the rising politicization of the justice systems raised a number of theoretical and political "dilemmas" as regards the very notion of "transition" to Western-styled democracy: "dilemmas" that could not be easily resolved just because of concurrent social changes and constitutional variability.

By contrast, studies undertaken by Western scholars emphasized the importance of slow yet evolving "achievements", and the support provided by both the elite and the people. Therefore they stressed the rising effectiveness of the democratic transition, despite the need to further improve it with additional "aids". In brief, they provided quite a linear interpretation of the problematic issues under consideration. So much so that some analysts were even inclined to give credit to a substantial equivalence between the politicization of the law and justice systems occurring in Eastern countries as well as the politicization of the law and the justice systems that occurred in the same period in Western countries.[6]

Needless to say, official EU representatives had no difficulty in assuming this sort of scientific literature as a reference framework. Relying on it, and recognizing that in the case of self-styled or newly-created democratic society to "reckon with the past" cannot be carried out to the point of damaging the economy and the State,[7] a lenient attitude towards the so-called lustration was suggested. Then, the accomplishment of western-style parameters was declared step by step. The official admittance of ten North Eastern Countries in May 2004 is the certification that such accomplishment has been formally achieved.

3. The Rising Political and Legal Dilemmas of EU Enlargement

The fact that the transition towards a Western-style constitutional democracy and market system of former Socialist countries was considered accomplished with the "adoption" of a cluster of imposed, and heteronomous, formal-official parameters is not the only striking issue of the 2004 EU enlargement. In fact, it perfectly clashes with the period of gestation and the drafting of the EU Constitutional Treaty.

As epochal events of this sort do not happen by chance, and occur even less by chance in the same time-frame, one might wonder whether the formal-legal certification of the accomplishment of the democratic transition has, or has not, resolved the conceptual/political "dilemmas" mentioned above. If not, did these "dilemmas" raise further questions within the EU inner circles? In other words: is the coincidence of the two epochal events a sign that the EU project reached such a problematic geo-political contour to require the enforcement of a formal-official EU identity framework to stabilize and defend its promoters? After all, how could one ignore that typical of post World War II transitions is the attempt to promote a

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6 Wojciech Sadurski, "Decommunisation, Lustration and Constitutional Continuity: Dilemmas of Transitional Justice in Central Europe", EUI Law Department Working Paper, 2003/15.

7 Helmut Quartisch, *Giustizia politica. Le amnistie nella storia* (Milano: Giuffré 1995).

damnatio memoriae—i.e. a mix of amnesia and amnesty—about past constitutional experiences and that this sort of *damnatio* cannot rely on mere economic "buying and selling," although this is an essential condition, but rather requires either a sort of self-identification with the new order or a symbolic Manifesto to improve the "social learning" about the overall socio-political change?[8]

To answer these questions and explain how and why the EU agenda reached the stage of setting up, at one time, a formal constitutionalization and the largest accession so far, it is useful here to recall major historical cleavages of European unionism.

As is known, European unionism was originally promoted by elite factions within historical national blocks of a number of European countries as a precautionary measure to tackle domestic and international issues and prevent undesirable socio-political upheavals within the post-war political order. In fact, given that constitutional experiences occurred in the first half of XX century, the European project has been, from the start, carried as a veritable "defensive modernization" strategy to come to terms with (1) the historical decline of the bourgeois domination of the overall functioning of the State; (2) the historical dissolution of the European rule in various non-European countries; (3) the historical emergence of new powerful political constituencies and economic corporations at world-system level. In short it has always been a question of defending-by-modernizing the legacies of the Enlightenment's features and the constitutional architecture and lifestyle (universalistic values and particularistic interests) deriving from Euro-centric liberal ideology.

