From 'Which Rule of Law?' to 'The Rule of Which Law?': Post-Communist Experiences of European Legal Integration

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In the last two decades, post-communist states experienced a fascinating political journey, from using the rule of law concept in the most general way as an early signal of the coming constitutional and political transformation, to specifically (as EU Member States) addressing the problem of the supremacy of EU law and its effect on emerging national democracy and constitutional sovereignty. In other words, they moved from asking the question 'which rule of law?' to the question 'the rule of which law?'

This move itself indicates the capacity of the rule of law, which is discussed in this article, to operate as a political ideal and a power technique at the same time. This duality of the rule of law operations will be outlined against the background of the process of European integration and its challenges to the traditional constitutional notions of sovereignty and legal unity. I shall argue that post-communist states initially had to embrace the substantive concept of the rule of law drawing on liberal and democratic values, which became a valid ticket for 'The Return to Europe' journey. However, the very process of European integration involved technical uses of law often challenging the substantive notion of the democratic rule of law and constitutionalism. The accession of post-communist states to the EU thus highlights the Union's more general problem and intrinsic tension between instrumental legitimacy by outcomes and substantive legitimacy by democratic procedures and values.

Introductory Remarks

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The Post-communist Noble Dream of the Rule of Law?

In the 1990s, discussions of the post-communist rule of law seemed to have no end and no borders. Political and legal scientists, economists, lawyers, politicians and moralists emphasized its essential importance alongside other general goals – market economy, liberal democracy, human rights, constitutionalism and European integration.[1] For instance, I remember a conference in Oxford in the mid-1990s at which one of the hosting professors expressed his bewilderment at the proliferation of the rule of law concept in post-communist transitional societies. Truthful to Dicey's doctrine and the local culture of hardly noticeable snobbery

[1] Sharon L. Wolchik and Jane L. Curry (eds.), *Central and East European Politics: From Communism to Democracy*, 2007.

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and civilisational superiority, the professor insisted that the rule of law was just a technique of government and all other meanings were profoundly wrong, informed by political failures in respective countries and theoretically misleading. According to him, the concept did not have any moral or political value and its meaning was purely instrumental, indicating that any power exercised on the basis and within constraints of the laws constituted the rule of law.

As a young academic coming from one of those post-communist countries, I could hardly understand the argument strictly separating the rule of law from democracy, human rights and constitutionalism. If the rule of law had a purely formalistic and technical meaning, its informative value would be zero because it would include everything and leave out nothing. The rule of law concept's theoretical contribution could successfully be challenged because it, being exercised by all modern societies irrespective of their political regime, would no longer have any significance. If all modern societies are governed by laws (and they, indeed, are governed by them, except for a few failed states), the rule of law would be just another name for modernity. It would be meaningful for social theory but not jurisprudence.

The last century revealed a simple truth: that even the worst totalitarian regimes had their legal systems and the most horrible tyrants acquired political power by legal means. The public trial became a synonym of a show of self-denial before the person's pre-arranged execution. Even the Holocaust ran according to the official rules of legal ordinances.

Reflecting on the atrocities of Nazism and Stalinism, post-war legal theory subsequently elaborated a substantive rather than formal notion of the rule of law/*Rechtsstaat* which was appropriated by the constitutional and democratic state as its legitimation formula. The rule of law became a heavily-loaded moral/political concept standing right next to the concepts of democracy, human rights and constitutionalism.

Kelsen's famous formula 'Norm is Norm' (and nothing else), which startled even H.L.A. Hart so much that he fell over backwards in his chair,[2] became considered an example of narrow legalism and formalism responsible for the collapse of democratic regimes and paving pathways for political totalitarianism.[3] The revival of legal theory as a moral political project was typical of post-war German

[2] H.L.A. Hart, 'Kelsen Visited', in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, 1983, p. 286, at p. 287.

[3] Attacks on Kelsen's theory as an argumentative ground used by despotic and tyrannical governments have recently been balanced by scholarly works relating his pure theory of law to theories of liberal democracy, constitutional statehood, and even political pragmatism. See especially David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, 1999 and Richard A. Posner, *Law, Pragmatism and Democracy*, 2003, p. 250.

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legal science with its Radbruch formula stating that law grossly violating basic principles of justice and humanity must yield to justice as incorrect or 'lawless' law,[4] its emphasis on supra-positive constitutional principles, theories of constitutional rights,[5] etc. However, it also was typical of the post-war US jurisprudence increasingly 'taking rights seriously'[6] and calling for 'the rights revolution'.[7]

Post-war legal theory revitalised 'supra-positive' and 'natural justice' arguments and reformulated the rule of law as a substantive justice concept drawing on democratic political principles and human rights. Resigning from the status of a general value-neutral science of law, legal theory sought to establish a common ground with moral and political philosophy by representing a body of the most general principles, values and understandings of law. The abstract nature of legal theory was to facilitate legitimacy of the concrete liberal democratic political regimes. The recent theoretical and practical focus on rights, principles and justice has been part of what Hart labelled 'the Noble Dream' of the constitutional rule of law as a system of principles and policies legitimizing democratic government.[8]

These brief comments on recent political and legal theory show that the legitimacy of modern constitutional democracy ultimately rests on popular sovereignty and the rule of law and civil rights based constitutionalism. A political system can be considered democratically legitimate if it is imposed by the sovereign people on itself, and political power can be exercised either directly by the people, or through their elected representatives. However, this democratic system itself needs constitutional legitimation in the sense that its principles and procedures have legal form and public officials are subject to the law. Democratically legitimized actions are governed by the rule of law and, at the same time, the legal rules are open to democratic change.[9]

Moving from general jurisprudential notions of the rule of law to the specific context of political and constitutional developments of post-communist states and their European integration in the aftermath of the 1989 revolutions, I believe that the rule of law can be coevally analyzed as an ideal signifying the emergence of democratic political ethics and principles in post-communist societies and as a tool of transformative policy drawing on democratic constitutionalism and constitutional rights, part of which was the policy of European political and legal

[4] James E. Herget, *Contemporary German Legal Philosophy*, 1996, pp. 4-5.

