How to measure the rule of law: a comparison of three studies

Dr. Pim Albers[1]
Special advisor of the CEPEJ
Council of Europe

1 Introduction

In the academic part of the inventory report of Hiil[2] we can read that there are many different definitions on the Rule of Law and that the underlying values may vary as well (the latter issue is the focus of discussion at Workshop 1 of this HiiL conference on the rule of law). There are end-based and institutional based definitions. Also a difference can be made between the notion of 'Rechtsstaat' which primary focus is on the vertical relationship between the state or government and the citizens and the 'Rule of law' as defined in the common law tradition which includes the horizontal relations amongst citizens too. The author of the inventory report recommends not to go too much into detail in the differences and similarities of the various rule of law notions, but to use another conception i.e. the 'thick' versus the 'thin' notion of the rule of law. For practical and theoretical reasons the rest of the report was drafted on the 'thinner' conception of the rule of law. This conception is based on two main elements:

1. The law should rule the conduct of people. Both vertical (between the government and citizens) and horizontal (between the citizens) interactions must be ruled by laws.
2. A distinction between rule *by* law (the governmental power is exercised through or via laws) and rule *of* law (officials exercise power in accordance with the law).

When it comes to the assessment of the level of rule of law in countries it is – according to the author of the inventory report – necessary to look at the *requirements* and *conditions* to be met[3]. Concerning the *requirements* a reference is made to the minimum quality standards of laws practised in a society and the role and position of the judiciary. It is stated that laws should be general publicly promulgated, prospective, intelligible, consistent, practicable, etc. Further, a high level of rule of law requires that there is a political independent and impartial system of courts, some form of separation of powers and a right to a fair trial. The last mentioned aspect (fair trial) is directly related to the need for fair and open hearings, the absence of bias during the judicial decision making process, a reasonable length of proceedings, etc. Another important aspect for an

[1] This article was written on a personal title and does not necessarily represent the official view of the Council of Europe. Information of the Council of Europe and the CEPEJ can be found at the following websites: www.coe.int and www.coe.int/cepej.
[2] HiiL (2007), *Rule of law inventory report; academic part*, The Hague.
[3] An alternative categorization is described by Samuels (2006), *Rule of law reform in post conflict countries' (World Bank paper),* Washington. In this article rule of law reform projects (for post conflict countries) are broken down in five categories: (1) human security and basic law and order, (2) a system to resolve property and commercial disputes and the provision of basic economic regulation, (3) human rights and transitional justice, (4) predictable and effective government bound by law and (5) access to justice and equality before the law (p. 14).

independent judiciary is to have a recognised and independent legal profession, easy access to courts and the necessity that for criminal cases there is a public prosecutor, operating with some degree of independence from the government, who is responsible for bringing violations of the law before the court[4].

For an adequate level of rule of law in a country there must be – according to the author of the Hiil inventory report – four *conditions* to be met. The first one is related to the judiciary. For a high level of rule of law there must be an independent and impartial judiciary (in addition to these alternative dispute resolution mechanisms). Secondly, rule of law needs a certain level of access to justice and the availability of some form of legal aid. Thirdly, it is important that citizens have some basic knowledge of the law. The last condition for rule of law described by the author is the necessity of freedom of speech, free press and freedom of assembly[5].

The notion of the 'thin' or 'thinner' conception, combined with the set of conditions and requirements to be met necessary for an adequate rule of law is the central point of departure of this article. When you know what kind of conditions and requirements of rule of law are necessary, you might want to use this to assess a country or a number of countries. The problem however is that there exists at the moment no comprehensive measurement system for the rule of law. Most of the studies are limited to certain aspects of the rule of law or viewing the topic from a specific angle. For example there are studies where the rule of law is measured by looking at the demand side: the needs of citizens, whilst there are also studies where the legal system (the supply side) is the main orientation. Also due to the 'controversy' between the end-based conception of the rule of law (primary oriented at the realization of certain values connected at the rule of law) and the institutional conception of the rule of law (there is rule of law when there (is) are (a group of) judicial institutions) it seems to be difficult to generate a complete list of rule of law indicators and to develop for example a 'rule of law' index[6].