From the Treaty of Rome (1957) up to the Single European Act (1986), the above was performed by levering on essentially economic imperatives. Since the 1980s, however, this practice proved to be absolutely inadequate in relation to changes triggered by global/local processes at either the international or the domestic level. In a nutshell, it became clear that existing private interest governments were imperiled at the national level and only weakly empowered at supranational level.[9] Consequently the European elite power was compelled to change its political agenda (from socio-economic communitarianism to political unionism) to better protect the European fields of strategic interests and values. And it did so up to the point of contradicting even the cautionary, reformist early imprinting of the project, as the interference of some EU Member States in civil conflicts occurring, just beyond the boundaries of the Union, in a neighboring country (i.e. former Yugoslavia) demonstrates.[10]

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8 *Ibid*.

9 Philip Schmitter, "The Future of Euro-Polity and its Impact upon Private Interest Governance within Member-States", *Droit et Societé*, 28 (1994), pp. 659–675.

10 Vittorio Olgiati, "The EU Charter of Fundamental Rights. Text and Context to the Rise of a "Public Interest" EU-oriented European Lawyer", *International Journal of the Legal Profession*, 9, 3 (2002), pp. 235–250, and Vittorio Olgiati, "L'Unione Europea verso

Needless to say, the change mentioned above also occurred in relation to—and at the same time as—the dismantling of the communist rule in Eastern European countries. In this juncture the idea to set up a European Confederation of these countries to facilitate a smooth socio-political transition, in view of their prospective integration into the EU, suggested in 1991 by Mitterand—or at least a "Visegrad Triangle" as envisaged by Havel, Walesa and Antall—was immediately abandoned. By contrast increasing efforts were devoted to the enactment of the Maastricht and Schengen Treaties and the planning of the Euro Currency system.

This sort of EU policy gave rise to two diverging trends: an increasing interest on the part of Eastern European countries to establish closer links with the USA, and an apparent competition among Western European countries to re-set their own pre-World War sphere of influence in the area. Then the Serbia–Kosovo war—i.e. the very first war on European continent since World War II—occurred. And it made apparent the paradox: i.e. that the USA's and the EU's pretensions to "inspire" Eastern countries to enact human rights, democracy, rule-of-law, etc. coupled with the breach of basic rules of national and international law—under the guise of self-claimed humanitarian aids and war to rouge regimes—by the very same USA and EU Member-States.

Given such a geo-political context—in which (1) only a veritable financial and legal colonization of Eastern European countries made their entry into the EU possible and acceptable, and this in turn was carried out in the course of (2) a concurrent blatant violation of the letter and the spirit of the *Jus Publicum Europaeum* on the part of the same EU Western countries predicating to be guardians of the rule of law and democracy principles—it is by no means fortuitous that additional serious "dilemmas" about the (democratic) nature of the EU policy's "style" have come to the fore. If then one adds the prospective political-economic impact of the EU enlargement at world-system level,[11] one can easily see what sort of historical conditions were on the EU agenda in the space–time under consideration.

As it will be outlined in the following paragraphs, the drafting of the EU Constitutional Treaty—with the inclusion of the section of the Nice Treaty labeled "Charter of Human Rights and Fundamental Freedoms"—is the official response to the disquieting state of EU affairs that has just briefly been described.

4. The Search for EU Governance Legitimacy

To fully understand the legal and political meaning of the drafting of the EU Constitutional Treaty and the inclusion of the EU Charter of Fundamental Rights

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una costituzione virtuale?", Paper presented at the International Conference "Le identità mediterranee e la costituzione europea" (Salerno, 2003).

[11] Neil Winn, "Europe's Role for Global Peace and Conflict Resolution", *ISIG Quarterly of International Sociology*, XII, 1–2 (2003), pp. 14–16.

as a way to handle the dilemmatic consequences of the EU policy after the fall of the Berlin Wall, it is necessary to consider the implications of the Euro firstly.

As it has been noticed, with the enforcement of the Euro currency system, the European elite set up the EU as a financial "fortress", to defend, by modernizing, a system of productive resources and a network of economic-social relations which could otherwise have been taken over or dispersed by aggressive foreign players. The political problem of the Euro, however, is that its enforcement was incapacitated by "economicism." Let us use an analogical example to make this statement clear. As with every "dowry institution"—each citizen of each EU Member State participating to the venture having given his or her share—the birth of the Euro ought to have been consequent upon the celebration of the EU basic interests/values "wedding", that is upon a procedurally correct and socially visible ceremonial act such as to permit the immediate recognition not only of the actors legitimately involved, but also of their respective legitimization to act.

