

Governance, Legal Order, and Social Integration: Reviewing New Governance Approaches in EU Studies

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Abstract

'New governance approaches' have flourished in EU studies after the Maastricht. Although the scholars who take these approaches have offered various viewpoints, the EU is commonly regarded as a *sui generis* system from a postnational perspective. The purpose of this paper is to review the current studies on these approaches and to propose one research strategy in order to make the studies more elaborate. Chapter 1 examines the implication of 'governance', and shows the difference between international relations and EU studies in terms of usage. Chapter 2 clarifies the target of new governance approaches in EU studies and delineates the postnational perspective. Chapter 3 presents the problem of how it is possible to differentiate between a national, an international, and an EU legal order, with the view to regarding a legal order as outcome and moment of governance, and offers one research strategy as a socio-legal approach that investigates the relation between a legal order and a mode of social integration.

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This paper concludes that the socio-legal approach is necessary for the postnational perspective of new governance approaches to catch up with the transformation of a sovereign nation-state in the EU.

Introduction

Throughout the past decade, we have read many discourses on the limit of sovereignty in the age of globalisation. However, there had already been a high degree of interdependence among states since the birth of the modern sovereign nation-state. The response to the fact was, at least in Europe, the formation of international organisations (Schermers and Blokker 1995: 1-3). This has made it impossible for national autonomy to remain unscathed, although autonomy ought to be reflection of national sovereignty. European integration can be basically understood as one of the traditional streams in Europe towards international cooperation. Along with these perpetual movements, came the horrible nightmares of the First and Second World War, as well as the diametrical relation between Germany and France, which became significant moments to form consensus about integration movements.

Nevertheless, I think that the astonishing development of globalisation since the late 80's has decisively forced European countries to recognise the limitation of national autonomy, and the need for organising cooperative action among them at a supranational level. The creation of the EU is understandable in this context.

The Treaty on EU (TEU) says in its preamble: 'Recalling the historic importance of the ending of the division of European continent and the need to create firm bases for the construction of the future Europe'¹. This statement draws attention to the following question: What situation would be 'the ending of the division', and what form would 'the construction of the future Europe' take? The experience in the EU seems to challenge the notion of a sovereign nation-state. In a sense, 'the ending of the division' and 'the construction of the

¹ European Communities, *European Union Consolidated Treaties of the Treaty on European Union and the Treaty Establishing the European Community* (Luxembourg: Office for Official Publications of the European Communities), 1997. While numbering of articles both of EU and EC treaty has been changed in Amsterdam Treaty, this booklet puts old numbering on text along with new one.

future Europe' have led to the transformation of a political community from a sovereign nation-state. What kind of polity, then, is emerging in Europe?

It is the new governance approaches that flourished in the 90's that tackled this problem. These approaches consider the EU as a *sui generis* system from a postnational perspective. Jachtenfuchs, one of main scholars of the new governance approaches, contends that:

governance by and within the European Union is developing towards a model of political organization which cannot be adequately described anymore by the concept of the externally and internally sovereign state.

(Jachtenfuchs 1997b: 39)

The main purpose of the approaches is to relativise the notion of 'sovereign state' and conceptualise 'governance beyond the state which does not mean governance above the state' (Ibid., 41). The 'governance beyond the state' signifies the transformation of a sovereign nation-state. In this sense, the adjective "new" is attached to the approaches. In order to realise this new situation, the viewpoint of post-modernism has been seen as necessary (Ward 1995). Many scholars of this approaches have hence advocated an anti-rationalist view and offered structure-centred and sociological institutionalist approaches to which such labels as 'social constructivism' or 'reflectivism' have frequently been attached (Jørgensen 1997; Christiansen, Jørgensen and Wiener 1999; Wind 1997; Jachtenfuchs 1995).

This paper reviews the current scholarship on governance approaches, and claims that, although the new governance approaches to the EU have great ambitions and the postnational perspective of the approaches may be excitatory for social scientists, we should reconsider the studies associated with legal scholarship in order to clarify current popular assumptions of the approaches. This paper suggests a socio-legal approach as a research strategy to exploit legal and sociological viewpoints for the new governance approaches.

Chapter 1 looks at the implications of the term 'governance' itself and examines the difference between 'governance without government' (Rosenau 1992) in international relations and 'governance beyond the state' in EU studies. This paper points out that, while the

former has focussed on the order within a sovereign state system, the latter has directed attention to the transformation of the very same system. Chapter 2 turns to governance studies on the EU and overviews their characteristics. This paper suggests that the empirical conception of the new governance approaches is conceptually inconsistent; the EU system has acquired 'stateness' (Shaw and Wiener 2000) without rejecting the 'stateness' of Member States. Chapter 3 links governance approaches to a socio-legal approach; firstly by proposing to examine how it is possible to differentiate among a national, an international, and an EU legal order on the basis of a dual dynamism, namely the evolution of legal norms and the unfolding of collective consciousness, secondly by propounding to consider the relation between a legal order and a mode of social integration. This paper offers the following viewpoints. On the one hand, a legal order is the outcome as well as the moment of governance. On the other hand, the legitimacy of a legal order depends on a mode of social integration. From these viewpoints, this paper argues that the new governance approaches on the EU should direct attention to what mode of social integration can legitimise the legal order of 'governance beyond the state'. This study on the relation between a legal order and a mode of social integration can be called a socio-legal approach to the new governance of the EU.

1 What is 'Governance'?: Its Implication

1-1 Meanings of Governance

This section defines the meanings of 'governance' and explores its implication for this paper by reviewing the current scholarship.

