Chapter 12
A Stress Test for Europe's Judiciaries

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Contents

Abstract The rule of law, judicial independence and separation of powers are values guaranteed in constitutions of member states of the Council of Europe. Nevertheless, in recent years, a number of challenges to these accepted values have emerged in different countries all over Europe. The legal responses from European institutions against systemic rule of law threats has yet to prove effective. In this

This chapter builds on the ideas first discussed by the authors in Holmøyvik and Sanders 2017. The text was last revised on 7 July 2018. Subsequent developments in legislation, case law and doctrine have only been incorporated to a limited extent.

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chapter we propose a national approach to protect European rule of law standards. To facilitate this process, we suggest stress-testing Europe's judiciaries. This should be done by means of structured thought experiments in which the likely effects of adverse developments (such as the ones to be witnessed in some European countries today) should be predicted to identify and remedy weak points in the constitutional and legal framework.

Keywords Council of Europe · judicial independence · rule of law · separation of powers · stress test for judicial systems

12.1 Introduction

The rule of law, judicial independence and separation of powers are values guaranteed in constitutions of member states of the Council of Europe.[1] According to Article 2 TEU, the rule of law is one of the common values upon which the EU is built. Nevertheless, in recent years, a number of challenges to these accepted values have emerged in different countries all over Europe in the form of threats to judicial independence. Events in EU member states such as Hungary, Poland, and Slovakia, as well as countries like Ukraine and Turkey should be mentioned in this context.[2] Commentators speak of a rule of law crisis and backsliding in Europe.[3]

The different challenges to judicial independence all over Europe in recent years, demand a discussion of proper reactions. As we shall discuss, European institutions face some difficulties in addressing systemic rule of law issues in the member states (see Sect. 12.2 below). Therefore, despite its importance for European integration and cooperation, the protection of the rule of law and judicial independence remains at present predominantly a national responsibility. In this essay we discuss how the European perspective can be applied on the national level to prevent rule of law backsliding. We suggest a national approach, not to remedy existing rule of law challenges like in Poland, but to review the existing legal framework in other European countries according to European standards as a preventive measure. We

[1] For a comparative overview, see Summary Report on the responses by the CCJE member states to the questionnaire for the preparation of CCJE Opinion No. 18 (2015).

[2] See for a list of recent Opinions of the Venice Commission on judicial reforms: https://www.venice.coe.int/webforms/documents/?topic=27&year=all. Accessed 1 March 2019. See also the Joint report of the CCJE and CCPE Challenges for judicial independence and impartiality in the member states of the Council of Europe 2016; CCJE/CCPE, SG/Inf(2016)3rev; CCJE, Report on judicial independence and impartiality in the Council of Europe member states 2017 (CCJE(2017)5Prov5); see also the various Opinions of the CCJE on recent developments in Bulgaria, Poland, Slovakia, Turkey, and Ukraine https://www.coe.int/en/web/ccje/status-and-situation-of-judges-in-member-states. Accessed 1 March 2019.

[3] See *inter alia* Pech and Scheppele 2017; Černič and Avbelj 2018; and Sanders and Von Danwitz 2018a.

argue that states should 'stress test' their judiciaries according to European rule of law standards. The purpose of such a judicial stress test is to reveal weaknesses in and subsequently take measures to strengthen the constitutional and legal framework for the protection of judicial independence as well as increasing the public's trust in the judiciary.

Since a stress test for judicial systems is a new concept, we offer no empirical evidence for its effectiveness.[4] However, given the serious nature of the threats to the rule of law in several European countries, and the apparent lack of effective legal remedies, we suggest that new approaches must be discussed. The main question this essay wishes to address, is according to which standards and which methodology such a judicial stress test could be performed at the national level (see Sect. 12.3 below). Finally, we discuss the limits of the stress test concept, especially in established democracies (see Sect. 12.4 below).

Stress tests are well known from the financial sector, in particular as a response to the 2007–2008 global financial crisis. Especially the IMF imposes them as part of the FSAP (Financial Sector Assessment Program) on financial institutions in order to identify vulnerability that could undermine the stability of a country's financial system.[5] In order to do this, the FSAP takes not only a broad view at the main structural, institutional, and market features and activities of the financial sector, but also takes into account the financial policy framework within which the financial sector operates.[6] We believe a European legal community facing its own judicial crisis can learn from the financial sector's response to the financial crisis. The stress test concept we discuss in this essay can be applied by governments and parliaments, judicial councils or court administrations, ombudsmen institutions as well as non-governmental organisations such as judges' associations and academics.

12.2 The Problem: A European Rule of Law Crisis and the Limited Effectiveness of European Institutions

12.2.1 Judicial Independence in a European Rule of Law Crisis

Without judicial independence, courts cannot fulfil their social function to institutionalise conflicts and bring them to a peaceful solution.[7] The ECtHR and the CJEU have therefore recognized judicial independence and impartiality as part of the very

[4] See Follesdal 2017 for the stress test concept applied at the international level to the ECtHR.

[5] Moretti et al. 2008, p 3.

[6] Moretti et al. 2008, p 4.

[7] Luhmann 1983, pp 100–106.

definition of a judiciary.[8] Moreover, without independent judges, there is no rule of law,[9] and no judiciary as the third power in a system based on the separation of powers.[10] Especially in parliamentary democracies, where the government is formed on the basis of and can be removed by a majority in parliament, the incentive of the legislature and executive to keep each other in check, might be limited. In such a system, the courts are particularly important for the enforcement of constitutional rules and to prevent the abuse of power by the executive and legislative powers.[11]

While judicial independence is at the centre of this essay, we shall not discuss the contents of this important concept,[12] but only refer to the standards expressed in the Venice Commission's Rule of Law Checklist,[13] the Opinions of the Consultative Council of European Judges (CCJE),[14] as well as the case law of the ECtHR. We also acknowledge that we discuss primarily European issues, leaving aside important questions outside Europe. Moreover, we focus on the protection of judicial independence as an important element of the rule of law. Accountability[15] and competence are recognised as indispensable prerequisites for a high quality judiciary,[16] but will not be discussed in this essay.

