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Human rights indicators in the field of criminal justice and crime control. Implications for the idea of law in governance and governmentality

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Guadalupe Barrena

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Introduction

My research question is whether there are better human rights indicators than others, and if so, what characterizes a good from a bad indicator. My hypothesis is that indicators of rule compliance must be committed to rule content.

I have avoided using a definition of human rights, and rather, I have focused on the notion of human rights 'law', as a set of sources stemming from public international law, adopted originally after the second world war. The field has expanded exponentially to develop a multitude of human rights rules within national jurisdictions.

My interest is centered in the interaction between human rights rules, and those of justice, both to enforce and apply criminal law. Criminal justice institutions are supposed to enforce and apply the rules that guard the most important values in society, and therefore, convey the most serious intervention of the state upon individuals. Human rights rules act upon criminal laws and institutions, by constraining state officials and by pushing for action. In the middle of these interactions, indicators are expected to bring clarity. Quantitative indicators provide precision, certainty, about our construction of reality. Originally, these salient features of law and indicators set the field for my research question. Indicators, I thought, help shed light into the obscurities of law, and help describe the actual life or norms.

The process of thinking about the issues I touch upon here, started as a genuine curiosity about instruments that are called today "indicators", particularly in the field of human rights in security and crime control. My first contact with this term was related to performance measurements in public institutions that have a responsibility in the fields of security and criminal justice– "indicators", then were knowledge meant for action. With time, human rights indicators have become an active professional market in my country. We are constantly exposed to figures that claim something about how we are doing in terms of safety from crime and

violence, or the ability of responsible authorities to process these events. In the early stages of my research I thought the construction of statistics was the sole realm of statisticians, as a brand of experts, and whose methodology was the ultimate measure of success in indicator construction. As I started to ponder the limits of this assertion, new roads appeared.

First, the avalanche of indicators in the international and transnational arenas, came about in the context of governance and global administrative law. Agents in organizations and institutions must be steered, nudged. Across jurisdictions, the creation of informal mechanisms parallel to formal decision making centers, grew rapidly: executives needed to execute, exercise power more freely from their principals. These attributes are sometimes identified as 'managerialism'. This is an important feature of the context where indicators have thrived.

My research also lead me to the literature on governmentality: 'the conduct of conduct', and the set of technologies that enforce power in distinct ways with particular goals. Without the divide between public and private power, the operation of forces outside the scope of the state are easy to perceive. Both, governance and governmentality admit a paramount place for statistics and quantification.

Criminal law is personal, blunt, definite, its exercise is about force and punishment. In that sense, it is transparent. Indicators, on the contrary, are built with a type of audience in mind, but are not personal. On the contrary, they are general. As opposed to blunt criminal sanctions, indicators are fluid, subtle. They are not about blunt force, but fluid authority.

If criminal law and indicators are so different, even before deciding which indicators are better than others, how can it be at all possible for these entities to co-habit public discourse so easily? Perhaps in an aim of self preservation and to avoid redundancy, my intuition was to examine whether indicators about law, could be constructed without explicit reference to the content of law. Even if this is useful, such indicators would not be indicators about rule compliance. Also, the growing market of indicator construction purportedly measures human rights compliance.

Human rights are the legal currency today. There is virtually nowhere to go, where we can elude human rights as a framework for government action. Everywhere, some aspect of international human rights law has become a part of domestically applicable law. Their concrete content, however, is very elusive. "Indicators" appeared in international discussion some 20

years ago to allow policymakers or government officials to tell whether something in the world is changing as a consequence of their intervention. Their "mature" form was published in 2012 by the UN High Commissioner on Human Rights. The opening paragraph on the UN High Commissioner on Human Rights website on indicators, reads:

> Human rights indicators are essential in the implementation of human rights standards and commitments, to support policy formulation, impact assessment and transparency. OHCHR has developed a framework of indicators to respond to a longstanding demand to develop and deploy appropriate statistical indicators in furthering the cause of human rights.[1]

The website also includes expressions concerning indicators like "robust statistics", and "[i]f you don't count it, it won't count."[2]

Human rights indicators, then, are an indeterminate thing "essential for the implementation" of human rights, useful in "policy formulation", "impact assessment" and "transparency". These creatures respond to the need for "statistical indicators". Indicators, then, have something to do with counting, are related to statistics, to assessments, to policy and transparency.

The indeterminate nature of indicators as rules, or measurements, opened yet another set of questions: is there anything to say about the relationship between law and facts, after positivism and realism have divided the field of legal theory on this point? The nature of indicators justifies addressing this issue in depth.

My plan to go about these issues is as follows:

I have divided this work in two parts: the insider's view (chapters 1 and 2) and the road towards the outsider's view (chapters 3 to 7). Chapter 1 is a brief restatement of leading sources describing indicators, and in particular, human rights indicators. Before setting out the triangle of law, governance and governmentality, I wish to reconstruct the central concepts in indicator literature, including the central moments in the history of the development of this practice. First, indicators appear as measurements, as objective facts that relate obscurely to other dimensions of

1 UNHCHR 'Human Rights Indicators. Tools for measuring progress' https://goo.gl/1rQvcp

2 UNHCHR 'A best-seller: the users' manual for implementation of human rights indicators' (28 July 2014) https://goo.gl/uJRgNZ

social arrangements. For instance, human rights indicators came to existence due to the push of concerns from large economies bearing the costs of international cooperation. International development practices required some form of control and accountability for revenue spent abroad. Despite their origins in social and economic targets, indicators have developed to cover explicitly legal dimensions, like the rule of law or human rights– first social and economic rights, and the civil and political rights. The most evolved stage of these tools are the indicators produced by the UN High Commissioner for Human Rights, as a tool for development specialists.

Chapter 2 explores the relationships between law and indicator production. A paramount feature of indicators is their adoption for action. Indicators are not meant to provide passive knowledge, but rather information useful in the exercise of power. The indicators I am interested in, should be first and foremost, a tool to implement law. The tool is uniquely suited to face the challenges of multilevel governance. A multitude of actors, jurisdictions and disappearing hierarchies, "governance by information" takes a paramount role. This entails that indicators can help stabilize the content of vague laws and principles, to enable their translation into multitude of settings. One of the reasons for the flexibility of indicators is their use of legal and non-legal authority. Even if in some contexts, it is convenient to see indicators as sharing legal authority, in many other circumstances, their reliance on other sorts of authority, like scientific authority. Indicator development in the field of security and crime control have still a long way to go, because they are set in the interstice of many important legal divides; on top of the economic, political or scientific authority indicators piggyback on. The examples in this chapter take the cases of policing in the Palestine Wall, Australian migration detention centers in Papua New Guinea, the Blackwater incident in Iraq, and the supervision of the Gulf of Aden.

The transit towards the outsider's view starts by setting the triangle between law, governance and governmentality. Chapter 3 describes how indicators for human rights compliance in the field of security and crime control, send us through the rabbit hole and force us to construe law across disciplinary divides. I set out to draw a triangle delimited by governance and management, law and governmentality. First, governance has so many meanings, I will describe a minimum content of the concept I will go back to, throughout the project. Second, I try to set out the scenario for a post-industrial legal arena, where the relationship between private

and public, national and international divides in law become blurred, and for good reason. I will use the example of the regulation of private military and security companies to show how firm divides offer more problems than they solve, from the perspective of one who wishes to protect herself from harmful actions of large, transnational private entities. In doing this, I seek to explain why this scenario is uncomfortable for legal practitioners and scholars, mostly trained in a formalist tradition. International legal scholarship struggles with a non-voluntaristic restatement of legal theory. Finally in this chapter, I lay out the main questions to ask about measurement and its close connection to the exercise of authority. Despite the fact that measurement can be an objective and neutral pursuit, its use in the public, political arena only loses explanatory power by assuming these neutral and objective boundaries to measurement. Rather, we gain and deepen our understanding of the phenomena surrounding measurement, by setting out to account for the political dimensions of all measurement, and in particular, to that measurement related to legal rules. These three roads will help me question human rights indicators. This triangle is loosely accounted for in the leading literature in this topic.

Chapter 4 starts from the problems identified in the cases discussed earlier, and attempts at laying out the land of available legal theories that account for the relation between measurement and rules. Although the specific topic of indicators has been of limited interest for legal theorists, classical legal theory can provide some insights. Firs, I sketch out the position of legal realism and empirical legal studies for the relationship of law and fact. In particular, some debates among classical American realists, show that the position of law before the facts the movement strives to produce, is unclear: once we know things about how law works, what framework can we use to know what to do with them? Or even, how can we choose facts that tell us things about how the law works? Realism, either classical, or new, lacks a clear answer for this question. This is why I turn to classical legal theory. Positivism is grounded on a firm separation between law and fact. An exploration of these concepts in Kelsen's legal theory, can shed light on what we mean by this separation, what its implications are for our forms of knowledge about law and science. My third step is to explore briefly the basic assumptions of Norm and Action, a classical text on deontic logic, to draw how a positive relation between law and fact can actually produce positive contents. We can interpret law bearing in mind how it is supposed to bear upon human behavior, and use the limits of logic upon human behavior, to interpret law in a sensible way. The

commitments we make here, can be used as the basic structure of indicators, as indicators are about changes in states of affairs—as are norms. Finally, I draw some conclusions on how these theories of law can be made compatible with a networked, as opposed to a hierarchical, legal order. All these three sketches can open up the way for an impure theory of law, one that is focused in the transit between law and other forms of knowledge, as opposed to their separation.

Chapter 5 deals with the need of government institutions to have information. Before the modern state was established, power was set up around the need of information. Across Europe, in Germany, Britain and France, government and private devices were set up to gather information about the population. The power behind number gathering and production entail the classification of society in the categories used for measurement—and the creation of such categories. In a very eloquent expression, numbers in this context are an example of "action at a distance": the center of measurement definition is here, but acts there to regulate, standardize, define. This ease of communication is not neutral, but requires an enormous amount of power investment—like the one required in France to implement the metric system. The avalanche of numbers, in Hacking's account, came at the same time as a major change in scientific knowledge during the 19th century: the replacement of determinism for probabilistic rationality. These features of the development of the modern and industrial state are present today. Like then, we keep zealous records of what we expect to be criminality figures. This entails the definition of a criminal subject, not apt for social production, not apt to convey the notion of power of the state. We can find similar effects in the definition of illness and the professions: measurement entails construction of measurable categories. Ultimately, the effort required to bring these measurements about, is easily explained in terms of the rationality of power conduction. The exercise of authority requires the identification of the source of power, for example, of the state. The power of the state lies in the apt bodies for production, reproduction, discipline: the classes of events state authorities keep track of, involve deviancy or sickness. This logic stands in sharp contrast to the mindset for human rights compliance. Whereas there is an important need to produce figures for the purpose of economic development, there is not such an urge to produce figures for freedom from torture, or other relevant human rights categories.

Chapter 6 touches another component of the development of measurements in the modern and industrial society: scientific measurement. The myth of objectivity and precision around

measurement was part of the growth of modern science. Yet, a detailed look at the process involved in defining the relationship between numbers and facts, reveals the complexities of building a scale, agreeing upon it and giving the scale a social value. Temperature is a good example of the process where a scale is proposed and stabilized. This, however, cannot happen before we know enough of the issue. Without a deep understanding of the phenomenon, figures have no meaning. This is what Kuhn calls 'text-book measurement'. In epistemological terms, measurement occurs when figures are interpreted within a logical space. As a form of representation, measurement is better understood not within truth values, but as a location within a theory. Like in other sciences, social science must deal with the problem of coordination between the object and the measurement. In social sciences, the use of *Ballung* concepts can assist us in understanding indeterminate terms. This indeterminacy does not defeat the use of logic as a heuristic for definition of the content of rules we wish to measure. Rather, indeterminacy must be embraced. This chapter shows the power of co-production, as a way of explaining how the importance of objective measurement is used in tandem with other forms of authority, like legal authority. This combination reduces resistance across fields of knowledge.

Chapter 7 is the last step in building the pillars of modern and industrial thought behind modern indicators. Management became a field of science in the late 19th century in the business schools in America. Ever since, management has had a close relationship with figures. Classical management even proposed scientific management, a method to find the one best way, to preserve efficiency and uniformity. Classical management and bureaucracy require hierarchy to function. Management later proposed the idea of understanding how management choices lead to institutional arrangements. Like in Damaska's coordinate and hierarchical state authority, presented in chapter 4, implicit values are translated into organization decisions. Also, the thirst for precise and objective information in management received a new push with strategic planning, a mixture of strategic thinking and measurement. All these tendencies have been repackaged under the dub of "new public sector management" (NPM), that intended to respond to big, inefficient governments. Despite the name, NPM preserves much of the same assumptions as classical management. In the end, the map of implicit and explicit values pursued in management, are responsible for plenty of choices that seem objective and scientific. The values of efficiency and uniformity are perfectly acceptable for profit organizations, but they seem and

odd choice for public institutions. They have been a historical choice. Perhaps a different way to think about management is to choose public value in a different setting. Although law is paramount in the construction of public institutions, law is fuzzy, and bureaucrats must act within their discretion. Like uncertainty, discretion must be embraced in the construction of indicators.

Part I: The insider's view

1 Top-down human rights indicators: governance by information

The legal aspect of human rights is today expressed as a set of dense, intricate, blurry aspirations, almost universal in reach. The open textured nature of these norms generates sometimes blind allegiance, sometimes uncertainty and mistrust. Skepticism is reinforced under the guise of "human rightism"–a mixture of faith or ideology, and a claim of untamed international rules that serve the purpose of such faith or ideology.[3] The elusiveness of the contents and limits of these rules, have called for a multitude of tools to predict and define their implications, and whether investment on their development and implementation, has any impact. Statistical measurement is prominent in this array of tools.

Statistical measurement connected to the achievement of a goal, came about within the realm of social indicators in the 1970s, defined as "direct and valid statistical measure which monitors levels and changes over time in a fundamental social concern".[4] In the earliest projects that connect indicator construction, justice and human rights, the notion of indicators is associated with measurements used in the field of international development, notably in the context of the United States Agency for International Development, or the Organization for Cooperation and Economic Development.

The literature on the topic of indicators in international law developed intensely from the year 2000. Books usually include one or two chapters on indicators specifically relevant to international human rights law. Other areas of practice include rule of law, financial governance, environment, public health, and others. The literature on human rights indicators has generally been pragmatic in its approach, presenting indicators as a fact we need to understand

3 Alain Pellet ''Human rightism' and international law' Gilberto Amado Memorial Lecture, 18 July 2000, University of Paris-X, Nanterre <https://goo.gl/9QCV5H>

4 OECD *Measuring Social Well-Being: A Progress Report on the Development of Social Indicators* (OECD, 1976) cited in Vera Institute, 'Global Guide to Performance Indicators', 2003 at fn 1 <https://goo.gl/2szMbQ>; OECD Better life initiative 'Measuring well-being and progress' (OECD Statistical directorate 2013) <https://goo.gl/5JFGzH>

systematically.[5] This literature often includes four topics: (i) a reference to the pervasive and growing reach of practices for indicator construction and consumption; (ii) a reference to canonical sources or turning points in the history of indicators in the UN system, including Mary Robinson and the Committee on Economic, Social and Cultural Rights; (iii) a reference to a cognitive or technical process for indicator construction; (iv) some critical remarks on why some are skeptical to indicators in the field of human rights. I will offer some remarks in these four topics, concentrating specifically on examples drawn from the governance, rule of law and human rights fields.

Although I have not introduced the issue yet, the triangle between law, governance and governmentality can shed light upon the role of lateral sources of authority, notably scientific authority. Later, I will draw on these examples to discuss how statistical measurement in the form of indicators, seems simple. Yet, to fully appreciate the complexity behind this tool, I propose to picture indicators as vessels traveling along legal channels. I also propose to disassemble the different layers of knowledge and authority that travel together on the vessel of numbers.

1.1 What is an indicator?

Let us start with a plain language definition of indicator: the word brings us back to the Latin indecis, the index finger. "[l]ogically, indicators detect, point or measure, but do not explain."[6] This indication results from any numerical, statistical information. I would like to keep this very brief and simple definition in mind for the following section.

In contrast, let us think of the more precise and complex definition from the leading text on indicators in the context of governance. Literature on the field of indicators grew steadily for the past decade, after the launching of the project at New York University in 2008.[7] The

5 Todd Landman and Edzia Carvalho *Measuring human rights* (Routledge London 2010) [Amazon Kiblde] loc 229, Into, para 1. (T Landman & L Carvalho *Measuring human rights)*

6 Theodore M. Porter *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (Princeton, Princeton UP, 1995) [Amazon Kindle], pos. 1003 (Porter, Trust in Numbers)

7 Kevin E. Davis, Benedict Kingsbury, Sally Engle Merry 'Indicators as a Technology of Global Governance' IILJ Working Paper 2010/2 Rev Finalized 08/02/2011 <https://goo.gl/4mAhiL>

participants in the research project brought about the best known literature on the issue.[8] The definition is this:

> An indicator is a named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon. The data, in this simplified and processed form, are capable of being used to compare particular units of analysis (such as countries or institutions or corporations), syn chronically or over time, and to evaluate their performance by reference to one or more standards.[9]

The definition highlights the importance of: (i) a collection of (ii) data; (ii) that has a name; and (iv) the purpose of projecting performance. This literature identifies as salient, the features of categorization, simplification, the rank structure, and the implicit theory they evaluate. These authors point to the need to define the indicator constructor as one in a position of power, as opposed to one who is the object of measurement. Yet, these authors also stress how fluid relationships in governance, as opposed to traditional hierarchical settings, confuse the role agents play in power relations. In a decision making setting, indicators are valued in terms of simplicity, efficiency, consistency, transparency, scientific authority and impartiality. The stated purpose of the collection of data, and the effect of simplification and processing, identified as components of indicators in this definition, are difficult challenges to overcome.

Although the current examples of indicators may share a lot of these features in common, holding back on identifying the attributes of data as particular to indicators, may open the field for discussion. As a starting point, a simple image of data used in the context of legal rules—of index fingers pointing at data while speaking of rules—may suffice.

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8 Kevin Davies, Angelina Fisches, Bennedict Kingsbury and Sally Engle Merry *Governance by Indicators. Global Power through Quantification and Rankings* (OUP Oxford New York 2012) (Davies et al *Governance by indicators)*

9 Kevin E. Davis, Benedict Kingsbury, Sally Engle Merry ‘Introduction: Global Governance by Indicators’ in Davies et al *Governance by indicators* (n6) p. 6

In the human rights community, the conversation over indicators to measure human rights started to develop around the turn of the millennium. At the time, two common meanings were identified by Maria Green:

> one a numerical definition in which "indicators" is simply another word for "statistics"; and one which we will call a more "thematic" approach in which the term "indicators" covers any information relevant to the observance or enjoyment of a specific right.[10]

The first comprehensive volume on human rights measurement–Measuring Human Rights–was firmly based on a social science perspective and pointed at measurement as "a cognitive process through which abstract concepts find numerical expression in the form of valid, reliable and meaningful indicators"[11]. The concern of Landman and Carvalho in Measuring Human Rights was to identify new or existing ways to "capture the lived empirical experience" for a "systematic analysis of human rights problems".[12]

Indicators can include different types of numerical or qualitative expressions. They can be a simple measurement, like the arm circumference in children as a proxy for malnutrition, read within a standard distribution that defines undernourished, poorly and well nourished kids. Indicators can also be the aggregation of measurements, like the Body Mass Index, which is read in the context of a chart tracking gender, age and height. The Human Development Index is an aggregation of three per-existing indicators: (i) life expectancy index, (ii) education index; and (iii) income index.[13]

10 Maria Green 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement' (2001) 23 Human Rights Quarterly 1062, 1077

11 T Landman & L Carvalho *Measuring human rights* (n3) pos 229

12 T Landman & L Carvalho *Measuring human rights* (n3) pos 229

13 Richard Rottenburg & Sally Engle Merry 'A world of indicators: the making of governmental knowledge through quantification' in Richard Rottenburg, Sally Engle Merry, Sung-Joon Park & Johanna Mugler *The World of indicators. The making of governmental knowledge through quantification* (CUP Cambridge 2015)

1.1.1 Indicators as facts–meant for action

Numerical data included in indicators are essentially descriptive. They capture or aim to place a state of affairs, within the realm of a given theory of the meaning of numbers. The measure of the arm circumference of a child means whatever we can make out within the framework of a theory drawn from mass measurements.

