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.

This analysis should be read to support the exclusion of prosecutors and especially investigators (a long standing concern of the Commission) from the Supreme Judicial Council. In the context of the Bulgarian debates on the reform of the judicial system, the Report could be read also to support even the exclusion of the Prosecution from the judicial system: an option which was openly advocated in 2002 by the Minister of Justice and some of the leading political forces.

The 2003 Report contains no criticism on the composition of the SJC. In terms of institutional reform, the Report argues again for the exclusion of the investigators from the judicial system, but there is no suggestion for a change in the role of the prosecution either in the SJC or more generally as a part of the judiciary. (Although there is subdued criticism that reforms towards greater accountability of prosecutors are needed, without specifying in what direction.) It is true that by 2003 the government had abandoned its plans to significantly change the position of the prosecution in the overall governmental structure due to a series of decisions of the Constitutional Court, which postulated that such reforms would require constitutional revisions through a Grand National Assembly—a specially elected parliament authorized to amend the Constitution on issues affecting *inter alia*, the separation of powers. But this procedural difficulty cannot be a conclusive reason for a change of the view of the Commission, if its previous criticism was based on a *normative* principle.

A second example of a change of position of the Commission in the period 2002–2003 concerns the issue of the so-called fixed mandates for senior magistrates in Bulgaria. In 2002, the Commission acknowledges as legitimate the *concerns* of the SJC regarding the introduction of such fixed mandates:

> During the work on reform, co-operation between the Ministry of Justice and the Supreme Judicial Council has developed considerably . . . The SJC has raised concerns where it considered reforms did not fully respect judicial independence (e.g. introduction of time-limited mandates for some appointments . . .)

In 2003 the Report hailed a constitutional amendment which actually authorized, among other things, the introduction of such limited mandates. In fact, the Report even fails to mention this aspect of the constitutional amendment, which the Commission required in a very straightforward way. If there were a set of coherent, even though not explicit, principles behind the position of the Commission, there would have been a need to explain in more detail how such significant changes of position could be justified.

Of course, a convinced contextualist could hardly be dissuaded by the present attempts to show that there is no coherent *normative* theory of judicial independence illuminating all the Regular Reports of the Commission, and possibly even the reports on specific countries. For present purposes, suffice it to say that the extraction of such a theory would be a very difficult task indeed, and that neither the Commission, nor independent analysts, such as the EUMAP project, has been able to articulate such a theory.

Yet, the paradox is that the *de facto* absence of such a theory has not deterred the Commission from endorsing the view that the evaluation contained in the Regular Reports follows a rigorous standardized methodology. In the 2003 *Strategy Paper: Towards the Enlarged Union*,[16] it is argued that:

> Under this methodology, the Regular Reports assess progress in terms of legislation and measures actually adopted or implemented. This approach ensures equal treatment for all candidates, and permits an objective evaluation of the situation in each country. Progress towards meeting each criterion is assessed on the basis of *detailed standard checklist*, which allows account to be taken of the same aspects for each country and which ensures the transparency of the exercise [emphasis added].[17]

Although the Commission has been careful to directly state that there are common principles in the interpretation of the different Copenhagen criteria, the understanding that such principles do exist is evident from scattered remarks in the text of the Regular Reports themselves. Typically, there are references to "benchmarks" and "standards" as in the following example from 2001: "Benchmarking and peer pressure is increasingly used inside the Union in order to develop interoperable and compatible administrative structures."[18]

Thus, through the ambiguity of diplomatic language, the Commission has smuggled a myth of a standardized normative theory of assessment of the progress of the accession countries towards meeting the Copenhagen criteria. At least in the area of judicial independence, such a standardized normative theory is most likely missing.

Some would be willing to dismiss this fact as being of minor importance. After all, diplomatic language is necessarily vague, and one should not try to look for profound conceptual and normative coherence in it. In the next section, it is argued that the existence of certain myths in the Regular Reports is hardly just a side effect of diplomatic linguistic subtlety.

4. USES OF THE MYTH

The myth of a standard, coherent theory of judicial independence has not found its way into the Regular Reports by chance. The explanation for its existence is rather that it is convenient for the major stakeholders in the accession process—the Commission and the national governments of the accession countries. The myth, as argued below, could be put to at least three different types of use: a bureaucratic, a normative, and a diplomatic one. Each of these is examined in turn.

