



FACULTAD DE DERECHO  
PONTIFICIA UNIVERSIDAD CATÓLICA DE CHILE

# CEREMONIA DE INAUGURACIÓN DEL AÑO ACADÉMICO DE LA FACULTAD DE DERECHO 2022

JUEVES 21 DE ABRIL DE 2022

*Invitado de Honor*  
*András Jakab*





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## **Programa de la ceremonia:**

Himno Nacional

Palabras del Decano

Charla Magistral dictada por el Profesor de la  
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*“Methodological Problems of Measuring the Rule of Law”*

Interludio musical

*Ecce sacerdos magnus del compositor Austríaco Anton  
Bruckner*

Premio Celia Pérez Matus

Premios Profesores

Premios Alumnos

Himno de la Universidad



**András Jakab**

András Jakab es uno de los profesores de derecho constitucional más prestigiosos de Europa. Actualmente es Profesor de Derecho Constitucional y Derecho Administrativo en la Paris Lodron University of Salzburg.

Obtuvo el grado de Licenciado en Ciencias Jurídicas y Políticas por la Pázmány Universidad Católica Péter (Budapest) el año 2001; luego el LL.M. en Derecho Alemán en la Universidad de Heidelberg y, posteriormente, el título de Doctor en Ciencias Políticas y Jurídicas en la Universidad de Miskolc, ubicada en Hungría.

Es miembro del International Society of Public Law, el Vereinigung der deutschen Staatsrechtslehrer, Societas Iuris Publici Europaei y la Academia Húngara de Ciencias.

Antes de incorporarse a la Universidad de Salzburgo, fue director del Instituto de Estudios Jurídicos de la Academia Húngara de Ciencias y profesor de la Universidad Católica Pázmány Péter.

El profesor Jakab es autor de numerosos libros y artículos académicos en las áreas de derecho constitucional, derecho europeo, razonamiento constitucional comparado, derecho alemán, derecho internacional público y teoría del derecho. Dentro de estos, destacamos los libros *The European Constitutional Language* y *Comparative Constitutional Reasoning* (editados por Cambridge University Press, los años 2016 y 2017, respectivamente) y el libro *The Enforcement of EU Law and Values: Ensuring Members States' Compliance* (editado por Oxford University Press, 2017). Ha publicado artículos en revistas como *American Journal of Comparative Law*, *Constitutional Studies*, *German Law Journal* o el *International Journal of Constitutional Law*, entre otros.

# Methodological Problems of Measuring the Rule of Law

**Professor András Jakab**

Univ.-Prof. Dr. András Jakab, LL.M., D.Sc. (University of Salzburg).

The present paper is based on Jakab and Kirchmair, “How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way” 22 *German Law Journal* (2021), 936–955.

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## 1. Why Measure Legal Systems? The Use of Rule of Law Indices

There is a large number of indices which all measure legal systems.<sup>1</sup> This can be explained by several factors: 1) One single number can easily sum up complicated questions,<sup>2</sup> so that non-professionals and the press can also use it.<sup>3</sup> We should not underestimate this explanatory character, because this simplification can also contribute to democratic

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1 Observing the increasing number of indicators and indices (i.e. composite indicators), some authors speak about an “indicator fatigue”, Hammergren, „Indices, Indicators and Statistics: A View from the Project Side as to Their Utility and Pitfalls“, 3 *Hague Journal on the Rule of Law* (2015), 311.

2 Saisana and Saltelli, “Rankings and Ratings: Instructions for Use“, 3 *Hague Journal on the Rule of Law* (2011), 247–268, esp. at 248.

3 This is also dangerous, because the measured value can also impact reality, for example, news about high levels of corruption can actually boost the acceptability of corruption itself, which can consequently also increase real corruption. See Ginsburg, „Pitfalls of Measuring the Rule of Law“, 3 *Hague Journal on the Rule of Law* (2011), 270: “Perceptions can produce their own reality”, 279: “a bad image can become a self-fulfilling prophecy”.

# Problemas Metodológicos para la Medición del Estado de Derecho

## Profesor Andrés Jakab

Dr. Andrés Jakab, LLM, DSc (Profesor Universidad de Salzburgo).

El presente artículo se basa en el texto de Jakab y Kirchmair, “How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way” 22 *German Law Journal* (2021), 936–955.

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### 1. ¿Por qué analizar los índices que evalúan el desempeño de los sistemas legales? El uso de los índices de estado de derecho

Hoy existe un alto número de índices para medir la calidad de los ordenamientos jurídicos.<sup>1</sup> Esta circunstancia puede explicarse debido a distintos factores: 1) Una única cifra fácilmente puede sintetizar preguntas complejas,<sup>2</sup> lo que permitiría su uso tanto a quienes no son profesionales, como a la prensa.<sup>3</sup> No deberíamos

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1 Observando el incremento en el número de indicadores e índices (por ejemplo, indicadores compuestos), algunos autores refieren a una “fatiga de indicadores”, Hammergren, „Indices, Indicators and Statistics: A View from the Project Side as to Their Utility and Pitfalls“, 3 *Hague Journal on the Rule of Law* (2015), 311.

2 Saisana y Saltelli, “Rankings and Ratings: Instructions for Use“, 3 *Hague Journal on the Rule of Law* (2011), 247–268, especialmente en p. 248.

3 Esto es también peligroso, porque los valores medidos pueden también impactar la realidad, por ejemplo, noticias acerca del nivel de corrupción podrían legitimar la corrupción en sí misma, lo cual podría, consecuentemente, incrementar los grados de corrupción existentes en la sociedad. Véase: Ginsburg, „Pitfalls of Measuring the Rule of Law“, 3 *Hague Journal on the Rule of Law* (2011), 270: “Las percepciones pueden producir su propia realidad”, 279: “una mala imagen puede llegar a convertirse en una profecía autocumplida”.



accountability. 2) Indices are often also considered as external measures in debates about evaluating reforms or the performance of the government.<sup>4</sup> Because of this, international organisations and NGOs use indices in order to foster and propagate best practices by comparing numbers on different countries. Exemplary countries usually score at the top of the scale set up by these organisations.<sup>5</sup> A side-effect of this approach can be seen, for example, when a government solely changes a policy in order to obtain a change to its score on a scale, without treating the real problem.<sup>6</sup> 3) Rule of law indices can show the de facto situation (law in action, instead of law in books), they can also show the extent of improvements and deteriorations, and very importantly: these results cannot be discredited as “simply one opinion”. Rule of law indices aggregate a large number of data including many expert opinions

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4 Botero, Nelson and Pratt, “Indices and Indicators of Justice, Governance, and the Rule of Law: An Overview“, 3 *Hague Journal on the Rule of Law* (2011), esp. at 153, 159–160.

5 About this problem in practice, and concerning the question of legitimacy, see Davis, Kingsbury and Merry, “Indicators as a Technology of Global Governance“, 46 *Law & Society Review* (2012), 71–104; von Bogdandy and Goldmann, “The Exercise of International Public Authority through National Policy Assessment: The OECD’s PISA Policy as a Paradigm for a New International Standard Instrument“, 5 *International Organizations Law Review* (2008), 241–298; Krever, “Quantifying Law: Legal Indicator Projects and the Reproduction of Neoliberal Common Sense“, 34 *Third World Quarterly* (2013), 131–150; Rosga and Satterthwaite, The Trust in Indicators: Measuring Human Rights, 27 *Berkeley Journal of International Law* (2009), 253–315.

6 Botero, Nelson and Pratt, op. cit. *supra* note 4, 159. In general see Saltelli, “Composite Indicators between Analysis and Advocacy“, 81 *Social Indicators Research* (2006), 65–77.

subestimar este carácter explicativo al momento de reflexionar en torno al surgimiento de los señalados índices, porque esta simplificación contribuye de manera importante a fortalecer el control democrático de la actuación las autoridades. 2) Los índices también son frecuentemente considerados criterios de evaluación externos en debates que tratan acerca de reformas, o bien de los procesos de evaluación de desempeño del gobierno.<sup>4</sup> Debido a esto, organizaciones internacionales y organizaciones no-gubernamentales usan índices para promover y propagar la adopción de buenas prácticas, mediante la comparación de resultados en diferentes países. Usualmente, países ejemplares obtienen resultados en lo más alto de la escala utilizada por estas organizaciones para efectuar la medición.<sup>5</sup> Un efecto colateral de esta aproximación se produce cuando un gobierno, con el fin de obtener un mejor resultado en sus índices, adopta medidas conducentes a ello, aun cuando las mismas no confronten necesariamente los problemas de fondo realmente existentes.<sup>6</sup> 3) Los índices de estado de derecho permiten evidenciar la operatividad *de facto* del ordenamiento jurídico (esto es, permiten apreciar el funcionamiento del derecho en la realidad, más allá de lo señalado en los libros o la teoría). Aquellas mediciones también permiten exhibir el alcance de las mejoras y de los deterioros que el ordenamiento puede experimentar en su funcionamiento y, cosa muy importante, lo hacen de una manera objetiva, desestimando con ello que las conclusiones obtenidas tras la respectiva evaluación representen “tan sólo una mera opinión”. De igual manera, los índices de estado de derecho

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4 Botero, Nelson y Pratt, “Indices and Indicators of Justice, Governance, and the Rule of Law: An Overview”, 3 *Hague Journal on the Rule of Law* (2011), especialmente en las pp. 153, 159–160.

5 Acerca de este problema, en la práctica, y en lo relacionado con la cuestión acerca de la legitimidad, véase: Davis, Kingsbury y Merry, “Indicators as a Technology of Global Governance”, 46 *Law & Society Review* (2012), 71–104; von Bogdandy y Goldmann, “The Exercise of International Public Authority through National Policy Assessment: The OECD’s PISA Policy as a Paradigm for a New International Standard Instrument”, 5 *International Organizations Law Review* (2008), 241–298; Krever, “Quantifying Law: Legal Indicator Projects and the Reproduction of Neoliberal Common Sense”, 34 *Third World Quarterly* (2013), 131–150; Rosga y Satterthwaite, The Trust in Indicators: Measuring Human Rights, 27 *Berkeley Journal of International Law* (2009), 253–315.

6 Botero, Nelson y Pratt, op. cit. *supra* nota 4, 159. En general, véase: Saltelli, “Composite Indicators between Analysis and Advocacy”, 81 *Social Indicators Research* (2006), 65–77.

(if well done) in a transparent and controllable way.<sup>7</sup> 4) Finally, economists need quantitative data in order to test political-economical correlations (for example between the rule of law and economic performance), therefore the characteristics of legal systems need to be quantified.<sup>8</sup>

The challenge is that in all these cases we want to measure a phenomenon that is not directly observable (rule of law for example).<sup>9</sup> Fortunately, statistics has several methods to handle this, and over the coming pages we will present this approach, without delving too deep into the mathematical details. We focus on the measurement of the rule of law, but the fundamental methodological problems are similar in the

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7 See, e.g., Fukuda-Parr, Lawson-Remer and Randolph, *Fulfilling Social and Economic Rights* (OUP, 2015), at 17, who provide a measurement approach of social and economic rights and “find some surprising and counterintuitive relationships between rights fulfillment, on the one hand, and democratic governance, civil and political rights, social spending, economic growth, gender equality, and legal commitments, on the other.” Cf on guidance of how to construct quantitative analysis in the field of human rights law, Strømme Lile, “Lost in operationalisation: developing legally relevant indicators, questions and benchmarks”, 21 *The International Journal of Human Rights* (2017), 1378–1400; as well as Fariss and Dancy, *Measuring the Impact of Human Rights: Conceptual and Methodological Debates*, 13 *Annual Review of Law and Social Science* (2017), 273–294 synthesizing theoretical approaches on human rights with theories of measurement, and differentiating a factualist, constructivist, and a constitutive approach. See also for a major database on all human rights recommendations that are outstanding against EU Member States, the EU Fundamental Rights Information System: <<https://fra.europa.eu/en/databases/efris/>>, (last visited 7 March 2022); cf also the data provided by CIRI: <<http://www.humanrightsdata.com/p/data-documentation.html>>, (last visited 7 March 2022); or Kochenov and Lindeboom (Eds.), *Kálin and Kochenov’s Quality of Nationality Index. An Objective Ranking of the Nationalities of the World* (Hart, 2020).

8 Erkkilä, Peters and Piironen, “Politics of Comparative Quantification: The Case of Governance Metrics”, (2016) *Journal of Comparative Policy Analysis: Research and Practice*, 319–328.

9 Kaufmann, Kraay and Mastruzzi, “The Worldwide Governance Indicators: Methodology and Analytical Issues”, 3 *Hague Journal on the Rule of Law* (2011), 220: “inherently unobservable nature”.

reúnen un importante número de datos -entre ellos, opiniones de expertos autorizados-, que (si están correctamente contruidos) permiten su manejo de manera transparente y controlable.<sup>7</sup> 4) Finalmente, los economistas necesitan datos cuantitativos para evaluar las correlaciones político-económicas (por ejemplo, aquellas que existen entre el grado de realización del estado de derecho en un país y el desempeño económico de aquel). Bajo este prisma, las características de los ordenamientos jurídicos necesitan ser cuantificadas.<sup>8</sup>

El desafío que presenta el uso de índices para medir ciertos aspectos del ordenamiento jurídico es que, a través de su aplicación, se busca medir un fenómeno que no resulta directamente observable (por

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7 Véase, por ejemplo, Fukuda-Parr, Lawson-Remer y Randolph, *Fulfilling Social and Economic Rights* (OUP, 2015), p. 17, quien ofrece un mecanismo de medida para acercarse al estudio de los derechos económicos y sociales “encontrando sorprendentes y contraintuitivas relaciones entre la realización de los derechos, por un lado, y la existencia de gobiernos democráticos, derechos civiles y políticos, gasto social, crecimiento económico, igualdad de género, y compromiso con la legalidad, por el otro”. Al respecto, compárese con las orientaciones proveídas para construir análisis cuantitativos en materia de derechos humanos: Strømme Lile, “Lost in operationalisation: developing legally relevant indicators, questions and benchmarks”, 21 *The International Journal of Human Rights* (2017), 1378–1400; y, también en: Fariss y Dancy, Measuring the Impact of Human Rights: Conceptual and Methodological Debates, 13 *Annual Review of Law and Social Science* (2017), 273–294, texto que sintetiza aproximaciones teóricas hacia los derechos humanos con teorías acerca de la medición empírica, y explica las diferencias entre la adopción de aproximaciones factualistas, constructivistas y constitutivas. Ver también, para disponer de una importante base de datos acerca de todas las recomendaciones recibidas en materia de derechos humanos por parte de los Estados integrantes de la Unión Europea, el sistema de información de la Unión Europea acerca de los derechos fundamentales: <<https://fra.europa.eu/en/databases/efris/>>, (última visita: 7 marzo 2022); compárese aquel con el sistema de información proveído por CIRI: <<http://www.humanrightsdata.com/p/data-documentation.html>>, (última visita: 7 marzo 2022); o con Kochenov y Lindeboom (Eds.), *Kälén and Kochenov's Quality of Nationality Index. An Objective Ranking of the Nationalities of the World* (Hart, 2020).

