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TRANSNATIONAL LEGAL INDICATORS: THE MISSING LINK IN A NEW ERA OF LAW AND DEVELOPMENT POLICY

DAVID RESTREPO AMARILES*

Abstract

This contribution explores the origins of legal indicators in contemporary law and development policy. In particular, it shows that as law progressively became a substantive field of development policy it also became increasingly shaped and disciplined, alongside other developmental fields, by metrics and indicators. The article highlights two main implications of this shift for business law reform. First, it promotes and evidence-based conception of legal reform which reinforces the idea that there is only one model of development and only one model of law in development. Second, indicators favour a mathematical proceduralisation of legal reform to the detriment of public participation and democratic debate. The article concludes with an invitation to law and development scholars to engage in the sustained critique and improvement of legal metrics.

Introduction

At a recent event in New York University, a member of the World Bank's Global Indicators Group presented the updated results of regulatory and legal reform projects associated to the *Doing Business* indicators[1]. The consolidated figures were impressive. Among others, she reported that since 2003, more than 50 economies have formed 'Reform Committees' around the results of *Doing Business* indicators, most often at the inter-ministerial level or reporting directly to the president or prime minister. In the same time period, governments implemented more than 600 legal and regulatory reforms also informed by *Doing Business* indicators. For instance, Peru has pursued reforms since 2008 seeking to facilitate the creation and development of new business corporations. The World Bank's Global

* Assistant Professor in Private International Law and International Arbitration, HEC Paris. Project Director of 'Big Data and the Law'. Research Fellow, Perelman Centre for Legal Philosophy.

Indicators Group reports the elimination of four procedures that cut in half the time needed to create a new business. As a consequence, Peru escalated 13 positions in the 'starting a business' rank, moving from 102 in 2008 to 89 in 2015.

The seemingly successful strategy of the World Bank Group to advance business law reforms through *Doing Business* indicators reflects a wider transformation in the way international organisations design, promote and implement legal and regulatory reforms today. This article argues that legal indicators mark the beginning of a new era of law and development policy characterised by the use of performance measures with governance purposes. In particular, it shows that as law progressively became a substantive field of development policy it also became increasingly shaped and disciplined, alongside other fields of development policy, by measurements and indicators.

This article is divided in three sections. First, I trace back the origins of indicators in law and development policy following David Trubek's and Alvaro Santos' moments of law and development. Second, I bring forth the shift towards governance in development policy in the early 1990s, and the rating of law as a substantive field of development policy subject to performance measures. Third, I discuss two possible implications of the shift towards indicators-based legal reform in law and development policy, namely (1) the emergence of an evidence-based practice of legal reform, (2) a mathematisation of its concepts and drivers.

I. Transnational Legal Indicators and the Law and Development Moments

The law and development idea is certainly older, wider and more complex than what David Trubek and Alvaro Santos have recently suggested[2]. Trubek and Santos provide an orthodox account which covers predominantly the post-war period, places the law and development movement in a typically U.S. perspective and focuses mainly on the geographical region of Latin America. This account overlooks earlier waves of the intellectual project of law and development in modern history such as those France, the Netherlands and the United Kingdom carried out as colonial powers in Africa, Asia and the Caribbean several centuries ago. But moreover, it fails to account for the different narratives of law and development existing around the world, and especially those which highlight the local views and legacies in the relationship between law and development, and give greater relevance to unofficial law.

Nonetheless, Trubek's and Santos' account is probably the most critical and complete analyses of contemporary debates in the United States on law and development. In this section, I trace down and characterise the role of indicators and performance measures in two of the three moments in which they divide law and development policy in the postwar period. I show

in each of them that development organisations like the United States Agency for International Development (USAID) and the World Bank conducted initiatives seeking to quantify the performance of state legal systems, and occasionally to link it with socio-economic performance.

1. The First Moment of Law and Development: USAID and SLADE

With the process of decolonisation in the 1960s, law was increasingly seen as a significant tool in the discourse of development agencies. According to Trubek and Santos, development policies from the 1950s until the beginning of the 1980s focused on the role of the state in managing the economy and transforming traditional societies[3]. In this first moment, law was an instrument used to modernise newly independent states, create formal structures for macroeconomic control in developing and independent states, and promoting social change[4].