[5] Robert Alexy, *A Theory of Constitutional Rights*, 2002.

[6] Ronald Dworkin, *Taking Rights Seriously*, 1978.

[7] Charles R. Epp, *The Rights Revolution: Lawyer, Activists and Supreme Courts in Comparative Perspective*, 1998; S. Walker, *The Rights Revolution: Rights and Community in Modern America*, 1998.

[8] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, 1983, pp. 132-144.

[9] Jürgen Habermas, 'Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism', in 92 *Journal of Philosophy* (1995), p. 109; John Rawls, 'Political Liberalism: Reply to Habermas', in 92 *Journal of Philosophy* (1995), pp. 132-180.

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integration. While our professor certainly was wrong in terms of denying any normative value to the rule of law and its symbolic role in the period of democratic transformation, he would have a lot to say about the rule of law's instrumental role in enforcing particular policies of new democratically elected governments and harmonizing them with the EU's policies and legal regulations.

The 'Return to Europe' as a Return to the Substantive Value-Based Rule of Law

Using the 'Return to Europe' slogan, post-communist countries expressed their general belief in the political, cultural, and historical unity of the continent interrupted by the period of communism, and started to work towards fulfilling the specific political ambition of accession to European political and economic institutions. The return to Europe, therefore, included a return to the rule of law as an institutional precondition of European integration. The rule of law, protection of human rights, constitutionalism and democracy opened the door to Europe represented by its organizations, such as the Council of Europe and the European Community which transformed itself into the European Union in 1992.

Analyzing the rule of law promotion and support by the Council of Europe and the European Union, it is clear that, though membership in both organizations was considered the hallmark of 'democracy' and 'the rule of law', the EU played a much more fundamental role due to its detailed sets of membership conditions, methods of screening and forms of political pressure which will be discussed in following parts of this text. On the other hand, the Council of Europe used soft diplomacy, preferring to accept new members on the basis of their commitments, rather than executed policies.[10] This approach was understandable in strategic terms of having former communist countries integrated at least in one organization of former West European democracies, especially when it was clear that EU or NATO membership aspirations would take much longer. However, it also resulted in the decline in standards and reputation of the organization originally designed to promote human rights and freedoms, because its inability to rigorously enforce membership criteria allowed some Member States simply to ignore commitments made before accession to the Council of Europe.[11]

Although it eventually was the EU which played a decisive role in the rule of law and democracy enforcement, however, the Council of Europe membership was also considered a top political priority because it granted new emerging democracies essential international legitimacy in the early 1990s. Furthermore, evaluative reports of the Council of Europe were commonly used by the Commission

[10] Daniel Tarschys, *Europe as Invention and Necessity*, 1999.

[11] For further details, see Stuart Croft et al., *The Enlargement of Europe*, 1999.

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during the EU accession process which thus limited the scale of damage to the Council of Europe's reputation and importance in the second half of the 1990s.

The rule of universal human rights – the Hungarian capital punishment case

Seeking to achieve international legitimacy and become part of the world of western liberal democracies, governments and top judicial bodies of post-communist countries engaged in a gigantic task of 'rethinking the rule of law after communism'[12] and making it compatible with substantive values of liberal democratic societies. Legal systems of emerging democracies in post-communist Europe were expected to incorporate liberal democratic values as substantive foundations of the new constitutional rule of law.

One of the most persuasive early examples of a substantive approach to the rule of law was the capital punishment case of the Hungarian Constitutional Court. The court was designed during early stages of constitutional transformation and political round table talks in 1989 and started working in 1990.[13] Its powers were modelled on the German Constitutional Court and its first judges were appointed mostly from academic positions. As in Germany or Poland, the first court was a typical 'professorial court' dealing with many fundamental issues of the constitutional state and the democratic rule of law.[14]

In October 1990, the court reviewed the criminal code's section on capital punishment and declared it unconstitutional. The decision was nine to one and the dissenting voice was concerned with procedural rather than substantive issues.[15] The judgment was surprisingly swift and was largely based on the expert view of other law professors.[16] Drawing on Article 54(1) of the Hungarian Constitution which provides that '… everyone has the inherent right to life and human dignity of which no one shall be arbitrarily deprived …', the judges came to the conclusion that capital punishment is *substantively* rather than procedurally arbitrary because there is no good reason to engage in this particular punitive practice. It was statistically demonstrated by the Court that the punishment does not work and therefore is unsubstantiated as a form of deterrence.

[12] For a comprehensive overview, see Adam Czarnota et al. (eds.), *Rethinking the Rule of Law after Communism*, 2005.

[13] Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 2002, pp. 82-83.

[14] For further details, see, for instance, Jiří Přibáň et al. (eds.), *Systems of Justice in Transition: Central European experiences since 1989*, 2003.

[15] The Capital Punishment Case No. 23/1990 of 31 October 1990. For details, see L. Sólyom and G. Brunner (eds.), *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*, 2000, pp. 118-138.

[16] Ibid., p. 120.

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The Hungarian constitutional protection of the right to life was modelled on Articles 6(1) and 7 of *The International Covenant on Civil and Political Rights* and Articles 2 and 3 of *The Convention for the Protection of Human Rights and Fundamental Freedoms* (commonly referred to as the *European Convention on Human Rights*). In this context, it is noteworthy that the Court's judgment coincided with Hungary's diplomatic efforts to become the Council of Europe's first post-communist state. The Court's interpretation of Article 54(1) of the Hungarian Constitution fully endorsed the 1983 *Sixth Additional Protocol* of the Council of Europe which declared capital punishment a form of inhuman and degrading punishment. The Court's interpretation was thus consistent with the Council of Europe's policy of abolition of capital punishment and significantly contributed to Hungary's speedy accession to the Council of Europe.