8 Erkkilä, Peters y Piironen, “Politics of Comparative Quantification: The Case of Governance Metrics”, (2016) *Journal of Comparative Policy Analysis: Research and Practice*, 319–328.

case of other indices measuring legal systems too.<sup>10</sup>

Quantification is not part of the traditional toolbox of a lawyer,<sup>11</sup> and the attitude of lawyers toward statistical methods is also ambiguous, to say the least.<sup>12</sup> On occasions they underestimate the indices because of the extent of simplification (or even discredit them, based on some unlikely outcomes), but at the same time they also admire the unintelligible mathematical models. In the present paper, we would like to find the golden mean between these two extreme approaches, by using the indices as important tools and as additional information for the better understanding of the overall view, while treating them with precaution and critique.

A remark on terminology: by indicator we refer to a single number or feature, and by index we refer to composite indicators.

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10 E.g. Blank e.a., *Bench Marking in an International Perspective: An International Comparison of the Mechanisms and Performance of the Judiciary System* (2004) <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Benchmarking.pdf>>, (last visited 7 March 2022).

11 Indices can be useful in the field of comparative law too, see Michaels, “Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law”, (2009) *American Journal of Comparative Law*, 765–796. But lawyers are usually cautious towards this approach. Other legal academics, linked to an underscoring system, used to emphasise the methodological shortcomings of the indices, like Fauvarque-Cosson and Kerhuel, “Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law”, 57 *American Journal of Comparative Law* (2009), 811–830.

12 See only the example given by Lile op. cit. *supra* note 7, p. 1379 referring, e.g., to research by Sano and Thelle, “The Need for Evidence-Based Human Rights Research” in Coomans, Grünfeld and Kamminga (Eds.), *Methods of Human Rights Research* (Intersentia, 2009), pp. 91–110, at 96 who point out that the papers published in the *Human Rights Quarterly* and the *Netherlands Quarterly of Human Rights* (between 2005 and 2007) do not use statistical analyses at all.

ejemplo, el estado de derecho).<sup>9</sup> Afortunadamente, las ciencias estadísticas disponen de diversos métodos para conducirse en este tipo de situaciones. En las páginas que siguen a continuación, se expondrá respecto de aquellos métodos, sin profundizar demasiado en los detalles matemáticos de los mismos. En este sentido, nuestro estudio se centrará solamente en la manera cómo es mensurado el grado de realización de las exigencias del estado de derecho en una sociedad. Ello, pese a que los problemas metodológicos que presenta la medición de índices de estado de derecho resultan similares a las dificultades que surgen al momento de medir otros índices acerca del funcionamiento del ordenamiento jurídico.<sup>10</sup>

La cuantificación no es parte de las herramientas que tradicionalmente dispone un abogado,<sup>11</sup> y la actitud del abogado hacia los métodos estadísticos es también ambigua, por decir lo menos.<sup>12</sup> En ciertas ocasiones, los abogados subestiman los índices debido al grado de simplificación que supondría su aplicación (o, incluso, los desacreditan, basándose en alguna consecuencia poco probable) pero, al mismo tiempo, también admiran la

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9 Kaufmann, Kraay y Mastruzzi, “The Worldwide Governance Indicators: Methodology and Analytical Issues“, 3 *Hague Journal on the Rule of Law* (2011), 220: “de inherente naturaleza inobservable”.

10 Por ejemplo, Blank, *Bench Marking in an International Perspective: An International Comparison of the Mechanisms and Performance of the Judiciary System* (2004) <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Benchmarking.pdf>>, (última visita, 7 marzo 2022).

11 Los índices también pueden ser de mucha utilidad en el ámbito del derecho comparado. Véase: Michaels, “Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law“, (2009) *American Journal of Comparative Law*, 765–796. Sin embargo, en general, los abogados son cautelosos respecto de esta aproximación. Otros académicos, vinculados a otros sistemas de análisis, suelen enfatizar los problemas metodológicos de los índices, como: Fauvarque-Cosson y Kerhuel, “Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law“, 57 *American Journal of Comparative Law* (2009), 811–830.

12 Véase tan solo el ejemplo ofrecido por Lile op. cit. *supra* nota 7, p. 1379 refiriéndose, por ejemplo, a la investigación conducida por Sano y Thelle, “The Need for Evidence-Based Human Rights Research” in Coomans, Grünfeld y Kamminga (Eds.), *Methods of Human Rights Research* (Intersentia, 2009), pp. 91–110, p. 96, quien concluye que los artículos publicados en el *Human Rights Quarterly* y el *Netherlands Quarterly of Human Rights* (entre 2005 y 2007) no utilizan ningún tipo de análisis estadístico.

## 2. Methodological steps

In this part we present the methodological questions based on the legal literature and on the OECD Handbook on Constructing Composite Indicators (2008).<sup>13</sup> The main rule is that the design of the index must be transparent, and the methodological choices must be grounded, otherwise the indices can serve pre-established policies.<sup>14</sup>

First, we have to note that some steps of the index-building presuppose a thorough knowledge of legal doctrine (e.g. conceptualisation), and other steps require expertise in working with quantitative data (e.g. handling and aggregating data). As there are only a few experts who excel at both fields, index-building is usually carried out via team-based work, based on the co-operation of legal experts and data experts, even if they sometimes speak entirely different languages.

### 2.1 Conceptualisation

Before starting the construction of the index, we should

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13 OECD Handbook on Constructing Indicators (2008) 20–21; <<http://www.oecd.org/std/42495745.pdf>>, (last visited 7 March 2022).

14 OECD Handbook on Constructing Indicators (2008) 13–14. See on this also Uruña, “Indicators and the Law A Case Study of the Rule of Law Index”, in Merry, Davis and Kingsbury (Eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and the Rule of Law* (CUP, 2015), pp. 75–102, at 96–97 holding that “Indicators, though, need to be generally perceived as nonpolitical by most of those who are being measured. Otherwise, they would lose most of their appeal.” Yet Uruña also states that “it would be silly to attempt to” prevent the numbers produced by indices “from being used politically”. To the contrary, “influence of an indicator derives from the fact that it is used by policymakers: otherwise, indicators would remain as a footnote in scholarly journals, with no influence in real life.” However, while he suggests that indices “may be transformed into sites of contestation of the definition of what it means to adhere to the rule of law”, we rather suggest that due to their political implications it is of utmost important to use transparent and rigorous methodology.

ininteligibilidad de determinados modelos matemáticos. En esta presentación, se busca encontrar un punto intermedio entre estas dos aproximaciones extremas, afirmando la utilidad de los índices, en cuanto herramientas que permiten lograr una mejor comprensión global de la realidad, lo que no impide, a su vez, señalar que esos mismos índices deben ser utilizados con precaución y examinados bajo una mirada crítica.

Una observación terminológica: por *indicador* nos referimos a un único número o característica, y por *índice* nos referimos a indicadores compuestos.

## 2. Etapas metodológicas

En esta sección se presentarán las preguntas metodológicas de acuerdo con los criterios establecidos en la literatura jurídica aplicable, y en conformidad a los estándares contenidos en el *OECD Handbook on Constructing Composite Indicators (2008)*.<sup>13</sup> La regla principal es que el diseño del índice debe ser transparente y las decisiones metodológicas deben encontrarse debidamente fundamentadas. De lo contrario, los índices pueden estar al servicio de políticas preestablecidas.<sup>14</sup>

Primero, debemos hacer notar que, tratándose de la construcción

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13 OECD Handbook on Constructing Indicators (2008) 20–21; <<http://www.oecd.org/std/42495745.pdf>>, (last visited 7 March 2022).

14 OECD Handbook on Constructing Indicators (2008) 13–14. Acerca de este punto, véase también: Uruña, “Indicators and the Law A Case Study of the Rule of Law Index”, en: Merry, Davis y Kingsbury (Eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and the Rule of Law* (CUP, 2015), pp. 75–102, en pp. 96–97 se sostiene que “los indicadores, por tanto, necesitan ser generalmente percibidos como no-políticos por la mayoría de quienes van a participar de la medición. De otra forma, ellos perderían por completo su atractivo”. Sin embargo, Uruña también precisa que “sería absurdo pretender” que las cifras producidas por los índices “no sean susceptibles de ser utilizadas políticamente”. Por el contrario, “la influencia de un indicador se deriva del hecho que es utilizado por quienes elaboran las políticas públicas: de otra forma, los indicadores se convertirían en meras referencias ubicadas por los autores al pie de sus artículos académicos, con ningún impacto en la vida real”. Sin embargo, mientras el autor sugiere que los índices “podrían ser convertirse en espacios de discusión acerca de lo que significa adherir al estado de derecho”, nosotros sugerimos que, debido a las implicancias políticas de los índices, es de la mayor importancia utilizar una metodología transparente y rigurosa.



clarify what we want to measure.<sup>15</sup> Babbie, quoting Kaplan, places measurable things into three categories: 1) direct observables like the number of seats in a parliament, 2) indirect observables, e.g. minutes of corporate board meetings which only convey indirect information on what actually happened, 3) and constructs or theoretical creations, such as IQ, or government performance.<sup>16</sup> Lawyers have a special expertise in the latter field: one of the main parts of a lawyer's work relates to conceptual analysis.<sup>17</sup> If we want to measure the rule of law, we have to define it.

The exact meaning of the rule of law as a term is, however, contested.<sup>18</sup> It is mostly defined as a list of requirements or legal techniques that aim at inhibiting the arbitrary use of (state) power.<sup>19</sup> Most characteristically, authors differentiate between formal-procedural (or thin) and material-substan-

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15 For our topic see, e.g., Jørgen and Skaaning, *The Rule of Law: Definitions, Measures, Patterns and Causes* (Palgrave, 2014), pp. 13–27.

16 Babbie, *The Practice of Social Research*, 13<sup>th</sup> ed. (Wadsworth Cengage Learning, 2013), pp. 168–169; Kaplan, *The Conduct of Inquiry: Methodology for Behavioral Science* (Chandler Publishing Company, 1964), pp. 54–56.

17 Jakab, “What makes a good lawyer?“, 62 *Zeitschrift für öffentliches Recht* (2007), 275–287.

18 For the difficulty to clearly delineating the values enshrined in Article 2 TEU, see for instance Lando Kirchmair, “Demokratische Legitimität, die EU-Rechtsstaatlichkeitskrise und Vorüberlegungen zu einer transnationalen Gewaltengliederung“, (2019) 6 (2) *Zeitschrift für praktische Philosophie*, pp. 171–212.

19 See for such an understanding also the most recent rule of law report of the Commission, COM(2020) 580 final, 30 September 2020 Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, available at [https://ec.europa.eu/info/sites/info/files/communication\\_2020\\_rule\\_of\\_law\\_report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication_2020_rule_of_law_report_en.pdf), p. 1.

de los índices, ciertas etapas suponen un conocimiento exhaustivo de la doctrina jurídica (por ejemplo, la fase de conceptualización). Mientras tanto, existen otras etapas en las cuales la construcción de los índices supondrá disponer de habilidades para el trabajo con datos cuantitativos (por ejemplo, el manejo de la agregación de datos). En cuanto sólo existen unos pocos expertos que sobresalen en ambos campos, la construcción de índices generalmente será llevada a cabo por equipos de trabajo que, conformados por expertos jurídicos y estadísticos, deberán cooperar entre sí, incluso si en ocasiones hablan idiomas distintos.

## 2.1 Conceptualización

Antes de comenzar la construcción de un índice, debemos aclarar qué es lo que queremos medir.<sup>15</sup> Babbie, citando a Kaplan, sitúa las cosas susceptibles de medición en tres categorías: 1) aquellas *observables directas*, como el número de asientos en un parlamento, 2) aquellas *observables indirectas*, como los minutos durante los cuales transcurre una junta corporativa, los que únicamente proveen información indirecta sobre lo que pasó efectivamente en ella, 3) y las que consisten en *constructos* o *creaciones teóricas*, como el IQ o el desempeño de un gobierno.<sup>16</sup> Los abogados tienen una pericia especial en este último campo. En efecto, parte de las responsabilidades propias del trabajo de un abogado está vinculada al desarrollo de análisis conceptuales.<sup>17</sup> En este sentido, si queremos medir el estado de derecho, primero tenemos que definirlo.

Sin embargo, el significado exacto del concepto de estado de derecho es una cuestión aún en disputa.<sup>18</sup> La mayor parte de la literatura lo define como una lista de requerimientos o técnicas

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15 En relación con este tema, véase, por ejemplo: Jørgen y Skaaning, *The Rule of Law: Definitions, Measures, Patterns and Causes* (Palgrave, 2014), pp. 13–27.

16 Babbie, *The Practice of Social Research*, 13<sup>th</sup> ed. (Wadsworth Cengage Learning, 2013), pp. 168–169; Kaplan, *The Conduct of Inquiry; Methodology for Behavioral Science* (Chandler Publishing Company, 1964), pp. 54–56.

