Concept Paper

Monitoring and Evaluation of the Rule of Law and Justice in the EU: Status Quo and the Way Ahead?

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1. Executive summary

This Concept Paper presents a framework for monitoring and evaluation of the rule of law and justice in the European Union. The development of the framework has been based on a number of principles - objectivity and neutrality, validity and reliability, actionability. It also firmly follows the commitment of the Stockholm programme towards the needs and interests of the citizens of the EU.

An analysis of the legal and political framework confirms that respect for the rule of law and justice are fundamental and constant principles for the EU. These values affect all policies and actions of the Union. At the same time, however, rule of law and justice have never been formulated in a manner which facilitates robust monitoring and evaluation. Moreover, the lack of conceptual clarity has been exacerbated by the introduction of related values and principles into the legal and political framework – freedom, equality, respect for fundamental rights, efficient justice systems, and access to justice. Not surprisingly there is a significant fragmentation in the existing attempts to monitor and evaluate rule of law and justice in the EU.

Innovative approaches are needed to bridge the gaps and bring the Union closer to the ideal of “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. In the Concept Paper we argue that an Index of justice should be based on two overarching concepts – rule of law and justice.

Rule of law has been defined as a multidimensional concept consisting of eight facets – 1) accountability to the law; 2) access to information; 3) independent judiciary; 4) effective judicial system; 5) respect for fundamental rights; 6) effective implementation of laws; 7) access to justice and 8) absence of corruption. Numerous data sets have been studied to identify indicators that inform the rule of law dimensions.

This thin conception of the rule of law places considerable emphasis on the institutional framework. The concept of justice should provide balance and focus on justice as experienced by the citizens of the Union. Justice has been understood as the amount of fairness that people experience and perceive when they take steps to solve disputes and grievances. This particular perspective on justice has been named Bottom-up justice. On each path to justice, people assess and derive fairness from three particular dimensions: the costs of justice, the quality of the procedure and the quality of the outcome. In this Concept Paper we argue that Bottom-up justice can be monitored and evaluated through asking the EU citizens about their experiences with justice.

Further, the Concept Paper uses the concepts of rule of law and Bottom-up justice to construct a prototype of an EU Index of justice. Various aspects of the use and implications of the Index are demonstrated. At the end, the Concept Paper initiates a discussion about the stakeholders in the process of monitoring and evaluation of the rule of law and justice in the EU.
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1. Framing the problem

Trust in institutions | It is crucial that we can trust rule of law and justice in the EU-member states. This is so for various reasons. Firstly, EU is a community of values. Respect for human dignity and human rights, freedom, democracy, equality and the rule are the heart of the European integration. Support for EU and further integration will erode if citizens and states no longer believe that EU member states uphold these values or if there are concerns that funds are misused, agreements are not respected, and discipline is lax. Investing in the soft power of the EU is essential for continued support. Secondly, the EU has a number of instruments the proper application of which relies mutual trust. The European Arrest Warrant, the Schengen Treaty, and more generally the principle of mutual recognition are a case in point. Thirdly, the EU promotes such values as rule of law and justice in its policies vis-à-vis third countries, and this is not credible if those values are not respected within the EU itself. The EU needs to lead by example.

Trust in the institutions of EU member states is clearly at stake. Since the accessions of 2004 and 2007 it has become clear that the transition process in new member states is not yet completed. Moreover, there are also serious concerns regarding old member states. These concerns show how important it is to enhance mutual trust in each other’s justice systems. A general and proper monitoring mechanism could contribute importantly to this end.

Independent assessments | Member states that are improving their justice institutions in order to acquire certain benefits of the EU partnerships want to be assessed in a fair and transparent way. Leaders in national courts and in other justice sector institutions need to be able to show that they make progress in their efforts to improve their services. Politically, these are sensitive issues. Preferably, officials in EU states should not be brought in a position that they have to judge the reliability or the performance of justice systems of other states.

Improved monitoring is needed | There is a general feeling that current monitoring and assessment regimes can be improved. Most of them are based on input or process criteria: i.e. number of policemen or courts per 100,000 of population; implementation of safeguards for judicial independence in formal legislation; acceptance of number of quality management tools in institutions. But input and processes do not always lead to effective output and outcomes. Moreover, fair outcomes and procedures are not only guaranteed by state institutions. Legal needs research suggests that not only formal legal institutions and private law firms, but also legal information websites, legal expenses insurers, television shows, local Civil society organisations, mediators, social workers take part in solving the justice needs of the people. So the focus of monitoring efforts is now shifting towards the beneficial effects of justice sector institutions on people, businesses and their relationships.

Effective and fair solutions | For instance, the Stockholm programme\(^2\) (Towards Citizens’ Europe in the Area of Freedom, Security and Justice) sets the interests and needs of people as a political priority for the coming years. Gaps and inefficiencies in access to justice for citizens in their roles of consumers, employees, pensioners, users of government services and property owners should be identified, so that they can be remedied. This is also the perspective of Civil society organisations, that want to see justice done, human rights protected, access to justice safeguarded or basic justice care for everyone.

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guaranteed. Businesses need enforcement of contracts, effective conflict resolution and protection of property rights in the real world, not only in the law as it is promulgated. When they do business throughout the EU, they need to be able to rely that the basic level of protection is roughly similar in quality everywhere.

Justice is an aspiration] But this remains an aspiration requiring more and hard work: no EU country is yet completely satisfied with every existing justice sector mechanism for all frequent and urgent issues that come up. As elsewhere, there is always scope for innovation and improvement of rules, procedures and the underlying processes.

To sum up, the challenges are to develop a system for monitoring and evaluating implementation of the rule of law that is:
- Focused on the interests and needs of citizens and businesses to solve the issues for which they need the national institutions
- Valid and reliable
- Capable of revealing longitudinal trends and dynamics
- Neutral and administered by unbiased stakeholders
- Non-judgmental
- Not only external evaluation, but a tool for learning and improvement internally, based on the belief that no member state has found a final and definitive answer to all challenges
- Actionable, ensuring that follow-up policies and actions are feasible

2. The need for a Justice Index in the EU

2.1. Political and legal framework

EU values] In order to define the scope and depth of the index of justice, we briefly review the justice principles and values which are of critical importance for the existence and functioning of EU. Beginning with analysis of the normative principles, we will proceed towards designing an index of justice based on coherent structure of concepts, indicators and data sources.

Principles and rights] Respect for justice in its various forms is a fundamental principle for the EU. According to Article 2 of the Treaty on European Union “The Union is founded on the values of respect for human dignity, freedom, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. Similarly, the Charter of Fundamental Rights of the European Union declares that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity and abides to the principles of democracy and the rule of law. These values are shared by all Member States in their pursuit for a Union “in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” By its institutional and functional design, the EU is based on the aspiration of achieving, monitoring and maintaining the highest standards of the rule of law, respect for fundamental rights, democracy and efficiency of the judiciary. The real and coherent implementation of the four basic freedoms of movement which underlie European

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4 [2010]. Treaty on European Union, C 83/01.
6 Ibid.
7 [2010]. Treaty on European Union, C 83/01.
integration are contingent on an existing and functional Area of freedom, security and justice (Article 3.2, TEU, hereinafter referred to as AFSJ). Furthermore, the EU is an “exporter” of democracy, the rule of law, human rights and the principles of international law (Article 21.2.b, TEU), which makes it all the more important that the EU itself complies with this standard.

Rule of law policies | Justice and the rule of law are basic principles for the existence of the EU, and as such, affect literally all EU policies and instruments. A notable example of the importance of justice is the enlargement policy which places significant emphasis on monitoring and assessing the level of justice and rule of law in the accession countries. The set of policies that shape AFSJ are based on the existence of a shared understanding of justice and mutual trust in the capability of each national system to achieve and maintain a high standard of justice and rule of law. Another illustrative example of the importance of justice are the EU’s external actions which should seek advancement of the rule of law and respect for human rights among other things (Article 21, TEU).

Possible legal basis for a mechanism for monitoring rule of law and justice | Despite the need for monitoring justice and rule of law, the legal basis for a monitoring instrument in the treaties of the EU is a matter of debate. According to article 70 TFEU, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby member states conduct objective and impartial evaluation of the implementation of the Union policies. This is related to the Area of Freedom and Security. Another issue is whether the principle of subsidiarity monitoring would have to be done at EU-level rather than by member states themselves, or between them.

Article 7 TEU, which foresees sanctions in cases where there is a risk that member states have seriously breached their obligations under article 2 TEU, does not explicitly call for a monitoring mechanism. Nor does the related article 258 TFEU. Thus, it remains to be seen whether these articles can be the basis of monitoring.

The ‘flexibility-clause’ of article 352 TFEU, which requires the Council to take appropriate measures to attain the objectives set out in the Treaties if those Treaties, has to be considered with caution.

