This problem is to a great extent transferred into the public discourse on the legislature. Initially, in the period of introducing the fundamental institutions of the state of rule of law the dimension of legislative technique was mainly discerned in law-making. The quality of the legal text was considered and in its defects the weakness of the legislature was seen. Discussions on the clarity of legal text dominated.

With legal regulations becoming more and more complicated, there appeared considerations on the economic dimension of the legislature. Only recently have the so-called corruption affairs led, paradoxically, to understanding the multi-dimensionality of the legislature. The public discourse, taking place primarily in the mass-media, concerns the problem of the legislature's ties with the quality of democracy as such and its capability of expressing the political interests of particular social groups in terms of the rule of law state.

During the third term of office, as many as 640 Acts were adopted while the previous also full term of office the Sejm, adopted 473 Acts. The current Sejm also works very fast: 394 Acts have already been adopted and it is not even half-way through the fourth term of office. During the previous term of office five Acts on average were adopted at each of the meetings and last year the number of adopted Acts exceeded an average of nine falling on each meeting.

The evaluation of the works of the Polish legislature made in the mentioned institutions is not good: a lot of legislative work is being done but its quality is low. In the first place, the translation of economic and political interests into the categories of the rule of law state is often incomplete in the sense that legal categories are most frequently sacrificed in favor of the economic or political good. Retroaction can be regarded as an obvious error in the art of legislation. However, the most frequent error consists of formulating normative acts in a lengthy and descriptive language, which results in it losing its normative force.

There are legal regulations whose function is not to express and protect the economic interest of a specific social group but only to delay the moment of facing the real solution to the problem. Through apparent legal categories, i.e. those which have weak normative force as a result of using vague formulations in the legal text, the political authority gains time to prepare itself for the next stage of the dispute.

Such measures sometimes serve to transfer political responsibility for the content of a normative act onto the judicial power since the vagueness of the text requires that a court, in the process of the application of law, effects its purposive interpretation. From the argumentative point of view, this kind of interpretation weakly connects a judgment with the legal text. The doubtful rules of reasoning based on purpose relationships result in the fact that the judgment itself loses its normative force. In this way, the political authority which created a vague legal text to simulate a solution of a social conflict shifts the responsibility for this conflict onto the judicial authority.

A similar role is played by the lack of terminological uniformity, using notions from different branches of law, which leads to the incompleteness of patterns of

procedures which are subject to regulation. In many cases, even acts do not contain definitions of the notions used in them. This makes it possible to use the legal text to omit law and to apply acts contradictorily to the aim of regulation.

All this results in an increase in the number of amendments and, at the same time, in shortages of consolidated texts of laws. The numerous amendments of law are not formulated in consolidated texts, which make it impossible for an ordinary citizen not only to apply them but even to become acquainted with their content. These phenomena raise particular concerns with regard to tax law since its application by tax-payers is, for this reason, difficult.

Of course, a significant number of these errors are not only technical errors. Many of them result from politics. Political trade-offs become visible in the translation of political and economic interests into legal categories. Very often, for reasons regarding the real condition of the state's finances, legal texts are apparent regulations. The vagueness of legal expressions and the absence of legal definitions are used for manipulation in order to water down the financial effects of the regulation.

The deficits in the activity of the legislature result in a significant degree of haste and poor preparation of legal acts. However, the primary problem lies in disturbances in the process of communicating political interests within legal discourse which is conducted in the institutions of the "rule of law" state. The Polish political class is not prepared to use these categories and regards legal notions as purely conventional which is why there is not only a lack of cohesion in the system of law but also a dysfunction within it. In this way a whole chain of communication barriers is formed, which results in poor legislation. With respect to society, the inability to use arguments and practical discourses can be observed. Thus the processes of articulating group interests are hindered. In turn, the political discourse not being linked to the social (practical) discourse is increasingly incapable of extracting general interest from group interests and to a high degree serves to present private interests as political interests. Since this phenomenon is impossible to hide within legal categories because of the guarantee of procedural protection of fundamental civil rights, the infringement of the structures of legal notions and institutions takes place. At the same time, manipulating the structure of law serves to hide the "privatization" of general interest since the legal text is almost unintelligible for an ordinary citizen. In this way legal measures become the lens through which all the deficits of Polish democracy can be viewed. Thus the legislature in Poland has become primarily a political activity in which the translation of political interests into legal categories is of no significance for the legislators.

3. Disintegrating Factors in Application of Law and its Enforcement

In the wide meaning of this word, the enforcement of law is the application of law, i.e. constructing individual and concrete norms (judgments, administrative decisions) on the basis of abstract and general norms issued by the legislature. In the narrow meaning, the enforcement of law is only the effecting of judicial

and administrative decisions. The condition of the Polish judiciary constitutes the primary problem of the widely understood enforcement of law.