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[16] http://europa.eu.int/comm/enlargement/report2002/strategy_en.pdf.

[17] Ibid., p. 9.

[18] http://europa.eu.int/comm/enlargement/report2001/(c) (Administrative capacity beyond accession).

4.1. The Myth as a Bureaucratic Instrument

The existence of coherent constitutional theories of judicial independence, which would have given a basis for comparative analysis of the different institutional models, would have undoubtedly provided a very transparent and efficient tool for the assessment of the progress of different countries in meeting the political Copenhagen criteria. Yet, in the absence of such a theory, a myth about it may serve the same function—cutting the costs of lengthy contextual explanations based on time-consuming empirical surveys. It is not that the Commission, its experts, and the national governments have spent insufficient time on the analysis of the legal systems in the accession states. But the reform of an entire judicial system is not a simple matter, which could be successfully accomplished within a couple of years. Institutional reforms show all their effects only after some time has elapsed and the true effects of the reforms inspired by the Commission are to be seen only in the future. There is bound to be unintended consequences, failures, or less-than-optimal arrangements.

In such circumstances, the myth of a coherent normative theory of judicial independence could be used to cut a few corners in the justification of particular institutional choices and options. As observed by the EUMAP project, in many countries the course of the reforms has been determined by EU experts. In Eastern Europe, common "European models" and "European experience" are often overriding or knock-down arguments in domestic politics, especially if they come from the mouths of EU experts or administrators. Indeed, again as noted by EUMAP, what happens is that at least some of those experts simply advocate solutions with which they are most familiar from their own countries: nevertheless, this local knowledge often passes for a universal truth in the Eastern part of the continent.

It should be noted that *not* using the myth of a coherent theory of judicial independence would have imposed significant costs on the Commission in the assessment of the legal systems of the candidate countries. There would have been two options. First, very detailed contextual analyses of the legal systems of the countries done through the commissioning of empirical research concerning the performance of different models. Again, due to the complexity of the issue, and the time constraints, the results of such an effort would not have been perfect, but arguably they would have been more frank and helpful than the "mythological" approach.

A second option would have been to attempt to design a complex, pan-European normative theory of judicial independence, which would have introduced common standards both for the eastern and the western parts of the continent. Assuming that such a theory is in principle possible (which is doubtful), its creation would have presented the Commission with a really Herculean task.[19] After all, judicial

[19] For an attempt to construct such a theory see the EUMAP project and its methodology, which is indeed rather sophisticated. Yet, the result of this project could hardly be described as a common European theory of judicial independence, which illustrates the point that even

independence is only one aspect of one of the Copenhagen criteria. In its Regular Reports, the Commission has provided roughly two pages of analysis of the judiciary in general for each of the countries. Within such a space, a truly helpful, coherent normative theory is difficult to construct. Assuming that these two pages reflect the resources at the disposal of the Commission for the assessment of judicial capacity, it is clear that the very rules of efficient bureaucracy would dictate the endorsement of time-saving constitutional myths against other, much more costly options.

4.2. The Myth as a Normative Argument in European Constitutionalism

The myth of a coherent normative theory of judicial independence is instrumental in the reinforcement of a particular view of the European Union as a community based on common values—a community of principle. This view is dominant in the theoretical discussions about the nature and character of the EU, and understandably illuminates the conceptions with which EU politicians and administrators approach practical problems, such as the evaluation of the progress of the accession countries.

The view of the European Union as a community of common values has direct implications for the European legal order. As Bengoetxea, MacCormick, and Moral Soriano have convincingly argued, this view would entail that EU law and EU constitutionalism should be based on comprehensive legal coherence, which would allow for the common set of values to permeate all spheres of communal life, by the creation of specific, common constitutional doctrines.[20] Indeed, they have claimed that the creation of such specific doctrines is at the heart of European integration:

> It seems no mere pun to link [integrity] with the idea of integration . . . The guiding value is integration of the states and their peoples into a community or union that succeeds in being more than an international association of treaty-observing states, while not yet leaping to the other pole of becoming a sovereign union state (like the UK or Spain) or a sovereign federal union (like the USA or Australia or India).[21]

The idea of the EU as a community of principle is capable of inspiring EU officials and illuminating their understanding of the character of the Union. There is a tiny step from the argument that the Union is based on common principles, to the idea that there are detailed common constitutional principles in the EU. If this is so, one should admit that there is, or at least that there should be a common theory of judicial independence, applicable to all member states.