2.2. EU’s explicit and implicit needs for evaluation and monitoring of justice

Monitoring implementation of justice policies | Declaring respect for a given normative principle is an important first step, but adhering positively to this principle in the manifold realities of economic and social interactions within the EU is another thing. Recognising the gap between black letter law and real life, Article 70 TFEU formulates the need for an objective and impartial evaluation of the implementation of Union’s AFSJ policies. The stated objective of evaluation and monitoring within the EU is to facilitate the full implementation of the principle of mutual recognition of criminal and civil judgements, judicial decisions and decisions in extrajudicial cases. Interestingly, the language of the Treaty is advisory rather than imposing an implementation of a robust and reliable monitoring and evaluation mechanism (or set of mechanisms).

Beyond policy assessment | It also should be noted that in Article 70 TFEU we see the call for thematic or policy-level observation. This is something different than the need to monitor the rule of law and justice at horizontal level. Thus, two levels of evaluation can be discerned – 1) observation of justice and rule of law related phenomena and 2) assessment of policies and instruments that are deemed important for achieving greater compliance with the higher level principles. However, the two levels of evaluation serve different purposes, require different approaches and differ in terms of their policy value.

The need for monitoring and evaluating rule of law and justice within the EU has been pronounced at different policy levels. The European Commission’s proposal for a Regulation on the Establishment of an Evaluation and Monitoring Mechanism to Verify the Application of the Schengen acquis calls for a coherent evaluation and monitoring mechanism covering all areas of the Schengen acquis.\footnote{European Commission. 2011. Amended Proposal for a Regulation of the European Parliament and the Council on the Establishment of an Evaluation and Monitoring Mechanism to Verify the Application of the Schengen acquis. \textit{COM (2011) 559.}}

**Stockholm program** Evaluation of the member states’ judicial systems is also at the core of the Stockholm program.\footnote{\[2010\]-a. The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens.} The Tampere European Council Conclusions\footnote{Tampere European Council. \[1999\]. Tampere European Council, 15 and 6 October 1999 : Conclusions of the Presidency, \textit{Bulletin of the European Union}, Vol. 10/1999. Tampere: European Council.} as well as the Hague Program\footnote{[2005]. The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, \textit{C 53/01}.} also reiterate the importance of objective justice assessment as a priority. In one way or another all policy documents recognize that monitoring and evaluation of justice and rule of law is a major need, but by reiterating this principle they also suggest that it is difficult to make progress in this area.

**Focus on citizen perspective** Overviewing the status quo, the Stockholm program argues that there is considerable fragmentation in the AFSJ. This fragmentation affects both policies and standards. Under the slogan \textit{Towards Citizens’ Europe in the Area of Freedom, Security and Justice}, the programme sets the interests and needs of people as a political priority for the coming years. Increased focus on evaluation is one of the tools which the Stockholm programme formulates. It should be noted, however, that the programme envisages mostly vertical monitoring — i.e. \textit{ex ante} and \textit{ex post} evaluation of particular legal instruments (1.2.5). An example of this approach is the European Council’s urge for enlargement of the Schengen area when new countries have fulfilled “the requirements to apply the Schengen acquis. \textit{(2.2)}”. In this way, conformity is measured not through benchmarks of justice and rule of law, but with tangible but still technical indicators of compliance.\footnote{Ibid.} Numbers of border patrol cars or boats are easy to account for but they do not necessarily tell us about the rule of law.\footnote{Other areas in which the Stockholm programme calls for evaluation are citizen’s rights in the information society \textit{(2.5)}; mutual recognition of judicial decisions \textit{(3.2.2)}, economic crime and corruption \textit{(4.4.5)};} This approach is in contrast to the stated priority to “focus on identifying the needs of citizens and practitioners.”

**Invitation to develop monitoring mechanisms** Despite the challenges of conceptualising, monitoring and assessing justice there is a constant mounting pressure for valid and reliable mechanisms for monitoring justice within the EU. The 2010 Stockholm Programme explicitly recognizes the need for an “objective and impartial evaluation of the implementation of the policies in the area of freedom, security and justice, in particular to promote the full application of the principle of mutual recognition.” The European Commission has been invited to submit “one or several proposals under Article 70 TFEU concerning the evaluation of the Union policies referred to in Title V of TFEU.” Similarly, the European Council invites the institutions and the Member States “to ensure that legal initiatives are and remain consistent with fundamental rights and freedoms throughout the legislative process by way of strengthening the application of the methodology for a systematic and rigorous monitoring of compliance with the European Convention and the rights and freedoms set out in the Charter of Fundamental Rights.”\footnote{[2010]. The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens.} Furthermore, monitoring and evaluation schemes are foreseen in the areas of free movement, mutual recognition, and corruption among others.\footnote{Ibid.}
3. Existing EU monitoring schemes and approaches

What is already being done in the EU | The following monitoring mechanisms have already been developed or are in the process of being developed.

- Open Method of Coordination (OMC). Intergovernmental mechanism on voluntary basis, which rests on benchmarks, indicators, guidelines and sharing best practices.
- The Cooperation and Verification Mechanism (CVM). CVM has been applied to monitoring the progress in fields of judicial reform, corruption and organized crime in Bulgaria and Romania.
- Peer review. The implementation of EU criminal justice instruments in national legislation is subject to peer evaluation. An example is the implementation of the European Arrest Warrant.\(^{17}\)
  The reports must be agreed with unanimously, including by the member state under review.
- Commission monitoring. The commission monitors the implementation of Framework Decisions in the area of the former third pillar. The commission relies for this on reporting by member states.
- Enlargement monitoring reports.
- Monitoring for regulatory compliance within the Schengen cooperation.
- Justice Forum. Brought together by the Commission, this forum consists of European practitioners’ organisations and discusses issues relating to EU criminal justice.
- Fundamental Rights Agency (FRA). Produces reports on fundamental rights in EU member states, but does not have mandate to review fundamental rights in the area of the former third pillar.
- EU network of Independent Experts on Fundamental Rights. Issues reports and opinions on the implementation of all aspects of EU Charter of Fundamental Rights.

4. Analysis: the scope for next steps

Ambiguity | Paragraph 4 and 5 show that the theory and practice of monitoring and evaluating justice and rule of law in the EU are still in their early stages. The processes are rather fragmented. Some policy documents outline the rule of law, while others focus on mutual trust as indication of a reliable and effective judiciary. For instance, the Schengen acquis attaches significant importance to effectiveness and efficiency, but also emphasises the utmost importance of respect for fundamental rights. An abundance of goals and objectives without clear relationships between them is not the best guidance towards building a coherent system for observing justice and rule of law. With respect to monitoring and evaluation, this ambiguity means that the EU has troubles to spell out its own standards of justice and rule of law. It should be no surprise that if the EU cannot elaborate its vision on standards then it will face significant challenges to put in place reliable monitoring and evaluation mechanisms.

Scattered processes | Second, monitoring and evaluation schemes are currently scattered among various policies – enlargement, free movement of individuals, internal and external border management (Schengen cooperation) as well as the various policies making the broader AFSJ. This fragmentation has been specifically acknowledged in the Stockholm programme. Despite the fact that various policies have similar objectives, there are also different dynamics, focuses and directions. Inevitably this impedes robust monitoring and evaluation of justice and rule of law.

Sensitive political issues | There are significant differences in the configurations of political interests within each policy area. Some domains are more sensitive than others and this is well visible in the

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\(^{17}\) See Dane, M., & Klip, A. (Eds.). 2009. *An additional evaluation mechanism in the field of EU judicial cooperation in criminal matters to strenghen mutual trust*. Tilburg, the Netherlands: Celsus legal publishers.
dialogue over monitoring and evaluation of the implementation of Schengen acquis. Objective monitoring and evaluation in these sensible areas is even more challenging. A more comprehensive, and more principled monitoring mechanisms may be more easy to defend and to implement than a process targeted on one specific policy or issue.

**From peer review to more robust empirical data** Fourth, monitoring is intrinsically an empirical enterprise which has to comply to rigorous rules and procedures in order to produce valid and reliable results. It should be noted that for a variety of reasons there is little experience in the EU with empirical observation and assessment of justice. This shortage can be followed back to the establishment of the European Coal and Steel Community and the European Economic Community in 1958. Peer-evaluation is the standard method of monitoring and evaluation. In a way, peer review is also empirical approach as far as it is based on collection and verification of facts. However, peer review is intrinsically a qualitative method and thus has serious restraints in terms of generalisibility.

**From input and process to output and outcome** Lastly, there is a recurring uncertainty of whether justice should be observed as a process or as an outcome. The former emphasises the adoption of sectoral acquis communautaire in the national legislation, the latter focuses on the implementation of measures and their impact on the state of rule of law, justice and respect for human rights.