The increasing number of cases subject to consideration by courts results from the extending scope of the rule of law state. However, this is being done without a reform in the judicature, within the framework of the conception of a judiciary which decided two million cases at the most by the end of the 1980s. So justice requires very strong financial support. The development of the institutions of the "rule of law" state cannot take place without developing the judicature. The present situation hangs a big question mark over Poland's implementation of a citizen's right to reliable court proceedings.

The above phenomena result in society's growing dissatisfaction with the operation of legal institutions. Of course, there are some factors which arouse in citizens a sense of disappointment with the judicature. Some of them are not connected with irregularities in the work of Polish courts.

However, Polish society is only starting to understand the model of legal culture characteristic of liberal countries. The 1980s crisis of law and the obvious defects of the legal order from those years created a simplified ideal of legal order where the accent was put on consistency of law with morality and fundamental human rights. The complex form of liberal legal culture, based on the conception of attitudinally neutral law, granting access to courts to everybody, granting vast guarantees of formal justice and the right to a reliable trial was not easily accepted by society who desired a quick and explicit reaction to infringements of law. Also the low quality of legal provisions was transferred to the evaluation of the quality of judicial decisions since it yielded a significant lack of uniformity of judicial interpretation. The large scale of implementation of new legal institutions into Polish law results in the fact that law cannot be understood by its addressees, at least in its functional sense.

And lastly, a social belief about the presence of bureaucratic anarchy in the state is spreading widely. The state is perceived by its citizens as a facet of disorder, the removal of bonds and anarchization of social life, and courts are regarded as part of this mechanism.

Besides financial expenditure, an overall reform of the system of justice is necessary: it should be based on the simplification of procedures, particularly in so-called small cases, on raising the judges' ethical level and changing their attitude towards the applied law. Judges are accused of misunderstood professional solidarity. Lawyers' corporations are blamed for excessive defence of their members' interests, even at the cost of the good of the administration of justice. The specific "guildicization" of lawyers is regarded as a manifestation of the ethical crisis of the judicature.[2]

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[2] Marek Zirk-Sadowski, "Uczestniczenie prawników w kulturze" [The participation of lawyers in the culture], *Panstwo i Prawo*, 9 (2002), pp. 3–14.

However, the poor assessment of courts is also caused by phenomena which have appeared inside the machinery of justice and which can be called the crisis of professional ethics and the crisis of the sense of responsibility for the content of the applied law. In the opinion of society, the judicial community does not, in principle, respond to public condemnation of corruption in the courts. The lack of explicit public disapproval of corrupted judges often results in the erroneous impression that the judicial community tries to conceal these phenomena and handle them among themselves. In this situation, appeals from judges for the autonomy of the courts in the system of authorities are often understood as an attempt to "seal" their community. These objections are also raised against the other lawyers' corporations whose reaction to breaches of the rules of professional ethics by their members is, according to public opinion, too weak.

A similar diagnosis of crisis is formulated in relation to the application of law by the state administration. In particular, the organizational and technical dimension of the administration's activity decisively raises objections. The deficits in the administration's IT equipment, the low level of its staff, and its dependence (especially at a local level) on the political sphere are common knowledge. Poland is in the course of building a modern state administration and this task will require significant financial support.

However, the crisis in the system of state administration manifests itself still more seriously when analysing the legality of its decisions. The case law of the Supreme Administrative Court can serve as an indicator of the efficiency of the state administration. For many years in almost one case in three, the Supreme Administrative Court has reversed the decision under appeal and nearly 39% of the acts of supreme authorities, e.g. the ministers, have been reversed or annulled.[3]

4. Society and Integration of Law

In the normative dimension over the cultural process of assimilating values and legal principles the process of developing legal institutions dominates. The implementation of Community law was not a process of historical evolution but a purely formal operation of introducing certain legal texts into the system of law. Thus legal institutions have been left suspended in a specific culture vacuum and therefore the actors of the legal institutions assume a purely instrumental attitude towards them; they are not able to fill the legal institutions with rational discourse. This purely external attitude to law, the absence of a social hermeneutics of law, results in the fact that legal institutions do not generate common, socially accepted symbols and meanings.

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[3] Informacja statystyczna o działalności wymiaru sprawiedliwości [Statistical information on the functioning of the justice system], Part I (Warszawa: Ministerstwo Sprawiedliwości. Dział Organizacyjny, 2002).