According to the Court's critics, 'there is little doubt that the symbolic significance of abolition moved the Judges to think that … they were acting in the name of the new democratic Constitution'[17] and the *European Convention on Human Rights*. The Court employed an unorthodox interpretation of Article 6(1) of the *International Covenant on Civil and Political Rights* as pointing in the direction of the abolition of capital punishment. Surprisingly, the Court did not raise the issue that the Covenant had already been binding in Hungary during the communist regime which maintained capital punishment for a limited number of serious criminal offences. Instead, the Court invoked Article 1 of the Council of Europe's 1983 Additional Protocol to argue against the legitimacy of capital punishment despite the fact that the *European Convention on Human Rights* was not ratified and therefore binding in Hungary at the time of the Court's judgment.[18]

Leaving aside speculations about possible political motives for the Court's judgment (rumours had it that the Court sought to support Hungary's entry into the Council of Europe by complying with its policy on the abolition of capital punishment),[19] the most plausible conclusion, therefore, is that the Court argued on the basis of abstract principles[20] and a general European consensus rather than European legal conventions. It presented particular interpretations 'as an interpretation shared by all 'modern constitutions', i.e., universally shared.'[21] It is important that this argument by universality of human rights used the *European Convention on Human Rights* as its referential point. 'Europe' represented universal human values

[17] G. Fletcher, 'Searching for the Rule of Law in the Wake of Communism', *Brigham Young University Law Review* (1992), p. 145, at p. 160.

[18] Sólyom and Brunner, *Constitutional Judiciary in a New Democracy*, pp. 122-123.

[19] Fletcher, 'Searching for the Rule of Law', at pp. 158-159.

[20] See Renata Uitz, *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication*, 2005, p. 210.

[21] C. Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Court and the Right to Human Dignity*, 2003, p. 165.

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and rights, and 'importing the law from Europe' amounted to becoming part of the global development of the democratic rule of law and a common language of human rights.[22] In this manner, the Minister of Justice, for instance, concluded that the abolition of capital punishment 'was in harmony with European legal development.'[23]

The rule of law defending democracy – the Czech lustration law case

The Hungarian Constitutional Court's strategy was typical of over-reliance on the *Zeitgeist* of universality of democratic values and human rights rather than consistently and logically constructed legal arguments. A similar perspective on the rule of law as a substantive concept based on democratic values and human rights was offered by the Czechoslovak Constitutional Court during its brief existence before the split of the Czechoslovak federation in 1992 and subsequently by the Czech Constitutional Court in its early decisions. In the famous and widely discussed federal court's judgment regarding the Czechoslovak lustration law[24] and the Czech court's judgment regarding *The Act on the Lawlessness of the Communist Regime and Resistance Against It*,[25] these constitutional courts formulated a strong doctrine of the democratic rule of law/*Rechtsstaat* based on the protection of human rights and substantive value-based legality as opposed to the formalist concept of socialist legality adopted and enforced by the previous communist regime.

Dealing with constitutionality of *The Act on the Lawlessness of the Communist Regime and Resistance Against It* in 1993, the Czech Constitutional Court argued that:

> 'The Czech Constitution accepts and respects the principle of legality as a part of the overall basic conception of a law-based state; positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose, law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values (para. 25).'[26]

However, this robust judgment of the Czech Constitutional Court was preceded by the equally important 'Lustration Law Case' delivered by the federal constitutional court in 1992. Considering the principle of legal certainty and its possible

[22] Ibid., p. 167.

[23] Solyom and G. Brunner, *Constitutional Judiciary on a New Democracy*, p. 120.

[24] Judgment No. 1/92Pl US of the Constitutional Court of the Czech and Slovak Federal Republic.

[25] *The Act on the Lawlessness of the Communist Regime and Resistance Against It*, No. 198/1993Sb. and the Judgment of the Constitutional Court of the Czech Republic, No. 19/93Pl US.

[26] For further discussion of this judgment, see Jiří Přibáň, *Dissidents of Law: on the 1989 velvet revolutions, legitimations, fictions of legality and contemporary version of the social contract*, 2002, p. 111.

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weakening by the lustration law screening public officials and possibly banning them from a civil service office,[27] the court ruled that it needed to be related to *substantive values* protected by formal legality. According to the ruling, formal legality and continuity with the old system must not compromise the new system and substantive values upon which it is being built. The citizens' trust in the democratic rule of law should not be put at risk by ignoring the different value system upon which it is built and insisting on formal continuity with the past communist legislation. Such legal continuity would result in the persistence of the old value system which would undermine the new democratic rule of law.

Furthermore, the Court interestingly analyzed the communist system as a system in which

> '[I]n addition to the formally legitimate institutions of legislative and executive power, the composition and activities of which were adapted in a purpose-oriented fashion to their designs on power, other state bodies and organizations also took part in the suppression of rights and freedoms without having any foundation at all in law for their activities (People's Militia), or they obtained such a foundation only through subsequent legal approval (Action Committees, Screening Commissions).'[28]

The communist state based on suppressing human rights and commonly acting outside the framework of its own laws is contrasted to the democratic rule of law based on protecting human rights and freedoms. The Court subsequently concluded that the democratic state could use exceptional methods to protect its foundational principles and values. Furthermore, the Court compared the post-communist Czechoslovak condition to other European states which

> 'also took measures of a similar type after the collapse of the totalitarian regime's monopoly power, and they considered them to be a legitimate means, the purpose of which is not to threaten the democratic nature of the constitutional system, the value system of a constitutional and law-based state, nor the basic rights and freedoms of citizens, rather the protection and strengthening of just those things.'[29]

Unlike in the Hungarian Constitutional Court's capital punishment case, attempting compliance with European legal policies and documents yet to be ratified by

[27] For the law's analysis, see J. Přibáň, 'Oppressors and Their Victims: The Czech Lustration Law and the Rule of Law', in Alexander Mayer-Rieckh & Pablo de Greiff (eds.), *Justice as Prevention: Vetting Public Employees in Transitional Societies*, 2007, p. 309.

