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.

(1) changeable and debatable at whim or by force, (2) subjected to a pluralistic legal interpretation, and (3) subdued to occasional power-game social constraints). At the time of the Weimar Constitution, the notion of "fundamental" rights was thus suggested not only to cover such a semantic and operational disempowerment, but also to assess a totally different institutional system. Actually, since then, the binary-model of human/fundamental rights no longer expresses the individual freedoms of personhood, but rather general political-institutional ordering principles of the given system that enforces them.[22] Accordingly, therefore, what for example the Nice Treaty still labels as human rights cannot be conceived as any other than protection rules of the EU institutional agents (EU Member States in particular), or as legal provisions sustaining the EU vested constituencies in the first instance, rather than as a direct guarantee of/for individual subjects.

A similar cognitive and operational shift has occurred to the notion of "democracy". If one reads any official EU legal document, the term democracy merely means official parliamentary acts and procedures performed by elected political representatives only. Also in this case, we owe, to the fear of the power elite for the risks inherent to rising pluralism, the legal positivization and codification of the concept. In turn, the traditional notion of "rule-of law" as the quintessence of a democratic system—forged in the second half of XIX Century by liberal ideologues to contrast democratic ideals[23]—was not abandoned: it simply lost is formal-abstract universal character, became an indicator of, or synonymous to, the so-called Administrative State and, lastly, took on the meaning of official law as a mere binding procedure. So, when one reads "rule-of-law" in any EU legal document, one has to aware that the term lacks any general substantive content.

7.4. Law's Empire as a Procedure

The theory and practice of positive law as a mere procedure constitutes a remarkable cognitive and operational shift in contemporary Western legal systems.

The core problem with this shift is that, notwithstanding the most refined systematizing efforts made in the last fifty years, it does not fit at all with either Classical Political Economy or Enlightenment constitutional tenets. These tenets are centered not on the added value provided by a type of decision-making implying relational/negotiable role-plays carried out within the framework of the self-referential logic of pre-defined proceedings and programs, but—as anybody knows—on individual actors' rational choices, i.e. a type of decision-making that excludes *a priori* that, e.g. common (political) values could match perfectly with personal (civil) in-

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22 Gustavo Gozzi, *Democrazia e diritti. Germania: dallo stato di diritto alla democrazia costituzionale* (Roma: Laterza 1999).

23 Maurizio Fioravanti and Stefano Mannoni, "Il "modello costituzionale" europeo: tradizioni e prospettive", in Gabriella Bonacchi (a cura di), *Una Costituzione senza Stato* (Bologna: Il Mulino 2001), pp. 23–70.

terests. Given this apparent contradiction, therefore, the enforcement of the law as a mere procedural system has been enhanced for decades informally, just to by-pass the limits of the traditional model without questioning its updated rationale. So much so that, in the meanwhile, the spread of two special structures, organically related to the new arrangement, completely change the constitutional scenario of any national and international western-style legal order: (a) the so-called "collegial formations," i.e. a sort of professionalized guilds, acting as semi-autonomous legal agents and embodying the procedural know-how required by the given legal field, and (b) sets of "qualitative procedural requisites", i.e. a sort of uniform body of legal standards, so as to establish a procedural threshold of interpretation of different variables.[24]

Needless to say, typical prototypes and the most notorious examples of these two structures today are just the EU Commissions, on the one hand, and the list of (so far 14) "fundamental" rights/liberties set up by the EU Court of Justice's praetorial jurisprudence,[25] on the other. As these structures are officially acknowledged as a constitutive part of the EU governance, it follows that the legal system already in force in the EU totally differs from the one that the liberal ideology contained in the Preamble suggests.