17 Jakab, “What makes a good lawyer?”, 62 *Zeitschrift für öffentliches Recht* (2007), 275–287.

18 Acerca de las dificultades para claramente delinear los valores contenidos en el artículo 2º del Tratado de la Unión Europea, véase, por ejemplo: Lando Kirchmair, “Demokratische Legitimität, die EU-Rechtsstaatlichkeitskrise und Vorüberlegungen zu einer transnationalen Gewaltengliederung“, (2019) 6 (2) *Zeitschrift für praktische Philosophie*, pp. 171–212.

tive (or thick) requirements.<sup>20</sup> Somewhat simplistically, the formal-procedural side includes such aspects as the stability of legal rules, compliance and fair enforcement, whereas the material-substantive side includes foremost fundamental rights, as well as checks and balances. It is not possible and not necessary to enter into debates over the meaning of the rule of law here.<sup>21</sup> Instead, we need to be aware of the structure of the concept as a list of requirements, and its anti-arbitrariness as a defining goal.

The various concrete definitions that are used by the various rule of law indices are usually based on legal-doctrinal opinions. If the majority of this legal-doctrinal professional community (constitutional lawyers of the relevant discourse, for instance) finds the definition acceptable (e.g. because it is based on authoritative legal documents), the definition seems to be appropriate.<sup>22</sup> We can, of course, encounter numerous

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20 Compare, e.g. May and Winchester (eds.), *Handbook on the rule of law* (Edward Elgar 2018), ch. 1; Palombella, The Rule of Law as an Institutional Ideal, in: L. Morlino and G. Palombella (eds.), *Rule of law and democracy: Inquiries into internal and external issues* (Brill 2010), pp. 4–37; Peerenboom, Human rights and rule of law: What's the relationship, *Georgetown Journal of International Law* 36 (3) (2005), pp. 809–945; Rodriguez, McCubbins, and Weingast, The rule of law unplugged. *Emory LJ* 59 (2009), pp. 1455-1494; Tamanaha, *On the rule of law: History, politics, theory* (Cambridge University Press 2004); Zimmermann, The rule of law as a culture of legality: Legal and extra-legal elements for the realization of the rule of law in society, *ELaw J.*, 14 (2007), pp. 10; a good overview by Timmer, Concepts of human rights, democracy, and the rule of law: A literature review, European Commission, available at <http://www.fp7-frame.eu/frame-reps-3-1/2013> (last visited 7 March 2022).

21 On these conceptual debates see for instance: Jakab, *European Constitutional Language* (Cambridge University Press 2016); Møller and Skaaning, *Requisites of Democracy. Conceptualization, Measurement, and Explanation* (Routledge 2011); for various causal relationships see Rigobon and Rodrik, Rule of Law, Democracy, Openness. And Income: Estimating Interrelationships, National Bureau of Economic Research (NBER) 2004, Nr. 10750, available at [www.nber.org/papers/w10750.pdf](http://www.nber.org/papers/w10750.pdf) (last visited 7 March 2022).

22 Saisana/Saltelli, op. cit. *supra* note 2, p. 249.

legales que apuntan a inhibir el uso arbitrario del poder estatal.<sup>19</sup> De manera característica, los autores distinguen entre los requerimientos formales-procedimentales (*thin requirements*) y materiales-sustantivos (*thick requirements*) de estado de derecho.<sup>20</sup> En términos algo simplistas, es posible señalar que las exigencias formales-procedimentales dicen relación con aspectos tales como la estabilidad de las normas jurídicas, la observancia de las mismas y su aplicación. Mientras tanto, los requerimientos materiales-sustantivos incluyen las exigencias asociadas a los derechos fundamentales, así como la existencia de un sistema institucional de frenos y contrapesos. En esta presentación no es posible, y tampoco resulta necesario, debatir en torno a la significación que es posible atribuir al concepto de estado de derecho.<sup>21</sup> Para el desarrollo del tema objeto de esta presentación basta con asumir que el estado de derecho representa un listado de requerimientos, y que el cumplimiento de los mismos tiene como objetivo definitorio el prevenir situaciones

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19 Para una comprensión como la señalada, véase el más reciente reporte de la Comisión acerca de estado de derecho, COM(2020) 580 final, 30 septiembre 2020 Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, disponible en: [https://ec.europa.eu/info/sites/info/files/communication\\_2020\\_rule\\_of\\_law\\_report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication_2020_rule_of_law_report_en.pdf), p. 1.

20 Compare, por ejemplo: May y Winchester (eds.), *Handbook on the rule of law* (Edward Elgar 2018), cap. 1; Palombella, The Rule of Law as an Institutional Ideal, en: L. Morlino y G. Palombella (eds.), *Rule of law and democracy: Inquiries into internal and external issues* (Brill 2010), pp. 4–37; Peerenboom, Human rights and rule of law: What's the relationship, *Georgetown Journal of International Law* 36 (3) (2005), pp. 809–945; Rodríguez, McCubbins, y Weingast, The rule of law unplugged. *Emory LJ* 59 (2009), pp. 1455-1494; Tamanaha, *On the rule of law: History, politics, theory* (Cambridge University Press 2004); Zimmermann, The rule of law as a culture of legality: Legal and extra-legal elements for the realization of the rule of law in society, *ELaw J.*, 14 (2007), pp. 10; para una complete revision, véase: Timmer, Concepts of human rights, democracy, and the rule of law: A literature review, European Commission, disponible en: <http://www.fp7-frame.eu/frame-reps-3-1/2013> (última visita, 7 marzo 2022).

21 Acerca del contenido de estos debates conceptuales, véase, por ejemplo: Jakab, *European Constitutional Language* (Cambridge University Press 2016); Møller y Skaaning, *Requisites of Democracy. Conceptualization, Measurement, and Explanation* (Routledge 2011); para el estudio de varias relaciones causales, véase: Rigobon y Rodrik, Rule of Law, Democracy, Openness. And Income: Estimating Interrelationships, National Bureau of Economic Research (NBER) 2004, Nr. 10750, disponible en: [www.nber.org/papers/w10750.pdf](http://www.nber.org/papers/w10750.pdf) (última visita, 7 marzo 2022).

terminological debates,<sup>23</sup> also about the concept of the rule of law (and because of the contested nature of values, we cannot expect a full consensus on this matter),<sup>24</sup> but the general advice is that we should use a mainstream definition (as far as there possible) with a small grain of caution. Because of the contested nature of the concept of the rule of law, the difficult task of finding a “common” opinion among experts can be shortcut by reference to official documents (e.g., by the EU, the UN, the Council of Europe, or the European Commission).

Consequently, some indices diverge concerning the exact definition used, a problem that we will discuss later. Legal indices usually measure the de facto characteristics of a system, so a well-crafted and substantively appealing law with a corrupt, oppressive or ineffective implementation will underscore on these scales.<sup>25</sup>

## 2.2 Selecting data

Once it is clear what shall be measured, the data for this measurement have to be found. The quality of a given legal

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23 On this phenomenon in general (lack of consensus and problems of definition in the case of composite indicators) see for example Cherchye, Lovell, Moesen and Van Puyenbroeck, “One Market, One Number? A Composite Indicator Assessment of EU Internal Market Dynamics“, 51 *European Economic Review* (2007), 749–779.

24 Botero, Nelson and Pratt, op. cit. *supra* note 4, p. 166 quoting Saisana and Saltelli, op. cit. *supra* note 2, p. 248: “*composite indicators are value laden constructs*”. On the necessary political content of indices, see also Urueña, “Indicators and the Law: A Case Study of the Rule of Law Index“, in Merry, Davis and Kingsbury, op. cit. *supra* note 14, pp. 543–584.

25 As a bad example, we can mention the *Global Right to Information Rating* (<<http://www.rti-rating.org>>, [last visited 4 October 2020]), in which two NGO’s analysed the situation relating to the right to information, but with rather surprising results: Moldova outscored the United Kingdom, and Russia performed better than the United States. Despite any disclaimer (such as that the implementation might differ from the written rule), it is a clear example of how unelaborated goal-setting and conceptualisation can make indices completely useless.

de arbitrariedad.

Las diferentes definiciones que son utilizadas para construir los distintos índices de estado de derecho están comúnmente basadas en opiniones jurídico-doctrinales. En este sentido, si la mayoría de la comunidad jurídica (abogados constitucionalistas representativos, por ejemplo) considera como aceptable una determinada definición (por ejemplo, porque está fundada en instrumentos legalmente vinculantes), la misma parecerá apropiada.<sup>22</sup> Por supuesto que podremos encontrar numerosos debates terminológicos<sup>23</sup> y discusiones acerca del concepto de estado de derecho (y, debido a la naturaleza disputada de los valores, no podemos aspirar a alcanzar un consenso pleno en la materia),<sup>24</sup> pero la recomendación es que se utilice una definición generalmente aceptada (hasta donde sea posible) con un pequeño grado de precaución. Debido a la naturaleza disputada del concepto de estado de derecho, la difícil tarea de encontrar una opinión “común” entre los expertos puede ser facilitada a través de la referencia a documentos oficiales (por ejemplo, aquellos emitidos por la Unión Europea, las Naciones Unidas, el Consejo de Europa, o la Comisión Europea).

En consecuencia, algunos índices difieren en cuanto a la definición exacta utilizada. Este es un problema respecto del cual se discutirá más tarde. En la generalidad de los casos, los índices jurídicos miden las características *de facto* de un ordenamiento. Esto explica por qué un derecho formalmente bien construido, y atractivo en cuanto a

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22            Acerca de estos debates conceptuales, véase, por ejemplo: Jakab, *European Constitutional Language* (Cambridge University Press 2016); Møller y Skaaning, *Requisites of Democracy. Conceptualization, Measurement, and Explanation* (Routledge 2011); para el estudio de varias relaciones causales, véase: Rigobon y Rodrik, *Rule of Law, Democracy, Openness. And Income: Estimating Interrelationships*, National Bureau of Economic Research (NBER) 2004, Nr. 10750, available at [www.nber.org/papers/w10750.pdf](http://www.nber.org/papers/w10750.pdf) (última visita, 7 marzo 2022).

23            En relación con este fenómeno en general (falta de consenso y problemas respecto de la definición en el caso de los indicadores compuestos), véase, por ejemplo: Cherchye, Lovell, Moesen y Van Puyenbroeck, “One Market, One Number? A Composite Indicator Assessment of EU Internal Market Dynamics”, 51 *European Economic Review* (2007), 749–779.

24            Botero, Nelson y Pratt, op. cit. *supra* nota 4, p. 166 citando a Saisana y Saltelli, op. cit. *supra* nota 2, p. 248: “*indicadores compuestos son construcciones cargadas de valor*”. Respecto del necesario contenido político de los índices, véase también: Urueña, “Indicators and the Law: A Case Study of the Rule of Law Index”, en: Merry, Davis y Kingsbury, op. cit. *supra* nota 14, pp. 543–584.

system cannot be measured directly. Therefore, proxies (approximate data) have to be used: the opinion of experts or that of the public (soft data) or approximate facts (hard data, i.e. the number of registered crimes, the budget of the courts, frequency of the modification of laws, frequency of the condemnation of a State by an international court of human rights).<sup>26</sup>

The main concern about expert opinions is the choice of experts and the subjectivity of their opinions. This is an especially sensitive problem in politically polarised countries.<sup>27</sup> As a (partial) remedy a transparent selection method, which is also well-balanced (in a country with inter-ethnic tensions for instance, the proportion of the experts should reflect the overall ethnic distribution), is preferable. Alternatively, the use of as many experts as possible (by random sampling or with the participation of every available expert) is an appropriate way to address the challenge of selecting experts (selection bias).<sup>28</sup> A further problem is that in case of general questions (which is often characteristic of legal indices), it is not easy to find an expert who is up-to-date in every field (for example, criminal procedure, which is an important constituent of the rule of law, is usually not well known by constitutional lawyers).<sup>29</sup> In several countries, participation brings risks for the expert

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26 Parsons, “Developing Clusters of Indicators: An Alternative Approach to Measuring the Provision of Justice“, 3 *Hague Journal on the Rule of Law* (2011), 170–185, 175–176.

27 The UN Rule of Law Indicators (2011) 1, see <[http://www.un.org/en/peacekeeping/publications/un\\_rule\\_of\\_law\\_indicators.pdf](http://www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf)>, (last visited 7 March 2022). In politically polarised countries, the results of the polls may vary: a popular government can increase trust in independent institutions (like the courts), and vice versa.

28 Gajduscek, “Miben áll, és mérhető-e a kormányzati teljesítmény? (What Is and How to Measure Government Performance?)“, 3 *Politikatudományi Szemle* (2014); 97–116, at 110.

29 On this problem, see *The United Nations Rule of Law Indicators* op. cit. *supra* note 25 24.

sus contenidos, obtendrá resultados deficientes, tras la aplicación de estas escalas, si aquel es implementado de manera corrupta, opresiva o ineficiente.<sup>25</sup>

## 2.2 Seleccionando los datos

Una vez que existe claridad respecto de qué es lo que debe ser medido, es necesario encontrar los datos para llevar a cabo la medición. La calidad de un sistema legal no puede ser medida directamente. Por lo tanto, esta medición exigirá el uso de datos derivados de fuentes próximas aceptables (*proxy data*): la opinión de expertos o del público (*soft data*), o bien aquella derivada de circunstancias conexas (*hard data*, como, por ejemplo: el número de crímenes registrados, el presupuesto asignado a los tribunales, la periodicidad con que se modifican las leyes, o la frecuencia con la que una corte internacional de derechos humanos condena al Estado).<sup>26</sup>

La principal preocupación acerca de las opiniones de los expertos dice relación con la elección de esos expertos y la subjetividad de sus opiniones. Este es un aspecto especialmente sensible en países políticamente polarizados.<sup>27</sup> Con el propósito de resolver el problema señalado, al menos parcialmente, resulta necesario establecer un método de selección de expertos que resulte transparente y suficientemente representativo (por ejemplo: en un país con

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25 Como representativo de un ejemplo incorrecto, es posible mencionar el *Global Right to Information Rating* (<<http://www.rti-rating.org>>, [last visited 4 October 2020]), en el cual dos ONGs analizaron la situación del derecho a la información con sorprendentes resultados: Moldavia disponía de mejores índices que el Reino Unido, y Rusia obtenía mejores resultados que los Estados Unidos. Pese al uso de cualquier descargo de responsabilidad (por ejemplo, que la implementación de las normas jurídicas podría resultar distinta al contenido de las mismas), el estudio en cuestión es un ejemplo claro de cómo la elaboración defectuosa de los objetivos y la conceptualización puede llevar a concluir la total inutilidad de los índices.