[28] Judgment No. 1/92Pl US. Available from: http://angl.concourt.cz/angl_verze/doc/p-1-92.php.

[29] Ibid.

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the republic of Hungary, the Czechoslovak lustration law case was already responding to European and international criticisms of an act of the democratically elected legislator. The lustration act was criticized for its apparently discriminatory and anti-democratic character.[30] The court, therefore, resorted to the argument using the rule of law as a system of values to: a) criticize the previous political regime; b) legitimize the new democratic regime and its commitment to the protection of human rights and freedoms; and c) compare the legislation to other European post-totalitarian or post-authoritarian measures and thus make it acceptable by European institutions, especially the Council of Europe.[31]

It is noteworthy that the Czech Constitutional Court adopted exactly the same strategy as the Czechoslovak Constitutional Court when dealing with constitutionality of the lustration law's extended novelization in the Czech Republic in 2001. In this judgment, the Czech Constitutional Court invoked the idea of 'a democracy able to defend itself'[32] and the corresponding obligation of political loyalty of civil servants as a legitimate aim of the democratic state's legislation. To enhance its argument, the Court subsequently cited the European Court of Human Rights case *Vogt* v. *Germany*[33] and emphasized the possibility of the absolute nature of political loyalty of civil servants.

From Designs to Techniques: On the Instrumental Role of the Copenhagen Criteria

What is common to the Hungarian capital punishment case and the Czechoslovak lustration law case is the use of the substantive value-based concept of the rule of law as a legitimation strategy signalling the 'return to Europe'. Unlike the universal human rights doctrine inspired Hungarian Constitutional Court, the Czechoslovak and, later, Czech constitutional courts were mainly drawing on post-war German theory of the democratic rule of law and the constitutional state.

These early robust and overtly political decisions formulated political and moral foundations of the democratic rule of law. However, this style of reasoning became indefensible in the face of the emerging system of constitutional democracy and its distinct modes and elaborate techniques of judicial reasoning. The time of designers was coming to its close while the time of technicians was in the ascendancy in the second half of the 1990s. The period of drafting constitutional

[30] See especially Jiřina Šiklová, 'Lustration or the Czech Way of Screening', in M. Krygier and A. Czarnota (eds.), *The Rule of Law after Communism*, 1999, p. 248.

[31] Jiří Přibáň, *Legal Symbolism: on Law, Time and European Identity*, 2007, pp. 159, 175 et seq.

[32] Judgment No. 9/2001Pl. US of the Constitutional Court of the Czech Republic, referred to as 'Lustration Law Case II'.

[33] Judgment *Vogt* v. *Germany*, (17851/91) [1996] ECHR 34 (2 September 1996).

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doctrines and documents, such as constitutions and human rights charters, was gradually replaced by the period of doctrinal elaborations and their technical applications.

This change is strongly present in the process of European integration. Between 1989 and 1993, post-communist states established EU membership as their foreign policy's ultimate priority, which was not perceived as clashing with the coeval process of rebuilding national sovereignty, constitutional statehood and the rule of law. The membership was considered a matter of national interest despite a profoundly asymmetrical relationship between the ever more economically and politically integrated EU and emerging post-communist democracies.

This 'asymmetric interdependence'[34] defined the whole period between the 1989 revolutions and the 2004 EU enlargement. Critics frequently commented on the European Union's vague promises of accepting post-communist countries 'in 5 years', ever since the fall of the Berlin wall. Nevertheless, post-communist political and constitutional transformations of the early 1990s and coeval profound transformation of the European Community into the European Union after the ratification of the Maastricht Treaty in 1992 eventually led to the outline of a specific integration policy for post-communist countries. In 1993, the newly established Union, therefore, adopted a set of Union membership conditions for candidate states which became known as the 'Copenhagen criteria' and were the basis of the conditionality process of EU accession.

As Milada Vachudova points out, the leverage of the EU/candidate states was originally passive and limited to the most general attractions of EU membership but transformed into an active one after the introduction of the Copenhagen criteria by the EU in 1993.[35] The Copenhagen criteria were adopted by the European Council in June 1993 and divided the EU accession conditions into three different categories – political, economic, and legal. While economic conditions specified the need to establish a functioning market economy compatible with market pressures, competition and regulations within the EU, political conditions listed the need to guarantee institutional stability of emerging democracies and their constitutional systems including the rule of law principles and human rights catalogues.[36] Political conditions even included respect for and protection of minorities for which there was no ground within the framework of European law.[37]

[34] Milada Anna Vachudova, *Europe Undivided: Democracy, Leverage, Integration after Communism*, 2005, p. 109.

[35] Ibid., ch. 3 and 5.

[36] Manfred Novak, 'Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU', in Philip Alston et al. (eds.), *The EU and Human Rights*, 1999, p. 687.

[37] Bruno De Witte and Gabriel N. Toggenburg, 'Human Rights and Membership of the European Union', in Steve Peers and Angela Ward, *The European Union Charter of Fundamental Rights: Politics, Law and Policy*, 2004, p. 59, at pp. 67-68.

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The asymmetrical relationship between the EU and post-communist accession states was justifiable by the Union's role as a political stabilizer at the time of social transformation[38] and accompanying ethnic and national tensions in the region of Central and Eastern Europe.[39] Until the Copenhagen Council, the issues of democracy and the rule of law were automatically associated with Member State governments and no formal criteria for applicant countries were defined by the Union. As Wojciech Sadurski commented:

> '[T]hese matters – democracy, the rule of law and human rights – have largely been taken for granted within the Community itself, and never before 1993 were they included in a formal set of criteria for *former* applicant countries, whose democratic and human rights credentials always seemed impeccable to the members at the time. But after 1993 the contrast between the rules for existing members and the admission criteria for prospective newcomers became sharp.'[40]

During the accession process, political and economic targets coincided with the legal requirement that all candidate states had to harmonize their national legal systems with the body of European *acquis*. Substantive political and economic achievements were thus accompanied by the instrumental need to adopt the EU *acquis* to adhere to political, economic and monetary goals of the Union. The harmonization of European and national laws and the incorporation of European legal regulations became a major political objective.