Society reads law as a source of rights, which are, however, regarded as specific bonuses in individual strategies. The number of lawsuits in courts increased from two million in 1989 to about eight million in 2002. This is not only a result of the expansion of the range of juridicization. To a significant extent, society perceives law as an important element of social play. The rights derived from law are not, however, regarded as manifestations of individual freedoms in relation to others and to the state. No need to negotiate the limits of this freedom in the process of the application of law is felt. An instrumental attitude prevails, and rights are regarded as goods distributed by law: they can simply be used in individual strategies and therefore it is necessary to win them.

The lack of the rooting of law in culture brings about attitudes of legal nihilism and legal instrumentalism. No connections are discerned between the normativity of law and morality; conventional normativity. The normativity of law is perceived as a sort of convention covering at most a political game, hence, the attitude which that legal regulations entail dishonest intentions. There is an impression that legal normativity does not, in principle, compete with any other normativity and is not supported by any other normativity. Normative disorder is felt in which both, good law and good customs as well as moral norms are absent. At the beginning of the 1990s this state was perceived as temporary disintegration of legal culture coming from the specific "restructuring" of the normative sphere, which, despite raising an impression of chaos, remained, however, under the control of some social elites. Since the end of the 1990s, after testing the variants of governance of all the political elites, the sense of permanent disintegration, the lack of homeostasis manifesting itself in the destruction of normativity, has been dominating.

Thus disintegration in legal consciousness consists of a paradox: there exists a sense of the presence of law, of its validity but it is accompanied by the sense of destruction of normativity. Law is a collection of texts, a source of certain goods but it is not a duty. If it works, it happens so only through the assistance of state coercion. Legal normativity is not of an argumentative nature. Law exists, as do legal institutions, but there is no legal order.

A crisis of legal culture brings the threat of anomy, i.e. lack or atrophy of social recognition for the binding rules of conduct. It may manifest itself as the disorganization of human relationships in large social groups (rural areas, roadblocks, the nihilistic attitudes shown by folk leaders).

Finally, a crisis of legal culture can lead to the destruction of normativity, i.e. the process of destroying the binding force of legal norms. The destruction of normativity is a result of the declining quality of law itself and the effectiveness of its enforcement by the state apparatus. Law loses its basic features: generality, ability to be universally binding, and to obtain rational justifications. Unlike with anomy, citizens become disoriented—they cannot differentiate between a norm and an exception. So violating law becomes thoughtless, a loss of critical assessment of self and others takes place.

5. Lawyers and Integration of Law

Lawyers themselves went the same way. The "department of justice" was not successfully transformed into the "administration of justice." Like the whole society, lawyers, subjected to the same factors, regarded law as a specific "bonus" in their individual strategies, i.e. they assumed a typically departmental attitude. Law was only expected to be more "elegantly", accepted in Europe. They did not presume that a new role in the social discourse was required of them, and especially of judges. As yet, lawyers have not accepted the requirement of giving an internal dimension to legal texts. The external attitude towards law dominates, reinforced by positivistic legal education, i.e. law is treated as an instruction, a sort of a stimulus. The argumentative nature of legal obligation, which would require the assumption an internal attitude towards a legal norm, i.e. the assumption of responsibility for the final content of law in the process of judging, is hardly noticed.[4] Such phrases as "judging" and "the administration of justice" almost do not exist in the lawyers' everyday discussion. They use such terms as the application of law, judicial decision, etc. which suggest law's instrumental nature and its stimulus character. Lawyers do not accept their participation in the argumentative cognition of law. Like the whole society, they regard "the play of law" as the distribution of bonuses. This attitude must be accompanied by corruption phenomena. As I have already remarked, this attitude of lawyers is to a great extent affected by their education.

Among lawyers, a conception of the profession prevails referring to legal positivism in which law is regarded as an object entirely external in relation to a lawyer, who is not responsible for its content. In Poland, legal positivism played, from this point of view, the role of a doctrine which protected the Polish lawyers' education after the war against excessive ideologisation since positivism as a method offers a conviction about the autonomy of law in relation to political and economic developments. Positivism showed that the notional apparatus of law and jurisprudence used by the lawyer is universal. Using this method in education greatly protected Polish legal culture from the belief that law was only a derivative of economic and political phenomena. Thus positivism, at least in its methodological sense, formed a pattern of the lawyer which was easily applicable also in the concept of the state of the rule of law. It regards law as the sovereign's order which the lawyer, equipped with the methodology of law, only subjects to formal analysis and arranges notionally. In this way, law as the content of the sovereign's will becomes, the subject of lawyers' cognition.[5]

In primitive positivism, participation in culture, understood as the lawyers' attitude to normative culture patterns, consists solely in the cognitive relation. The

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[4] Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1978), pp. 282–292.