The United States played a significant role in shaping development policy and financing the production of legal measures. At the end of the World War II, the World Bank, the main development international organisation today, lacked resources to conduct research on the impact of reforms. Additionally, the Bank had not yet rated law as a developmental discipline, and thus legal reforms had little weight in its budget[5]. The global development agenda in the 1960s was largely set and financed by the United States through the USAID, which was and remains a key instrument of U.S. foreign policy.

Most likely the first large-scale empirical and comparative research in the field of law and development took place in the 1970s. John H. Merryman and Lawrence Friedman launched the ambitious SLADE research project at Stanford University[6]. After having surveyed the field, they concluded that the main weakness of research in law and development was the lack of a solid empirical base. Merryman and Friedman requested a grant to USAID with the purpose of developing a "new body of theory and method - a 'social science' of law and development - to provide the intellectual framework for effective study, research and decision-making"[7]. The objective was twofold. First, SLADE aimed to produce quantified and comparable knowledge of legal systems in the form of legal indicators, and second, to explore the relations and correlations between them and social indicators[8].

To operationalise and disaggregate the concept of law for quantification, they define it in terms of legal system, i.e. in terms of institutions, processes and actors, and not in terms of rules[9]. Merryman and his colleagues wanted to advance the idea that legal systems could be usefully described in quantitative terms through these categories. Their definition was very much in line with the prevailing understanding of law within the development field, but it contrasted sharply with the view of law

as a system of rules prevailing in legal scholarship, and most particularly, in comparative law.

SLADE conducted research of the legal systems of Latin America and Mediterranean Europe during three years. They obtained 26 measurements of different variables spanning a period of twenty-five years (1945 to 1970). Most of the empirical work relied on fieldwork in each of the countries and on available national and regional statistics. Unfortunately, SLADE ran out of funding before analysing the data and USAID turned down a request for an additional grant. The data collected remains mostly unprocessed and of little use in academic and policy research[10]. Merryman explained that when SLADE completed empirical research, USAID had lost interest in law as a component of development while scholars began to find it more productive to look elsewhere[11].

2. The Second Moment: The World Bank and the CPIA

Beginning in the 1980s, the second moment of law and development experienced the creation of the World Bank's indicators *Country Policy and Institutional Assessment* (CPIA). They were the first transnational legal indicators produced by an international organisation. In reaction to the Soviet Union's promotion of state-interventionism, western development agencies preached a view of development in which growth was achieved by 'getting prices right, promoting fiscal discipline, removing distortions created by state intervention, promoting free trade, and encouraging foreign investment'[12]. Trubek and Santos describe this second moment as 'law and the neoliberal market'[13]. As in the 1960s, the interest for law in the 1980s was mainly instrumental and its substantive dimension strongly neglected, but the focus was completely different. In this new context, significant efforts in legal reforms went to strengthening the rights of property and ensuring the enforceability of contracts.

The CPIA reflect not only the transition from the first to the second post-war moment of law and development, but also an early attempt to assess the rule of law through indicators. On the one hand, the CPIA sought to adapt the Bank's aid allocation policy to the changing political conditions, so it could send the right message to borrowing countries and tackle the expansion of communist ideas. On the other hand, the CPIA was the first attempt of the World Bank to measure legal systems in a comparative and sustained manner and to relate them to development policy. They perfectly embodied the idea that law was a formal instrument to foster a market-based economy.

The CPIA contributed immensely to break ground for the creation of transnational legal indicators as we know them today. First, they set the conceptual framework according to which law would be evaluated as an instrument of economic development. It focused neither on processes or actors, nor focused it only on rules. The CPIA introduced the concept of

performance, which measures the actual capacity of legal systems to accomplish certain desirable objectives and functions. The CPIA abandoned, like SLADE, the micro-perspective usually adopted by legal scholars. They were not interested in assessing if criminal offenses, contract clauses, or administrative acts were correctly defined, interpreted and applied from a doctrinal perspective. They focused on assessing if legal systems effectively protected property rights, enforced contracts, ensured legal certainty, among others. Good performance was viewed from a global perspective and progress evaluated on the basis of the effects legal systems produce on the ground.