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a more focused review of the candidate countries would have not necessarily produced a single, coherent theory of judicial independence.

[20] "Integration and Integrity in the Legal Reasoning of the European Court of Justice," in Grainne de Burca and J. H. H. Weiler (eds.), *The European Court of Justice* (Oxford: Oxford University Press 2001), p. 82.

[21] Ibid., p. 85.

Taking this tiny step is the cognitive mechanism through which the ideal of a community based on common principles ends up re-enforcing the creation and perpetuation of specific constitutional myths, as the myth of a coherent theory of judicial independence.

4.3. The Myth as a Pragmatic Argument in Accession Negotiations

Probably the most important use of the myth of common constitutional principles and standards in the area of judicial independence has been registered in the negotiations between the Commission and national governments in the elaboration and the implementation of the so-called Action Plans—the strategies of the accession countries in meeting the Copenhagen criteria.

First of all, the myth of the existence of common principles of judicial independence could be used as a powerful argument to put pressure on particular governments to pass specific reforms. This has, however, not been the most important use of the myth, since the Commission has hardly had a specific agenda for reforms in each and every country. Therefore, it is most likely that domestic governments would form a coalition with the Commission in order to pass a particular reform of the judicial system, which in most cases would meet the resistance of the domestic judiciary. Reforming the judicial system always involves interpretation of domestic constitutional principles: it is no coincidence that domestic constitutional courts have been heavily involved in adjudication concerning reforms of the judiciary.

In these circumstances, the myth of a common European theory of judicial independence is particularly handy for a coalition between a domestic government and the EU Commission. If a domestic court (or some part of the judiciary) raises an objection against a specific reform proposal on the grounds of a contradiction with domestic (constitutional) rules, the government sponsoring the reform could argue that it is required by the common European constitutional principles. Such was the case, for instance, in the already mentioned episode from the Slovenian accession efforts, in which the government argued that an extension of the probation period for judges was required for EU membership against objections that it was unconstitutional on domestic constitutional grounds.

Probably the most spectacular instance of such a use of the myth of a common theory of judicial independence was the saga of the introduction of constitutional amendments in Bulgaria which allowed for the prolongation of the probationary period for judges, the introduction of time-limited mandates for senior magistrates, and the reduction of the immunities enjoyed by the magistrates. The whole problem started with the fact that some of the measures from the Action Plan agreed by the government and the Commission had been found unconstitutional by the Bulgarian Constitutional Court. Therefore, upon the explicit insistence by the Commission, an urgent amendment of the Constitution was arranged, which was defended at least partly on the grounds that, in this way, Bulgaria would adopt a model reflecting common European values and principles. On the basis of the previous discussion,

it is not difficult to discern that this was largely a mythological justification. More importantly, however, the normative priority of the Action Plans over domestic constitutions is quite problematic, and hardly serves the purpose of creating a culture friendly to the rule of law.

Finally, it should be said that the discussed myth could have other strategic uses in the interaction between domestic and EU politics: it is by no means impossible for domestic judiciaries and especially domestic constitutional courts to use this myth as an argument against the government and the legislature. If the view of the domestic court is close to the views of the Commission, the domestic government would find itself in a difficult position. The general point is that the myth is instrumental in bridging domestic and EU politics, and this accounts for much of its popularity.

5. The Costs of the Myth

Despite being instrumental for a variety of purposes, the use of a myth is accompanied by certain costs. In this section, I explore two types of costs, which seem to be especially high. Taking them into account might counsel against the use of the myth of a coherent theory of judicial independence in accession politics.

5.1. The Irreducible Political Role of Judges: A Challenge to Traditional Views of Independence

First, despite various short-term benefits, the use of the myth of a common European theory of judicial independence conceals a long-term common European problem, and delays its adequate treatment. This is the problem of the growing and irreducibly political power of the judiciary in contemporary constitutionalism. There is a rich literature on the political power of constitutional and high appellate courts, in the activities of which the processes of the "judicialization of politics" and "politicization of jurisprudence" are most visible. Yet, these processes could also be seen in the activities of other parts of the judiciary, such as the prosecutors, for instance. At the bottom of this problem is, on the one hand, the irreducible vagueness and indeterminacy of law, and especially constitutional law. With the expansion of the regulatory state, the need for interpretation of legal norms permeating more and more areas of social life has become particularly acute. In such a context, the powers of the judiciary, as the traditional ultimate interpreter of legal norms, have dramatically increased.

