a successful judicial reform. For a Martian anthropologist on a field trip to Earth, it might have appeared that the principle of judicial independence is a convenient rhetorical instrument for justifying positions which do not fit well together.

This chapter takes its cue from the insights of Martian scholarship, and attempts to analyze the politics behind the constitutional principle of judicial independence in the EU enlargement process. This process is commonly described in normative terms as *harmonization* of the legal systems of the accession countries with the rules and principles of the EU. There are strong assumptions behind this misleadingly simplistic picture however. One of these assumptions is that the EU normative order is itself internally coherent and complete: what is necessary is just its "transplantation" to the legal systems of the accession states. The paper will question this assumption, as far as the issue of judicial independence is concerned. The starting point will be to demonstrate that Western European legal systems provide *a plurality of models* of judicial independence, and that there is no prospect of convergence among them on key issues. Therefore, there is no sufficiently specific common European theory of judicial independence. Of course, at a very abstract level it could be claimed that similar principles are being followed. But when it comes to their application, interpretation, and implementation through different institutional arrangements, it becomes clear that the balancing of different competing values has produced a variety of different models. The European normative space, therefore, is characterized by competing conceptions and theoretical dilemmas, as much as by agreement on common general principles. These problems are discussed in section one.

Section two analyses the language of the Commission Regular Reports. These Reports are the major EU instruments of monitoring the progress of the accession countries in their preparation for Union membership, and therefore, reveal the standards used in this process. Two interpretations of these reports as related to the issue of judicial independence are possible. One is that the Commission has made particularistic and contextual judgments in assessing the legal systems of the accession countries regarding the issue of judicial independence. On this interpretation, the reports synthesize the conclusions of careful contextual analyses, which focus on country-specific problems without the ambition to construct a coherent pan-European theory of judicial independence.

A second, more ambitious reading, which is probably more consistent with the aspirations of the Commission, is that the reports rely on some consistent set of common standards concerning judicial independence. Yet, the irony is that, as was claimed above, there are arguably no such common standards easily derivable from the legal traditions of member states. Therefore, on the second interpretation, the Commission reports develop and rely on a certain myth: the *myth of a common European theory of judicial independence*. This interpretation, as it will be argued, does have evidential support. Thus, for instance, the reports often criticize the structure of the judicial systems of different countries, as well as specific institutional arrangements, as violating putatively common constitutional principles of judicial

independence while, at the same time, similar arrangements could be found in European Member States, or other applicant countries, which are not criticized. Of course, the same institutional model could perform differently depending on the context: criticisms of the Commission are often well founded and justified. The question which is raised is rather about the advantages and costs of the perpetuation of the *myth* of a common European theory of judicial independence? In other words, why do the Commission and the participants in the EU enlargement process prefer to use a *constitutional* language implying the existence of some common theory of judicial independence, in the actual absence of such a theory?

Section three of the chapter attempts to show that the preservation of the myth is instrumentally convenient for certain actors. A number of hypotheses are explored, which purport to explain the eventual perpetuation of the myth through its uses in enlargement politics. First, it is argued, constitutional language and constitutional arguments do save time. For instance, it is not necessary to develop complex contextual cost–benefit analyses of the performance of different institutional models if there is an "argument of principle" ruling them out as unconstitutional. Although rather simplistic, this hypothesis has explanatory power because of the bureaucratic character of the enlargement process, with its emphasis on timeliness and efficiency. The bureaucratic character of the process places also an emphasis on common "standards", "benchmarks" and "performance criteria", the availability of which is dependent on the existence of a common detailed theory of judicial independence.

Second, the myth of judicial independence is instrumental in the creation of a certain picture of the European Union as a polity based on common principles and standards. The discussions of the future Constitution for Europe have spurred the debates about the character of the European polity. A community of integrity of principles is seen by many as an important ideal, which could mobilize the support of the people of Europe for the new constitution.