This conclusion would not be shocking if only the above issues were a mere matter of ideology. But it is not the case. Once treated procedurally—as Luhmann would put it—citizenship rights lose any political meaning because de-politicization is the structural–functional prerequisite of any legal procedure. They thus indicate mere social-cultural variables, i.e. social difference, not a proper political identity! Furthermore, once performed procedurally, citizens' participation to electoral competition is not an exercise of a fundamental right of democracy but a token of the degree of self-legitimation of the given political system. Once conceived procedurally, the division-of-powers principle—upon which the democratic value of the rule-of-law traditionally stands—does not guarantee any right or claim for it merely signals the cyclical turn-over of those in charge of given power structures. Once defined procedurally, even the expressions of sovereignty do not signal the full right of a supreme power, but a certain type of functionally differentiated status-role.[26]

In other words, in as far as the procedural logic of the so-called "societal constitutionalism"[27] has de-constructed traditional constitutional theory and practice, centered on the State-society divide, the substantive *ratio juris* of positive-codified

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[24] David Sciulli, "Towards Societal Constitutionalism: Principles from Communicative Action and Procedural Legality", *British Journal of Sociology*, 39 (1988), pp. 377–407.

[25] Petri Helander, "Supremacy and Scope of Community Law—Room for Principles?", *Turku Law Journal*, 3, 1 (2001), pp. 43–58.

[26] Niklas Luhmann, *Legitimation durch Verfahern* (Frankfurt-am-Main: Suhrkamp Verlag 1983).

[27] David Sciulli (1988), *op. cit.* n. 24.

law has eroded and the legal representation of social dynamics have turned into a veritable artifice. Surely this evidence was not the kind of legal experience that many citizens in Eastern European countries expected when complying with the EU entry conditions.

8. Ex Oriente Lumen?

Upon initial inspection, the list of problematic socio-legal issues that the EU Constitutional Treaty embodies is so large that it has been argued that the Treaty could only work—as Sigfrid Kracauer would put it—as a mere *ornament der masse*. Yet, this conclusion is both superficial and misleading. A sketchy look at the power games currently going on at social level provide us with a rather different view-point and make apparent a much more intriguing framework.

In the course of the discussion, the hybrid nature of the EU Constitution Treaty has been outlined as it mixes in a paradoxically synchronic way XIX Century-old individualistic legal principles and Late-Modern processual/transpersonal socio-legal interactions. Within, but also beyond, this structure, however, another "bifurcation" exists—also typical of XX century European constitutionalism—and plays an extremely relevant role: that between "substantive" and "formal" constitutions (the former being the expression of the vital force of politically active social groups able to establish a relatively stable and visible normative order in a given space–time, and the latter being the expression of the formal institutionalization of such a legal construction in proper technical legal terms.)[28]

As it is known, this sort of "bifurcation", running internally within any socio-normative realm, becomes scientifically apparent in the Thirties, as soon as the decline of the bourgeois' legal project matched with the rise of new social, political and cultural "capitals". Since then, it signals the existence of a cleavage between official and unofficial constitutional variables, or, if one prefers, a dialectical relationship between the manifest and latent socio-legal positions that social forces take on in the course of the ups and downs of their conflictive interactions, especially in relation to what is occurring at the institutional level. Moreover, it also signals the fact that collisions and collusions between normative facts and legal rules—between living laws and official laws—are as much irrepressible as the conflictive compositions of values and interests involved. Hence, their overall dynamics are particularly relevant for the social reproduction of social groups and the way in which their own particular interests and values fit or not into the established forms of a given constitutional system.

Needless to say, also in this respect, the process of EU constitutionalization does not make an exception. So much so that it is impossible to fully understand the above mentioned paradoxical synchronic wave without considering the

[28] Costantino Mortati, *La costituzione in senso materiale* (Milano: Giuffré 1940).

contradictory scenarios in which the EU ruling elites seem to place themselves vis-à-vis prospective EU constitutional patterns.

As the ideal of European societies' integration is not in the EU agenda, and due to the fact that current EU policy emphasizing diversity cannot but produce such a type of hybrid and spurious constitutional syncretism mentioned *supra*, it follows that the EU power elites are also moving towards a Janus-headed socio-political system: a model that in theoretical terms revitalizes—as has been said—the Rousseauian model, but that in technical legal terms resembles a veritable (albeit democratically self-styled) "Double-State", i.e. a political-institutional form of governance in which the superimposition of a special normative layer over pre-existing ones rules them in a relatively discretionary way.[29] Two diverging—but nevertheless complementary also—hypotheses, therefore, could be envisaged.