The term 'governance' has various meanings in both academic and political discourse. Rhodes refers to this term with the following six separate uses: 'as the minimal state, as corporate governance, as the new public management, as "good governance", as a socio-cybernetic system, as self-organizing networks' (Rhodes 1996: 653). In spite of this equivocality, we can say that the term 'governance' connotes a certain operation for public problem-solving and order-creating. When this term is applied to a public order at a national or international level, we holds two different points of view. The first is governance by formal

institutions of a state, especially, a government. In this popular view, we can regard governance as the action of an organ which domestic law has institutionalised. The second is governance by all social actors along with governments (Commission on Global Governance 1994). In this unusual context, we can consider governance the general function for public problem-solving and order-creating. According to Rosenau, the second is 'a system of rule' (Rosenau 1992). He explains governance in the broad sense as follows:

It [governance] embraces governmental institutions, but it also subsumes informal, non-governmental mechanisms whereby those persons and organizations within its purview move ahead, satisfy their needs, and fulfill their wants.

(Ibid., 4)

The usage in this context thus highlights that a government is not an only actor for governance. In other words, governance is feasible even though it cannot depend on a formal, central, and hierarchically-organised authority. Rosenau formalises this usage as 'governance without government', and defines it in the following functions: 'to prevent conflicts', 'to procure resources', and 'to frame goals and policies' (Ibid., 3). Not only from a theoretical possibility, but also empirical evidences in environmental issues, these arguments raise the following problems, which force us to reconsider our current way of thinking.

The burden of proof may actually reside with those who maintain that the establishment of governments or more limited public authorities is necessary to achieve these ends because the operation of any government or organized public authority is costly, both in material terms (for example, the funds required to run public agencies) and in terms of more intangible values (for instance, the bureaucratic inefficiencies and the restrictions on individual liberties imposed by even the most enlightened of governments).

(Young 1997 : 4)

The concept of 'governance without government' has been in fashion among internationalists. The situation in the late twentieth-century makes us confront with a difficult task of order-creating imposed by greater interdependence through economic globalisation, security issues after cold war, and global environmental problems. The situation also makes us expect an excitatory new order emergence owing to the demise of sovereignty, activation of non-governmental organisations, and the quickening of a global civil society. In these circumstances, '[s]ome of the functions of governance . . . are now being performed by activities that do not originate with governments' (Ibid., 3). Governance has thus been 'a distinctive motto for international public order' (Kennedy 1997: 548). Kennedy sums up this circumstance as follows:

"Governance" in this literature, as opposed to "government", is the complex of more or less formalized bundles of rules, roles, and relationships that define the social practices of state and non-state actors interacting in various issue areas, rather than formal interstate organizations with budgets and buildings and authority to apply rules and impose sanctions.

(Ibid., 549)

This research perspective attempts to relativise the very existence of government, which has important implications for the public order both on a national and an international level. With regard to a national level, these governance arguments imply that a national government can no longer be the only centre for public problem-solving. The fact that a nation-state has been faced with limits in terms of responsibility and ability has been admitted externally through globalisation and internally through highly differentiated social-part-system, which has been pointed out by systems theory (cf. Luhmann 1984). The former has hollowed out sovereignty, and the latter has hollowed out hierarchy (Jachtenfuchs 1995: 122-3). In this context, we can state that governance by a minimum state is available within a nation state. Deregulation with the aim of exploiting market mechanism, the replacement of a public with private sector in a welfare policy arena, and the reformation from *ex ante* control by the discretion of government

to *ex post* arbitration by judiciary may be cases to be assumed through this conception. This relativisation of government by differentiating between governance and government may be filled with the idea of liberalism. According to Rhodes' arrangement, 'the minimal state', 'the new public management', and 'good governance' refer to governance based on liberalism (Rhodes 1996 : 653-656). As Kennedy points out, this liberalism is also a possible fundamental idea in an international order which is defined as governance without government (Kennedy 1997: 549).

With regard to the international level, this concept would relativise the very notion of the territory of a nation-state. Along with the evolution of globalisation, interdependence and the external diseconomies caused by it have increased to a higher degree. In this context, there are two areas of difficulty: Issues in which no state is involved and issues in which all states are involved. This suggests that it would be important to inquire the feasibility of public problem-solving and order-creating in such a space that is not structured by a state form. The conception of 'governance without government' implicates necessary change of perspective: from 'governance within a national border' to 'governance beyond a national border'. This change of perspective would be important for EU studies. In a sovereign nation-state model, three elements of the political system, i.e. state, government, and governance, have formed a harmonious whole. Europeanisation through the evolution of European integration has forced us to sharply differentiate among these three elements (Caporaso 1996: 32-3). This conceptual differentiation is based on the assumption that the expected function of a state could be carried out without a state-like structure.

1-2 International Relations and EU studies

As far as interdependence inevitably emerges, every society constantly faces collective-action problems. Governance in order to solve the problems is necessarily postulated at all level of society from the local to the global level (Young 1997: 3-4). According to Young's understanding, it is a regime that activates this governance, and the elements of the regime are 'social institutions that consist of agreed upon principles, norms, rules, decision-making procedures, and programs that govern the interactions of actors in specific issue areas' (Ibid.,

5-6). There are two possible patterns for a regime that is created out of social institutions: a state-organised regime and a non-state regime (Ibid., 6). Although both international relations and EU studies have investigated the non-state as well as the state-organised regime by using the term 'governance', it seems that the fundamental aim of each has been different. In international relations, the focus has been on the conditions of effective collective problem-solving in an arena of world politics consisting of sovereign states which insistently pursue their own interests. The concerns have been about why world politics does not necessarily fall into chaos despite lacking the formal authority based on clear competence and responsibility. Rosenau sets up a task to be inquired by the governance studies in the following manner:

Given an order that lacks a centralized authority with the capacity to enforce decisions on a global scale, it follows that a prime task of inquiry is that of probing the extent to which the functions normally associated with governance are performed in world politics without the institutions of government.

(Rosenau 1992: 7)

We can accordingly say that the focus in international relations has been on order-creating problems with the premise that no essential transformation is emerging in an international society. Young states:

... [W]e need a more sophisticated understanding of international society, one that emphasizes the significance of new forms of governance in a setting in which states continue to serve as primary repositories of authority.