5. Justice and Rule of Law

**Looking for core concepts** What the brief overview reveals is that there is a significant fragmentation in the policy and legal framework which explicates EU values and principles of justice. As a result of this variety of principles it is difficult to refine benchmarks of justice. Not surprisingly the approaches towards monitoring and evaluation of national justice systems are also fragmented and inconsistent. A good example of the conceptual ambiguity is the long list of values and principles justice spelled out in different EU policy and legal documents: justice; rule of law; democracy; freedom; equality; respect for fundamental rights; independent judiciary; efficient justice system; access to justice; respect for judicial decisions; objective system for justice prosecution.

**Rule of law and justice** Apparently such a long list with closely connected and often overlapping values and principles is just the beginning of a process of designing a mechanism for monitoring and evaluation of justice. An objective, valid and reliable assessment has to focus on the dimensions which are deemed central but at the same time are amenable to operationalization and monitoring. Repetitions and redundancies should be avoided. From the long list of EU values and principles, we propose to focus on rule of law and justice and as the most fundamental notions. Most other principles are in fact facets of one of the two concepts or variations of this, and we will show in the following paragraphs that all of them can be measured in the context of a monitoring system that focuses on rule of law and justice.

**Democracy and freedom** Democracy and freedom are perhaps exceptions to this. Democratic governance facilitates justice and rule of law but is not identical to them, although participation and voice are important elements of justice and rule of law as well. Freedom is partly covered by rule of law, which guarantees freedom of expression and other fundamental human rights, but it may be seen as a more general term. It is intrinsically difficult to coherently define and measure democracy. Therefore, our is to design a monitoring and evaluation mechanism around the values of justice and rule of law.

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18 Bollen, K. 1990. Political Democracy: Conceptual and Measurement Traps. *Studies in Comparative International Development (SCID)*, 25(1): 7-24. noting that the main challenges in conceptualising and measuring political democracy are the lack of a coherent theoretical mode, the effect of confounding concepts and the tendency to treat democracy as binary rather than continuous concept. See also
concept paper we will frequently refer to this mechanism as an Index of justice and rule of law. After the EU dimension is added we can brand this new tool as **European Index of justice and rule of law**.

### 5.1. Rule of law

**Conceptualizing rule of law for measurement purposes** | Most of the concepts discussed above are relevant to justice, but at the same time they can also be constructed as dimensions of the overarching notion of the rule of law. However, as theory and practice shows, there is little agreement about what defines rule of law. In the words of Brian Tamanaha “the rule of law is strikingly like the notion of the “good,” in the sense that everyone is for it, but there is no agreement on precisely what it is”.\(^{(19)}\) In general, there are two approaches to outline the scope, structure and content of the rule of law, although the two are often merged and confused.\(^{(20)}\) The *thick* or substantive conception of RoL emphasizes the ends that RoL is supposed to serve within a society. The *thin* or instrumental definition of RoL outlines the institutional elements that are believed to sustain RoL in a particular society.\(^{(21)}\) Both notions are difficult to observe and interpret, but there is an agreement that the *thin* conception of RoL is more amenable to translation into observable indicators.

**Dimensions of rule of law** | Another consensus among scholars and practitioners is that the rule of law is a multidimensional concept. Identifying its sub-dimensions, however, is a debated topic. For instance, the World Justice Project Rule of Law Index specifies nine components of the aggregate notion of the rule of law.\(^{(22)}\) Benton\(^{(23)}\) outlines three dimensions – 1) laws which are publicly known and relatively settled; 2) a judiciary “schooled in legal reasoning, knowledgeable about the law, reasonably efficient and independent from political manipulation and corruption” and 3) force able to enforce laws, execute judgments, and maintain public peace and safety. An even more aggregated approached is used by Tamanaha\(^{(24)}\) who argues that the rule of law consists of two general facets: 1) protection against government tyranny and 2) qualities of legality.

**Possible approach in eight dimensions** | It goes beyond the scope of this Concept Paper to construct an undisputed concept and structure of the rule of law. Our approach is to begin from the EU values and principles in the field of justice and proceed towards representing them as dimensions of the higher level concept. An independent and effective judiciary which equally applies clear and publicized laws are all integral components of the rule of law. Guarantees for human rights, order and security and access to justice can also be conceptualised as part of the rule of law. Using this approach we classify the EU values and principles into eight rule of law dimensions\(^{(25)}\):

- Accountability to the law
- Access to information
- Independent judiciary

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22 Limited government powers; absence of corruption; order and security; fundamental rights; open government; effective regulatory enforcement; access to civil justice; effective criminal justice; informal justice.
25 See Appendix 1 for description of the dimensions of the rule of law
Effective judicial system (criminal, civil and administrative)
- Respect for the fundamental rights
- Effective implementation of laws
- Access to justice
- Absence of corruption

Other dimensions possible | The proposed classification of the rule of law into these particular 8 dimensions can be argued, re-framed and amended. Our objective here is to provide a taxonomy through which the rule of law in the EU member states can be monitored and evaluated. The classification should be considered as an invitation for a dialogue rather than as final definition.

5.2. Understanding Justice as Fairness: A Bottom-up Approach

The need to operationalize justice | Justice is an overused term, showing its tremendous appeal as a value to citizens, but its content and dimensions are rarely explored in depth. Various EU policy documents proclaim the importance of justice but stop short from defining what it means. Depending on the particular context or perspective justice signifies different things for different people. Aware that one can not measure justice if it has not been sufficiently defined we will delineate a conception which can be operationalised and observed. This conception refers to perceiving ‘justice as fairness’ from the perspective of the individual.

Justice as fairness | From the perspective of political philosophy, John Rawls’ famous work *A Theory of Justice*\(^2\) literally argues for a stance of ‘justice as fairness.’ Fairness refers to having equal rights to basic liberties and ensuring that inequalities benefit the least advantaged members of society. There also must be fair equality of opportunity in terms of offices and positions. The claims by Rawls may be examined in more concrete terms within the field of psychology and law, where justice as fairness also has a long history. Here, as is applicable to the current approach to justice, dispute resolution procedures are often evaluated in terms of fairness.

Empirical justice research | Much more powerful than the opinion of one famous philosopher, however, is the extensive research that has been done into how people evaluate justice themselves. Psychologists, anthropologists, economists and many other social science researchers have established how people evaluate situations in which others take decisions that impact their lives. Whenever people deal with other people at work, at home, in the community, in the court room or within the institutions of the state they tend to value procedures and outcomes in very similar ways. In fact, dominating the psychological research is the notion that social processes must be just and fair and this research has identified many specific factors that make a procedure or an outcome fair as experienced by the people involved.\(^2\) During the process of resolving issues people interact in procedures and consider them as fair or unfair. Based on the previously established and accepted perspectives of justice as fairness, our conception of justice is that it can be observed as the perceived fairness which people receive when they need and encounter means of dispute resolution.

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Bottom up justice | Responding to the Stockholm programme priority to focus on the interest and needs of citizens, we will adopt a bottom-up perspective towards justice. In this perspective, justice is assessed through the fairness perceptions of people who have had to deal with various types of disputes and grievances. Bottom-up justice is the extent to which people who need justice can 1) access 2) fair dispute resolution processes and 3) obtain fair outcomes to their problems. A growing body of research demonstrates that law influences how people deal with the problems of everyday life. Such situations largely affect people’s confidence in justice and fairness. Everyone needs justice to protect important interests. Well functioning justice systems should provide basic justice care in the form of rules, processes and fair outcomes. What this means is that when there is a dispute or grievance, there must be accessible mechanisms which result in fair resolutions. Such mechanisms will be referred to as paths to justice.

Citizen’s perspective | The notion of bottom-up justice is based upon the findings of research that people do need, observe and evaluate justice. In other words, the users of justice can tell justice from injustice, fairness from unfairness. Our own research indicates that when thinking about paths to justice people use three indicators – quality of the procedure, quality of the outcome and costs. These are the three dimensions of bottom-up justice. In practical terms, this means that bottom-up justice is assessed and evaluated through asking people about their real-life experiences in situations when they needed a just resolution of their problems. A well functioning legal system is supposed to provide people with processes and outcomes which are considered as fair and accessible. To be sure, this does not require a complete rethinking of the rule of law and the justice sector institutions. The factors which determine what people see as a fair procedure or outcome are very close to well known principles of law and governance. As we will see in the next paragraph, people value participation, voice, respect, restoration of harm, equality, equity and attribution in accordance with needs. These items are important elements of the main theoretical approaches to justice as well.

5.3. Dimensions of Bottom-up justice

In this paragraph, we show the dimensions of bottom of justice as they have been identified by research. This is what people value and what determines to what extend they are satisfied with procedures and outcomes.