Second, the CPIA rendered law a measurable and quantifiable concept. They provided the first systematic, comparative and quantified study of law, making possible the identification of macro-changes and patterns of legal systems around the world. From today's perspective, the CPIA indicators look undeveloped, lacking statistical sophistication, and methodological rigour. Even with these limitations, the CPIA set the foundation of the third moment of law and development during which the World Bank Institute would develop the *World Governance Indicators* and the *Doing Business* indicators.

II. Law and Performance Measures: A New Era in Law and Development Policy

In the 1990s development policy takes a radical turn and embraces the governance rhetoric. It radically transformed the way regional and international development organisations designed and promoted legal reform, and more widely, development policy itself. In this section, I analyse the shift towards governance in development policy and the inclusion of law as one of its substantive and measurable dimensions.

1. A New Development Rhetoric: Governance and the Rule of Law

International organisations saw the end of the communist bloc and the intensification of transnational economic flows as an opportunity to sponsor a new rhetoric in which the rule of law embodied the global legal standards favouring transnational economic integration. Ibrahim Shihata, former vice-president of the World Bank, was the first to call this new development rhetoric by the name of 'governance'[14]. Shihata acknowledged the importance of the Bank's mission to alleviate poverty and foster economic development during the previous decades through lending and development aid. However, he predicted that institutions within states needed to be reinforced because economic growth in the following years would come through the development of the private sector, rather than through the further expansion of states enterprises[15]. Hence, Shihata argued

that if the Bank wanted to accomplish its ultimate mission it needed to expand its range of action beyond economic policies[16].

This reasoning constitutes a key moment in contemporary development policy. It built a bridge from 'plain development policy' to what some commentators call 'governance through development'[17]. Shihata argues that getting involved in governance is compatible with the articles of the Agreement because the field is free of political consideration. But additionally, he claims that the Bank's involvement is necessary in order to achieve its mandate. Shihata's view depoliticises governance and the rule of law, facilitating the latter's incorporation in the new financing system of the Bank, which gradually shifted from project-based to policy-based loans.

For Shihata, the rule of law would function as a magnet of foreign direct investment in developing economies, which in turn, would fuel economic development and contribute to poverty reduction[18]. Law became thus an institutionalised variable in the decision-making processes of the Bank. This shift within the most influential development institution had important repercussions for states and other international organisations, which very quickly endorsed the idea that good governance was the key factor to ensure economic development.

In 1991, the Council of the European Community issued a resolution setting for the first time the rule of law, market-friendly regulations and development in the wider framework of governance[19]. In 1999, it was the turn of the United Nations. Mark Malloch claimed that globalisation was 'too important to be left unmanaged'[20] and recommended linking market economies to better governance to ensure that the benefits of globalisation would reach all sectors of society[21]. In 2004, the UN Secretary General endorsed Shihata's proposal and linked governance and the rule of law. Moreover, he argued that the rule of law was a proper supranational concept - a sort of *acquis international*, with autonomous meaning and existence from national rule of law models[22]. The wide acceptance of the governance and rule of law rhetoric inaugurates the beginning of the third moment of law and development and a prosperous period in the production of legal indicators.

2. The Third Moment: World Governance Indicators

The main implication of the governance and rule of law rhetoric for law and development policy was that legal and regulatory reforms were not seen anymore as a tool for economic reform, but as an end in itself. This led development organisations to set a new reform agenda for developing states, which purported to strengthen and improve law as a whole under the idea of the 'rule of law'[23]. As with any other dimension of the Bank's development policy, the rule of law, and thus state legal systems, were subject to the discipline of measurement, performance and numbers.

In 1996, the World Bank published a technical paper titled the *Performance Monitoring Indicators Handbook* calling on all its units to measure progress of the Bank's projects towards explicit short and long-term objective [24]. In 1998, the Board of Governors adopted the *Comprehensive Development Framework* to unify the Bank's development strategies. It states in principle four that 'development performance should be evaluated on the basis of measurable results'[25]. The World Bank acknowledges today that turning to performance measures in the 1990s marked a significant overhaul of its development policy[26].

These transformations triggered the emergence in 1996 of the *World Governance Indicators* (WGI) and the inclusion of the rule of law as one of its six dimensions. The rule of law, set next to proxies accounting for the economic, political and social dimensions of governance, became a proxy indicator of state legal systems. The WGI sought to fill the lack of follow-up and monitoring instruments in the field of governance as mandated by the *Comprehensive Development Framework*. They were the first of a new generation of indicators customised to the Bank's need of collecting information about the effectiveness of its development policies.