(Young 1997: 2)

In European integration studies, there have been two basic issues of concern. The first is under what conditions and by what impetus integration can go ahead or not. This research agenda has investigated why sovereign states would proceed beyond merely voluntary

cooperation. In other words, the ‘spillover effect’ (Cf. Schmitter 1996a) to go beyond a decentralised decision-making system such as an international society has been studied. This issue postulates the second: At what stage can we say that ‘integration’ is completed?

In these streams of EU studies, we could problematise whether integration would lead up to the rejection of ‘stateness’ (Staatlichkeit)² of Member States or not. On one hand, a strand of EU studies based on federalism, functionalism and neofunctionalism has considered the integration process as Member States’ giving up stateness gradually. According to this perspective, the creation and evolution of the EU necessarily emerges out of the atrophy of stateness (Jachtenfuchs 1995: 122; Neunreither 1998: 419). On the other hand, the arguments for emphasising ‘pooling and delegation of sovereignty’ based on ‘national preference formation’ and ‘interstate bargaining’ (Moravcsik 1998b: 20) have also considered the formation of the EU not as the integration beyond international cooperation. The classical realist view, *a fortiori*, had regarded the rejection of their stateness as an impossible revolution (Jachtenfuchs 1995: 120; Neunreither, *ibid.*). In spite of the difference about the prospect of European integration, these two discourses have admittedly presupposed that there must be a trade-off between integration and stateness. The term ‘integration’ has accordingly meant a federal state formation, immolating stateness of Member States.

Against this dichotomy, the new governance approaches in EU studies have been trying to define the new reality in the present EU system. The main concern of these approaches has been to catch up with the transformation of nation-state.

The language of governance brings to light the changing role and structure of the nation state and the emergence of the EC/EU can be seen as part of this process of transformation.

(Armstrong and Bulmer 1998 : 255).

² Usage of this word is seen in Shaw (1999: 584) and Shaw and Wiener (2000: Introduction). In my interpretation, ‘stateness’ in the literature refers to the properties which can empirically be observed in an actual state, and to the characteristics which can theoretically be supposed in an ideally assumed state. This concept has influenced our thinking as normative arguments for a modern state. Shaw and Wiener claim that both political scientists and lawyers have not been able to escape from ‘the touch of stateness’ (*Ibid.*).

The new governance approaches in EU studies have emphasised on what is overlooked if we are bound by the notion of nation-state. They claim that the integration does not necessarily cause the stateness of Member States to be undermined and hence may rather lead up to a *sui generis* system. As noted below, I think the EU certainly shows the strange conjuncture that the EU system has been acquiring stateness without rejecting the stateness of Member States. The next chapter discusses these new governance approaches.

2 A Post National Perspective

2-1 A *sui generis* system

The institutional features observed in the EU is slippery at first glance. The EU system has state-like as well as non state-like institutions. The EU has one money and one market, a central bank, and a big budget from which some constituent units receive almost 5 per cent of their GDP. The EU also has a legislative power that is often supreme over Member States, common policies that cover almost all areas of public policy and over 80 per cent of rules about internal market, as well as the capacity to conclude international treaties. However, these state-like institutions do not have supreme authority, a centralised hierarchy of public offices, a definite territory, exclusive identity, and a monopoly of coercive means (Hix 1999: 3 ; Schmitter 1996b: 131-2).

Jachtenfuchs points out the following three features: 1) 'uneven Europeanization', 2) 'permanent institutional change', and 3) 'new patterns of legitimation' (Jachtenfuchs 1997a). The first is about 'functional subsystems of society' which are 'europeanised to largely different degrees' (Ibid., 3). While the economy and the legal system have been far-reaching about Europeanisation, 'politics and society largely remain organised within nation-state' (Ibid., 4). The second is about adverse situations for effective governance. Despite the fact that 'a rather stable institutional context' would be postulated for governance, '[t]he European Union . . . is characterized by a decade-long process of institutional change which is both incremental and deep' (Ibid.). In addition this incremental institutional changes have taken place both at the EU and a national level. Notwithstanding, the speed of the latter is slower than

the former (Ibid.). The third is about non-parliamentary democracy. It can be said not only that 'models of democracy developed in the national context cannot be easily transferred to the European Union', but also that 'a political strategy based on such a transfer would not necessarily lead to a more democratic EU and to an increase in its legitimacy' (Ibid., 6). The EU system is thus exposed to an unprecedented situation which compels the EU itself to try to find a new model of legitimisation.

The approval of 'differentiated integration' as a strategy for further integration makes things more complicated (Wessels 1998; Tuytschaever 1999; Shaw 1998; Stubb 1997; Ehlermann 1995). 'Provisions on closer cooperation'³, which was inserted by the Amsterdam Treaty, has given practical expression to this problematic strategy. The differentiation can be categorised as the following (Ehlermann 1995: See, Table of Categorisation of Differentiated Integration; Cf. Stubb 1997; Tuytschaever 1999). The first is the differentiation of time called 'multi-speed'. This means that, while a core group goes further, others will follow later. Examples of this are EMU, a harmonisation of the VAT, articles 15 (ex 7c) EC⁴ in the internal market, 30 (ex 36) EC in the custom union, 95 (ex 100a) EC in the approximation of laws, 134 (ex 115) EC in the commercial policy, 176 (ex 130t) EC in the environment. The second is the differentiation of space called 'variable geometry'. This means that permanent or irreversible separation between the hard core and others is allowed. Its examples are EMS, WEU, EUREKA, and the Schengen Agreements. The third is the differentiation of matter called 'à la carte'. This means that all members can 'pick-and-choose as from a menu, in which policy area they would like to participate, whilst at the same time holding only to a minimum number of common objectives' (Ibid., Table). Examples of this are the Social Charter and EMU in the case of the UK and Denmark, and the second pillar in the case of Denmark. 'Opt-out' and 'opt-in' about social policy or defense policy and 'Ins' and 'pre-Ins' concerning EMU are the terms which indicate these Member States. In the near future, perhaps twelve or thirteen countries will join the EU. The conditions of these candidates greatly vary. It is expected that the differentiation strategy will be inevitable. The EU system would be flexible, or otherwise be disunited, in terms of

³ This provisions is prescribed from article 43 (ex K.15) TEU to article 45 (ex K.17) TEU. For a text of articles of the Treaty on EU, see supra note 1.