[5] Marek Zirk-Sadowski, *Prawo a uczestniczenie w kulturze* [Law and Participation in Culture] (Łódź: University of Łódź Press, 1998), Chapt. 3.

lawyer is defined here as the sovereign's delegate. The sovereign delegates the law-making and the application of law to a number of institutions and primarily to the judiciary. Each legitimated use of this delegation must be based on the assumption that it is only the fulfilment of the sovereign's orders. The formal-dogmatic method coupled with the code excludes the lawyer's influence on culture patterns related to law.

Thus in primitive positivism the lawyer's participation in culture must be reduced only to the cognition of law and the epistemology of law which becomes part of the model of the science of law. So, in the act of cognizing law the lawyer does not constitute the law as a cultural object, assuming a passive, solely cognitive attitude towards it, the same as is assumed towards natural objects.

In the positivistic approach, participation in culture via law is predominantly achieved in the cognition of law. Law presented as an object of cognition separated from the cognizing subject must be sufficiently "objectivised", shown as an object resembling natural objects. For this reason, a basic problem in primitive positivism is the removal of subjective elements from the act of cognition of law. Preserving a borderline between subjectivity and objectivity in the cognition of law is one of the foundations of positivistic epistemology.

This model of lawyers' participation in culture now has a disintegrating effect on the professional roles of lawyers in the integration of Polish law and Community law. Legal positivism is based on the domination of the "hard" law conception, i.e. law built on rules and having strictly determined limits. The demand is that these rules be explicit so that they could effectively perform the function of controlling society. The task of legal institutions is to bring legal rules into effect while functioning under conditions of very limited discretion. We can say that bureaucratic institutions are an ideal of such institutions.

In Community law, the so-called "soft law" model has been predominating as an instrument of the EU Institutions' activity for many years. Most generally speaking, it can be understood as the "principles of conduct" which are not a legal binding but have considerable practical consequences. In this conception of law it is easier to omit the consequences of the lack of political agreements, but at the same time it requires a common understanding of the principles of Community law since in practice the application of soft law consists in "weighing" the principles within the discourse conducted in the Institutions. In EU law this imposes an active, adaptable understanding of law based on referring to principles. The rational discourse taking place in the European Institutions serves to "weigh" principles and not only to apply rules. Thanks to this, there is no clear-cut distinction between legal and social institutions. What finally affects the determination of borderlines between these two types of institutions is the application of the subsidiarity principle.

Assessing the cultural "distance" between the professional roles of lawyers in Poland and in the European Union, we can say that our conception of lawyer is based on the conception of autonomous law (cf. our last year's report) in which an important role is played by the application of rules, interpreted, however, on the basis

of the adopted conception of the "bill of rights" which guarantees law its autonomy in culture, while the European institutions are already developing the concept of reflective law which is created on the basis of discussing principles, which is significantly negotiable in character and refers to social self-control mechanisms.

In Poland, legal positivism entirely leaves out this cultural and communicative character of law by assuming that the content of law becomes known due to the linguistic correctness of the text which guarantees, to a significant degree, its reading in accordance with the legislator's intention. The opposite of this approach is the concept of the content of law as an effect of the argumentation conducted within a culturally determined discourse.

The absence of discursive legal culture (created by lawyers) capable of negotiating the content of law is a source of interpretative disintegration and an ordinary lawyer's inability to engage in the culture of soft, responsive "subsidiary" law. Such a role can be played only by the highest judicial institutions which establish specific, small communication communities, capable of generating new meanings against the background of a legal text created by the legislature. In this situation it is justified to suppose that we are approaching a model of the judicature with the strong domination of the hierarchically highest level courts, which will in fact perform the function of a specific controller of the limits of interpretative swings and which will be incapable of the discursiveness of the lower level judiciary.

The public law of the Polish People's Republic period was based on orders; it was a kind of instruction. During the transformation new texts were included in it, containing provisions guaranteeing human and civil rights as well as the institutions of a free-market economy, pluralistic society and a liberal-democratic state. The autonomy of such law in culture, i.e. its resistance to economic and political instrumentalization, is possible when a change of the text of law is accompanied by a new legal discourse in which the scope of legal obligation and its authority result from argumentation and not from the direct imposition of duties by the legislature.

A legal text is always written in natural language and is a collection of general provisions. So it cannot be directly applied to the settlement of a specific case which is always individual and concrete. The substance of the third power in this new model does not consist in creating new legal texts but in establishing the meaning of legal texts via argumentation. Power over the meaning of law is the essence of administration of justice in which the judge is a kind of negotiator of the content of law and, as a result, of morality and politics.[6] Within this meaning, the power of interpretation is the essence of the law.