The legal basis of European integration of post-communist countries was formed by the system of the Europe Agreements which obliged the candidate states to harmonize their laws with EU law.[41] Strengthening the instrumental control of the accession process, the Commission introduced its *Agenda 2000* in 1997 which focused on the ability to adopt the enormous body of the EU *acquis*, including the Treaties, secondary legislation and case-law of the European Court of Justice.[42] In 1998, the Commission, therefore, formed the Accession Partnerships with individual countries which included the legal systems' harmonization deadlines and priorities. Furthermore, the Partnerships led to the formation of the National Programmes for Adopting the Community *Acquis* in which the candi-

[38] For a more general discussion, see Wojciech Sadurski et al. (eds.), *Spreading Democracy and the Rule of Law? The impact of EU enlargement on the rule of law, democracy and constitutionalism in post-communist legal orders*, 2006.

[39] Jiří Přibáň, 'European Union Constitution-Making, Political Identity and Central European Reflections', 11 *European Law Journal* (2005), p. 135.

[40] Wojciech Sadurski, 'Charter and Enlagement', in 8 *European Law Journal* (2002), p. 340, at p. 343.

[41] Frank Schimmelfennig, 'The Community Trap: Liberal Norms, Rhetorical Action and the Eastern Enlargement of the European Union', 55 *International Organization* (2001), p. 47.

[42] Michael J. Baun, *A Wider Europe:The Process and Politics of European Union Enlargement*, 2000.

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date states specified their harmonization policies including the adoption of legal acts, institutional reforms and financial resources. These policies were then annually assessed in the Commission's Progress Reports.[43]

While the 1993-7 period mainly involved general remarks regarding democracy and the rule of law reforms, the Progress Reports turned political conditionality into a detailed monitoring technique after 1997. The first reports were published in the autumn of 1998[44] and consisted of a number of subsections evaluating different branches of government, the system of justice, its efficiency, judicial professions, corruption and anti-corruption measures, protection of civil and political rights, social rights, minority rights and policies, etc. The reports assessed progress in legislation and administrative measures in specific policies in individual countries, described accomplishments and prescribed further measures to ensure the whole process successfully came to its end. National governments were asked to set out short- and medium-term priorities for the adoption of the *acquis* and were provided financial assistance to achieve these goals.[45]

The EU as a 'Patron' of Political Stability and Democratic Reforms?

The Copenhagen criteria and subsequent Progress Reports and other policies introduced by the EU, like any other external policies, largely depended on internal conditions and factors facilitating their adoption by candidate states.[46] They had to be reformulated at national level as political interests, party ideologies, governmental programmes and constitutional changes. Though heavily influencing constitutional and political developments in post-communist countries,[47] the quality and effect of incorporated EU laws eventually depended on national legal and political institutions[48] and cultures, while the EU could only monitor this process of legal harmonization.[49]

[43] See, for instance, Marc Maresceau (ed.), *Enlarging the European Union: Relations Between the EU and Central and Eastern Europe*, 1997; Marise Cremona (ed.), *The Enlargement of the European Union*, 2003.

[44] Andrew Williams, 'Enlargement of the Union and human rights conditionality: a policy of distinction?', in 25 *European Law Review* (2000), p. 601.

[45] Vachudova, *Europe Divided*, p. 125.

[46] Judith Kelley, 'International Actors on the Domestic Scene: Membership, Conditionality and Socialization by International Institutions', in 58 *International Organization* (2005), p. 425.

[47] Geoffrey Pridham and Tatu Vanhaven (eds.), *Democratization in Eastern Europe: Domestic and International Perspectives*, 1994.

[48] Eric Stein, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?', 88 *American Journal of International Law* (1994), p. 427.

[49] Jon Elster et al., *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea*, 1998.

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From the perspective of the democratic rule of law, the Copenhagen criteria and the conditionality designed Progress Reports of the Commission had very mixed results. EU membership was considered such a political priority in all candidate states that the laws were approximated without appropriate democratic deliberation and justified as historical necessity. The candidate states did not participate in the creation of EU *acquis* and their contribution to the Europe Agreements and conditionality documents was very limited.[50] Despite all these shortcomings, the candidate states nevertheless enjoyed racing in what was nicknamed the EU accession 'regatta'[51] and competed themselves with each other in terms of their number of completed chapters of EU negotiations. In this context, one can legitimately ask whether metaphors of racers at sea should not be replaced by an old-style east European metaphor of 'Potemkin villages' scattered along riverbanks of Central and East Europe.

Despite fundamental criticisms, however, the whole process of European integration also had an enormously positive and stabilizing effect on post-communist candidate states throughout the 1990s and the early 2000s. While drawing on the difference between 'insiders' and 'outsiders' and using the rule of law, democracy and human rights criteria as political pressure devices, the conditionality of the Copenhagen criteria successfully pushed 'outsider' post-communist countries to enact specific policies and comply with standards of democratic constitutionalism and the rule of law.

How much EU 'law in books' influenced candidate states' 'law in action' will always be subject of political disputes and academic interest. Nevertheless, the very existence of EU political conditions constituted a specific limitation of post-communist political power and successfully contained some excesses of political populism.[52] Though inappropriately deliberated at nation state level, legal rules of EU *acquis* still served as an instrument of political reforms enhancing democracy and political accountability in candidate countries. In other words, the conditionality process weakened democratic deliberation but strengthened democratic institutional designs in those countries. The harmonization of EU and national legal systems happened as a rapid fast-tracked process of importation of laws but it also permanently affected legal and political institutions and thus contributed to the much slower and ongoing process of transformation of legal and political

[50] Frank Schimmelfennig and Ulrich Sedelmaier, 'Governance by Conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe', 11 *Journal of European Public Policy* (2004), p. 661.