- Accessibility of dispute resolution. Costs of access to justice

Costs and effort of achieving outcomes | Understanding accessibility is particularly important because when deciding whether or not to solve a problem legally, the expected amount of transaction costs may largely determine whether the users will do something to pursue conflict resolution. Unfortunately, high costs of access to justice have been cited as a main reason for unresolved legal disputes. It may be argued that individuals with more resources receive a greater share of justice than individuals or legal entities with fewer resources. Inevitably this inequality erodes the belief in fairness and rule of law. Three broad


categories of accessibility are outlined, namely out-of-pocket expenses, opportunity costs, and intangible costs (including stress and emotional costs resulting from contact with the process) (see Appendix 2).

- **Fair dispute resolution processes: procedural, interpersonal and informational justice**

**Quality of the procedure** | The measurement and evaluation of fairness in justice processes is an immensely studied area, largely taking form in the 1970s. The research surrounding this topic, primarily from the field of social psychology, has examined justice in terms of procedural, interpersonal and informational justice. While first it was argued that people care about procedures because it allows them to have some control over the outcome, later research demonstrated that people also care about procedures regardless of the outcome they receive. From the fairness of justice processes people also impute information about their importance and value as members of the community and society. Three dimensions of the quality of the procedure have been operationalised: procedural justice, interpersonal justice and informational justice (see Appendix 3).

- **Fair outcomes**

**Quality of the procedure** | Despite the growth of procedural justice literature suggesting that the procedure can be as important as the outcome, evidence remains illustrating the importance of fairness evaluations of the outcome of procedures. While the procedural/interactional conceptualization has become quite accepted amongst scholars examining justice perceptions, the model driving the fairness of outcomes is somewhat more ambiguous. Bottom up Justice can be based on four dimensions in particular when measuring fairness judgments: distributive justice, restorative justice/corrective justice, functionality/pragmatism and transparency (see Appendix 4). In cases in which the dispute evolves around alleged harmful behaviour for which someone is liable the quality of the outcome is enriched with a retributive justice sub-dimension.

6. **Monitoring and evaluating Bottom-up Justice in practice**

**Monitoring in situations that matter most** | The justice perceptions of people (across these dimensions) can be investigated for each situation in which individuals deal with the legal system. For citizens, what matters is whether they obtain a fair outcome and a fair process when serious interests are at stake. So a monitoring system should try to establish whether people feel treated fairly in situations when they are victimized by crime, are accused of a crime, have a serious conflict at work, have issues with sellers of goods and services of a substantial value, need access to social security, etc. etc.

**Versatility of Bottom-up justice** | The concept of Bottom-up justice does not discriminate between modes of dispute resolution. Formal and informal justice delivery mechanisms interact in complex ways which vary across jurisdictions, legal and social cultural boundaries. Therefore Bottom-up justice recognizes that an effective and functional legal system provides multiple justice venues which complementary guarantee accessible and fair processes that result into fair outcomes. This mode of monitoring is independent of whether it is a particular institution such as a formal court or the police that delivers justice. It looks at the aggregate results of all contributions to a fair society.

6.1. **Towards an index of justice**

**Building an index from data** | Following a brief review of the basic EU needs to monitor and evaluate justice, we argue that an index of justice with two main components - rule of law and bottom-up justice - is a viable answer to the increasing demand for objectivity and transparent evaluation of justice and rule
of law in the EU. In the preceding paragraphs, we outlined our understanding of the two dimensions of the index.

**Feasibility** | The next question is how to populate the index and more specifically its indicators and sub-indicators with reliable data. What might look like a technical issue is in fact a question about the feasibility of monitoring and evaluation of justice and rule of law in the EU. Even the most elaborated system of concepts, indicators and variables will be nothing more than a paper exercise if there is no data available. In the next two sections we elaborate a plan to collect, organize and represent data about bottom-up justice and rule of law in EU.

6.2. Data on Bottom-up justice

**Survey research** | As noted earlier, Bottom-up justice is the perceived fairness of the paths to justice which are available to respond to people’s needs for justice. Such needs for justice arise when individuals or organisations are involved into conflicts, disputes or grievances with others. Experiences with and perceptions of paths to justice can be studied quantitatively or qualitatively. Without discussing the advantages and disadvantages of each approach, we suggest that quantitative data collection methods are more suitable for the specifics of the Bottom-up justice dimension of the Index of justice.

6.3. Data on Rule of law

**Selecting suitable rule of law indicators** | In addition to the EU monitoring schemes and approaches noted above (see 3), numerous indexes focus on justice related concepts. Our purpose is to review the existing approaches and identify data sources that might add value in the quest to monitor justice and rule of law in the EU. Here we should also acknowledge the value of the WJP’s Rule of Law Index. This index provides balanced but also robust assessment of rule of law. Our suggestion is that its actionability can be further extended through adding a Bottom-up justice dimension component to and a perspective which focuses on justice processes.

**Selection process** | Due to the differences and variation in design, focus and implementation of these indexes, it is necessary to specify criteria for considering data sources for inclusion in the development of a justice measure. In doing so, we are guided by our principles for the development of justice indicators. Furthermore, stricter requirements have been elaborated. First, we are looking for data sources which bear relevance to justice related phenomena. Second, the data sources should be comprehensive. What this means is that the particular source should contain comparable data on a substantive number of countries. Again, it is a subjective decision but we decided to focus on sources which contain data on at least 30 countries. A third criterion for inclusion is the longitudinal character of the data source.

**The existing datasets that can be used** | In Appendix 5 we present 23 data sets that were found to meet these criteria. Our focus will be on the ability of these data sets to add knowledge about rule of law and justice and in the EU member states.

7. A prototype of an Index of justice

**What the index would look like** | To illustrate the content and dimensions of the Justice index we will create a hypothetical index which will cover two EU member states. Because it is a visualisation exercise and some of the data in the Bottom-up justice dimension has been made up, we will refer to the countries

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30 For the time being we will focus on bottom-up justice as experienced by individuals although organisations’ also have justice needs.
as Country A and Country B. The point is that using this approach, the EU can further develop its policies and practices on evaluation and monitoring of justice.

**Example of bottom up justice data** | For the Bottom-up justice dimension we use data from actual studies performed in Country A and Country B. It should be noted, however, that the three sub-dimensions of Bottom-up justice were assessed through interviews with users of a particular path to justice. Therefore, the actual data do not reflect the perceptions of a randomly selected sample of individuals who share their experiences with justice and paths to justice for a given period of time. Nevertheless, for the sake of illustration, we will use the available data sets to simulate data collected from sufficiently large samples of respondents in a particular country.

**Example of rule of law data** | To populate the 8 rule of law dimensions we browsed the available data sources. The process of mapping data points to particular rule of law dimensions was conducted in accordance with the links identified in the previous chapter. Again, data for the same two EU member states were extracted whenever available. Data for 2011 or for the most recent year was used. In order to convert the various scales and ranges into the 1 to 5 scale that has been used to measure the Bottom-up justice indicators, we used a simple min-max normalisation. Therefore, all indicators are expressed on a scale from 1 (low and negative) to 5 (high and positive).

**Giving weights to data to build an index** | Weighting is an important issue when multidimensional concepts such as Bottom-up justice and rule of law are operationalised and constructed. Questions about weighting arise in the process of aggregation of items into sub-indicators and indicators. The data that we use to illustrate the Justice index is not weighted, so every item or sub-indicator participates equally. This decision, however, does not mean that the data making the Justice index should not be weighted. An integral part of the discussion on evaluating and monitoring justice and rule of law in the EU should focus on the question of weighting.

**How much justice per country?** | The indicators and sub-indicators of Bottom-up justice can be presented at different levels of aggregation and analysis. Beginning from the most aggregated level, we present the composite Bottom-up justice indexes of the two countries. The figure below shows the composite Bottom-up index of Country A and Country B. Thus, the figures reflect the combined amount of procedural and outcome fairness as well as the costs of justice that the people of the two countries experience when they need justice. Different comparisons can be made at this level. Cross-country contrast and longitudinal analyses of trends are the two most obvious examples.

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31 See OECD Handbook for advantages and disadvantages of min-max normalisation as well as for alternative mechanisms.
32 Here it should be reminded again that the Bottom-up justice data is hypothetical.
Which type of justice needs to be improved? | Further desegregating the data, we can compare the countries at the level of the three Bottom-up justice sub-indicators - costs of access to justice, quality of the procedure and quality of the outcome. Numerous findings can be imputed from the data. First, the citizens of Country B experience significantly more fairness when travelling on paths to justice. Particularly large is the gap in the dimensions of procedural justice, interpersonal justice and informational justice. What this data suggest is that the justice processes that citizens in country A have at their disposal to deal with disputes and grievances are not seen as fair. There are also differences in the quality of the outcome dimensions, but these are not as dramatic as the one in the quality of the process. In both countries, the costs for travelling paths to justice look relatively similar.