26 Parsons, “Developing Clusters of Indicators: An Alternative Approach to Measuring the Provision of Justice“, 3 *Hague Journal on the Rule of Law* (2011), 170–185, 175–176.

27 The UN Rule of Law Indicators (2011) 1, véase: <[http://www.un.org/en/peacekeeping/publications/un\\_rule\\_of\\_law\\_indicators.pdf](http://www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf)>, (last visited 7 March 2022). En países políticamente polarizados, los resultados de las encuestas podrían variar: un gobierno dotado de alta popularidad podría incrementar la confianza en las instituciones independientes del país (como los tribunales), y viceversa.



too (if for example he or she criticises the current regime), even if anonymity is granted, obtaining (unbiased) reports will be more complicated.<sup>30</sup> However, an obvious advantage of acquiring an expert opinion is that wide opinion polls are expensive, hard data are not always available from every single country, and some questions can only be answered by experts.

An important advantage of using opinion polls in the general population is that it also takes into consideration the situation of vulnerable groups. Even though opinion polls can also be biased, if they are professionally, then the situation of these groups can be better represented than in expert opinions and in hard data. A further advantage of survey data is that it can also enlighten the differences between hard data and reality.<sup>31</sup> Unfortunately, however, opinion surveys are expensive, and the questions are limited (as the general population cannot answer very specific questions). Sampling and measurement in no-go zones (in European countries it is less of a problem) and among vulnerable groups is also complicated. Public opinion is also very changeable, especially if it is influenced by the news.<sup>32</sup> A further critique is the limited possibility of cross-country comparison, due to divergent historical mentalities.<sup>33</sup>

Although the use of hard data is objective, the scope of measurement is very limited. A large proportion of our questions cannot be measured even by using proxy hard data (it can also occur that while something is measurable by hard data, there is no data from a given country). We must also be cautious when using available data: 1) sometimes

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30        *The United Nations Rule of Law Indicators* op. cit. *supra* note 25 28.

31        Parsons, op. cit. *supra* note 26, p. 177.

32        Parsons, op. cit. *supra* note 26, p.178.

33        Parsons, op. cit. *supra* note 26, p. 179.

tensiones inter-étnicas, la proporción de expertos debe reflejar la distribución total de las etnias presentes). Alternativamente, el uso de tantos expertos como sea posible (seleccionados al azar o bien permitiendo la participación de todo experto disponible) representa un modo apropiado para abordar el desafío de seleccionar expertos (evitando el sesgo de selección).<sup>28</sup> Un problema adicional es que, tratándose de preguntas generales (cuestión que es usualmente característica de los índices legales), no es fácil encontrar un experto que esté actualizado en todos los ámbitos del Derecho. Por ejemplo, el Derecho Procesal Penal no resulta normalmente conocido por los abogados constitucionalistas, pese a que aquel es un importante elemento de estado de derecho.<sup>29</sup> En varios países, para los expertos, la participación es un riesgo —por ejemplo, si ella o él critican al régimen en el poder—, incluso si el anonimato está garantizado. Ello explica por qué, en estos casos, la obtención de un reporte imparcial podría ser algo aún más complicado de lograr.<sup>30</sup> Sin embargo, la intervención de expertos en el proceso de medición representa una ventaja obvia considerando que las encuestas de opinión amplias son costosas, que no siempre está disponible el *hard data* de cada país, y que algunas preguntas sólo las pueden contestar, precisamente, los expertos.

En general, una ventaja importante de utilizar las encuestas de opinión es que las mismas permiten considerar también la situación de grupos vulnerables. Si bien las encuestas de opinión pueden ser parciales, la situación de aquellos grupos podría ser representada de mejor manera a través esas encuestas que por medio de la opinión de expertos y el *hard data*. Ello, siempre y cuando dichas encuestas sean profesionalmente diseñadas e implementadas. Otra ventaja adicional de los datos obtenidos a través de las encuestas es que ellos pueden ofrecer una luz sobre las diferencias existentes entre el *hard data* y la realidad.<sup>31</sup> Sin embargo, las encuestas de opinión, desafortunadamente, son costosas y el ámbito de las preguntas limitado, debido a que la opinión general no puede responder preguntas muy específicas. El muestreo y la medición en zonas

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28 Gajduscek, “Miben áll, és mérhető-e a kormányzati teljesítmény? (What Is and How to Measure Government Performance?)”, 3 *Politikatudományi Szemle* (2014); 97–116, p. 110.

29 Acerca de este problema, véase: *The United Nations Rule of Law Indicators* op. cit. *supra* note 25 24.

30 *The United Nations Rule of Law Indicators* op. cit. *supra* note 25 28.

31 Parsons, op. cit. *supra* nota 26, p. 177.

they are corrupted by the authorities (e.g. police sometimes discourage the victims of small crimes where there is limited probability of success, in order to ameliorate statistics). 2) Sometimes, the measured value only has an impact on the question in extreme cases (e.g. the budget of courts on the rule of law). 3) And sometimes, it is not at all obvious whether a boost of an objective value has a positive or negative effect on the phenomenon (the high efficacy of public prosecutors can be indicative of an authoritarian judiciary tradition, while low efficacy can be indicative of incompetent prosecutors) (4) And finally, the partial nature of the data (i.e. objective data are only available on certain special questions, not on all questions) can lead to arbitrary selection.

Some indices combine the different sources, making the results more robust (see for example the WJP-Index below), and the data sources are also cross-checked (via a method known as triangulation).

## 2.3 Statistical analysis

There are different types of data: yes or no (binary data: 1 or 0), points on a given scale<sup>34</sup> (ordinal data, for instance, the experts of the Freedom House evaluate the questions on a scale ranging from 1 to 7), percentages (metric data, e.g. trust in institutions in the Eurobarometer), etc. In order to put all the data in one final index, we have to normalise (homogenise) them.<sup>35</sup> For cross-country comparison, we have to adjust the

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34           Setting levels of measurement is in itself problematic: do we use nominal, ordinal, interval or ratio measure? See Babbie, op. cit. *supra* note 16, pp. 155–158, 180–184.

35           E.g.: transforming a 0-1 scale into 0-100 means that 1 will be 100, a 0-4 scale into 0-100 means that the value of 1 will be 25, 2 is equal to 50, 3 is 75 and 4 is 100. Another possible method is the standardisation, i.e. the rescaling of variables in order to obtain a zero mean and a standard deviation of one.

peligrosas (*no-go zones*) —en países europeos esto es un problema menor— y entre grupos vulnerables también es problemático. La opinión pública también es muy variable, especialmente si está influida por las noticias emitidas por los medios.<sup>32</sup> Una crítica adicional es lo limitada que es la posibilidad de hacer comparaciones entre países, debido a lo divergente de las mentalidades históricas.<sup>33</sup>

Aunque el uso de *hard data* es objetivo, el alcance de la medición es muy limitado. Una gran proporción de nuestras preguntas no puede ser medida ni siquiera utilizando un *proxy* de *hard data*; también puede ocurrir que mientras algunas son medibles por *hard data*, no hay datos disponibles de un determinado país. Se debe actuar con cautela cuando se utilizan los datos disponibles: 1) a veces son corrompidos por las autoridades; por ejemplo, algunas veces, la policía en los países desincentiva la denuncia de las víctimas de crímenes menores, en los que existen limitadas posibilidades de éxito para investigar, con el fin de mejorar las estadísticas. 2) A veces, el valor medido sólo tiene impacto en la pregunta en casos extremos; por ejemplo, el presupuesto de los tribunales en el estado de derecho. 3) Y a veces, no es en absoluto obvio si es que el aumento de un valor objetivo tiene un efecto positivo o negativo en un fenómeno; por ejemplo, la alta eficacia de los fiscales puede ser indicativo de una tradición judicial autoritaria, mientras que la baja eficacia puede ser indicativo de fiscales incompetentes. 4) Finalmente, la naturaleza parcial de los datos —por ejemplo, los datos objetivos sólo están disponibles respecto de ciertas preguntas especiales, no de todas ellas— puede llevar a una selección arbitraria.

Algunos índices combinan las diferentes fuentes, logrando resultados más robustos (WJP- Index). En estos casos, se hace una verificación cruzada de las fuentes de los datos, mediante un método conocido como triangulación.

### 2.3 Análisis estadístico

Hay distintos tipos de datos: datos representativos de un sí o no (datos binarios: 1 o 0), puntos en una escala dada<sup>34</sup> (como los datos

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32 Parsons, op. cit. *supra* nota 26, p.178.

33 Parsons, op. cit. *supra* nota 26, p. 179.

34 Definir niveles de medición es un problema en sí mismo: ¿Resultará necesario, por ejemplo, utilizar una medida de ratio nominal, ordinal o de intervalo? Véase: Babbie, op. cit. *supra* nota 16, pp. 155–158, 180–184.

data according to the size of the given country.<sup>36</sup>

There are several statistical methods for dealing with missing data. We can, for instance, simply delete the whole row of data (i.e. if an expert only answers 24 out of 25 questions, we can delete all his or her answers, or we can only leave out the unanswered question). The problem is that 1) the missing data are usually non-random (e.g. some experts are afraid of answering several questions), in this case, simply disregarding the missing answer can bias the result; 2) deleting data can also decrease the reliability of the result (that is an increasing standard error).<sup>37</sup> Therefore, if the quantity of missing data is more than 5%, we can use imputation.<sup>38</sup> If, for example, an expert answered only 24 out of 25 questions, we can deduce her or his 25<sup>th</sup> answer by imputing this answer based on the other answers given by the expert in question. Or we can use the mean of the answers of the other experts, eventually belonging to the same cluster (based on the similar answers). We can also use a variety of other, more complicated statistical methods, and while each of these methods has a different advantage and inconvenience, we can reduce the bias of the outcomes based on these methods.

We have to separately examine the non-arbitrary selection of the indicators, on which the indices are based.<sup>39</sup> Indices

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36 Saisana and Saltelli, op. cit. *supra* note 2, p. 251.

37 Saisana and Saltelli, op. cit. *supra* note 2, p. 252.

38 See Little and Rubin, *Statistical Analysis with Missing Data*, 2<sup>nd</sup> ed. (Wiley, 2002) on filling in for missing values.

39 On this topic, see in detail e.g. about the democracy-indices Müller and Pickel, “Wie lässt sich Demokratie am besten messen? Zur Konzeptqualität von Demokratie-Indizes“, 48 *Politische Vierteljahresschrift* (2007), 511–539. For an overview of various strategies on how to measure democracy, see Seawright, and Collier, “Rival Strategies of Validation: Tools for Evaluating Measures of Democracy”, 47 *Comparative Political Studies* (2013), 111–138. On governance indexes see Gisselquist, “Developing and evaluating governance indexes: 10 questions”, 35 *Policy Studies* (2014), 513–531.

ordinales; los expertos de la *Freedom House* evalúan preguntas en una escala que va del 1 al 7), porcentajes (datos métricos, por ejemplo: confianza en las instituciones en el Eurobarómetro), etc. Para poner todos los datos en un índice final, tenemos que normalizarlos, homogeneizarlos.<sup>35</sup> Para comparaciones entre países, tenemos que ajustar los datos de acuerdo con el tamaño del país en cuestión.<sup>36</sup>

Hay varios métodos estadísticos para tratar con datos faltantes. Por ejemplo, podemos simplemente borrar toda la fila de datos; es decir, si un experto sólo responde 24 de 25 preguntas, podemos borrar todas sus respuestas, o podemos dejar fuera sólo aquellas preguntas que no fueron contestadas. El problema es que 1) la información faltante usualmente no es al azar —por ejemplo: algunos expertos temen responder varias preguntas—, en este caso, simplemente descartar la respuesta faltante puede resultar en un sesgo; 2) borrar los datos también puede disminuir la confiabilidad del resultado (ese es un error estándar creciente).<sup>37</sup> Por lo tanto, si la cantidad de información faltante es más que el 5% del total, podemos acusar esa imputación.<sup>38</sup> Por ejemplo, si un experto responde sólo 24 de 25 preguntas, podemos deducir su respuesta número 25 imputándola, basándose en las otras respuestas que dio el experto en cuestión. O bien, podemos usar la media de las respuestas de otros expertos que eventualmente pertenezcan al mismo grupo (basado en las respuestas similares). También podemos usar una variedad de otros métodos estadísticos más complejos, y si bien cada uno de estos métodos presenta una ventaja y una desventaja, a través de ellos podemos eventualmente reducir el sesgo del resultado.

Tenemos que examinar separadamente la selección no-arbitraria

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35 Por ejemplo: transformar una escala 0-1 en una 0-100 significa que el valor 1 representará 100, una escala 0-4 en una de 0-100 significará que el valor 1 es 25, que 2 será equivalente a 50, que 3 es 75, y que 4 es 100. Otro método posible de aplicar es la estandarización, por ejemplo, *rescaling of variables in order to obtain a zero mean and a standard deviation of one.*

36 Saisana y Saltelli, op. cit. *supra* nota 2, p. 251.

37 Saisana y Saltelli, op. cit. *supra* nota 2, p. 252.

38 Véase: Little y Rubin, *Statistical Analysis with Missing Data*, 2<sup>nd</sup> ed. (Wiley, 2002), acerca de cómo complementar la ausencia de ciertos valores.

based on many but bad indicators (meaning indicators which are actually irrelevant for the concept to be measured) are called “indicator rich but information poor”.<sup>40</sup> We can test this issue by using multivariate analysis. We examine the relation between the indicators, and the impact of them on the final outcome (i.e. on the value of the rule of law index). Besides, we always have to test the influence of the individual variables on the final outcome (i.e. examine robustness).<sup>41</sup>

We also have to deal with outliers, i.e. observations distant from other observations. In many cases, these result from measurement errors. Here too, we can use several statistical methods to handle the problem: we can simply delete the values, use imputation techniques, or introduce natural logarithm, for example, to increase the goodness of fit. Of course, there are some real outliers too. We have to take them into consideration.