⁴ For a text of articles of the Treaty Establishing European Community, see supra note 1.

time, space, and matter. Nevertheless, respect for 'acquis communautaire', which would be the so-called fundamental principle for constitutional architecture of the EU system, has to be defended to the last, according to the TEU.⁵

Through this brief overview, we can perceive the logical inconsistency that exists within the EU system. It has been acquiring stateness without rejecting the stateness of Member States. Simultaneously, these features would allow us question the institutional characters of the EU system. Is it a federal state, or an international organisation? If both are wrong, what kind of polity is emerging in Europe? It appears that we face 'a sui generis political system' (Eising and Kohler-Koch 1999: 3) which takes the form of 'a unique set of multi-level, non-hierarchical and regulatory institutions, and a hybrid mix of state and non-state actors' (Hix 1998: 38-39). Schmitter expresses the difficulty of imaging this *sui generis* system as follows:

If you can do this[to imagine the EU system: Y.U.], you will have succeeded in at least mentally superseding the limits imposed by the nation-state upon our habitual ways of thinking about politics, although it may still be difficult for you to imagine how such a 'post-sovereign, polycentric, incongruent, neo-medieval' arrangement of authority could possibly be stable in the longer run.

(Schmitter 1996b: 131-2)

New governance approaches have tried to deal with this *sui generis* system from a postnational perspective.⁶ There have been offered several models for interpreting the *sui generis* system in these new governance approaches: 'multi-level governance' (Marks et al: 1996), 'network governance' (Kohler-Koch 1999; Jachtenfuchs 1997a; Börzel 1997), 'post-modern state' (Caporaso 1996), 'fusion thesis' (Wessels and Diedrichs 1997), 'consortio' or 'condominio' (Schmitter 1996b), and 'regulatory state' (Majone 1996). In spite of the variety,

⁵ Article 43 1 (f) TEU prescribes the conditions of using the closer cooperation as follows; it 'does not affect the 'acquis communautaire'. For the text of Treaty, see supra note 1.

⁶ For the literature on new governance approaches, we can find almost comprehensive references in bibliography of Hix (1998).

the following seems to be common among the approaches. Firstly, the EU is regarded as a *sui generis* system which is differentiated from a federal state and an international organisation. Secondly, the emergence of this system is interpreted as the transformation of the sovereign nation-state system, a notion of whose system has dominated the thinking of many social scientists, and influenced frameworks and concepts in social sciences. Thirdly, in order to overcome a cul-de-sac of analysing the postnational climate with the framework of a nation-state, we have to pursue an anti-rationalist, a structure-centred, a reflectivist, or a social constructivist viewpoint.

The concept 'governance' is useful for interpreting a *sui generis* system like the EU. Jørgensen points out that there are several conceptual advantages to this concept (Jørgensen 1997). The first is that the concept 'refers to a system of rule without an implicit or explicit teleology in the form of a Euro-federal state' (Ibid., 2). By making governance a core concept, we can escape the tenacious notion 'state'. Next, the concept 'refers to a regional integrated system of rule in which the Member States are no longer the exclusive possessors of legitimacy and authority' (Ibid.). By focussing not on government but governance, we can overcome classic intergovernmentalism which has regarded the EU system as simple international cooperation and hence has overlooked the potential of the *sui generis* system. Finally, the use of governance as a core concept makes it possible 'to transcend some of the borderlines': 'between domestic and international, between comparative politics and international relations, and between national and European law' (Ibid.). Progress would thus be made in our study of the postnational condition, by the use of the term 'governance'.

2-2 Research Strategies

We should rely on the framework of Hix (1998) in order to recognise the research strategic consistency of new governance approaches. From these four dimensions: 1) empirical conception, 2) theoretical assumption, 3) method, and 4) normative prescription, Hix reviews new governance approaches in EU studies as a 'coherent research agenda'. This section presents the characteristics of these approaches, building on the basis of Hix's framework.

Firstly, the new governance agenda is based upon the empirical conception (Ibid., 38-9) that

the EU system is 'a *sui generis* phenomenon' (Ibid., 54). It is a system of multi-level, non-hierarchical, deliberative, and/or apolitical governance (Ibid., 39), in which we find a complex web of public/private networks and quasi-autonomous executive agencies. The complex web is woven up from territorial networks (Marks et al 1996) and functional networks (cf. Wessels 1997). In this web, neither the state nor the market has no longer a central role in the process of governing. Polycentric and mutually dependent relationships among state and non-state actors are observed in this process (Hix 1998: 39). This forms the basis for a new style of problem-solving in EU governance.

Secondly, as for the theoretical assumption (Ibid., 47-8), scholars who try to find the new governance in the EU system prefer institutional and structural approaches to actor-centred rationalist approaches. They contend that the assumption of preference-formation and strategic interaction based on individual rational expectations would be out of touch with reality, because the system is too complex and uncertain (Ibid., 48). The complex dynamics of institutional changes is the main target of the new governance approaches. In other words, the very foundation or environment of individual actors is under scrutiny. We should raise the scholarship of Armstrong and Bulmer (1998) about this point. Moreover, we should also refer to social constructivism. It has called for epistemological and ontological reflection of the modern simple framework that a subject can capture an object, and has emphasised identity, worldview, social norms, and ideas for recognising the substantive process of structural change (Christiansen, Jørgensen, and Wiener 1999; Shaw and Wiener 2000).