I will start the 'journey' towards the development of rule of law indicators with three studies, which partly measure the rule of law. These studies are: 'Governance Matters' and 'Doing Business', by the World Bank and the study on judicial systems carried out within the framework of the Council of Europe (CoE) by the European Commission for the Efficiency of Justice (CEPEJ).The first two of these studies are primary oriented at the 'demand side' of the rule of law; The third is focussing on the legal institutions that are necessary for an acceptable level of the rule of law. At the end of this article the three studies are compared with each other and an attempt is made to see which aspects of the rule of law are covered by the three studies and where the 'blind spots' are. This can be helpful to make to step into the direction of the development of a complete list of rule of law indicators.

[4] Hiil (2007), *Inventory report*,p. 15 – 19.
[5] Hiil inventory report, p. 18.
[6] Hiil (2007), *Draft concept paper 'further conceptualization and practical progress on building coherent and effective rule of law programmes and strategies*, p. 4.

2 Rule of law and good governance: 'Governance Matters' and 'Doing Business' (World Bank studies)

2.1 'Governance Matters'

The 'Governance Matters' study is aiming at assessing countries at the level of 'good governance'. In the conception of good governance it is not sufficient when there is high level of rule of law in a given country. Other aspects need to be taken into account as well. As a result of this the researchers of the 'governance matters' study evaluates the level of democracy and political stability in a country, the effectiveness of policies of governments, the quality of regulation and the level of corruption. Kaufman, Kraay and Mastruzzi (2007) identify six dimensions of 'governance':

1. *Voice and accountability*: this measures the extent to which in a country citizens are able to participate in selecting their government, freedom of expression, freedom of the media, etc.
2. *Political stability and absence of violence*: this measures the perception of the likelihood that the government will be destabilised or overthrown by unconstitutional or violent means; it includes domestic violence and terrorism.
3. *Government effectiveness*: this measures the quality of public services, and the degree of its independence from political pressures, the quality of policy formulation, etc.
4. *Regulatory quality*: this measures the ability of the government to formulate and implement sound policies and regulations.
5. *Rule of law*: this measures the extent to which agents have confidence in and abide by the rules of society, in particular the quality of contract enforcement, the police and the courts, as well as the likelihood of crime and violence.
6. *Control of corruption*: the measurement of the extent to which public power is exercised for private gain[7].

The methodology for data collection is primary based on the 'demand' side of 'governance' (and rule of law). Governance is measured by using data sources from: surveys of firms and individuals, the assessments of commercial risk rating agencies, non-governmental agencies, multilateral aid agencies and other public sector organizations. In 2006 around 33 different sources were used produced by 30 organizations (in total 310 individual variables)[8]. It must be noted that as a result of the choice for this manner of data collection not the *real* level of governance (in objective terms) is measured but the *perceived* level of governance (based on the subjective opinions of citizens, experts, etc.). This explains why there is sometimes a large difference between for example a specific score on the rule of law indicator in the governance studies (and ranking of countries), and the level of rule of law based on other information sources.

[7] Kaufman, Kraay and Mastruzzi (2007), *Governance Matters VI: aggregate and individual governance indicators 1996 – 2006*: p. 3 and 4.
[8] Id. (2007), p. 4.

The statistical methodology that the researchers of the governance indicators are using is known as the 'unobserved components model'. This model is applied to construct aggregate indicators for the six dimensions. The aggregate indicators are weighted averages of the underlying data, reflecting the precision of the individual data sources[9]. When it comes to the individual sources to measure the rule of law the 'governance matters report III' indicates that 15 different sources are used, varying from 'representative sources' like the Country Risk Service (Economist Intelligence Unit) , the Economic Freedom Index (the Heritage Foundation/Wall Street Journal), Human Rights Reports (US State Department, Amnesty International) and 'non-representative sources' such as the Business Enterprise Environment Survey (World Bank), the Voice of the People Survey (Gallup International) and the Global Competitiveness Report (World Economic Forum)[10].