8.1. Towards a "Felix Austria" EU Model?

The original aim of European unionism was to end the devastations of the wars of the XX Century by means of a defensive modernization policy against any potential "Enemy". Yet, the fall of the Berlin Wall and the peaceful *acquis* of Eastern countries makes the EU single space larger than that conquered and subdued by—or anyhow politically prone to—Napoleon's or Hitler's army. Hence, one might wonder: what about the interior/exterior "enemy" now? Is that original aim still valuable?

In a recent study devoted to prospective world-system geo-political scenarios, an American scholar argued that the EU turned into a selfish "fortress". More precisely, the EU defends its domestic welfare rather than defending common Western strategic interests and values at global level, the burden of which is nicely delegated to the USA. Given this new sort of "splendid insulation", the EU gains twice: it avoids certain responsibilities in case of "dirty work", and enjoys the benefits of a "good" internal and international standing.[30] Unfortunately it is impossible to deal with this international issue here. For brevity sake, let us simply stress its extraordinary relevance for prospective interior *vs.* exterior EU constitutional governance trends.

However, the argument offers us the chance to deal with the other side of the coin, i.e. to discuss constitutional "visions" about future Europe from the inside. For the purpose of this study, this means to focus in a prospectivist way on the way in which the EU constitutional process is constructing a proper intra-European geo-political hegemony, or—if one prefers—is assessing the symbolic (and material) power asset of the EU power elite in both social and legal terms. In short: what sort of "fortress" are we talking about?

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[29] Ernst Fraenkel, *Il doppio-stato. Contributo alla teoria della dittatura*, (Torino: Einaudi 1983).

[30] Robert Kagan, *Of Paradise and Power* (New York: Knopf 2002).

With regard to this topic, it is quite apparent that the "visions" of the future Europe were already formulated in the past.[31] Even though ideologically raised, the claim about the "common destiny", the "civilizing mission", the "common cultural tradition" of Europe made in the Preamble of the EU Constitutional Treaty, recalls a governance model that Montesquieu, following Machiavelli, envisaged, i.e. that of the search for an equilibrium between the different European constituencies. In turn the regulatory standards for a more centralized, reinforced EU governance system recalls not only the problem raised by either Voltaire or Burke, i.e. that due to the diversity of European countries any equilibrium is unstable and conflicts inevitably occur, but also the solutions provided respectively by Leibniz and Rousseau, i.e. that either a balanced dualism between top–down and bottom-up constituencies, or directorial guarantees stemming from a superior confederate asset is needed.

If so, how can one miss that the French-German cooperation within the EU revitalizes the myth/reality of the leading "civilizing mission", "common destiny" and "common tradition" of Mitteleurope: i.e. the myth/reality of a never-ending historical trend spanning from the Holy Roman Empire—as a legacy of ancient Rome—up to the "Universal" Habsburg Empire? And how can one exclude that the claim for a formal "reinforced" cooperation could be a stepping-stone for a renewed Holy Alliance to impede that not only a sort of Auschwitz, but also a sort of Termidore could occur again, and eventually on a European scale?

In any case, whatever way in which one looks at the matter, there is no doubt that the Habsburg *Austria Felix* governance model, especially when shaped as a "Double Monarchy" legal system, seems to offer an appealing historical reference to promote a long-lasting EU rule. On the one hand, it could reinforce the structure and the image of the new (democratic-style) EU "Double-State" system, as somewhat created by the EU Constitutional Treaty, without repressing the interior diversity of the each EU country. On the other hand—as Bagehot would put it—it could raise a sentiment of reverence for the venerable symbolism evoked by a traditional form of power and authority. In other words—and, of course, *mutatis mutandis*—one could even venture as far to say that a sort of up-to-date Mitteleuropean governmentality model might not have been so far, or be now, unrealistically imagined as a possible way out of the kind of challenges—i.e. multicultural fragmentation and political instability—that the EU power elite inevitably has to face, and will have to face even more in the near future.