In recent years, a number of challenges against the rule of law and judicial independence have emerged in a number of European states, as evidenced by numerous opinions of the Venice Commission, the CCJE and CCPE, and more

[8] See *inter alia* European Court of Human Rights, *Stafford v. the United Kingdom*, 28 May 2002, ECLI:CE:ECHR:2002:0528JUD004629599, para 78; Court of Justice of the European Union, *De Coster*, 29 November 2001, ECLI:EU:C:2001:651, para 10; Court of Justice of the European Union, *El Hassani*, 13 December 2017, ECLI:EU:C:2017:960, para 40.

[9] Stein 2009, p 302.

[10] CCJE Opinion 18 (2015), para 11; see for example Federal Constitutional Court of Germany, *Gerichtsbezirke*, 10 June 1953, BVerfGE 2, 307 and Federal Constitutional Court of Germany, *Soforthilfegesetz*, 9 November 1955, BVerfGE 4, 331, paras 49–50; Hillgruber 2017, Article 97, para 1.

[11] Gardbaum 2014, p 613.

[12] On the contents of judicial independence, see Venice Commission, (CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges; Venice Commission, (CDL-AD(2016)007, Rule of Law Checklist, p 20; CCJE, Magna Charta of Judges; CCJE Opinion No 1 (2001); Kiener 2001; Jackson 2012; Di Federico 2012; Engstad et al. 2014; Gee et al. 2015.

[13] Venice Commission, CDL-AD(2016)007 Rule of Law Checklist.

[14] CCJE Opinions and Magna Carta. See https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta. Accessed 1 March 2019.

[15] See on accountability only: CCJE Opinion No. 18 (2015), paras 20–33; ENCJ Report 2013–2014.

[16] See especially the projects of the ENCJ on Independence and accountability 2016, 2017: https://www.encj.eu/articles/71. Accessed 1 March 2019.

recently by the European Commission acting under the Rule of Law Framework. We will mention nine issues that appear particularly timely in Europe today.[17]

(1) *Taking over constitutional courts*. Constitutional courts found in many European countries are particularly exposed for political interference in being veto players in the political system. Veto players are in political science literature defined as individual or collective actors that have to agree on a proposed legislative or policy change.[18] Constitutional courts are veto players due to their power to block laws and administrative decisions that the court finds contrary to the constitution or other superior norms (i.e. human rights treaties). From a political actor's perspective, constitutional courts can therefore be considered an obstacle for fundamental political and societal reforms which may run counter to constitutional norms or international obligations. Therefore it may be politically desirable to first neutralise the constitutional court, either by appointments or other means, in order to provide a 'friendly' interpretation of the constitution and other superior norms. This sequence of events can be observed in Poland, where the ruling Law and Justice Party adopted legislation reforming the procedures of the Constitutional Tribunal shortly after gaining a majority in parliament and forming a government in 2015.[19] The growing tendency of undue interference in the work of constitutional courts has been recognised by the Venice Commission by a declaration of concern in 2016.[20]

(2) *Politicisation of the appointments of judges*. Appointments of constitutional court judges have been the subject of major political controversy not only in Poland, but also in other EU member states like Croatia[21] and Slovakia.[22] Another example is Romania, where a study concludes that the transfer of judicial appointments and oversight from the Ministry of Justice to an independent judicial council has led to a greater sense of security and independence among judges.[23]

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[17] For an in-depth overview of recurrent issues with examples of incidents across Europe, see the CCJE and CCPE 2016 Report SG/Inf(2016)3rev Challenges for judicial independence and impartiality in the member states of the Council of Europe, part D. See also the Bureau of the Consultative Council of European Judges (CCJE) CCJE-BU(2017)11 Report on judicial independence and impartiality in the Council of Europe member States in 2017.

[18] On veto players, see Tsebelis 2002, p 2; and Tsebelis 1995, pp 289–325.

[19] See CCJE/CCPE SG/Inf(2016)3rev, paras 176–178; Venice Commission CDL-AD(2016)001.

[20] See the Declaration by the Venice Commission on undue interference in the work of Constitutional Courts in its member States, adopted by the plenary on 16 March 2016, http://www.venice.coe.int/webforms/events/?id=2193. Accessed 1 March 2019.

[21] Bureau of the Consultative Council of European Judges (CCJE) CCJE-BU(2017)11 Report on judicial independence and impartiality in the Council of Europe member States in 2017, paras 56–61.

[22] In Slovakia, seats on the Constitutional Court were vacant for three years (2014–2017) due to the president refusing to appoint candidates elected by parliament. On the background and current political controversies concerning judicial appointments in Slovakia, see Ovádek 2018.

[23] See Johnson and Radu 2013, p 35.

(3) *Taking over councils for the judiciary*. A number of European states have followed Council of Europe recommendations[24] and introduced judicial councils for the appointment of judges and other decisions concerning their careers. While the effect of judicial councils is debated by scholars,[25] the recommendations say that decisions of appointment and promotion of judges should be taken by an independent authority with a substantial representation of judges (ideally the majority, elected by their peers).[26] What we see in some states is a *de facto* politicisation of the judicial councils. Poland has reorganised its judicial council so that its members from the judiciary, forming a majority in the council, are to be appointed by parliament.[27] Likewise in Turkey, the 2017 constitutional revision allows the President to appoint 6 out of 13 members of the judicial council, while the remaining members will be appointed by Parliament, which due to the same constitutional amendments will most likely be controlled by the president's party.[28] In 2012 Hungary was also criticised for leaving too much discretion concerning judicial appointments to the politically elected president of the National Judicial Office and thus weakening the National Judicial Council. Much of this criticism has later been addressed.[29]

(4) *Interference with judges' tenure and work environment*. For judges already in position, the regulation of tenure is vital for their independence. The introduction of age or term limits with retroactive effect, as in Hungary[30] and in Poland,[31] can be used to purge the judiciary of judges appointed under previous political regimes and to replace them with judges of their own choosing.[32] Such measures may encourage

[24] CCJE, Opinion n° 10 (2007); Venice Commission, CDL-AD(2010)004, paras 28–32; ENCJ, Councils for the Judiciary Report 2010–2011 (2011).

[25] See Kosar 2018.

[26] CCJE, Opinion n° 10 (2007), paras 15–20.