Pinpointing specific problems and taking action | The data also allow for a deeper look in the composition of a particular sub-indicator of Bottom-up justice. For instance, after identifying that procedural justice is a concern, we can plot the individual items that make this dimension. There are seven elements of procedural justice (voice, neutrality, objective application of rules etc.) which can pinpoint where and why people’s perceptions of justice are not particularly high. Various inferences can be made at this level.

Independence of judiciary as a problem | For instance, lack of neutrality of the decision makers in dispute resolution procedures is a signal for distrust in the independence of the people and organisations that are tasked with solving disputes. In this way, the indicator reflects the notion of independence as the people see and experience it in their every day lives.

Justice in consumer, family, criminal, employment and other matters | Furthermore, Bottom-up justice data can reveal how people perceive the degree of fairness of the most frequent paths to justice. The figure below presents how people experience the four most prevalent justiciable problems. First, the data reveals what are the most frequently occurring legal problems in a given society. Second, the reader can compare across different types of justice processes and make inferences about their costs and quality. In a way, the data reveal benchmarks of fair justice processes. In this particular example, the way employment disputes are being dealt with could reveal strategies for improving processes and outcomes in other types of problems. It is also possible to compare similar paths to justice across countries. For instance, one can compare justice processes designed to solve consumer disputes based on the perceived fairness of processes and outcomes. Furthermore, focusing on a single path to justice pinpoints its strong and weak points.
Pinpointing need for improvements in rule of law | Next, we turn to the rule of law component of the Justice index. The data from the available sources reveal sharp contrasts between country A and country B. In line with the Bottom-up justice indicator the rule of law score of country B is significantly higher. As the figure shows, there are marked differences for most index dimensions. Country A scores around the middle of the scale on almost all indicators. Respect for fundamental rights is the dimension in which country A significantly outperforms its average score and comes significantly closer to country A. On the other hand, an independent judiciary is the most problematic rule of law domain. This is an example of how the index can pinpoint and signal various achievements and challenges. After areas of concern have been identified additional data can be collected to verify the scope of the problem, its political and legal dimensions as well as strategies for improvement.

Assessing improvements over time | It should also be noted that this approach makes possible longitudinal comparisons. For instance, the concerns with judicial independence of Country A could be followed back throughout to find out the trends. One possible scenario is that there is a positive trend signalling that there are policies and actions that target the problem and most importantly - deliver results. Alternatively, the longitudinal analysis might reveal that there is little development during a particular period of time. This would be a strong indication for lack of effective policies and actions.

Detailed analysis of problems | At the next level of analysis we can compare two (or more) countries on a particular dimension of the rule of law. The figure below shows how the access to justice dimension has been aggregated. Apparently, the most profound gap between the two countries in the area of access to justice as reflected by the indicators is the amount of legal aid budget. Despite the fact that the numbers have been adjusted for purchasing power, there is still a significant difference between the public resources spent on legal advice and representation. Less dramatic but still considerable is the difference between the two countries’ scores on the WJP’s indicator access to civil justice. On the other hand, two of the Doing business indicators (costs of enforcing contracts and costs of conducting bankruptcy proceedings) are the same for both countries.
**Building an aggregate index?** Different approaches are possible when it comes to the aggregation of the two index components - Bottom-up justice and rule of law. One possibility is to aggregate the two dimensions into one composite score. Such an approach will facilitate comparison and ultimately result in country rankings. An alternative would be to report the two dimensions of the index separately. This approach will make it more difficult to rank the countries but after all the purpose of such an index will be mostly to monitor and evaluate justice and rule of law rather than create an order.

8. **Additional data sources**

*Adding existing EU data* Multiple EU specific data sources can be used to enrich the presentation of the rule of law dimensions. For instance, the Stockholm Programme refers to the peer-review mechanisms and acknowledges their usefulness. Other relevant data is collected and processed at different intervals for the purposes of different policies. This data is mostly qualitative and contains rich insights about the national systems of the EU member states.

*From qualitative to quantitative* With relatively little efforts the qualitative reports can be processed into data points which can be used in the computation of the rule of law dimensions. The accuracy and reliability of the scores should be guaranteed with a well developed system based on clear and practical scoring criteria and mechanisms for evaluation of inter-raters reliability. An example might be a bi-annual CVM report (see above in 0) which is analysed by experts and converted into points for Accountability to the law, Independent judiciary and other rule of law dimensions. Furthermore, the scores derived from rigorous data collection mechanisms might be given more weight in the composite index.

9. **Who should be involved in the index?**

*Possible participants* Numerous stakeholders are involved in the EU policies related to justice and rule of law. The question of who should be put in charge of the Justice index requires careful elaboration and political will. To initiate the discussion we will outline a couple of possible options. It should be noted, however, that the list is not exhaustive. Therefore we will leave the discussion about the advantages and disadvantages of each option to the ongoing debate on monitoring and evaluation of justice and rule of law in EU. What is important to discuss is the role of the particular institutions in the EU justice policies, capacity to perform independent monitoring and evaluation and the related question of impartiality.

- **Civil Society Organisations**
  - Advantages: Entrusting the Justice Index to CSOs will empower organisations from the EU members states to become guardians of justice. At local level they will be able to launch different campaigns for improvement of justice and rule of law. Having
Ownership on such a tool will give justice CSOs considerable power and clout. Vesting the instrument in CSOs will mitigate the risk of politicising and biasing the index.

- **Disadvantages:** CSOs might not be taken seriously at EU level. There is significant variation in the development of the civil society in the different EU member states.

**European Commission**

- **Advantages:** The Commission is the guardian of the treaties and from this position has significant responsibilities in the legislative and implementation process. The Commission is involved in the different policies which have to do with monitoring and evaluation of justice and rule of law. Results from monitoring and evaluations of justice and rule of law can be directly integrated in the legislative process.
- **Disadvantages:** Might be perceived as biased by national governments.

**European Parliament, Civil Liberties, Justice and Home Affairs Committee**

- **Advantages:** As the only directly elected institution of the EU the Parliament can vest significant amount of legitimacy to the index. Results from monitoring and evaluations of justice and rule of law can be directly integrated in the legislative process.
- **Disadvantages:** The Parliament represents various political interests which might jeopardise the neutrality of the Index. Systematic monitoring and evaluation is not part of the core functions of the Parliament.

**European Council, General Secretariat of the Council of the European Union**

- **Advantages:** If sufficiently embraced the Index of justice can benefit from top-level political support.
- **Disadvantages:** The European Council represents national interests and thus the neutrality of the tool might be challenged. Systematic monitoring and evaluation is not part of the core functions of the European Council.

**European Union Agency for Fundamental Rights**

- **Advantages:** The Fundamental Rights Agency has a clear mandate to monitor and evaluate respect for fundamental rights in the EU. FRA is regarded as professional institution with considerable expertise in monitoring and evaluation.
- **Disadvantages:** FRA’s mission are fundamental rights which is important but only part of justice and rule of law.

**Council of Europe, European Commission on the Efficiency of Justice**

- **Advantages:** CoE is regarded as neutral organisation based on solid respect for the fundamental human rights. Considerable experience in monitoring and evaluation of efficiency and quality of justice.
- **Disadvantages:** CoE is outside the EU institutions and the monitoring and evaluation mechanism might be politically incompatible with its mandate. Capacity to conduct large scale monitoring and evaluation projects might be a challenge.
Concept Paper:
Justice Monitoring and Evaluation in the EU:
Status Quo and the Way Ahead?

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Appendix 1: Rule of Law Dimensions

- **Accountability to the law**
  Accountability refers to the processes, norms, and structures that hold the population, organisations and public officials legally responsible for their actions and that impose sanctions if they violate the law.

- **Access to information**
  Access to information refers to the ability of citizens and organisations to request, receive and process public information.

- **Independent judiciary**
  Judges and other dispute resolution professional are not subject to external pressure notably from the executive and legislative branches of government and resolve disputes according to the law.

- **Effective judicial system (criminal, civil and administrative)**
  Effective judicial system provides mechanisms for recognizing, protecting and enforcing rights and legitimate interests. The emphasis of this dimension is on the effectiveness of the legal system which means that the disputes which have legal solution are resolved in a predictable, timely and cost-effective manner.

- **Respect for the fundamental rights**
  The extent of respect for the fundamental rights as foreseen in the Charter on Fundamental Rights and European Convention on Human Rights. Respect for fundamental rights means that there are accessible and reliable mechanisms for remedying violations of fundamental rights and the citizens have equal opportunities to use these mechanisms to seek redress.

- **Effective implementation of laws**
  Effective implementation of laws refers to the extent to which laws, regulations and case law are implemented in an equal and fair manner.