As a number of indicators suggests—from the letter of Otto von Habsburg, published by an Austrian newspaper in 1987, to praise the enforcement of the Maastricht Treaty, up to the election of Simeon of Saxony–Coburg–Gotha at the Bulgarian parliament—there is no apparent contradiction between the EU policy and a prospective monarchic constitutional revival in Europe. Actually, if one

[31] Bo Petersson and Anders Hellstrom, "The Return of the Kings. Temporality in the Construction of the EU Identity", *European Societies*, 5, 3 (2003), pp. 235–252.

excludes the struggle for the organizational dominance[32] that Nation-States and new powerful corporate socio-legal orders are carrying out at patrimonial and symbolic level at present—a matter that unfortunately cannot be dealt with in detail here—one hardly notices any contrast within European aristocracy—whether by old-blood or by new-money—as regards the advantages offered by the EU constitutional process to strengthen typically selective and exclusive clan ties.

8.2. Towards a "Legal Bukowine" EU Model?

Having said the above, however, it would be naïve to undervalue the limits that are inherent of the Mitteleuropean model, and, more particularly, socio-political risks stemming from any form of clan ties. It is well known that the historical weakness of both the Holy Roman and the Habsburg empires' model is that the dynamic of interior cultural, political and legal diversity, matched with the recurrent instability and mobility—by enlargements and contractions—of their formal-official borders. In this respect one can hardly speak of a "common" destiny, tradition, or civilizing mission even within the Mitteleurope. The good, old, highly refined, structures of the so-called *Rechtspublizistik*, and its related "Empire Patriotism" were not able to counteract the recurrent claim for what Ratzel called *Lebensraum*, either in the form of the enforcement of the *cuius lex, ejus rex* or *cuius regio, ejus religio* rules, or in the form of the struggle for a *Sonderweg* to national irredentism, independence and self-determination. It is, therefore, not by chance that we owe to Gumplowicz one of the most radical studies of the human history as a never-ending form of "tribal war", and to Ehrlich the first conscious approach to legal pluralism as a general theory of law. The reference model for Gumplowicz's theory was his personal experience of the historical turn of order and disorder stemming from occasional, temporary and arbitrary territorial partitions and aggregations in the Baltic, Northern Slavonic and Southern Slavonic regions, areas in which the oppressed cyclically turned into oppressors and vice versa. The reference model for Ehrlich's theory was his personal experience of the force of multicultural living conditions *vis-à-vis* formal-official law in the Bucowine region, the most central region within the central geo-political realm of the whole European continent.

As one can see, there are serious historical records in Europe that cannot be hidden or ignored. Even less so when a constitutional process of continental dimensions such as that that has been described so far is currently in progress.

9. Conclusion

As it has been stressed, the historical coincidence of the process of EU constitutionalization and the EU Eastern enlargement has exacerbated a variety of theoretical

[32] Mancur Olson, *The Logic of Collective Action* (Cambridge, MA: Harvard University Press 1966).

and practical "dilemmas" concerned with the a-systematic functioning and the "democratic deficit" of the overall EU *Struckturbildung*. Such a coincidence also acted as a political catalyst to reinvigorate the still-living ideology of Europe as an expansionist, self-fulfilling "civilization" model *vis-à-vis* both neighboring countries and the world-system. In this respect, a last—but by no means least—issue cannot be left aside at the conclusion of this study: no mention at all can be found in the Treaty of a boundary or a dead-line about the EU territorial incrementalism, especially beyond commonly acknowledged, traditional *limes* of what is meant by "Europe". As there is any notion in the EU Constitutional Treaty of Europe as a *Finis Terrae* of the Eurasian continental platform, the option for a new sort of new European imperial policy at transcontinental level cannot, therefore, be reasonably excluded.