[27] See the Venice Commission CDL-AD(2017)031 Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, paras 19–27. There are a number of cases pending at the CJEU concerning this question: C-487/19; C 824/18; C-625/18; C-624/18; C-585/18.

[28] See the Venice Commission CDL-AD(2017)005 Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, paras 114–119; see also Sanders and Von Danwitz 2018a.

[29] See the Venice Commission CDL-AD(2012)020 Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary paras 38–45 and 88.

[30] CCJE/CCPE SG/Inf(2016)3rev, para 166.

[31] Venice Commission CDL-AD(2017)031-e, paras 44–52. The CJEU was addressed in relation to this issue: see European Court of Justice, *Commission v. Poland*, order of 17 December 2018, ECLI: EU:C:2018:1021 by which the positions of the judges of the Supreme Court including the president's were secured. See also the Opinion of AG Tanchev of 11 April 2019 and the judgement of 20 June 2019. See for the pending case C-192/18 the Opinion of AG Tanchev of 20 June 2019.

[32] A recent example is the introduction of retirement schemes for judges in Armenia after the 2018 political revolution, see Venice Commission CDL-AD 2019(030), Armenia, Joint opinion on the amendment to the judicial code and some other laws.

loyalty to political authorities incompatible with judicial independence, and may have a chilling effect on the remaining judges. Another measure with similar effects can be the transfer of judges against their will, which has been reported as a recurrent problem in Turkey.[33]

(5) Another avenue to interference with judicial independence goes through *judicial administration*. In many countries the executive exercises a strong influence on judicial administration,[34] which brings along the risk of political interference with the judicial function. In the case of *Kinský v. The Czech Republic*, the ECtHR found that an order by the Ministry of Justice requiring the courts to report on the proceedings in a number of politically controversial cases violated the impartiality of the court.[35] In the case of *Baka v. Hungary*, the ECtHR found a violation of Article 6 of the ECHR due to the absence of judicial remedies following the dismissal of a chief judge.[36] Another example is the recent Polish judicial reforms, where the Minister of Justice's power to appoint, dismiss and sanction court leaders has raised particular concerns over the internal independence of Polish judges.[37]

(6) The application of *disciplinary procedures* against judges or even *strong public criticism* undermining public trust in the judiciary may also infringe on judicial independence.[38] Political statements and criticism of on-going judicial proceedings was a continuing factor for the ECtHR finding a violation of Article 6 of the ECHR in the above-mentioned *Kinský* case. Another example is Romania, where judges claim that the other branches of government use the media to discredit and to put pressure on how judges decide cases.[39] In Poland, a foundation close to the government allegedly initiated a campaign on billboards and the internet in autumn 2017 in support of the controversial judicial reforms.[40]

(7) *Non-enforcement of court decisions* remains a problem in a number of states.[41] Non-enforcement of court decisions may undermine the credibility and authority of the judiciary as well as its effectiveness. Of particular concern is non-enforcement of court decisions on constitutional issues. In the recent case of Poland, the government refused to publish decisions of the Constitutional Tribunal

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[33] CCJE/CCPE SG/Inf(2016)3rev, paras 182–183.

[34] See with further references CCJE/CCPE SG/Inf(2016)3rev, paras 99–113.

[35] See European Court of Human Rights, *Kinský v. The Czech Republic*, 9 February 2012, ECLI:CE:ECHR:2012:0209JUD004285606, paras 95–98.

[36] See European Court of Human Rights, *Baka v. Hungary*, 23 June 2016, ECLI:CE:ECHR:2016:0623JUD002026112.

[37] See the Venice Commission CDL-AD(2017)031 Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, paras 100–108.

[38] See Sanders and Von Danwitz 2017b and 2018b.

[39] See Johnson and Radu 2013, p 38.

[40] See Sanders and Von Danwitz 2017b and 2018a.

[41] See the CCJE/CCPE SG/Inf(2016)3rev, paras 206–212.

on the constitutionality of legislation concerning the Constitutional Tribunal itself, and which it found to be an unconstitutional interference with judicial independence.[42]

(8) *Procedural changes negatively affecting the effectiveness of the courts*. In Poland, amendments to the law on the Constitutional Tribunal have introduced a number of procedural measures, concerning *inter alia* the sequencing of cases and increased jurisdiction for the plenary, and which according to the criticism from both the Venice Commission and the EU Commission, may prevent the court to function properly.[43] Similar procedural measures were also hastily introduced for the Constitutional Court of Georgia in 2016.[44]

(9) The *independence of the prosecution* service is also an important point to be kept in mind as an important factor in a state based on the rule of law.[45] As the CCPE has pointed out, without the non-interference of the executive in the prosecution service, certain criminal cases might not reach the courts at all.[46] Insofar, the Polish reform which made the Minister of Justice also the Prosecutor General, is highly problematic.[47]

12.2.2 Limited Effectiveness of European Institutions and the Need for National Responses

The serious threats depicted above raise the question of proper reactions. Given that such problems may arise all over Europe and challenge the fundamental values expressed in Article 2 TEU, EU responses come into view first. For the member states of the EU there is the Article 7 TEU procedure, which was launched by the European Commission and Parliament in 2017 against Poland after extensive discussions between the European Commission and Poland.[48] In 2018, the same

[42] See the Venice Commission CDL-AD(2016)026-e, para 75.

[43] See the Venice Commission CDL-AD(2016)026 Poland - Opinion on the Act on the Constitutional Tribunal, para 123, and Commission Recommendation (EU) 2016/1374 of 21 July 2016 regarding the rule of law in Poland, para 41.

[44] See the Venice Commission CDL-AD(2016)017 Georgia - Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings.

[45] See CCJE/CCPE SG/Inf(2016)3rev, paras 118–152. See for this point also: Court of Justice of the European Union, judgements of 27 May 2019 (OG, - C 508/18 - and PI C-82/19, ECLI:EU:C:2019:456) and (PF - C 509/18, ECLI:EU:C:2019:457).

[46] See CCPE Opinion No. 9 (2014) 'Rome Charter'.

[47] Venice Commission CDL-AD(2017)028.