In methodological terms, indicators should not be used as predictors of future behavior; or outcome, due to three main factors: (i) external, unaccounted circumstances; (ii) lack of standardized measurement; (iii) few observations.[14] Indicators are also limited in their explanatory power. Indicators are tools, data, that should provide input for diagnosis, rather than the full diagnosis process itself. Neither the actual measurements, nor the organized collection of processed data, are proper descriptions of states of affairs, as they require a theory that provides numbers with useful meaning. Against the backdrop of a theory, explanation can occur. For instance, by telling how (much, often, etc) a particular activity within the justice system takes place, we can decide what such behavior tells us about the system as a whole.[15] Indicators are thus, better understood as "conceptual framework" for action[16]–or perhaps even as a synthesized conceptual framework.

Indicators are meant for action. One of the central components of Stone's pragmatic approach to the construction of indicators, is the need to build them to speak to the officials who are expected to produce a conduct that will bring about movement and change:

> It is designed specifically for use by an official with formal authority over the people expected to produce the outcome being measured. In concrete terms, active indicators: (i) capture performance in tight time frames: usually days, weeks, or months; (ii) present data at the level of operational responsibility; (iii) ground discussion at management meetings where officials are accountable for results; and

14 Juan Carlos Botero, Robert L Nelson & Christine Pratt 'Indices and Indicators of Justice, Governance, and the Rule of Law: An Overview (2011)' 3 Hague J Rule of Law 153. 157

15 Botero et al (n12) 157

16 Botero et al (n12) 160

(iv) describe outcomes in common language, often in graphic form, understandable by people both inside and outside the institution." [17]

Indicators are used as qualified facts: although not exclusively, they are used within the context of officialdom, either because officialdom is the source or the target of such data.

Simplicity is achieved by "turning the issue at hand into a measurement problem and then developing a set of explicit, often technical rules for measurement. Measurement standards are therefore at the core of indicators." More radically, "any indicator entails a measurement standard or measurement rule; it may entirely consist of such a standard."[18] Yet, oversimplification in indicator construction occurs within the process shared by social scientists; but since indicators are meant for action, simplification also occurs within the context of institutions. Indicators are characterized by their simplification of complex social phenomena". They are meant to simplify, to reduce.[19] Two factors are striking about this reduction: first, "raw" data is transformed from the point of intake, at the bottom of the chain of command, and edited for the consumption of decision makers; often substituting the evidence for the inference interpreters attach to such raw data. That is, persons in institutions that consume data, rarely take the measurement themselves. A hierarchy or system exists within institutions, whereby data is produced, usually demoted from the place of consumption and action. In transit to their consumption point, indicators are transformed, cleaned, simplified. Consistency limits aside, this collection system means that indicators use magnitudes, often designed to track action of bureaucrats, which are later transformed into revealing aspects of institutional performance. "Authority" attached to such information changes along the chain of command to match the level of hierarchy in the collection system. Simplification, therefore, occurs by stripping actual social phenomena from their complexities and transform them into place holders for administrative action.

17 Christopher Stone 'Problems of Power in the Design of Indicators of Safety and Justice in the Global South' in Davies et al *Governance by indicators* (n6) p. 285

18 Tim Büthe 'Beyond Supply and Demand: A Political-Economic Conceptual Model' in Davies et al *Governance by indicators* (n6) p. 29, at 90, note 3 and accompanying text.

19 Kevin E. Davis, Benedict Kingsbury, Sally Engle Merry 'Introduction: Global Governance by Indicators' in Davies et al *Governance by indicators* (n6) p. 7

1.1.2 The process of indicator definition

The use of indicators covers a multitude of functions: (i) contextual information via wide ranging descriptive statistics; (ii) classification of rights violations, places where they take place and other "classes of things than can be compared"; (ii) monitoring compliance assessed, for instance, via UN specialized bodies; (iv) pattern recognition with the assistance of time series or spatial information; (v) policy prescription and advocacy, since measurement is used as a source of pressure, evaluation and judgment.[20] Saliently, human rights measurement has become a tool for international donors to assess the human rights record of recipient countries, as a means of accountability from donors to local taxpayers.[21]

The process of creation of indicators can be summarized as follows:

> (a) identifying a concept; (b) specifying the concept by developing a definition of it; (c) ope rationalizing the definition, by identifying the dimensions and sub-dimensions such concept; (d) evaluating the validity and reliability created indicators. Indicators may be objective or subjective.[22]

The operational steps in measurement come from social science methodology. In particular, 'Measurement Validity: A Shared Standard for Qualitative and Quantitative Research', referenced by Measuring Human Rights sets the picture for these steps: [23]

- Background concept: the "broad constellation" of meanings for a particular concept; A task of conceptualization requires the formulation of an operational concept from the "broad constellation" and through the looking glass of the research purposes.
- A systematized concept is then used for the purposes of a particular research. With this concept as a basis, indicators are developed to classify or score cases against the background of the concept.

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20 T Landman & L Carvalho *Measuring human rights* (n3) pos 229, Intro. The purpose of measuring human rights, para 1

21 T Landman & L Carvalho *Measuring human rights* (n3) Chapter 3.

22 Francisco López Bermúdez 'Creating and applying human rights indicators' in Dinah Shelton Oxford Handbook on Human Rights (Oxford UP Clarendon 2013) [Amazon Kindle] pos. 17501

23 Robert Adcock and David Collier Measurement Validity: A Shared Standard for Qualitative and Quantitative Research The American Political Science Review, Vol. 95, No. 3 (Sep., 2001), pp. 529-546 531

- The indicator is a “measure” or an “operalization” or an operationalized definition in qualitative research. By applying them to cases, we obtain measurements.
- And as a result we obtain the scores for cases.

Of course, this lay of the land is itself simplified:

> searchers routinely make complex choices about linking concepts to observations, that is, about connecting ideas with facts. These choices raise the basic question of measurement validity: Do the observations meaningfully capture the ideas contained in the concepts?[24]

These complexities aside, the validity of measurement seems to be grounded on the quality of the concept operationalization, even before methodological issues arise regarding research design. Surprisingly, though, the measurement literature stemming from the political science realm pays little attention to the essential difference between law and fact—measurement of social facts may be slightly different than measuring human rights, which have an explicit legal dimension. Social scientists may insist on measuring human rights, when they measure the circumference of a child to evaluate malnutrition. This, however, requires an explanation to build a bridge between the fact and a rule that purportedly predicates about malnutrition. Measuring objects related to how things are the case, is quite different from measuring the actuality of something that ought to be the case. This additional layer of complexity on the operationalization of concepts for measurement is not often observed in the “pragmatic” literature in human rights indicators–even if scholars point in passing to the relevance of considering items, such as a wide array of sources of law in the operationalization of concepts.

Recent work has focused on developing tools to count, and thus allow for consistency in the analysis of discourse used in human rights country reports.[25] Measuring human rights does

24 Adcock & Collier (n21) p. 529

25 Christopher J. Fariss, Fridolin J. Linder, Zachary M. Jones, Charles D. Crabtree, Megan A. Biek, Ana-Sophia M. Ross, Taranamol Kaur, Michael Tsai ‘Human Rights Texts: Converting Human Rights Primary Source Documents into Data’ PLOS ONE September 29, 2015 https://goo.gl/vpKnwJ makes publicly available the text versions of a large database of human rights reports, from Amnesty International (1974–2012), Human Rights Watch (1989–2014), the Lawyers Committee for Human Rights (1982–1996), and the United States Department of State (1977–2013) with “document term matrices” throguh human coded variables and computer learning methods. The text compares these techniques with other important projects, like CIRI database or Hathaway’s

concede that there can be a measure "in principle" and one "in practice", where principle is centered on the legal framework of the country; and practice means the use of "event-based data". Authors also point to the importance of the legal framework to build the concept we intend to measure.[26] The four step process would yield a "score" in a "country-year data point" composed of several items:[27]

> (i) Country X's "degree of satisfaction" status of the International Covenant on Civil and Political Rights or the Convention Against Torture;
>
> (ii) The number of the acts of torture committed that year;
>
> (iii) The relative scale and frequency of torture in a scale of 1 to 5
>
> (iv) The average public perception
>
> (v) The proportion of government expenditure as a percentage of GDP dedicated to combating torture;
>
> (vi) and the number of police officers in training.

In Laudman's framework, "event based data" respond to the questions of "what happened, when it happened and who was involved". The most pressing question in measuring human rights violations is the process available to determine whether events can be classified as relevant to a particular violation–which in turn raises the question of what the legal standard is, and how events get to be classified as relevant. The events-based data seems an important source of knowledge, crucial for human rights measurement–yet, the question of how data is actually eligible as a "human rights violation" is unclear. Other elements of measurement, like standard based measurement, or the use of surveys raise methodological questions of their own, but the underlying assumption is the same: why is the indicator described above for torture, an adequate indicator at all? How is this measure related to the law on torture? Is it supposed to relate to the law of torture at all? These questions take us back to the governmentality framework, inasmuch

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torture coding.

26 T Landman & L Carvalho *Measuring human rights* (n3) pos 229, Intro. The purpose of measuring human rights, para 2 [Kindle DX]

27 T Landman & L Carvalho *Measuring human rights* (n3) pos 229, Into. The purpose of measuring human rights, para 3 [Kindle DX]

as the determination of limits between compliance and non-compliance sometimes stem from implicit, extra-legal biases.

1.2 Early stages: international economic and social indicators

The history of indicators in the field of human rights is relatively short. Indicators as understood in the realm of global governance were introduced in the past few decades, supplementing the traditional practice of measurement, with new elements like the integration of extra-governmental agents. Learning about these developments can be useful in understanding some instances of indicator creation, with a critical look into the object they measure and with a glimpse at the context of their production. I would argue that the development of measurements for human rights compliance are today intertwined with measurements for two main audiences: the business community, and international development agencies. Only very few projects have actually addressed the issue of human rights compliance as their explicit goal, so that these indicators allow for a better understanding of human rights rules and responsibilities for various agents.[28] At the same time, this history provides context for the spreading of management techniques across the world as a development tool.[29]

The contemporary development of global indicators has set the UN in a central role, along with the Bretton Woods institutions, within a global thrust to produce economic statistics. Despite the link between these institutions and the pursuit of global economic development, the process of indicator construction has not been accompanied by a discussion on the political implications of these processes. Michael Ward observes that:

> The organization has tried to avoid debates about the philosophy of numbers, but it has encouraged a view that information should serve not only as the basis for developing new knowledge and improving general wisdom and insight, but also as the basis for treating policy issues fairly and objectively.[30]

28 López Bermúdez (n20) 54

29 See, 7.2 ‘Economic theory: “new” public sector management‘ 259

30 Michael Ward *Quantifying the World: UN ideas and statistics* (Indiana University Press, Bloomington, 2004) [Amazon Kindle] p. 17

The field of international statistics has developed in the postwar period and "has shaped our understanding of the world".[31] The period that followed the second world war sought the development of world statistics. World accounting systems came into existence with varying degrees of participation within different international organizations. According to Michael Ward, the UN "was an efficient innovator. It played an important role in developing, extending and implementing, in different areas of the world, ideas that had been generated from various outside sources."[32]

The historical situation where the United Nations assumed its mandate on statistics was definitive of its future. First, the organization had only a few member states, some of which were highly industrialized, with strong statistical offices in place–and with a clear power share in determining what was expected of the nascent organization in this field. The main concern of governments at the time was to stabilize the world economy and to reconstruct Europe. The goals were clear for the UN statistical agenda, for at least three decades. The relevance of information at the time was unquestioned:

> Data was necessary for making economic policy decisions and for monitoring economic progress, conducting demographic analysis, and assessing social well-being. Statistics were also deemed crucial to the sharing and transfer of knowledge and the development of better relations between states.[33]

The mandate for the UN Statistical Office was clear: quantifying the world was almost a mission statement.[34]

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31 Ward (n28) p. 1. The second half of the nineteenth century, after the *adunation* of France saw an intense increase in statistical activity across Europe. International statistical conferences were held from 1851 to 1875. In 1885 the International Statistics Institute was created. An opportunity to promote harmonization in methods to satisfy a higher, supra-national authority provided by an international statistics authority. The ISI preceded the League of Nations, the ILO and later the United nations in the task of coordinating national statistics authorities. Hence, the emergence of these international institutions brought about the reduction of the importance of ISI activities. See Alain Desrosieres *The Politics of Large Numbers. A History of Statistical Reasoning* (Harvard UP Cambridge 2002) 155

32 Ward (n28) p 3

33 Ward (n28) p 6

34 Ward (n28) p 6

Standards were essential, not only for the purpose of comparing countries and their activities through time and across the world, but also for aggregating such countries into larger political and geographical entities. Statistical methods already in place in industrialized countries facilitated sharing information and knowledge via their sophisticated statistical methods. The emergence of new countries in the decolonization era brought about a new power distribution among the International Monetary Fund and the World Bank, which strove to bring new countries into their statistical agendas. By the late 1960s, a new agreement existed: “full employment” arrived as the core concept controlling the statistical agenda of the era. Full employment was also perceived as a means for poverty reduction, which in turn explains the focus on the Gross National Product and Gross Domestic Product as the key indicators for economic progress in the post war era. Despite early interest from the West towards the social agenda, Cold war concerns grew western countries suspicious.

The development of quantification within the realm of the UN and the Bretton Woods institutions is the result of the changing ideas regarding international development. Michael Ward identifies the major development ideas in each decade since 1940, accompanied by the salient features of statistical development and changes in UN institutions on this field:

1940s	The UN Statistical Commission was set up; FAO introduced the crop output volumes, and food supply tables were introduced;
1950s	The UN issued the Report on the World Social Situation; the System of National Accounts was introduced; ILO and FAO developed information on food prices and availability, statistical offices in developing countries were introduced and technical assistance was provided to conduct population census;
1960s	Several UN United Nations Center for Trade and Development was created, along with the United Nations Industrial Development Organization. For the first time, UNESCO produced global data on education.
1970s	UN Habitat was set up, launching the right to housing program; UN took over International Comparison Program from the World Bank, for training and capacity building for data reporting requirements; ILO focused on informal sector; environmental statistics were first produced.
1980s	Development of social statistics: the first global health statistics by UNICEF; the UN Social Indicators manual appeared; the UN Human Development report was produced for the first time; first report on statistics about women, as well as the Human Development Index;
1990s	The System of National Accounts was revised again, and the Minimum National Social data set was produced
2000s	The UN development assistance indicators were developed

Table 1: Early stages: economic and social indicators[35]

The development of the mandate for the UN Statistical Office has been heavily focused on the field of economic indicators, health and development. The collaboration of Amartya Sen with the UN Development Program brought about the open intervention of the UN in the construction of human rights indicators, as framed by the “capabilities approach”. Most elements in the capabilities approach tend to relate to development issues, with little emphasis on legal aspects traditionally covered by civil and political rights.

35 With information from the table at Ward (n28) Table 0.1, pos 342

In a parallel development, by the late 1950's the private sector pushed to create a "system of social and demographic statistics". But the initiative did not gain momentum with governments and statisticians, due to concerns of the burden this would impose. Sovereign states opposed the creation of this indicators because this would "allow outsiders to make assessments of human rights progress and social achievement ".[36] Although development indicators existed since the 1960's, their scope was limited to wealth distribution in the world. By the 1960s, private consultants started to develop figures to asses risk for business in a multitude of countries across the world. During the 1970s there was an early development of social statistics. By the 1980s, interest grew for the creation of a broader understanding for economic growth, beyond the traditional dimensions of the gross domestic product. In the same decade, the World Bank published the "World Development Indicators", which drew heavily from private sector risk assessment methods and figures.

The contemporary Human Development Index (HDI) brought the concept of human development to the forefront, emerging from the United Nations Development Program. The HDI was intended as a balance to the use of the Gross National Product. The HDI and the role of the United Nations ran into the Washington Consensus and the fall of the Berlin wall in 1989, making way for reforms in Eastern Europe and the former USSR. Measurement was focused again in the development of economies. In 1996 the United Nations created an Expert Group to create a "minimum national social data set" of 15 indicators.[37]

Professor López Bermudez states that by the time the UN ventured into the field of human rights indicators proper, in the late 1980's, "diverse influential actors had already created

36 López Bermúdez (n20) Pos 17472

37 Economic and Social Council, Working Group On International Statistical Programmes And Coordination. Social Statistics: Follow-Up To the World Summit For Social Development. Report of the Expert Group on the Statistical Implications of Recent Major United Nations Conferences, (18 sess) 24 January 1996, E/CN.3/AC.1/1996/R.4 para. 96 https://goo.gl/HmauXt: (i) Population estimates by sex, age, ethnic group; (ii) Life expectancy at birth by sex; (iii) Infant mortality by sex; (iv) Child mortality by sex; (v) maternal mortality; (vi) percentage of infants weighing 2.5 kg; (vii) Average number of years of schooling by sex and income class; (viii) GDP per capita; (ix) Household income; (x) monetary value of basket of food for meeting the nutritional requirements; (xi) Unemployment rate by sex; (xii) Employed population rate by sex, formal and informal sector; (xiii) Access to safe water; (xiv) Access to sanitation; (xv) Number of people per room, kitchen and bathroom;

and promoted social and development statistics indicators".[38] The absence of explicit reference to indicators in UN Human Rights treaties and the absence of UN involvement, lead to the adoption of preexisting data as an alternative to track compliance.

These few historical remarks show how counting in the international arena has been very close to the needs of the global economy. Social indicators developed in this framework, and developed into a conceptual mixture of social economic indicators, with an explicit connection to human rights in Amartya Sen's contribution to the human development index. These events, however, are not a reference in the contemporary work on international human rights law, and the indicators used in their institutional framework within the United Nations.

1.3 Law & development and the human rights based approach to development

The avalanche of human rights indicators is linked to the international development agenda, and can be analyzed from the perspective of the Law and Development movement. There is a need for new approaches to international development cooperation. Development cooperation can be defined as:

> an activity that aims explicitly to support national or international development priorities, is not driven by profit, discriminates in favor of developing countries, and is based on cooperative relationships that seek to enhance developing country ownership [39]

The development agenda has been making use of quantitative techniques for over 40 years. In the International Country Risk Guide, 1980, these indicators were unconcerned with law—their focus was evaluation of risk for investment. As a dimension of that risk, law and order was included. These indicators, however, were not intended to address law reform issues.

38 López Bermúdez (n20)

39 Josè Antonio Alonso, Jonathan Glennie, 'What is development cooperation?' Ecosoc development Forum , 2015 Development Cooperation ForumPolicy Briefs no. 1 p.1 https://goo.gl/Uwy4Pb

These indicators "were about governance", but not intended to be used "in governance".[40] Rather, the indicators were private, for the consumption of corporations.

In the post war period, only economists and statisticians were involved in measurement. The 1950 International conference on statistics and the creation of specialized statistics services, were established. Later, in the early 1960s, the first wave of the Law and Development movement appeared. The movement was focused in the transformation of legal culture, including legal education. For this wave of the movement, indicators were not relevant. Rather, the focus was on the effects of a new idea of law—within notions of economic growth. After a few years of investment, legal reform was perceived as unsuccessful. The main criticisms went along the lines that "legalism, instrumentalism and authoritarianism may form an amalgam" to strengthen authoritarian regimes.[41] At that point, law became irrelevant to the development community.

Later, in the 1990's, the Washington consensus enabled a neo-liberal environment with a renewed place for law under institutionalism: (i) law was part of the "institutions" of society; (ii) and hence, determines production and transaction costs, and therefore is relevant to profits. Law could effectively block economic activity, and thus, a new role for the legal system was to promote economic development.[42] The notion that law was relevant for development was this time accompanied by a wealth of cross country research, seeking correlations between the rule of law and economic development, or between the latter and certain characteristics of legal systems.