Third, the myth of a consistent theory of judicial independence has instrumental uses in the process of negotiations as well. At the start, it strengthens significantly the bargaining position of the Commission *vis-à-vis* the governments of accession countries: the existence of common European norms and standards is a "self-explanatory" argument in favour of certain recommendations. Further, however, the myth has empowered national governments, pursuing reform of the judicial system, against the opposition of domestic judiciaries and other actors. This use of the myth is gaining some prominence at the moment: national governments and the Commission form coalitions against "recalcitrant" judiciaries in the promotion of "European standards and values".

This curious patchwork of bureaucratic, normative, and pragmatic uses of the described myth of the constitutional principle of judicial independence comes at a certain price, however. Section four of the chapter attempts to give an account of the various problems to which its perpetuation is likely to lead. Two of these are singled out for special analysis. First, the myth conceals a common, pan-European problem:

the growing political power of judges and courts. It perpetuates the Weberian image of the judge-administrator, who just applies previously existing rules without much innovation and law-making. Contemporary judges and magistrates, as it will be argued, increasingly serve important political functions. So the real question is not how to devise institutional solutions withholding the political powers of the judiciary, but how to "structure" their discretion so that they produce socially beneficial policies. A franker approach to this problem in the accession process could have been more useful not only to the accession states, but the Union at large.

Second, the myth of a common theory of judicial independence reinforces a grander myth—the myth of the EU as a community based on common normative principles and values. Although probably instrumental for the construction of a European identity, an inflation of the grander myth of EU as a community of principles threatens to "bureaucratize" and "judicialize" the integration process, and thus to deprive it of its most important dimension—the *political* dimension. After all, European integration, as many hope, is a political project in which people with similar, but still distinct, cultural histories and values come together to build a common future on the basis of mutual trust and understanding. It is not just a project of *following* common principles and *endorsing* common values, but primarily of *creating* new normative solutions which will give a chance to every member to present themselves in their best light.

2. Judicial Independence as a Myth

Giacomo Oberto, Deputy Secretary General of the International Association of Judges,[3] has attempted to extract from a number of international agreements a set of common standards and rules concerning the independence of the judiciary.[4] The following principles will be elaborated, and used as a starting point for our discussion:

> The Judiciary is an autonomous body. It is not subject to any of the other two powers of the State. Public prosecutors should enjoy the same guarantees provided for by the law concerning the judicial status. More specifically:

[3] http://space.tin.it/edicola/goberto/.

[4] The main agreements he focuses on are the following: the United Nations "Basic Principles on the Independence of the Judiciary", approved in 1985; the "Judges' Charter in Europe", adopted on March 20, 1993, in Wiesbaden (Germany) by the European Association of Judges, regional group of the International Association of Judges; Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges, adopted on October 13, 1994; the European Charter on the Statute for Judges of the Council of Europe, approved in Strasbourg on July 8–10, 1998; the "Universal Charter of the Judge", unanimously adopted in November 1999 in Taipei (Republic of China, Taiwan) by the International Association of Judges.

1. Judges and public prosecutors are only subject to the law.
2. Judges and public prosecutors should be appointed for life or for such other period and conditions, that judicial independence is not endangered. Any change to the judicial obligatory retirement age must not have retroactive effect.
3. Judges and public prosecutors should be selected through competitive examinations. The selection and appointment of a judge or of a public prosecutor must be carried out according to objective and transparent criteria based on proper professional qualification. Where this is not ensured in other ways that are rooted in established and proven tradition, selection should be carried out by an independent body that includes substantial judicial representation.
4. The Executive or to the Legislative power should have no influence in the process of selection of judges and public prosecutors.
5. A High Council for the Judiciary should be established. This Council should be entrusted with the appointment, assignment, transfer, promotion, and disciplinary measures concerning judges and public prosecutors. This body should be composed of judges and public prosecutors, or at least have a majority representation of judges and public prosecutors.
6. Judges and public prosecutors cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure.
7. Disciplinary action should be carried out by independent bodies that include substantial judicial representation. Disciplinary action against judges and public prosecutors can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure.
8. Each judge and each public prosecutor has the right to be provided with an efficient system of initial and further judicial training; attendance to these two forms of training should be, for a certain period, compulsory for each judge or public prosecutor, or at least it should represent an essential condition for moving to a higher post. Judicial training should be provided by an independent institution, such as the French *Ecole Nationale de la Magistrature*, or by the independent body, that includes substantial judicial representation.
9. Judges and public prosecutors must be granted proper working conditions.
10. Salaries of judges and of public prosecutors be fixed by statute (and not by an act of the executive power) and linked to the salaries of parliamentarians or of ministers. They should not be reduced for any reason.
11. Judges and public prosecutors must be granted full freedom of association, both on national and international level. Activity in such association must be officially recognized as judicial work.

