Third World Quarterly, Vol. 34, No.1, 2013, pp 131–150

Routledge
Taylor & Francis Group

Quantifying Law: legal indicator projects and the reproduction of neoliberal common sense

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ABSTRACT *Development thinking in the past two decades has explicitly embraced law as an engine of development. This legal turn has been accompanied by a dramatic expansion of efforts to measure and quantify legal systems. Against claims that legal indicators are neutral, technical descriptions of the legal world, this article argues that legal indicators do not merely reflect legal reality; their construction and deployment are central to the continuing diffusion of neoliberalism as development common sense. The article considers the two most prominent projects to quantify law in the service of economic development—the World Bank's Worldwide Governance Indicators and* Doing Business *indicators—and argues that these reproduce a narrow neoliberal conception of law as a platform for private business and entrepreneurial activity, and institutional support for a system of* laissez faire *markets.*

One of the most striking features of development thinking in the past two decades is the explicit embrace of law as an engine of development. Rule of law departments have sprouted in all major international financial institutions, bilateral aid agencies and nongovernmental development organisations, and scholars and practitioners now regularly advocate legal reform in developing countries as a means to sustainable economic growth.

This legal turn in development theory stands in sharp contrast to much development thinking and policy making in the past half century. A Law and Development movement briefly flourished in the 1960s and early 1970s but made little impress on the neoliberal theory that has dominated both developmental praxis and academia for the past four decades. If neoliberal policies of economic liberalisation and privatisation ultimately rested on a legal framework and the functioning of legal institutions, explicit recognition of the legal system was absent from the neoclassical model of freely exchanging individuals in a system of *laissez faire* markets. However, since the early 1990s, and especially in the new century, law has taken centre stage in development thinking. This

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ISSN 0143-6597 print/ISSN 1360-2241 online/13/000131-20

http://dx.doi.org/10.1080/01436597.2012.755014

can be seen in the recent explosion of law reform projects providing assistance to developing countries seeking to reform their legal systems or justice institutions, as well as in academic and policy literature.

This new focus on law has been accompanied by an explosion of quantitative studies and attendant efforts to measure and quantify countries' legal systems. Cross-country statistical analyses purporting to find a causal connection between legal institutions or the rule of law and economic development have proliferated almost as rapidly as the reform projects to which they provide sustenance. If law is the development community's new church, quantitative analysis is the rock on which it is built. Indeed, one author argues that the optimism of those promoting law as an answer to development derives largely from the support of empirical, quantitative studies deployed in support of their claims.[1] Quantitative analysis, of course, requires data and a signal development of the past two decades is the dramatic and rapid expansion of efforts to gather quantitative information about legal systems. The most sophisticated of such efforts collect variables that purport to measure a range of aspects of a country's legal institutions or even specific aspects of a jurisdiction's legislative and regulatory environment. All these indicator projects claim to be neutral, technical descriptions of the legal world.

This article interrogates this claim and argues that legal indicators do not merely reflect the legal reality in developed and developing jurisdictions; their construction and deployment are central to the continuing diffusion of neoliberalism as development common sense. It considers, specifically, the two most prominent exemplars of the project to quantify law in the service of economic development—the World Bank's Worldwide Governance Indicators (WGI) and *Doing Business* (DB) indicators—and their role in narrowing the horizons of intellectual production in the development field.

First, the article explores some of the conditions leading to the increasing use of indicators for measuring law and legal institutions, namely renewed attention awarded the law in development policy and theory since the 1990s. It argues that for all the pronouncements of a sea-change in development theory and policy—a move to a post-Washington Consensus which leaves neoliberal dogma behind—the new law-focused discourse continues to undergird many of the same neoliberal assumptions about development and growth.

It then turns to the project of quantifying law. It analyses the project's claim to objectivity and argues that, while a number of critics have questioned the accuracy and usefulness of individual indicators in codifying and representing legal reality, few question the background assumptions and conceptual categories which structure the indicators themselves—assumptions and categories which are not neutral but are rather the outcome of implicit (neoliberal) theories about law and development. Through a close analysis of the WGI and DB indicators the article shows how these reproduce the neoliberal view and its narrow conception of law as a platform for private business and entrepreneurial activity and institutional support for a system of *laissez faire* markets.

Finally, the article considers the implications of the value-laden nature of legal indicators. It argues that legal indicators function as implicit or even explicit standards and, as such, exert significant influence in diffusing and embedding a neoliberal view of law, naturalising and reifying neoliberal institutions—of private property relations, contract, etc. At the same time this ostensibly neutral, technical and ultimately market-facilitating conception of law facilitates a concomitant narrowing of the political and 'a tendency to close off spaces for participation and democratic contestation' in legal and development policy.[2]

The neoliberal legal consensus

The dramatic growth of legal indicators can be situated within its contemporary political, economic and ideological context, namely one characterised by the neoliberal mode of governance premised on the extension of market relations. This political-economic programme has, since the 1990s, become nearly universal: almost all governments, regardless of political orientation, adhere to its tenets.