Thirdly, as for method (Hix 1998: 43-4), a comparison with other political systems should be rejected, because the EU is a *sui generis* system, according to the new governance approaches. The approaches thereby calls on a *sui generis* method and a new theory. Schmitter has discussed this in detail. He states as follows.

Our language for discussing politics – especially stable, iterative, 'normal' politics – is indelibly impregnated with assumptions about the state. Whenever we refer to the number, location, authority, status, membership, capacity, identity, type or significance of political units, we employ concepts

that implicitly or explicitly refer to a universe featuring sovereign states and 'their' surrounding national societies.

(Schmitter 1996b: 132)

According to him, we have to find 'a new vocabulary' (Ibid., 133) in order to grasp the developments of EU.

Fourthly, as for the normative prescription (Hix 1998: 54), the new governance approaches do not attach importance to a classical parliamentary democracy at a supranational level as noted above, even though it is the established ways for 'input oriented legitimization' (Scharpf 1999: 7-10) in a modern state. Instead, the approaches seek the following; 1) 'output oriented legitimization' (Ibid., 10-13) where democratic legitimacy depends on independent expertise and judicial independence or 2) 'deliberative democracy' (Eriksen 1999; Cf. Habermas 1995, 1996) in which the comitology⁷ can be regarded as the chance of forming a political public sphere (Habermas 1995; Joerges and Neyer: 1997). In this sense, the crisis of legitimacy in the EU is interpreted as the transitional process to a new polity. The approaches thus try to establish a new mode of legitimacy. A number of terms have been offered to characterise this mode: transparent and consensual policy-making, pareto-efficient problem-solving, individual civic and consumer rights, and so forth (Hix 1988: 55). But, as will be noted in chapter three, we should also investigate this problem of legitimacy from the viewpoint of legal norms and collective consciousness.

Against these new governance approaches, Hix tries to set up a new duality in EU studies by claiming comparative politics approaches. He states, '. . . the EU certainly possesses all the classic characteristics of a political system' (Hix 1998: 41) and 'the connection between politics (i.e. public opinion, party competition, dimensions of conflict) and government (i.e. the policy-making and legislative processes)' is 'well researched in the study of domestic systems' (Ibid., 55). He acknowledges that the EU system has no state form. But, according to

⁷ The term 'comitology' refers to the circumstance that many committees over which no one can glance have been set up around the Commission and been affecting the policy-making and implementation of the EC. Not only bureaucrats at a national or subnational level but also representatives of interest groups at an European level have been participating in these committees. For more detailed, see Shaw (1996: 159-62).

him, it can be regarded as a political system. The EU system has produced regulatory policies (internal market, social policy, environmental policy, and competition policy), redistributive policies (CAP, structural fund, R&D), macroeconomic stabilization policies (EMU and the action of ECB and Ecofin), citizen policies (police and judicial cooperation, asylum policy, and immigration policy) and global policies (CFSP, trade policy and development policy) (Hix 1999: 8). Moreover, the EU system has been given the institutions of 'an ever-wider range of executive, legislative and judicial powers' (Ibid., 3). He writes: 'in a different environment, government and politics could be undertaken without the classic apparatus of a state' (Ibid., 5). Hix thereby argues for a normal political analysis, supposing as if the EU were a domestic political system.

Hix's arguments would be persuasive. However, what is a domestic political system without a state form? How can an operation of system as such be legitimatised? For comparative politics, these inquiries are beyond the scope. Its interest is in the conflict concerning interest and power in the EU as a normal political system. The new governance approaches problematise the very point that the EU system operates like a state without a state form. We can say that a matter of concern is different between comparative politics and the new governance approaches. The latter is interested in grasping the structural transformation of a sovereign nation-state and the emerging process of a non-state polity. According to the premise of the approaches, this polity must not be an embryonic federal state or international organisation. This approaches try to overcome a dichotomy between state-like and non state-like form, supranationalism and intergovernmentalism, neofunctionalism and neorealism, and claim that the EU system is an emerging polity of new type.

On this point, I think it is important to inquire why the third way between a federal state and an international organisation should be explored. The basic interest of the new governance approaches lies in problematising and relativising the notion of 'sovereignty' and 'nation-state'. In this sense, the approaches claim that the frameworks of other EU studies like neofunctionalism, liberal intergovernmentalism (Moravcsik 1991, 1998a, 1998b), and comparative politics should be rejected because they implicitly take state-centred views (Jachtenfuchs 1997b; Jørgensen 1997). However, with regard to liberal intergovernmentalism

and comparative politics, this rejection has to be reviewed more deeply, because these theoretical approaches acknowledge the alteration of a sovereign state system through an increasing interdependence of international society in the age of globalisation. Hix states *a fortiori* that the EU system is a political system without state form, as noted above. We should hence restate this situation more exactly: what has been rejected by the new governance approaches is the equilibrium point which institutional changes would necessarily lead up. So long as the equilibrium point of institutional changes is seen as a sovereign nation-state system, the notion of nation-state would admittedly stick in our minds, irrespective of a descriptive or prescriptive concern. The new governance approaches reject this implicitly or explicitly expected equilibrium point which would always gives pressure to changing institutions and to which institutional changes would lead up. Social constructivism just advocates these arguments. Social constructivists state as follows:

Studying integration as process would mean concentrating research efforts at the nature of this change, asking to what extent, and in which ways, a new polity is being constituted in Europe. In our view, it is the constructivist project of critically examining transformatory processes of integration rather than the rationalist debate between intergovernmentalists (implicitly assuming that there is no fundamental change) and comparativists (implicitly assuming that fundamental change has already occurred) which will be moving the study of European integration forward.