[51] The 'regatta principle' was introduced at the EU Helsinki Summit in December 1999. According to the principle, each candidate state could complete the accession talks at any time without being held back by other candidate states and their negotiations.

[52] See Přibáň, *Legal Symbolism*, at pp. 99-102.

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cultures of candidate states, such as changes in argumentative styles of the judiciary, administrative governance, etc.

After the fall of communism, the process of Europeanisation was always closely associated with the processes of democratization and constitutionalisation. Some academics even wrote about the 'accession's democracy dividend'[53] when examining the force, impact and limitations of the Union's external pressure on the accession countries. EU membership was considered the best protection of emerging constitutional democracies in Central and Eastern Europe against illiberal and authoritarian politics, corruption, arbitrary use of power by civil servants, lack of public accountability, and many other sorts of political failures. In other words, EU institutions were expected to promote and police exactly the same goals which defined post-communist constitutional and political transformations. Weak national political and legal institutions, which suffered from insufficient resources, experience, and were prone to political cronyism and corruption, were expected to be externally supported and stabilized during the transitional period by the EU.

EU institutions 'patronized' national politics and represented another check on standards and quality of constitutional and democratic transformations. It was legitimized by the enormous popularity of the prospect of EU membership. At the beginning, the Commission's overall scrutiny and evaluation classified three different groups of candidate states: those already conforming to the democracy criterion (the Czech Republic, Estonia, Hungary, Poland and Estonia), those on their way to meeting the criterion (Lithuania, Latvia, Romania, Bulgaria), and Slovakia as a country failing to meet it and therefore excluded from accession talks. However, the Slovak parliamentary election of 1998 resulted in the end of the Mečiar government and the new government led by Prime Minister Dzurinda subsequently re-opened accession talks in February 2000 and eventually succeeded in bringing the country to the EU in the first enlargement wave in May 2004.[54]

While the Slovak example persuasively shows the public mobilization and democratization potential of EU membership and the Union's stabilizing role in national politics,[55] conditionality criteria also strongly affected national political and legal agendas in countries classified as already having democratic governance in 1997. Indeed, the rule of law and democratic transformation originated in internal political changes in those countries. Political demands for free elections,

[53] Wojciech Sadurski, 'Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe', 10 *European Law Journal* (2004), p. 371.

[54] Frank Schimmelfennig et al., 'The Impact of EU Political Conditionality', in Frank Schimmelfennig and Ulrich Sedelmaier (eds.), *The Europeanization of Central and Eastern Europe*, 2005, p. 29, at pp. 37-42.

[55] Geoffrey Pridham, 'EU Enlargement and Consolidating Democracy in Post-Communit States – Formality and Reality', in 40 *Journal of Common Market Studies* (2002), p. 953.

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multi-party political systems, independent systems of justice, freedom of expression, local government, etc., had been formulated by national democratic forces. Nevertheless, it is important to emphasize that those forces always could rely on the EU as a major point of reference and supranational organization of democratically governed liberal states based on the rule of law. The EU represented a 'normal state of things' towards which post-communist countries in transformation were heading and which, therefore, could and actually did have a strong synergistic effect in European politics.[56]

The candidate states' 'patronized status' did not change until the Union's engagement in constitution-making process which was opened by the Convention in 2002, continued by approving a draft of the Constitutional Treaty in 2004, and eventually failed due to the 'No' results of ratification referenda in France and the Netherlands in 2005. During the Convention's work on the constitutional treaty, the candidate states were invited to contribute to its drafting but they could not block any consensus that could be established amongst Member States at the time. In other words, the post-communist states' status changed from passive recipients of EU laws to active participants in EU constitution-making.

Furthermore, the stabilizing effect is still detectable these days even in the most Eurosceptic countries, such as the Czech Republic. The EU finds itself in the paradoxical situation of being a highly suspicious political organization typical of impersonal administrative power and already imposing too many of its regulations on post-communist countries, yet containing even worse political inclinations of national political and bureaucratic élites.[57] Traditional Central and East European distrust of the state as an alien and incomprehensible institution has been associated with the EU bodies, yet the same bodies are locally believed to have powers to make national politics more accountable and under public control. The dividend still pays off despite local distrust of the company's management because all other alternatives would have amounted to political losses rather than profits.

European 'Things Administering Themselves'? EU Accession's Impact on Different Branches of Constitutional Power

The Copenhagen criteria and conditionality process show the difference between political goals and operations, that is, between the democratic rule of law and specific policies of its implementation, stabilization and enhancement. The EU

[56] See, for instance, Andrew Evans, 'Voluntary Harmonisation in Integration between the European Community and Eastern Europe', in 22 *European Law Review* (1997), pp. 201-220.

[57] Jacques Rupnik, 'From Democracy Fatigue to Populist Backlash', in 18 *Journal of Democracy* (2007), p. 17.

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can demand that its Member States and candidate states be democratically governed and rule of law based. However, the Union as a supranational organization itself is short of democratic governance.

The EU rule of law, therefore, heavily draws on the administrative state's legitimacy based on efficiency and outcomes rather than values and democratic procedures.[58] It resembles earlier political developments within the nation state in the late 19th century when the bureaucracy became the most important legitimizing part of the political will and the rationality of bureaucratic order informed the notion of legitimacy by legality. Regulatory 'necessities' and efficient measures make the EU copy the design of the administrative state and invoke 'the common benefit' rather than seek legitimation through 'representative democracy'.

In this state of 'things administering themselves',[59] political goals of democracy, human rights and the rule of law can be formulated by the EU as external conditions but not as the Union's internal principles which need to be adopted at post-communist nation state level. They can be referred to as Member State intrinsic principles and as such legitimately expected of candidate states. However, this 'horizontal argument' is impossible to supplement by a 'vertical argument' of the EU democratic rule of law permeating the candidate state political and legal institutions.