Neoliberalism holds that well-being is best promoted by the liberation of individual entrepreneurial activity. To this end its adherents advocate free markets, the liberalisation of trade and finance, and a limited role for the state in the economic and social organisation of society.[3] On the transnational plane the neoliberal view holds that the world is moving towards a global consensus, based on an integrated global economy, free markets, deregulation, privatisation, a minimal state subordinate to multilateral organisations, and international property rights for foreign investors.[4]

In the context of development policy the neoliberal governance model has increasingly moved away from an exclusive concern with free market and anti-state economic policies. A doctrinaire insistence on privatisation and deregulation, synonymous with the structural adjustment of the 1980s, has given way to a global call for rule of law and judicial reform, or what Sousa Santos terms 'neo-liberal legal globalization'.[5]

In one sense this legal turn is hardly surprising. Harvey has argued that neoliberalism should be understood not simply as a world-view or collection of economic policies, but rather as a 'political project to re-establish the conditions for capital accumulation and to restore the power of economic elites'.[6] It follows that, under a Marxist analysis, a close relationship between law and capital accumulation, and thus law and neoliberalism, is quite logical. Pashukanis famously described the juridification of social life under capitalism, arguing that the legal form is generated by commodity exchange, while Lukács described law as a 'life-form' created by capitalism.[7]

Nevertheless, against the history of postwar development theorising, in which law was conspicuously absent, the contours of the legal turn appear in sharp relief. During the 1960s and early 1970s a short-lived Law and Development movement flourished in the USA, but by the mid-1970s the movement's leading figures had become disillusioned with the poor or even counterproductive results of their efforts.[8] Even at the movement's height, prominent development organisations such as the World Bank paid little attention to the role of law.[9]

From the late 1970s, led by the World Bank, with its formidable resources as both lender and research institute, mainstream development thinking took a distinct turn to focus on the neoliberal market-stimulating (and anti-state) reforms that were soon gathered under the umbrella of 'structural adjustment'.[10] Opening domestic economies to imports, freeing prices from controls, macro-economic stabilisation, privatisation of state-owned enterprises, reduction of trade tariffs, and financial and labour market liberalisation all featured prominently in Bank policy prescriptions.[11] If legal reform was often a necessary concomitant to such policies, it was seldom explicit in the neoliberal development model.

In the 1980s and early 1990s structural adjustment came under widespread attack. Failure to achieve promised growth,[12] increasing inequality both within and between countries,[13] and dissent within influential donors such as Japan,[14] put boosters of Washington Consensus policies on the defensive. Increasingly policy makers and academics have talked about the importance of institutions, including, in particular, legal institutions. Already in a 1994 report the World Bank was arguing that sustainable development required 'a predictable and transparent framework of rules and institutions for the conduct of private and public business'.[15] This framework, the then Bank president, James Wolfensohn, explained in 1999, included 'an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system'.[16]

Contemporary mainstream development thinking is now dominated by talk of legal institutions. Law now provides a vocabulary for policy making, but in the new development vernacular, law's role in the developmental process remains narrowly conceived, undergirding the same assumptions as earlier forms of neoliberal thinking: individual entrepreneurship remains the engine of growth; and the role of the state must be limited to facilitating the operation of a system of *laissez faire* markets.[17] As Wydick explains, 'to provide an incentive for exchange, people have to be confident in the contractual promises of their reciprocating partners'.[18] Without such confidence, transactions will not happen. Thus legal institutions such as 'contract law, property rights, and civil courts inspire confidence by ensuring that partners on the other side of a transaction keep their promises'.[19]

On this view the law is a platform for individual productivity, facilitating the private sector and the free market, and a tool, in the World Bank's words, to 'empower private individuals to contribute to economic development by confidently engaging in business, investments and other transactions'.[20] The result is a general understanding that the law should be 'market friendly'—that is, 'that it should limit itself to protecting property rights, freedom of contracts, and enterprise'.[21] The law, in short, should be the product of market forces or, at the very least, should be adapted to the requirements of the market.

Quantifying law: legal indicator projects

It is within this context that a series of projects to quantify law have taken shape. The tendency towards quantification is by no means unique to the field of law and development. Since the 1990s the expansion of econometric and quantitative modelling techniques, with an attendant almost automatic quantitative orientation to all social questions, has been a signal development in the social sciences. This quantitative fetishism is also apparent in the realm of international policy and administration. The past two decades have seen the development of a plethora of international governance indicators, including measures of 'human development', corruption, economic and political freedom, political risk, and even compliance with human rights norms.[22]

Efforts to construct quantitative measures of law take a variety of forms but fall broadly into two groups. The first group of projects seeks to measure and quantify a range of institutions including, but not limited to, legal institutions. Here, the legal system contributes to one or more components of a larger institutional mapping. The most common legal indicator included in such projects is a measure of the rule of law, although other institutional variables, such as level of corruption or democracy, also capture aspects of a society's legal structure. Examples include the World Bank's WGI,[23] the World Economic Forum's *Global Competitiveness Report* (measuring determinants of 'global competitiveness'),[24] the University of Maryland's Polity IV database (measuring features of political systems),[25] Transparency International's Global Corruption Barometer (measuring levels of corruption),[26] and the Ibrahim Index of African Governance (measuring aspects of countries' governance).[27]

The second group of projects focuses specifically on measuring and quantifying jurisdictions' legal and regulatory regimes. The World Bank's DB project is the leading example of this approach.[28]

Objective descriptions of reality?

