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**CONSTITUTIONAL TERMINOLOGY
IN TRANSITION**

**THE DRIFTING SEMANTICS OF THE SUPRANATIONAL
DISCOURSE UNDER NEGOTIATION**

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Constitutional Terminology in Transition

The Drifting Semantics of the Supranational Discourse under Negotiation¹

Izabela Jędrzejowska

1. Why supranational legal discourse?

Research in itself does not constitute a self-explanatory art, even the one undertaken with a view to delve into the constitutional culture of present-day Europe. On the contrary, when undertaking a study of such an outstanding phenomenon as the European unification process, one may not abstain from providing clearly defined objectives of an endeavour of this kind. Without any hesitation and false modesty I admit to have been driven by the desire to gain more insight into the highly complex reality the foundations of which – notably from the historical angle – seem somewhat utopian in their idealism. Furthermore, the conviction that cognitive processes not only may not be separated from, but are determined by language, provided the rationale behind confronting the European legal space from the perspective of the discourse that both defines and delimits it.

On the one hand the study of the language may indeed help us towards the understanding and control of human events (cf. Bloomfield 1933). On the other hand, it reveals the bias and limitations that the language imposes on the manner we picture and, as a consequence, also shape our immediate reality. This inescapable subjectivity of perception does not pertain exclusively to the differences of perspectives offered by each and every national language, but also the instance of addressing a certain reality in terms of a discourse devised within, and for the purposes of a different reality. Thus conceptualising the European unification process in terms of the state-oriented legal discourse not only constitutes the focal point of this contribution, but it is also challenged as the source of bias and limitation with regard to the manner in which the European reality is currently conceived of by the EU citizens.

¹ The present article summarizes the findings of a more comprehensive research project published under the same title with a kind support of Dimitris-Tsatsos-Institut für Europäische Verfassungswissenschaften, FernUniversität in Hagen. The author would like to thank Prof. Dr. Peter Schiffauer for making the final review of, and offering insightful remarks on the present text.

2. The EU and the transformation of the traditional constitutional discourse

It is noteworthy that principles shared by members of a given collectivity are frequently elevated to the rank of norms (cf. von Wright 2000: 354). Thus the language of law constitutes a tangible record of the manner in which societies organise themselves and their common existence.

Traditional constitutional discourse was devised within and for the purposes of the statist milieu. The term *constitution* was applied to the ordinance of government as early as in Roman times. Constitutionalism is therefore often construed as the subjection of a state to a higher (fundamental) law. However, the state site is not an exclusive point of reference for the contemporary constitutional theory, of which non-state sites such as WTO or the United Nations are good exemplification.

In the same vein, the establishment of the European Communities, and subsequently the European Union, has exerted profound influence on constitutional law and constitutional linguistics. The reality of integrating Europe which is marked by a constant interaction between the national and supranational levels has brought about substantial changes to the constitutional law at large: on the one hand, it resulted in the emergence of a multilevel supranational *constitutional culture* (*Verfassungskultur*)²; on the other hand, it necessitated changes in the Member States' national constitutional orders.

2.1 Transcending the boundary of a state

A quick glimpse at the EU legal discourse reveals its heavy dependence on the statist discourse. Basic constitutional concepts such as *democracy*, *representation* or *citizenship* borrowed from the state site constitute also the founding principles of the Union's constitutional order. Strong state legacy in the supranational context should nevertheless come as no surprise taking into account the fact that the young European constitutional order is

² For the notion of *Verfassungskultur*, see Häberle (2009), available at: <http://www.fernuni-hagen.de/imperia/md/content/rewi/iev/haeberleievonline2009nr3.pdf>

based on national constitutions of EU Member States. As stated by the Federal Constitutional Court of Germany in its judgment on the Treaty of Lisbon:

*Die Quelle der Gemeinschaftsgewalt und der sie konstituierenden europäischen Verfassung im funktionellen Sinne sind die in ihren Staaten demokratisch verfassten Völker Europas.*³

Furthermore, given that the EU legal discourse may not, and should not be devised in its entirety as an independent linguistic code, the statist discourse *de facto* must transcend national boundaries. At the same time, the new environment for the state-oriented concepts might make them seem misplaced and inadequate, unless we realise the profound metamorphosis they undergo as a result of their transposition to the supranational level of the Union.