A third law and development moment can be observed in the turn of the millennium. This wave was characterized by including law as an objective of development intervention. There was a flourishing of multiple measures that intend to address the status of the legal system. The Rule of Law Index is one of these measures.[43] I will explore the implications of this project below.[44] I will present below three examples of development or business risk indicators that aim to capture

40 René Ureña 'Indicators and the Law. A case study of the rule of law index' in Sally Engle Merry, Kevin E. Davis & Benedict Kingsbury *The Quiet power of indicators. Measuring governance, corruption and the rule of law* (Cambridge UP New York 2015) [Amazon Kindle]

41 Ureña (n38) pos. 2403

42 Ureña (n38) pos. 2426

43 Ureña (n38) pos. 2477

44 See section 1.3.3 'The World Justice Project Rule of law index' p. .29

a rule of law dimension. These examples will hopefully clarify how these inductors are not properly human rights indicators, even if they are dubbed as using a rights based approach.

1.3.1 Universal development goals: millennium and 2030

On the issue of indicators for development or for rights, explains that in some sectors, human rights discourse is perceived as "lawyers' jargon" for the development community; or, from the opposite perspective, in some sectors "poverty reduction" is perceived as a surrogate term to determine compliance with economic rights.[45] This tension has been addressed by the "human rights based approach" to development. In fact, major rights measurement initiatives in the current decade have been launched by a joint development and rights based platform–like the Millennium Development Goals or the Sustainable Development Goals.

One form to supplement the [economic] development perspective, is the "human rights based approach".[46] The international cooperation framework as articulated from a human rights based perspective, covers traditional human rights principles: (i) universality and inalienability; (indivisibility; (iii) interdependence and interrelatedness; (iv) equality and non-discrimination; (iv) participation and inclusion; (v) accountability and rule of law.[47] The human rights based approach is only a synthesis of "nine core international human rights treaties and related instruments, as well as the jurisprudence, analyses, and recommendations of corresponding human rights bodies", and hence, it can only be "a prism directing operational activity towards the larger framework of human rights law and expertise for fuller guidance."[48]

45 Green (n8) 1095

46 The need to incorporate this perspective is articulated as follows: , "…As the traditional development discourse loses its political and financial attraction, a broad process of rethinking development aid has started, and a search for new paradigms for international cooperation has emerged. One of these new paradigms is the human rights approach to development" in Christian Salazar-Volkman *A Human Rights-Based Approach to Programming for Children and Women in VietNam: Key Entry Points and Challenges* (Traffic-UNICEF, New York 2004) p. 2 <https://goo.gl/YX15QX>

47 2007 Guidelines for UN Country Teams on Preparing a Common Country Assessment and United Nations Development Assistance Framework in Alisa Clarke 'The Potential of the Human Rights-Based Approach for the Evolution of the United Nations as a System' (2012) 13 Hum Rights Rev 225, 231

48 Clarke (n45) 232

From a legal standpoint, justice is a vehicle for the prevalence of any right. A functioning justice system is a condition for accountability for public authority, a vehicle for monitoring and for remedying inequality and arbitrariness. As put by the UN Development Group, "international human rights standards and principles must underpin development, [...] access to justice and effective justice administration are enablers for development and human rights, among others."[49]

The most important global initiative of this field is the Millennium Development Goals (MDGs). The project established common indicators to help countries focus on priorities for review in 2015. Also, the system provided a set of benchmarks for countries to achieve.[50] Already in the MDGs, there was concern about the measurement, ownership, and leadership of indicators; and concern about the changing benchmarks, for instance, from number of people to proportion of population covered, e.g., in the Rome Declaration on World Food Security. Also, in line with management language, concerns were expressed in terms of the need to identify outcome, process and results.[51]

The Human Rights Based Approach to development has power and has built great expectation around it in the UN System. Yet, there is skepticism regarding the impact of a human rights based approach to achieve the actual outcome. Some have expressed skepticism: "Shanta Devarajan, the World Bank's chief economist for Africa, is quoted in a 20 June 2011 World Bank blog arguing that a concern for human rights was neither necessary nor sufficient to achieve health and education outcomes".[52] From the perspective of the UN system, the development of the HRBA has potential if brought into the training of local officials. Enhanced training tools can include (i) jurisprudence, (ii) "clear benchmarks for indicators vis-a-vis the range of economic, civil, cultural, social, and political rights", (iii) "best practices" in programming implementation, and (iv) increase processing of learning experiences on the ground.[53]

49 UN Public sector report 2015 30

50 Clarke (n45) 228

51 Clarke (n45) 237

52 Clarke (n45) 242 Citing Shanta Devarajan 'Human Rights and Human Development' (World Bank, *Africa can end* Poverty, 20 June 2011) <https://goo.gl/Sd5dr4>

53 Clarke (n45) 241

In 2015, the General Assembly requested the creation of a "global indicator framework" to follow on the implementation of the 2030 Development Goals. The follow-up and review of the 2030 Agenda is a primary State concern, which can be achieved by using and assisting on the development of appropriate indicators. High expectations were set on those indicators, and clear mandates were provided for: the attributes of these indicators would be of "high- quality, accessible, timely and reliable disaggregated data". The purpose of this set of indicators would be to assist in "the measurement of progress. " [...]According to the General Assembly, "data is key to decision-making."[54]

The Global Indicator Framework was requested with the following four conditions: (i) "a set of global indicators"; (ii) "complemented by indicators at the regional and national Levels" [...] ; (iii) "simple yet robust," (iv) that "preserve the political balance, integration and ambition" in the Agenda.[55] In terms of process, the indicators would be developed by the Inter-Agency and Expert Group on Sustainable Development Goal Indicators; and would be approved by the United Nations Statistical Commission, and adopted by the ECOSOC and the General Assembly. The Mandate for the Inter-Agency and Expert Group evidences the fact that indicators cannot be built in a vacuum, inasmuch as the group was required to draw upon existing work at the national, regional and international level. Also, the group was required to assist in the implementation of those indicators agreed upon by member states; the creation of a "data-user forum, tools for data analysis and an open dashboard" on the progress of implementation of 2030 goals.[56]

Within the 2030 Development Goals, Goal 16 "peace, justice and strong institutions", was split into 24 indicators, which were later classified into tier I (conceptually clear, data available; tier II (conceptually clear, data not regularly available; and tier iii (not conceptually

54 General Assembly Resolution 'Transforming our world: the 2030 Agenda for Sustainable Development', GA Res 70/1 UN Doc A/RES/70/1 (25 September 2015) para 48: "We are committed to developing broader measures of progress to complement gross domestic product"

55 GA Res 70/1 (n52) para 75

56 Ana Marìa Lebada 'IEAG-SDGs Proposes 231 Global Indicators, 80 Under Review' *IISD SDG knowledge hub*, 6 January 2016 https://goo.gl/gyPRHu

clear).[57] Out of the 24 indicators for goal 16, only 7 were classified as conceptually clear and with readily available data. There were 9 classified as tier II with a clear definition but no readily available data; and 8 indicators were classified as conceptually unclear for which no standard exists for calculation today.

57 UN Inter-agency Expert Group on SDG Indicators 'Tier classification for global SDG indicators' (21 sept 2016) <https://goo.gl/nxaQoG>; See mandate at UN ECOSOC Statistical Commission 'Report of the Inter-agency and Expert Group on Sustainable Development Goal Indicators' UN Stat Comm 46 Sess 15 Dec 2016, UN Doc E/CN.3/2017/2 (Annex 1) <https://goo.gl/A1joMU>

Goal	Indicator	Tier
16.1 Significantly reduce all forms of violence and related death rates everywhere	16.1.1 Number of victims of intentional homicide per 100,000 population, by sex and age	i
	16.1.2 Conflict-related deaths per 100,000 population, by sex, age and cause	II/III
	16.1.3 Proportion of population subjected to physical, psychological or sexual violence in the previous 12 months	II
	16.1.4 Proportion of population that feel safe walking alone around the area they live	II
16.2 End abuse, exploitation, trafficking and all forms of violence against and torture of children	16.2.1 Proportion of children aged 1-17 years who experienced any physical punishment and/or psychological aggression by caregivers in the past month	i
	16.2.2 Number of victims of human trafficking per 100,000 population, by sex, age and form of exploitation	i
	16.2.3 Proportion of young women and men aged 18-29 years who experienced sexual violence by age 18	ii
16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all	16.3.1 Proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms	ii
	16.3.2 Unsentenced detainees as a proportion of overall prison population	i
16.4 By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime	16.4.1 Total value of inward and outward illicit financial flows (in current United States dollars)	ii
	16.4.2 Proportion of seized small arms and light weapons that are recorded and traced, in accordance with international standards and legal instruments	i
16.5 Substantially reduce corruption and bribery in all their forms	16.5.1 Proportion of persons who had at least one contact with a public official and who paid a bribe to a public official, or were asked for a bribe by those public officials, during the previous 12 months	ii
	16.5.2 Proportion of businesses that had at least one contact with a public official and that paid a bribe to a public official, or were asked for a bribe by those public officials during the previous 12 months	i
16.6 Develop effective, accountable and transparent	16.6.1 Primary government expenditures as a proportion of original approved budget, by sector (or by budget codes or similar)	i

institutions at all levels	16.6.2 Proportion of the population satisfied with their last experience of public services	iii
16.7 Ensure responsive, inclusive, participatory and representative decision-making at all levels	16.7.1 Proportions of positions (by sex, age, persons with disabilities and population groups) in public institutions (national and local legislatures, public service, and judiciary) compared to national distributions	iii
	16.7.2 Proportion of population who believe decision-making is inclusive and responsive, by sex, age, disability and population group	iii
16.8 Broaden and strengthen the participation of developing countries in the institutions of global governance	16.8.1 Proportion of members and voting rights of developing countries in international organizations	i
16.9 By 2030, provide legal identity for all, including birth registration	16.9.1 Proportion of children under 5 years of age whose births have been registered with a civil authority, by age	i
16.10 Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements	16.10.1 Number of verified cases of killing, kidnapping, enforced disappearance, arbitrary detention and torture of journalists, associated media personnel, trade unionists and human rights advocates in the previous 12 months	iii
	16.10.2 Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information	ii
16.a Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime	16.a.1 Existence of independent national human rights institutions in compliance with the Paris Principles	i
16.b Promote and enforce non-discriminatory laws and policies for sustainable development	16.b.1 Proportion of population reporting having personally felt discriminated against or harassed in the previous 12 months on the basis of a ground of discrimination prohibited under international human rights law	iii

Table 2: SDG Goal 16 indicators

From these 12 topics related to “peace, justice and strong institutions”, we can see a mixture of components that reminds us of law and development dimensions inserted into the rule of law index (detailed below). Only point 3 addresses access to justice explicitly, while others, like areas 1, 2, and are directed to violence reduction, items 4, 5 and b refer to some form of crime control in relation to bribery, international illicit traffic or terrorism; and other dimensions relate to procedural aspects in institutions; decision making, representation in global governance, transparency, non-discrimination. Rather than a rights based approach, these items are reminiscent of values cared for in the law and development movement. These approaches are not synonyms. Nor is it clear whether these dimensions can fulfill the goal of determining whether human rights are complied with.

The need for further development of statistical tools in the field of governance, peace and justice was reaffirmed by the request to the Group of Experts to use a three-tier classification for the Sustainable Development Goals, and in particular those related to Goal 16:

Tier III indicators
16.1.2 (violence reduction) Conflict-related deaths per 100,000 population, by sex, age and cause
16.2.1 (end violence against children) Proportion of children aged 1-17 years who experienced any physical punishment and/or psychological aggression by caregivers in the past month
16.4.1 (Reduction of illicit traffic) Total value of inward and outward illicit financial flows (in current United States dollars)
16.6.2 (effective, transparent, accountable institutions) Proportion of the population satisfied with their last experience of public services
16.7.1 (Responsive decision-making) Proportions of positions (by sex, age, persons with disabilities and population groups) in public institutions (national and local legislatures, public service, and judiciary) compared to national
16.7.2 (Responsive decision-making) Proportion of population who believe decision-making is inclusive and responsive, by sex, age, disability and population group
16.10.1 Number of verified cases of killing, kidnapping, enforced disappearance, arbitrary detention and torture of journalists, associated media personnel, trade unionists and human rights advocates in the previous 12 months
16.b.1 (non-discriminatory laws and policies) Proportion of population reporting having personally felt discriminated against or harassed in the previous 12 months on the basis of a ground of discrimination prohibited under international human rights law

Table 3: SDG Goal 16 Type III indicators

Complex concepts are difficult to bring into concrete dimensions that can be quantified. In fact, the idea of "conflict" is highly contested, as its many definitions in the legal, social or political realms are somewhat inconsistent. Interests of stakeholders may prevail. The measurement of reality requires first the production of a workable concept whose dimensions are susceptible to be measurable.[58]

Considering the long route many actors have walked to create governance statistics, the content of Goal 16 seems in a way as a proof of concept. Governance as a term in fashion since the beginning of the 21st century appears still undefined, without salient features of its own that can be widely accepted–and hence the construction of governance indicators starts with the process of finding an operational concept that can be set in motion towards indicator construction.

Goal 16 opens a new opportunity for stakeholders to attempt the construction of acceptable indicators. In March 2015, the Report of Cabo Verde on governance, peace and security statistics was issued outlining some prominent issues in the process of indicator construction regarding Goal 16.[59] As a result, the Praia Group was created by the Statistics Commission to gather information and champion a process to address the issue of governance statistics. The Group will produce a handbook on governance statistics by 2018. The Praia Group delivered its first report on December 2015. Then the group set out to map practices from government agencies and NGOs in the conceptualization and measurement of governance.[60] A second target for the Praia Group would be to map demand for governance statistics, in order to identify how demand is different for countries at different stages of development and different constituencies. The areas identified as priority are: "violence and perceptions of peaceful

58 See 6.4.1 'Characterization', p. 234

59 UN ECOSOC Statistical Commission 'Report of Cabo Verde on governance, peace and security statistics' Stat Comm (46th Sess), 3-6 March 2015, UN Doc E/CN.3/2015/17 <https://goo.gl/SnY42C>

60 UN ECOSOC Statistical Commission 'Report of the Praia Group on governance statistics' UN Stat Comm 47th Sess, 17 Dec 2015, E/CN.3/2016/16 <https://goo.gl/p34UFz> para. 6. See para. 12 regarding the handbook on governance statistics

societies, quality of democracy, corruption, institutional capacity, child protection, justice, women's participation and empowerment, illicit financial flows and human rights" [61]

The Report of Cabo Verde offers a brief history of initiatives aiming at measuring governance, sponsored by a number of intergovernmental agencies and governmental groups since early 2000.[62] This background illustrates the difficulty of the concept building process that the Statistical Commission has entrusted the Praia Group. Background information leading to the Development Goals include contributions by the UNIDC[63], UNDP[64], UNICEF in conjunction with UNDP and UNPBSO[65], and a collaboration between UNDP and the UNHRC[66].

The construction of indicators in the field of international cooperation and development has been a long existing endeavor, closely related to the need to reconstruct post-conflict regions where international support was invested after the second world war. Success was of the essence. Information to determine such success was crucial. This is how the Gross Domestic Product was created in the first place. These objectives have not ceased to lead decision makers in the international arena. Legitimate as they may be, these objectives do not translate easily into the global rule of law: still, there is a valid question to ask whether rules are followed—and in particular, human rights rules.

1.3.2 Worldwide governance index

The World Bank Worldwide Governance Indicators use a multitude of sources that include government, expert and NGO sources, household and firm surveys. The index uses the following definition of governance:

61 UN ECOSOC. Statistical Commission 'Report of the Praia Group' (n58)

62 UN Statistical Commission 'Report of Cabo Verde' (n57) paras. 1-7

63 UN Office for Drug and Crime 'Accounting for Security and Justice in the Post-2015 Development Agenda', September 2013 https://goo.gl/XidVPW

64 UNDP Global Dialogue on Rule of Law and the Post-2015 Development Agenda, 26-27 September 2013, New York https://goo.gl/U9WbtV

65 Unicef, PBSO, UNDP Report on the expert meeting on an accountability framework for conflict , violence, governance and disaster and the Post-2051 development agenda, New York, 18-19 June 2013 <https://goo.gl/6XwidL>

66 UN OHCHR/UNDP Expert Consultation 'Governance and human rights: Criteria and measurement proposals for a post-2015 development agenda' 13-14 November 2012, New York <https://goo.gl/xbjsuk>

> traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them.

This definition is broken down into the following six categories: (i) voice and accountability; (i) political stability and absence of violence; (iii) government effectiveness, (iv) regulatory quality; (v) rule of law; and (vi) control of corruption. These dimensions are fed with secondary data, prone to change every year. For the 2015 report, the WGI gathered information from over 30 sources.[67] The data are gathered from over 30 different sources and comprise a multitude of different individual measurements. The WGI compiles and manages the figures but is not responsible for collection. The "rule of law" dimension is a composite taken from various sources. This method gives the data set the power to compare across nations with an almost universal reach. Data sources include 6 representative sources and 15 non-representative sources. For each source, a list of relevant variables is provided in the methodology of the data set.[68] For

67 The list of sources for the WB 2015 World Bank Governance Index Jan 2, 2017 <https://goo.gl/22znfb> include: ADB African Development Bank Country Policy and Institutional Assessments; AFR Afrobarometer; ASD Asian Development Bank Country Policy and Institutional Assessments; BPS Business Enterprise Environment Survey; BTI Bertelsmann Transformation Index; CCR Freedom House Countries at the Crossroads; EBR European Bank for Reconstruction and Development Transition Report; EIU Economist Intelligence Unit Riskwire & Democracy Index; FRH Freedom House; GCB Transparency International Global Corruption Barometer; GCS World Economic Forum Global Competitiveness Report; GII Global Integrity Index; GWP Gallup World Poll; HER Heritage Foundation Index of Economic Freedom; HUM Cingranelli Richards Human Rights Database and Political Terror Scale; IFD IFAD Rural Sector Performance Assessments; IJT iJET Country Security Risk Ratings; IPD Institutional Profiles Database; IRP IREEP African Electoral Index; LBO Latinobarometro; MSI International Research and Exchanges Board Media Sustainability Index; OBI International Budget Project Open Budget Index Expert; PIA World Bank Country Policy and Institutional Assessments; PRC Political Economic Risk Consultancy Corruption in Asia Survey; PRS Political Risk Services International Country Risk Guide; RSF Reporters Without Borders Press Freedom Index; TPR US State Department Trafficking in People report; VAB Vanderbilt University Americas Barometer Survey; WCY Institute for Management and Development World Competitiveness Yearbook; WJP World Justice Project Rule of Law Index; WMO Global Insight Business Conditions and Risk Indicators;

68 World Bank Worldwide Governance Indicator 'Rule of Law' https://goo.gl/yAZfZb; Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi 'The Worldwide Governance Indicators: Methodology and Analytical Issues' (World Bank Draft policy research working paper, September, 2010) <https://goo.gl/6HEh9W> p. 3, describe the rule of law indicator as: "capturing perceptions of the extent to which agents have confidence in and abide

instance, the eight dimensions of the Economist Intelligence Unit cover: (i) violent crime, (ii) organized crime, (iii) fairness of judicial process, (iv) enforceability of contracts; (v) speediness of judicial process; (vi) confiscation/expropriation, (vii) intellectual property rights protection, and (viii) private property protection. Although some aspects of this list can be easily translated into rights language, this is not their vocation. The category for "civil liberties" include the following dimensions that might be relevant to a rule of law measurement:

> 51. The use of torture by the state
>
> 52. The degree to which the judiciary is independent of government influence. Consider the views of international legal and judicial watchdogs. Have the courts ever issued an important judgment. against the government, or a senior government official?
>
> 54. The degree to which citizens are treated equally under the law. Consider whether favored groups or individuals are spared prosecution under the law.
>
> 55. Do citizens enjoy basic security?
>
> 56. Extent to which private property rights are protected and private business is free from undue government influence
>
> 58. Popular perceptions on protection of human rights; proportion of the population that think that basic human rights are well-protected.
> If available, from World Values Survey, % of people who think that human rights are respected in their country.