Quantitative indicators make a complex social reality easier to comprehend and analyse, allowing comparisons across time and space and a shared understanding across diverse knowledge communities.[29] Much of the attraction of indicators lies in their claim to objectivity as simple descriptors of social phenomena. The use of numbers to convey information, Porter suggests, has appeal precisely because it suggests objectivity and enhances the credibility of judgments. Quantification and the language of mathematics, he argues, 'ha[ve] long been almost synonymous with rigor and universality'.[30] Indeed, Porter suggests that the turn to quantitative methods arose precisely in the context of politically contested decision making: policy makers turned to numbers, and in particular cost–benefit analyses, 'to create a basis for mutual accommodation in a context of suspicion and disagreement' and thus to 'promote procedural regularity' and 'give public evidence of fairness'.[31]

The various efforts to construct legal indicators listed above are typical in this respect: each is presented as a neutral, technical endeavour concerned with the positive description of the legal reality as it exists in the world's various jurisdictions. Indeed, the authors of legal indicators suggest they are useful precisely because, in quantifying the subject of analysis, they eliminate the subjectivity characteristic of more qualitative assessments.

Critics of the legal indicator projects have largely accepted this proposition. While some have questioned the accuracy and usefulness of individual indicators in quantifying and representing legal reality, few question the background assumptions and conceptual categories that structure the indicators themselves. Most critics instead focus on functionalist concerns: the indicators produced do not capture aspects of legal systems in a manner *useful* for development-promoting legal reform. A recent intervention by Davis is characteristic and rehearses several common arguments.[32] First, some variables do not exclusively capture characteristics of the legal system. Crime rates, for instance, used in compiling many aggregate indicators of the rule of law, capture both legal and non-legal (cultural, for instance) aspects of a society. Similarly, security of private property (from, say, government expropriation) will depend not only on legal protections and the judiciary, but also on the level of popular support for government expropriation. The latter, in turn, may be shaped by whether ownership of property is concentrated in the hands of, say, a particular ethnic group.[33] As a guide for reform, such indicators that capture both legal and extra-legal elements are potentially unhelpful.

Second, many legal indicators lack precision. An indicator measuring the 'quality of the legal system' may provide little information about the specific aspects of that system. Such a variable, Davis argues, 'captures too broad a range of characteristics of a legal system to provide practical guidance for reformers'.[34] But indicators that claim to measure a narrower component of a legal system may also suffer from such lack of precision and conceptual confusion. A typical rule of law indicator will reflect, among other measures, both the level of contract enforcement and property rights protection. For the legal reformer it may be very difficult to disaggregate these various components of the rule of law. Measures of property rights security similarly conflate a number of aspects of the legal system, including not only a jurisdiction's property law, but also its criminal law, contract law and taxation law, as well as characteristics of legal enforcement and the judiciary, such as the latter's independence and corruption.

A final complaint is that some legal indicators capture aspects of the legal system not amenable to reform at all. This is true of many of the efforts to code the historical origins of legal systems, as in the endeavours of some researchers to trace jurisdictions' legal roots to English common law or French civil law.

These critiques, while valuable, are limited to indicators' functionality: their ability to inform the choice and targeting of development-abetting legal reforms. The animating concern is the efficacy of the indicators in question; for authors such as Davis the goal is one of improvements in indicator construction. Indeed, many critics, while trenchant in their analysis of legal indicators, are optimistic that, with technical advances, useful indicators may be produced. Thus, Davis can write that 'additional empirical research employing more useful legal variables…may come to fulfill its promise'.[35] What remain unquestioned are the conceptual categories which structure the indicators and the resulting choice to privilege certain aspects of a legal system—say, property rights protection or contract enforcement—in the construction of indicators.

A second group of critiques centres on questions of methodology. Here, many interventions do explicitly question the indicators' claims to objectivity by pointing to sources of subjectivity in the statistical and econometric techniques used to compile and aggregate data and arrive at numerical scores for particular legal variables.[36] A central concern is the use of perception-based data to arrive at ostensibly objective indicators: legal variables are largely constructed from the subjective judgment of researchers or survey respondents, including firms, industry leaders, and, to a lesser extent, households. The concern with such data is that individuals' perceptions of legal institutions or a regulatory environment may be influenced by non-legal or ephemeral characteristics of a given society. For instance, Ocampo and Vos argue that perceptions of the rule of law may be influenced not only by knowledge of how a legal institution such as the judiciary operates, but also by a country's economic performance: 'when a country faces an economic crisis, people are more likely to perceive the quality of the country's institutions as deteriorating'.[37] What is being estimated, they conclude, is not the 'quality of the rule of law itself, but the perceived quality of the rule of law, which in turn had been largely influenced by the vicissitudes of economic performance'.[38]

This second group of critics is right to question claims to objectivity. However, in focusing on one source of subjectivity—perception-based survey responses—they ignore a second, more fundamental source of subjectivity, namely the very concepts and categories used in constructing indicators. Implicit in Ocampo and Vos's criticism is an assumption that some objective quantitative representation of the rule of law is in fact possible and that the rule of law is itself an objective category and descriptor of a legal system. But what is the rule of law that is being measured, subjectively or otherwise? What facets of a legal system are actually captured by indicators? And how are those facets selected for measurement over other ways of describing a legal system?