(Christiansen, Jørgensen and Wiener 1999: 537)

From a normative point of view, however, the equilibrium point of institutional changes is more important because it is a frame of reference for the prescriptive assessment of an emerging polity like the EU. If we reject the model of sovereign nation-state system as the equilibrium point, what can we assume instead of that model? How can we assess the new governance of the EU from a normative point of view without that frame of reference? We must reexamine the legitimacy foundation of the EU governance. This paper claims that, in

order to do that, the concepts of 'legal order' and 'social integration' must be available. In the final chapter, the relation between these concepts and governance is discussed.

3 Linking to a Socio-Legal Approach

3-1 Legal Order and Governance

This final chapter considers the linkage between the governance approaches and a socio-legal approach, and presents one framework of the latter. This framework builds on the basis of the concept of 'legal order' and 'social integration'.

At first, this section will examine why legal studies would be useful and necessary for the governance approaches, and then will discuss how to differentiate between a national, an international, and an EU legal order for identifying the postnational characteristics of EU governance. After that, this section considers legal norms and collective consciousness which are a dual dynamism for legitimisation of governance.

On one hand, it seems that legal studies would strengthen the explanatory capability, and widen the scope of the new governance approaches, because law, including both statutory and customary laws, must be the architecture of governance. Governance is ordained by a legal order, because the latter is structural elements of the former. The term 'legal order' includes not only a system of law as references for interpretation and judgement, but also institutions of enactment and enforcement. It is constituted not only by a statutory law, but also customary law. But the latter would be more crucial when addressing to the formation of governance without government. Besides, we can refer to the structure of a legal order. The structure consists of legislative procedure, institutions for law enforcement, and a judiciary system. And we can also specify the function of a legal order. For example, while there is 'a law of conflicts, equilibrium and co-ordination', we may also suppose 'a law of solidarity and integration' (Pescatore 1970: 169). A legal order thus supports and puts governance into operation, and simultaneously it is the outcome of governance.

On the other hand, we must point out that the empirical conception of the new governance approaches needs to be considered in terms of legal studies. The differentiated and multi-level

governance of the EU, which the approaches have described as postnational characteristics, would present great challenges to legal studies, the judiciary, and law practices. Armstrong raises its practical and normative problems for law:

... as governance evolves and as actors within different governance regimes or networks seek to recast their conflicts in legal terms, how ought law, as an institution, to approach such issues?

(Armstrong 1998:170)

Armstrong says that there are problems with the legitimacy and representativeness of actors, i.e. a social partner, environmental group, or big business, who are engaged in the very network that distinguishes the EU governance from others (Ibid., 170-1). Moreover, the postnational dimension of the EU system, which the new governance approaches have pointed out, raises 'the challenge of building a link between integration and constitutionalism' (Shaw 1999: 586). Shaw writes:

if the EU is indeed more than an international organisation but less than a state, how is it to proceed in terms of political organisation? It simply begs the question to describe the EU as an emergent postnational non-state polity.

(Ibid.)

If we depend on the 'touch of stateness' to capture the essence of this non-state polity, we would misunderstand what has happened in Europe. The significance of constitutionalism without prejudice to a traditional model of constitution should be investigated (Ibid.; Shaw and Wiener 2000).

The following question becomes important. What kind of a legal order is possible if the EU governance is legitimate and stable? When we try to regard a *sui generis* system observed in the EU as an indication of the birth of a new type of polity, in what sense is it new? Considering this question from the viewpoint of legal order, I think it would be clearer whether a *sui generis*

system of the EU would emerge as a postnational polity that is continual, stable, and legitimate.

As noted above, we can point out that there is a difference between international relations and EU studies in light of the aim of focussing on governance. The new governance approaches in EU studies use the concept in order to catch up with the transformation of nation-state. The essential conception is the 'governance beyond the state' (Jachtenfuchs 1997). However, the main problem of international relations is how 'governance without government' is available within a sovereign nation-state system (Rosenau 1992; Young 1997a, 1997b). It seems that the legal order for which empirical conception of 'governance without government' has its affinity is international law, and hence it is useful to study governance from the viewpoint of international law. On this point, Kennedy explains the affinity as follows.

In a sense, international relations theorists are focusing on concerns that have preoccupied public international lawyers all along, and it seems no coincidence that international lawyers' surge of renewed interest in international relations theory coincides broadly with this turn to "process" within international relations itself.

(Kennedy 1997: 550)

According to Kennedy, there are five points of view with regard to international lawyers' interest in governance; 1) resurrecting 'public international law as the keystone of international order despite the apparent demise of the project of United Nations institution building', 2) analysing order problems in complex interdependence caused by economic globalisation, 3) feminist or neocolonialist critics of 'the phenomena represented by the move to governance', 4) 'global environmental protection and the advancement of "international civil society"', 5) the problem of the legitimacy of international and national governmental institutions, *a fortiori*, in relation to 'the vindication of individual human rights and collective self-determination' and 'a source and marker of legitimation for international organizations and state governments' (Ibid., 549).

In contrast, the very legal order for which the empirical conception of 'governance beyond

the state' has its affinity is problematic because the new governance approaches have explored the structural change of the sovereign state system itself. Hence the object of legal studies which could contribute to the approaches might be neither an international law nor a national constitution. It might be the new legal order that corresponds to 'governance beyond the state', or this differentiation itself might be problematic. Putting the new governance approaches aside, we can admittedly observe two dimensions in the EU legal order: a dimension as a highly developed international law and as a developing constitution. However, inferring from the new governance approaches, we ought to be able to realise the originality of the EU legal order. As a theoretical assumption, therefore, we can distinguish three processes in the EU legal order: a formation process of a constitutional order as within a sovereign nation-state, an evolutionary process of an international legal order as within international organisations, and a transformation process into a new polity.

However, before addressing to these arguments, it is necessary to inquire about the problem of how to distinguish the difference among three legal orders. When trying to observe the relationship of the EU legal order to the other two, there can be four logical possibilities: the EU legal order is 1) differentiated not from a national but an international legal order, 2) differentiated not from an international but a national legal order, 3) differentiated from both, and 4) not differentiated from both.