The Rule of law index used by the researchers of the 'Governance Matters' study is based on a mixture of elements. Some of them are related to the independence of the judiciary, fairness of judicial proceedings, speediness of proceedings, judicial accountability and trust in the judiciary as well as the enforceability of contracts; others are related to crime and law enforcement. For example for the aggregate data on the rule of law sources are used on the topics: losses and costs of crimes, kidnapping of foreigners, violent crime, organized crime, fraud and money laundering, trafficking, etc[11].
In the 'thinner' conception of rule of law especially perception information on crime is not included. On the other side some sources that are mentioned in the other dimension of the 'governance indicators' would normally fall under the definition of 'rule of law'. Examples of indicators for measuring the *requirements* and *conditions* for rule of law found in other dimensions are: freedom of association, political rights, freedom of the press, political participation (Voice and Accountability), administrative burden of legislation, complexity of the tax system, (worsening) of import and export regulations (Regulatory Quality), the perceived corruption of judges and magistrates (Control of Corruption).

From this point we can conclude that the 'Governance Matters' study uses a specific approach and definition concerning rule of law, which does not completely match with the 'thinner' conception as defined in the Hiil inventory report. Certain elements that do fall in this conception however, can be found in other dimensions of the 'governance indicator'. Another conclusion is that the measurement of the rule of law (as defined in 'Governance Matters') is based on information sources from the demand-side. (Opinion) surveys and assessment of (private) agencies are used to determine the *perceived* rule of law. As a result of this, the governance matter study has one major limitation: it does not measure the rule of law from an institutional point of view.

[9] For the technical explanation of the methodology see: Kraay (2007), *Technical documentation for the Worldwide Governance Indicators 196 – 2006*, Washington.
[10] See: Kaufman, Kraay and Mastruzzi (2003), *Governance Matters III: governance indicators for 1996 – 2002*, Washington. And Kaufman, Kraai, Mastruzzi (2007, Governance Matters IV. In the appendix 11 Representative sources and 13 non-representative sources are mentioned (see: table B5, p. 74).
[11] Kaufman, Kraay and Mastruzzi (2007), *Governance Matters IV*, p. 70 – 75.

2.2 'Doing Business'

The main aim of this study of the World Bank is to measure business regulation and the protection of property rights, including their effect on businesses, especially small and medium sized business firms. The results of the various Doing Business reports show how easy or difficult it is to start (and close) a business in a country. One of the assumptions used in the 'Doing Business' methodology is that 'the security of property and the enforcement of contracts are essential for investment, trade and ultimately economic growth'[12]. The enforcement of contracts can be seen as one of the indicators that may be useful for measuring (some aspects of) the rule of law. A proper enforcement of contracts will influence the rule of law positively.
The Doing Business study is not created with the aim to measure the rule of law, but to assess the level of attractiveness for companies to invest in certain countries around the globe. That is why the outcomes of the study are only of limited use for measurement of the rule of law. However, on the other side it must be noted that the study on enforcement of contracts is a good example of how this element of the rule of law can be measured. This is the main reason why it is included in the article.

In the Doing Business study there is a positive relation between the courts and the judiciary and the investment climate of enterprises. The authors of the various reports stated that businesses are best served when courts are fast, fair and affordable[13]. Corruption in the judiciary will have a negative effect on the public trust of enterprises (and citizens) and the level of investments.

Countries are ranked and rated on the issue of enforcing contract on the basis of three criteria:

- the number of procedures from the moment a plaintiff files a lawsuit in a court until the moment of payment;
- the time in calendar days to resolve a dispute;
- the cost in court fees and lawyer fees, were the use of lawyers is mandatory or expressed as a percentage of the debt value[14].

The information regarding the enforcement of contract is based on surveys that are send to experts in the various countries, including lawyers, business consultants, accountants, government officials, etc[15]. Quite similar to the 'Governance Matters' approach the researchers of the Doing Business studies are oriented towards the demand side when it comes to the collection of data. As a result of this there can be a large difference between the perceived level of enforcement of contracts and the real adjudication. Due to their methodology of data collection, reliable information on the duration of proceedings and other relevant aspects of the functioning of courts is not retrieved directly from their

[12] Djankov, La Porta, Lopez-de-Silanes, Schleifer (2003), *Courts.* In: Quarterly Journal of Economics.
[13] World Bank (2007), *Doing Business 2007: how to reform*, Washington, p. 51.
[14] See: http://www.doingbusiness.org/ExploreTopics/EnforcingContracts/.
[15] See: www.doingbusiness.org/MethodologySurveys/default2.aspx. World Bank (2007), *Survey on Contract Enforcement*, Washington.