The very categories that are used in indicator projects are not neutral or objective but are themselves the outcome of 'implicit theories about social life and social relationships—theories that are obscured by claims of neutrality and objectivity.'[39] As Merry puts it, 'indicators typically conceal their political and theoretical origins'.[40] A close analysis of legal indicator projects reveals that the form of the indicators themselves, quite aside from the accuracy of their content, reproduces particular concepts of law and its relationship to society, namely those central to the neoliberal legal consensus discussed above. The remainder of this section examines this through a discussion of the two most influential indicator projects: the WGI and the DB projects. The former aggregates data on various subjective measures of institutional quality, including the rule of law, while the latter uses survey data to measure countries' legal and regulatory environments.

The Worldwide Governance Indicators project

One of the earliest and largest attempts to quantify law is the World Bank Institute's WGI, updated annually under the title *Governance Matters*.[41] The WGI project collects data on 212 jurisdictions, measuring six dimensions of governance since 1996. Data are collected from 35 different sources and aggregated to create measures of six dimensions of governance: voice and accountability; political stability and absence of violence/terrorism; government effectiveness; regulatory quality; rule of law; and control of corruption.[42]

While several of the dimensions contain legal elements—regulatory quality and control of corruption, for instance—the rule of law dimension is the most obviously *legal* indicator. It seeks to capture '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'.[43] It is a composite indicator based on a large number of individual variables measuring perceptions of the rule of law; data are collected from surveys of firms and business executives, 'country experts', and, to a lesser extent, households.[44]

Despite the neutral language used to describe the rule of law indicator, an analysis of the survey-level sources used to compile the indicator suggests an overriding concern for the relationship between legal institutions and private business activity. That is, the rule of law indicator is structured so as to gather information predominantly about how legal institutions affect market-based business activity.

For example, the World Bank and European Bank for Reconstruction and Development's *Business Environment and Enterprise Performance Survey* collects responses from firms in transition economies about their financial performance and their perceptions of the regulatory and investment climate. The WGI draw on several questions in constructing the rule of law indicator, including 'How problematic is crime for the growth of your business?' and 'How problematic is [the] judiciary for the growth of your business?'.[45]

Another important survey used to construct the rule of law indicator is the World Economic Forum's Global Competitiveness Survey. The survey collects responses of domestic and foreign-owned firms on various issues relevant to the business environment and firm competitiveness. The WGI draw on a number of measures, including business costs of common crime, business costs of organised crime, protection of financial assets, protection of intellectual property, judicial independence and efficiency of the legal framework in settling disputes and challenging government actions.[46] The latter, it should be noted, is not a measure of the efficiency of the legal framework in general. Rather, survey respondents are asked specifically whether: 'The legal framework in your country for *private businesses* to settle disputes and challenge the legality of government actions and/or regulations is inefficient and subject to manipulation…or is efficient and follows a clear, neutral process'.[47] The ability of, say, labour to challenge the legality of a business' action is of no concern in this conception and measurement of the legal framework.

Not all data are drawn from surveys. A large portion of the inputs to the WGI comes from expert assessments. Business Environment Risk Intelligence, for example, is a commercial risk rating agency. The WGI use its measure for 'enforceability of contracts' found in its Operational Risk Index. This index, unsurprisingly, given its primary use in rating commercial risk, measures 'obstacles to business development'.[48] Another source of expert assessment is the Global Insight Global Risk Service, a commercial business information provider. Its staff contribute several measures to the WGI, including the enforceability of government contracts and the enforceability of private contracts.[49]

A further commercial business information provider, the Economist Intelligence Unit, collects expert assessment of the enforceability of contracts, speediness of the judicial process, government confiscation or expropriation of property, intellectual property rights protection, and private property protection.[50] Global Insight Business Risk and Conditions, another commercial business information provider, produces 'assessments of the quality and stability of various dimensions of the business environment'. The WGI use two of its expert assessment-based measures: 'Judicial Independence' ('An assessment of how far the state and other outside actors can influence and distort the legal system' that 'will determine the level of legal impartiality *investors can expect*') and 'Crime' ('How much of a threat *businesses face* from crime' which 'can cause major inconvenience for foreign investors').[51]

What, then, can be concluded of the WGI project to measure the rule of law? First, there is an overwhelming emphasis on a limited number of variables: security or protection of property rights (including intellectual property), enforcement of contracts, and the independence of the judiciary are the most important components of the rule of law as measured by the WGI. Measures of the level of crime are also recurring, if less important, variables—'have you been the victim of a crime', 'trust in the police', etc. Finally, a number of additional idiosyncratic variables is included in some individual sources, such as 'kidnapping of foreigners' and 'trafficking in people'.

Second, many of the legal variables included quite explicitly measure a legal institution's effect on *private business*. Rule of law indicators such as 'obstacles to business development', 'business costs of crime' and 'how much of a threat businesses face from crime' all evince a concern for the law's influence on business agents operating in the market, rather than, say, on a worker at the coal face or even a hypothetical 'average' individual in a given jurisdiction. This is unsurprising given that many of the WGI's sources are quite explicit in stating that their animating concern in collecting data is to measure the effect of legal institutions (be this the 'law on the books' or the enforcement of that law by police or judiciary) on *business*. The World Economic Forum is concerned with the rule of law as a determinant of business competitiveness. The Business Environment Risk Intelligence seeks to provide its clients with assessments of the 'quality and stability' of the business environment. And the World Bank's *World Business Environment Survey* claims to provide a measure of how, among other factors, the legal system shapes the investment and business climate.