These principles, or a similar set, form the normative framework for the doctrine of judicial independence in modern liberal democracies. At this level of abstraction, most liberal democracies would arguably espouse these principles.

Yet, when it comes to concrete interpretations and the institutional implementation of these principles, consensus no longer exists, even among established western democracies.

One focus of substantial disagreement in the interpretation of judicial independence concerns the checks and balances between the major branches of power (principles four and five from the list above). In some western legal systems, the Minister of Justice, or its functional equivalent, is authorized to make judicial appointments upon the advice or nomination from senior members of the judiciary. Also, the Minister of Justice may have certain powers related to the promotion and demotion of already appointed magistrates, as well as to the imposition of disciplinary sanctions.[5]

Other systems prefer to deprive the Minister of Justice of the power of appointment, promotion and demotion of magistrates. In these systems, this function is entrusted to an independent body, governing the judicial branch.[6] The composition of these bodies, however, also reflects different levels of involvement of the legislative and the executive branches in the personnel and management affairs of the judiciary. It could be argued, that the very fact that the executive and the legislative branch are entitled to appoint members of the body governing the judicial system is already a compromise of principle four as formulated above. This compromise is, however, deemed necessary in order to preserve a degree of *accountability* of the judiciary *vis-à-vis* the political branches of power, and ultimately, the citizens as electors. Having this in mind, it could be said that the principle of judicial independence should always be balanced against the principle of accountability of the judicial branch. The judiciary should not be out of tune with the preferences of the citizens, and should be representative of these preferences to a degree.

However, different legal systems of established democracies balance these competing values—accountability and independence—in different ways. Some systems rely on highly unrepresentative judiciaries as a social group. Other systems attempt to achieve a greater degree of representation including through popular elections of magistrates. Further, different ideas of accountability of the judiciary are also in operation. Some systems rely on political accountability, and in them political bodies (like the Minister of Justice) have greater powers in determining the personnel policies of the judicial branch. Other systems rely more on the professional ethics of the community of lawyers as a self-regulating body: in these systems, accountability is treated as accountability to peers on the basis of professional standards, rather than as accountability to other branches of power.[7]

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[5] Typical of the Anglo-Saxon model, the UK and US in particular.

[6] This is the Mediterranean model, exemplified most clearly by Italy.

[7] For a recent, very illuminating discussion of the institutionalization of the principle of judicial independence in the major established western democracies, see Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, (Oxford: Oxford University Press 2002). See also S. Shetreet and J. Deschenes (eds.),

Another point of divergence among the legal systems of established democracies is the character of internal accountability within the judiciary. The legal systems of continental countries (especially these of Latin Europe) rely on strong internal accountability, which means that senior magistrates exercise significant control in terms of career promotion and demotion over junior magistrates. In contrast, in common law countries, there is greater internal independence of the magistrates.

A further difference in the interpretation of the principles of judicial independence involves the position of public prosecutors in the constitutional model. In some systems, the prosecutors are part of the executive, and thus fully accountable to politically elected bodies. In other systems they are part of the judiciary and enjoy different degrees of autonomy both *vis-à-vis* the other branches, but also *vis-à-vis* the other parts of the judiciary as well.

Finally, a controversial issue worth mentioning is the elaboration and the adoption of the budget of the judiciary. Again, different systems allow for various degrees of judicial "independence" in this sense. In some systems, the government and parliament have greater leeway in the appropriation of funds for the judicial branch, while in other systems the draft budget is closely coordinated with the independent body governing the judicial system. The formulation of principle 10 from the list above could hardly address the complexity of the problem with the funding of the judicial system. Since financial independence is one of the key components of judicial independence, the vagueness of principle 10 illustrates a general point: convergence on normative principles exists only at a very high level of abstraction, a level which is not very helpful when it comes to the assessment of different institutional solutions.