This apparently extravagant analogy would not be significant were it not for a substantial reason: that is—as we learn from the unsurpassed historical model of *Austria Felix*—when a marriage of political/property interest is celebrated to avoid a conflict between neighbor States and/or defend or "round out" a sovereign territory, it is good practice for the wedded couple to appear on the balcony of the palace so that all the people know who has married who, and who among the relatives and connections has been excluded from the symbolic and material benefits of the union.

Unfortunately, in the case of the Euro this good ancient rule was completely ignored: to the extent that, even today, common European citizens know what the Euro currency looks like, but are not at all aware of who, behind the windshield of the official institutions, came together to rule the matter and whether it was done on equal terms or otherwise. To put it in another way: it is not true that the enactment of the Euro system preceded the rise of a proper EU ruling class. In fact, the contrary is true, for the dominating EU historic block—concealed behind the complexity of the EU governance system—did not include some Member States and still less some fractions internal to certain national elites. With the Euro, therefore, the original and unresolved problem of the EU "democratic deficit", far from being mitigated has actually been aggravated: for the first time in EU history, it has taken on importance and visibility which is not solely declamatory, but openly conflictive even at the very top of the European socio-political ladder.[12]

Alongside the recognition of the power of immediate or postponed self-exclusion (opting-out) or entry (opting-in)—a sign of the lack of a common co-alignment, and therefore, of a latent conflict (as in the case of Britain and Denmark)—dominant EU power elite fractions enacted a preventive and discriminatory selection to the detriment of other fractions also. It is important to state—aside from the rigidity

[12] Vittorio Olgiati (2003), *op. cit.* n. 10.

of the Maastricht Treaty parameters and their subsequent violation—the spatial-temporal coincidence of events that appear otherwise quite distinct when seen from a superficial light: (1) the political attack conducted—even through judicial activism—against certain political parties and financial groups which were considered, on various heads, not to be organically oriented towards the EU "common" values and interests (the case of Belgium, Italy, France, etc.); (2) the political vindication of the right of secession of highly industrialized sub-national entities (the case of Italy); (3) the sudden establishment of transversal political alliances between and within opposite parties (the case of Italy, Germany, The Netherlands, etc.); (4) the political obstructionism about a non-negotiated restructuring of the Euro system in the event of EU enlargements (the case of Ireland); (5) the *sine die* postponement and/or re-proposition of national political referendums about the Euro and overall EU *Struckturbildung*; and, last but not least (6) the sudden decision of the USA for the inclusion of Eastern European countries into NATO before their entry into the EU.

As one can see, the number of variables that provide evidence of an open conflict of interest/values and a lack of a democratic rule-of-the-game within and among EU and EU Member States power elites is quite large. Actually, it has grown even larger in the last few years, as demonstrated by the standing of some European countries in relation to the USA pre-emptive war against Iraq—and the end of Globalization as a post Cold-war international order system[13]—as well as the subsequent failure of the EU inter-governmental conference held in Rome in October 2003 to discuss the draft of the EU Constitutional Treaty.

In this context, how can EU constitutionalization be heralded as a sign of the democratic rule-of-law oriented interests/values of the European community as a whole? How can it be officially claimed that it "seals" off the common destiny of the European society? And, how far can one think that a paper-Treaty is the best way to raise social consensus and political legitimization towards the kind of European unionism that the same Treaty is supposed to constitutionalize?