Even where a particular legal variable does not explicitly measure the impress of law on business, this remains an implicit concern. Perception-based data are drawn largely either directly from business firm respondents or from 'experts' working for commercial business information providers assessing the impact of legal environments on the competitiveness of or riskiness for capital. This is not universally the case; the WGI also incorporate several population surveys of households, such as that conducted by the Chilean NGO Latinobarometro in several Latin American countries.[52] However, as Arndt and Oman note, the aggregation procedure used by the WGI's authors to construct 'composite indicators assigns less weight to sources that differ from the majority'. The population surveys tend to fall in the minority. The result, Arndt and Oman show, 'is effectively to give much more weight to expert assessments and [business] enterprise surveys than to population surveys—to the point that population surveys carry practically no weight in the composite indicators'.[53] Moreover, even if a simple average of all sources was used rather than weighing them according to their degree of correlation, 'expert assessments and business surveys would nonetheless still dominate simply because there are significantly fewer cross-country-comparable household surveys'.[54] Whereas expert assessments and business surveys tend to cover a large number of countries and are thus comparable across jurisdictions, household surveys tend to be conducted in only one or a limited number of jurisdictions. There is thus a relative paucity in internationally comparable household-survey data. It is also noteworthy that, in population surveys, the socially excluded—those most affected by economic poverty or legal or cultural status—make up the great majority of non-respondents.[55] The result, in short, is a sample bias in favour of business-oriented perceptions of the rule of law.

This bias is significant given the potential differences in the perceptions of the rule of law by different groups in society. Consider, for instance, one of the variables taken from the World Bank's *World Business Environment Survey*. Respondents are asked: 'To what degree do you agree that the legal system will uphold contract and property rights?'.[56] It is misleading to conclude, as the survey implies, that the resulting numerical score will give a general measure of the protection of property rights and enforcement of contracts in a given jurisdiction. There is no reason to assume that a particular jurisdiction's legal system treats *all* property claims or *all* contractual claims the same. As one commentator has observed of rental contracts, 'in many jurisdictions residential tenants are granted significant levels of protection from eviction for ideological reasons that have no application in cases involving commercial contracts'.[57] Jurisdictions may also treat various property entitlements differently. The treatment of real property and personal property, for example, diverged early in the history of most common law jurisdictions. The survey provides, at best, some indication of the protection and treatment of a particular class of property and contractual claims. A Colombian farmer forced from his/her land by a government-backed paramilitary will no doubt answer the survey quite differently from the executive of the biofuel conglomerate now cultivating palm oil crops on this land. Only the latter, one can safely assume, will find him/herself a respondent for the *World Business Environment Survey*.

The Doing Business project

If the rule of law that emerges from the WGI is one implicitly shaped by a formal business sector orientation, the DB project, as its name indicates, is explicitly concerned with the relationship between law and business.[58] The project seeks to construct indicators that quantify a jurisdiction's laws and regulations in terms of their relation to—and the extent to which they 'enhance or hinder'—business activity.[59]

The DB reports compile 'objective measures' of laws and regulations in some 185 countries.[60] The specific features of the legal system that the project seeks to assess include, for instance, the ease of starting a business, employing workers, of enforcing a contract, obtaining credit, and protecting investors.[61]

The resulting database contains information on the extent to which the law facilitates or hampers business activity. A country in which there are more steps to starting a business—or where those steps take longer to complete or cost more—will score poorly on the corresponding measure. The ease of enforcing a contract—the steps necessary to file a lawsuit and so forth—is similarly scored, as is the ease of hiring and firing workers.[62]

The area of labour regulation provides a useful snapshot of the study's approach to measuring law more generally. The DB authors construct a Rigidity of Employment Index, itself the average of several sub-indices: a Difficulty of Hiring index, a Difficulty of Redundancy index, and a Rigidity of Hours index.[63] Each index scores countries from zero to 100 with higher values indicating 'more rigid' regulation. The Rigidity of Employment index, for instance, rewards jurisdictions with a low minimum wage and relaxed rules for termination; a jurisdiction with no requirement of advanced notice for redundancy termination or mass dismissals will score highly. By way of contrast, a jurisdiction that places limits on work time or mandates paid annual vacation will be penalised.[64]

How do these indices reflect the lived reality of labour regulation and its competing demands of economic efficiency and social protection? DB pays lip service to non-efficiency goals that undergird labour regulations. For instance, the 2010 report observes that employment laws are 'needed to protect workers from arbitrary or unfair treatment and to ensure efficient contracting between employers and workers'.[65] However, a closer look at the resulting indices suggests that the primary, overriding concern is with efficiency and ease of business, namely through maintaining only minimum labour market regulations, rather than social protections.