sources: the courts and other judicial institutions[16]. The Doing Business study is not only criticized on the choice to rely only on 'demand side' sources, but also for its methodology in general and the use of ranking. Some of the critical scientists are of opinion that indicators used in the reports are poorly explained, that there is a large gap between the figures evaluated ex-ante and the results observed and that the choice for a survey to measure 'doing business' (as well as some part of the rule of law in the form of enforcement of contracts) is 'risky'[17].

As has been said in the introductory paragraph both the 'governance matters' study and the 'doing business' studies are examples of methods for measuring the rule of law from the demand side. It illustrates how (elements of) the rule of law can be measured from the perspective of the user. What about the supply side? Is there an example where the rule of law is measured from the perspective of legal systems or institutions? Yes, in the next paragraph the CEPEJ evaluation scheme on legal systems will be presented as an illustration of how some part of the rule of law can be measured from the perspective of the supply side. The general assumption is that a proper infrastructure for legal systems and functioning of systems will positively contribute to enhancing the rule of law in a country.

Before I explain what the CEPEJ methodology on evaluating legal systems is, I will describe the conception of the rule of law, used by the Council of Europe and the working methods in the legal field.

3 Rule of law and the Council of Europe

The core aim of the CoE, founded in 1949, is to protect and promote human rights, rule of law and pluralist democracy[18]. One of the most important cornerstones concerns the European Convention on Human Rights[19]. In this Convention many elements regarding the adequate *conditions and requirements* for rule of law (as defined in the 'thinner' conception) can be found. A guarantee for an independent and impartial judiciary and the right to a fair trial is laid down in article 6 of the Convention. The governmental power exercised 'through or via laws' can be derived from many other articles of the Convention. When you look at the sub articles of the Convention you can see that most of them start with a sentence explaining that the rights and duties of citizens and the government are protected by and based on the law. Examples are article 2.1 'everyone's right to life shall be protected *by law*', article 7 'no punishment without *law*' and article 10.2 'the exercise of these freedoms [**PA:** of expression] (…) may be subject to such formalities, conditions, restrictions or penalties as are prescribed *by law*'. The *conditions*

[16] Uzelac (2007), *Public and Private Justice: the challenges of rational assessment of performance in the contemporary justice systems*, p. 17. In: Uzelac and Van Rhee (eds.), *Public and Private Justice; dispute resolution in Modern Societies*, Antwerp – Oxford.
[17] Du Marias (2006), *Methodological limits of 'Doing Business' reports (working paper AED-2006-1 version 4)*, Nanterre.
[18] Council of Europe (2006), *Building Europe together on the Rule of Law*, Strasbourg.
[19] Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No.: 005).

for rule of law, concerning freedom of expression, association and assembly can be found in articles 10 (freedom of expression) and 11 (freedom of assembly and association) of the Convention.

To promote the rule of law (as defined by the Council of Europe from an intergovernmental perspective) the Council uses two working mechanisms, namely the intergovernmental and co-operation activities:

- the intergovernmental activities, on which all the member states work together on the drafting of conventions and recommendations[20].
- the co-operation activities to strengthen the rule of law, involving the Council of Europe and one or more member states[21].

The intergovernmental activities are carried out by various steering committees, which monitor the work of specialised expert committees. In addition to this there are also ad-hoc committees on public international law, terrorism and the protection of asylum seekers and refugees.

The legal co-operation programmes are designed to help beneficiary countries with their institutional, legislative and administrative reforms. They mainly involve in working with government authorities to prepare and introduce legislation as well as an operational framework which match the country's specific needs and features (in conformity with the rule of law principles) to ensure that reforms are carried out. For example: by providing in-service training for professionals at all levels of the justice system.

As a part of the intergovernmental activities of the Council of Europe, the European Commission for the Efficiency of Justice (CEPEJ) periodically 'evaluates' the legal systems of the 47 Member States of the Council of Europe.