The items in the World Bank's Worldwide Governance Indicators do not explicitly pick any of these. The fields of interest reported also cover a number of issues concerning property rights. Only as a point of clarification, consumers of rankings must be aware of the goal producers have in mind. Who is their audience? What is the purpose of the information delivered? Are either the World Bank Governance indicators of the Economist Intelligence Unit

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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."

concerned measuring compliance with human rights standards? Maybe. The framing of the questions about surveys seems better suited for a measurement of perception, in the case of the information we get from the EUI. Sadly, the listings of information taken from the EUI, and used in the World Bank indicator is not enough to establish what kind of information is being used.

Rankings or indexes are sometimes constructed like a Matryoshka style process, where information coming from one source is combined with other, from different sources, and repackaged into new discrete categories. This adds a layer of complexity and uncertainty in a deconstruction or interpretation process, if we wish to determine what object in the world the index or the ranking refers to. Oddly, complexity is something we hope to circumvent when we offer a score of some sort. Apparently, some dimensions in the field of development or business risk measurement, are more transparent than others because of a shared understanding of their meaning. The multiplicity and diversity of methods to assess the rule of law, however, point at the opposite conclusion. The meaning of this dimension is still too disputed to have a common understanding of its core values. It seems plain, that there is no shared meaning for any ranking, or score, or indicator for a rights oriented perspective of fair trial, the quality of criminal justice, personal liberty, or any dimension relevant in a human rights approach to security and crime control. Arguably, this shared understanding is lacking even in concepts such as extra-judicial killings. One reason to explain this, is the absence of a purposeful endeavor to build such measurements. Rule of law and similar dimensions have a strong connection to the business risk initiatives starting in the 1960s. Even though these initiatives are commendable, their perspective inhibits the development of other measurements. Most importantly, these business risk or development indicators, confuse the field as they purportedly provide measurements about some dimension of the rule of law, often as a procedural dimension, and often via surveys either from experts or open population, where available. This is where the World Justice Project sought to innovate.

1.3.3 The World Justice Project Rule of law index

The World Justice Project is an independent US based organization founded in 2006. Their main project, the Rule of law index offers nine dimensions relevant to a global index whereby countries are ranked:

> The rule of law is not the rule of judges or lawyers: all elements of society are stakeholders. It is our hope that over time, this diagnostic tool will help identify strengths and weaknesses in each country under review and encourage policy choices that strengthen the rule of law.[69]

The methodology in the index picks four dimensions for the rule of law to thrive: "The rule of law is a system in which the following four universal principles are upheld:[70]

> 1 The government and its officials and agents as well as individuals and private entities are accountable under the law;
>
> 2 The laws are clear, publicized, stable and just; are applied evenly and protect fundamental rights; including the security of persons and property;
>
> 3 The process whereby the laws are enacted administered and enforced is accessible, fair and efficient;
>
> 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 community they serve"

These nine dimensions are called "factors" and include the following:

69 WJP The World Justice Project Rule of Law Index Report 2016 (WJP Washington 2016) p. 8 <https://goo.gl/A35tMb>

70 WJP The World Justice Project Rule of Law Index Report 2016 (WJP Washington 2016) p. 13 <https://goo.gl/A35tMb>

Dimensions	Indicators
constraints in government powers	Government powers effectively limited by (I) the legislature; (ii) the judiciary; (iii) independent auditing and review; (iv) Government officials are sanctioned for misconduct; (v) subject to non-governmental checks; (vi) Transition of power is subject to the law
absence of corruption	whether public officials in (I) the Executive, (ii) the judiciary, (iii) police, and (iv) legislature, use public office for private gain;
open government	"publicized laws and government data, right to information, civic participation, complaint mechanisms;
fundamental rights	(i) equal treatment and absence of discrimination; (ii) "right to life and security of the person" "effectively guaranteed"; (iii) due process of law and the rights of the accused; (iv) freedom of opinion and expression; (v) freedom of religion; (vi) privacy; (vii) freedom of assembly; (viii) labor rights;
order and security	(i) "crime is effectively controlled"; (ii) civil conflict is effectively limited; (iii) people do not resort to violence to redress personal grievances;
Regulatory enforcement	(i) government regulations are effectively enforced, (ii) applied and monitored without improper influence; (iii) administrative proceedings are conducted without unreasonable delay; (iv) due process is respected in administrative proceedings; (v) the government does not expropriate without lawful process and adequate compensation;
Civil justice	(I) People can access and afford civil justice; (ii) free of discrimination; (iii) free of corruption; (iv) free of improper government influence; (v) not subject to unreasonable delays; (vi) effectively enforced; (vii) ADRs are accessible, impartial, and effective
Criminal justice	(i) "criminal investigation system is effective"; (ii) criminal adjudication system is timely and effective; (iii) correctional system is effective in reducing criminal behavior; (iv) criminal system is impartial; (v) criminal system is free of corruption; (vi) criminal system is free of improper government influence; (vii) due process of law and the rights of the accused;

Table 4: WJP Factors of the Rule of Law[71]

The sources of information are a general population poll with 1000 respondents in three large cities and a qualified respondent's questionnaire.[72] The questionnaire was constructed with open and closed questions, as well as "detailed hypothetical scenarios".[73] The fact that the index

71 With information from World Justice Project 'Factors of the Rule of Law'https://goo.gl/kw5NfM 15

72 WJP 'Rule of Law Index report (n69) p. 15

73 Wolfgang Merkel 'Measuring the quality of rule of law: virtues, perils and results' in Michael Zürn, André Nollkaemper, Randall Peerenboom *Rule of Law Dynamics* (Cambridge UP Melbourne 2012) [Amazon kindle]

is built solely on the basis of self-generated data is outstanding. Yet, the concentration on public perception is problematic. The same can be said for the concentration on only urban areas; as well as the slim or absent justification for the definitions and theoretical basis for the core principles and components in the index.[74]

In particular, the WJP's inclusion of a section on fundamental rights is commendable. The survey design for this section in the open opinion poll, contains questions such as the following:

In [COUNTRY], people can freely join together with others to draw attention to an issue or sign a petition
In practice, workers in [COUNTRY] can freely form labor unions and bargain for their rights with their employers
In [COUNTRY], people can freely express opinions against the government
In [COUNTRY], people can freely attend community meetings
In [COUNTRY], the media (TV, radio, newspapers) can freely expose cases of corruption by high-ranking government officers without fear of retaliation
In [COUNTRY], civil society organizations can freely express opinions against government policies and actions without fear of retaliation
In [COUNTRY], political parties can freely express opinions against government policies and actions without fear of retaliation
In this [COUNTRY], religious minorities can freely and publicly observe their holy days and events

Table 5: WJP General population opinion poll on fundamental rights[75]

These questions are far more abstract than others for other rule of law factors, such as:

> Thinking about the most recent incident, did you (or the person living in your household) have to pay a bribe to the police officer who approached you (or the person living in your household)?[76]

These questions are uneven. While question 35 displays abstract rights concepts about which people are intended to give their opinion, question 24 proposes a concrete scenario people

sec 2.5.3. Reliability

74 Merkel (n70), sec 2.5.4. Validity

75 The World Justice Project, 'General Population 2016 - Opinion Poll', Question 35a-h https://goo.gl/Wjypo4

76 The World Justice Project, 'General Population 2016 - Opinion Poll', Question 24a https://goo.gl/Wjypo4

can answer on the basis of their own experience. Abstract concepts are more difficult to pin and communicate.

The Rule of Law index is important because it seems to exemplify a new era in law and development, where the rule of law is perceived as an end in and of itself, as opposed to a means to economic development.[77] The index aims at measuring "law in action" as opposed to "law in the books". To achieve this, the index moves away from "describing how the justice system actually works", which professor Ureña exemplifies by the number of courts, judges or prosecutors, common to indicators in the second wave of law and development. Rather, the index measures the perception of the public and experts about the rule of law. According to Ureña, the index is thus anchored in a realist tradition, as viewed by Roscoe Pound.[78] In an interesting defense of the method of measuring perception, Ureña says that the "'the reality' of the rule of law is the experience of those living (or not living) under it". In fact, Ureña argues, "there is no reality beyond such perception".[79] Further, "the indicator's mediation is both a descriptive and a normative exercise […] descriptive because it demonstrates perception; it is normative because of its reliance on a set of deontological factors."[80]

International development as an activity seeks to distance itself from the future of a profitable world market. This differentiation causes confusion in indicator production projects. The picture painted by professor Ureña accounts for the Rule of Law index in its own terms, perhaps from the perspective of the authors of the index. A radically different view can be entertained, taking the index at face value, but comparing it to others in the family, like the World Governance indicators, by the World Bank. An apparently neutral description would downplay the implications of the "law for profit" approach that permeates both initiatives. The World Bank project is transparent in its appeal to the importance of enforcing contracts, and the notion of "law for public order", focusing on police, courts, crime and violence.[81] In this context, "state

77 Ureña (n38) pos. 2676
78 Ureña (n38) pos. 2703-2724
79 Ureña (n38) pos. 2703-2724
80 Ureña (n38) pos. 2724-43
81 Jothie Rajah 'Rule of Law' as Transnational legal order' in Terrence Halliday & Gregory Schaffer Transnational Legal Orders (Cambridge University Press, New York, 2015) [Amazon Kindle] Pos. 8701

legitimacy lies not in restraints on state power and the delivery of individual rights but in state facilitation of private sector development".[82] This observation merely points out a style, a perspective, that is not sufficiently explained in the Rule of Law index, and that follows from the authority it grants to the World Bank Governance indicator. Compared to the human rights tradition received from the Universal Declaration of Human Rights, the effect produced by this interpretation of the rule of law, is to capture the concept as aligned with the security and development of private business.[83] This perspective stands in stark contrast with the one proposed by Professor Ureña, which accounts for the index as the third wave of law and development, where law is an end, rather than a means to advance economic growth. The importance of this remark is not the content of these positions, so much as the source of the divergence: the materials examined are not explicit about these values, and in proposing an indicator, they necessarily offer a partial account of the concept they aim to measure. This is the nature of the process. Yet, in so doing, indicators that hide these choices, invite confusion and prejudice.

Another important aspect of the Rule of Law index is its choices of method. In 2008, the consortium responsible for the project promoted a "glocalization" initiative with the Vera Institute, in Chandigarh, India, Lagos, Nigeria, Santiago, Chile, and New York city. The integration of these results to the design of the indicator is unclear. Apparently, the impact of this process for the construction of indicators was lost in the way. Originally, the function of these exercises was to develop indicators in four cities around the world, to provide a local input into what should be counted in a rule of law indicator; and to deliberately input the most marginalized aspects of social life into the measurement. The rationale was simple: "those on the margins of society usually experience problems accessing justice first and most acutely".[84]

Another measure to balance the information used in the Rule of Law Index, was to conduct both open and expert surveys. Open surveys account for fifty percent of the points in the grading system of the Rule of Law index, and the other half comes from expert surveys.

82 Rajah (n78)'Pos. 8789
83 Rajah (n78)' Pos. 8792
84 Rajah (n78)'Pos. 8930

However, open surveys are conducted only every three years, whereas expert surveys are conducted on a yearly basis. Although the cost of logistics is understandable, the bias towards expert opinion is clear. These elements are hard to set aside If we read professor Ureña's claim, that rule of law has no other reality than the one captured by perceptions. Despite the fact that the Rule of Law index—or any other, for that matter—may constitute platforms for exchange, in a community of practice, the power of the messenger should address the fat that some agents lack the power to make their voices heard.

These examples of criticisms of the Rule of Law index show the tension between the implicit and explicit goals of indicator construction, as well as the risks of the perspective from which indicators are designed. Also, these remarks point at the difficult place for law in the international arena, in particular, in an economic mentality. The uncertain role legal institutions play in the wide array of interests in the international cooperation, is reflected in the design of indicators.

1.4 Human rights indicators: civil, political, economic social and cultural rights

Indicators specifically tailored for the human rights world are relatively new. Before this particular development presented, measurement was proposed for related, although not identical dimensions: development and business risk figures, that track law and order, living conditions or major economic indicators. Today, the field of indicators offers measurements for rules related to the major rights covenants. I will refer to the classical pair, often called the Universal Bill of Rights: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

Historically, the measurement of deviancy and population, including health, are a defining trait of the industrial state. Modern measurements on crime-related phenomena, as well as social conduct, can be traced back to the 19th century. For instance, causes of death have been updated for almost two hundred years and are today universally applied. This historical strand of measurement overlaps with the development and economic indicators, that appeared after the second world war, as part of the reconstruction project.

Indicators in the field of economic, social and cultural rights tended to be developed before those of civil and political rights, perhaps because of a sense of urgency after years of pushing these rights to the sidelines. This perception was fueled by the multitulde of privately produced measurements, such as Freedom House Freedom in the World index.[85] Conveniently, though, the measurement used in lieu of rights measurement were development indicators, as opposed to explicit measures of compliance with economic, social and cultural rights.[86] The development of these indicators came at the time of a strong push at the Vienna Conference in 1993. Economic, social and cultural rights have developed rapidly as a result of the adoption of indicators under the San Salvador Protocol in the Inter-American Convention of Human Rights, established the duty to report in the form of indicators.[87] The Inter-American Commission on Human Rights later developed a set of guidelines to develop such indicators.[88]

Maria Green offered in 2001 a road map of issues and definitions that needed to be adopted, including whether human rights indicators equate human development indicators, and the relation between civil and political rights and economic and cultural rights. As regards civil or economic rights indicators, one perception is that economic rights seemed more prone to statistical analysis; whereas civil and political rights relied more on "thematic", general information related to compliance. Green finds evidence of the use of statistical information in the Human Rights Committee. This background practices exist, even if there may be a terminological difference with the Committee on Economic, Social and Cultural Rights, an early adopter of indicators for state party reporting. Green mentions CCPR documents dating 1997 and 1998.[89] Also, the manual on reporting for the Committee Against Torture encouraged the use of

85 Sital Kalantry, Jocelyn E. Getgen, & Steven Arrigg Koh 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32 Human Rights Law Quarterly 253, p. 258

86 Ann Janette Rosga & Margaret L. Satterthwaie 'The Trust in indicators: Measuring Human Rights' (2009) 27 Berkeley Journal of International Law 235 https://goo.gl/7rLMHb p. 273-74

87 Protocolo de San Salvador, Inter-American Commission Guidelines for preparation of progress indicators in the area of economic, social and cultural rights OEA/Ser.L/V/II.132 Doc. 14 rev. 1 19 July 2008 https://goo.gl/OSrA7a, article 19

88 Inter-American Commission 'Guidelines for preparation of progress indicators in the area of economic, social and cultural rights' OEA/Ser.L/V/II.132 Doc. 14 rev. 1 19 July 2008 https://goo.gl/OSrA7a

statistical information.[90] At that time, the CESCR committee had already adopted indicators as a general rule for states parties in the General Comment 1.[91]

The most powerful contribution to human rights measurement as it evolved into the beginning of the 21st century, was made by political scientists. Literature and international conferences in the early 2000's were devoted to finding the causes of cross-national variations in human rights compliance. These were the product of increasing interest in this topic. [92] Practitioners with the Human Rights Data Analysis Group were instrumental in analyzing large amounts of data for international truth commissions, in an attempt to track systematic and gross human rights violations. Human rights advocates, scholars, and governments often find themselves issuing or reacting to statements of the type: "There was a standard practice by the police of torturing prisoners," or "The human rights situation is improving in the country." Methodological concerns over measurement issues involving human rights were expressed, pointing at the success that social science methodology can offer where cases are too many to be fully investigated.[93]

At the same time, or probably as an effect of the use of these measurement techniques, an increased demand from international human rights organizations and donors became apparent. The United Nations, the World Bank, national agencies for international cooperation in the United States, United Kingdom, Sweden and Denmark used measures for different purposes.

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89 Green (n8) fn 86-88: Concluding Remarks of the Human Rights Committee on the initial report of Zimbabwe, U.N. Doc. CCPR/C/79.Add.89, 4 Aug. 1998, para. 18; Concluding Remarks of the Human Rights Committee concerning the second periodic report of Sudan, U.N. Doc. CCPR/C/79/Add.85, 9 Nov. 1997, para. 17; Concluding Remarks of the Human Rights Committee on the second periodic report of Egypt, U.N. Doc. CCPR/C/79/Add.23., 9 Aug. 1993, para. 2.

90 Green (n8) 1092, citing Joseph Voyame and Peter Burns *The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment in United Nations Manual on Human Rights Reporting Under Six Major International Treaties* (United Nations Geneva 1997) https://goo.gl/Yxds2D 371

91 CESCR General Comment No. 1: Reporting by States Parties, Document E/1989/22, Thirteenth Session of the CESCR, on 27 July 1981, para. 6;

92 T Landman & L Carvalho *Measuring human rights* (n3) pos 260, inro, para 3, citing Jabine and Claude, Human rights and statistics

93 Ignacio Cano, Evaluating Human Rights Violations, Eleanor Chelimsky & William R. Shadish (Eds,) Evaluation for the 21st Century: A Handbook(1997 SAGE Thousand Oaks) 221-233

Some, to find ways where aid could be more useful to counterparts; others as an incentive to provide aid to those who achieved improvements.[94]

The apparent lack of enforceability of economic, social and cultural rights triggered the interest on creation and use of indicators. The Committee for Economic, Social and Cultural Rights called in General Comment 1, for the adoption of "national or other more specific benchmarks, which can provide an extremely valuable indication of progress."[95] Later, in General Comment 3 for the states parties to implement concrete, targeted measures, and monitor closely their progress.[96] According to the Committee, states are bound by the Covenant to monitor the extent of the realization of economic, social and cultural rights, even within the available resources, even if scarce.[97] The Committee on Economic, Social and Cultural Rights pushed more definitively for the inclusion of indicators in General Comment 13 in 1999:

> At a minimum, the state party is required to implement the national education strategy that should include mechanisms such as indicated in benchmarks on the right to education but which can be closely monitored.

Further, it stated in General Comment 14 that states parties are called to:

> adopt and implement a national public health strategy and plan of action, on the basis epidemiological evidence, addressing health concerns of the whole population; the strategy and plan of action shall be devised, and reviewed on the basis of the participatory design process;[98]

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94 T Landman & L Carvalho *Measuring human rights* (n3) pos 270, inro, 'Background developments' para 3 Citing Thomas B. Jabine and Richard P. Claude (eds) *Human Rights and Statistics: Getting the Record Straight* (UPenn Press, Pensylvania 1991)

95 CESCR General Comment No. 1: Reporting by States Parties, Document E/1989/22, Thirteenth Session of the CESCR, on 27 July 1981, para. 6;

96 CESCR General Comment No. 3: The Nature of States Parties' Obligations, Document E/1991/23, Fifth Session of the CESC on 14 December 1990, para. 2, 11

97 CESCR General Comment No. 3: The Nature of States Parties' Obligations, Document E/1991/23, Fifth Session of the CESC on 14 December 1990, para. 2, 11; See López Bermúdez (n20) p. 880;

98 CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), Document E/C.12/2000/4, Twenty-second Session of the CESCR on 11 August 2000;

In order to achieve this, states parties should devise indicators and benchmarks to measure progress.