- **Access to justice**
  Access to justice refers to the equal availability to dispute resolution mechanisms which lead to fair outcomes in all areas of law - civil, family, criminal, administrative etc. Access to fair dispute resolution mechanisms and outcomes should not be contingent on wealth, social or political power, ethnicity, gender, religion or any other characteristic of the person. Geographical location, access to technologies and legal awareness should also not be factors that impede access to justice.

- **Absence of corruption**
  Corruption is the abuse of public powers for private gains. Public and private officials who are entrusted with powers have to use this power for achieving legitimate outcomes. Use of entrusted power for attainment of illegitimate private gains is corruption.
Appendix 2: Categories of costs of access to justice

Monetary costs| The first dimension of out-of-pocket expenses refers to monetary costs, which are relatively easy to quantify and measure. Focus is given to private costs, referring to those costs that are incurred by the individual user of justice. Legal fees and court fees are two of the most perceptible and common monetary costs of dispute resolution. Common sources of payment include expert and translator fees, services for summons, communication costs and transportation costs, to name a few. Having such a quantifiable measure also makes comparisons between different legal systems manageable, which is an advantage when implementing the monitoring of justice processes.

Opportunity costs| These refer to missed opportunities as a result of involvement in a justice process and are less straightforward when compared to out-of-pocket expenses. Effective redress of justice also requires an investment of time. The time component of the paths to justice is one of its most significant barriers. Much research focuses on the delays associated with dispute resolution. People spend time collecting information, contacting professionals, travelling, or awaiting hearings, as well as many other time-consuming activities. Furthermore, as a result of time invested, individuals are likely to incur missed opportunities and forgone earnings. Had the process not consumed the time of the user, he or she would have been able to earn wages, enjoy recreational activities or spend his or her time in some other manner.

Emotional costs| It is undeniable that searching for justice and experiencing (in)justice is associated with stress and emotions such as stress, anger, fear, anxiety and frustration. This mix of stress and emotions may be deemed as the intangible costs of justice. Where more stress and negative emotions exist for the individual, the legal procedure will be seen as more costly. Psychologists, cognitive scientists, sociologists, and biologists distinguish numerous categories of emotions. The existing justice literature, though scarce in some areas, can support the notion that these emotions are encountered by individuals. For example, in the victimological literature, attention has been given to this topic, finding that feelings such as fear and anxiety are commonplace when people are involved in justice procedures. Such emotions may be said to result from the actual legal problem, but in many cases are a result of the actual procedure. Both negative procedures and outcomes may exacerbate these emotions. The following sections will examine the importance of process and outcome fairness as experienced and internalised by the users of justice.
Appendix 3: Dimensions of the quality of the procedure

Procedural justice | This refers to the perceived fairness of the procedures used to obtain a given outcome. People regard an outcome as more fair if the procedure leading to it is perceived as fair. First in 1975, Thibaut and Walker introduced an early conceptualization of procedural justice, focusing on the ability to exercise control over justice processes and outcomes. They argued and showed that evaluations were based on process-control (development and selection of information) and decision-control (the extent to which a participant can unilaterally influence the outcome). Building on the work of Thibaut and Walker, Leventhal defines as fair procedures which provide an opportunity for representation, are based on accurate information, are consistent, involve authorities who suppress biases, provide the opportunity to correct for mistakes, and involve authorities who act ethically. Procedural justice is often summarized in terms of participation, voice, neutrality and accuracy.

Interpersonal justice: respect | Additional research has furthermore demonstrated that interactional justice, which refers to the quality of the interpersonal treatment that people receive when procedures are implemented, influences overall justice judgments. Interactional justice has further been divided into interpersonal and informational justice. Interpersonal justice is defined as the degree to which people are treated with politeness, dignity and respect by the authority in question. Empirical studies have demonstrated that procedures in which people are treated with respect and politeness result in more favourable justice perceptions. In contrast, any perceived violation of these aspects of interpersonal justice has a negative impact on justice evaluations regardless of the favorability of the outcome. Research even suggests that disrespectful treatment is the most common form of injustice.

Informational justice | This refers to the explanations and justifications provided to participants in justice processes. These should convey objective, timely and comprehensive information about both procedures and outcomes. Research findings indicate that informational justice is an important factor in the psychological process of forming justice judgments. Informing people about general rules and their rights in a procedure before applying these was found to have a positive effect on justice perceptions and is hence likely to result in higher levels of cooperation with the authority (Van den Bos, Vermunt, & Wilke, 1996). Particularly in confusing and complex procedures, users require information about the steps they will encounter and their role in proceedings.

Appendix 4: Dimensions of the quality of the outcome

**Distributive justice** | Perhaps the most common concept in the social justice literature, distributive justice focuses on the fair allocation of resources among community members. The focus of most studies is on determining principles for distributions people consider just. The main goal then is to make sure an outcome renders people what they are due. While there are many conceptualizations and perspectives surrounding distributive justice, the three of the most common criteria refer to distributive justice is equality, equity and need, and are sufficient in illustrating the distributive indicator of bottom up justice. First, the equality dimension refers to the equality of outcomes, which entails the belief that resources should be allocated equally for all people. Second, equity theory argues that outcomes individuals receive should reflect their efforts. In order to determine whether the outcome one receives is fair, an individual should compare his or her own outcome-to-input ratio to that a person in a similar situation. Resources should be allocated equally for all people. Third, the need perspective emphasizes that resources should be allocated according to people’s needs. According to this view, an outcome is perceived as just if the needs of individuals are taken into account when deriving the outcome.

**Just deserts as an additional element** | Where harm has been done within a dispute, retributive justice is relevant. According to retributive justice, the offender must be punished in proportion to the harm he or she caused (Carlsmit, Darley, & Robinson, 2002). Punishment acts to reinforce rules that have been broken and re-affirm a moral balance between the wrongdoer and the wronged. The just deserts model asserts that a sanction is needed to restore the balance that has been disrupted by the criminal act. Similar to restorative justice, a conflict that requires retribution must also include an element of fault. Furthermore, intention may also be linked to retribution, where the wrongdoer should have had the objective of causing harm to the injured party. In addition to the motives (e.g., intention, the level of harm severity is and important determinant of the size of the retributive needs (Darley & Pittman, 2003).

**Restorative justice** | The concept of restorative justice, also closely linked to corrective justice, focuses on the harm that has been caused to one of the parties. Therefore, including this indicator suggests that the conflict has resulted in harm, whether it is emotional or material. To achieve this, restorative justice principles include repairing harm and restoring losses, holding injuring parties accountable through understanding and helping parties to obtain closure (Umbreit, 2009). Guiding values further encourage restoration of the injured party’s security, self-respect and self-control in addition to encouraging offenders to accept responsibility (Morris, 2002). Bilateral consensus is an underlying theme of restorative justice, which may be assessed by remorse of the injurer and acknowledgment and explanation of wrongdoing (Okimoto et. al. 2009). This bilateral decision process consequently achieves mutual agreement, a central aspect of restorative justice. Similarly, corrective justice also sees one party as the injurer and the other as the injured, suffering some type of injustice. A defendant’s unjust gain is correlative to the plaintiff’s unjust loss. Where there is fault, corrective justice requires that the initial equality of the two parties be restored. In many cases, this may refer to compensation and restitution through the legal system, which is also seen as a restorative measure. Corrective justice requires that the wrongful act of one person be matched by the unjust loss of the other person, which understandably is often difficult to obtain.

**Pragmatic justice** | The functionality of outcomes is related to practical fairness, and more specifically examines how useful a given outcome is to people. An outcome of a fair process should solve the underlying problem or conflict. Within this concept falls the notion of deterrence, which follows an instrumental approach. Unlike retribution, for example, the outcome is not only to deal with feelings of morality - it has to deliver a solution. It is forward looking, and attempts to either cause change in the behaviour of the injurer or fix a relationship that may have been damaged by the conflict. In the latter case, there would be a need for the existence of a previous relationship in order for this notion to be important to individuals seeking justice. Enforceability is also an issue that is included within the concept of functionality. For example, even where compensation is imposed, if no pressure by legal bodies or
social institutions is imposed on the injurer to pay compensation, individuals are unlikely to feel it was useful or fair. In essence, functionality refers to solving the problem that was caused by the conflict.

**Transparent justice** In short, when referring to transparency, justice users are asked to evaluate the extent to which they received an explanation for the reasons for the particular outcome, justification for this outcome. Furthermore, fairness is achieved if people are able to compare their outcome to other similar situations. For this reason, information about what is appropriate should be available. A clear example is receiving compensation. Often it is difficult for people to know what amount of compensation they should be receiving and they may have inaccurate expectations. Therefore, making this information transparent is likely to result in fairness perceptions of justice.
Appendix 5: Datasets containing rule of law data

1. The bi-annual report of the European Commission for the Effectiveness of Justice (CEPEJ, 45 countries) describes and compares the judicial systems of the Council of Europe Member states. In essence, the evaluation scheme provides national statistics which reflect various parts of the assessed judicial systems. As such, the statistics do not evaluate but describe national systems. The national reports also contain qualitative parts which add supplementary information. CEPEJ prepares the general methodology and distributes questionnaires to national contact points. The aggregated reports are organised by subject matter: judicial budget, access to justice, courts, alternative dispute resolution, judges, trials, prosecutors and lawyers. To illustrate the potential use of the CEPEJ data we will use the (purchasing power adjusted) per capita legal aid budget. This data will be added to the access to justice dimension of rule of law.