5. Ex Occidente Salus?

As if the disquieting state of the EU affairs discussed thus far were not enough, additional technical issues add up to worsen the situation of the EU strategy: the epochal crisis of Western formal-official codification and legal positivization. As a matter of fact, a paradoxical aspect of EU constitutionalization is that it is taking place at a problematic historic moment of the "law's empire." Both constitutionalism as a politico-legal discipline and constitutionalism as a concrete form of order are, at present, far from being anchored to secure theoretical and practical bases. Attempts

[13] Vittorio Olgiati, "Constitutional Instability. A World-system Issue", in Alessandro Gobbicchi (ed.), *Globalization, Armed Conflics and Security*, Atti del Convegno CEMISS-Centro Militare di Studi Strategici, (Soveria: Rubettino 2004) (in print).

at a revision of existing Western-style constitutional systems are in progress in almost any country in the world. A condition of constitutional instability is also apparent in any country, due to either the so-called "explosion" of legal pluralism, the erosion of Nation-State sovereignty or the rise of new political strategies such as pre-emptive war and terrorism.[14]

In Europe the above is further complicated by the fact that there is no country in which the theory and practice of the Constitution do not, in one way or another, recall the codification model as a pivotal structure of State-centered nationalism: a historical legacy that the EU tends to go beyond. Besides this, the EU (a) is not and does not take a State-form, for it is the product of mere international treaties, and consequently (b) it does not have the possibility of setting up a proper, autonomous constitutional system, and even less a self-styled democratic constitutional system rooted, as in the case of State/Nation, in the principle of legality and on the criterion of the fiduciary mandate lacking, as it does, any exclusive sovereignty over its own people and its own territory. If one then adds the fact that the so-called "EU citizenship" is *de jure* no more than a "social label" (as, e.g., England is a (1) common law, (2) monarchical, (3) confessional, and (4) colonial State ruling a European colony within Europe, while for example Finland or Italy are not), one can easily understand why an international legal act such as the Constitutional Treaty has been drafted by a group of (not democratically elected) State representatives, gathered in an informal setting called the "convention."

To conclude it is apparent that the EU Constitutional Treaty is not, and cannot be, a way to substantiate the (self-styled democratic) rule-of-law, division-of-powers, etc. principles. However, as its structure and functions are anyhow technically and politically relevant for prospective EU scenarios, let us comment on its "mimetic" discursive content.

6. The Binary Nature of the EU Constitutional Treaty

The EU Constitutional Treaty represents the quintessence of the EU law-policy, as has been performed so far: a mix of voluntaristic-rationalistic legal constructivism and jusnaturalistic-decisionist neo-institutionalism. As a constructivist regulatory model, the Treaty is for sure a sort of creative/regressive re-issue (in late-modern key) of Rousseau's "social contract." Urged by a veritable *status necessitatis*, it is the result of a contractual agreement between EU Member States acting as private agents, intentionally disposed to limit their own sovereignty so that it can be implemented (by virtue of the EU legal principles of "direct effect" and "supremacy") by EU agents (devoid of a substantial democratic legitimization) *as if* it were the expression of the general will (of European society), in the interest of the pacific cooperation of each (State) and all (citizens), and therefore in the general interest of the overall Europe as formally constituted by the Union.

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[14] Vittorio Olgiati (2002, 2003), *op. cit.* n. 10.

As one can see, in the articulation of its essential elements, the EU Constitutional Treaty does not appear to diverge greatly—*mutatis mutandis*—from that hypothesized by Rousseau to give credit to the shift from a "state of nature" to a "civil society."[15] The only exception—intriguing and innovative—is that (1) the agents are not physical persons, but States and EU organs, and consequently (2) there is no original "state of nature" except that given by the political and legal systems of the current *pouvoir constituée*, just as (3) there is no civil and political society except through the re-enforcement of the same political and legal constituted power. The novelty of the Treaty, therefore, is that it is the result of a self-interactive process, an act of self-observation and self-recognition of mere vested interests and values, brought about and intentionally oriented to function in the absence of an explicit, visible and substantial, popular *pouvoir constituant*.