Important remarks from the UN Habitat program also point toward the idea that social rights indicators were based upon the information that already existed from social and development data–not so much as a set of indicators developed ad hoc to measure compliance. The expert group set up for this purpose had the following mandate:

> the focus of the expert group meeting be placed in the creation of manageable set of indicators for monitoring progress towards the realization of the right to housing identify those indicators for which information has already been collected, or which could otherwise be easily collected.[99]

Only as a mater of illustration, other references by UN bodies include the Human Rights Council,[100] the Committee Against Torture in their monitoring of Honduras,[101] the Committee on the Elimination of Discrimination against Women in their monitoring of Lao political participation of women, and the duty of the State party to provide statistical information to follow up on concluding observations.[102] The Committee on Economic, Social and Cultural Rights in relation to the United Kingdom, called to reduce inequality in infant mortality and life

99 López Bermúdez (n20)

100 UN High Commissioner for Human Rights, *Human rights indicators. A Guide to measurement and implementation* HR/PUB/12/15 New York / Geneva 2012 https://goo.gl/UAYlNs

101 CAT Consideration Of Reports Submitted By States Parties Under Article 19 Of The Convention. Concluding observations of the Committee against Torture. Honduras, CAT/C/HND/CO/1, 23 June 2009, para. 17, at https://goo.gl/AEh4SB

102 CEDAW Concluding observations of the Committee on the Elimination of Discrimination against Women. Lao People's Democratic Republic, CEDAW/C/LAO/CO/7, 7 August 2009, CEDAW 44th session, para. 32, available at https://goo.gl/Mkuycp The concluding observation requires: "The State party is also called upon to provide statistical data on the representation of women in all areas of political and public life, including in the judiciary, police and military areas."

expectancy at birth, by 10 per cent.[103] The Human Rights Committee called for the Czech Republic to adopt indicators in relation to non discrimination.[104]

By 2000, the UN High Commissioner for Human Rights set up a small unit with the purpose of advancing indicators in the field. In 2005, a meeting of chairpersons of the human rights treaty bodies called "Statistical information related to human rights ", requested the preparation of a draft document on the possible use of indicators. Discussions signaled the importance of borrowing existing data sets:[105]

> there could be some indicators that are uniquely human rights indicators, there could be a large number of other indicators such as socio economic statistics that could meet all the definition requirements of human rights indicators
>
> to the extent that such indicators related to the human rights standards and are used for human rights assessment, it would be helpful to consider dentist human rights indicators

These remarks appeared in a paper by consultant Emilie Filmer-Wilson in 2005, and published in 2006.[106] At this point, there was common approach to economic, social and cultural rights existed with civil and political rights. The document presents 12 "illustrative indicators”

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103 CESCR Consideration of reports submitted by states parties under articles 16 and 17 of the covenant. Concluding observations of the Committee on Economic, Social and Cultural Rights. United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories E/C.12/GBR/CO/5, CESCR 42nd sess. 12 June 2009, para. 32: “The Committee is concerned that health inequalities among various social classes in the State party have widened by 4 per cent among men and 11 per cent among women, especially with regard to access to health care, goods, facilities, and services. “ available at https://goo.gl/dsR2yA

104 CCPR Consideration of reports submitted by states parties under article 40 of the covenant. Concluding observations of the Human Rights Committee. Czech Republic. CCPR/C/CZE/CO/2, CCPR 90th Sess., 9 April 2007, para. 16: The Committee recommended that the State Party “Institute effective monitoring mechanisms and adopt indicators and benchmarks to determine whether relevant anti-discrimination goals have been reached”; available at https://goo.gl/rqWn8n

105 UN OHCHR Report on indicators for monitoring compliance with international human rights instruments HRI/MC/2006/7, 11 May 2006 para. 7 https://goo.gl/FGQJzo

106 Emilie Filmer- Wilson ‘An Introduction to the Use of Human Rights Indicators for Development Programming’ (Jjune 2005) p. 3 available at https://goo.gl/b7pAXJ; later printed in (2006) 24 Netherlans Quarterly of Human Rights 155

along with the corresponding method data sheets." The results of this initiative will be discussed below.[107]

At about that time, the Rapporteur on the right to health in 2000 introduced a key distinction that accounts for the singularity of purpose in human rights indicators:

> what tends to distinguish the right to health indicators from health indicators is less its substance then (i) it's explicit derivation from specific rights to health norms; and (ii) the purpose to which it is put, neatening the right to health monitoring with a view to holding duty-bearers to account[108]

Further, the Rapporteur offered a crucial explanation of how health indicators could be related to right of health indicators:

> […] while it is suggested that a health indicator may be regarded as a right to health indicator if it corresponds to a specific right to health norm, this correspondence — or link — has to be reasonably exact. For example, it is unconvincing to argue that a health indicator is a right to health indicator because it somehow reflects "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". In that example, the norm is exceedingly vague and the correspondence between indicator and norm will inevitably be inexact. The relationship between indicator and norm has to be reasonably close and precise.[109]

The Rapporteur also introduced a key distinction highly operational today between structural, process and outcome indicators. Structural indicators track whether "key structures, systems and mechanisms that are considered necessary for the realization of a given rights exist". Process indicators refer to the extent to which "necessary activities for the realization of a given rights are going out, measuring the effort". Outcome indicators measure the results of a given policy.[110]

107 See below, 1.4.1 'United Nations High Commissioner for Human Rights' p. 44

108 UN General Assembly Report of the special rapporteur Paul Hunt. 'The right of everyone to enjoy the highest attainable standard of physical and mental health' UNGA A/58/427 10 October 2003 Para. 10, available at https://goo.gl/3iU1T9

109 UN General Assembly Right to health 2003 (n105) Para. 11

110 UN General Assembly Right to health 2003 (n105) Para. 15

The framework for the right to health created a hiatus in the process of adoption of indicators. Paul Hunt introduced the categories of "structural, process and outcome indicators to the human rights world, arguing these were "widely understood" categories in the world of health measurement. In his own words, the Rapporteur stated that "human rights-based approach to particular issues, such as development, poverty reduction and trade, brings certain valuable perspectives that otherwise tend to be neglected"[111]. What I believe is the epicenter of the avalanche for human rights indicators is the following paragraph in the Rapporteur's 2006 report:

> 52. If progress is to be made, there must be a degree of terminological clarity and consistency. In 2003, the Special Rapporteur suggested that special attention should be devoted to the following three categories of indicators: structural, process and outcome indicators. While there is no unanimity in the health literature, these categories and labels are widely understood. They are also relatively straightforward. They are used by some departments in WHO, such as the Department of Essential Drugs and Medicines Policy. Since 2003, OHCHR and others have also begun to use these three terms. Eibe Riedel, Vice-Chair of the Committee on Economic, Social and Cultural Rights, has adopted these terms and categories. In the Special Rapporteur's view, these labels will serve as well as (if not better than) others. Since consistent terminology will greatly assist States, intergovernmental organizations, civil society groups and others, he recommends that when formulating human rights indicators in relation to health they be categorized as structural, process and outcome indicators[112]

The words I underlined are worth noting: first, the indicator structure is suggested because it is straightforward, because it is "widely understood", they come from the measurement of health conditions—and as such, probably from the social indicator world that also inspired the Freedom House Freedom in the World index; they are aimed at revealing the situation of those

111 ECOSOC 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental healt Paul Hunt' HRComm 62nd session E/CN.4/2006/48 3 March 2006 https://goo.gl/5foykC para. 25

112 ECOSOC Right to health 2006 (n108)

who are most often neglected; and they were adopted by the Committee on Economic, Social and Cultural Rights. The language used by the Rapporteur is strikingly categorical:

> 29. […] "there is no alternative but to use indicators to measure and monitor the progressive realization of the right to the highest attainable standard of health. While a key question used to be "Is there a role for indicators in relation to the right to the highest attainable standard of health?", today the crucial question is "How can indicators be most appropriately used to measure and monitor this fundamental human right?" The human rights-based approach to health indicators set out in this chapter provides an answer to this crucial question.[113]

A great source of concern against this background, is the transit from this very clear perspective on the use of measurement in the social rights agenda, to their widespread adoption in the world of civil and political rights.[114] Sally Engel Merry accounts for the relevance of this style of indicators into the implementation of social change theories, into human rights monitoring.[115]

Apparently, civil and political rights measurement started as a field of interest for social scientists, who though the field of economic, social and cultural rights already had the data they wanted to build:

> Civil and political rights researchers were convinced that they needed what they thought ESC advocates already had: measurement tools that would enable cross-national comparisons. To achieve this, they sought to create single or composite assessments of human rights performance: indicators, or sets of indicators, that would measure the status of civil and political rights in a given country.[116]

Indeed, "[i]nsomuch as the statistical description of human rights already is well established in areas of environmental quality, food, health, education, and employment, the

113 ECOSOC Right to health 2006 (n108)

114 UN General Assembly Right to health 2003 (n105) para 5

115 Sally Engle Merry 'Firming up soft law. The impact of indicators on transnational human righs legal orders' in Halliday & Shaffer *Transnational Legal orders* (Cambridge University Press, New York, 2015) [Amazon kindle] pos 9659

116 Rosga 'Trust in indicators' (n83) p. 267

challenge now arises to improve statistical description addressing personal security and political rights."[117] This development is ironic, considering the historical rejection for economic, social and cultural rights. Yet, apparently the field benefited from extensive measurement experience in the corresponding areas for development. This literature evolved from the social indicators movement.

Other important arguments for the lack of development in civil and political rights indicators is related to incentives. First, some authors point at the difference individuals or non-governmental organizations may face while tracking government's' performance in the field of civil and political right–compared to follow-up on social, economic or cultural rights. This perception may be accurate in some contexts, but in others, private parties also exert considerable violence against citizens dedicated to monitoring or evaluating free speech and other rights. Another argument points at the lack of incentives governments have to produce accurate data for the identification of baselines and follow up for extra-judicial killings, enforced disappearances, torture and other civil or political rights.[118]

The International Covenant on Economic, Social and Cultural Rights was an early adopter of the notion of indicators for their inclusion in state compliance reports. The striking factor about these benchmarks is that they are used "in order to reach further specification of obligations arising out of social rights should not be underestimated for the future role of social rights in the development discourse".[119] Although some authors have recognized the importance of drawing a line between development and rights indicators, due to their legal legitimacy, this phase in indicator construction has not yielded too many products yet.[120]

The knowledge structure of development indicators based on structure, process and outcomes is misleading from a social science perspective. Outcomes are usually difficult to

117 Robert Justin Goldstein 'The Limitations of Using Quantitative Data in Studying Human Rights Abuses' in Thomas B. Jabine and Richard P. Claude (eds) *Human Rights and Statistics: Getting the Record Straight* (UPenn Press, Pensylvania 1991) at 12

118 Goldstein (n114) at 30

119 Markus Kaltenborn *Social Rights and International Development. Global Legal Standards for the Post-2015 Development Agenda* (Springer Heidelberg New York 2015) at 36;

120 Judith V. Welling 'International Indicators and Economic, Social, and Cultural Rights' (2008) 30 Human Rights Quarterly 933, at 948 https://goo.gl/Z4ePj7

measure because no data is available. Structure and process refer to a different concept to that normally attributed in social science, namely the structure of society and the process of social change.[121] Development indicators tend to focus on a theory of social change that acts upon governmental, as opposed to social structures, and normally address government processes. In this respect, development indicators are seen from the perspective of the theory of change they apply, which is imbued by current development theory—whether first, second or third waves of development theories. The emphasis on law as a means to an end is apparent, and these measurement schemes carry this perspective with them.

1.4.1 United Nations High Commissioner for Human Rights

In 2012 the Office of the High Commissioner for Human Rights issued a document called Human Rights Indicators. A guide to measurement and implementation.[122] The guide defines "indicator" as:

> specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights[123]

Thus, indicators are about "specific information" in regard of "a state or condition" of an "object, event activity or outcome" with a rather loose relationship to human rights rules. This relationship is of relatedness–and pragmatism. Indicators have something to do with human rights rules and can be used in the implementation of human rights standards. In a similar vein, the European Union points at the power of indicators as "information tools" that "make perceptible trends that are not immediately detectable" by simplifying reality.[124]

121 SE Merry 'Firming up soft law' (n112) pos 9757

122 UNHCHR Human Rights Indicators. A guide to measurement and implementation HR/PUB/12/15 (UN New York, Geneva 2012) https://goo.gl/2L1ggY

123 UNHCHR Human rights indicators (n119) p. 161

124 Klaus Starl et al 'Baseline Study on Human Rights Indicators in the Context of the European Union. Work Package No. 13 – Deliverable No. 1' December 24, 2014, p. 14 available at https://goo.gl/bfECR8

Indicators in the UNHCHR guide present a managerial approach, and aim at bringing together the language of human rights with the language of development. The translation of legal terms into measurement tools used for planning actions, is expected to broaden the reach of human rights. Also, the inclusion of precise points for quantification within the scope of human rights rules, can help clarify their meaning and brings into the rule the interpretation of soft law sources.[125] Literature points at the divergence in methodology to develop human rights indicators. UNHCHR method is just one among many alternative methods to measure human rights compliance.[126]

The relationship between legal and development horizons in indicator construction, is yet to be further explored in practice. This is revealed by reading the sample indicator for fair trial. In the UNHCHR version of this indicator, twelve dimensions are included: (i) public and private defenders; (ii) proportion of crimes adjudicated; (iii) proportion of hearing open to the public; (iv) proportion of cases with an "irregularity in the pretrial determination of charges"; (v) cases adjudicated in absentia; (vi) cases with "adverse public statements" (violations to presumptions of innocence); (vii) juveniles detained during trial; (viii) recidivism in juveniles; (ix) number of convictions vacated or sentences reduced by higher court; (x) conviction rates by types of crime and victims; (xi) number of arbitrary detentions; (xii) miscarriages of justice and due compensation.

This selection of items to be measured for the protection of fair trial, is contained in the ! outcome" section of this indicator. Other sections (structural and process indicators) are aimed at the community of international development and have a framework aimed at building a plan of action. Outcome measures are directed at capturing the legal obligation of states. These obligations are most clearly linked to article 14 of the International Covenant on Civil and Political Rights:

125 SE Merry 'Firming up soft law' (n112)
126 Starl et al (n121) p. 91

Illustrative indicators on the right to a fair trial	
A. Access to and equality before courts and tribunals	A.1 Conviction rates for indigent defendants provided with legal representation as a proportion of conviction rates for defendants with lawyer of their own choice
	A.2 Proportion of crimes (e.g., rape, physical assaults) brought before judicial authorities
B. Public hearing by competent and independent courts	B.1 Proportion of total hearings opened to general public
	B.2 Proportion of adjudicated cases for which at least one irregularity in the pretrial determination of charges was noted by the courts
C. Presumption of innocence and guarantees in the determination of criminal charge	C.1 Proportion of convictions obtained in absentia (in whole or in part)
	C.2 Reported cases of presumption of guilt and prejudgment by a court or public authorities (e.g., adverse public statements)
D. Special protection for children	D.1 Number of children arrested/ detained per 100,000 child population
	D.2 Recidivism rates of juveniles
E. Review by a higher court	E.1 Proportion of criminal convictions in which sentence was reduced or a criminal conviction vacated or returned for retrial or re sentencing
F.1 Conviction rates by type of adjudicated crime (e.g., rape, homicide, physical assaults) and characteristics of victims and perpetrators (e.g., sex, juvenile)	
F.2 Reported cases of arbitrary detention in the reporting period	
F.3 Reported cases of miscarriage of justice and proportion of victims who received compensation within a reasonable time	

Table 6: UNHCHR Sample Fair Trial indicator

Article 14 of the ICCPR has a much broader scope than the indicator. I have highlighted the passages in this article, which can be linked to the quantifiable items chosen for the indicator.[127] The article has 7 paragraphs. The indicator covers sections of onlye three of those paragraphs. These areas include: (I) reference to “a fair and public hearing”, ·the press and the public may be excluded from all or part of a trial” in paragraph 1,; (ii) the right to be presumed guilty, in paragraph 2 ; and (iii) the right to be present during trial, to have legal assistance. An on paragraph 3, section d.

127 International Covenant on Civil and Political Rights 16 December 1966 UNGA Res 2200A (XXI) 999 UNTS 171, entry into force 31 March 1976 art. 14 available at https://goo.gl/9mW2am

This sample indicator is purportedly one about the legal dimension of the right to a fair trial. The striking observation is that the indicators chosen by the UN High Commissioner's sample indicator, cover only few areas of the right to fair trial, as legally expressed by the International Covenant on Civil and Political Rights. Reductions are understandable. The question always remains: how were these reductions agreed upon? What was the purpose of choosing certain areas as a priority over others? In other words, how did we get from 'here' to 'there'? How can we tell one "translation" of rights language into concrete, measurable magnitudes, is better than another one? Is indicator construction really cherry-picking legal dimensions to tell a story about human rights?

Cherry-picking aspects of reality to look for in order to make decisions, has some problems. The UNHCHR guide starts by "painting" different pictures from divergent accounts of Middle East countries at the point of the the Arab Spring, in 2011. The different pictures drawn are introduced in the foreword, to signal the importance of having objective data about the condition of human rights implementation in the world, as a source of information for policy decision making. The tone is set for a managerial approach to indicators:

> At the heart of this thinking is the recognition that to manage a process of change directed at meeting certain socially desirable objectives, there is a need to articulate targets consistent with those objectives, mobilize the required means, as well as identify policy instruments and mechanisms that translate those means into desired outcome[128]

The indicators developed by the High Commissioner were intended to serve "as a bridge between human rights law and development planning".[129] Lawyers mostly from the Global North attended the six planning meetings, and the indicators were drafted by a development economist and a statistician. The ideas involved in the operation of a system of indicators, are: the management of a process of change, socially desirable objectives, targets, and desired outcomes. In this guide, deprivation of basic needs, including food and water, are described in the same

128 UNHCHR Human rights indicators (n119) p. 11
129 SE Merry 'Firming up soft law' (n112) pos. 9697

level as due process of law, rule of law and democracy. Indicators are introduced as a useful tool in communicating the status of these areas of social life across the world. These indicators have a double purpose: first, they are intended to draw a picture, to be responsive to targets, they are also objective and useful in the political process where public policy is developed. At the same time, human rights indicators were dubbed by Mary Robinson as the "science of human dignity"–maybe as a tag to address the fact that indicators are also used to tell whether compliance exists.

The final report is transparent in these goals. Performance indicators are used along with compliance indicators. The quantitative information gathered is meant to be used along with qualitative determinations from courts, similar bodies and human rights experts[130] (i) structure, process and outcome categories are directly borrowed from the development planning framework, and earlier adopted in the indicators for the right to health, replacing the dimensions of "respect, protect and fulfill—the core human rights actions to be performed by states parties;[131] (ii) the indicators are presented in a grid that can fit into a page which details steps leading to the expected outcome;[132] (iii) indicators from the millennium development goals.

Similarly to the World Justice Project, despite the fact that the tables in the UNHCHR do address the need for disaggregation into race, gender, disability, age groups, ad so forth, "the demands of measurement and the availability of data restrict the theoretical model of social change embedded in the table to a development one".[133]

The UNHCHR's indicators are built against the background of the ever questioned authority of treaty-based bodies in the core United Nations human rights treaties. Rossga points at the claim the UNHCHR makes for objective scientific authority in the adoption of indicators.[134] Additionally to other areas of concern, Rossga points at the goal of shrinking the gap between human rights duties and domestic policy choices. The effect, similarly to the

130 SE Merry 'Firming up soft law' (n112) pos. 9697

131 SE Merry 'Firming up soft law' (n112) Pos. 9633

132 The reference to the Prince's mirror and the advance of tblae like statistics in the early 19th century Germany and France. See below, section 5.1.3 "Adunation" of France: acting at a distance, p. 186

133 SE Merry 'Firming up soft law' (n112) pos 9734

134 Ann Janette Rosga and Margaret L. Satterthwaite 'Measuring Human Rights: UN Indicators in Critical Perspective' in Davies et al *Governance by indicators* (n6) p 307

stabilization of meanings proposed by Halliday, is that policy choices and their measurements may become a proxy for international human rights measurement, simply because that data is readily available.[135]

1.4.2 Access to justice as management

In the late wave of new public sector management, the World Bank devoted a number of studies in developing measures for court performance. These measures were focused in a preliminary stage on the efficiency of court administration, on the basis of three arguments: first, timeliness can be built from data that is objective and readily available; "that congestion, cost, and delay are the problems most often complained about by the public in most Countries";[136] and in terms of strategy, the preliminaries of the study would benefit from the measurement of a dimension that is rather apolitical, as opposed to others, such as corruption.

The dimensions in that study would involve:[137]

1) number of cases filed per year;
2) number of cases disposed per year;
3) number of cases pending at year end;
4) clearance rate (ratio of cases disposed to cases filed);
5) congestion rate (pending and filed over resolved);
6) average duration of each case; and
7) number of judge per 100,000 inhabitants.