This is borne out at the individual country level. South Africa's labour market, for instance, has long been marked by discriminatory practices. In an effort to remedy such discrimination, the post-apartheid government has made redundancies subject to affirmative action rules, a legislative move that earns the country lower scores on the employing workers indices—priority rules for dismissals are considered a rigidity and penalised.[66]

Georgia, by way of contrast, which has pursued an aggressive neoliberal agenda of deregulation and liberalisation, is praised for its new business environment. Recent DB reports consistently make clear that Georgia is a success story.[67] This was not always the case: in the 2005 report, Georgia scored 17 on the Difficult of Hiring index, 60 on the Rigidity of Hours index, 70 on the Difficult of Redundancy index, and 49 on the Rigidity of Employment index.[68] Following labour law amendments in 2006 and the introduction of a new labour code, Georgia's indicator measures rose dramatically. In the 2008 report Georgia scores zero on the Difficulty of Hiring and Difficulty of Redundancy indices, 20 on the Rigidity of Hours index, and seven on the Rigidity of Employment index.[69] In 2006 and 2007, Georgia ranked sixth and fourth in the world, respectively, under the 'employing workers' rubric and the 2010 report put it ninth in the world.[70]

The DB authors have only praise for Georgia's reforms: 'Georgia's new labour regulations help workers move to better jobs'; 'Georgia's flexible labour rules, in its new labour code' was one of the '3 boldest reforms, driving the biggest improvements in the DB indicators'.[71] But in what do Georgia's new labour laws, applauded with such insouciance by DB, actually consist? The report's authors welcome eased restrictions on the duration of term contracts and number of overtime hours, and the elimination of mandated premiums for overtime work. Gone, too, is the requirement to notify labour unions when firing redundant workers.[72] But other features not highlighted by DB are no less striking: the new labour law allows unconditional dismissal of workers, marginalises trade unions in collective bargaining, removes various rules governing working conditions from the arena of collective bargaining, and places strict temporal restrictions on strikes.[73] The 2006 law has also been criticised by the International Labour Organization (ILO) on the grounds that it is not in conformity with core labour standards.[74]

In short, analysis of the employing workers indices—or, for that matter, DB's other indices—reveals that countries' legal systems are quantified according to whether regulations exist, irrespective of the social purpose behind them. Implicit in the DB indicators is the assumption that regulations have costs and few—perhaps no—benefits. The best designations are given to the countries with the lowest amount of regulation: a high quality legal system is synonymous with low costs to business.

Rule of law: rule of market

Writing about efforts to measure human rights compliance, Rosga and Satterthwaite observe that 'the presentation of neatly tabulated numbers erases the means and messiness of their own generation. It obscures evidence of the human judgment.'[75] Despite this obfuscation, behind the neutrality of numbers a normative vision can often be discerned. Quite aside from whether the content of the legal indicators discussed above accurately or objectively reflects that which they purport to measure, a close analysis of their form reveals certain background assumptions about, and even a structuring conception of, law and its role in development. Even assuming that a given indicator provides an objective measure of, say, the security of private property rights, in privileging these functions and institutions of a legal system and orienting representations of the law to its effect on the market-based business activity of economic agents, the indicator reproduces an inherently normative vision of law.

This is all the more apparent when one considers the alternative forms indicators may have taken. In constructing an indicator of the rule of law, the authors of the WGI need not have sought to measure only, or primarily, the existence or efficacy of business-facilitating legal institutions. An alternative structuring conception of the rule of law might have privileged institutional features providing for equality before the law, the uniform application of laws to all individuals irrespective of commercial status, the existence of clear, consistent and publicly promulgated legal rules, or any of the other institutions commonly associated with liberal legal thought. Alternatively they might have embraced a 'thick' conception of the rule of law, recording the existence of institutions protecting political liberties and human rights, ensuring democracy, or entrenching political moral concepts of justice and fairness. Instead, the WGI reproduce the neoliberal view of law, espoused by the World Bank, among others: the rule of law consists in those legal institutions which provide predictability for private commerce and market-based business activity, while acting as a constraint on a predatory, property-appropriating state.

The vision of law reflected in the DB indicators is similarly one which privileges private business activity as the animating concern of law and legal regulation. These indicators are constructed in such a way as to suggest little concern for the economic and social rationale behind regulation—for instance the non-efficiency grounds for limits to working hours or a mandated minimum wage. Rather, as the DB authors themselves explain, the law is understood in the first place in terms of its facilitation and promotion of private business activity.[76]

What implications follow from this? The fact that the DB indicators are concerned with the effect of law on business is not surprising—the explicit rationale for creating the indicators is to 'provide an objective basis for understanding and improving the regulatory environment for business'.[77] Nor is it necessarily problematic that a similar normative vision implicitly orientates the WGI. The real significance of these indicators lies rather in their influence *beyond* the purely positive act of quantification.

Legal indicators have been incorporated into, and have come to pervade, all areas of mainstream development thinking. Both the WGI and the DB indicators are promoted by the World Bank and are regularly cited in publications advocating rule of law reforms in developing countries.[78] They are also employed in various academic studies, especially cross-national statistical analyses of the relationship between law and development. In their various uses legal indicators are treated as objective facts, but their normative vision, if obscured, is nonetheless reproduced. This is most evident—and most influential—in their deployment as prescriptive instruments, namely 1) as standards; and 2) as instruments of conditionality.