Weighting is an important question too. We can sum up the data with the same weight, but some characteristics are more important than others (for instance, concerning the rule of law, it is more important that the police cannot shoot innocent civilians arbitrarily, than the duration of a legal procedure).<sup>42</sup> On the other hand, it is not easy to find an objective method for weighting (due to a lack of knowledge, and consequently,

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40 OECD Handbook on Constructing Indicators (2008), 25.

41 The multivariate analysis mentioned earlier shows the inner correlation structure of the indicators. Analysing robustness on the contrary shows the impact of the indicators and methodological choices (normalisation, weighting) on the index.

42 As an example of a weighted index of the rule of law see for example Tai, “Developing an Index of the Rule of Law: Sharing the Experience of Hong Kong“, 2 *Asian Journal of Comparative Law* (2007), 1–19.

de los indicadores en que los índices están basados.<sup>39</sup> Los índices basados en muchos indicadores *malos* (queriendo decir, indicadores que son de hecho irrelevantes para el concepto que se va a medir) suelen ser llamados “indicador rico, pero información pobre”.<sup>40</sup> Podemos probar este asunto utilizando análisis multivariados. Examinamos la relación entre los indicadores y el impacto de éstos en el resultado final; por ejemplo, sube el valor del índice del estado de derecho. Además, siempre tenemos que probar la influencia de las variables individuales en el resultado final, es decir, examinar la solidez.<sup>41</sup>

También tenemos que lidiar con valores atípicos (*outliers*), por ejemplo, observaciones distantes de otras observaciones. En muchos casos, estos resultan de errores de medición. Aquí también podemos usar distintos métodos estadísticos para manejar el problema: podemos simplemente borrar los valores, usar técnicas de imputación o introducir un logaritmo natural, por ejemplo, para que el ajuste mejore. Por supuesto también hay valores atípicos reales. Debemos tenerlos en consideración.

La decisión acerca si ponderar los resultados representa también una cuestión importante. Podemos sumar los datos con la misma ponderación, pero algunas características son más importantes que otras —por ejemplo, en relación con el estado de derecho, es más importante el hecho de que la policía no pueda disparar arbitrariamente a civiles inocentes que la duración de un

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39           Acercas de este tema, véase en detalle, por ejemplo, sobre los índices de democracia en: Müller y Pickel, “Wie lässt sich Demokratie am besten messen? Zur Konzeptqualität von Demokratie-Indizes“, 48 *Politische Vierteljahresschrift* (2007), 511–539. Para una revisión de varias estrategias acerca de cómo medir una democracia, examínese: Seawright, y Collier, “Rival Strategies of Validation: Tools for Evaluating Measures of Democracy”, 47 *Comparative Political Studies* (2013), 111–138. Para el estudio acerca de índices de gobierno, véase: Gisselquist, “Developing and evaluating governance indexes: 10 questions”, 35 *Policy Studies* (2014), 513–531.

40           OECD Handbook on Constructing Indicators (2008), 25.

41           El análisis multivariado mencionado anteriormente muestra la profunda estructura de correlación de los indicadores. Analizando su solidez, por el contrario, se aprecia el impacto de los indicadores y de las opciones metodológicas adoptadas (normalización, ponderación) en relación con los índices.



due to a lack of consensus between experts).<sup>43</sup> When testing indices without weight, using multivariate analysis, we are only able to change them by adding or deleting indicators. In the case of weighted indicators, we can change the weight too, without deleting the indicator. The underlying method of weighting must be clear and explicit too.<sup>44</sup> In several cases, weighting can be implicit too: if for instance, we build in strongly correlated indicators into the index, this also results in the weighting of the given question.

Instead of weighting, but in order to lower the impact of extreme values on the final index (considering the example above: in order to avoid overscoring legal systems where the police can kill innocent people, but where other institutions are working well), we can use a geometric mean instead of an arithmetic mean. This allows for greater comparability, i.e. the state with the arbitrary police but with a good performance on other scales will not perform better than a similar (slightly underperforming) state without such an extreme value.<sup>45</sup> Instead of using means, we can also use factor analysis, but the description of this method is beyond the framework of the

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43 Saisana and Saltelli, op. cit. *supra* note 2, p. 254 wrote on the subjective character of weighting. Also sceptical toward weighting: The UN Rule of Law Indicators (2011), 5. On the methods of weighting, see the OECD Handbook on Constructing Indicators (2008), 31–33, and Sharpe and Andrews, “An Assessment of Weighting Methodologies for Composite Indicators: The Case of the Index of Economic Well-Being“, CSLS Research Report, No. 2012-10. An example of an index without weights is the Islamic Constitutions Index, see Ahmed and Gouda, “Measuring Constitutional Islamization: The Islamic Constitutions Index“, 38 *Hastings International and Comparative Law Review* (2015), 1–74.

44 Saisana and Saltelli, op. cit. *supra* note 2, p. 255.

45 Saisana and Saltelli, op. cit. *supra* note 2, p. 256. Instead of taking the sum of the values and dividing it by the number of numbers (arithmetic average), we take the  $n$ th root of the product of  $n$  numbers (geometric average).

procedimiento legal.<sup>42</sup> Por otro lado, no es fácil encontrar un método objetivo para ponderar, debido a la falta de conocimiento y consecuentemente debido a la falta de consenso entre los expertos.<sup>43</sup> Cuando se prueban índices sin ponderación, usando análisis multivariable, sólo somos capaces de cambiarlos al añadir o al eliminar indicadores. En el caso de los indicadores ponderados, también podemos cambiar la ponderación sin eliminar el indicador. El método para ponderar que subyace también debe ser claro y explícito.<sup>44</sup> En muchos casos, ponderar también puede ser implícito: por ejemplo, si construimos en el índice indicadores fuertemente correlacionados, esto también resulta en que se pondera la pregunta dada.

En vez de ponderar, pero con el fin de bajar el impacto de valores extremos en el índice final —considerando el ejemplo anteriormente señalado: con el fin de evitar sobrevalorar sistemas legales en los que la policía puede matar gente inocente, pero en los que otras instituciones están funcionando bien—, podemos usar una media geométrica en vez de una media aritmética. Esto permite una mayor comparabilidad, es decir, el Estado con una policía arbitraria, pero con un buen desempeño en otras escalas, no se desempeñará mejor que un Estado similar —pero con un rendimiento ligeramente más bajo— que no tenga un valor tan

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42 Un ejemplo de índice de estado de derecho construido a partir de la ponderación está contenido en: Tai, “Developing an Index of the Rule of Law: Sharing the Experience of Hong Kong”, 2 *Asian Journal of Comparative Law* (2007), 1–19.

43 Saisana y Saltelli, op. cit. *supra* nota 2, p. 254 refiere al carácter subjetivo de la ponderación. También es posible advertir aproximaciones escépticas acerca de la ponderación en: The UN Rule of Law Indicators (2011), 5. Acerca de los métodos de ponderación, véase: OECD Handbook on Constructing Indicators (2008), 31–33, y Sharpe y Andrews, “An Assessment of Weighting Methodologies for Composite Indicators: The Case of the Index of Economic Well-Being”, CSLS Research Report, No. 2012-10. Un índice que no considera la ponderación es aquel contenido en el Índice de Constituciones Islámicas. Véase: Ahmed y Gouda, “Measuring Constitutional Islamization: The Islamic Constitutions Index”, 38 *Hastings International and Comparative Law Review* (2015), 1–74.

44 Saisana y Saltelli, op. cit. *supra* nota 2, p. 255.

present study.<sup>46</sup>

We can also build sub-indices from indicators. This is useful because 1) it can diminish misunderstandings and biases, occurring in the case of using isolated indicators, 2) and we can measure the complex and multi-faceted characteristic of the institutional functions.<sup>47</sup> We can build dimensions from sub-indices. These are on a higher level of abstraction than the indicators, but on a lower level compared to the final index: for example, in the case of the rule of law, the efficiency of the justice system, or that of the police. We also can statistically test the relation between the dimensions,<sup>48</sup> also in order to measure the impacts on the final index. Here we can use factor analysis as well or principal component analysis or Cronbach's alpha test.<sup>49</sup> Thereafter we can correct the list of indicators, or the weights and the classifications into sub-indices (so that they measure similar but not identical things, with an existent but not full correlation). While building up the final index, we have to allow for the possibility of decomposition too, so that we can deduce from it the basic data and indicators.<sup>50</sup>

## 2.4 Presenting, interpreting and comparing results

The results are better represented in charts, but textual information is also needed for their interpretation. We have to keep in mind that the numbers in themselves can only

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46 See in detail Rosenthal and Voeten, "Measuring Legal Systems", 35 *Journal of Comparative Economics* (2007), 711–728.

47 The UN Rule of Law Indicators (2011), 3.

48 Voigt, "How to Measure the Rule of Law", (2012) *Kyklos*, 262–284.

49 OECD Handbook on Constructing Indicators (2008), 25–27, 63–82.

50 OECD Handbook on Constructing Indicators (2008), 16.

extremo.<sup>45</sup> En lugar de utilizar medias, también podemos usar análisis factorial, pero la descripción de este método va más allá de la estructura del presente estudio.<sup>46</sup>

También podemos construir subíndices a partir de indicadores. Esto es útil porque 1) puede disminuir los malentendidos y sesgos que ocurren en el caso de usar indicadores aislados, 2) y podemos medir las características complejas y multifacéticas de las funciones institucionales.<sup>47</sup> Podemos construir dimensiones a partir de subíndices. Estos están en un nivel de abstracción más alto que los indicadores, pero en un nivel más bajo comparados con el índice final: por ejemplo, en el caso del estado de derecho, la eficiencia del sistema judicial o de la policía. También podemos probar estadísticamente la relación entre las dimensiones,<sup>48</sup> también con el fin de medir los impactos en el índice final. Aquí podemos usar análisis factoriales también, o análisis de componentes principales, o la prueba alfa de Cronbach.<sup>49</sup> Luego podemos corregir la lista de indicadores, o las listas y las clasificaciones en subíndices, para que midan cosas similares, pero no idénticas, con una correlación existente, pero no total. Mientras que construimos el índice final, también tenemos que dar espacio a la posibilidad de descomposición, para que podamos deducir de ello los datos básicos y los indicadores.<sup>50</sup>

## 2.4 Presentando, interpretando y comparando resultados

Los resultados quedan mejor representados en tablas, pero también se requiere información textual para su interpretación. Debemos tener presente que los números en sí mismos sólo

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45 Saisana y Saltelli, op. cit. *supra* nota 2, p. 256. En vez de considerar la suma total de los valores para luego dividirlos por el número de los números (proporción aritmética), se ha preferido considerar la nth raíz del producto de n números (proporción geométrica).

46 Véase, en detalle: Rosenthal y Voeten, “Measuring Legal Systems“, 35 *Journal of Comparative Economics* (2007), 711–728.

47 The UN Rule of Law Indicators (2011), 3.

48 Voigt, “How to Measure the Rule of Law“, (2012) *Kyklos*, 262–284.

49 OECD Handbook on Constructing Indicators (2008), 25–27, 63–82.

50 OECD Handbook on Constructing Indicators (2008), 16.

represent correlation.<sup>51</sup> In order to establish a causal relation on the basis of this, the content needs to be considered further.

Visualisation of the results with graphs, for example, can be instructive, too. These can influence (or manipulate) interpretation and understanding, too.<sup>52</sup> The results of an analysis extended to multiple countries can be represented on a map, or the countries can be classified into clusters. If there are other indices on the same question, we should compare them with our own index, and we should also explain the differences (low correlation).

### 3. International Indices on the Rule of Law

Here, we present four internationally recognised indices on legal systems.<sup>53</sup> These are the indices of the Freedom House (“Freedom in the World”, FIW), the Bertelsmann Stiftung (“Bertelsmann Transformation Index”, BTI), the World Bank (“Worldwide Governance Indicators”, WGI), and the World

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51 A well-known example *ad absurdum* on the difference between strong correlation and causality: according to superstition, the presence of storks can boost fertility. This belief seems to be confirmed by the data: childbirth is correlated with the number of storks in a given region. In fact, in urbanised regions, the hunting-ground of storks is very limited. Parallel to this, in urban, industrialised regions, the birth rate used to be lower than in rural regions. So there is no causality between the number of storks and number of new-born babies. Babbie, op. cit. *supra* note 16, pp. 94, 442–449 and 483–484.

52 See further for example: Telea, *Data Visualization: Principles and Practice*, 2<sup>nd</sup> ed. (CRC Press, 2015); Ballstaedt, *Visualisieren: Bilder in wissenschaftlichen Texten* (UVK, 2012).

53 For a historically informed extensive overview see Nardulli, Peyton and Bajjalieh, “Conceptualizing and Measuring Rule of Law Constructs, 1850–2010”, 1 *Journal of Law and Courts* (2013), 139–192.

pueden representar la correlación.<sup>51</sup> Con el fin de establecer una relación causal el contenido debe ser considerado más a fondo.

La visualización de los resultados en gráficos, por ejemplo, también puede resultar instructiva. Estos pueden influir (o manipular) la interpretación y también la comprensión.<sup>52</sup> Los resultados de un análisis extendido a múltiples países pueden ser representados a través de un mapa, o bien los países pueden ser clasificados en grupos. Si hay otros índices en las mismas preguntas, tenemos que compararlos con nuestro propio índice y también tendríamos que explicar las diferencias (baja correlación).

### 3. Índices internacionales del estado de derecho

Aquí, presentamos cuatro índices internacionalmente reconocidos sobre sistemas jurídicos.<sup>53</sup> Estos son los índices de la *Freedom House* (“Freedom in the World”, FIW), el *Bertelsmann Stiftung* (“Bertelsmann Transformation Index”, BTI), el *Banco Mundial* (“Worldwide Governance Indicators”, WGI), y el *World Justice*

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51 Un bien conocido ejemplo *ab absurdum* de las diferencias existentes entre una fuerte (evidente?) correlación y causalidad: de acuerdo con la superstición, la presencia de cigüeñas puede ser señal de fertilidad. Esta creencia parece confirmada por el hecho de que el número de nacimientos está correlacionado con el número de cigüeñas en una determinada región. De hecho, en regiones urbanizadas los cotos de caza reservados para las cigüeñas son altamente limitados. Paralelo a aquello, en regiones urbanizadas e industrializadas, la proporción de nacimientos suele ser menor que en regiones rurales. Por tanto, no existe una relación de causalidad entre el número de cigüeñas y el número de bebés recién nacidos. Babbie, op. cit. *supra* note 16, pp. 94, 442–449 and 483–484.