An illustrative example in this respect is that of *democracy*. On the one hand, it is a concept shared in the occidental culture, which allows for the interpretation that a certain „common core“ of its meaning could be identified irrespective of the differences implied by the societal and temporal deixis where it originates. Thus the principle of democracy, and more precisely representative democracy, constitutes both the foundation of the Union and the condition *sine qua non* of a membership of a state in the EU (cf. in this respect Articles 2 and 10 of the Treaty on European Union). On the other hand, if we assume that democracy may be very generally defined as the form of organizing power within a given community, it becomes transparent how multifaceted and polysemous a term it is.

The historical reading of democracy should be particularly accentuated in the EU context, as currently observable erroneous perception of the European unification process stems from the fact that the supranational reality of the Union is still being interpreted and evaluated from the perspective of a nation-state experience, and in terms traditionally attached to the statist environment (cf. e.g. Grucza 2004: 28, Tsatsos 2009). Lack of such considerations resulted in reducing the EU-specific democracy by the political and scholarly discourses to a cliché expression of *democratic deficit*. It should be kept in mind, however, that the dual quality of the EU as the Union of States and peoples (Tsatsos 2009) directly implies a different

³ “In a functional sense, the source of Community authority, and of the European constitution that constitutes it, are the peoples of Europe with their democratic constitutions in their states.” The text of the judgment of the Federal Constitutional Court of Germany is available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html.

realisation of democracy and representation in the European milieu. Likewise, the very transfer of the concept of *sovereignty* from state to EU context results in an automatic modification of its semantic qualities, notably the acceptance of its divisibility⁴ without which its operation in the supranational context would appear highly problematic.

The problem of bias when conceptualising a certain reality in terms of a discourse devised within, and for the purposes of a different reality, which is aptly epitomised by Weiler through a metaphor on the vocabulary of oranges and apples (1999: 268), could be resolved by way of explicit re-articulation of the statist discourse that is applied to denote the supranational legal order. The historic importance to develop a new special legal discourse in all its respective varieties of EU national languages becomes apparent in the light of the necessity to explicate to the EU citizens the immediate reality they are experiencing, thus also changing the way they perceive it. Moreover, since public opinion on the European Union affairs is by and large formed on the basis of views disseminated through the political channel, a concentrated effort should be put forth so as to achieve a more adequate and reliable political discourse which as a matter of fact is often purposefully devoid of objectivity.

To recapitulate on the remarks voiced so far, contrary to popular belief, the meaning is not anchored in a given legal concept, but negotiated within a community that adopts it as a way of reference to the reality of its common existence. In other words, legal hermeneutics should not be regarded as restrained by the *Wortlautgrenze* (i.e. the limit imposed by the wording of a law).⁵ For this reason, core constitutional concepts such as *democracy*, *representation* and *sovereignty* may not be interpreted without their prior contextualisation, i.e. thorough verification how they are materialised in the societal and temporal praxis. The high dynamics of the EU's political and legal dimension further reinforces indeterminacy of the supranational discourse, the meaning of which requires constant renegotiation so as to adapt to the ever-changing European reality.

Irrespective of the difficulties inherent in the study of the linguistic dimension of the European integration process, bringing to the fore the importance of the supranational legal

⁴ On the divisibility of the concept of sovereignty, see *inter alia* Přibáň (2010), Schiffauer (2004: 48ff). As rightly argued by Schiffauer (2003: 602), only relatively isolated existence of a society may create conditions for its full unity and sovereignty. It should be noted, though, that such conditions are, in particular in the modern globalised world, practically unattainable.

⁵ In this sense already Schiffauer (1979)

discourse, and notably the specific manner in which its semantics is being fashioned, unveils the innovative character of a novel entity from behind the mystifying clothing of the old linguistic form.

2.2 The uniqueness of the European experience

As has already been argued, language in its quality as a tool of law constitutes a tangible record of the evolution of the rules governing the organization of societies. At the same time, the linguistic form of a concept tends to be more stable than its meaning which presupposes a temporal gap between the modification at the level of semantics, its actual representation by way of a linguistic sign, and finally its perception by the general public. This is why the distinct semantic quality of terminology coined exclusively for the EU legal contexts, such as *the European Commission, a directive, comitology, Union acquis*, etc. is comparatively easy to note, whereas the change of the meaning of the core constitutional concepts such as *democracy, sovereignty, or citizenship* borrowed from the statist milieu might be vague and almost indiscernible.