If the first or second case is relevant, we can not regard the EU legal order as unique. In this case, laying the foundation for EU governance is the legal order in an embryonic federal state or a high developed international organisation.

If the third or fourth case is valid, it would reversely amount to the advent of a new legal order. The third case is plain. It means the birth of a unique legal order. To verify the validity of this case, we must ask whether we can say or not that the mediacy of the EU legal order produces a relation which is different from the existing one between the national and the international legal order in Member States. It should instantaneously be considered whether the relation between the national and the EU legal order is not equivalent to the existing one between the national and the international legal order in Member States.

The fourth case may oppositely raise a conundrum. There are two patterns: 1) the EU legal

order would become an international as well as a national legal order; 2) both a national and an international legal order would no longer exist, and the EU legal order would become only one legal order. Both patterns are a very strange logical possibility. The third case assumes the existence of a national and an international legal order. The fourth case rejects not only the differentiation but also the very existence of these two legal orders. How is it possible that a national legal order is simultaneously an international legal order? Do we have only one legal order that is born of European law (Bleckmann 1983), which order is not different both from a national and an international legal order? We should question whether the differentiation between a national constitution and an international law is no longer valid. In any case, by directing our attention to the third or fourth case, I think that we may conceptualise the legal order of 'governance beyond the state'. In order to investigate these two cases in greater detail, we have to completely escape from the 'touch of stateness' (Shaw and Wiener 2000).

However, these static frameworks are too simple. Reality is more complicated. Before continuing, we must inquire the way of problematising the relation among the three legal orders from broader viewpoints. The concept of governance can convert our view into a broader context. There are some cases in which collective actions for public problem-solving are organised: 1) as a government, 2) as an international organisation, and 3) as a bilateral cooperation. Because law is the architecture of governance, it can be said that these cases are governance designed: 1) by a constitution, 2) by an international institutional law or multi-lateral treaty, and 3) by a bilateral treaty respectively. The first is governance designed by a domestic constitutional legal order. The two latter cases are governance designed by an international legal order. If the EU stands on the third or fourth case noted above, it must perform governance designed by the legal order *sui generis*.

Establishing the term 'governance unit' corresponding to each legal order would be available as a means to explore the EU system for the novelty of its polity. A governance unit is a space in which collective decisions are formed and executed, and is supported by, and newly reforming, its legal order. If differentiating among the three legal orders makes sense, there can be three governance units corresponding to each legal order: a national, EU, and an international governance unit. These units would be related to each other. One may make

preconditions on others, or they may cause reciprocal conflicts. As a response, we might add governance at a subnational level. However, as long as subnational governance emerges within a national legal order, it should be included in governance at the national level. Even the transborder network of subnational actors may be regarded as part of the governance operation at the EU or international level. In short, it is important to ask about which legal order subnational actors are based on. However, we should take seriously that these networks of subnational actors can be and have been one of driving forces to cause the dynamic interrelationship among the three governance units.

We can recognise a dual dynamism which operates in order to legitimise the collective decisions within a governance unit; these are the evolution of legal norms and the unfolding of collective consciousness. These two dynamisms intersect and affect each other. The function of governance is constantly exposed to, and simultaneously has an effect on, both dynamisms. By operating so, they become the forces for legitimisation of a governance unit. If we can identify the peculiar interrelationship between two dynamisms and grasp their respective essential characteristics that are indigenous to the EU governance and not observable in other governance units, then we would have the right to differentiate among the three legal orders and simultaneously could regard the EU as a legal order *sui generis*. We thereby have the task of building ideal types of a national, an international, and an EU governance unit respectively concerning the interrelationship between the evolution of legal norms and the unfolding of collective consciousness as well as their respective characteristics within the EU governance unit

With regard to a national governance unit, the collective consciousness is materialised as a national community consisting of people; legal norms are crystallised as a national constitution. Based on the dual dynamisms as such, the political power is organised as a sovereign state. With regard to an international governance unit, the collective consciousness is materialised as a territorially divided, thin, but problem-sharing community formed from a unit of nations; legal norms are crystallised as an international law. Based on the dual dynamisms as such, political power is organised as an international organisation or regime.

How does an EU governance unit then operate? There are a community consisted of EU

citizens, treaties, agreements, Community law, and several institutions at the EU level. But the legitimacy of the EU, which ought basically to be supported by the collective consciousness and legal norms, has been a notable agenda since the Maastricht. While the spread of citizens' skepticism that was triggered by the Denmark shock has made Eurocrats and political leaders pay attention to the importance of 'input-oriented legitimization' (Scharpf 1999), the language of 'deficit' compared with a political form of state has penetrated discourses on the problem of legitimacy (Shaw and Wiener 2000). If EU governance is supported by a particular legal order within a non-state polity, which we can suppose from the new governance approaches, the legitimisation through a frame of reference of parliamentary democracy within a nation-state is problematic (Jachtenfuchs 1997a), as noted above. Moreover, the EU has obviously got no integration mode similar to a nation-state and is not based on a fiction of social contract among citizens.

We should therefore investigate how it is possible that governance without a nation-state framework is legitimised. In order to address ourselves to this problem, we must promote a more detailed conceptual understanding about a dual dynamism. Although the complete accomplishment of the task is beyond this paper, the final section offers a socio-legal approach through examining the concept of 'social integration', as a starting point of the task.

3-2 A Socio-Legal Approach

This final section briefly examines the concept 'social integration' through focussing on its pattern of modern nation-state, and offers a socio-legal approach to investigate the relation between a legal order and a mode of social integration. This pattern gives us a useful ideal type of social integration, and its ideal type can be good starting point to consider 'governance beyond the state'.