The Union, therefore, is best described as the rule of law without legitimacy by democratic procedures, yet legitimized by democratic constitutionalism at Member State level.[60] In European legal and political studies, this structural setting is widely discussed as the EU's 'democratic deficit'. The EU's democratic deficit literature is almost as rich and diverse as literature on the rule of law in post-communist countries. For some, the lack of democracy at EU level merely proves how wrong all Euro-enthusiasts have been in pursuing their visions of European statehood. For others, the deficit has been just a minor structural deficiency fully compensated for by *common benefits* of EU membership and democratic legitimacy guarantees facilitated by political institutions of Member States. Nevertheless, both

[58] David Beetham and Christopher Lord, 'Legitimacy and the European Union', in Albert Weale and Michael Nentwich (eds.), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, 1998, p. 15, at p. 17.

[59] Carl Schmitt, *Legality and Legitimacy*, 2004, pp. 5-6.

[60] See, for instance, the Treaty of Lisbon, especially its Article 10 which reads: '1. The functioning of the Union shall be founded on representative democracy. 2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens. 3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen. 4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.'

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sides of this argument admit that European integration has been running as a profoundly legalistic and depoliticized project short of substantial democratic deliberation.[61]

One of the most noticeable common benefits stretching beyond the EU and its actual Member States, indeed, was the Union's *democratizing effect* on the candidate states during their accession talks.[62] From the perspective of the candidate states, EU membership and conditionality process were equally legitimized by 'the national benefit' and received public support. Nevertheless, the rule of law is primarily a structural precondition of democratic constitutionalism. It, therefore, has to be examined against the background of structures and operations of political and legal systems.

From the perspective of constitutional separation of power, the executive branch of national government benefited while the legislature was reduced to a body mechanically implementing EU *acquis* during the accession process. Parliamentary debates were initially limited to a few plenary sessions in most candidate states and this atmosphere of political ignorance lasted until the final stages of legal harmonization.[63]

Accession conditions were hardly disputed by national parliaments and swiftly accepted in the hope of speeding the process of EU integration. Special committees administering European integration commonly discussed acts of legislation before they were submitted to ordinary legislative procedures and EU legal regulations were adopted through fast-tracking parliamentary procedures to meet deadlines set up during accession talks. For instance, the Czech government set up a special department which scrutinized all legislative proposals in terms of their compatibility with EU law and recommended to the government whether to proceed with legislative acts, or not.

The power of national bureaucracy was being enhanced by reports and political changes demanded by the EU's bureaucratic class.[64] Knowledge, finances and human resources made the executive branch privileged over the legislature and, to a lesser extent, the judiciary[65] and key national ministers, together with EU officials responsible for enlargement, formed a special group of administrators managing the accession process.[66] Instrumentality of accession procedures prevailed

[61] Přibáň, *Legal Symbolism*, at pp. 116-119.

[62] Ibid., at p. 119.

[63] Zdena Mansfeldová and Michal Klíma (eds.), *The Role of the Central European Parliaments in the Process of European Integration: Proceedings of International Conference, Prague, 12-14 September 1997*, 1998.

[64] Peter Mair, 'Popular Democracy and EU Enlargement', 17 *East European Politics & Societies* (2003), p. 58.

[65] Heather Grabbe, 'How Does Europeanisation Affect CEE Governance? Conditionality, Diffusion and Diversity', in 8 *Journal of European Public Policy* (2001), p. 1013, at p. 1016.

[66] Sadurski, 'Accession's Democracy Divident', at p. 383.

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over and occasionally even imperilled substantive goals of democracy, human rights and the rule of law.

As regards the system of justice, legislative harmonization obviously needed to be accompanied by judicial harmonization which would guarantee the consistent interpretation of EU laws and legal acts approximating national and EU laws by the judicial branch.[67] With few exceptions, such as the Polish Constitutional Tribunal cases concerning the different retirement age of male and female employees, the judiciary supported harmonization and a generally pro-EU interpretation of laws.[68] Judges even used EU laws as a form of self-empowerment against the legislative and executive branches of their nation states. Again, the power of expert legal knowledge served to conform to the general political trend of European integration.

From Constitutional Sovereignty To EU Membership and Divided Sovereignty

During the 1990s, post-communist countries reinvented their national sovereignty, drafted new constitutional documents, and subsequently used their newly built constitutional sovereignty in EU membership negotiations. With the exception of Hungary and Poland, post-communist states joining the EU in 2004 had all been 'new states' – Estonia, Latvia and Lithuania reconstituted their statehood against the background of the collapsing Soviet Union, Slovenia left behind former republics of Yugoslavia in violent turmoil, and the Czech Republic and Slovakia peacefully abandoned common Czechoslovak federal statehood. For these states, EU membership was yet another form of their new existence and a proof of identity in the world of international politics and law.

The EU requires its Member States to delegate substantial sovereign powers to its institutions including monetary policy, foreign affairs, border controls, judicial power and policing. In all post-communist countries, these sovereign powers were being reconstituted since 1989, yet coevally limited during the accession process. This process of self-limitation of constitutional sovereignty was intended to cement rather than weaken the liberal democratic rule of law at post-communist nation state level. Nevertheless, it also revealed structural shortcomings of the EU as a supranational organization stretching far beyond a common international law framework, yet falling short of any form of federal or confederative democratically legitimate statehood. It, therefore, is not surprising that the issue of constitutional sovereignty and its limits have returned as the most prominent

[67] Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, 2005, p. 52.
[68] Ibid., at pp. 52-54.