2. The World Justice Project (66 countries) is a multinational and multidisciplinary initiative which aims to monitor the rule of law throughout the world. The Rule of Law Index (ROLI) aims to respond to a long-time demand for a reliable and valid cross-country measure of the rule of law concept. It recognizes the complexity of the rule of law concept and uses a four facet model to observe it in real life. The model is based on four universal principles of rule of law which are defined as: 1) accountable government; 2) publicized and stable laws that protect fundamental rights; 3) an accessible, fair and efficient process and 4) access to justice. Each of the indicators is further operationalised into sub-indicators and questionnaire items. ROLI undoubtedly comprehensively covers the area of rule of law. Some of the ROLI indicators directly link to the corresponding dimensions of the Justice index: access to civil justice, fundamental rights, effective regulatory enforcement of the law, effective criminal justice and absence of corruption. Limited government powers will be added to the accountability to the law dimension. Open government includes items which monitor the degree to which citizens can receive legal and administrative information and therefore will be referred to the access to information dimension.

3. The Cingranelli-Richards Human Rights Dataset (CIRI) contains longitudinal quantitative information (195 countries) about the level of respect that national governments provide for 15 human rights, as recognized internationally. Annually updated country level datasets are available since 1981. These include information on measures of government human rights practices, describing a variety of rights such as worker’s rights, women’s rights and torture. The current data set consists of information that make it one of the most comprehensive sources of quantitative comparative knowledge in the field of human rights. Due to its focus on human rights, the index covers the concept of respect for fundamental rights. These rights include both physical integrity rights such as the right not to be tortured in addition to civil liberties such as freedom of speech and freedom of religion.

4. The Bertelsmann Transformation Index (BTI) assesses and evaluates the progress, development and transformation of 128 countries in transition. Specifically, BTI focuses on progress in democracy, market economy and governance. Higher rankings indicate transformation of the democratic order through “terms of acceptance, interest representation and political culture” (Bertelsmann Stiftung, 2010, p. 6). The index consists of two ranking tables – Status Index on political and economic transformation and a Management index assessing the quality of governance. Under the Status Index, rule of law more generally is considered as a part of political transformation, including a measure for independent judiciary having the ability to
interpret and review existing laws, pursue own reasoning free from corruption and develop a
differentiated organization. There is also an indicator for absence of corruption within the rule of
law measure, examining the extent to which those officials engaging in corrupt activities face
prosecution and punishment. Protection of fundamental rights is also included, focusing on the
guarantee and protection of civil rights more specifically.

5. Transparency International defines corruption as “the abuse of entrusted power for private gain”
. The Corruption Perceptions Index (CPI) “ranks countries according to the degree to which
corruption is perceived to exist among public officials and politicians” (Transparency
International, 2010, p. 1). Perception-based data (178 countries) is collected from different
sources “produced by reputable organisations and data gathering organisations”. For instance,
the last edition of CPI from 2010 uses 13 different surveys conducted by 10 organizations of the
likes of: regional development banks, Bartelsmann Foundation, Freedom House, World Bank etc.
The data sources can be further classified into two streams – business people opinion surveys
and secondary assessments of country performance, conducted by experts. Interestingly, despite
its title, CPI does not draw on actual perceptions of ordinary people from the assessed countries.
With regard to concepts measured that are related to the rule of law indicators, dealing with the
absence of corruption is the primary goal of the CPI. In order to avoid double count of the data
of some of CPI sources we will not include this index into the justice index.

6. Worldwide Governance Indicators (WGI) (212 countries) is a project of the World Bank mostly
known from the popular Governance Matters series of papers authored by Daniel Kaufman and
his co-authors (see for example and references Kaufmann, Kraay, & Mastruzzi, 2009). Similar to
CPI but at a larger scale, WGI is a secondary and even tertiary index of data obtained from vast
number of sources that provide data on various aspects of governance. RoL is envisioned as one
of the six dimensions of governance; the others being: voice and accountability; political stability
and absence of violence; government effectiveness; regulatory quality; and control of corruption.
In order to avoid double count of the data of some of WGI sources we will not include this
index into the Justice index.

7. The Global Peace Index (153 countries) is composed of 23 indicators, ranging from a nation’s
level of military expenditure to its relations with neighbouring countries and the level of respect
for human rights. Included in the index are indicators such as violent crime, access to weapons,
jailed population, displaced people, homicides, security officers and terrorist acts. The rankings
range from more peaceful to less peaceful. The majority of the indicators do not fall under the
rule of law dimensions, and those that may would result in a double count of the data. Therefore
the GPI is not included in the justice index.

8. The Human Rights Index (195 countries) measures the degree of lack of protection or
noncompliance of the obligations of States in regard to human rights and the International
humanitarian law. Similar to the CIRI and the GPI, the main focus is on respect for human rights.
Therefore, the dimension of respect for fundamental rights is measured using HRI indicators
that measure the failure to ratify international instruments of human rights, violation of
international law on human rights, and violation of international humanitarian law. The three
indicators, based on 22 items, are then weighted and information appears to come from sources
such as the Office of the High Commissioner for Human Rights, Amnesty International and
Human Rights Watch.

9. The Failed States Index (177 countries), prepared by the Fund for Peace and published by
Foreign Policy, is based on their levels of stability and the pressures they face. It includes 12
indicators including human rights, delegitimization of the state, demographic pressure, group
grievance, human flight, uneven development, factionalized elites, external intervention, poverty, refugee flows, public services and security threats. The indicator human rights of the FSI is linked to the rule of law indicator for respect for fundamental rights, though it is unsure from where this data is obtained.

10. The Ibrahim Index of African Governance is a composite index (48 countries), constructed by combining underlying indicators in a standardised way to provide a statistical measure of governance performance in all African countries. The Index is an aggregation of third party data. First, a subcategory if the index is rule of law. This subcategory then looks at independent judiciary, one of the 8 dimensions described above. Furthermore, the effective judicial system is linked to the indicator of the Ibrahim Index measuring the judicial process. Absence of corruption is also included to a large extent, within the subcategory of accountability (accountability, transparency and corruption in the public sector and in rural areas; corruption and bureaucracy; accountability of public officials; prosecution of abuse of office). Finally, respect for fundamental rights is included in the indicator of participation and human rights, examining human rights, political rights, worker’s rights, women’s rights, civil liberties and freedom of expression.

11. The Political Terror Scale (PTS, 190 countries) measures levels of political violence and terror, using a 5 point indicator. The scale classifies countries into one of five levels and therefore can be interpreted as an indicator of state violations of citizens’ physical integrity. It includes abuses such as extrajudicial killing, torture or similar physical abuse, disappearances, and political imprisonment. Focus is on violence carried out by political actors, including the state and its agents. Data comes from two sources: (1) yearly country reports of Amnesty International and (2) the U.S. State Department Country Reports on Human Rights Practices. In essence, PTS is based on the same data sources as CIRI, but uses different coding scheme to process the raw data. Focus here is given to the rule of law indicator of respect for fundamental rights. Because coding is done from same source material as CIRI, we will not include this index into the justice index to avoid double counting of the data.

12. The Human Security Index (HSI) (232 countries) is intended to represent the recent-to-current situation. It includes the Economic Fabric Index, the Environmental Fabric Index and the Social Fabric Index (most important to justice related issues). Though presented in the spirit of the Human Development Index (HDI) it is not currently intended to become an annual publication. After all, societies rarely change so quickly (unless blasted by natural disaster, war or other major impact, in which case good indicators are unlikely to quickly characterize such change) for annual updates to be meaningful. Includes indicators of freedom from corruption, environmental protection, peace, protection of diversity and information empowerment. The indicator of corruption control falls under the rule of law dimension of absence of corruption.