4 Rule of law and legal systems: CEPEJ study on judicial systems

The creation of the CEPEJ was one of the outcomes of the 23rd Ministerial Conference of Justice Ministers of the Council of Europe (London 2000). Its main tasks is: "to examine the results achieved by the different judicial systems in the light of the principles [comment **PA:** access to justice and efficient court proceedings, the status and role of legal professionals, administration of justice and management of courts, use of information and communication technologies] referred to in the preamble to this resolution by using, amongst other things, common statistical criteria and means of

[20] Article 15.a of the Statute of the Council of Europe described that the Committee of Ministers shall consider the action required to the further aim of the Council of Europe including the conclusion of convention and agreements. Conventions and agreements become final after adoption by the Committee of Ministers, They are binding on states that ratify them. The possibility for drafting recommendations is prescribed by article 15.b. The Committee of Ministers may make recommendations on matters for which it had agreed 'a common policy'. Recommendations are not binding for member states, although the Committee of Ministers can ask member states to inform it on the action taken by them on recommendations.

[21] Council of Europe (2006), *Building Europe together on the Rule of Law*, Strasbourg, p. 5.

evaluation"[22]. This task should be – according to Resolution 2002 (12) – accomplished by the identification and development of indicators, collection and analysis of quantitative and qualitative data and the definition of measures and means of evaluation[23].

The start of the evaluation activities of the CEPEJ on legal systems was in July 2003 when a small expert group (composed of 6 experts and an additional scientific expert) held its first meeting. During that meeting a preliminary draft of a questionnaire on legal systems was created, based on a discussion document with lessons learned from the past and recommendations on how to implement a comparative study successfully. The general outline of the questionnaire was based on the wish to evaluate all the relevant aspects that are connected with the composition and functioning of judicial systems and the need to take the main principles for 'efficiency of justice' (as has been drafted in the Statute of the CEPEJ) into account. The 'pilot scheme' 2005 was composed of 123 questions categorized by the following topics:

- General country information
- Access to justice and to all courts
- Functioning of courts and efficiency of justice
- Use of information technology in the court
- Fair trial
- Judges
- Public prosecutors
- Lawyers
- Enforcement agents and execution of court decisions

The first evaluation round in 2004 showed that it was possible to collect qualitative and quantitative data of the judicial systems of the Member States of the Council of Europe[24]. From that point of view it was a success in the sense that it was the first study with a large overview of the composition and functioning of legal systems in the world. On the other side, it also clearly showed the problems and limitations of such a study. One of the lessons learned from the pilot exercise was that in future evaluation rounds better and more precise definitions of the basic legal terms, such as 'courts', 'lawyers', 'enforcement agents', 'cases', must be used. This to avoid or – at least – to reduce the interpretation problems for the respondents during the process of registration of the data. Another lesson concerned the budgetary data of the judicial branch. To compare countries in a more reliable manner it is necessary to collect more detailed information on this topic. The same can be said about the performance information of courts. For a better comparison more precise definitions of 'cases' and 'duration of proceedings' are necessary[25].

[22] Article 2 Resolution 2002(12) Establishing the European Commission for the Efficiency of Justice (CEPEJ).
[23] Resolution 2002(12), Article 3.
[24] See: CEPEJ (2005), *European judicial systems: facts and figures (data 2002)*, Strasbourg.
[25] The CEPEJ (2005) report showed that most of the countries in Europe are not able to collect information on one of the most important performance indicators of the courts, namely the length of proceedings.

On the basis of the experiences of the first evaluation round on judicial systems an improved version of the questionnaire was drafted and sent to representatives of the Member States (September 2005). The topics in this questionnaire were based on the following items:

- General (country) information
- Budgetary data concerning judicial systems
- Legal aid
- Users of the courts and victims
- Organisation of the court system (functioning)
- Monitoring and evaluation of courts
- Fair trial (fundamental principles, timeframes of proceedings, civil, administrative an criminal cases)
- Career of judges and prosecutors (appointment and training, practice of the profession, disciplinary proceedings)
- Lawyers
- Alternative Dispute Resolution
- Enforcement of court decisions
- Notaries

The second report 'European Judicial systems (edition 2006: 2004 data)' was officially presented in October 2006[26]. This report contained a more detailed description of the judicial systems in Europe compared with the first one. Despite the fact that more detailed information could be presented, there are still problems to be solved. Especially, regarding problems to collect and present performance information of the courts of the European Member States. Due to definition problems and different case registration methods it is still very complicated to present at a European level comparative information about the performances of courts. Hopefully, the problem will be reduced when the third evaluation round is launched by the end of September 2007. During that evaluation round an electronic (web-based) questionnaire – instead of a paper based questionnaire – will be available for the member states to register the data (including a detailed grid with (common) court case categories).

