhmann, *Politik der Gesellschaft*, pp. 357ff.

³⁵ *Ibid.*, pp. 358 [translation MA].

political system adapted itself to its own history. None of these formulas has been dropped, each just modified the ones already in existence and adapted them to more complex political circumstances'.³⁶

Seen from such a perspective, the major anomaly of legitimacy in the European political system may in fact be that, for example, operations of European institutions are legitimized by mechanisms which may be apt for the welfare state (such as through an extensive use of expertise in comitology), yet that this form of achieving legitimacy was not crafted on to an existing democratic form of achieving legitimacy—therefore the 'democratic deficit'. However, such an observation in the first place points to nothing else than the question of whether democracy is a required and indeed viable option for achieving legitimacy in the European political system at all. As part of the political system, the European political system requires legitimacy and it *does* achieve it—albeit not extensively through democratic forms. Whether the democratic deficit will be closed, democracy being crafted onto existing forms of achieving forms of legitimacy within the European political system, will then entirely depend on whether the political system, against a variety of possible legitimizing procedures, selects to address mounting political complexities by describing itself as democratic. This may sound trivial at first, but it forms a highly consequential observation when it comes to assessing the possibilities of closing the democratic deficit in the future. The most obvious route conceivable in this context remains the evolution of a European statehood with a constitution prescribing democracy as the main source of political legitimacy, or, put in systems-theoretical terms: the European political system observes itself as a state and describes itself as democratic. Modelled closely after the example of European nation-states, the democratic gap would simply, although belatedly in the process of state-formation, be closed.³⁷ In a way, therefore, whether the European system of dynamic, multi-level governance can be legitimized democratically does not depend on the 'institution' of democratic mechanisms, but on the degree to which parts of this system become accessible for representative or other types of democratic legitimization. Of course, an emerging, constitutionalized and democratic European statehood will go furthest down the route of closing the democratic deficit in this respect. Yet even then one could expect that supplementary, issue-related or deliberative forms of democratic *and other types of* legitimization will be selected for specific political contexts. Forms of democratic legitimization will always remain processes through which the political system addresses specific complexities. It might alternatively select 'sovereignty' forms as the most appropriate mechanisms for achieving legitimacy (when it may choose, for example, that defence policies remain outside the purview of a European state and subject to intergovernmental decisions between remaining nation-states). It will certainly shield some areas of monetary policy from being subject to democratic

³⁶ Ibid., p. 365 [translation MA].

³⁷ Of course one could also argue that compared to the formation of European nation-states, the European Union introduced democratic forms of achieving legitimacy much earlier in its career as a state; see Gorm Harste, 'The Democratic Surplus in the Construction of the European Union'; working paper (Århus: University of Århus, 1997). However, such an argument tends to underrate the varying societal contexts of the evolving European nation-states and a European state. Whereas the former still need to be set in the context of a transformation from stratification to functional differentiation as the main differentiating principle of society, the latter occurs in the context of a functionally differentiated world society.

review procedures to a large extent (the ECB mirrors the Bundesbank in this respect). And, most importantly, new ways of achieving legitimacy within the European system will emerge, even if a fully-fledged European state were to come about. In the context of ongoing globalizing processes, to be understood as increasing complexities in the political system too, the problem is not one of achieving democracy whilst the sovereign welfare state is 'under pressure'. It is one of achieving legitimacy under the condition of the sovereign democratic welfare state being under pressure. For the time being, it looks as if the European political system is on the way of trying to achieve legitimacy by evolving into a modified form of that sovereign democratic welfare state. But it remains to be seen whether this evolutionary route then forms a model for fulfilling the legitimacy function in the political system of world society as a whole (thus maybe putting it down the route to some form of world state). Against the background of a value-driven assessment this might seem a worthwhile route to go, certainly preferable to totalitarian forms of achieving legitimacy in the political system. From a systems-theoretical, theory of society point of view, it must be treated as an open question to be answered in the course of systemic evolution alone.

Conclusion

This article has attempted to provide an account of processes relevant in the context of the evolution of European integration inspired by a modern systems theory of society. It is the main advantage of such an exercise that it offers a wealth of possibilities in which issues of particular interest to students of European integration can be linked, benefit from and profit by a theory of society which is conceptually rich in that it encompasses not only a systems theory, but also theories of differentiation and evolution. If anything, such a perspective requires one to highlight how issues quite often observed as bounded realms form part of ongoing social processes. In so doing, it informs a 'deconstructive' as well as a 'reconstructive' method. In relation to the issue of a European constitution, for example, it 'deconstructs' the notion of the constitution by, on the one hand, pointing to its inherently processual character, and, on the other hand, pointing to its characteristic not as a singular process or entity, but as a form of structural coupling between the political and the legal system—a form of structural coupling itself to be observed in many forms in world society. On the other side, however, modern systems theory reconstructs the notion of the constitution by allowing one to account for the unity within the diversity of constitutions/constitutionalizing processes in world society, thereby also embedding it in a wider account of social change.

The charge has often been levied against modern systems theory that it is a 'grand theory' of Hegelian proportions whose only standards of validity are the ones it posits itself. This is true to the extent that it is indeed a theory about the entirety of society understood as everything social. It is not true to the extent that underlying modern systems theory is a radically constructivist epistemology.³⁸ There are no

³⁸ See also: Mathias Albert, 'What Systems Theory Can Tell Us about Constructivism', in Karin Fierke and Knud-Erik Jørgensen (eds.), *Constructing in International Relations: The Next Generation* (New York: M.E. Sharpe, 2001), pp. 93–111.

grounds—not even consensual ones—for ‘validity’ in modern systems theory, only orders of observation. And observations can always be observed at higher orders of observation. This does indeed not lay the grounds for ‘parsimonious’ or ‘lean’ theorizing. But its complexity reflects a substantial argument about the proper level of a social-scientific observation of complex social systems—and there can hardly be any doubt that Europe is full of those.