[48] See the press release with a link to further information, especially the Reasoned proposal under Article 7(1) for a Council decision http://europa.eu/rapid/press-release_IP-17-5367_en.htm. Accessed 1 March 2019.

procedure was also launched against Hungary.[49] However, while the importance of the Article 7 procedure shall not be denied, severe measures against a member state demand unanimity among all other member states in the Council, which questions the applicability of the procedure.[50]

Short of the Article 7 procedure, the EU legal toolbox does not appear well stocked to deal with systemic threats to the rule of law in member states. The Commission has launched an infringement procedure under Article 258 TFEU against Poland because of the change of retirement ages of judges.[51] Yet this procedure does only address very particular issues such as a particular law regulating retirement ages rather than the broader systemic threat to the rule of law in Poland, of which the fusion of the Minister of Justice and the Prosecutor General, the reforms of the High Judicial Council, the Ministry of Justice influence over the selection of court presidents are just examples.[52] Scheppele has suggested that the Commission could 'bundle' a set of distinct complaints into systemic infringement actions under Article 258 TFEU, but this has yet to happen.[53] Other legal means, for example an infringement procedure for violation of Article 19 TEU at the CJEU, are in their early stages of development,[54] but has been used against Poland for its reform of the Supreme Court.[55] While these recent decisions show how important the rule of law is for the Court of Justice of the European Union as a fundamental European value and basis for European cooperation, such decisions can - again - only address specific cases brought to the court. Legal means by the member states within the European context, as for example denying the execution of a European Arrest Warrant, are also just emerging.[56] A less explored but quite dramatic option, suggested by Kochenov, is for member states under Article 259 TFEU to bring direct actions against other member states for systemic rule of law violations.[57]

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[49] See the press release: http://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act. Accessed 12 October 2019.

[50] See Von Bogdandy et al. 2012, pp 496–507; Greer and Williams 2009, p 474.

[51] Court of Justice of the European Union, *Commission v. Poland*, action brought on 21 December 2017 (case pending), case C-715/17

[52] See for a detailed analysis: COM(2017) 835 final Reasoned Proposal in Accordance with Article 7(1) of the Treaty on the European Union Regarding the Rule of Law in Poland.

[53] See Scheppele 2016; see also Pech and Scheppele 2017, pp 38–44.

[54] See Court of Justice of the European Union, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, ECLI:EU:C:2018:117, paras 41–43; see also Closa et al. 2014/2015, p 9 ff, and Sanders and Von Danwitz 2018a.

[55] See Court of Justice of the European Union, *Commission v. Poland*, preliminary order of 17 December 2018, ECLI:EU:C:2018:1021, by which the positions of the judges of the Supreme Court including the president's were secured. See the judgement in the same case of 20 June 2019, ECLI:EU:C:2019:531. See for another important decision concerning the rule of law: Court of Justice of the European Union judgement, OG -C 508/18 and PF - C 509/18, 27 May 2019, ECLI:EU:C:2019:456.

[56] Court of Justice of the European Union, *LM*, 25 July 2018, ECLI:EU:C:2018:586. See also: Wendel 2019.

[57] See Kochenov 2016.

Time will tell if any of these mechanisms will prove effective against systemic threats to the rule of law.[58]

On the level of the Council of Europe, effective legal tools against violations of judicial independence are even more limited. Beyond decisions of the ECtHR in particular issues, there is not much the Council of Europe can do.[59] Still, the importance of Council of Europe institutions such as opinions of the Venice Commission must not be underestimated. On the one hand, such opinions entail the current standards for judicial independence. Such standards are not legally binding for the member states. Nevertheless, they do have considerable influence on institutions such as the European Union, the ECtHR, the CJEU, the other member states and the opinion of an increasingly internationally interested public. While the current development of these tools is important, their effectiveness has yet to be proven.

The lack of effective European rule of law enforcement mechanisms means that, for the time being, judiciaries remain a national responsibility, not only in relation to their financial basis but also in relation to their legal and constitutional framework. This suggests that attempts to strengthen and preserve judicial independence and the rule of law should also be made at the national level. Consequently, the stress test concept addresses the problem by introducing a tool for assessing the national situation of judicial independence which is not currently experiencing a rule of law crisis, for identifying possible threats and hopefully for strengthening legal (especially constitutional), political and social safeguards. This way, the stress test concept is an attempt to sidestep Jon Elster's paradox: while constitutions often are written in times of crisis, they ought to be adopted in maximally calm and undisturbed conditions.[60]

As a side note, while the stress test has a primarily national focus, we suggest that its results may also be relevant for European institutions. European institutions can use the results to refine their own standards and also to give member states advise on future reforms. This is in line with the interdependent way in which European rule of law standards are developed and applied. Such standards are drafted explicitly or implicitly on the basis of current developments in the member states. In case of the Venice Commission, for example, specific events in Council of Europe member states trigger a request for an opinion which leads to the application and sometimes development of existing rule of law standards. Moreover, it is also conceivable that European institutions can use the results of national stress tests to question the effectiveness of their own legal tools by means of a stress test on a European level.

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[58] For a pessimistic view, see Kochenov 2015.

[59] The Council of Europe has denied Russia voting rights, which, however, together with the payment cuts from Turkey, might lead to a financial crisis of the institution. See http://www.dw.com/en/russia-withholds-payments-to-the-council-of-europe/a-42792673. Accessed 1 March 2019.

[60] See Elster 1995, p 394.

12.3 The Three Stages of the Stress Test

12.3.1 Introduction: What Are the Standards and What is the Methodology?

In this section we will discuss the standards and methodology of a stress test for European judiciaries. The methodology we propose is partly deductive and partly inductive. The deductive element comes from the European standards for what should count as an independent exercise of the judicial function. The inductive element comes from the fact that European judiciaries operate within different legal frameworks and political contexts. This means that measures taken in order to align national institutions with common European standards must be tailored to the national legal and political context. Consequently, the specific measures may differ from state to state.

Considering first the standards, we will argue that when assessing judicial independence on the national level within the framework of a stress test, states should adopt a European standard. As mentioned above, judicial independence is a key component in what is sometimes called a European constitutional heritage, though this term obfuscates the fact that for most of the 20th century many European states were dictatorships with little judicial independence. Today however, all 47 member states of the Council of Europe have entrenched at least a declaration of judicial independence in their constitutions.