The existence of a plurality of different institutional models of judicial independence could be interpreted in at least two different ways. The first one, and probably the more plausible, is that, from a constitutional point of view, there is a plurality of legitimate competing solutions to the question of judicial independence. Democracies resolve this question in different ways depending on their constitutional traditions, the character of their political process, etc. There is no overall best solution: all of them have advantages and disadvantages. On this view, there is a minimal set of requirements which all democracies must meet: after these requirements are met, however, a wide variety of institutional models, reflecting different conceptions of underlying principles and values, are acceptable.

A second interpretation of the existing variety could be called *contextualist*. The contextualist argues that all legal systems (of established democracies) follow the same (or very similar) sets of normative principles. However, differences in the context entail that these principles should lead to different institutional solutions. The contextualist would argue that if we have taken into account all the relevant social, political, and economic differences among the given countries, we would be

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Judicial Independence: The Contemporary Debate (Dordrecht: Martinus Nijhoff Publishers 1985).

able to explain how the following of the same normative principles lead to different institutional solutions. A difficulty of the contextualist position is that the normative theory of judicial independence that it advances must be incredibly detailed and complex, so as to explain all institutional differences by simultaneously preserving normative unity and coherence. Such a theory would contain propositions such as the following:

> In countries with majoritarian politics, executive domination over the parliament, and a low level of separation of powers, it is necessary to have as little interference of the political branches as possible, while in countries with weaker executives, stronger parliaments, and extensive separation of powers (for instance, through federalism), a greater degree of political involvement in the governing of the judiciary could be tolerated.

Through the construction of such complex normative principles of judicial independence, a contextualist could claim that there is a single normative theory on this issue (at least in Europe or concerning the established western democracies). The empirical institutional divergence would be explained away by differences in the context in which this theory is applied.

The contextualist view is arguably theoretically possible. The problem with it is that a super complex theory of judicial independence has not been yet elaborated either for Europe or for the western democracies in general. Of course, academics and constitutionalists do their best, but there is no candidate theory on the horizon which would command universal acceptance. Reasonable, deep disagreement persists at the theoretical level as well, as is evident at the level of substantive constitutional principles, institutional arrangements, etc. Thus, the fact that a super-contextualist theory is in principle possible should not be confused with the question about its existence. The confusion of these two issues creates constitutional myths—in the present case, the myth of a single coherent theory of judicial independence in Europe or in the established democracies in general. One of the consequences of the myth, as will be shown below, is that under the guise and authority of mythological common normative principles, usually purely contextual, sometimes controversial or simply unfounded assessments could be made.

3. The Myth in the Regular Reports of the European Commission

The Copenhagen criteria do not explicitly mention the issue of judicial independence as a condition for the accession of the candidate countries to the European Union. The language of the criteria rather focuses on the stability and efficiency of judicial institutions: "stability of institutions guaranteeing . . . the rule of law". This extremely vague language has posed serious problems for the Commission in developing a suitable strategy for monitoring and evaluating the progress of the candidate countries. Throughout the monitoring process, the Commission has

placed an emphasis on different aspects of judicial reform. An influential study of the monitoring process conducted by the Open Society Institute in Budapest, the findings of which are used below, summarizes the areas of interest for the Commission in the following way:

> The Commission has placed great emphasis on the ability of judiciaries to safeguard citizens' rights, contribute to a favourable business environment, and implement EU legislation, as well as more recently (2001), on the judiciary's adjudicative and administrative independence.[8]

The Regular Reports of the Commission from 2001 onwards consistently mention judicial independence as an area of judicial reform which deserves closer monitoring. Thus, in the overview of the developments in the candidate states, in the 2001 Regular Reports the Commission argues that:

> Further progress was made in reforming and strengthening the judicial system, as a vital element in ensuring respect for the rule of law and in the effective enforcement of the *acquis*. Several countries advanced in adopting basic legislation, strengthening human resources and improving working conditions. Efforts in this area need to be further stepped up, with particular attention to ensuring the *independence of the judiciary* [emphasis added].[9]

After the peak of interest in judicial independence between 2001 and 2002, the Commission shifted its attention to differently formulated problems—such as judicial capacity—which are broader (and even vaguer) than judicial independence.