Indicators as standards

A growing body of literature argues that projects of quantification may serve as a site for the exercise of social power when ostensibly objective indicators, consciously or unconsciously, become implicit standards. In his study of the rise of monitoring techniques in business and government management, Power describes the rise of audits as a mode of social control. An audit, Power argues, is 'never purely neutral in its operations'.[79] It creates (typically quantitative) standards of performance that not only allow for 'internal improvements to the quality of service' but also 'make these improvements externally verifiable via acts of certification'.[80] But if these standards facilitate external monitoring, one implication of Power's work is that they also continue to exert pressure for compliance independent of any explicit process of external scrutiny; the standard itself continues to exist beyond any formal monitoring process.

The legal indicators discussed above establish clear standards against which a jurisdiction's legal system and institutions may be judged, both from within and without. They reflect an implicit ideal: in the case of the WGI, a legal system involving strong private property rights protection, contract enforcement and Western-style juridical institutions. By quantifying and rank-ordering legal systems, these indicators measure not simply reality but the gap between reality and the ideal, between performance and the standard.

The ideal implicit in the WGI becomes explicit in DB. Here, jurisdictions are ranked according to their distance from the ideal of a *laissez-faire*, deregulated legal environment. The DB authors are clear in their intention that their indicators should provide standards against which legal and regulatory regimes can be evaluated, and they invite governments to use the indicators as benchmarks to assess their own performance.[81] Indeed, the authors claim the project has induced a number of countries to institute reforms based on an assessment using DB standards—287 such reforms in 131 economies between June 2008 and May 2009, if a recent report is to be trusted.[82]

A further consequence follows from the transformation of indicators into standards. As Rosga and Satterthwaite observe, standards have the potential to 'depoliticize choices that would otherwise be openly contested in the public sphere'.[83] Policy making—in this case about legislation or regulation or the inviolability of property rights—shifts from the political, the site of deliberation and choice, to the domain of technical expertise. Political questions about justice, equity and distribution become technical questions about measurement and methodology—in Kennedy's words, they become the subject of institutional and bureaucratic practice and 'sink into the background'.[84]

The neoliberal rule of law thus becomes naturalised and reified, no longer understood as socially produced but rather as fixed and immutable, a 'basic requirement…for a modern state', as one World Bank official puts it.[85] Alternative institutions or social arrangements are pushed beyond our line of sight or even our imagination. The result, to paraphrase Susan Marks, is that we take the legal world for granted and treat it as an 'objective domain' rather than the one shaped through political struggle.[86] Neoliberal legal institutions and arrangements—represented in the ideal of the standard—are treated as the technical necessities of any modern and developed legal system. Legal arrangements, such as the labour regulations central to the contemporary welfare state, on this view, cannot be understood as a historically contingent balance between competing political interests, the product of struggle and negotiation between capital and labour. Rather, they are simply inefficiencies, impediments to a technically mandated and universally applicable rule of law, the adoption of which is not a decision grounded in political choice, but a neutral, technical imperative. Political participation and domestic contestation in legal policy is thus narrowed or even foreclosed.

Indicators as instruments of conditionality

Indicators operating as standards are influential in promoting reform towards the ideals and normative visions implicit in the numerical indices. By both establishing the standards—publicised and celebrated as such—and facilitating the evaluation necessary for self-auditing, the legal indicators seek to achieve compliance without resorting to the forceful imposition of reforms from without.[87] This does not mean, however, that the indicators do not also facilitate more overt forms of coercion. Governments in many countries, but especially developing and transition economies, face considerable pressure to meet the standards manifest in the indicators. The most obvious source of pressure relates to the conditionality of development assistance. If conditionality is not itself new—indeed, it is almost synonymous with the structural adjustment lending of the 1980s—assistance increasingly is explicitly tied to reform as measured through quantitative indicators, including the WGI and DB indicators.

Since the late 1990s World Bank assistance has been increasingly allocated according to governance criteria, including measures of a jurisdiction's legal system. The World Bank's International Development Association (IDA), for instance, provides interest-free credit and grants to the world's 81 poorest countries for programmes that 'boost economic growth, reduce inequalities and improve people's living conditions'.[88] IDA credits and grants have averaged roughly US$15 billion over the past three years. IDA resources are allocated to countries based on their performance in implementing specific policies as measured by the Bank's Country Policy and Institutional Assessment (CPIA).[89] The CPIA ratings, in turn, assess 'the quality of a country's policy and institutional framework'.[90] Specifically 20 criteria representing various policy and institutional vectors are scored. Among the data used in the CPIA are the Bank's own DB labour market rigidity scores.

The World Bank's use of the DB indicators is indicative of a broader trend in the use of legal indicators in conditioning and determining development assistance. The CPIA is also used by various other multilateral development banks to allocate concessional funding—the Asia and African Development Banks, for instance—while many bilateral donors now use the WGI and DB indicators directly as the basis for aid allocation. The trend is illustrated by the USA's Millennium Challenge Account (MCA), through which US development assistance is increasingly dispersed and which explicitly ties aid to 'good governance', including legal reform.[91]

The MCA, run by the Millennium Challenge Corporation (MCC), seeks to 'reward nations that root out corruption, respect human rights, and adhere to the rule of law'.[92] As of July 2012 the MCC had approved $8.4 billion in compacts with 40 countries.[93] Eligibility for assistance through the MCA is dependent on 'performance' in three broad policy areas—'ruling justly', 'investing in people' and 'encouraging economic freedom'—measured using 17 'policy indicators', including a number of legal variables.[94] The indicators themselves, which serve as benchmarks, are developed by third parties: to measure a country's 'performance' in meeting target governance (including legal) reform, the MCC uses measures from the World Bank's WGI and DB.