More important still is the fact that in European public law, judicial independence is enshrined in Article 6 of the ECHR, which as interpreted by the ECtHR sets a binding minimum standard common for all the member states of the Council of Europe. For the member states of the European Union, maintaining independent judiciaries is also a legal obligation flowing from the EU treaties and the case law of the CJEU (see Sect. 12.2.1 above). While states are sovereign and may in theory adopt and interpret national law that does not meet the minimum standards of its treaty obligations, membership in the ECHR means that states are no longer completely free to organise their judiciaries unless they accept to violate their international obligations and suffer the political and legal consequences that follow.[61]

A more practical consideration for applying a European standard when assessing national legislation is that European standards can be more developed than national ones. This is not to say that national constitutions or the literature on rule of law indicators cannot provide useful guidance for national rule of law questions, quite the opposite. However, the aim of the stress test is to complement the national discourse with a European perspective in order to avoid national biases. In addition to Council of Europe and EU treaty obligations, states should also consider the

[61] See Article 46(1) of the ECHR as interpreted in European Court of Human Rights, *Scozzari and Giunta v. Italy*, 13 July 2000, ECLI:CE:ECHR:2000:0713JUD003922198. On the interrelation between national constitutions and European law, see Grimm 2016, pp 271–294.

standards for judicial independence developed in the opinions and recommendations issued by the Council of Europe's Venice Commission. While these are non-binding advisory opinions (soft law), they do approach the issue in a more systematic and comprehensive way than the ECtHR and national courts can do on a case-by-case basis.

In its opinions on constitutional and legislative reforms in individual countries, the Venice Commission relies on a wide range of sources.[62] In addition to hard law sources in the form of the ECHR and ECtHR case law and other international treaties, it also makes use of soft law standards, such as recommendations of the Committee of Ministers of the Council of Europe or best practices among its member states.[63] Particularly useful for the evaluation of national judiciaries are the Commission's so-called reference documents.[64] These documents contain a compressed and systematic overview of European standards and requirements pertaining to specific issues. A particularly relevant reference document for a stress test is the Venice Commission's 2010 *Report on the Independence of the Judicial System*.[65] Similar reference documents discussing contemporary standards for judicial independence have also been adopted by the Council of Europe's Consultative Council of European Judges.[66]

For the purpose of a stress test, it is important not to confuse standards with implementation. Neither the standards developed by the Venice Commission, nor the case law of the ECtHR requires states to adopt specific institutions, procedures or models to safeguard judicial independence.[67] While it might be criticised that this leaves the standards open for multiple interpretations and is too uncertain, it should be kept in mind that these standards cannot and do not aim at a harmonization of the judiciaries in European states. The standards are output oriented:

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[62] For an overview of the Venice Commission's opinions concerning the judiciary until 2015, see CDL-PI(2015)001 Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges.

[63] On the working methods of the Venice Commission, see Buquicchio and Granata-Menghini 2013, p 244.

[64] The Venice Commission's reference documents are available on the Commission's website: http://www.venice.coe.int/WebForms/pages/default.aspx?p=01_main_reference_documents&lang=EN. Accessed 1 March 2019.

[65] See the Venice Commission, CDL-AD(2010)004 Report on the Independence of the Judicial System Part 1: The Independence of Judges. See also CDL-AD(2016)007 Rule of Law Checklist.

[66] See in particular CCJE Opinion no. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, CCJE Opinion no. 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence and CCJE Opinion no. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy.

[67] This point has been emphasized by the ECtHR in *inter alia* European Court of Human Rights, *Kleyn and Others v. the Netherlands*, 6 May 2003, ECLI:CE:ECHR:2003:0506JUD003934398 para 193. The Venice Commission too has repeatedly stressed the states' margin of appreciation when deciding on which measures to take in order to comply with European standards, see Buqicchio and Granata-Menghini 2013, pp 244–246 and Craig 2017, pp 78–79.

They only describe the conditions for an independent exercise of the judicial function. The states are free to adopt whatever measures required to meet these conditions. This margin of appreciation is important to recognise as judiciaries in Europe operate in different institutional, legal, political and cultural contexts, which means that measures to meet the standards should be tailor-made for each national context (see Sect. 12.3.4 below).

To illustrate the point just made, the Venice Commission considers as a standard that '[a]ll decisions concerning appointment and the professional career of judges should be based on merit applying objective criteria within the framework of the law.'[68] To meet this standard, and to prevent politically motivated appointments, the Venice Commission recommends that states establish independent judicial councils in which judges have a decisive influence on decisions on the appointment and career of judges. At the same time, the Venice Commission acknowledges that there is no single model which applies to all countries. In countries where judicial appointments lies with the executive power or in parliament, legal culture, political traditions or stringent qualification requirements may have a restraining effect that allows the standard to be met without the recommended judicial council. The introduction of councils for the judiciary may serve as an example. Such institutions are recommended by European standards and also guaranteed in the Polish Constitution.[69] However, the German legal system do not provide for such councils neither on the federal nor on the level of the states (*Länder*). Consequently, a reform of its council will have a different effect on the Polish system than would the introduction of the same Council in Germany.[70]

As the example and the discussion above show, the stress test concept presupposes an interdependency between the national level and the European level. European standards of judicial independence are used to evaluate the measures taken at the national level. Yet these standards must be considered with due regard to the national context. Like the standards discussed above, the stress test on the national level is output oriented. The aim of the stress test is not a European standardisation of institutions and procedures, but rather judiciaries which, whatever their organisation, competences and function within each legal system, can exercise the judicial function independently in accordance with the European standards. The interdependency between the European and the national level is further reflected in the three stages of the stress test, which we will discuss below.

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[68] See the Venice Commission CDL-AD(2010)004 Report on the Independence of the Judicial System Part 1: The Independence of Judges, para 82(2) and paras 28–32.

[69] There is a discussion whether Judicial Councils are really effective in achieving their goals of securing judicial independence and impartiality, see Bobek and Kosar 2015.

[70] This is not to say, however, that nothing could be improved on the German system. German Judges Associations have demanded the introduction of a Judicial Council for decades. See Sanders and Von Danwitz 2018a.