The human rights argument connected to the study was built around the effect of public availability of court performance data;[138] as well as a broader effect related to good governance which "should ensure greater respect for the rule of law, confidence in the judiciary, and legal protection of human rights".[139]

135 Rosga & Satterthwaite 'Measuring Human Rights' (n130) p 314
136 Maria Dakolias 'Court Performance Around the World: A Comparative Perspective' (1999) 2 Yale Human Rights and Development Journal 87 Para 11, p 92 at https://goo.gl/HWnpg9
137 Dakolias (n132) para 13, p 92
138 Dakolias (n132) p. 141
139 Dakolias (n132) p. 142

Specifically in the theme of court performance, the "Global Measures of Court Performance", which explicitly align eleven "core" court performance measurements: (i) Court User Satisfaction, (ii) access fees, (iii) case clearance rate; (iv) on-time case processing, (v) pre-trial custody, (vi) court file integrity, (vii) backlog, (viii) trial date certainty, (ix) employee engagement(x) collection of fines and fees, (xi) cost per case.[140] The framework is built to allow for the alignment of these core measures with a set of court values: (a) equality, (b) fairness, (c) impartiality, (d) independence, (e) competence, (f) integrity, (g) transparency, (h) accessibility, (i) timeliness, and (j) certainty. The framework positively affirms its universal appeal of these core values and measures. Values are cross-referenced in a chart that provides for room to measure each value along each core measure, that is, for each core measure of user satisfaction, a corresponding measure would exist for each core value. The framework is compelling in that it results from the experience of a number of organizations with world reputation in court management. The author used to be vice-President of the National Center for State Courts in the United States.

It is interesting, however, that these core measures and values are not explicitly related to legal dimensions for fair trial, which at the suggested level of generality, would probably also have a universal appeal. The authors point at the need to adapt the framework and bring it "home":

> Ultimately, the fundamental questions of what to measure and how to measure it must be answered by individual courts or justice systems. Court policymakers and practitioners should do a similar mapping exercise to that illustrated in Table 1 and Table 2 that is unique to their circumstances and needs. [...] high level goals and objectives are best formulated by the courts and justice systems themselves who must give meaning to the performance measured aligned with their own values and success factors.[141]

140 Dan H. Hall and Ingo Keilitz, International Framework for Court Excellence. Global Measures of Court Performance. Discussion Draft Version 3. November 9, 2012. p 10 at https://goo.gl/rLzYrf

141 Hall and Keilitz (n136) p 9

The framework takes from the experience of other initiatives, for instance, the European Commission for the Efficiency of Justice Guidelines on judicial statistics.[142] The Guidelines are remarkable because they provide explicitly for monitoring of rights protected in the European Convention of Human Rights:

> 24. Detailed up-to-date statistics in the member states on national cases before the European Court of Human Rights concerning the various rights protected by Article 6 are a key tool for evaluating and managing European Court of Human Rights judgments, in particular for the purpose of remedying situations which breach the convention. The relevant bodies of member states are accordingly invited to maintain statistics in tabular form on national cases concerning Article 6 ECHR so that Court judgments are appropriately executed and further breaches prevented.
>
> 25. Tables should, in particular, record the number of cases per year:
> § notified by the Court
> § declared inadmissible by the Court
> § ending in a friendly settlement
> § ending in a violation finding
> § ending in a non-violation finding and relating at least to:
> § breach of the reasonable time requirement
> § non-execution of Court decisions.
>
> 26. As far as possible the tables could likewise cover other rights protected by Article 6 ECHR.

The 2016 edition of the report on court performance in Europe reveals that only half of the member states to the Council of Europe have monitoring mechanisms to follow up on violations of article 6 of the European Convention on Human Rights.[143] It is also remarkable that the study

142 CEPEJ 'Guidelines On Judicial Statistics (GOJUST)' CEPEJ 12th plenary meeting, (Strasbourg, 10 – 11 December 2008) https://goo.gl/dPhVLy

143 CEPEJ.*European judicial systems. Efficiency and quality of justice. Edition 2016 (2014 data)* CEPEJ Studies no. 23 p. 183 https://goo.gl/7Jpf2d

collects information on management data, including budget, staffing and time management. Yet, the illustrations of this management information carries data on robbery and intentional homicide, presumably to keep a balance between serious and non serious crimes.[144]

The Commission has developed a framework to measure the "quality of justice" which starts at the level of "rigorous methodologies normally available on the market for assessing the quality of goods and services" and intends to cover "all aspects of the justice system".[145] Despite the explicitly "managerial" approach, which excludes the measurement of quality of the decisions in the justice system, the standards include both (i) mandatory requirements as enshrined in the European Convention on Human Rights; and (ii) the gap from expected outcomes, as defined by the perception of users in the justice system. The requirements are listed in items derived directly from the language of article 6 of the European Convention:

> the related case law of the Court, as well as the fundamental principles which stem from States' traditional constitutions, the issue of the quality of proceedings and decisions must be sought in the light of these objectives and institutional constraints.[146]

All, as required "in a democratic society"--again, from the text of the Convention. The elements that comprise the scorecard are:[147]

> i. The fairness of the proceedings
>
> ii. The reasonable duration of the proceedings
>
> iii. The publicity of the judgment / decision and transparency of the process
>
> iv. The protection of minors (and other subjects for whom it is appropriate to provide a form of assistance)
>
> v. The comprehensibility of the prosecution, the course of the procedure, and of judgments / decisions

144 CEPEJ *Efficiency and quality of justice* (n139) p. 237

145 CEPEJ Measuring the quality of justice, CEPEJ(2016)12, Strasbourg, adopted on 7 December 2016, at the 28th plenary meeting of the CEPEJ https://goo.gl/mwUtpv

146 CEPEJ Measuring the quality of justice (n141)

147 CEPEJ Measuring the quality of justice (n141)

vi. The right to legal assistance and access to justice in general
vii. The legal aid (when all the conditions are met)

Another example comes from the United Nations Office on Drug and Crime's tool kit for court management, explicitly with a focus on access to justice. The report states that "[t]he management of the courts must be efficient and effective so that the criminal caseload can be adjudicated fairly, appropriately, and promptly."[148] The toolkit is designed in the form of a survey. The toolkit is constructed in four sections, and seventeen specific areas that cover criminal justice institutions, including policing, prosecution, courts, defense, corrections, juvenile justice and others: "[c]ourts" is only one of these tools. The purpose of the toolkit was to facilitate several activities for government officials, UN agencies, individuals and NGOs:

> to conduct comprehensive assessments of criminal justice systems; to identify areas of technical assistance; to assist agencies in the design of interventions that integrate United Nations standards and norms on crime prevention and criminal justice; and to assist in training on these issues."[149]

The application of these frameworks has not received too much attention in the current discussion about indicators in international law.

The past two decades have been the scenario for the audit explosion in the international arena. Current accounts of the use of indicators, can be read as the current "avalanche" of numbers, to use Ian Hacking's expression. This avalanche has touched every field of international law, and human rights is one case in point. In particular, civil and political rights have been described as a field where this phenomenon has been present since the early stages of development in the field. Leading scholars on the field have provided important definitions and case studies. Yet, current accounts of indicator explosion fail to explain a few discontinuities.

As index fingers pointing at a particular phenomenon, measurements applied to rights rules, indicators are figures meant to provide information to define actions and policies. As

148 UNODC *Access to justice. The Courts. Criminal Justice Assessment Toolkit* UN New york 2006 https://goo.gl/GcsaFu

149 UNODC Introduction. Criminal Justice Assessment Toolkit (UNODC, New York, 2006) https://goo.gl/gCNsyu

opposed to other forms of information constructed for the sake of theoretical knowledge, indicators are inserted into the context of institutions that produce and consume them. They are construed by the goals their creators pursue, the limitations of the process taken to define their values, the institutional framework where raw data is produced, chains of command where the information is delivered.

Despite the narrative of rise of the human rights discourse, the history of indicators suggests the interaction of various fields of practice and knowledge, where rights play an increasingly important, albeit still negligible role. The development of international statistical fora was characterized to fulfill the needs of the aftermath of the second world war. Reconstruction and the need for economic stability paved the way. Later, the driving forces of statistical offices would be replaced by the requirements of post-colonialism and the economic realities of the cold war. These horizons set the tone for the technology of measurement in the international arena—and its driving force upon national statistic institutions. The Bretton Woods institutions and an array of UN offices, grew ever more diligent on measuring the power of national markets, and the multitude of social indicators that came with it. Several dimensions of these measurements were packaged into business risk measurements, and later into governance and rule of law indicators. Although these measurements often include some explicit legal dimension, their methods hardly reflect the direct aim to assess the reality of rule compliance.

Important exercises for the definition of rights and their measurable dimensions, have been around for over 20 years. Yet, the most crucial step in human rights indicators is yet to be addressed: social indicators are not necessarily a synonym with human rights indicators. The specificity of the legal framework must be accounted for in indicator construction. Even if this remark seems obvious, its presence in the literature is scarce. Sometimes authors refer to it as a requirement that can be easily fulfilled with a straight forward stipulation of what international treaty law says.

This picture is also incomplete if we look at the history of the development of civil and political rights. Although some crime control indicators are included in the most widely known indexed for business risk or governance, their measurement is not inscribed with a rights

framework. The reason for the imbalance existing today between civil an political rights and economic, social and cultural rights, can be summarized in two statements: first, the community dedicated to economic, social and cultural rights saw measurement as a means to guarantee compliance of otherwise blurry state duties; and to achieve his, this community saw fit to piggy bank on existing social indicators, and to develop specifically tailored human rights indicators along the way. From the perspective of the community dedicated to civil and political rights, however, the challenges are immense: the raw data needed to produce these indicators, comes last in the list of official priorities, for several reasons. One of those reasons is the fact that indicators of civil and political rights are perceived as a more direct and transparent link to rules: torture can be counted into discrete cases, and these cannot be easily dismissed as poor counting; housing deficiencies can be argued as progressive compliance for economic, social and cultural rights.

In the next chapter, I will explore the legal implication of indicator construction and consumption, using examples of indicator use in a transnational environment, with multiple jurisdictions and agents from public and private, domestic and international sectors. These examples will help me draw a more detailed picture of the problems indicators present when channeled across jurisdictions and realms of law we traditionally think about as separate. I will also address more detailed aspects of indicators as a part of private, voluntary standardization.

2 Human rights indicators in transnational legal orders

Measurement as an auditing practice, is a form of technology of governance or governmentality. Power distinguishes between the programmatic and technological components of auditing practices, and recognizes that all auditing practices are ostensibly technological–they are "concrete tasks and routines which make up the world of practitioners".[150] Indicators are not only technologies, but arguably they represent a programmatic element as well–although hidden behind the guise of neutral, practitioner oriented technologies. Pretty much in the same vein as audit practices for Power, indicators seem to have a programmatic level, a layer of expectations, only loosely connected to the actual technologies.[151]

Elementary forms of quantitative information have been available to the modern state since its foundations, preceded only by Charlemagne and the Renaissance in the dimensions of the measurement projects.[152] Censo et censura, a formula to refer to a person's rendering themselves to discourse, to allow the authorities to have information to protect them, was half the power of the nascent political entity in the 16th century–along with population numbers relevant for taxation. In a way, measurement in the public sphere precedes the state, and incites little intellectual curiosity. For ideological reasons proper to the 19th century, however, the state developed around "an avalanche of numbers" as described by Ian Hacking—at first, to define who the average man was, to identify his mean attributions, to set a line of normalcy. Later, statistics became the tool for science and politics to tame the unpredictability of the world. Statistics were abandoned as a source of knowledge for the rules of morals and nature, and instead became a source to circumvent the need for causation in an indeterministic world. These developments were combined in the style of the modern bureaucracy, typical to the industrial state. Bureaucracies count and measure. They do this to promote efficiency, uniformity. interchangeability, consistency. [153]

150 Power The audit society 6 [amazon kindle]

151 Power The audit society 7 [amazon kindle]

152 Witold Kudla *Measures and Men* (R Szreter trans) (Princeton UP Princeton 1986) p 19

153 Pasquale Pasquino 'Theatrum politicum: the genealogy of capital-police and the state pf prosperity' Graham Burchell & Colin Gordon & Peter Miller (Eds.) *The Foucault Effect . Studies in governmentality* (U Chicago

Today measurement in this realm satisfies needs similar to those during the *adunation* of France in the early 19th century:[154] they are a technology of trust, to transport information. But not across the territory of the sovereign state, but across jurisdictions and legal divides of national or international, public and private domains. Today, concurring in time with a perceived decay in the role of state sovereignty, a new avalanche of numbers falls upon us, originated in the international and transnational arenas. Governments, intergovernmental organizations, transnational corporations, informal expert groups associated to these entities, offer visions on how to conduct governments and markets alike, in the form of standards, mostly voluntary. Many of these standards suppose that agents must count everything, or that a third party will count everything possible, for the purposes of auditing and verification of standard compliance.[155] My focus Is the connection of counting to these standards. Human rights have entered this field of measurement and standardization relatively late, after economic and development indicators. Civil and political rights in particular, have entered the last into this field. Transnational or international financial institutions started this measurement frenzy, to be followed by all sorts of regulatory agencies who pass judgment on public and private entities alike. Literature has explored vastly the effects in the political arena, the symbolic place of measurement and the implications of this avalanche in practices and relationships.

Human rights literature today openly or inadvertently turns to measurements and figures of some sort. Only by way of illustration, take Ruti Teitel's Humanity's Law, a book where the central thesis is the development of a general international legal order whose leit motif is the protection of the person, as opposed to an old regime centered in the protection of the state. One argument leads to explaining the role of human security in Amartya Sen's and Martha Nussbaum's capabilities approach, used as a basis for the human development index. An indicator on human security is then used as a clarification on how the concept can be both universal (minimum) and local (flexible) at the same time: "measured in terms of expectations of living without experiencing states of "generalized poverty based on falling below critical

Press, Chicago 1991) 105

154 See below "*Adunation* of France", p. 186

155 Nils Brunsson and Bengt Jacobsson 'The contemporary expansion of standardization' in Nils Brunsson & Bengt Jacobsson *A World of Standards* (Oxford UP Oxford 2000) p 10 on the effect of standardization

thresholds in any domain of well-being." The measure they propose is the "expected number of years of life outside the state of generalized poverty".[156] Humanity's Law also observes how the discourse on good governance is generally related to a connection to human development, which in turn has a relation to per capita income.[157] Professor Teitel argues for the place of the protection of persons as the driving force of today's "Humanity law": "[o]ver history, the humanity norm has been defined in rights terms, in response to certain practices that violated the human body and its integrity."[158]

Three years after Professor Teitel's book was published, The Twilight of Human Rights by Eric Posner appeared. Professor Posner refers to the "idiom" of human rights that has increased 200-fold in English speaking books since 1940: "human rights law has failed to accomplish its objectives… there's little evidence that human rights treaties as a whole, have improved the well-being of people".[159] The Twilight of Human Rights relies heavily on literature which aims at testing a correlation between the ratification of human rights treaties and the human rights situation in the world.

Professor Teitel's book does not propose to prove that humanity's law rules today; but she does rely upon those who suggest that there can be a measure for the actuality of human rights, and for human security in particular—although the fact that the reference appears in a footnote would suggest the inclusion of the measurement is not that interesting for the author. The rationale for this reference seems to be a tendency to bring human rights and economic development together—and besides the theoretical discussions on the matter, the effect has been that "number crunchers" have been figuring out how to level the field to include these two dimensions. This point has been discussed in the previous chapter.

Professor Posner's argument, on the other hand, is fundamentally based on indicators, including the Freedom House or Human Rights Watch reports, and other similar sources. The discussion on the reliability of the information provided by these types of reports is rich. Yet,

156 Ruti Teitel *Humanity's Law* (Oxford university press 2011) p164 n74, citing Gary King and Christopher J. L. Murray, "Rethinking Human Security," (2002) 116 Political Science Quarterly 592, 595

157 Teitel (n2) p 154 fn 51

158 Teitel (n2) p 154 fn 57

159 Eric Posner *The Twilight of Human Rights* (Oxford University Press New York 2014) [Amazon Kindle] pos 294

these figures continue to be popular and powerful. The magazine Foreign Affairs explains their appeal in simple terms: "[u]nlike the number crunchers, Freedom House knows how to tell a story."[160] Simply put, these figures are powerful because they collapse plenty of judgments from many persons and groups involved in the process, discussions and information, all into one figure. Whether there is a shared concept of what is measured, is unimportant. The message is clean, precise, powerful. As consumers, we may be unwilling to know the details that go into the process, and rely on the information we can access, because there is value in a worldwide scale, which in an apparently transparent format, conveys a ballpark notion of the state of "Freedom in the world".

The every-day developments in international law include events like the certification process for private security and military companies, under their International Code of Conduct. I have used some examples in the previous chapter, to ground these panoramic discussions on the role of state-centered law in current international law, on the very concrete effects in the life or real persons. These effects, as we saw, occur at the meeting point of various legal regimes with important blind spots. It would appear that these blind spots are illuminated by the use of "measurable and objective standards", to be developed in the certification process for these private security and military companies. The rules that govern the activities of these corporations are all included in what professor Teitel would call "humanity's law". Despite of the rise of this discourse in international law, we struggle to know what it means exactly on the ground. Struggling with meaning is part of the life of the law. What seems foreign to the discussions about meaning, is the clarifying effect sought from, or attributed to "measurable and objective standards", like those that feed Freedom House's index, and a multitude of similar measurements.

This chapter presents a broad framework to think about indicators in the way they are currently used in international human rights law. Indicators in international human rights have become pervasive in last 20 years. Every area of concern in the field is developing indicators in the global or domestic arena, to measure any number of issues related to rights compliance. The

160 Ilya Lozovsky 'Freedom by the Numbers. Freedom House's index of freedom in the world is flawed — but the story it tells is indispensable' (Foreign Policy, 29 Jan 2016) https://goo.gl/ndC7qZ

difficulty is posed by the scarcity of analytical frameworks to think about the process and quality of such indicators. This chapter aims at setting the field for a discussion on the role of measurement in government, the particular role of indicators in the field of human rights. Later, the examples on this chapter will help me as a framework for the implications for the idea of law. An obvious item of concern is the difference between rights rules and other areas of measurement–like health, income or violence. Observable sociological facts are distinguishable from rule compliance. Yet, there is something familiar in the administration and measurement worlds that seems to bring human rights indicators home: despite any fundamental differences, law is a form of classification that can be used in the process of indicator development.[161]

2.1 Implementation by numbers

The literature describes the interaction between law and measurements in the form of benchmarks, scorecards, indicators, and rankings, as a salient feature which either coexists with, or defines transnational governance. The meaning of an indicator is not even across disciplines, and we can stick to the definitions quoted in chapter as "a named collection of rank-ordered data"[162], or simply an index finger pointing.[163] Indicators describe a numerical, quantitative description of a social phenomenon. They speak to an audience in the need to compare and rank different units synchronically; or the same unit across time.

Measurement in the era of glottalization is connected to the growth of standardization as a technique of regulation. Standards have a clear normative content, despite their obscure relation to traditional sources of law. Standards and standard-based organizations are expected to

161 R Rottenburg & SE Merry (n13) pos. 463; Indicators include several different techniques, like forms of policy experimentation, trials and open explorations, and recently, the use of social media as sources for quantification. Interestingly, an application called "SketchFactor" that gathers information exclusively from users concerning threats to security, in order to offer secure and insecure routes. This application completely bypasses the administrative records of crime reporting, and goes directly with the information gathered by end-users. SketchFactor did not survive severe criticisms regarding the racial bias that users might be prone to induce when reporting "sketchy" things in their neighborhood. See Andrew Marantz 'When an app is called racist' (The NewYorker, July 25, 2015) <https://goo.gl/uNrpTQ>

162 Kevin E. Davis, Benedict Kingsbury, Sally Engle Merry 'Introduction: Global Governance by Indicators' in Davies et al *Governance by indicators* (n6) p. 6

163 Botero et al (n12) 157 160-1

influence others in the adoption of such standards. Measurement in reporting is an efficient way to fulfill this audit requirement, which is expected to increase ah adherence or compliance.[164] The field of human rights law has only recently been reached by this measurement spree.