Early evidence suggests that the MCA and MCC have already been influential in shaping recipient (and prospective recipient) countries' policies and institutional reforms—termed by some the 'MCC effect'.[95] Johnson and Zajonc find substantial, if preliminary, evidence that countries have responded to the MCA by seeking to improve their indicators.[96] The same study cites an author of DB for the claim that '80 per cent of countries that have carried reforms to make it easier to start new businesses claimed to have done so for the purpose of potentially receiving MCA funds'.[97] On the whole the MCA model has attracted widespread plaudits and some have argued that it represents the future of international aid disbursement.[98] Indeed, there are some indications that other donors may simply 'free-ride' on the MCA, using its indicator-based assessments as the basis for their own disbursement of aid.[99] More and more donors, it appears likely, will use the same narrow selection of indicators and standards against which recipients' legal systems are evaluated.

But it is not only through official development aid that the standards conveyed by legal indicators exert pressure on governments. These indicators also provide benchmarks for private capital, which represents the most significant source of investment in many developing countries. Multinational corporate investors spend significant resources on assessing the economic, political and legal environment in potential investment locations. Studies, although limited, suggest empirical indicators, especially those supposedly measuring legal systems and institutions, are now widely used in making such assessments.[100]

Conclusion

The rise of legal indicators within the development industry is not an innocent, scholastic advancement. Indicators, this article has argued, should be understood not as an objective mirror but as a prism reflecting legal phenomena through a neoliberal reality and reproducing a neoliberal view of the law—the very same view that is now central to contemporary development thinking and prescribed with increasing vigour to developing countries. As standards and benchmarks, legal indicators become instruments of power. They identify deficits in a legal system—absence of a strong rule of law or over-regulation, say—and thus justify intervention (reform guided by outside experts), while also pointing the way to redemption (adoption of the neoliberal ideal represented in the standards conveyed by indicators).

In this way legal indicators are deeply implicated in the continuing reproduction of neoliberal legal globalisation and appear a necessary concomitant to the legal turn in development theory described at the start of this article. Today, even while the neoliberalism of structural adjustment is challenged by actors in the South, the neoliberal legal consensus is entrenching itself further as a global common sense. The remarkableness of the consensus lies precisely in the universality of its reception among elites in core and periphery alike, by whom it is perceived as legitimate, even necessary. And as the neoliberal legal consensus gains global hegemony, it brings with it a depoliticised conception of law. The neoliberal rule of law establishes a framework in which market relations can flourish—low transaction costs, secure property rights, enforceable contracts and economically efficient regulations become the sole criteria for evaluating the law. Through the prism of indicators we can make out the demarcations of a neoliberal world, a vision of law not as socially constitutive norms but the product of market forces. Legal indicators thus point to continuities, rather than any caesura, in mainstream development theory. Contrary to claims that the turn to law marks a break from neoliberal development policy, analysis of the indicator projects central to the new discourse suggests that these continue to undergird many of the same neoliberal assumptions about development and the primacy of the market—and herald a further narrowing of the development policy agenda.

Notes

The author would like to thank Teresa Almeida Cravo, Rob Knox, David Kennedy and conference participants in Barcelona, London and Prato for their comments on previous drafts of this paper.

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24 See the World Economic Forum's *Global Competitiveness Reports*, at http://www.weforum.org/issues/global-competitiveness/.
25 See the Polity IV Project, at http://www.systemicpeace.org/polity/polity4.htm.
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47 *Ibid* (emphasis added).
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58 See, for example, World Bank, *Doing Business 2004: Understanding Regulation*, Washington, DC: World Bank, 2004; World Bank, *Doing Business 2010: Reforming Through Difficult Times*, Washington, DC: World Bank, 2009; World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs*, Washington, DC: World Bank, 2010; World Bank, *Doing Business 2012: Doing Business in a More Transparent World*, Washington, DC: World Bank, 2012; and World Bank, *Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises*, Washington, DC: World Bank, 2013.
59 World Bank, *Doing Business 2004*, p 1. The project's creators note that they seek to establish 'the scope and manner of regulations that enhance business activity and those that constrain it' (p viii).
60 World Bank, *Doing Business 2013*, p v. The original 2004 report included data on only five areas of law in 133 countries.

61 For example, *Doing Business 2010* included the following areas: 1) starting a business; 2) obtaining licences; 3) employing workers; 4) enforcing a contract; 5) obtaining credit; 6) closing a business; 7) registering property; 8) protecting investors; 9) paying taxes; and 10) trading across borders. The most recent report, *Doing Business 2013*, includes 1) starting a business; 2) dealing with construction permits; 3) getting electricity; 4) registering property; 5) getting credit; 6) protecting investors; 7) paying taxes; 8) trading across borders; 9) enforcing contracts; 10) resolving insolvency; and 11) employing workers.
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