In technical legal terms the rationale of the Treaty is therefore clear: to do (or not to do) things with words, by means of the use of the constructivist "as if" (*Als Ob*) legal device as a pivotal *fictio intellectualis*[16] of a political project that, for fifty years, has been portrayed as a veritable self-fulfilling prophecy but that has actually been consolidated according to the *Ratio Status* or "Doctrine of State Interests", as suggested by the century-old, but living still, *Arcana Imperii* European legal tradition.[17]

In turn, as a neo-institutional regulatory model, the Treaty is an equally interesting case of creative/regressive re-issue (in late modern key) of a well-known constitutional trend leading to the constitutional hypostatization of the Judiciary as "supreme power" of existing institutional domains. To have an idea of this trend (and consequently of the politicization of the Justice system) it is sufficient to consider that the claim of traditionally self-styled universal values and principles typical of early Enlightenment and Classic Political Economy overlap upon a late-modern constitutional architecture that, for historical reasons, cannot but deal with a "bifurcation" of Western European constitutionalism that occurred after the failure of the Weimar Republic and the Nazi experience. As the trauma of these events had to be covered, such a "bifurcation" has been officially formalized. This is the case of post-war Italian and French constitutional systems. In short, it is about the process of "de-personification" (Italian case) and of "presidentialization" (French case) of the formal/material State sovereignty.

Now, if one reads either the Preamble or the text (so far available) of the EU Constitutional Treaty, it is apparent that the emphasis put on liberal-democratic values and principles as the EU legal foundations recalls the Italian constitutional model enforced in 1947, in which no real subject—be it either a political leader, a particular class, a king or the people—seems to hold the "supreme power", i.e. the

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15 Jean Jacques Rousseau, "Extrait du project de paix perpétuelle de monsieur l'Abbe de Saint-Pierre", in *Œuvres completes*, vol. III (Paris, 1964).

16 Hans Vaininger, *Die Philosophie des Als Ob* (Berlin, 1911).

17 Vittorio Olgiati (2003), *op. cit.* n. 10.

sovereignty of the State is totally de-personified. On the other hand, the emphasis put on the functioning of the EU institutions and decision-making procedures recalls, in turn, the French constitutional model enforced in the 1950's by De Gaulle, in which the State sovereignty is individualized not by means of a somewhat *legibus solutus* leader, but by an agent/agency provided with relatively discretional—presidential—powers in order to by-pass the overall formal-legal design of the political dynamic of the State machinery governance. In short, the supreme power is embodied by a sort of powerful, politically independent, "commissioner" able to act also in case of a daily (i.e. not exceptional but recurrent) state of necessity. Being so, the EU Constitutional Treaty not only combines, but up-to-dates the logic of the above mentioned constitutional models, by enlarging and refining either the range of fundamental values and principles or the prerogatives of the commissarial system.

6.1. The Pillar of EU Constitutionalism: the Court of Justice

Paradoxically, the way in which the above technical solution could actually work can hardly be found in the works of the Convention that drafted the EU Constitutional Treaty. In fact, to have more information on this issue, one has to focus on the works of another Convention that drafted another EU Treaty, now officially included in the former, i.e.—as has been said—that part of the Nice Treaty entitled "Charter of Human Rights and Fundamental Freedoms of the European Union." As a Treaty, the Charter is a political document. Yet it has been written "as if" it is a legal text suitable for action in Court. Its aim, therefore, is to provide the European Court of Justice with both wider competence and a formal cover, "as if" the same Court—embodying the Law—is and acts as a truly "impersonal" and "independent" organ.

Unfortunately, however, such a double fictionalism cannot mask the fact that the EU is not ruled by the division-of-power principle and that modern legal theory rejects the idea of judges as mere Law speakers. Hence, simply by virtue of the Charter's drafting, the EU Court has been provided with the most discretionary—supreme—decision-making power over any other European institution and the overall EU governance system.[18]

This result should not be surprising. It is a direct consequence of the inclusion of the fictional implications of the above mentioned constitutional "bifurcation" into a unique body. In fact, the more State sovereignty and supreme constitutional power appear de-personalized, or somehow detached, from the ordinary political playground, the more the legal presumption that only the Law—as a pure value—can provide undisputed democratic legitimization to the constitutional system comes to the fore. Yet, the Law cannot be performed by any other than human "carriers" in actual practice. Hence, sooner or later, the organized body of judges—either constitutional or ordinary—objectively and subjectively transpose the Law's aims thus turning into the real sovereign agents.