Significantly, in no way is this lacuna a sign of a lack of attention or an occasional mistake. The fact is that there is a growing internal cleavage—but also a common networking role-play—within the EU power elite between those fractions that are still culturally and politically attached to the State-nation territorially constituted interests and values, and those fractions that, by contrast, are more and more culturally and politically attached to transnational corporate socio-legal orders pursuing, at economic and institutional level, interests and values *sans Patrie*. Unfortunately—as has been previously said—the struggle for the organizational dominance that is currently going on between nation-State oriented and trans-national corporation oriented groups[33] is a theme that cannot be dealt with here. But it is clear that, being open and unresolved the issue of the *limina* of the EU single space, this is a major problem that all EU "citizens" will have to face in the future.

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[33] Vittorio Olgiati (2001), *op. cit.* n. 21.

3. A Problem of their Own, Solutions of their Own: CEE Jurisdictions and the Problems of Lustration and Retroactivity

David Robertson

1. Introduction

The idea of the rule of law is very rich and deep, allowing much legitimate variation in its implication. When a difference between local constitutional interpretations takes one system out of the category of "a state governed by the rule of law" but leaves another within it is essentially a judgment call. I am concerned with the pragmatic question of what precise rules or constitutional court decisions are necessarily implied by the avowed preference "*non sub homine, sed lege e dei.*" No analysis of the problem I address could be intellectually honest were it to insist on a simple and uniform definition being applied everywhere in the CEE area. In the end if will be for the reader to decide whether, for example, the differences between the Czech and the Hungarian approach to the rule of law falls within the necessary area of what the ECHR has called a "margin of appreciation", or whether we must rule one or other state to have failed the test. What is very important indeed is how the Constitutional Courts have gone about assessing the legitimacy of the policies covered here. What the rest of Europe will gain, or suffer from, is very much a matter of high doctrine. Such doctrine constitutes further building blocks in the constructive writing of democratic political theory by courts as they move towards an international constitutional common law.[1] What the Hungarian, Czech, Polish, Slovenian, Lithuanian and Estonian High Courts have thought when asked about the constitutional validity of some methods of dealing with the problems of the past could be of enormous value in this long term endeavour. At the very least their difficulties draw our attention to how little worked out are many of our legal assumptions and icons in this area.

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[1] I have discussed the idea that the CEE courts are working towards a common constitutional law in David Robertson, *Democratic Transitions and a Common Constitutional Law for Europe.* (Oxford: Europaeum 2001). It is clear that at least some of the leading CEE jurists themselves have an idea very close to this, and an ambition to share in developing such an international approach. See, especially, László Sólyom, "Opening Address, 10th Conference of European Constitutional Courts", in *Bulletin on Constitutional Case Law* (Budapest: Council of Europe 1996).

Wojciech Sadurski et al. (ed.), Spreading Democracy and the Rule of Law?, 73–96.

2. The Nature of the Case Law

The way in which concepts like "the rule of law", "a state under the rule of law" and so on are worked out and used in CEE court decisions needs to be understood in terms of the very nature and context of the case law, which is very different from that of established Western courts. To start with the material I deal with comes from the very early years of the development of curial authority in CEE jurisdictions. The consequence of this is that these courts did not assess the constitutionality of, for example, lustration statutes against a background either of well-established constitutional rights doctrine, or even of well-established structural constitutional doctrine. Rather the lustration cases were, *inter alia,* precisely part of the material used by the courts to develop their doctrines on vires and rights. It was not, in other words, quite a matter of asking whether s.5 of Act No 198/1993 of the Czech Parliament, (on retrospective punishment) breaches guarantees of legal certainty which are of vital constitutional importance, as it might be in a longer established court. It is much more a matter of using reflection on s.5 to work out what legal certainty means and how important such legal certainty is to a democratic constitution and the rule of law. The difference is that to a large extent a western court analyzes a troubling statute against a relatively well-established definition of a constitutional right to see if it passes scrutiny. There is, as it were, only one puzzle. Here there is a double puzzle—the statute needs to be analyzed, but the right has to be as well—they are interdefined. There is thus a self-reflexivity in the process of constitutional jurisprudence over this period and in these countries which is highly unusual and crucial. These (and of course many other types of decisions) are what have made the constitutional doctrines the rest of Europe will have to cope with and which it may benefit from. From our point of view the great advantage is that there is far more, more thoughtful, and less formulaic discussion of absolutely core questions than one finds anywhere except in similar transition states.[2] This cannot be stressed enough. This idea of reflection on complex problems is crucial, though its relative frequency between countries is also one of the keys to the differences in constitutional understanding one finds on the rule of law. Decisions of the Czech