But above all, the WGI were a means to ensure governance discipline and accountability from borrowing countries. The Bank could not directly intervene in the institutional design of borrowers since, pursuant the articles of the Agreement, it would mean entering into political considerations. This new generation of indicators, which also includes *Doing Business* and *Investing Across Borders*, was the missing link of the World Bank's development policy to enhance their governance capacity over national legal systems and ensure they were fit, eventually, for the market economy.

In 1999, Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobatón, the authors of the WGI, published the first paper of the series *Governance Matters* in which they correlated governance and rule of law indicators with socio-economic indicators. They concluded that there 'is a strong causal relationship from good governance to better development outcomes such as higher income per capita, lower infant mortality, and higher literacy'[27]. The study provided strong support for the Bank's focus on governance and confirmed the rule of law was a key dimension of development policy.

Celine Tan has rightly interpreted these changes as a shift towards 'governance through development'[28]. Her insightful study of the World Bank's and the International Monetary Fund's Poverty Reduction Strategic Papers (PRSPs) shows that development instruments based on measurable results have become a normative framework for policy reform at national levels[29]. As a consequence, national policymaking is standardised among countries, which facilitates the role of international organisations in streamlining local institutions according to international benchmarks and standards.

III. Evidence-Based Policy: The Way Ahead?

The number of legal indicators in the last 15 years has increased dramatically. According to a recent study of the Civil Law Initiative, until the year 2000, only six sets of transnational indicators contained relevant information about state legal systems, in comparison to more than 20 today[30]. Public and private organisations like the World Bank, the World Economic Forum, the World Trade Organisation, the Civil Law Initiative, and the Organisation for Economic Co-operation and Development (OECD) among others regularly produce and use indicators to assess the performance of state legal systems. Indicators also allow them to design, promote and audit the evolution of legal and regulatory reforms throughout the world. In this section, I bring forth some key features of *Doing Business* indicators and the WGI, and highlight some possible implications of relying on them for conducting legal reform.

1. Legal Indicators and Legal Reform in Business Law

Legal reform rapidly became a main focus of the new governance and rule of law rhetoric. States needed to ensure good 'fundamentals' at the local level to be competitive in the global economy. Perry Kessaris has rightly noted that legal systems became a component of 'investment climate' - "a 'portmanteau phrase' which lumps together law, politics, economy and infrastructure of a given national or sub-national region"[31]. Moreover, if the rule of law was the bottom line of a good legal investment climate, in practice, legal reforms extend well beyond its scope.

In 2005, the World Bank's flagship *World Development Report* stated that investment climate improvements required changes to laws and policies[32]. Most initiatives focused primarily on business law. The World Bank reports in particular to have funded more than 600 legal and judicial reforms in 85 countries, including the drafting of property protection laws in Albania; anti-trust and anti-dumping laws in Egypt; value-added tax legislation in India; property, secured transactions and company law in Belarus; commercial, financial and investment laws in Lebanon; and anti-monopoly laws in Argentina[33].

But reform alone was not enough. The Bank was concerned with effective reform. Its data showed that 90 percentage of firms in developing countries reported gaps between formal policies and what happens in practice[34]. John Ohnesorge has rightly pointed out that domestic legal reforms in the framework of development policy do not take place in a vacuum[35]. They unfold through mechanisms ranging from UNCITRAL model laws and World Trade Organisation treaty-based regimes to external-imposed constrains of loan conditionality and managerial mechanisms identifying good legal reform practices and recommending them to third countries. Legal indicators adopt the latter approach. The World Bank for

instance relies on Investment Climate Surveys and the *Doing Business* indicators because they benchmark regulatory regimes in more than 130 countries and provide evidence about what governments at all levels can do to create a better investment climate[36].