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[18] Vittorio Olgiati (2002, 2003), *op. cit.* n. 10.

As current judicial activism shows, the above evolutionary legal trend has been tacitly accepted and widely enforced by almost all European countries over the past decades. This is particularly apparent at present simply because it increasingly challenges traditional prerogatives formally ascribed to other State organs. The constitutional model envisaged by the EU Constitutional Treaty, therefore, does not constitute an exception. Rather it is one of the most remarkable, refined and advanced examples.

Indeed, the whole story of the European Court of Justice is the story of a highly decisionist judicial activism, as demonstrated by the enforcement of *ex novo* self-referential EU standards even against national Constitutional Court decisions. Accordingly, therefore, it is hardly deniable that the EU Justices are indeed the subjects that, in the final instance, legally hold—and will hold even more in the future—the reins of the overall EU constitutional asset.

This being so the case, the technicalities of the EU Treaty throw an even more disquieting light on the general EU constitutional scenario discussed above, for, in actual practice, they further politicize the EU legal system in a non-democratic way—Courts being, by their very nature, autocratic—and leave open and unresolved the conflict between and within the fractions of the EU power elite—Courts being, by their very nature, based on social conflicts and legal disputes.

The implications of all the above are of extraordinary importance to Eastern countries. In fact, they add up to the fact that there is hardly any chance that the EU, through its Court, will consider the entry of Eastern European countries as a way that could undermine the already achieved *acquis communautaire*: an *aquis*—it is worth noting—that not only does not constitute a legal tradition "common" to these countries, but also does not offer, by its very nature, any chance either to them or to any Western country "to reckon with their past" in a non-conflictual way.

7. Taking EU Fundamental Rights Seriously

The fact that the architecture of the EU Constitutional Treaty might not fit adequately to Member States that, for more than fifty years, shared neither the alleged Western "common" legal tradition nor the Community's *acquis* is not the only legal variable that deserves attention. The overall normative dimension of the EU policy also was shaped and pursued according to values and interests typical of Western European socio-legal contexts only. Being unlikely that this legacy will be re-framed on equal basis between Western and Eastern EU Member States, a focus on the doctrinal nature of basic legal issues such as EU fundamental rights and liberties cannot be left aside.

7.1. The Idealistic Nature of the EU Constitutional Treaty's Preamble

The Preamble of the Draft Constitutional Treaty solemnly recalls a (subsequently deleted) statement of an ancient Greek historician, Thucydide II, in order to stress

the never-ending "civilizational mission" of Europe in the world and its still living attachment to everlasting humanistic values, such as those now formally recognized under the label of the inviolable rights of the subject and the respect for the law. No mention is made, by contrast, of the Manifesto of Ventotene written in the Ventotene prison by one of the leading promoters of the European unionism, Altiero Spinelli. In that Manifesto, the ideal of a United Europe is historically conceived as the only way-out to overcame—verbatim—the "civilizational crisis" of continental European societies: i.e. the rupture of Western *Weltanshauung*, and the turn of one of its constitutive patterns towards extreme forms of authoritarianism and totalitarianism. In other words, the EU Constitutional Treaty not only ignores what was—and still is—the core rationale of the EU project (see *supra* par. 2), but also hides the fact that the Community's founding-fathers aimed at a veritable "civilizational transition" from what might be called modern Western barbarism, i.e. nothing less than a substantial "transition from within."

Besides, no mention is made in the Treaty about other, subsequent continental European "transitions" such as those occurring to Greece, Portugal and Spain on the one hand, and in East Germany, on the other. Even less is mentioned about European countries "transitions" from colonialism, i.e. about the ways in which e.g. Belgium, England and France reacted against the claim for Western-style national independence, civil rights and self-determination made by Asian and African colonized countries.