A second source of the expansion of the political powers of the judiciary has been the growing need for a specific type of policy decision—adjudicative decisions between competing comprehensive ideological views and doctrines. In contemporary pluralistic societies, reasonable disagreement reaches deep into what Rawls has called the "basic structure of society". Sometimes disagreement concerns not only issues relating to the *common good* of the given community, but also to the *principles of justice* according to which disputes should be resolved.

In the "circumstances of politics" marked by profound disagreement, as argued by Waldron, there is a need for an adjudicative procedure, which is not based on some specific contested substantive view of justice. Waldron himself believes that procedural views of democracy provide the answer to the predicament of profound disagreement. Waldron's views presuppose the restriction of the powers of courts, and greater reliance on democratically elected assemblies.[22]

A different answer to the same problem—the problem of pluralism and disagreement—draws on the insight of Martin Shapiro that the central rationale for the operation of courts is that of *neutral arbiters* in disputes between two parties.[23] In the circumstances of profound disagreement between competing conceptions of justice, it is no surprise that there is a growing need for neutral arbiters. Courts, especially constitutional and high appellate courts, are rather well suited to act as such arbiters in modern constitutional democracies. Therefore, their very constitutional position accounts for their growing powers.

The problem with this solution, however, is that because of the typical vagueness and indeterminacy of law, and constitutional law in particular, the neutrality of courts as arbiters cannot be anchored in constitutional rules and even principles—the discussion of the principle of judicial independence above has demonstrated this claim.[24] Another traditional way of ensuring their (political neutrality) is through institutional isolation from the other branches both in terms of appointment and promotion, but also in budgeting terms. Indeed, modern judiciaries are self-regulating and self-evaluating to a great degree, which is clearly demonstrated in Eastern Europe in the almost universal process of setting up of Judicial Councils. This second traditional way of ensuring the "neutrality" of courts as arbiters admits that the distinction between "principle" and "policy" in judicial work is significantly blurred. Courts *are* policy makers on this view, but their institutional isolation from other branches is sufficient to guarantee that their policies of adjudication between the claims of individuals and groups disagreeing on issues of justice and the common good are fair and impartial.

In order to strengthen the legitimacy of courts as specific policy makers a number of scholars argue in favour of increasing the accountability and political responsibility of judges and magistrates through the mechanisms of popular elections. Inspired by American models (at the state level), these proposals aim to make the judiciary more responsive to and more representative of the preferences of the citizens.

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22 Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press 1999).

23 Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press 1981).

24 See Wojciech Sadurski, "Legitimacy and Reasons of Constitutional Review after Communism," in Wojciech Sadurski (ed.), *Constitutional Justice, East and West* (The Hague, London, New York: Kluwer Law International 2002).

There are at least three different, traditional ways of interpreting and responding to the problem of the growing political powers of the judiciary, which I sum up in Table 1.

As shown in Table 1, all three models have their own advantages and disadvantages. While the first two attempt to address the problem of the growing power of the judiciary through an increase of its political accountability, the third model attempts to ground the legitimacy of the judiciary in its role as a neutral arbiter between competing political views. In terms of weaknesses, the first two models may lead to the weakening of the traditional democratic institutions, or to the emergence of rampant political majoritarianism: in many countries of Eastern Europe, aggressive majoritarianism is a problem which needs to be taken seriously. The third model risks the capturing of the judiciary by special interests not controllable by the democratic process. This is also a real danger for many of the countries in the region.

Not surprisingly, therefore, the Commission has oscillated between the different models (especially the second and the third one) in its Regular Reports assessing the progress with judicial reforms in the accession countries. Even within single countries, the Commission has hesitated between the second and the third view over the years. Yet, despite the lack of a single best answer to the problem of the expansion of judicial power, for a variety of reasons (already discussed) the Commission and national governments have preferred to work on the assumption that they are implementing common European norms and solutions, which actually has resulted in the concealment of a common problem.