52 Para identificar más ejemplos al respecto, véase: Telea, *Data Visualization: Principles and Practice*, 2<sup>nd</sup> ed. (CRC Press, 2015); Ballstaedt, *Visualisieren: Bilder in wissenschaftlichen Texten* (UVK, 2012).

53 Para una revisión histórica de la materia, véase: Nardulli, Peyton y Bajjalieh, “Conceptualizing and Measuring Rule of Law Constructs, 1850–2010”, 1 *Journal of Law and Courts* (2013), 139–192.

Justice Project (“Rule of Law Index”, WJP RLI).<sup>54</sup> We have chosen these four indices because they are internationally the most well-known ones. In order to give a clear-cut picture, we represent the similarities and differences in a chart.<sup>55</sup>

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54 For the former three, a good overview is given by Thiery, Shering and Muno, “Wie misst man Recht? Möglichkeiten und Grenzen der Messung von Rechtsstaatlichkeit, Kongressbeiträge“, in Estermann (Ed.), *Interdisziplinäre Rechtsforschung: Kongressbeiträge „Wie Wirkt Recht“* (Stämpfli, 2009). Concerning Freedom House, see for an overview on the historical conditions of the Freedom in the World indicator, see Bradley, “International Organizations and the Production of Indicators: The Case of Freedom House” in Merry, Davis and Kingsbury (Eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and the Rule of Law* (CUP, 2015), pp. 27–74, concluding at 31 that “Freedom House’s production of its indicator has been motivated primarily by the benefits to reputation and institutional identity that have accrued to the organization as a result of its indicator’s prominence and credibility”.

55 The chart is based on the following literature. For the first three indices: Skaaning, “Measuring the Rule of Law“, 63 *Political Research Quarterly* (2010), 449–460; Thiery, Shering and Muno, op. cit. *supra* note 54; Kaufmann, Kraay and Mastruzzi, op. cit. *supra* note 9; and the websites of the indices. For WJP RLI: *Developing Indicators to Measure the Rule of Law: A Global Approach. A Report for the World Justice Project*, 2008 Vera Institute of Justice; Botero and Ponce, *Measuring the Rule of Law* (2011). On the EU Justice Scoreboard, see: <[http://ec.europa.eu/justice/effective-justice/scoreboard/index\\_en.htm](http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm)>, (last visited 7 March 2022).

*Project* (“Rule of Law Index”, WJP RLI).<sup>54</sup> Hemos elegido estos cuatro índices porque internacionalmente son los más conocidos. Con el fin de dar una imagen clara, expondremos las similitudes y diferencias en un cuadro.<sup>55</sup>

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54 Respecto de los tres primeros índices señalados, es posible encontrar una buena revisión en: Thiery, Shering y Munro, “Wie misst man Recht? Möglichkeiten und Grenzen der Messung von Rechtsstaatlichkeit, Kongressbeiträge“, en: Estermann (Ed.), *Interdisziplinäre Rechtsforschung: Kongressbeiträge „Wie Wirkt Recht“* (Stämpfli, 2009). En lo que respecta al índice de la *Freedom House*, una revisión acerca de las condiciones históricas en las que surgió el indicador *Freedom in the World* es posible encontrarla en: Bradley, “International Organizations and the Production of Indicators: The Case of Freedom House” en: Merry, Davis y Kingsbury (Eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and the Rule of Law* (CUP, 2015), pp. 27–74, estudio que concluye que “la construcción del indicador de la *Freedom House* ha sido motivada, principalmente, por los beneficios que aquella ha traído para afirmación de su propia identidad institucional y su reputación, la que se ha visto incrementada debido a la preeminencia y credibilidad, precisamente, de sus indicadores” (p. 31).

55 La tabla se encuentra basada en la siguiente literatura. En relación a los primeros tres índices: Skaaning, “Measuring the Rule of Law“, 63 *Political Research Quarterly* (2010), 449–460; Thiery, Shering y Munro, op. cit. *supra* nota 54; Kaufmann, Kraay y Mastruzzi, op. cit. *supra* nota 9; y los sitios *web* de los índices. Para el WJP RLI: *Developing Indicators to Measure the Rule of Law: A Global Approach. A Report for the World Justice Project*, 2008 Vera Institute of Justice; Botero and Ponce, *Measuring the Rule of Law* (2011). On the EU Justice Scoreboard, see: <[http://ec.europa.eu/justice/effective-justice/scoreboard/index\\_en.htm](http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm)>. (última visita, 7 marzo 2022).



	<b>FIW</b>	<b>BTI</b>
<b>Goals (Measured values?)</b> <sup>56</sup>	Global comparative evaluation of political rights and civil liberties	Evaluates and measures the steps of developing and transition countries (Entwicklungs- und Transformationsländer) toward democracy and market economy
<b>How long and how frequently in how many countries?</b>	Yearly since 1972 195 countries today (+15 disputed or special territories).	Since 2006 two-yearly (a pilot study in 2003) today 129 developing and transition countries (i.e., every non-member country of the OECD in 1989, provided that the population is over 2 million)
<b>Conceptualisation</b>	<p>Political rights:</p> <ol style="list-style-type: none"> <li>(1) Electoral process</li> <li>(2) Political pluralism and participation,</li> <li>(3) Functioning of Government.</li> </ol> <p>Civil Liberties:</p> <ol style="list-style-type: none"> <li>(1) Freedom of Expression and Belief</li> <li>(2) Associational and Organisational Rights</li> <li>(3) Rule of law [in common sense with somehow arbitrary elements],</li> <li>(4) Personal Autonomy and Individual Rights</li> </ol> <p>There are four questions on the rule of law:</p> <ol style="list-style-type: none"> <li>(1) Is there an independent judiciary?</li> <li>(2) Does the rule of law prevail in civil and criminal matters? Are police under direct civilian control?</li> </ol>	<p>The final index (Status Index) is composed of a democracy and market economy part.</p> <p>The Democracy Index is based on an explicit and philosophically elaborate democracy-concept:</p> <ol style="list-style-type: none"> <li>(1) Stateness</li> <li>(2) Political participation</li> <li>(3) Rule of law</li> <li>(4) Stability of democratic institutions</li> <li>(5) Political and Social Integration</li> </ol> <p>The four constituents of the rule of law are partially overlapping, according to the traditional legal doctrine:</p> <ol style="list-style-type: none"> <li>(1) Separation of powers,</li> <li>(2) Independent judiciary</li> <li>(3) Prosecution of office abuse,</li> <li>(4) Civil rights</li> </ol>

56 According to Thiery, Shering and Munoz, op. cit. supra note 54, p. 154, the correlation between the FIW and the BTI is very high (0,938), but the WGI correlates with the FIW and the BTI only by 0,664 and 0,663 respectively, which may indicate that the WGI is measuring something different to the other two.

WGI	WJP RLI
Aggregate and individual governance indicators	Measurement of the de facto rule of law, (based on the people’s experience, not on the legal rules)
Since 1996, and yearly since 2002, on 215 economies at the present time.	Yearly since 2011 (in 2012/13, a unified biannual report), in 102 countries
<p>For six dimensions of governance:</p> <ol style="list-style-type: none"> <li>(1) Voice and Accountability</li> <li>(2) Political Stability and Absence of Violence</li> <li>(3) Government Effectiveness</li> <li>(4) Regulatory Quality</li> <li>(5) Rule of law</li> <li>(6) Control of Corruption</li> </ol> <p>“Rule of law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.”<sup>57</sup></p> <p>Conceptualisation is questionable,<sup>58</sup> it is based rather on formal than substantive criteria.</p> <p>Measuring rule of law on the basis of 23 sources (including the partial indices – and not the main indices - of BTI, FIW, WJP.) using 86 data units (44 of them are representative, 42 are not”</p>	<p>Based mainly on UN-documents, the definition of the rule of law is a system relying on the following four principles:</p> <p>“(1) The government and its officials and agents as well as individuals and private entities are accountable under the law.</p> <p>(2) The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.</p> <p>(3) The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.</p> <p>(4) Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.”<sup>59</sup></p>

57 <http://info.worldbank.org/governance/wgi/rl.pdf> (last visited 7 March 2022).

58 Especially critically Ginsburg, op. cit. supra note 3, p. 271.

59 <http://worldjusticeproject.org/what-rule-law>>, (last visited 7 March 2022).

	<b>FIW</b>	<b>BTI</b>
	<p>(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?</p> <p>(4) Do laws, policies, and practices guarantee equal treatment of various segments of the population?</p>	
<b>Selecting data</b>	<p>Expert opinions evaluating with points ranging from 1 to 7, a general codebook with the definition of the grades only, not that of the individual questions.</p> <p>The list of experts is not public, the selection is not transparent.</p> <p>Measuring 27 questions in 8 groups</p>	<p>Mainly based on expert opinion, with a standardised codebook. Points ranging from 1 to 10 (with separate instructions for every single question). Not only numbers but a descriptive text (two reports on a country: a foreign and a domestic report, the latter of which also comments on the former); the list of experts is public, but non-transparent</p> <p>hard data too (on inflation and education).</p> <p>17 criteria with 49 questions.</p>
<b>Methods of aggregation</b>	arithmetic mean	arithmetic mean

WGI	WJP RLI
<p>Representative indicators are indicators that cover a set of countries in which the distribution of governance is likely to be similar to that in the world as a whole.[...] In contrast non-representative indicators cover either specific regions (for example the BEEPS survey of transition economies or the LatinoBarometer survey of Latin American countries), or particular income levels (for example the World Bank CPIA ratings that cover only developing countries).<sup>60</sup></p>	<p>According to the principles above, they measure 9 factors and 47 sub-factors:</p> <ol style="list-style-type: none"> <li>(1) Constraints on Government Powers</li> <li>(2) Absence of Corruption</li> <li>(3) Open Government</li> <li>(4) Fundamental Rights</li> <li>(5) Order and Security</li> <li>(6) Regulatory Enforcement</li> <li>(7) Civil Justice</li> <li>(8) Criminal Justice</li> <li>(9) Informal Justice</li> </ol> <p>(i.e. traditional, tribal, and religious courts)<sup>61</sup></p>
<p>Based on several hundred indicators from 32 different sources.</p>	<p>So-called General Population Polls: 1000 respondents from the three largest cities of the country, selected by probability sampling.</p> <p>+ Qualified Respondents' Questionnaires: on average, 25 legal professionals from each country (the scores from the two types of Questionnaire – when available – were weighted 50%-50%)</p> <p>Selecting experts: two methods:</p> <ol style="list-style-type: none"> <li>(1) random sampling from a list of experts like law professors, attorneys, NGO professionals etc.</li> <li>(2) WJP network of practitioners and academics</li> </ol>
<p>Aggregation in three steps:</p> <ol style="list-style-type: none"> <li>(1) Each question is assigned to one of the six indicators</li> <li>(2) Responses are rescaled between 0 and 1, 1 meaning the best outcome</li> <li>(3) Constructing a weighted average using an Unobserved Components Model</li> </ol>	<p>Aggregation in five steps</p> <ol style="list-style-type: none"> <li>(1) Translating the questionnaire into numbers</li> <li>(2) Raw country scores aggregated from the individuals (experts or general public)</li> <li>(3) Normalising the raw data.</li> <li>(4) Aggregating normalised data into factors and sub-factors using simple average</li> <li>(5) Final ranking of the countries.</li> </ol>

60 Kaufmann, Kraay and Mastruzzi, op. cit. supra note 9, p. 243.

61 They also collect data on the 9th factor (Informal Justice) but they do not take into consideration in the aggregate index and in the ranking. These systems are especially complicated, and it is not too easy to measure comparably the efficiency and fairness in these cases. Therefore, the aggregate index is made up of 8 factors and 44 sub-factors “only”.

	<b>FIW</b>	<b>BTI</b>
<b>Degree of transparency</b>	Low but progressing (not every datum is available on the website, the sub-indices of the rule of law are also inaccessible)	High (all data used is available on the website, with the related part of the country-report).
<b>Strength</b>	(1) Data available since 1972 (2) Well-known trademark	(1) Transparency (2) The controlling function of the second report (3) Better conceptualisation compared to the FIW (4) As a last step an expert committee corrects the data regionally and globally to enable better international comparison
<b>Shortcomings and critiques</b>	(1) Geometric mean would be better here than arithmetic mean. (2) Lack of transparency (coding below the sub-categories remains non-transparent). (3) The differences between the grades of the 1-7 are unclear. (4) Lack of consistency in time: changing questions (5) the borders between the dimensions are unclear. (6) Selection of experts is not transparent.	(1) Geometric mean would be better here than arithmetic mean (2) Not transparent selection criteria of the experts. (3) The Status Index implies that political and economic development are strongly correlated, which is not necessarily true (see China).
<b>General evaluation of the index</b>	Old methodology and lack of transparency.	Developed methodology, transparent and global index with a part focusing on the rule of law

WGI	WJP RLI
Very elaborate calculations, but inherits the non-transparency of the sources.	High (data used is available on the website)
(1) Elaborate mathematical model (2) Robust (the change of a single indicator does not severely impact the whole index).	Also focusing on the perception of the rule of law in vulnerable groups (such as in low-income groups)  The selection of experts is transparent.
(1) Inheriting the shortcomings of the original sources, (2) Favours market-economies, because of the numerous market-indicators. (3) Difficult comparison in time and between countries as the sources are constantly changing. (4) Weak conceptualisation. (5) No text, only numbers.	(1) No text, only numbers (except one paragraph interpreting the results in the last version). (2) The Constraints on Government Powers sub-index is centred on presidential systems.
The method minimises the subjective elements (except for the selection of indicators), the main focus is not the rule of law.	Very elaborate methodology, focusing on the aspects of the rule of law

The Freedom House index, although it deserves praise for pioneering work, having been established already in 1972, and its almost universal coverage, is methodologically a dinosaur (unclear conceptualisation, questions are partly overlapping, partly lack coverage; even the simple awareness of methodological problems seems to be missing). It also fundamentally lacks transparency, as for instance, it is unclear who the experts are and how they are chosen.