13. The Social Institutions and Gender Index (102 countries) draws on 12 social institutions variables from the OECD Gender, Institutions and Development (GID) Database that have been grouped into five categories or sub-indexes: Family Code, Physical Integrity, Son Preference, Civil Liberties, and Ownership Rights. The SIGI looks at discriminatory social institutions. Physical integrity examines violence against women, including female genital mutilation, and the laws that exist

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38 Level 1: Countries . . . under a secure rule of law, people are not imprisoned for their views, and torture is rare or exceptional. . . . Political murders are extremely rare to Level 5: The terrors of Level 4 have been extended to the whole population. The leaders of these societies place no limits on the means or thoroughness with which they pursue personal or ideological goals.
combating such behaviors. Generally, these indicators look at the **accountability of the law**, examining the existence of women’s legal protection under the indicator of restricted physical integrity. Furthermore, **respect for fundamental rights** is addressed in terms of civil liberties defining women’s rights (forced marriage, minimum age for marriage among men and women, custody, inheritance). Also included under this dimension are freedom of movement and access to public space.

14. The Global Integrity Index (GII, 38 countries) annually assesses more than 300 indicators of the existence, effectiveness, and citizen access to key national-level anti-corruption mechanisms. More specifically, it looks at the mechanisms against corruption - government accountability, transparency, and citizen oversight. GII quantitatively assesses the opposite of corruption, that is, the access that citizens and businesses have to a country’s government, their ability to monitor its behaviour, and their ability to seek redress and advocate for improved governance and the mechanisms in place to prevent abuses of power and promote public integrity. First, the existence of public integrity mechanisms, which promote public accountability examines government (executive, legislative, judicial) accountability, falling under **accountability of the law**. Similarly, **access to information** is covered, for example through the items measuring their access to legislative documents and asset disclosure records, and more generally through the indicator of public access to information. **Absence of corruption** also has its own indicator, measuring anti-corruption law and anti-corruption agency. The more general concept of rule of law exists within an indicator, that when broken down, examines **independent judiciary**, **effective judicial system** (enforcement, appeals, following written law), and finally **access to justice** (through equal access to the justice system for citizens).

15. The International Crime Victim Survey (ICVS) (37 nationwide, 78 cities) is a programme of standardised sample surveys to look at householders’ experience with crime, policing, crime prevention and feelings of unsafety in a large number of countries. The survey was set up to produce estimates of victimisation that can be used for international comparison. Data is included on fear of crime and perceptions of the police and corruption, in addition to providing victimization rates of all types of crimes. The **effective judicial system (criminal)** dimension is measured using a few items from the questionnaires. Victims are asked the extent to which they are satisfied with the police, in addition to reasons for their satisfaction or dissatisfaction. There are also items examining the performance of the police, including if they are doing a good job and if they are helpful. Furthermore, victims are asked if they were subjected to corruption by government officials, measuring the rule of law dimension of **absence of corruption**. This measure includes who was involved in the corrupt behaviour. All respondents, victims or non-victims, were asked to report the likelihood they believed corruption would exist in transaction with different public officials.

16. The United Nations Surveys on Crime Trends and the Operations of Criminal Justice Systems (100 countries) collect data on the incidence of reported crime and the operations of criminal justice systems with a view to improving the analysis and dissemination of that information globally. The survey results provide an overview of trends and interrelationships between various parts of the criminal justice system to promote informed decision-making in administration, nationally and internationally. The rule of law dimension of **respect for fundamental rights** may be reflected in the measure of time in prison awaiting trial, which is linked to a speedy process and unfair imprisonment.
17. **Doing Business (183 countries)** is a World Bank associated project which assesses annually the impact of legal regulations and administrative practices on the business environment. Two types of indicators are operationalised and monitored in order to evaluate the legal and administrative burdens that small and medium enterprises face when doing business. First, experts evaluate the number of steps required to perform the activity. Second, again experts assess how many days and other resources are needed to accomplish the task. Two of the Doing Business indicators might be used as proxies for observing the **effectiveness of the judicial system**. Duration, and number of procedures required for enforcing contracts reflect the ability of the national justice system to cope efficiently with disagreements based in contractual relationships. Similarly, the duration and number of procedures required for resolving bankruptcies indicates the effectiveness of the judicial systems. The costs of enforcing contracts and bankruptcy procedures can be viewed as proxy of **access to justice**.

18. The **Freedom of the World Index (194 countries)** provides annual evaluation of the state of global freedom. Freedom has been understood as “the opportunity to act spontaneously in a variety of fields outside the control of the government and other centers of potential domination—according to two broad categories: political rights and civil liberties.” Experts assess the extent to which a set of 10 political rights and 15 civil liberties are implemented in real life. The indicator Functioning of the government corresponds with the dimension **accountability to the law**. Three of the Freedom of the World indicators inform the dimension **respect for fundamental rights** - Freedom of expression and belief, Associational and organizational rights and Personal autonomy and individual rights. The Rule of Law indicator is more challenging because it reports a single number composed of four facets. Each of these sub-indicators refer to different dimensions of our conception of the rule of law but Freedom of the World does not publish their individual scores. In order to avoid confusion we will not use this particular indicator.

19. The Index of Economic Freedom of the Heritage Foundation (183 countries) analyses ten components of economic freedom which are grouped into four domains: Rule of law, Limited Government, Regulatory efficiency, Open Markets. Data is collected through meta-analysis of available indexes, reports, news, and magazine articles. The rule of law component consists of two sub-factors - Property rights and Freedom from corruption. Property rights assesses the extent to which laws protect and enforce the right of individuals to accumulate private property. Thus the Property rights indicator is linked to the **effective implementation of laws** dimension. At face value the Freedom from corruption indicator is appropriate for the Absence of corruption dimension. However, it is derived primarily from Transparency International’s Corruption Perceptions Index and its inclusion might result in data redundancy and double counting.

20. The **Global Competitiveness Report of the World Economic Forum (GCR, 42 countries)** studies various factors underpinning national competitiveness. Twelve pillars of competitiveness are identified and studied mostly with data from the World Economic Forum’s annual Executive Opinion Survey. In the first pillar, Institutions, GCR evaluates among other things the extent of

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39 The discrete activities studied by Doing Business are: starting a business, dealing with construction permits, employing workers, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and closing a business.

40 Freedom of the World methodology evaluates rule of law through four batteries of questions: 1) Is there an independent judiciary?; 2) Does the rule of law prevail in civil and criminal matters? Are police under direct civilian control?; 3) Is there protection from political terror, unjustified imprisonment, exile, or torture, whether by groups that support or oppose the system? Is there freedom from war and insurgencies?; 4) Is there protection from political terror, unjustified imprisonment, exile, or torture, whether by groups that support or oppose the system? Is there freedom from war and insurgencies?
protection of property rights and intellectual property rights. These two sub-indicators refer to the **Effective implementation of laws** dimension.

21. The Civicus Civil Society Index (56 countries) assesses the state of civil society at national level. Civil society has been conceptualised as “the arena, outside of the family, the state, and the market where people associate to advance common interests”. Recognising the complex nature of civil society the identifies a four dimensional structure to observe it in real life: structure, values, environment and impact. The last dimension is about the impact that civil society’s actors have on people’s lives and on the society as a whole. Impact itself is a composite indicator consisting of four sub-indicators. One of these sub-indicators - holding state and private corporations accountable - is particularly relevant to our **Accountability to the law** dimension of the rule of law.

22. The Sustainable Governance Indicators (SGI, 31 countries) evaluate aspects of governance in the members states of the Organisation for Economic Co-operation and Development. Data are collected from official statistical sources and expert opinions. The indicators are organized into two groups - Status Index and Management Index. The former evaluates the institutional framework of governance, whereas the latter is concerned with the processes of policy implementation. Three of the indicators of the Status index merit special attention. Access to information, civil rights and rule of law are constructed as dimensions of the quality of democracy. Access to information has been operationalised as media freedom and thus it deviates from our understanding that it is the ability of citizens and organisations to request, receive and process public information. Civil rights, on the other hand, is the extent to which “the state respect and protect civil rights, with courts protecting against rights violations”. This indicators is used in the construction of **Respect for human rights**. Lastly, SGI defines rule of law as the level to which “government and administrative bodies act in accordance with the law to provide legal certainty”. Thus the indicator is relevant to **Effective implementation of laws**.

23. The Democracy Index (167 countries) is compiled annually by the Economist Intelligence Unit. According to the assigned scores the countries are categorised into full democracies, flawed democracies, hybrid regimes and authoritarian regimes. Most of the indicators and sub-indicators of the Democracy index are derived from expert evaluations. Five categories are monitored and evaluated by the index.\(^{41}\) Of particular interest are a couple of variables which bear significant relevance for different dimension of the rule of law.\(^{42}\)

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41 Electoral process and pluralism, functioning of government, political participation, political culture and civil liberties.

42 Effective system of checks and balances, accountability of government to the electorate between elections, access to information, corruption, civil service which is willing and capable of implementing government policy, freedom of expression and protest, respect for minority views, use of torture by the state, independence of the judiciary, religious tolerance and freedom of religious expression, the degree to which citizens are treated equally under the law, extent to which citizens enjoy personal freedoms, extent to which citizens enjoy basic security, popular perceptions on human rights protection, absence of discrimination.