One of the most negative results of this concealment has been the neglect of actual *policy-making* decisions by the judiciaries in the accession countries, and an exclusive focus on the *institutional model* of independence. The Commission preferred to trigger institutional reforms rather than to look into the specific policy-making processes in the judiciary in a given country. In other words, the accession negotiations were carried out on the assumption that the choice of institutions can guarantee the adequacy of policies. As shown in Table 1 above, however, this is hardly the case—all institutional models may sometimes lead to wrong and dangerous policies adopted by the judiciary.

5.2. A Grand Myth of the EU as a Community of Principle?

The second cost associated with the endorsement of myths of common constitutional principle is that it in fact takes for granted the ideal of Europe as a community of principle as the best or even as the only political ideal about the EU. The defenders of the ideal of the EU as a community of principles usually portray the existing alternatives to their view as mere *modus vivendi* justifications of the Union as an instrument for the advancement of narrowly understood economic interests of the Member States. Indeed, if the choice were simply between a community of principles and such a *modus vivendi* society, few would argue that the former is not a more valuable form of human cooperation.

Table 1 The growing political power of the judiciary—institutional answers

	Third legislative chamber model	*Politically accountable judiciary*	*Strongly independent judiciary*
Rationale of the operation of constitutional and high appellate courts	Judges are policy-makers, similar to the legislative branch, but having a political programme structured in a different way	Judges administer and implement decisions and programmes of the politically elected branches	The judiciary lacks a specific political programme and acts in an opportunistic way as a policy-maker
Body administering and supervising the judicial system	An independent body, composed of appointees of the political branches of power	Minister of Justice or an equivalent political figure	An independent Council composed of appointees of the judiciary
Appointments	Senior judges appointed by the political branches or directly by the electorate	Senior judges appointed by the political branches of power, and especially the Minister of Justice	Appointments by independent judicial councils
Guarantees of independence	Different composition than the other political branches; different political agenda	Professional ethics	Institutional separation from the other branches
Representative character of the judiciary	Essential	Not essential	Not essential
Advantages	Ensures a degree of political responsibility for policy decisions	Ties responsibility for policy-making to traditional channels of democratic representation	Preserves better the character of the judiciary as a "neutral arbiter"
Disadvantages	Competing with democratically elected branches and weakening of traditional democratic institutions; danger of aggressive majoritarianism	The judiciary cannot be an effective check against aggressive political majoritarianism	The judiciary may start defending only their own corporate interest, and become captured by strong special interests, because of the low level of accountability

However, this dichotomy is misleading, because there are numerous possible intermediate positions, in which although the members of a given community are not fully committed to the same basic normative framework, they might consider staying together valuable not only from a narrow self-interested point of view. They all might actually be motivated by *different ideals of the common good*, and believe that cooperation with the other members of the society is their best chance to realize their own ideals.

All societies may rely on myths for the purposes of social mobilization and integration. One should not expect Europe to be the great exception from this rule. Yet, an account of the costs of the myths should be kept as well. This is not the place to explore all the costs of the grand myth of Europe as a community of principle. One of them should be at least indicated, however. This myth seems to lead to an excessive emphasis in the integration process on *normative harmonization* rather than on *political invention* of new normative solutions. The former requires the following of existing common normative frameworks, while the latter is centred on the notion of trust in the capacity of members having different normative agendas to understand each other, and resolve their disputes in a just, equitable and creative manner. Probably the *normative harmonization* view was sufficient for the accession process; it would hardly be sufficient for the further consolidation of European constitutionalism, however, in the circumstances of growing disagreement about the ultimate goals of the Union.

6. Conclusion

In this chapter, the issue of judicial independence in the accession process was examined, and it was argued that any claim that the Commission assessment of the legal systems of the accession countries has been based on a coherent theory of judicial independence is deeply problematic. Despite the lack of such a theory, factors diverse as the dominant intellectual understanding of the nature of the Union and pragmatic considerations in the negotiations process, have presupposed the construction of a certain myth of such a coherent theory. The chapter examined some of the uses of this myth and the costs related to these uses.

The issue of judicial independence was a tiny aspect of the accession process. Therefore, one should be careful in generalizing on the basis of the finding of this study. Yet, it seems what has been said for the issue of judicial independence might have some relevance for the assessment of the accession process in general.