The Doing Business project clearly fills a void of quantified legal information which international development organisations require to inform and monitor legal reform in the context of governance[37]. *Doing Business* indicators claim to provide actionable evidence on the specific laws and regulations that enhance or hinder business activity, and the public institutions that supported it[38]. With that purpose, it makes available to reformers a database with good practices and benchmarks in most fields of business law. It also ranks legal and regulatory reforms with proven records of success or failure, and even more impressive, and probably worrying, it makes available a reform simulator. The latter allows governments to test, in advance, the impact of legal reforms upon their *Doing Business* ranking, both at the level of the ease of doing business rank and at the disaggregate level of each of its variables[39]. The combination of the above tools renders national law reformers not only dependent from development agencies' data, but also accountable vis-à-vis the reform agenda set at an international level.

2. Evidence-based Reform and the Mathematical Turn in Development Policy

By making available legal information that is comparable over time and across countries, transnational legal indicators allow policymakers to spot systematically legal issues needing reform, design evidence-based legal reform projects and monitor their implementation periodically. In this section, I discuss two possible implications that the use of rankings and indicators may convey for the intellectual project of law and development. First, I show that indicators promote an evidence-based conception of legal reform that reinforces *en passant* the idea that there is only one model of development and only one model of law in development. Second, I show that legal indicators promote a mathematisation of the values and drivers of legal reform to the detriment of public debate and democratic participation.

Evidence-Based Law and Development Policies

Transnational legal indicators have encouraged law and development policy-making to rely increasingly on evidence. Jeffrey J. Rachlinski argues that this may be a desirable development. 'Evidence-based law' would be better law because it would be informed by reality[40]. Adam Aft, Craig Rust, and Alex Mitchell, founders of the *Journal of Legal Metrics* have also claimed that law is far from immune to the subjective biases and beliefs of its observers and practitioners[41]. In their view, more empirical data will chase away anecdotic evidence, popular beliefs or plain factual ignorance,

which in their view often underpin assumptions and judgments of decision-makers[42].

An evidence-based approach to law and development policy intends to provide more accurate accounts of the relations between law and reality, including the identification of progress made and to be made in every society. It would also call upon reformers to conduct impact assessments prior and after legal reforms and, more generally, equip professional decision-makers with the tools to choose courses of action with proven track records. In other words, it would aim to ensure that legal reforms are carried out on solid factual grounds.

But this enthusiasm needs to be nuanced. From a practical perspective, the amount of legal and regulatory reforms informed by indicators is still relatively insignificant compared to the amount of reforms pursued every year worldwide. From a theoretical perspective, indicators should not be equated to an unbiased source of empirical evidence. They convey the political and economic views of the issuers as well as their reform priorities. In particular, legal indicators from the World Bank and development international organisations tend to promote the idea that there is only one model of development and only one model of law in development[43]: a private-led model where the rule of law is defined as a proxy of legal systems and its rhetoric is expanded to encompass business law and regulation. Additionally, they tend to be both selective and culturally biased. Selective because they emphasise those areas of law related to the functioning of the market economy, and culturally biased because they promote a one-size-fits-all model of law drawn largely from the institutional setting, mode of operation, economic qualities and legal culture of common law systems.

For instance, *Doing Business* indicators assume there is a causal link between legal reforms and economic outputs of regulation. The reform simulator reinforces this shortcoming. First, it presents improvement in the ranking as the direct result of legal reforms. Yet, in practice, two-thirds of the variables *Doing Business* uses to calculate the rankings relate to economic outputs. These are nonetheless neglected in the simulator as changes in the rank are set to depend only upon the legal variables. In other words, the simulator assumes that better economic outputs will follow from the implementation of regulatory reform.

Second, the reform simulator lays on the assumption that less regulation is better for economic growth. Vinod Thomas and Xubei Luo reveal that 7 out of the 10 variables of *Doing Business* assume that less regulation is better for business, which is a highly controversial and unsettled theory[44]. In turn, this is problematic for two main reasons. First, it disregards that regulation can also bring social and corporate benefits. It depends on the amount of regulation each society starts from and on its social and cultural conditions. On the other hand, it neglects recent evidence

showing that regulatory vacuums can also lead to poor financial performance of economies[45]. Hence, if overall *Doing Business* may provide reformers with some useful data, its all-inclusive reform packages should be carefully examined.