What about rule of law and the CEPEJ-questionnaire? The CEPEJ questionnaire is not created with the aim to measure the rule of law, but to stimulate countries to improve the 'efficiency' (and quality) of justice and to promote an exchange of information between Member States in this field. Of course, the underlying values of the questionnaire are based on how the Council of Europe is promoting the rule of law. These values are described earlier in this paper and are mostly referring to the European Convention on Human Rights.

When the 'thinner' conception, the conditions and requirements of the rule of law (defined by the inventory report of Hiil) are laid down next to the items described in the questionnaire, I can make the following conclusion. Compared with the two World Bank studies, the main source of the CEPEJ data is not based on the 'demand' side but on the

[26] CEPEJ (2006), *European Judicial systems: edition 2006 (data 2004)*, Strasbourg.

'supply side' (the judicial institutions, governmental agencies in the justice sector and the (private) legal professionals). Judicial institutions and governmental agencies are requested to send their data to 'national correspondents'. These correspondents – mostly representatives of ministries of justice – are responsible for the delivery of the replies to the secretariat of the CEPEJ. The choice of the CEPEJ to use the 'supply side' of judicial system does not imply that no questions are asked concerning the 'users of the courts'. Many questions are added to the questionnaire with regards to the rights and position of the users of the courts. For instance by asking if specific guarantees are given in court proceedings to vulnerable persons, if complaint and compensation procedures are available, court information for users on the internet is present, etc. In contrast with the two World Bank studies, the only questions posed are with respect to the availability of specific arrangements for the users of the courts. Perception questions and questions concerning the level of satisfaction or public trust in the judicial systems are not included in the questionnaire. It is assumed that if certain guarantees, proceedings and legal institutions are available (and are functioning properly) this will contribute to 'the efficiency of justice' and the rule of law. From the perspective of the author of the Hiil inventory report this is an 'institutional conception of the rule of law' (the rule of law can be considered as a set of institutions).

The CEPEJ questionnaire covers certain topics that are defined as the *conditions* and *requirements* for rule of law. Many questions are drafted with respect to the (independent) position of the judiciary, fair trial, and reasonable length of proceedings, access to justice and courts, legal aid and the role of the public prosecutor. What is lacking are questions concerning the minimum quality standards of law practices in a society, the extent to which the law is can be understood by citizens, freedom of speech and a free press. Due to the institutional setting of the CEPEJ, these areas are not covered by this Commission but are the domain of other institutions or commissions within the Council of Europe. For example the Committee of Ministers is responsible for monitoring Member States regarding the level of compliance of states with legal standards issued by the Council of Europe (Conventions, Resolutions, and Recommendations). The quality of constitutional laws is the responsibility of the 'Venice Commission' and special Human Rights Committees (for example) are responsible for the drafting and promotion of knowledge in the member states on the European Convention on Human Rights.

Limitations of the CEPEJ evaluation study

As can be derived from the previous passage the CEPEJ study does not cover all the aspects of the rule of law and its main approach is 'institutional based'. Another limitation of the CEPEJ study is that it relies only on one – governmental – information source. Compared with the two World Bank studies, the CEPEJ cannot rely on a pool of data sources. Moreover the perception of the rule of law is not measured by taking into account the demand side. The third limitation of the CEPEJ approach is that the geographical coverage of the study is limited to 47 countries, despite the fact that certain regions in the World (for example in the Middle East) have shown their interest to start a

similar exercise[27]. The last limitation that can be mentioned is the fact that the outcome of the CEPEJ evaluation studies is limited to a description of the state of affairs of legal systems. It is not a 'real' evaluation and the CEPEJ has not developed yet sophisticated 'indicators' to measure 'efficiency of justice' or to generate an 'efficiency of justice' index.