For the above outlined reasons, although the EU constitutional order is fashioned in a manner hardly known or even entirely novel when compared to the state-bound constitutional orders (cf. e.g. Gerkrath 1997: 229), this novelty is not adequately reflected by the borrowed statist discourse transferred to the Union context. In the light of the above remarks, two pertinent questions could be posed:

1. What does the particular legal order of the European Union consist in?
2. What linguistic means would properly delineate it?

With regard to the unique character of the European Union, it has already been identified in the dual character of the EU as the Union of states and European peoples (cf. Tsatsos 2009). Furthermore, one could arguably point to the pertinence of the teleological justification of legitimacy of the Union, namely: EU Treaties may rightly be referred to as the “Peace Treaties” (see e.g. Petersmann 2003: 81), as they have safeguarded a peaceful coexistence of

the peoples of Europe. The most noteworthy of the distinct characteristics of European Union, however, is that of heterarchy of the national and supranational legal orders (cf. Přibáň 2010: 49, 59, Schiffauer 2003: 606), which transpires also from the stance taken on the issue by constitutional courts of some Member States.

Despite the fact that the Union, just as other international organisations, is based on an international public law treaty, its recognition as a *sui generis* legal system is slowly gaining momentum. The European Union has developed an „autonomous legal order ... [which] provides for a binding hierarchy of norms, many of which are adopted by majority decisions.“⁶ No other international organisation disposes of an infra-constitutional legal system holding such a density and power of regulation in socio-economic and other fields of policy-making (cf. *ibid.*).

Having pointed to the distinct characteristics of the particular legal order of the European Union, the second question, namely that of its adequate linguistic representation, needs to be addressed.

The author of this contribution is convinced that the EU of today is too complex and too idiosyncratic an entity to be defined as an *association of states* (*Staatenverbund*),⁷ notably in the light of the fact that its construction is not based exclusively on the intergovernmental logic. The same inadequacy of denotation pertains to the attempts to accommodate the Union into the framework of a federal *Superstate*, as the heterarchic EU legal order is distinct from hierarchic classical pyramid structure of a federal state (Schiffauer 2003: 606ff).

With the denial of both intergovernmental and federal logic for the European integration process, a new path of conceptualisation opens and with it, a novel manner of social co-existence.

⁶ See a comparative study carried out by the European Parliament's DG IPOL Policy Department C: “Federal states and international organisations: A short comparison of their amending rules with the European Union”, Directorate General for Internal Policies, Policy Department C: Constitutional Affairs, 2011, PE462.421.

⁷ See the judgment of the German Constitutional Court of 12 October 1993, BVerfGE 89, 155; Brunner v European Union Treaty CMLR [1994] 57.

3. The new drift of the EU constitutional linguistics

Defining a given entity by way of a statement what it is not may exert but a very limited impact on an improved cognisance of its characteristics. In turn, coining a new term to denote it possesses potentially a quasi-constitutive quality and should, therefore, be resorted to with due prudence.

Having asserted the distinctness of the EU's legal order from intergovernmental and federal logic, the next step entails its proper conceptualisation. A major breakthrough in this respect is terming the Union's decision-making structure as *polycephalic* (Schiffauer 2003, 2004, 2011),⁸ i.e. unlike in a classical national state, polycentric and heterarchic.

The significance of coining a new EU-specific concept is multifarious: it is an effective means of emphasising the innovative anatomy and shape of the Union, as well as communicating its novelty to the general public. At the same time, it is not limited to a purely linguistic operation, as the choice between the political options depicted by the old (federal order) and novel (polycephalic order) formula of conceptualising the Union presupposes concomitantly application of certain solutions and mechanism of decision-making inherent in the said political options.

Thus the advantage of the Union following a polycephalic path of integration lies in safeguarding the unique identity of the Member States despite their concomitant transformation within the supranational order (cf. Schiffauer 2004: 53). Schiffauer further argues that the said transformation of Member States within the EU does not question their statehood as such, but rather implies the emergence of a new form of statehood of which, in diversity of their national identities, they are constitutive part of.