Indicators and the Mathematical Proceduralisation of Law

As I have explained elsewhere, legal indicators convey a mathematisation of the legal concepts they measure[46]. In the context of policy-making, they also convey a mathematisation of the purposes of the reform. Indicators draw on a process of commensuration of legal phenomena generally made up of three distinct but interrelated stages. First, it disaggregates the concept intended to be measured into several sub-variables. For instance, when *Doing Business* measures contract enforcement it defines it in terms of the number of procedures needed to obtain a judicial decision, the time it takes to obtain the enforcement, and total cost of the procedure itself.

Second, indicators quantify each of the different variables. Since legal phenomena are non-observable in the empirical world, indirect measurements are needed. They allow socio-legal scientists to pose measurement problems as problems of statistical estimation or prediction[47]. The reason is straightforward. Contrary to phenomena in the natural world, such as weight or length, most dimensions of the social institution we call law are not readily quantifiable. Indirect measurements build upon a collection of directly measurable quantities that are 'believed to reflect the underlying interest to some degree'[48]. They rely on mathematical and statistical techniques to draw abstract variables from the data collected empirically.

The *WGI Rule of Law Indicator* illustrates clearly the role mathematics play in the quantification stage of indicators. Kaufmann et al. produce numeric evidence of the six dimensions of governance, including the rule of law, through a statistical tool known as unobserved components model (UCM)[49]. The UCM allows the combination of the values of variables from different data sources into a single score. It builds upon the assumption that each variable provides an imperfect signal of the rule of law that is difficult to observe directly. Kauffman et al. assume it is possible to write the observed score of the rule of law in country *j,* based on the relevant variables in source *k,* y_{jk}, as a linear function of unobserved rule of law in country, g_j, and a disturbance term ε_{jk}.

Equation 1

$$y_{jk} = \alpha_k + \beta_k(g_j + \varepsilon_{jk})$$

where α_k and β_k are parameters that map the rule of law in country j in the observed data in source k, y_{jk}.

Third, indicators normalise and aggregate individual variables into a single score through mathematical operations. Most indicators rely on the aggregation method of average -or mean- to calculate the estimates. This means that they claim to describe legal systems at a general level, assuming the normal distribution of the values obtained. They identify a model of the legal condition examined – e.g. a rule of law standard - and interpret all deviations as imperfections in the realisation of the model. The main implication of quantification and mathematical aggregation is that mathematical operations such as the method of maximum likelihood or weighted mean constitute the object measured at the expense of political considerations.

Indeed, the mathematical proceduralisation underlying indicators tends in many occasions to supersede the argumentative and consensual model underpinning international law in the mission of defining the form and content of legal standards with global scope, whether it is the rule of law, contract enforcement, legal certainty, etc. Transnational economic and social actors commonly perceive international dialogue under democratic conditions as difficult to reach, costly, inefficient and often inconclusive. In other words, the Habermasian model of proceduralisation of law shows practical weaknesses for development policy. In the context of the 'audit society' we live in mathematical reasoning is gaining predominance in legal reform because it is seen as a technical, often depoliticised, means to set standards and assess their compliance[50].

Finally, mathematisation opens up new horizons for the governance of legal systems and analysis of law. With legal indicators available, development policy makers in international organisations can establish relations between law and other quantified variables such as poverty, economic growth and human development. It allows to track patterns and trajectories of legal systems over time and to relate them with social and economic change. Yet, mathematical rationality strips legal phenomena away from their context and the intrinsic complexity of law as a social institution. Since, this simplification is unavoidable in quantitative comparisons of socio-legal phenomena, users of indicators need to make sure they are used only as headlights, and never as 'go' or 'no-go' signals.

Concluding Remarks

Transnational legal indicators exemplify as much as they intensify the transformations of the intellectual project of law and development today. They constitute a clear example of how performance measures and non-binding policy instruments from international organisations become in practice truly transnational normative frameworks guiding legal and

regulatory reform projects locally, and eventually shaping states legal systems. It also confirms the links between development policy and governance, in which the latter tends progressively to instrumentalise and absorb the former. In spite of their evident pitfalls and shortcomings, law and development scholars should not turn a blind eye to legal metrics. Empirical evidence is certainly preferable to subjective biases and beliefs in legal reform. The challenge ahead is thus to engage in a sustained critique and improvement of existing metrics. We must ensure that policy-makers have access to more sophisticated data and are equipped with the conceptual and methodological tools to make good use of it.

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