A future possibility is the use of the current CEPEJ data to create a list of indicators, like 'access to justice'. Such index can be composed of aggregated data derived from: the budget for legal aid, number of geographical court locations, the number of lawyers (excluding legal advisors) representing clients in courts, the availability of compensation procedures for victims of crimes, court internet portals, etc. Countries can be 'ordered' (or ranked…) by the descending or ascending level of access to justice. Other indicators that may be created are: the level of independence of the judiciary and judges, efficiency and effectiveness of court proceedings (by taking into account the court performance; for example: clearance rate, length of proceedings, costs per case, etc[28]) and the level of organization of (private) legal professionals (lawyers, enforcement agents, mediators, notaries).

5 The three studies compared with the 'thinner' conception of the rule of law

In my opinion the description of the 'thinner' conception of the rule of law, including the conditions for rule of law and the requirements needed, is a first step towards making 'rule of law' measurable. However a further debate on the conception is necessary. On the other side, I have to add to this statement that the elements described in the Hiil inventory report are useful for a first exercise to see at which level indicators for measuring the rule of law already has been developed. Moreover, it can be used to see if it is possible to create a full list of rule of law indicators or even a rule of law index.

In this article I have described three studies (two World Bank studies and one evaluation project of the CEPEJ). The World Bank studies are using sources from the 'demand side', whilst the CEPEJ is using sources from the 'supply side' (the legal institutions, ministries of justice and legal professionals). All of the three studies cover some aspects of the rule of law. For illustrative purposes I have drafted table 1.

This table shows only where the 'added' values of the different studies are with respect to the measurement of the rule of law and where the 'blind spots' are i.e. the areas of the rule of law that are not covered by the three studies. Especially the requirements focussing on the judiciary are covered by the 'Governance matters' study, the CEPEJ study and to a lesser extend by the Doing Business study as well. The three studies can have an added value regarding the measurement of 'the independence and the functioning of the judiciary' when the information of the perception surveys (used in the World Bank studies) are linked to the institutional data on judges, prosecutors, courts (and court

[27] ABA – CEELI and the Arab Council for Judicial and Legal Studies (ACJLS) (June 2007), *ACJLS Benchmarking initiative (final report)*.
[28] See for example: http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm.

performance) collected by the CEPEJ. This would generate a '*perceived'* and '*real´* overview of the (independence) of the judiciary, judges, prosecutors and the functioning of courts.
Also for the other aspects of the rule of law, a mixture of perception studies and data derived from legal institutions will give a (more) complete view on the rule of law (because the demand side is linked to the supply side).

Table 1 Three studies compared

	Governance matters	**Doing Business**	**CEPEJ report judicial systems**
Main source of data	Perception studies	(perceptions of) experts	Legal institutions, ministries of justice
Requirements (the law)			
Laws are prospective	×		
Laws are clear	×		
Adequately promulgated, published	×	×	
Clear criteria for determining validity of laws	×		
Stability of laws	×	×	
Laws have the form of general rules	×	×	
Requirements (the judiciary)			
Political independent system of courts	×		×
Level of separation of powers	×		×
Right to a fair trial within reasonable time	×	×	×
Legal professions	×	×	×
Role of the public prosecutor	×		×
Conditions			
Access to justice and legal aid			×
Basic education and knowledge of laws			
Freedom of speech (and assembly)	×		

For future development of a complete list of indicators for measuring the rule of law and the methodology to be applied I would like to suggest using a mixture of information sources (supply *and* demand side). The two World Bank studies and the CEPEJ studies give an idea of what kind of data already is collected and which indicators have been created. However, more research in this field is necessary. This research can be done by making use of a comparative analytical framework, similar to the one I have presented in this paper, based on a detailed (and empirical) definition of the 'rule of law' where

empirical studies in the field of justice and rule of law can be compared with each other[29]. Information derived from this comparison may be the primary source for the development of a complete list of rule of law indicators and the development of a rule of law index.

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[29] For example the UNDP and Eurostat have published an overview of sources of governance indicators which can be useful for completing the listing of rule of law indicators. See: UNDP and Eurostat, *Governance indicators: a users' guide*, New York and Luxemburg.