Meanwhile, the mechanism for creating a new legal discourse was lacking in the transformation process. The organisation of legal education was, to a large extent, to blame. The absence of argumentative attitude to law and the appearance of very complicated legal regulations finally resulted in the "hyperinstruction" effect. As

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[6] Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1986), pp. 166–167.

a result, justice became a chaotic distribution of bonuses, dependent on the quality of judges—on their qualifications, their sense of morality and law—where the majority of judges played the role of little gods.

6. Conclusion: Integration vs. Disintegration of Polish Legal Culture

This problem became manifest in the integration processes. So, paradoxically, the implementation of EU law led to the strengthening of the tendency to instrumentalize law. The disintegration of the legal order is a result of the narrow understanding of the harmonization of law in the implementation of new legal texts. They were introduced to the Polish legal order without a reference to the achievements of the European legal discourse. The consequences of this primitive implementation of law have led today to alarming phenomena, e.g. in the area of fiscal law. As it turns out, a number of institutions, e.g. goods and services tax and excise (VAT) are understood in entirely different ways by Polish courts and European courts.

Although the way in which Polish legal culture determines the role and principles of the legal discourse resembles that of European culture, this resemblance, however, concerns only the legal culture of professionals—the lawyers engaged in legal practice and doctrine—and at the same time its nature is formal. The disintegrating elements manifest themselves early, such as in the field of attitudes assumed by lawyers towards law, the willingness to actively develop legal normativity, the perception of law, its creation and application as a kind of social negotiation in which lawyers play the role of social arbiters.

The problems concerning citizens' legal awareness are unknown. The poor development of civil society in Poland is of particular importance. The autonomous sense of civil freedom, which constitutes a criterion of assessment of positive law, is probably weakly developed in Poland. Again, we do not mean here the tendency to "copy" the social institutions of the West which began after 1989, but civil society understood as a capacity to articulate needs autonomously via social discourse and the appointment of political representations for interests established in this way. The appearance of such a society is a fundamental condition for successful legal integration with an active, adaptable and argumentative European legal culture. The direct effectiveness of Community law presupposes the possibility of exercising individual rights and their semantic development by society. This requires the existence of social institutions such as voluntary civil associations and, as a result, the emergence of a public sphere remaining beyond the reach of the state's direct control. Of course, the appearance of such society must naturally be a slow process whose course will also be influenced by economic as well as educational conditions. Only then will the current disintegration of legal culture have a chance to become positive integration, i.e. creating a new kind of legal culture in Poland.

14. EU Enlargement and the Constitutional Principle of Judicial Independence

Daniel Smilov

1. Introduction

At the end of 2002, the Bulgarian Constitutional Court (BCC) took a key decision invalidating the plan of the government to reform the judicial system. The judges argued that many provisions in the amendments to the Law on the Judicial System, sponsored by the cabinet of PM Simeon Sax-Cobburg-Gotha,[1] violated the principle of judicial independence in the Bulgarian Constitution.

The BCC has a history (although not a fully consistent one) of defending judicial independence against interference by the political branches of power—the legislature and the executive. Especially prominent in this regard was the resistance of the Court against the plans of the 1994–1996 Videnov[2] government to introduce substantial judicial reforms, which were in many respects similar to the more recent plans for reforms.

In 1994–1995 the stance of the Constitutional Court was widely hailed by commentators of Bulgarian politics, and by representatives of the EU and the Council of Europe. In fact, the Videnov government was much criticized by European analysts and politicians for its controversial policies.

Somewhat paradoxically, the 2002 decision of the BCC, which was similar to its predecessors in many ways, was interpreted in negative terms by the EU Commission, and became the major reason for a temporal "freezing" of the negotiations between Bulgaria and the EU on issues concerning the judiciary. After the decision, further reform of the judicial system could proceed only by means of a constitutional amendment. The Commission insisted on the introduction of such amendments as a condition for the closing of the negotiation "chapters" concerning the judicial system. In order to comply with these requirements the Bulgarian government drafted the amendments which were adopted by parliament, rather hastily, in September 2003. These amendments limited significantly the immunities previously enjoyed by Bulgarian magistrates, and made it possible for the government to introduce limited terms of office (mandates) for senior judges and prosecutors. What would have been seen in 1991–1996 as a significant attempt to limit judicial independence, in 2003 was deemed constitutionally compatible and necessary for

[1] Leader of the ruling party—Movement Simeon II.

[2] Bulgarian Socialist Party.

Wojciech Sadurski et al. (ed.), Spreading Democracy and the Rule of Law?, 313–334.

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