One of the most critical 2002 reports of the Commission concerning Latvia asserts that:

> The issue of the independence and efficiency of the judicial system, including the establishment of an independent court administration, still needs to be addressed. Furthermore, other issues such as the absence of well-defined criteria and transparent methods for selecting judicial apprentices and appointees, and the Ministry of Justice's influence over career paths, also need to be tackled. . . . (The Ministry of Justice determines the number of Judges and administers the budgetary resources of the judiciary. It supervises the organisation of activities at regional and district courts.)[10]

A positive report—the one on the Czech Republic—contains almost identical language concerning the powers of the Czech Ministry of Justice, and yet, there is no criticism that the principle of judicial independence has been endangered. Nor is there an explanation why the model works in the Czech Republic but obviously fails to work in Latvia:

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[8] EUMAP, "Overview: Judicial Capacity," (Budapest: Open Society Institute 2002), p. 19.

[9] http://europa.eu.int/comm/enlargement/report2001/ (Section 1 a, Overall Development).

[10] http://europa.eu.int/comm/enlargement/report2002/lv_en.pdf, p. 22.

> [In the Czech Republic], judges are nominated by the Ministry of Justice and appointed for life by the President of the Republic . . . The Ministry of Justice determines the number of judges and state prosecutors and their promotion, and administers the budgetary resources of the judiciary . . . The Constitution enshrines the independence of the judges, although the Minister of Justice is responsible for appointing, transferring and terminating the appointment of the President and Vice Presidents of courts.[11]

As could be anticipated, the Eastern European models of judicial independence differ from one another as much as the western European models discussed in the previous section. There are similar puzzles and similar dilemmas, such as the legitimate powers of the Minister of Justice in the appointment and promotion policies of the judiciary, the existence and composition of supreme judicial councils, etc. The variety is indeed significant. Some countries have followed the Latin European model of self-governing judiciaries, through the establishment of independent bodies—Judicial Councils. Yet, the composition of these bodies varies—in Bulgaria, for instance, only half of the members are appointed by Parliament, while the other half are appointed by the different branches of the judiciary—the judges, the prosecutors, and the investigators. In Romania, all of the members of the Council are elected by parliament through a majority vote, although they are nominated by the judiciary.

Other countries, the Czech Republic for instance, have opted for judicial administration through the Ministry of Justice, which is responsible, in fact, for the governance of the judicial system, and is empowered to determine key questions of personnel policy through the appointment of Court presidents. A reform in 2002 introduced Judicial Councils in the Czech judicial system, but these are just consultative bodies with no formal powers regarding the appointment, promotion, or disciplining of judges. A similar model has been in operation in Latvia, as already mentioned, and has been the focus for criticism from the Commission. In Slovakia such a model existed until 2001, when it was replaced with a model with a Judicial Council, partly under pressure by the Commission.

Given this variety in institutional implementation of the principle of judicial independence in the region, the Commission has apparently faced a very difficult task in trying to introduce any consistent scheme of evaluation of the performance of the different models. Ultimately, it seems, the Commission has failed to do so, and its Regular Reports should be read mainly as contextual assessments, which are based, not on any uniform model of evaluation, but rather on the particular agreements reached between governments and the Commission, as well as on the opinions of local and EU experts (peer review).

This conclusion is supported by the findings of the EUMAP project as well, whose authors argue that:

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11 http://europa.eu.int/comm/enlargement/report2002/cz_en.pdf, p. 22.