[2] Transitions need not be dramatic to be useful to us in this way—not only does the South African Court give us similar original reflection, but so does the Canadian Court on receiving its Charter. On the latter see Claire L'Heureux-Dubé, "Realising equality in the twentieth century: The role of the Supreme Court of Canada in comparative perspective", *International Journal of Constitutional Law* Vol. 1 No. 1, January 2003; for a South African case exhibiting the degree of open and flexible thought typical in some CEE cases, consider *Republic of South Africa vs. Grootboom,* 2001 (1) SsA. 46. The rival constitutional theories behind the South African Bill of Rights are well depicted in Martin Chanock, "A Post-Calvinist Catechism or Post-Communist Manifesto? Intersecting Narratives in the South African Bill of Rights Debate" in Philip Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: OUP 1999).

court are perhaps the best examples: frequently there is a depth of reflection on democracy and on the relationship between law and core socio-political values that one could never find in an established western court—indeed which no western court *has ever* undertaken. One good example in the case on the constitutionality of the statute *Regarding The Lawlessness of the Communist Regime and Resistance to it*[3] which I discuss later.[4] A case less commonly analyzed is the Court's (retrospective) validation of the 1945 Benes decree, from October 1945, "On the Confiscation of Enemy Property and the Funds of National Renewal."[5] The case arose because of a challenge to the legality of the confiscation of property belonging to German citizens and Czech sympathizers the end of the Second World War. It could have been handled by a short and technical demonstration of the constitutional status of the interim government in 1945, and indeed the court did give such an answer. But far more of the judgment is dedicated to answering the plaintiffs claim, hopeless in terms of positive law, that the Benes decrees "violated the legal canons of civilized European societies and that, therefore, they must be considered not as acts of law but of force." In answering this, the court made a series of assertions which characterize the way it looks at the past, and at the foundations of a democratic legal order. In particular, the sense of the primacy of the political base for the legitimacy even of procedural law comes across clearly.

The constitutional requirement laid down in the 1920 Constitutional Charter that the Czechoslovak state have a democratic character, is rather a concept of a political science character (and which is juristically definable only with difficulty) which, however, does not mean that it is a meta-legal concept, hence not legally binding. On the contrary, the constitutional principle mandating the democratic legitimacy of the governmental system was a basic characteristic feature of the constitutional system which as a result meant that, in the 1920 Constitutional Charter of the Czechoslovak Republic, this principle *was ranked above and prior to requirements of formal, legal legitimacy.*[6]

It is, of course, possible to make the argument that any court which does indeed think that any principle can rank above "formal, legal legitimacy" does not understand the rule of law, and it is arguable the Hungarian Court, for one, would take that position. I believe, with the Czech court, that the rule of law, or the idea of a "state under law", especially in a transition period, actually requires this politically informed depth of analysis. Much is made in this ruling of the nature of human

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3 Act No 198/1993 Sb.

4 This has been very ably analyzed elsewhere by another contributor to this book, Jiri Priban, to whom I owe a great debt in my understanding of this entire topic, and whose work I admire without, necessarily, actually agreeing with it. See Jiri Priban, "Moral and Political Legislation in Constitutional Justice: A Case Study of the Czech Constitutional Court," *The Journal of East European Law*, 8:1 (2001), pp. 15–34.

5 Pl. US. 14/94—Benes Decree No. 108.

6 *Ibid.*