Last, but not least, the Preamble simply "forgets" that for about forty years the European unionism grew up in a state of limited sovereignty because Western European countries had to comply with the military and financial rule of the *Pax Americana*, and that some legacies of such a foreign rule are still influential, albeit in a different fashion.

In brief, the Preamble not only is idealistically constructed, but avoids any historically determined account of the real issue at stake: "to reckon with the past" on the part of the whole—Western and Eastern, modern and contemporary—European society *vis-à-vis* either itself or the World-system.

Of course one could argue that those who drafted the text opted for legal amnesia in a technical sense. Yet, this does not excuse the lack of any reference to another unavoidable issue, i.e. the problematic evidence of what Giddens called the dark consequences of (western-style) Modernity, i.e. the collapse of major tenets of Enlightenment's and Classic Political Economy's narratives, as epitomized at present by the intelligence failure of a number of high-tech devices and the rise of the so-called *Risikogesellshaf*.

As legal ideals and economic principles of such narratives are the basic reference standards of the Preamble, the lack of any concern about what are now known as the "false promises" of (western-style) Modernity cannot be undervalued here: it signals that, besides the above mentioned political-cultural rupture, the EU constitutional project is ideologically repressing also a plausible and socially adequate representation of what current and prospective EU governance is and will be like.

7.2. The Vanishing Nomic Function of Contemporary Written Constitutions

Misrepresentations contained in the Treaty appear even more apparent if one recalls the Rousseauian-styled functional-fictional constructionist nature of the EU Constitutional Treaty (see *supra* par. 5.1) and consider it in relation the vanishing guarantee of rationality of Western formal knowledge and know-how[19] in the field of law, i.e. in relation to current theory (and practice) of democracy in the final instance.

As is well known that the constitutionalization of fundamental rights and values in self-styled democratic legal systems has been a recurrent *vexata quaestio* among legal scholars. In the late 1920s it was claimed that such constitutionalization would reduce conflicts deriving from the rising wave of social and cultural pluralism, while hiding the weakening of the organic hegemony of traditional power elites. The post-war Italian constitution formalized this option and acted as a model. In the past decades, however, multiculturalism and legal pluralism have undermined altogether the core rationale of all written constitutions—namely its judicial interpretation[20]—as it already had undermined not only legal codification but also the traditional function of official law as a generalized medium of social control.[21]

Quite paradoxically, there is no sign of such evidence in the EU constitutional Treaty. Rather, the universalistic pretence of EU fundamental rights and the claim for the *nomic* potentials of the rule-of-law are stated as a dogma, to assure European "citizens" that, if provided with them, they can forge their "common destiny" democratically. Unfortunately for EU "citizens" the "nature of things" are not as they appear to be. To have some insight, let us consider two, for brevity sake, major items: current notions of human/fundamental rights and democracy.

7.3. Cognitive and Operational Shifts about the Notion of Human Rights

Contrary to common understanding of lay people, the so-called "human" rights lost any universal and/or human character *strictu sensu* as soon as they were formally positivized and codified (for the space–time contingency of positive law makes them

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19 Immanuel Wallerstein, "Social Science and Contemporary Society: the Vanishing Guarantees of Rationality", *International Sociology*, 11, 1 (1996), pp. 7–25.

20 Francesco Belvisi, "Un fondamento delle costituzioni democratiche contemporanee? Ovvero: una costituzione senza fondamento", in Gustavo Gozzi (a cura di), *Democrazia, Diritti, Costituzione. I fondamenti costituzionali delle democrazie contemporanee* (Bologna: Il Mulino 1997), pp. 231–267.

21 Vittorio Olgiati, "The Conceptual Shift of a Key-Concept. Norm Production in Contemporary Sociology of Law in Europe", *Journal of Legal Pluralism and Unofficial Law*, Special Issue, 41 (1988), pp. 89–109, and, Vittorio Olgiati, "Vers une refonte des communautes epistemiques en Europe", in Lorena Parini (dir.), *State et Mondialisation. Strategies et Roles* (Paris: L'Harmattan 2001), pp. 191–223.