> To date, however, the accession process has shown that the Union itself needs a more comprehensive approach to the [judicial] reform question. There are few standards on how the judiciary should be organised and how it should function, and the existing expert support system is often uncoordinated and ineffective . . . Determining the acceptability of different arrangements requires clear articulation and understanding of the standards the EU wishes to apply to itself and its candidates. The candidate States are under an effective obligation to fulfil the Copenhagen criteria, but the EU has yet to elaborate any standards by which the candidate States' efforts—or member states continuous performance—can be measured. More precise standards are necessary to encourage a uniformly high level of respect for judicial independence across Europe.[12]

The lack of a coherent theory of judicial independence, and the corresponding lack of a consistent scheme of evaluation of the performance of different models, has led to occasional problems:

> There have been . . . instances where the Commission has sent mixed signals to the candidate states. On occasion, the direction of the judicial reforms in different countries has been dependent on expert advice from EU member states; in the absence of EU-wide standards, pre-accession advisors and representatives of twinning institutions have often simply encouraged the adoption of specific solutions imported from their own states . . . Candidate states cannot be reasonably expected to bring their judiciaries in line with standards that are themselves not defined.[13]

It has to be kept in mind that the Regular Reports of the Commission have been tremendously important in determining the course of judicial reform in the accession states. Only in the period 2001–2003, under pressure from the Commission have there been constitutional amendments concerning the status of the judicial system in Slovakia and Bulgaria (and a proposal for constitutional amendment in Romania), as well as adoption of major legislation in Poland, Bulgaria, Slovakia, the Czech Republic, Estonia, and Slovenia. Many of these pieces of legislation have tried to change the institutional balance of power within the judiciary and among the major branches of power as well, with the goal of strengthening the performance of the judicial system. The lack of a coherent theory of judicial independence, and its link to the performance of the judicial system as a whole, has led the Commission to endorse some projects of reform and reject others in a somewhat opportunistic way.

Thus, in Slovakia the Commission repeatedly advocated the abolition of the probationary period for judges (obviously with the view to strengthen judicial

[12] EUMAP, "Judicial Independence," in *Judicial Independence in the EU Accession Process* (Budapest: Open Society Institute 2001), p. 26.

[13] Ibid., pp. 20–21.

independence) while in Bulgaria it supported a constitutional amendment in 2003 which extended the probationary period from three to five years. Curiously, the government in Slovenia has argued that a similar extension of the probationary period for judges for up to five years is *necessary* for EU accession. As another controversial example from the evaluation practice of the Commission, the Latvian case could be cited, where EU experts suggested the appointment of judges in the Ministry of Justice in order to improve its efficiency in administering the judicial system: this has been seen by independent analysts as a violation of the principle of the separation of powers itself.[14]

All in all, it is difficult to argue that a coherent scheme of principles could be derived from the overall record of the Commission as an evaluator and inspiration behind the reforms of the judiciaries in the accession countries. In some of them, the Commission has accepted that models with extensive powers accorded to the Minister of Justice are legitimate and perform well (the Czech Republic). In others, the Commission has suggested and supported the introduction of independent Judicial Councils (Slovakia). In others still, as in Latvia, the Commission had been ready to experiment with institutional innovations (as the appointment of judges in the Ministry of Justice). Also, the balance between independence and accountability has been struck differently in separate countries, depending mostly on the context and the past performance of different institutional models. Probably a super-theory could fit all differences into a coherent whole by taking into account all contextual differences between the countries. The problem, however, is that the Commission has not tried to elaborate even the rough outlines of such a theory, and has left this task to inventive academics and analysts.

In this chapter, unfortunately, such a Herculean task cannot be pursued. Furthermore, there are some suspicions that such a super-complex theory does not exist at all. This is so, not only because cross-country analysis would be unable to establish a single pattern, but also because some of the positions taken by the Commission regarding *single* accession countries do not fit well together. Take as an example Bulgaria, and the Regular Reports of the Commission for this country for 2002 and 2003. There are some important differences in these two reports, concerning key areas of reform of the judiciary in the country. Thus, in 2002, the Commission argues that:

> The Supreme Judicial Council represents judges, prosecutors, and investigators, and its members comprise representatives of all three groups, as well as a number of members elected by Parliament. The three groups have different roles in the judicial system, and hence different interests and management structures. This makes it difficult for the SJC to play a fully effective role in the professional management of judges and the court system.[15]

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[14] The last two examples are taken from the cited above *EUMAP* study.

[15] http://europa.eu.int/comm/enlargement/report2002/bu_en.pdf, p. 24.