The Bertelsmann Transformation Index in contrast, features a sophisticated methodology. The transparent and global index also elaborates on democracy with a part focusing on the rule of law.

Similarly, the index of the World Justice Project is also a methodologically sophisticated project.

A virtue of the Worldwide Governance Indicators of the World Bank is that it minimises the subjective elements (except for the selection of indicators, some of which, however, are only available for money). The main focus is, however, not on the rule of law, and the results stem from other indices and indicators, therefore the WGI necessarily inherits the methodological problems of the original indices and indicators that it aggregates. A further problem is that the countries are given a “percentile rank”, which means that a country can easily “improve” in the ranking if many other countries deteriorate in the actual (absolute) quality of the rule of law values (or the other way around: it can “deteriorate” in the ranking, if many other countries actually improve their quality of the rule of law).





	<b>FIW</b>	<b>BTI</b>
<b>Objetivos (¿Cuáles son los valores medidos?)<sup>56</sup></b>	Evaluación global comparativa de derechos políticos y libertades civiles.	Evalúa y mide las etapas por las que avanzan los países en desarrollo y en transición (Entwicklungs- und Transformationsländer) hacia la democracia y la economía de mercado.
<b>¿Por cuánto tiempo y qué tan frecuentemente, en cuántos países?</b>	Anualmente desde 1972, 195 países hoy (+15 disputados o territorios especiales).	Desde el 2006, cada dos años (existe un estudio piloto en 2003). Hoy, 129 países en desarrollo y en transición (es decir, todo país que no era miembro de la OCDE en 1989, siempre que su población esté por sobre los 2 millones).
<b>Conceptualización</b>	<p>Derechos políticos:</p> <p>(1) Proceso electoral                      (2) Pluralismo político y participación                      (3) Funcionamiento del gobierno.</p> <p>Libertades civiles:</p> <p>(1) Libertad de expresión y creencias.                      (2) Derechos de asociación y organización.                      (3) estado de derecho                      Rule of law [en el sentido común con elementos algo arbitrarios]                      (4) Autonomía personal y derechos individuales</p> <p>Hay cuatro preguntas en el estado de derecho:</p> <p>(1) ¿Existe un poder judicial independiente?                      (2) ¿Prevalece el estado de derecho en materia civil y penal? ¿Está la policía bajo control civil directo?</p>	<p>El índice final (Status Index) se compone de una parte de democracia y de economía de mercado.</p> <p>El Democracy Index está basado en un concepto de democracia explícito y filosóficamente elaborado:</p> <p>(1) Estatalidad                      (2) Participación política                      (3) estado de derecho                      (4) Estabilidad de las instituciones democráticas                      (5) Integración política y social</p> <p>Los cuatro constituyentes del estado de derecho se superponen parcialmente, siguiendo la doctrina legal tradicional:</p> <p>(1) Separación de poderes,</p>

56 De acuerdo con: Thiery, Shering y Munoz, op. cit. supra nota 54, p. 154, la correlación entre el FIW y el BTI (0,938), pero el WGI se correlaciona con el FIW y el BTI sólo por 0,664 y 0,663 respectivamente, lo cual podría indicar que el WGI está midiendo algo distinto a los otros dos índices.

WGI	WJP RLI
Indicadores de gobernanza agregados e individuales.	Medición del estado de derecho de facto (basado en la experiencia de las personas, no en reglas legales)
Desde 1996, y anualmente desde 2002, en 215 economías, actualmente.	Anualmente desde 2011 (en 2012/13, un reporte bianual unificado, en 102 países)
<p>Considera seis dimensiones de gobernanza:</p> <ol style="list-style-type: none"> <li>(1) Voz y responsabilidad</li> <li>(2) Estabilidad política y ausencia de violencia</li> <li>(3) Efectividad del gobierno</li> <li>(4) Calidad regulatoria</li> <li>(5) estado de derecho</li> <li>(6) Control de la corrupción</li> </ol> <p>“El estado de derecho captura percepciones de la medida en que los agentes confían en las reglas de la sociedad y las cumplen, y en particular la calidad del cumplimiento de los contratos, los derechos de propiedad, la policía y los tribunales, así como la probabilidad de crimen y violencia.”<sup>57</sup></p> <p>La conceptualización es cuestionable,<sup>58</sup> se basa más bien en criterios formales que sustantivos.</p> <p>La medición del estado de derecho se basa en 23 fuentes (incluyendo los índices parciales y no los principales de BTI, FIW, WJP.), usando 86 unidades de datos (44 de ellos son representativos, 42 no lo son. Indicadores representativos</p>	<p>Basado, principalmente, en documentos de la ONU. La definición del estado de derecho es un sistema que se sostiene en los siguientes cuatro principios:</p> <p>“(1) El gobierno, sus oficiales y agentes, así como individuos y las entidades privadas, son responsables ante la ley.</p> <p>(2) Las leyes son claras, publicitadas, estables y justas; se aplican uniformemente; y protegen los derechos fundamentales, incluida la seguridad de las personas y la propiedad y ciertos derechos humanos fundamentales</p> <p>(3) El proceso mediante el cual se promulgan, administran y hacen cumplir las leyes es accesible, justo y eficiente.</p> <p>(4) La justicia es impartida oportunamente por representantes y neutrales competentes, éticos e independientes que existen en número suficiente, tienen recursos adecuados y reflejan la composición de las comunidades a las que sirven”<sup>59</sup></p>

57 <<http://info.worldbank.org/governance/wgi/rl.pdf>> (last visited 7 March 2022).

58 Especialmente crítico al respecto: Ginsburg, op. cit. supra nota 3, p. 271.

59 <<http://worldjusticeproject.org/what-rule-law/>>, (last visited 7 March 2022).

	<b>FIW</b>	<b>BTI</b>
	<p>(3) ¿Hay protección del terror político, encarcelamiento injustificado, exilio o tortura, sea por grupos que se oponen o que apoyan al sistema? ¿Hay libertad frente a la guerra y las insurgencias?</p> <p>(4) ¿Garantizan las leyes, políticas y prácticas la igualdad de trato de varios segmentos de la población?</p>	<p>(2) Poder judicial independiente,</p> <p>(3) Enjuiciamiento por abusos por parte de las autoridades</p> <p>(4) Derechos civiles</p>
<b>Selección de datos</b>	<p>Opiniones expertas que evalúan con puntajes que van del 1 al 7, un codebook general con la definición de notas únicamente, no el de las preguntas individuales.</p> <p>La lista de expertos no es pública, la selección no es transparente.</p> <p>Medición de 27 preguntas en 8 grupos.</p>	<p>Principalmente basado en opiniones de expertos, con un codebook estandarizado. Los puntos van del 1 al 10 (con instrucciones separadas para cada pregunta individual).</p> <p>No únicamente números, sino que un texto descriptivo (dos reportes de un país: un reporte extranjero y uno doméstico, este último también comenta sobre el primero); la lista de expertos es pública, pero no transparente.</p> <p>Considera también hard data (en inflación y educación)</p> <p>17 criterios con 49 preguntas.</p>
<b>Métodos de agregación</b>	Media aritmética	Media aritmética

WGI	WJP RLI
<p>son indicadores que cubren un conjunto de países en los que es probable que la distribución de la gobernanza sea similar a la del mundo en su conjunto.</p> <p>En contraste, los indicadores no representativos cubren o bien regiones específicas (por ejemplo, el BEEPS Survey of Transition Economies, o el LatinoBarometer, encuesta respecto de países Latinoamericanos), o niveles de ingreso particulares (por ejemplo los World Bank CPIA ratings, que cubren sólo países en desarrollo).<sup>60</sup></p>	<p>De acuerdo con los principios citados, miden 9 factores y 47 subfactores:</p> <ol style="list-style-type: none"> <li>(1) Restricciones a los poderes del gobierno.</li> <li>(2) Ausencia de corrupción</li> <li>(3) Gobierno transparente</li> <li>(4) Derechos fundamentales</li> <li>(5) Orden y seguridad</li> <li>(6) Implementación de normas administrativas</li> <li>(7) Justicia civil</li> <li>(8) Justicia penal</li> <li>(9) Justicia informal</li> </ol> <p>(por ejemplo, tribunales tribales, tradicionales y religiosos)<sup>61</sup></p>
<p>Basado en varios cientos de indicadores provenientes de 32 fuentes distintas.</p>	<p>Las llamadas encuestas de población general: 1.000 encuestados de las tres ciudades más representativas, seleccionados por muestreo probabilístico.</p> <p>Cuestionarios de encuestados calificados: en promedio, 25 profesionales del derecho de cada país (los puntajes de los dos tipos de cuestionarios, cuando estaban disponibles, se ponderaron 50%-50%)</p> <p>Selección de expertos: dos métodos:</p> <ol style="list-style-type: none"> <li>(1) muestreo aleatorio de una lista de expertos como profesores en derecho, abogados, profesionales de ONG, etc.</li> <li>(2) red WJP de profesionales y académicos</li> </ol>
<p>Agregación en tres pasos:</p> <ol style="list-style-type: none"> <li>(1) Cada pregunta se asigna a uno de los seis indicadores.</li> <li>(2) Las respuestas se reescalan entre el 0 y el 1, representando 1 el mejor resultado.</li> <li>(3) Construcción de un promedio ponderado utilizando un modelo de componentes no observados (Unobserved Components Model)</li> </ol>	<p>Agregación en cinco pasos:</p> <ol style="list-style-type: none"> <li>(1) Traducir el cuestionario a números.</li> <li>(2) Puntaje bruto de los países agregados de los individuos (expertos o público en general).</li> <li>(3) Normalización de los datos sin procesar.</li> <li>(4) Agregación de datos normalizados en factores y subfactores usando un promedio simple.</li> <li>(5) Clasificación final de los países.</li> </ol>

60 Kaufmann, Kraay and Mastruzzi, op. cit. supra note 9, p. 243.

61 Ellos también recopilan información acerca del noveno factor (justicia informal), pero no lo consideran para efectos del índice agregado y el ranking. Estos sistemas son particularmente complicados, y no resulta muy fácil medir en términos comparados su eficiencia y justicia en estos casos. Por tanto, el índice agregado está construido solamente a partir de 8 factores y 44 sub-factores

	<b>FIW</b>	<b>BTI</b>
<b>Grado de transparencia</b>	Baja, pero progresiva (no todos los datos están disponibles en el sitio web, los subíndices del estado de derecho también son inaccesibles).	Alto (todos los datos utilizados están disponibles en el sitio web, con la parte relacionada del informe de país).
<b>Fortalezas</b>	<p>(1) Datos disponibles desde 1972.</p> <p>(2) Marca notoriamente conocida.</p>	<p>(1) Transparencia.</p> <p>(2) La función de control que tiene el segundo reporte.</p> <p>(3) Mejor conceptualización comparado con el FIW.</p> <p>(4) Como paso final, un comité de expertos corrige los datos regional y globalmente, para habilitar una mejor comparación internacional.</p>
<b>Deficiencias y críticas</b>	<p>(1) La media geométrica aquí sería mejor que la media aritmética.</p> <p>(2) Falta de transparencia (la codificación debajo de las subcategorías se mantiene no transparente)</p> <p>(3) Las diferencias entre los grados del 1 al 7 no es clara.</p> <p>(4) Falta de consistencia en el tiempo: las preguntas cambian.</p> <p>(5) Los límites entre las dimensiones no son claros.</p> <p>(6) La selección de expertos no es transparente.</p>	<p>(1) La media geométrica sería mejor que la aritmética.</p> <p>(2) Criterios de selección de los expertos es poco transparente.</p> <p>(3) El Status Index implica que el desarrollo político y económico están fuertemente correlacionados, lo que no es necesariamente cierto (ver China).</p>
<b>Evaluación general del índice</b>	Metodología anticuada y falta de transparencia.	Metodología desarrollada, transparente e índice global con una parte centrada en el estado de derecho.

WGI	WJP RLI
Cálculos muy elaborados, pero afectados por la falta de transparencia de las fuentes.	Alto (los datos utilizados están disponibles en el sitio web)
<p>(1) Modelo matemático elaborado</p> <p>(2) Robusto (el cambio de un solo indicador no impacta severamente a todo el índice).</p>	<p>Se centra también en la percepción de estado de derecho en grupos vulnerables, como grupos de bajos ingresos.</p> <p>La selección de expertos es transparente.</p>
<p>(1) Análisis afectado por las deficiencias de las fuentes originales.</p> <p>(2) Favorece las economías de mercado, debido a los numerosos indicadores de mercado.</p> <p>(3) Dificil comparación en el tiempo y entre países ya que las fuentes cambian constantemente.</p> <p>(4) Conceptualización débil.</p> <p>(5) No hay texto, sólo números.</p>	<p>(1) No hay texto, solo números (excepto un párrafo que interpreta los resultados de la última versión)</p> <p>(2) El subíndice Restricciones a los Poderes del Gobierno se centra en los sistemas presidenciales.</p>
El método minimiza los elementos subjetivos (excepto por la selección de indicadores), el enfoque principal no es el estado de derecho.	Metodología elaborada que se centra en los aspectos del estado de derecho.

# APPENDIX

## Chile – Freedom House 2021

**FREE**

**93/100**

<b>Political Rights</b>	<b>38/40</b>
<b>Civil Liberties</b>	<b>55/60</b>

### LAST YEAR'S SCORE & STATUS

**90/100 Free**

*Chile is a stable democracy that has experienced a significant expansion of political rights and civil liberties since the return of civilian rule in 1990. Ongoing concerns include corruption and unrest linked to land disputes with Indigenous Mapuche people. In 2019, Chile experienced massive and at times violent protests against the government and societal inequality. The demands for change culminated in a national plebiscite in October 2020, in which voters chose to replace the dictatorship-era constitution with a new charter to be drafted starting in 2021.*

## Key Developments in 2020

- In an October plebiscite, an overwhelming majority of voters decided to replace the dictatorship-era 1980 constitution with a new charter, which will be drafted by a 155-member constitutional convention set to be elected in April 2021.
- In March, President Sebastián Piñera declared a state of emergency in response to the COVID-19 pandemic that included a stringent national lockdown, which continued throughout most of the year. Nonetheless, Chile suffered over 600,000 cases and 16,000 related deaths by the end of 2020, according to researchers at the University of Oxford.
- The massive protests and subsequent police repression that erupted in October 2019 declined significantly amid measures to contain the COVID-19 crisis, but sporadic protests and police abuses continued throughout the year.