12.3.2 Stage 1: Mapping Threats to Judicial Independence

The first stage in the stress test should be to map potential threats to judicial independence. Thus, the list of nine challenges to judicial independence in Europe provided in Sect. 12.2.1 above can provide a useful starting point. Recent experiences in Europe show that interferences with judicial independence come in a number of forms and methods. It might also be assumed, that such interferences evolve over time. Therefore, the list above is by no means exhaustive, but should be constantly revised and updated.

We will argue that states should approach potential threats to judicial independence from a European perspective. While the national context is obviously relevant and important when considering potential threats, it can be difficult to anticipate potential threats to judicial independence based only on national experiences since they can be few and limited. A European perspective on the other hand will provide stress testers with more cases and examples of threats to judicial independence. From the cases and experiences in other countries, stress testers can identify a number of characteristics of methods and techniques used to subvert judicial independence as well as which institutions, rules and procedures are particularly contested. The purpose of this first stage of the test should be to provide a broad factual basis for testing judicial independence in the national context under hypothetical scenarios (stage 2) and finally to propose measures to remedy weaknesses (stage 3).

12.3.3 Stage 2: Stress Testing Judiciaries

Stage two of the stress test is about envisaging certain scenarios in which the judiciary comes under the attack of political forces trying to wrestle the courts under their control. The test is to see whether or not, or to what degree and on which terms, constitutional and legislative safeguards can withstand different forms of interference.

The point of departure for a stress test should be the list of techniques and approaches employed for subverting judicial independence based on the experiences from a number of European countries and compiled in stage one. The stress test should be undertaken by way of a careful analysis of how the political and legal framework in the tested country would - most likely - react to the previously identified threats. Could similar approaches be successful in other countries? Are changes to the constitutional and legal framework needed to prevent these approaches to be successful? Possible scenarios can be anything from subtle and limited manipulation of judicial appointments to a full scale political takeover of the judiciary like the one we are witnessing in Poland these days. While legal safeguards such as judicial review and constitutional guarantees are of the utmost importance, such tests should also take into account the effects of the media, NGOs, the international community and other relevant factors.

Another aspect to be kept in mind is that the scope of judicial independence is not necessarily clear and this must be kept in mind when performing the stress test.[71] What constitutes courts of law, judges and judicial power may vary between legal systems. If it is the exercise of the judicial function that is to be protected from interference, the stress test must take into account that not all tasks performed by courts and judges involve judicial adjudication. Moreover, decisions that in some countries are considered judicial adjudication and made by judges, can in other countries be administrative decisions. Therefore, in order to be effective, the term 'judiciary' should not be understood in too narrow a sense when it comes to the stress test.[72]

It should also be noted that neither legal safeguards nor the political climate are necessarily static. Therefore, the stress test should be undertaken in different stages, taking into account the possible development of the political climate and the effects of previous attacks against the judiciary. It is likely, that at some stage, the rule of law in every state will crumble once the stress is high enough. The stress test should help identify critical points where attacks on judicial independence can be initiated easiest.

12.3.4 Stage 3: Considering Measures

The third and final stage of the stress test is to consider and propose remedies to the flaws and weaknesses in the protection of judicial independence identified in stage two. Before considering measures to be taken, the plausibility of potential threats to judicial independence identified in stage two should be assessed. Not any imagined scenario of adverse conditions to the judiciary is conceivable within a specific national context. Thus a risk assessment involving both the probability and the damage potential of a possible threat should be carried out before considering concrete measures.

If the risk assessment concludes that measures should be taken to counter a specific threat, the question is what measures are appropriate. The answer to this question is of course context dependent, and a general discussion of measures goes beyond the remit of this essay. Instead we will make some general remarks on institutional (1) and non-institutional measures (2).

(1) First we do not underestimate the difficulties in responding with concrete measures to hypothetical scenarios produced by a stress test. However, as pointed out above, most legislation is both a reaction to past experiences and a prognosis on future developments. Uncertainties in the effectiveness of measures or the best

[71] For a discussion on the ambiguity in the concept of judicial independence, see Macdonald and Kong 2012, pp 832–833.

[72] This approach was also taken in the joint CCJE/CCPE Report SG/Inf(2016)3rev; see also Shetreet 2011, p 17.

response to specific threats can in any case be mitigated by drawing on experiences and best practices from other countries. For example, one of the lessons learned from the controversial reform of the Polish Constitutional Tribunal in 2015–2016 is that changes to procedural rules can undermine the effective functioning of a court to the extent that it cannot function properly.[73] In such a scenario, a possible measure can be to entrench key procedural rules in the constitution, for which amendments are usually more time consuming and requires a large majority in parliament as for example in Hungary after the 2010 elections.

Empirical and qualitative research on courts can also provide valuable insights into the functioning of specific mechanisms and procedures. For example, a quantitative study by Ginsburg and Melton based on data from 192 countries between 1960 and 2008 suggests that rules governing the selection and removal of judges are the most important safeguards for judicial independence in authoritarian regimes and new democracies.[74] Their findings also suggest that that constitutional safeguards for judicial independence are most effective when they establish a political machinery of checks and balances, rather than relying solely on the normative effect of declarative rules saying judges shall be independent.[75] Such 'mechanical' safeguards in the form of additional veto players or clear boundaries for legislation may be particularly relevant in typical European parliamentary systems where the majority in parliament and the executive usually belong to the same political party or block. Turning again to the Polish judicial reforms since 2015 as an example, they have been implemented with relative speed and ease by a scant majority in the Polish parliament working in conjunction with a President from the same party.

Another question is on which level in the hierarchy of norms safeguards for judicial independence are to be regulated. The answer will to a large extent depend on where the threat comes from. If for example individual judges' independence in deciding cases vis-à-vis their court presidents is at risk, appropriate measures can be regulated in law, as the law is beyond the powers of court presidents. If however the threat comes from parliament, which in parliamentary systems is likely to act in concert with the executive, legislative measures may be inadequate. In such a scenario, only the constitution or other norms with more rigorous amendment procedures (so-called 'organic laws') may provide adequate protection.[76]

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[73] See the reports of the Venice Commission CDL-AD(2016)001-e Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, para 88, and CDL-AD(2016) 026-e Poland - Opinion on the Act on the Constitutional Tribunal, para 123. See also the Venice Commission CDL-AD(2016)017 Georgia - Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings, para 64.