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constitutional problems in the wake of the EU accession of former post-communist states. The public, its political representations and various constitutional bodies gradually began to emphasize the need to protect national statehood and closely associated it with the protection of constitutional democracy and human rights.[69]

Reflecting on the prominent position of constitutional courts during post-communist transformations and the legalist character of EU integration, it is not surprising that these judicial bodies became a centre of constitutional debates regarding the EU's structure of 'divided sovereignty'. Constitutional ambivalence about the accession process was addressed differently by different constitutional courts in different post-communist countries. As early as 1998, the Hungarian Constitutional Court raised the question of legitimacy of the harmonization process in its 'Europe Agreement Case' in which it reasserted constitutional sovereignty of the Republic of Hungary against the direct applicability of EU law and stated that a transfer of sovereignty to a foreign legal system needed to be explicitly authorized under the Hungarian constitutional rule.[70] In the judgment, it also emphasized that the constitutional amendment must follow the prescribed constitutional procedure rather than be stealthily enforced by means of parliamentary ratification of an international treaty.

Similarly, the Slovenian Constitutional Court argued that 'the Constitution places the public interest, for the State not to commit itself under international law to fulfil obligations which are not in conformity with its Constitution, at the level of a constitutional value.'[71] Should the Court find some provisions of an international treaty unconstitutional, the ratification is subject to the state's reservations added to the treaty, its renegotiation or alternatively to a prior constitutional amendment.

It is interesting to see how constitutional courts' commitment to the rule of law and constitutional sovereignty during the accession process opened a debate which logically followed the 1993 German Constitutional Court's Maastricht decision addressing the same problems from the perspective of a court of a Member State.[72] In this landmark decision, German judges discussed wide technical implications of the political fact that there is no European *demos* and the EU, therefore, falls short of substantive democratic legitimation necessary for any project of

[69] Andrew Moravcsik and Milada Anna Vachudova, 'National Interests, State Power and EU Enlargement', 17 *East European Politics & Societies* (2003), p. 42.

[70] Allan Tatham, 'Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court', in 48 *International and Comparative Law Quarterly* (1999), p. 913.

[71] Decision No. RM-1/97, 5 June 1997, Uradni list RS, No. 40/97, on Europe Agreement. Quoted from Albi, see n. 67 above, at p. 116.

[72] Ibid., at p. 135.

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supranational statehood based on the supremacy of its legal system.[73] The doctrine of EU legal monism, which would successfully argue for the supremacy of EU laws over legal and constitutional norms of Member States, is impossible to establish due to the lack of democratic legitimacy of the Union. Constitutional rights of citizens of Member States, therefore, have to be protected even against EU institutions. This form of legal dualism means that any EU limitation of constitutional sovereignty of Member States always can be reviewed and reconsidered by constitutional courts of those states.[74]

Constitutional courts of central and east European candidate states have interpreted the relationship between EU and national legal systems as a matter of intergovernmental negotiations drawing on national mechanisms of democratic legitimization. However, since the accession of post-communist countries to the EU in 2004, jurisprudence and theory of EU law in those countries has been witnessing much more diverse elaborations of this issue. For instance, the Constitutional Review Chamber of the Estonian Supreme Court recently concluded that the system of EU laws enjoyed supremacy over the Estonian Constitution because

> '… within the spheres, which are within the exclusive competence of the European Union or where there is a shared competence with the European Union, the European Union law shall apply in the case of a conflict between Estonian legislation, including the Constitution, with the European Union law.'[75]

On the other hand, the 'Lisbon Treaty' judgment of the Czech Constitutional Court reiterates the German constitutional doctrine of *Kompetenz der Kompetenz* and, although declaring its commitment to the 'pro-European' interpretation of EU treaties, states that

> '[I]n the case of a clear conflict between the national Constitution and European law, which is impossible to mitigate by any reasonable interpretation, the constitutional order of the Czech Republic, especially its substantive core, takes precedence.'[76]

[73] For a different view favouring the supremacy of European law, see Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, 2001.

[74] For further discussion, see Jiří Přibáň, 'Is There the Spirit of the European Law? Critical remarks on EU constitution-making, enlargement and political culture', in Volkmar Gessner and David Nelken (eds.), *European Ways of Law*, 2007, p. 231, at p. 246.

[75] *Constitutional Judgement of the Supreme Court of Estonia on the interpretation of the Constitution, No. 3-4-1-3-06*. See http://www.nc.ee/?id=663.

[76] See section 85 of the judgment No. 19/08 Pl. US of 26 November 2008 regarding the constitutionality of the Treaty of Lisbon.

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Similar examples of reformulating the principle of constitutional sovereignty in the post-accession new Member States may be found, for instance, in the Polish Constitutional Tribunal's 'Euro-warrant case'.[77]

Concluding Remarks

The growing variety and complexity of constitutional jurisprudence in Central and Eastern Europe merely proves that former candidate states have joined other Member States in attempts at finding reasonable responses to legal and constitutional dilemmas of the current EU rule of law *vis-à-vis* the rule of law of democratic constitutionalism existing at nation state level. Furthermore, these constitutional dilemmas confirm that post-communist states have joined EU Member States in their complex constitutional structures and semantics of the divided rule of law and democratic legitimacy both embedded in and transcending the nation state. They actively participate in the construction of a specific European supranational polity which may not have characteristics of a modern democratic nation but still can effectively enhance the rule of law based on human rights equally shared by all EU citizens.

In other words, the rule of law and democratization problems faced by those countries in the 1990s have become intrinsic part of European governance which may primarily be driven by instrumentality and complex techniques of supranational administration but, nevertheless, cannot eliminate issues of substantive democratic values and their recognition by a supranational community of EU citizens. After the 2004 and 2007 enlargements of the EU, the problem of post-communist constitutional and political transformations and the democratic rule of law, therefore, has eventually become part of a much wider and more complex problem of democratization of the EU rule of law stretching far beyond matters of technicality and 'things administering themselves'.

[77] Massimo Fichera, 'The European Arrest Warrant and the Sovereign States: A Marriage of Convenience?', 15 *European Law Journal* (2009), p. 70.

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