Traditional expressions of compliance mechanisms only included measurement almost as an afterthought. Indicators have been used in reporting requirements enshrined in treaty monitoring mechanisms:

> In all three areas, compliance control is anchored in extensive reporting requirements. These can pertain to implementation measures, such as legislative or administrative steps, or to indicators of performance towards a specified outcome, such as emissions or weapons data. The latter type of reporting requirements would appear to be more common in the environmental and arms control areas.[165]

Reporting duties as a mechanism to ensure compliance, are common. Their explicitly quantitative character, is not yet commonplace. For instance, there are duties to report on emissions data in the Convention on Long-Range Transboundary Air Pollution. Also, in the Chemical Weapons Convention parties enter figures on weapons stocks, facilities and destruction measures.[166] In the 1970s environmental impact assessment entered the human rights field. Later, it gained traction with the Vienna declaration in 1993, which called: "on prominent international and regional finance and development institutions to assess also the impact of their policies and programs on the enjoyment of human rights"[167] The purpose or monitoring through data reporting is to keep a close verification on progress towards the achievement of goals set up in treaties, as opposed to traditional reporting on implementing measures.

A second aspect of the relationship between measurement and rules is the role these instruments play in the development of precision in the content of rules. Firmly set in the

164 Gôran Ahrne, Nils Brunsson and Christina Garsten 'Standardizing through otganization' iin Nils Brunsson & Bengt Jacobsson *A World of Standards* (Oxford UP Oxford 2000) 50, p. 64

165 Jutta Brunné Compliance control in Geir Ulfstein Making Treaties work. Human Rights, Environment and Arms Control (Cambridge university press 2007) 373, 374

166 Bruneé (n10) p. 374

167 K. Tomaševski, 'Human Rights Impact Assessment: Proposals for the Next 50 years of Bretton Woods', in J. Griesgraber and B. G. Gunter (eds.), Rethinking Bretton Woods, Promoting Development: Effective Global Institutions for the Twenty-first Century(Pluto Press, London, 1995) p 83;

perspective of transnational legal phenomena, indicators can be studied from the perspective of an "order", as a goal "in a domain of social activity or an issue area that relevant actors have construed as a "problem" of some sort or another". In this perspective, indicators can be read as an "order", in an aspirational way, focused "on the dynamic, recursive processes in which legal norms become settled and unsettled".[168] In turn, "normative settling" is reached with the "courts stabilize the meanings of terms in ambiguous legislation, so that meanings narrow, "become cognitively taken for granted by actors".[169] Stabilization becomes possible through waves of litigation that tend to diminish, as legal meanings become clear, and doctrine further contributes to stabilization. Also, stabilization occurs through the practices of relevant agents, "who come to settle on the norms that guide their activities and behave accordingly".[170] The use of indicators "helps specify obligations more clearly and specify the terms of compliance"[171]. An unwelcome result is the transformation of the human rights legal discourse into a technocratic and rational one based on the language of economics and management".[172] This mixture of discourses allows for a connection between the human rights and development worlds, but is hermetic to connections between "human rights and social movements". Stabilization is important not only from the perspective of traditional soft law as an early evidence of future hard law. In a different dimension, soft law can be passed as hard law on the areas of (i) precision, (ii) enforceability, and (iii) third party power to settle disputes.[173]

The process of stabilization seems more closely connected to a recursive iteration of approaches to norm determination, while the multiplicity of agents and for a seem relegated to

168 Halliday & Shaffer 'Transnational legal orders' Pos. 590 defining "transnational legal orders". In Halliday & Shaffer *Transnational Legal orders* (Cambridge University Press, New York, 2015) [Amazon kindle]

169 Halliday & Shaffer Pos. 1079

170 Halliday & Shaffer pos 1079

171 SE Merry 'Firming up soft law' (n112)

172 SE Merry 'Firming up soft law' (n112)

173 SE Merry 'Firming up soft law' (n112) pos. 9531, citing Shaffer and Pollock 2010; Shaffer and pollock 'Hard versus soft law in international security' (2011) 52 Boston college law review 1147 p. 1170. https://goo.gl/IRlQUa These notions are familiar in other theories of law, where law is essentially a communication process with a certain pedigree, yet a message needs to be transmitted for the use of language to function. Hence the element of precision is important. And this is the reason why I believe there are more sophisticated ways to achieve precision within the "recursive" process identified by Halliday and Shaffer as an element of transnational legal orders.

the background. “[L]earning by experience”. A process described by Cassese and Casini suggests a method for regulating the adoption of indicators. The process consists of five stages: (i) expose a problem, and issue legislation; (ii) new framing of the problem explaining why measures in step 1 failed, and identifying a second solution; (iii) then administrators are appointed to gain expertise on the matter; promote new legislation and further centralization; (iv) bureaucrats now see their goal as “tightening the screws”; (v) bureaucrats readily adopt “scientific expertise”.[174] The process of successive approaches, however, is not explicitly set in multi-level governance environments. The networked character of the process seems better captured by other forms of interaction, like “experimentalist governance”, addressed below.

2.1.1 Indicators: between legal and non-legal authority

Like standards, indicators are a fact of social life. Their existence, however, does not come without problems for the operation of law. Whether indicators are properly within the realm of regulation, or rather are a tool used in regulation through standards, is unclear. Wide agreement can be expected on the collaboration of law and numbers for the purposes of the stabilization process I described above. Yet, a pressing question for practitioners is whether indicators should be treated as a form of law, or rather as a sort of proof of rule compliance. Inevitably, this question concerns the sources of law– or any other similar concept that enables us to distinguish legal rules–enforceable against the agent’s will, ultimately through public institutions—from other forms of normative legal content. I will discuss this in more detail in the next chapter, from a legal theory perspective. Here I will make remarks in relation to approaches in the literature addressing the legal character of indicators. These discussions set off to challenge a binary conception of law, or at least they challenge the suitability of the canonical description of sources of law.

Von Bogdandy and Goldmann argue the case for “relative normativity”. They describe the canonical sources of international law in the Statute of the International Court of Justice as “basic”, leaving important gaps for other sources, such as soft law. Along with soft-law, other

174 Sabino Cassese and Lorenzo Casini ‘Public Regulation of Global Indicators’ in Davies et al *Governance by indicators* (n6) p. 471-72

non-deontic elements are missing from this canonical list of sources.[175] The theory of the sources of law today competes with other accounts of the way the international legal order is built. Goldmann's taxonomy of relative normativity offers a detailed examination of new forms of normativity, typically within the context of international administrative authority. [176]

175 Armin von Bogdandy and Matthias Goldmann 'Taming and Framing Indicators: A Legal Reconstruction of the OECD's Programme for International Student Assessment (PISA)' in Davies et al *Governance by indicators* (n6) p. 52, p. 71

176 Matthias Goldmann 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' in Armin von Bogdandy Rüdiger Wolfrum, Jochen von Bernstorff Philipp Dann, Matthias Goldmann (eds.) *The Exercise of Public Authority Advancing International Institutional Law* (Springer Heidelberg 2010) 661, 692-702; also, the notion of "fluid authority" needs to be explored in more detail, See Nico Krisch 'Liquid authority in global governance' (2017) 9 International Theory 237 p. 256 "Liquid authority, on this account, is characterized by a high degree of dynamism, with actors, sites and weights constantly shifting, making it difficult to pinpoint, to grasp, and to control"

1. Instruments Concerning Individuals	a) International Administrative Decisions.- UN Taliban and Al Qaida Sanctions Committee
	b) International Administrative Recommendations.- National Contact Points resolutions
	c) International Administrative Information Acts.- Interpol notices
2. decisions concerning states	a) International Public Decisions.- UNESCO World Heritage Committee awarding a grant to a site enlisted as world heritage
	b) International Public Recommendations.- like the OSCE High Commissioner on National Minorities
	c) international secondary law.- amendments to the appendices of CITES
	d) internal operational rules.- internal procedures of the Security Council Sanctions Committee
	e) international public standards .- OECD Guidelines on Multinational Enterprise
	f) International implementing standards.- FAO Secretariat International Plans of Action and Technical Guidelines for Responsible Fisheries
	g) Preparatory expert assessments.- Codex Alimentarius Commission adopting risk assessment reports prepared by the Joint FAO/WHO expert bodies relating to scientific information about the risks to consumers' health
	h) National policy assessments.- OECD PISA policy assessment

Table 7. Von Bogdandy and Goldmann taxonomy: governance by information

Indicators would probably enter into this taxonomy either in the proxies for decisions, e.g., threshold measurements that would imply that a person should be referred to the UN Security Council Sanctions Committee; or the measurements sought in the PISA assessment procedure, or the phrasing of scientific evidence in consumer risk protection, or the framework applied to corporations in the National Contact Point resolutions.

Von Bogdandy and Goldmann advocate for the introduction of "governance by information" into the forms of exerting public authority. This is the case of the "National Policy

Assessment" in the OECD PISA evaluation process, a purely formal standard: to enable its ante facto role these authors insist on the need for stakeholders to know whether they are subject to measurable standards that convey public authority. Like the PISA evaluation process, only some measurements are relevant to law, and such relevance is determined with recourse to some sort of norm that conveys public authority. The question concerns the identification of powers conferred to those in a position of authority, to act when prompted by this information.[177]

In their challenging work, von Bogdandy and Goldmann propose a legal definition for a standard that aims at controlling instruments like the National Policy Assessments in the PISA process:

> the revelation of empirical information with a claim to objectivity by international institutions that evaluate the outcomes of domestic policy, produced for the purposes of the latter and coupled with a light enforcement mechanism[178]

These authors see the future of national policy assessments as key in the development of a new sort of "multi-level governance", on the basis of the importance of performance as a factor of legitimacy of national authorities. This perspective is powerful because it is grounded on a wide understanding of international public authority, which combines the approaches of constitutional law, administrative law and institutional law.[179] Yet, the issue of ante facto effect needs to be addressed: the distinction of law and other forms of normativity is still relevant, especially to assuage concerns of the deterioration of the rule of law as a consequence of relative normativity. The fact that non-deontic elements, like measurements, can go into the canon of sources is not in itself problematic, but it can become a problem legal certainty, if subjects need to plan or anticipate the legal consequences of their actions, and if official or third-party intervention may be unleashed or blocked because of non-conformity. For this reason, a notion, a content, an idea of law, of law as a distinct form of social organization—public, private, national,

177 A von Bogdandy and M Goldmann 'Taming and Framing Indicators' (n169) p. 67

178 A von Bogdandy and M Goldmann 'Taming and Framing Indicators' (n169) p. 75

179 Armin von Bogdandy, Philipp Dann & Matthias Goldmann 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities" in Armin von Bogdandy Rüdiger Wolfrum, Jochen von Bernstorff Philipp Dann, Matthias Goldmann (eds.) *The Exercise of Public Authority Advancing International Institutional Law* (Springer Heidelberg 2010) p.3, 21

international—is still relevant and cannot be easily removed from the playing field–without the risk of losing it.[180]

Rather than belonging to a form of "relative normality", a slightly different angle is presented by Goldman. Writing independently, Goldman classifies indicators within the realm of non-legal instruments with high legal or political impact. The "legal" definition in this classification is based on the use of deontic terms:

> [o]nly instruments with a significant prevalence of deontic vocabulary expressing commands, requests, and recommendations may be termed legal. As it is sometimes difficult to make a precise distinction between facts and norms at a theoretical level, my distinction between "legal" and "non-legal" instruments is rather heuristic than systematic.[181]

The Goldman taxonomy places indicators along with fact-finding reports, databases, and other instruments. Goldman sets forth the idea of a continuum in normativity, as opposed to positivist or realist accounts which insist on a clean cut between law and other sources of normativity. I will engage with these problems in the next chapter.

In more practical terms, indicators, like standards, have been classified as binding or voluntary. Binding indicators can either be produced by the regulator upon regulated entities, or produced by the regulator, and consumed by a third party. For instance, indicators produced by intergovernmental organizations and applied upon individuals can become authoritative for states —inn the case of education or the Human Development Index or the OECD's PISA evaluations.[182] Perhaps the classification involving third parties may be confusing if we assume that governments are responsible for the education results, or the conditions tracked by the HDI. Yet, the classification is revealing in the special attribute of "voluntary" indicators. Whether inductors are formally non-binding, the authority they carry is a relevant aspect of processes in

180 Jan Klabbers 'Goldmann Variations' in in Armin von Bogdandy Rüdiger Wolfrum, Jochen von Bernstorff Philipp Dann, Matthias Goldmann (eds.) *The Exercise of Public Authority Advancing International Institutional Law* (Springer Heidelberg 2010) p. 713

181 M Goldmann 'Inside Relative Normativity' (n170) p. 664 fn 15

182 Sabino Cassese and Lorenzo Casini Public Regulation of Global Indicators in Davies et al *Governance by indicators* (n6) p. 467

governance contexts: conformity to indicators or standards, even non-binding standards, is a key phenomenon of non-hierarchical settings.

The problem that indicators present for the question of legal authority, can be summarized as follows. Generally, legal systems do not grant facts with the pedigree of legal rules. Rather, facts are the relevant conditions for the application of law. Rather than facts, certain actions by determinate agents, in given conditions, are acknowledged as having legal authority. Also, the voluntary character of these measurements and standards, cannot be equated to the existence of open ended concepts that require settling. First, the function of open ended concepts in law, is their determination though application. Second, law is always voluntary in the sense that agents who wish to have recourse legal authority in their private interactions, must adopt certain conditions and formalities. Private parties are not required to celebrate contracts, but if they make use the power conferred by contract law, they must abide by the conditions and restrictions that the legal system imposes on contract law. Parties who wish to trade outside the realm of law, may do so and face the consequence of the unavailability of public institutions to enforce their duties. Thus, nor the open ended, nor the voluntary character of indicators or standards, help us indistinguishable this form of normativity from traditional legal rules. This point will be explored further in the next chapter.

2.1.2 Can regulation be relevant to indicator production?

Indicators are produced in communities of practice. The production of indicators can therefore be self regulated, or formal regulation can assist in producing quality outcomes. These communities of practice can be regulated like markets, or rely on scientific authority as arbiter. Such is the case of social sciences, uniquely suited to address methodological concerns in indicator design. Apart from the service that science can play as arbiter, law is also a source of guidance. Some methodological decisions in indicator production can find support in legal categories, to yield a precise and relevant classification of phenomena.

Other perspectives would prefer a rationalist approach adamant on precision, which can be difficult to achieve as a matter of cognitive processes, and in terms of a polycentric community of stakeholders.

Rather than regulating measurements, another approach is the use adjacent regulations, through existing norms, and apply them to aspects of indicator production and dissemination. An interesting perspective is their protection and dissemination under free speech regulation. Arguably, indicator regulation cannot preclude the emission of inaccurate information. This perspective changed regarding the credit ranking agencies in the aftershock of the world financial crisis in 2009. Regulation in Europe included regulated areas like "registration, conflict of interest, disclosure, surveillance, and sanctions". Apart from regulating agencies, an alternative approach is to regulate the process whereby indicators are produced, via principles of administrative law, like "transparency, access, participation, and review"[183] The taxonomy is important and sensitive to the notion of multiple and overlapping classes of stakeholders.[184]

In one perspective, indicators are like markets and are better off if self regulated: indicators allow the interaction to expand beyond the core community of practice that develops the indicators, and allows the interaction to transcend communities, like human rights and development.[185] Yet, even if "[c]ommunities of practice" yield diverging views on the definitions, construction or interpretation of indicators as a source of regulation—even if informal– process regulations may foster and enhance the operation of such communities. Despite the fact that the indicator may provide a platform around which communities engage in discussion, and are able to contest it in dialogue and interaction,[186] these flow of ideas can be supported through regulation.

Social sciences have a leading role in the production of indicators, because measuring techniques for social indicators are built around social science principles. One road for regulation could be to provide that methodological issues be brought to the forefront. Freedom House's

183 Cassese and Casini (n29) p. 471-72

184 Büthe (n16) p. 33 Rule demand, rule supply, users and targets. Parties who are measured, would be called targets in Buthe's typology.

185 Cfr Ureña (n38) pos. 2768

186 Ureña (n38) pos. 2768

indicator for freedom in the world, is essentially based on perceptions of Freedom House staff and consultants. Freedom House's Comparative Survey on freedom (essentially concerning civil and political rights) was developed by a political scientist.[187] Yet, it is arguably this cloak of scientific power that calls for regulation of process in indicator construction, which should allow for contestation of the information and findings. Also, the Freedom House Index lacks an underlying concept of democracy or freedom. It does include notions like equality before the law, or independence of the judiciary, the security of citizens in cases of war, insurgency, crime or terror.[188] However, the absence of a root concept compromises the indicator validity. The indicator has low reliability, since it depends on a team of experts, whose membership changes along time. They are expected to use the Freedom House code book to apply a numerical score, with little guidance.[189]

Methodological aspects are paramount in indicator production. First, methodologies need to be proven. In the case of the Freedom House indicator, by 1976 the indicator received wide support and attention. Foreign diplomats and press correspondents were all interested on learning about the survey. The survey received the name of Freedom in the World Report in 1978. The early methodology has been repeatedly criticized, as it is virtually unaccounted for. The original author has explained that the survey aimed at producing a tool with few man-hours–as the survey received very little funding, "orienting a discussion of varying levels of freedom"[190] The author, trained in developing social indicators, explicitly stated that his aim was not to develop a new kind of social indicator, as those are most useful if they are statistical measure of measurable quantities". The more doubtful basis for this measurement, the less useful the indicator".[191] These remarks were made in the early stages of the development of the indicator, and arguably, they describe clearly the weaknesses the indicator retains today.

187 Christopher Bradley 'International organizations and the production of indicators. The case of Freedom House' 'the indicator and its methodology'in Sally Engle Merry, Kevin E. Davis & Benedict Kingsbury *The Quiet power of indicators. Measuring governance, corruption and the rule of law* (Cambriudge UP New York 2015) [Amazon Kindle] para. 13 Pos. 1078

188 Merkel (n73) section 2.1.1 Concept

189 Merkel (n73) ch 1 section 2.1.4 Reliability

190 Bradley (n34) Pos. 1132 para 5

191 Bradley (n34) Pos. 1234

Second, contestation might be introduced as a matter of process in indicator development. Particularly, indicators used to measure people, should seriously consider the involvement of the target of measurement. A model of experimentalist governance would favor the development of th Also, the "next generation of indicators", in involving all layers of authority and all local relevant stakeholders, much like the process of "glocalization" discussed earlier. These mechanisms should allow for some liberty and creativity in the design and use of indicators. One procedural advantage of local involvement in indicator development is the sensitivity to relevant issues on the ground, and from a political perspective, the exchange of power flow from the top down. Another road available to improvement of measurements, is the choice of more "concrete" dimensions. In the case of the Freedom in the World indicator, staff pointed at the value of choosing to measure things that are more concrete to people, like "rule of law, freedom of expression, freedom of worship and protection of property".[192]

The Freedom House Index is only an example of complex problems. Standard criticism towards indicators points at (i) the complex nature of human rights, including the abstract nature of human rights norms, and the challenge for conceptualization; (ii) the need to interpret the numbers we obtain from the measurement; and a more general (iii) "mystification" of statistics. Crucially, critics point towards the need for "[a] theory of the relationship between the overall object of the right, its component parts and the relevance of indicators needs to be developed in each case."[193] And citing Kabeer, "the problem that this raises is not one of a normative standpoint per se … but in determining the extent to which this normative standpoint expresses values that are relevant to the reality it seeks to evaluate."[194]

Law can be relevant to all three steps in the process of quantification:[195] it starts by finding commonalities across individual situations, which are obviously unique, but quantification requires that we see them as sharing a core set of defining elements. Desrosieres stresses the

192 Bradley (n34) Pos. 1885

193 Nancy Thede 'Final paper. Human Rights and Statistics – Some Reflections on the No-Man's-Land between Concept and Indicator' Session I-PL 1 Statistics, development and human rights, Montreux, April 8-9 , 2000

194 Naila Kabeer 'The Conditions and Consequences of Choice: Reflections on the Measurement of Women's Empowerment' UNRISD Discussion Paper No. 108, August 1999 p. 41 available at https://goo.gl/5KWnzq

195 R Rottenburg & SE Merry (n13) pos 491

pragmatic approach that precedes the cognitive impact of such classifications. The original process leads to the second step of classification. Classes must be mutually exclusive and all-encompassing. All objects of observation must fit into classes. Law is also a source for classifications and can provide support in this process. The development of global systems of quantification has indeed lead to the abandonment of local classification in favor of global conceptions. Adoption of international and transnational regulations can provide a framework for this process. The last step is the codification of individual phenomena into the categories we have devised.