[74] See Ginsburg and Melton 2014, pp 209.

[75] On the distinction between the constitution as a machinery and a norm, see Troper 2001, pp 147–162.

[76] See for example the suggestions made in the Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality, CM(2016)36 final.

As illustrated above, deciding on institutional measures raises a number of questions. A final issue to keep in mind is the potential negative effects of measures to protect judicial independence. Consider for example that judges are found to be vulnerable to pressure by threats of disciplinary sanctions from the executive or the court administration. In this case, the criteria for disciplinary sanctions can be clarified and restricted in the law or the competence to initiate disciplinary procedures can be reallocated to a different body. However, such measures must be balanced against the equally legitimate interest in holding judges accountable for errors and abuse of powers. The aim should be to render judges independent in the exercise of the judicial function, not to render them unaccountable.

(2) Not all potential threats to judicial independence can be met by simply introducing institutional mechanisms or procedures to insulate the courts from undue interference. We will mention three types of non-institutional measures to be considered.

First of all, there is ample research and experience to suggest that building a 'culture of judicial independence' in society and among political actors is at least as important as institutional safeguards.[77] One example is the above-mentioned study by Ginsburg and Melton, which suggests that in established democracies, many with old constitutions with relatively weak formal safeguards, judicial independence is established by practice rather than by law alone.[78] Within the context of a stress test, it is a particular challenge to identify cultural preconditions for judicial independence and to suggest effective measures to build and maintain such a culture.

Second, threats to judicial independence can be met with non-institutional preventive measures by strengthening courts' and judges' capacity to offer off-bench resistance to interference.[79] Research on judges in hybrid regimes suggest that judges' social networks with political elites, organisation of judges associations and cooperation with bar associations can help mobilise legal professionals to protect judges against both blatant interference or the chilling effect of strong formal powers vested in the executive. A recent example from an established democracy is the Norwegian Judges Association's successful interference with the Norwegian government's attempt in 2017 to cut short the term of its newly appointed judge on the EFTA Court.[80] Courts and judges can also seek international support. Within the Council of Europe, constitutional courts or equivalent apex courts can request the Venice Commission for *amicus curiae* opinions on comparative constitutional

[77] For a discussion and overview of relevant contexts for judicial independence, see Macdonald and Kong 2012, pp 846–852.

[78] See Ginsburg and Melton 2014, pp 206–209.

[79] In the following we draw on the discussion and summary of scholarship in Trochev and Ellett 2014, pp 67–91.

[80] See https://www.politico.eu/article/norway-accused-of-meddling-with-judicial-independence-per-christiansen-efta/. Accessed 1 March 2019.

and international law issues pertaining to judicial independence.[81] Judges can also rally international support by engaging in transnational networks of judges and lawyers, though recent experiences in Hungary and Poland suggest that the international critique of judicial reforms may have limited effect.

Third, problems with illegitimate interferences in the judiciary are not always due to a flawed institutional framework. In a study on the reforms of the justice system in Guatemala, Rachel Sieder found that too much attention has been paid to institutional design in order to strengthen the rule of law at the expense of addressing underlying causes for the lack of judicial independence.[82] Despite institutional advances in appointment procedures, the judicial system in Guatemala remained corrupt and under the influence of powerful individuals and groups, leading to a deep mistrust of the justice system among citizens. According to Sieder, corruption explains much of the weakness of the Guatemalan judicial system.[83] In such a scenario, strengthening disciplinary procedures and oversight mechanisms may alleviate the problem. However, it is likely that judges will remain susceptible to corruption without higher salaries, better training to increase their standing and adequate protection against intimidation and threats.[84]

12.4 The Counter Argument: Is it Really About Law, Or About Culture?

While we have just mentioned three types of non-institutional measures, the stress test concept we propose in this essay presupposes that threats to judicial independence can at least to some extent be prevented by measures improving the legal and institutional framework. However, the way in which *de jure* judicial independence, in particular constitutional guarantees, actually enhance *de facto* judicial independence, is a point of debate.[85]

The above-mentioned study conducted by Ginsburg and Melton finds that in established democracies, there seems to be no statistically relevant relationship between *de jure* and *de facto* judicial independence.[86] In fact, older democracies, which may have the oldest constitutions with the weakest guarantees of judicial independence, tend to have high levels of *de facto* judicial independence. Ginsburg

[81] See CDL-AD(2016)015 Republic of Moldova – Amicus Curiae Brief for the Constitutional Court on the Right of Recourse by the State against Judges, CDL-AD(2017)002 Republic of Moldova – Amicus Curiae Brief for the Constitutional Court on the Criminal liability of judges, and CDL-AD(2016)036 Albania – Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors (the Vetting Law).

[82] Sieder 2004, p 111.

[83] Sieder 2004, p 105.

[84] See also CCJE/CCPE Report SG/Inf(2016)3rev, paras 284–288, 291–302.

[85] See with references to the discussion: Ginsburg and Melton 2014, p 188.

[86] Ginsburg and Melton 2014, p 205.

and Melton ponder whether such democracies might have developed alternative mechanisms of protecting judicial independence.[87] The experiences from these countries suggest indeed that judicial independence, observance of the rule of law and separation of powers is not only a matter of legal and constitutional guarantees, but also of something else, possibly a matter of tradition and political culture.[88]

In relation to Germany, for example, Gärditz has argued that the position and actual independence of the German Federal Constitutional Court was due to 'institutional respect' between the court and the other branches of the German government rather than the text of the German Constitution, which is quite weak regarding formal safeguards of the Federal Constitutional Court.[89] The experiences of many established European democracies suggest that such a 'culture of judicial independence' may very well be the most important factor for maintaining judiciaries free from political interference.[90] By 'culture' in this context, we mean informal rules on acceptable behaviour and respect of other powers of state towards the judiciary. While the basis for such a 'culture of independence' are yet uncertain, it can reinforce formal legal safeguards, as well as substitute such safeguards.