## Political Rights

### A Electoral Process

A1 0-4 pts

<b>Was the current head of government or other chief national authority elected through free and fair elections?</b>	<b>4/4</b>
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Presidential elections in Chile are free and fair. The president is elected to a four-year term, and consecutive terms are not permitted. Piñera was elected in December 2017 to serve his second term; he had served as president previously, from 2010 to 2014.

A2 0-4 pts

<b>Were the current national legislative representatives elected through free and fair elections?</b>	<b>4/4</b>
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The 2017 legislative elections were the first to take place under new rules that established more proportional districts, and increased the number of seats in both houses. The Chamber of Deputies now has 155 seats, up from 120 previously. The number of Senate seats was increased from 38 to 50, but the new seats will be introduced gradually, with the Senate reaching its new 50-seat capacity in 2022.

Senators serve eight-year terms, with half up for election every four years, and members of the Chamber of Deputies are elected to four-year terms. Since 1990, congressional elections have been widely regarded as free and fair.

**A3 0-4 pts**

**Are the electoral laws and framework fair, and are they implemented impartially by the relevant election management bodies?**

4/4

Chile's electoral framework is robust and generally well implemented. In October 2020, a national plebiscite was held on replacing the 1980 constitution, considered by its critics an ideological embodiment of the dictatorship led by General Augusto Pinochet. An overwhelming 78 percent of voters supported replacement, and 79 percent endorsed the election of a 155-member constitutional convention to draft the new charter. Elections to the convention were set for April 2021. The balloting will be held concurrently with subnational elections, including for governors, who will be elected for the first time following a 2018 legal reform.

**B Political Pluralism and Participation****B1 0-4 pts**

**Do the people have the right to organize in different political parties or other competitive political groupings of their choice, and is the system free of undue obstacles to the rise and fall of these competing parties or groupings?**

4/4

Chile has a multiparty political system in which parties operate freely. The current Congress, which held its first session in March 2018, includes representatives from more than a dozen political parties, as well as several independent candidates. Multiple new parties were registered or began organizing in 2020, motivated by interest in participating in the constitutional convention set to be elected in April 2021.

**B2 0-4 pts**

<b>Is there a realistic opportunity for the opposition to increase its support or gain power through elections?</b>	<b>4/4</b>
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Power alternation between parties occurs regularly, both in Congress and for the presidency.

**B3 0-4 pts**

<b>Are the people's political choices free from domination by forces that are external to the political sphere, or by political forces that employ extrapolitical means?</b>	<b>4/4</b>
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People are generally free to exercise their political choices without undue influence from actors that are not democratically accountable.

**B4 0-4 pts**

<b>Do various segments of the population (including ethnic, racial, religious, gender, LGBT+, and other relevant groups) have full political rights and electoral opportunities?</b>	<b>3/4</b>
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The constitutional convention set to be elected in April 2021 will feature gender parity among its 155 members, and 17 seats will be reserved for members of Indigenous communities.

Women are represented in government, and the electoral system includes a quota for women in the legislature. However, women report difficulty gaining influence in intraparty debates.

The interests of the Mapuche minority, which represents about 9 percent of the population, are present in political life, with Mapuche activists regularly making their voices heard in street demonstrations. However, this activism has yet to translate into significant legislative power. In 2017, one Mapuche candidate was elected to the Senate, and one to the Chamber of Deputies.

Public officials from affluent backgrounds, including family-based political networks, remain overrepresented in positions of political power.

C Functioning of Government

C1 0-4 pts

<b>Do the freely elected head of government and national legislative representatives determine the policies of the government?</b>	<b>4/4</b>
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While lobbying and interest groups exist and work to shape policy, there is little significant intervention by actors who are not democratically accountable in policymaking processes.

C2 0-4 pts

<b>Are safeguards against official corruption strong and effective?</b>	<b>3/4</b>
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Anticorruption laws are generally enforced, though high-level corruption scandals crop up with some regularity. In June 2019, General Juan Miguel Fuente-Alba became the first former army commander in chief to face corruption charges in a criminal court; he remained under house arrest throughout 2020, as investigations into military corruption continued

to expand. In November 2018, Piñera dismissed 21 army generals amid multiple corruption scandals in the military, bringing about the most significant change in the army’s high command since 1990.

**C3 0-4 pts**

<b>Does the government operate with openness and transparency?</b>	<b>4/4</b>
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The government operates with relative transparency. In 2009 the Transparency and Access to Public Information Law came into force; it increases public access to information and created a Council on Transparency. Agencies have generally been responsive to information requests, and failures to comply with the law or other measures designed to encourage transparent operations have been punished with fines.

In September 2019 the government replaced the decades-old Copper Law, in what was viewed as a major step toward improving transparency in the wake of series of corruption scandals involving the armed forces. The previous legislation had stipulated that 10 percent of the state-run copper giant Codelco’s export sales be channeled to the armed forces without oversight.

**Civil Liberties**

**D Freedom of Expression and Belief**

**D1 0-4 pts**

<b>Are there free and independent media?</b>	<b>4/4</b>
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Guarantees of free speech are generally respected, though some laws barring defamation of state institutions remain on the books. Media ownership is highly concentrated.

During the 2019 protest movement, the offices of at least two newspapers were set on fire, looted, and otherwise vandalized: El Líder in San Antonio, and El Mercurio de Valparaíso in Valparaíso. Another outlet in the El Mercurio group, El Mercurio de Antofagasta, was attacked by protesters in January 2020.

### D2 0-4 pts

<b>Are individuals free to practice and express their religious faith or nonbelief in public and private?</b>	<b>4/4</b>
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The constitution provides for religious freedom, and the government generally upholds this right in practice.

### D3 0-4 pts

<b>Is there academic freedom, and is the educational system free from extensive political indoctrination?</b>	<b>4/4</b>
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Generally, academic freedom is unrestricted in Chile. In 2019, protesters occupied, vandalized, and looted some universities, forcing several educational establishments to finish the semester early or move classes online. Some academics were publicly harassed, especially on social media. However, in 2020 academic freedom was restored to its previous level after the government implemented restrictions in response to the COVID-19 pandemic, which severely dampened both the protest movement and on-campus activity in general.

Score Change: The score improved from 3 to 4 because the protest-related disturbances, closures, and intimidation that affected university campuses in 2019 largely subsided in 2020.

**D4 0-4 pts**

<b>Are individuals free to express their personal views on political or other sensitive topics without fear of surveillance or retribution?</b>	<b>4/4</b>
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Chileans enjoy open and free private discussion.

**E Associational and Organizational Rights**

**E1 0-4 pts**

<b>Is there freedom of assembly?</b>	<b>3/4</b>
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The right to assemble peacefully has traditionally been widely respected. However, peaceful protest activity that arose in 2019, when people took to the streets to demonstrate against the government and against societal inequality, was severely disrupted by a variety of factors including people who took advantage of the protest movement’s cover to engage in looting, arson, and vandalism; and by widespread police violence and a restrictive state of emergency that was imposed in response to the unrest.

In March 2020, the COVID-19 pandemic prompted President Piñera to declare a new state of emergency, and the government took measures that restricted civil liberties, including a stringent lockdown and a ban on public gatherings of more than 50 people.

Due in large part to pandemic-related restrictions, both civilian violence and police repression decreased significantly in comparison to 2019. However, sporadic protests did occur, and a minority of the thousands of Chileans who gathered in a central square in Santiago on the first anniversary of the start of the 2019 upheaval looted, rioted, firebombed a police headquarters, and burned two churches. The police continued to engage in acts of repression, including an October incident in which a member of the carabineros (the national police) allegedly threw a teenager off a bridge in Santiago; the officer was charged with attempted murder. In late November, protesters demanding Piñera’s resignation clashed with carabineros in Santiago, resulting in the detention of 74 people.

Score Change: The score improved from 2 to 3 because, while violent incidents were reported, there was a significant decrease in protest-related violence compared with 2019.

#### E2 0-4 pts

<b>Is there freedom for nongovernmental organizations, particularly those that are engaged in human rights– and governance-related work?</b>	4/4
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Nongovernmental organizations (NGOs) form and operate without interference.

#### E3 0-4 pts

<b>Is there freedom for trade unions and similar professional or labor organizations?</b>	4/4
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There are strong laws protecting worker and union rights, but



some limited antiunion practices by private sector employers continue to be reported.

## F Rule of Law

### F1 0-4 pts

<b>Is there an independent judiciary?</b>	<b>4/4</b>
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The constitution provides for an independent judiciary, and the courts are generally free from political interference.

### F2 0-4 pts

<b>Does due process prevail in civil and criminal matters?</b>	<b>4/4</b>
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The right to legal counsel is constitutionally guaranteed and due process generally prevails in civil and criminal matters. However, indigent defendants do not always receive effective legal representation.

In December 2020, opposition senators introduced a bill proposing a general amnesty for the hundreds of protesters arrested during the main wave of upheaval in late 2019. President Piñera repeatedly declared that he would veto any such law, and the bill remained pending at year's end. The Public Prosecutor's Office stated in October that more than 5,000 indictments related to protest violence had led to 725 convictions for various crimes, with 648 people still detained pending resolution of their cases.

Hundreds of carabineros also remain under investigation by prosecutors for alleged human rights violations, but as of October only one police officer had been convicted, and local human rights advocates criticized prosecutors' alleged lack of

political will to investigate and prosecute state agents.

Human rights groups and the United Nations have criticized the government's use of antiterrorism laws, which do not guarantee due process, to prosecute acts of violence by Mapuche activists.

**F3 0-4 pts**

<b>Is there protection from the illegitimate use of physical force and freedom from war and insurgencies?</b>	<b>2/4</b>
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While the government has developed mechanisms to investigate and punish police abuses, excessive force and human rights abuses committed by the carabineros still occur, and such abuses intensified during the social upheaval that started in 2019. The protest movement was also marked by a general state of unrest in many places, as some took advantage of the uprising to commit acts of arson, looting, and other vandalism.

By the end of 2019, at least 29 civilians had been killed and more than 3,000 injured, including over 350 eye injuries inflicted due to security forces' use of rubber bullets and pellets. More than 2,700 members of security forces were also injured during the unrest. The government's National Institute for Human Rights, Human Rights Watch (HRW), and Amnesty International all accused the carabineros and the military of perpetrating human rights violations during the protests, including excessive use of force against protesters, as well as torture and sexual abuse of people held in detention. Significant property damage that took place during the protests also contributed to a threatening and unstable environment.

In 2020, the scale of abuses committed by the security forces fell because of the decline in protests amid the COVID-19

pandemic and associated restrictions, but criticism of security force tactics continued. In November, the head of the carabineros, Mario Rozas, resigned after police officers shot and wounded two minors in a raid at a state-run foster home; Rozas had faced heavy criticism for the police’s handling of the social crisis in 2019.

**F4 0-4 pts**

<b>Do laws, policies, and practices guarantee equal treatment of various segments of the population?</b>	<b>3/4</b>
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While indigenous people still experience societal discrimination and police brutality, their poverty levels have declined somewhat, aided by government scholarships, land transfers, and social spending.

LGBT+ people continue to face societal bias, despite a 2012 antidiscrimination law that covers sexual orientation and gender identity. In November 2018, the president signed a gender-identity law allowing for gender identity to be changed on the civil registry.

In practice, elites benefit from systematic favorable legal treatment, and widespread grievances about social inequality were a major driver of the 2019 protests.

**G Personal Autonomy and Individual Rights**

**G1 0-4 pts**

<b>Do individuals enjoy freedom of movement, including the ability to change their place of residence, employment, or education?</b>	<b>4/4</b>
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The constitution protects the freedom of movement, and the government respects this right in practice. Freedom of movement was constrained in 2019 due to the roadblocks, damage to train stations, and vandalism associated with the social unrest that began in October. In 2020, the transit impact of civil unrest ceased, and by the end of the year the only constraints on freedom of movement stemmed from governmental measures to control the spread of the coronavirus.

Score Change: The score improved from 3 to 4 because the roadblocks, disruption to public transportation, and other restrictions on movement associated with the protests of 2019 were alleviated in 2020.

**G2 0-4 pts**

<p><b>Are individuals able to exercise the right to own property and establish private businesses without undue interference from state or non-state actors?</b></p>	<p><b>4/4</b></p>
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Individuals generally have the right to own property and establish and operate private businesses, and are able to do so without interference from the government or other actors. However, Mapuche activists continue to demand greater territorial rights to land, ancestral waters, and natural resources, and ongoing tensions in the Araucanía Region produced violent clashes in August 2020 between Mapuche activists and non-Indigenous groups supported by the carabineros.

### G3 0-4 pts

**Do individuals enjoy personal social freedoms, including choice of marriage partner and size of family, protection from domestic violence, and control over appearance?**

4 / 4

The government generally does not restrict personal social freedoms. However, violence against children and women remains a problem. A law against femicide went into force in 2010. A total of 40 femicides were reported as of December 2020. According to HRW, emergency calls reporting gender-based violence and harassment rose significantly in the first half of 2020.

In 2017, a law introduced by then-president Michelle Bachelet that decriminalized abortion in the events of rape, an inviable fetus, or danger to the life of the woman, took effect.

A 2015 law recognizes civil unions for same-sex and different-sex couples, but same-sex marriages are not recognized.

### G4 0-4 pts

**Do individuals enjoy equality of opportunity and freedom from economic exploitation?**

3/4

While compulsory labor is illegal, forced labor, particularly among foreign citizens, continues to occur in the agriculture, mining, and domestic service sectors.

Although there have been improvements in fighting child labor, minors still suffer commercial sexual exploitation and work unprotected in the agricultural sector. Moreover, there is limited public information about forced child labor.



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