Peoples living in developed countries have accepted a political form of nation-state as a matter of course, and peoples living in developing countries have pursued the agenda of its full construction in the name of 'independence' and 'modernisation'. Within this framework, political power has been organised 'by the people', and collective decisions for public problems have been executed 'for the people'. In short, a sovereign nation-state has been

considered as an edifice in which democracy is exploited even to the point where physical violence is converted to legitimate power. But for that, a 'nation' has to be transformed first into a 'people'. This transformation takes place through 'modern social integration'.

The term 'social integration' refers to the integrity of individual actors in a community based on a common understanding about certain norms (Habermas 1973, 1996; Lockwood 1963). To be socially integrated means that 'social norms' (Shaw and Wiener 2000) are imprinted via a general socialisation process. By doing so, social integration carries out its functions to delimit a community from others and to reproduce an identity of this community across generations. On the basis of these arguments, we can say that social integration refers to the formation process of a collective consciousness and simultaneously its materialisation process into a community. Through this process, shared norms are gradually produced and eventually recognised as legal norms. In short, social integration can create the pre-legal condition of the validity of law, which is foundation of collective decisions.

In this modern age, a 'people' was discovered through the process of modern social integration. Inhabitants within a certain territory became citizens who understood themselves as members having the status of 'Staatsbürgerschaft'. They were democratically connected with the political policy-making process beyond all castes, and were equally intermediated by the law. This new mode of social integration was the very foundation of legitimisation of political power without religious authority (Habermas 1996: 135). Social integration into a people was precondition for a sovereign state form because this integration made it possible to make collective decisions like redistribution, regulation, and sanction, as the expression of a general will. To be socially integrated thereby implies that a community which can make collective decisions is created. We can thus say that legitimacy potentially depends on a degree and mode of social integration.

At the same time, a constitution of a sovereign nation-state also performed significant function for modern social integration, as Grimm states:

Though in nature a complex of legal norms, the constitution is not exhausted in its legal validity. On the basis of its legal effect, it is instead an important

factor for social integration. By fixing a society's basic consensus as to the principles of its co-existence and the settlement of its disputes, it links holders of different convictions and interests, enables them to settle their differences peacefully and facilitates the acceptance of defeats.

(Grimm 1995: 245)

But, I think that, while modern social integration has certainly been promoted by a modern constitution, the shared minimum norms, laying the foundation of a constitution, were formed through the process of social integration. In other words, modern social integration was the prerequisite for a constituent power, whereas the very operation of a constitution has reinforced a degree of social integration. We should suppose the interrelationship between social integration and constitution.

Along with the formation process of a constitution, modern social integration created a law community within a territory. The degree and form of modern social integration into a sovereign nation-state defined the boundary of a national legal order. Within the boundary congruent to a nation-state, key conception is collectivity for construction of a general will which is reflection of, as well as prerequisite for, sovereignty. This collectivity is necessary, on the one hand, for external articulation and representation of collective interests, and on the other hand, for internal collective decisions. The notion 'social integration' was thus in reference to the potential to legitimatise the very existence of a law community where a general will would be uncovered and realised.

The European modern sovereign nation-states, as a law community being clearly delimited from others, had the final responsibility for rights of citizens. Along with its responsibility, a political mobilisation of inhabitants as citizens through democratic organisation of political power became a firm base for collective decisions (Habermas 1992, 1995, 1996). The emergence of a non-state polity like the EU, therefore, makes us confront the following problems. To what degree is it possible to make collective decisions without a nation-state mode of social integration? What mode of social integration would and could legitimatise the EU legal order in 'governance beyond the state'? What kind of social integration would be

prerequisite for the EU legal order?

It is this point that has been furiously argued since the 'Maastricht decision' of the German Constitutional Court, which offered 'No Demos' thesis (Weiler 1995). The EU has been regarded as a democratically deficient polity because of the condition of no 'demos' (political unity within a public sphere on the basis of conscious citizens' social contract). In relation to these arguments, it has been questioned whether it is possible without integration based on 'ethnos' (ethno-culturally pre-political unity) to create the very foundation of democracy (Mancini 1998; Weiler 1995, 1998; Grimm 1995; Habermas 1995).

We can not say that modern nation-state mode of social integration is the only possibility for collective decisions. As noted above, law is the architecture of governance. And indeed, governance at the EU level has been developing. It is, therefore, important to exploit the pre-legal conditions of the validity of legal norms within the EU governance unit, and to examine the mode of social integration as a precursor to that condition. If the postnational mode of social integration which substantively legitimatises the EU legal order can be identified, then we can find the way to interpret the EU governance as the emergence of a new type of polity. For that reason, the relation between legal norms, which is the basis of a legal order, and the collective consciousness, which is materialised through social integration, should be analysed carefully. As a theoretical assumption, the governance structure can be captured from the features of its legal order and mode of social integration. And this mode is a sociological condition of the EU legal order through which legitimacy and efficiency of EU governance are solidly founded. The research strategy as such can be called a socio-legal approach. This paper claims that this approach is important in order to interpret the *sui generis* of EU governance from a postnational perspective.

Conclusion

I think that the new governance approaches have the broad scope to grasp the dynamic transformation of communities in this age of globalisation. The approaches are especially suggestive when we grope around in the dark for a postnational model in the formation process

of broader law communities like the EU. However, as this paper has discussed, the approaches have to extend the research target to legal orders. The grounds for the legitimisation of collective decisions depend on a mode of social integration, which must affect the development of legal orders.

We can regard the development of the EU legal order as part of the historical self-realisation process of European legal norms. Europe was never a single unitary community from the outset. European legal norms have been created in the process of cultural and political conflicts over a long period of time. At 'a new stage in the process of European integration'⁸, are European legal norms forming themselves into an international, a constitutional or a new legal order? This question is important for the new governance approaches which regard the EU as a *sui generis* system. We must ask about how legal norms are produced through social integration and what relation there is between a legal order and a mode of social integration. This socio-legal approach is necessary to attain the foundation of 'governance beyond the state'.

⁸ From the preamble of Treaty on EU. For the text of the treaty, see *supra* note 1.

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