It is noteworthy that construing the Union as a novel model of statehood may be convincingly based on the following premises:

- i) the EU is a form of *polity*. This Greek notion offers a very broad and comprehensive understanding of the concept of statehood which is not limited to the legal organisation of

⁸ See in this respect also Haratsch, Schiffauer, Tsatsos (2010: 2).

the state power, but refers to the “sum total of social rules that govern a society” (Tsatsos 2009: 1f). Thus, the concept which is currently conventionally referred to as a *state* conveys the meaning originally ascribed to that of a *polity* (cf. *ibid.*). D. Tsatsos therefore characterises the EU in its present shape as a *Sympolity* (Tsatsos 2009, see also Haratsch, Schiffauer, Tsatsos 2010);

- ii) the notion of statehood is relevant whenever a successful organisation of a *demos* is attained (cf. Schiffauer 2004: 44). Whilst in the EU context it is presumably more appropriate to refer to European *demoi*, in principle “[d]emos” *kann nicht als Einheit gedacht werden, also nicht als Einheit einer Gesellschaft, sondern muss entworfen werden als Zusammensein einer Vielheit, verbunden durch Bindekräfte zivilen Lebens, die den Zusammenhalt dieser Vielheit organisieren*⁹ (*ibid.*, cf. also Schiffauer 2007). Among the uniting forces of a community Schiffauer enumerates Law (in the form of a commonly elaborated and recognized normative text), the principles of democracy, freedom and solidarity, as well as basic and human rights commonly recognized in the occidental tradition (Schiffauer 2004: 44);
- iii) the legitimizing force behind the novel form of statehood is its voluntary character (see e.g. Schiffauer 2003: 606, Weiler 2003: 21).

Interestingly, whilst the reality is already characterised by the existence of the novel form of European statehood (with the necessary conditions to this effect being fulfilled), its perception is very limited, even non-existent. Limited societal responsiveness to the novel reality is nevertheless not a surprising phenomenon. History serves as a very rich record of social upheavals of seemingly revolutionary character which, in a diachronic perspective, proved to be mere shifts of power rather than qualitative transformations of societal organisation. In turn, revolutions construed as peaceful reorganisations of civil society’s harmonious co-existence are *per force* slow processes, as they take place, if at all, at the level of people’s mentality, their attitudes and, perhaps most importantly, their identity.¹⁰

⁹ “[d]emos may not be conceived as unity, i.e. unity of a given society, but must be construed as an assemblage of a multiplicity, interconnected by the binding powers of a societal common existence, which enable the coherence of this multiplicity.”

¹⁰ Cf. in this respect Gruzca (2004: 27).

A question arises whether the innovative form of the EU's statehood will ever be grasped and imprinted in mentality of the European peoples?

As aptly stated by Schiffauer (2003: 606):

*Solange in der öffentlichen Meinung aber die Vorstellung einer polykephalen Staatlichkeit noch nicht eingewurzelt ist und noch nicht zu einer allgemeinen Überzeugung geführt hat, dass eine Staatlichkeit der Union in keiner Weise eine Bedrohung der Staatlichkeit ihrer Mitgliedstaaten bedeutet, solange ist es vorzuziehen, die Europäische Union noch nicht als einen Staat zu bezeichnen.*¹¹

4. Which way for Europe?

Given the unprecedented dynamics of the EU political and legal reality, notably in the current period of economic austerity and deep social crisis,¹² it is not feasible to devise a discourse that could adequately denote the phenomenon of the integrating Europe for more than a short-term basis. For this reason, the semantics of the EU discourse may justifiably be referred to as “die unabgeschlossene Semantik”¹³, i.e. the semantics that is neither pre-defined nor pre-determined.

The question as to the further evolution of the European unification process, thus also EU constitutional linguistics which conceptualises it, remains *a priori* inconclusive. Whilst any attempt to gain some insight into the future trajectory of the European Union is by and large a futile endeavour, one could try to revive the latent potential of *fiat* of the European legal linguistics. The very realisation that the mode of conceptualising a given reality translates directly into the way it is being shaped may be qualified as a helpful tool to this end.

¹¹ “As long as the notion of a polycephalic statehood is not deeply rooted in the public opinion, and does not yet incline to the conviction that the statehood of the Union by no means imperils the statehood of its Member States, it is preferable for the European Union not to be qualified as a state.”

¹² Current crisis is rightly perceived as exceeding purely economic sphere and is frequently addressed in terms of institutional crisis, i.e. the crisis of trust to the EU institutions.

¹³ The author is grateful to Prof. Dr. Peter Schiffauer for suggesting the concept, which was elaborated as part of the German translation of the title of the research project (*Verfassungsterminologie im Übergang. Die unabgeschlossene Semantik des Ringens um einen supranationalen Diskurs*) the main ideas of which are harvested in this contribution.

The historic challenge lies in leaving the “beaten track” of thought, irrespective of its otherwise illusory security, and taking up the new drift. Or, in other words, the challenge entails accepting the existence of what was earlier unconceivable.

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