Indeed, the importance of non-legal factors for maintaining the rule of law is recognized by the Venice Commission, which does not limit its assessments to legal factors only, but also considers contextual elements: 'The presence (or absence) of a shared political and legal culture within a society, and the relationship between that culture and the legal order help to determine to what extent and at what level of concreteness the various elements of the Rule of Law have to be explicitly expressed in written law.'[91]

Nevertheless, while some – especially Western – European countries rely heavily on such a culture of independence as safeguards for the rule of law, formal legal safeguards are not irrelevant. Culture can change. The resilience of a culture of judicial independence becomes particularly questionable when established political forces are being replaced by new ones and with increasing polarisation of politics. It would be naïve to assume that the judiciaries in established European democracies are immune to the techniques employed to subvert judicial independence as for example in Poland.[92]

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[87] Ginsburg and Melton 2014, p 208.

[88] Ginsburg and Melton 2014, pp 194, 208. See for a similar argument in respect to the Swiss judiciary: Meyer 2019.

[89] Gärditz 2018. Gärditz suggests including more safeguards in the constitution now, which could protect the constitutional court against an attack from a new government.

[90] See for the 'culture of judicial independence': CCJE/CCPE, SG/Inf(2016)3rev, para 6; Sanders and Von Danwitz 2017a. See also Shetreet 2011, who, however, sees the culture of judicial independence as a general element of political culture. See for the importance of unwritten rules for the functioning of democracies: Levitsky and Ziblat 2018.

[91] Venice Commission, Rule of Law Checklist CDL-AD(2016)007, para 42.

[92] See for example an interview with Professor Gärditz of Bonn University, Germany: https://verfassungsblog.de/die-meisten-dinge-die-in-polen-und-ungarn-gelaufen-sind-koennten-ohne-weiteres-hier-auch-passieren/. Accessed 1 March 2019.

One example is the above-mentioned attempt by the Norwegian government to cut short the term of its judge on the EFTA Court by applying the national retirement age on an international court without a fixed retirement age.[93] There is a clear resemblance to Hungary's and Poland's much criticised application of rules on retirement age. Only after fierce criticism in the press and from the Norwegian Judges Association, as well as from the EFTA Court itself, did the government back down. In a future and different political context, such non-legal factors may not be as effective as they are today.

In another recent example from Germany, a town denied the extreme right wing NDP party to rent a hall of the town even though it had been ordered to do so by the Federal Constitutional Court.[94] This situation raised the fundamental problem that the judiciary has no power to enforce its own decisions.[95] The serious tone in which the court demanded that the situation was investigated by the government of the respective federal state (*Land*) showed that it was aware of the danger a disregard of its decisions could pose. The state's government replied that the town had not been aware that it had no discretion to follow the court's decision.[96] However, commentators have questioned this statement, hinting that the town might not have wanted to be seen as hosting the unpopular party and arguing that not enforcing a decision of the Constitutional Court would be an unprecedented denial of justice, comparable to events in Turkey.[97] If, in the future, the enforcement of court decisions should become a question of political popularity more regularly, the rule of law would be in grave danger.

In our view, Ginsburg and Melton's finding that formal legal safeguards do not statistically correlate with *de facto* judicial independence in established democracies but only in transitional democracies and autocratic regimes, does not mean that legal safeguards are irrelevant. Quite the opposite, it suggests that improving *de jure* judicial independence is important in the event of a backsliding of democracy. It is precisely such situations which the stress test concept is intended to anticipate. And in these situations legal safeguards appear to be effective.

To be clear, we are not suggesting that stress tests alone can work wonders in protecting judicial independence. Moreover, we appreciate that considerable differences between European countries exist and that some systems might react differently than others to threats. However, we believe that a critical public review of the judiciary's independence under adverse scenarios may not only improve formal legal safeguards, but also raise the awareness in society of the importance of independent judiciaries for modern democracies under the rule of law. This way, a stress test may also contribute to building and maintaining a political culture which

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[93] See https://www.politico.eu/article/norway-accused-of-meddling-with-judicial-independence-per-christiansen-efta. Accessed 1 March 2019.

[94] Federal Constitutional Court of Germany, 24 March 2018, 1 BvQ 18/18.

[95] Breyer 2010, pp 3–68.

[96] Podolski 2018b.

[97] Podolski 2018a, b.

serves as the necessary basis and most resilient protection of judicial independence. In the financial sector, stress tests of financial institutions have the aim of reducing uncertainty in the markets.[98] For the judiciary too, stress tests may be employed to increase the public's trust in the judiciary.

12.5 Concluding Remarks

We have argued that European states should learn from the challenges to the rule of law in different European states and critically review the constitutional and legal framework of their own national judiciaries. This should be done by means of a stress test which assesses the robustness of national judiciaries against the adverse developments of the constitutional and legal framework as well as in the political culture. Such a stress test is important for both newer and established democracies. While the latter often rely on a culture of independence rather than on detailed constitutional and legal safeguards (*de jure* judicial independence) in order to achieve *de facto* judicial independence, political cultures can change.

The stress test shall use European standards and be performed in three stages. Stage one requires a detailed analysis of the different techniques used in attacks against the rule of law and judicial independence. We have focussed on nine potential threats as examples ranging from the takeover of constitutional courts, infringements of judges' tenure to measures against court administrations and prosecution services. On stage two, judiciaries should be stress tested by envisaging scenarios in which the techniques analysed on stage one are applied against the judiciary in another country. This way, weaknesses can be identified. On stage three, institutional and non-institutional measures shall be considered by which identified weaknesses can be improved or remedied.

Finally, we envisage a stress test for European judiciaries to be a fundamentally comparative exercise. In a time of rising nationalism in Europe, we should not forget that the history of European constitutionalism is not one of isolated national developments, but one of increasing diffusion and learning across borders.[99] In addition to treaty obligations, the last decades have also seen a burgeoning transnationalisation of constitutional law through soft law instruments.[100] European rule of law standards develop in an interdependent dialogue between member states and European institutions. Within this tradition and emerging framework, the stress test serves as a cross borders communicative tool of rule of law values.

[98] See Geithner 2014, p 312.

[99] See Elkins 2010.

[100] See Bartole 2017.

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