This seemingly simple and neutral process in quantification comes at a cost. First, commonalities mean that certain aspects of reality will be ignored in favor of other elements of reality that are brought into the forefront. This can either mean that there is a progressive destruction of or complex apprehension of reality–as some critics put it; or that the thin components of the description of reality (exemplified by indicators here) live along more complex descriptions of reality in a virtuous cycle.[196] The process of indicator construction is pragmatic in the first place. Measurement comes at a cost. More sensitive data require more costly measuring techniques and processing time. Already existing data can provide a proxy for these sensitive data and replace them in indicators to increase efficiency.[197] Practical matters like the form where data will be collected, the conditions where data collectors will work, also impact the creation of indicators.

Epistemological problems for indicator construction, can be solved resorting to a rationalist framework. Oakeshott identifies the need for objectivity and precision, but also the rejection of practical knowledge. In this rationalist project, indicators are expected to produce objective measures, which enable objective judgments, which show the way towards progress. By definition, these indicators are expected to provide good, quality, useful knowledge. This

196 R Rottenburg & SE Merry (n13) pos. 563, citing Theodore M. Porter, 'Thin Description: Surface and Depth in Science and Science Studies' (2012) 27 Osiris 209, where Porter p. 211 makes the point of thin as opposed to thick description "While thick description does tend to get complicated, since meanings can be elusive and cultures are far from homogeneous, it does not refer merely to an abundance of detail."

197 R Rottenburg & SE Merry (n13), citing Sally Eagle Merry & Susan Coutin 'Technologies of truth in the anthropology of conflict' 41 American Ethnologist 1-16

particular brand of rationalism offered is “unfiltered by tradition or habit” and is motivated by a need for “certainty, finality and uniformity”.[198] This rationalist framework, however, seems impossible to achieve. Admittedly, a crucial element for human right implementation comes from good information. Measurement must become available to determine budgetary considerations. For example, in order to take actions in favor of health for the most disadvantaged, “we must first create the tools for measuring inequity reliably now and over time”.[199] But methodological problems render bad information worse than no information at all. Statistical knowledge will always be imperfect, but methodological tools can make imperfect knowledge worse.[200] Also, heuristics and biases as developed by Tversky and Kahneman imply a cognitive challenge in the decision making process.[201]

Another element of complexity vis-a-vis a rationalist approach is the inherent polycentricity of the process whereby human rights needs are determined. Like other fields in public policy, a complex network with multiple centers is characteristic of the human rights needs problem. There are three sides to this issue: (i) human rights needs for rights holders (ii) “the inherent qualities of human rights” and (iii) the broader circumstances of policy making – budgeting in particular.[202] Focusing on epistemic challenges inherent to human rights, and concurring with the observation of little explored relationships between legal concepts and measurements, the literature recognizes a lack of due consideration to the legal features of human rights as defined by international law.[203]

198 David McGrogan ‘Human Rights Indicators and the Sovereignty of Technique’ (2016) 27 European Journal of International Law 385–408 394

199 Jaakko Kuosmanen ‘Human Rights, Public Budgets, and Epistemic Challenges’ (2016) 17 Hum Rights Rev 247–267 250

200 Kuosmanen (n46) 251

201 Kuosmanen (n46) 256 citing R Maccoun, ‘Biases in the Interpretation and Use of Research Results’ (1998) 49 Annual Review of Psychology 259 p. 275 for mechanisms to tame bias, like incentives for accuracy, accountability, feedback.

202 Kuosmanen (n46) 251

203 Kuosmanen (n46) 254

2.2 Indicators of standard compliance for private security contractors for military and security services

In the previous chapter, I explored the attributes of the international statistical infrastructure, as well as some examples of indicators built in the realm of intergovernmental organizations, or by private entities within the framework of law-for-profit. I started off this chapter exploring some positions on the relation between indicators and the law, either as a form of regulation, or a regulated activity. Now, I will turn to four examples of the relationship between standardization, indicators and the law, across different jurisdictions, and across the public-privet divide.

In the private sector, "[t]wo decades of political struggles over the meaning and scope of "corporate human-rights responsibility" have culminated in the appearance of a business-case approach."[204] This approach is represented by instruments that show how responsible corporations are better-off. The core assumption is that corporations risk their own capital when they incur in human rights violations.[205] The approach is expressed in terms of insurance against costs incurred if the risk of human rights violations becomes real. The approach is "actuarial", in the sense of prudentialism. One form of conveying the information is with country risk assessments for a set of rights, like discrimination, personal life, liberty and security, forced labor, and torture. Risk is assessed for formal law, practice and then a self assessment of the corporation in question. These indicators are normally produced by a private consultant on the basis of information coming from Amnesty International, Human Rights Watch or the United States Department of State.[206] These assessments may be useful to determine risk for the purposes of preserving profitability of a market. The measurements, however, can be a source of conflict with legal determinations, if not carefully tailored.

In the following sections, I will offer some examples of the processing of misconduct by private law enforcement agents, in the service of private multinational companies in

204 Ronen Shamir and Dana Weiss 'Semiotics of Indicators: The Case of Corporate Human Rights Responsibility' in Davies et al *Governance by indicators* (n6) p. 6 110, 112

205 Shamir and Weiss (n51) 113 citing Mary Robinson, "The Business Case for Human Rights," Visions of Ethical Business, in https://goo.gl/HZoMGT (1998)

206 Shamir and Weiss (n51) 116

transnational settings. The leading example on the literature in recent times is the Blackwater incident in Iraq that lead to the death of 14 civilians in 2007. Other examples include the deployment of G4S personnel in the wall around the Palestinian territories, heir deployment in Papua New Guinea, in a migration detention center; and the problem of policing the Gulf of Aden against piracy in the high seas.

2.2.1 International Code of conduct for Private security and military corporations

Standards for certification of private security providers, under the International Code of Conduct for Private Security Service Providers are an excelent example to analyze the status of indicators in the fields of security and crime control. The Code is enforced by an Association under the steering of governments, private companies, and private parties.[207] International security contractors operate in a gray area of the law. The current consensus is that they are not governed by the rules of public international law., applicable to human rights or humanitarian law. These rules are applicable to state forces. The circumstances where non-state actors may carry state liability are extremely limited. Yet, private corporations do provide security services in a multitude of settings. The vacuum created as a consequence of a traditional interpretation of international law has been characterized by Rosslyn Higgins, a former member of the International Court of Justice, as "'an intellectual prison of our own choosing' […] 'declared … to be an unalterable constraint'.[208] The problems only deepen if we consider that these private entities sometimes operate under contracts with other non-state actors, and therefore, they do not carry any sort of governmental authority. In these conditions, the application of human rights law is at least tenuous. Private parties acting under a private capacity may entail state liability due to the failure to act in a prescribed form by human rights standards. Yet, their duties are not identical with those of states bound by international legal rules.

Private military and security agencies share access to an enormous market in land ans sea. As transnational corporations, they share all the governance issues of large business

207 ICoCA Webinar: IcoCA Certification (Otober – November 2016) [video] https://goo.gl/9gn1wy

208 Sorcha MacLood 'Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-'Plus' (2015) 62 Neth Int Law Rev 119, s.2, fn 26-7 and accompanying text

corporations. Yet, as their market is focused on a task closely connected to state authority, corporate governance transcends the interests of stockholders. In particular, the regulation of private agents with apparent law enforcement powers is problematic and is currently largely unresolved. Regulation from both private and public sources seems ineffective. Despite this fact, private corporations in this business have subjected themselves to the development of measurable standards of conduct. As a result of a long process lead by the Swiss Government, in 2010, corporations voluntarily adopted the International Code of Conduct. The American Association Standards developed to implement the Code, refer to the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[209] The Code set forth a duty to implement mechanisms for monitoring and enforcement among the members of the private contractor.

The ICoCA Code reaffirms the private nature of the actors that accept the regulations, and their potential impact on the conditions of security , human rights and the rule of law. The conceptual framework for the code is the approach of "Prevent, Protect, Remedy" as prepared by the Special Representative for Business and Human rights The Code provides for the creation of a "independent governance and oversight mechanism".[210] Quite strikingly, the Code provision 14 states its relationship with general domestic and international law:

> This Code complements and does not replace the control exercised by Competent Authorities, and does not limit or alter applicable international law or relevant national law. The Code itself creates no legal obligations and no legal liabilities on the Signatory Companies, beyond those which already exist under national or international law. Nothing in this Code shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.[211]

Companies, therefore, recognize that the applicable domestic or international rules are relevant and binding, to substantiate private responsibility, either from tort or criminal law.

209 ANSI/ASIS PSC.1-2012, Management Systems for Quality of Private Security Company Operations - Requirements with Guidance https://goo.gl/UTxH8i

210 ICoCA International Code of Conduct for Private Security Service Providers (9 Nov 2010) https://goo.gl/C3ETka s. 12

211 ICOCa Code (n 210) s. 14

The Articles of Association, the structure for the management and oversight body for the Code, sets forth a mechanism to support companies develop a procedure to hear complaints from private parties. The procedure is elective for private parties. If complainants claim that the process if not fair, the Secretariat may defer to a different available procedure. The complaints procedure may parallel any action in domestic law, in any available forum.[212]

The Management Systems for Quality of Private Security Company Operations [213] are an American National Standard, which has been recognized, along with standards from the International Standards Organization, as acceptable for purposes of IcoCA certification. The standard takes the approach that "all segments of society […] have a shared responsibility to act in a way that respects and does not negatively impact upon human rights [...]".[214] As a means for getting there, the Management Systems Quality Standard proposes to create a "transparent governance and management framework", to follow international and local law, conduct extensive "internal and external risk assessments", or to "conduct performance evaluations of services rendered".[215] The only particular guideline is to ensure that the use of force is necessary, proportional and lawful, and to report and investigate all allegations. seem to identify human rights as a risk, in the same way as health or environmental risks.[216]

The effectiveness of this arrangement is still to be seen. The implementation mechanisms are not in place yet, and enterprises are just starting the certification process now. The Code provides for the following implementation mechanisms, where measurements are central:

> 7. Those establishing this Code recognize that this Code acts as a founding instrument for a broader initiative to create better governance, compliance and accountability. Recognizing that further effort is necessary to implement effectively the principles of this Code, Signatory Companies accordingly commit to work with

212 ICoCA Articles of association (Geneva 2013) https://goo.gl/Q42yAC articles 13.2.1-13-2-10

213 ANSI/ASIS PSC.2-2012, Conformity Assessment and Auditing Management Systems for Quality of Private Security Company Operations https://goo.gl/zsk1tp

214 ANSI/ASIS PSC.1-2012, 'Management Systems'(n56) sec. 0.2 Human Rights Protection

215 ANSI/ASIS PSC.1-2012, 'Management Systems'(n56) sec. 0.2 Human Rights Protection

216 MacLood (n55) fn 89 and accompanying text

states, other Signatory Companies, Clients and other relevant stakeholders after initial endorsement of this Code to, within 18 months:

a) Establish objective and measurable standards for providing Security Services based upon this Code, with the objective of realizing common and internationally-recognized operational and business practice standards; and

b) Establish external independent mechanisms for effective governance and oversight, which will include Certification of Signatory Companies' compliance with the Code's principles and the standards derived from the Code, beginning with adequate policies and procedures, Auditing and Monitoring of their work in the field, including Reporting, and execution of a mechanism to address alleged violations of the Code's principles or the standards derived from the Code;

(sic) and thereafter to consider the development of additional principles and standards for related services, such as training of external forces, the provision of maritime security services and the participation in operations related to detainees and other protected persons.

The principles of the Code require broad compliance with human rights, and in particular, human rights relevant to the use of force by law enforcement authorities. These regulations are to be translated into "objective and measurable standards", which will be used in certification processes and in the attention to claims of misconduct.

Yet, one of the mechanisms in the Code to enforce its provisions consists of a process of certification, where a series of measurements and standards will be applied to ensure risk reduction.[217] The Code and the situations it seeks to regulate are a perfect example of what Kingsbury, Kirsch and Stewart called the "global administrative space".[218] One way of looking at

217 Stuart Wallace 'Case Study on Holding Private Military and Security Companies Accountable for Human Rights Violations' FRAME 10.7404/FRAME.REPS.7.5 <https://goo.gl/y2eSG5>

218 Nico Krisch and Benedict Kingsbury 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 European Journal of International Law 1, 1 <https://goo.gl/ShjoW5>: "a space in which the strict dichotomy between domestic and international has largely broken down, in which administrative functions are performed in often complex interplays between officials and institutions on

this issue is as challenging the management style applied to private businesses—as opposed to the management style used in public institutions. A third way seems to be the public value approach.[219]

The cases below are presented as a means of illustration for the complexities of the issues involved in governance in the first place, and as a means to offer a basis for reflection on the impact of objective and measurable standards in the provision of these services. The cases are probably not fair depictions of the operation of the standards, as they involve conduct displayed before the Code was adopted, or the relevant authority made no reference to the code. Yet, these situations depict actual persons affected by the conduct of an entity subject to multiple jurisdictions (Israel and the United Kingdom in the first, Australia and Papua New Guinea in the second). The applicability of international human rights law to these cases was not in question. The salient features of these situations is the multiplicity of for a available for the matter to be decided, the multiplicity of sources of law to be applied and the framing of the role of the transnational enterprise in ensuring its actions are free from liability due to a breach of international human rights law—either because they act within the limits of the law, or because liability is individual for security agents.

2.2.2 Private military in the wall in Palestine

The OECD Guidelines for Multinational Enterprises 2011 Edition, state that members to the OECD may establish a National Contact Point, among other things, to hear inquiries, and contribute to "resolution of issues that arise relating to the implementation of the Guidelines".[220] The Guidelines are recommendations from governments to multinational enterprises, whether the OECD member is the home or host state for the corporation. The Guidelines are not binding, but enterprises are encouraged to follow them where local legislation is not in conformity wit the guidelines. The Guidelines identify states as responsible for human rights compliance, but also

different levels, and in which regulation may be highly effective despite its predominantly non-binding forms"

219 Laura A. Dickinson 'Regulating the privatized security industry: the promise of public/private governance' 63 Emory Law Journal 417 p 431 sec.IV A Core Public Values

220 OECD Guidelines for Multinational Enterprises 2011 https://goo.gl/xJZnng principle 2

acknowledge that enterprises must prevent, protect and alleviate human rights issues derived from their operation.[221]

The National Contact Point in the United Kingdom received a complaint against an enterprise based in London, with operations in approximately 120 countries. In 2002 "Group 4 Falck, one of the two companies that merged to become G4S, acquired a 50% holding in the Israeli company Hashmira Technologies." G4S increased its holdings of the company. By 2014, it owned 90% of the Israeli company. It provides services to "50,000 customers (including 35,000 private individuals)."[222]

The findings make reference to the fact that confidential information was excluded from the review. Confidential information derived from contractual obligations between the company and its clients, among which is the state of Israel. The National Contact Point declined the opportunity to receive information that would not be made available to the complainant. The substance of the complaint was described as covering: (i) adverse human rights effects caused as a result of actions relating to the wall between Israel and the Palestinian territories; and (ii) acts reflecting widespread practices by security and military personnel. Information was available regarding investigations of individual participants.[223]

The National Contact Point "note[d] that the Guidelines imply that withdrawing from a business relationship is a last resort". Before this alternative is taken, companies must "prevent or mitigate the impacts if it has leverage to do so, to increase its leverage". (para. 45) Corporations are also expected to "give priority to the most serious abuses or those where urgent action is required to prevent the possibility of remedy being lost".[224] The National Contact Point also mentioned a duty to "not knowingly enter into contracts where performance would directly and materially conflict with….international law…and are not excused by any contractual obligation from complying with this Code."[225]

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221 OECD Guidelines (n220)

222 UK National Contact Point for the OECD Guidelines for Multinational Enterprises Lawyers for Palestinian Human Rights (LPHR) & G4S PLC: Final statement after examination of complaint March 2015 Ss 6 https://goo.gl/o1iW2K para. 6

223 UK National Contact Point (n68) para 34

224 UK National Contact Point (n68) para. 46

225 UK National Contact Point (n68) para. 51

The National Contact Point concluded that the business should evaluate mechanisms to use its leverage to mitigate the adverse effects of the company's operation in the facilities referred to in the Advisory opinion issued by the International Court of Justice, concerning the wall in the occupied territories of Palestine.[226] Perhaps, objective and measurable standards in the ICoCa Code should provide for situations where business relationships become incompatible with corporate responsibility.

2.2.3 Papua New Guinea migration detention center

The government of Australia set up the Manus Island Regional Processing Centre (RPC), to hold aliens awaiting for their refugee status to be determined. This Processing center is outside of the jurisdiction of Australia and was set up via an agreement with the government of Papua New Guinea. In February 2014, on the 16th and the 18th, violent events developed in and around the detention center that lead to the death of a man, and 70 other people were seriously injured.[227] A senate committee was set up to investigate the events. The Committee found that the events were "eminently foreseeable, and may have been prevented if transferees had been given a clear pathway for the assessment of their asylum claims". It also stated that the origin of the disturbances could be clearly identified: the facilities were transformed into mixed facility to a single male facility, and the population held there were nearly doubled in the space of 12 weeks.

The Committee pointed at four types of reasons leading to the events: three of them related to the persons detained, their number, composition, the uncertainty surrounding their refugee status, and one factor related to inadequate facilities.

The Committee determined that evidence supported the conclusion that G4S staff, and other local staff, "used excessive force to bring transferees who had egressed from Oscar compound back into the centre, and then continued to assault transferees inside the centre." Also, the contractor G4S was aware of the fact that the local officers "would intervene in

226 Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, https://goo.gl/yVrrgH

227 Legal and Constitutional Affairs References Committee 'Report. Incident at the Manus Island Detention Centre from 16 February to 18 February 2014 11 December 2014' Commonwealth of Australia 2014 ISBN 978-1-76010-103-9 https://goo.gl/Oke0UZ s. 8.1

circumstances where G4S was unable to maintain control of the centre", as noted by the contractor's "Emergency Management Plan". The contractor was also aware that "such a deployment would result in violence and possibly the death of protesters."[228]

The Committee concluded that at the time of the events, the government of Australia was exerted "effective control with respect to the Manus Island RPC and the individuals held there". Also, the Committee determined that Australia has a duty of care towards refugees under domestic law and under international law– "contractual arrangements with G4S or other service providers would not discharge Australia from its non-delegable duty of care to asylum seekers".[229]

The United Nations also uses the services of G4S or other private security or military corporations–as do many others, despite the scandals that from time to time reach the press, like Nisour Square shootings in Iraq in 2007. The Working Group on mercenaries has noted the role of market pressures upon the effectiveness of attempts to control the market of private security or military corporations; whose employees may fall under the category of mercenaries, unprotected by the Geneva Conventions.[230]

2.2.4 Other private contracts in land: Blackwater

The privatization of use of force in transnational settings is hardly new. Incentives for states to contract out security and military services are very effective: the availability of trained staff after demobilization in the 1980s, government will to communicate the downsizing of military expenditure, and the option to supplement military activity without absorbing the full cost of staffing deployment, and the creation of a new, powerful market that attracts new employees with higher income than staff military personnel. The growth of this market can be reflected in the United States, where the use of private contractors increased by 10 from the Vietnam war to

228 Legal and Constitutional Affairs References Committee (n227) s. 8.18

229 Legal and Constitutional Affairs References Committee (n227) s. 8.36

230 General Assembly 'Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination' A/71/318 9 August 2016 https://goo.gl/wOzcEY Para. 72-74

the Gulf war, increasing from 1 in every 500 to 1 in 50 military personnel. By the time the Iraq war started, contractors in all positions outnumbered military staff.[231]

In response to the Blackwater scandal in 2007, Condolezza Rice called for a panel of experts to investigate the circumstances of private military in Iraq. The panel concluded that:

> the legal framework for providing proper oversight of Personnel Protective Services (PPS) is inadequate, in that the Panel is unaware of any basis for holding non-Department of Defense contractors accountable under US law.[232]

Among other findings, the report established the "lack of specific identifiers for the many private security contractors", leading to "confusion about responsibility",[233] in the cases of use of firearms, "the scope of investigations has not been broad enough to ensure that on-the-scene information is gathered"[234], "the Embassy process for addressing incidents, including those involving US Military is insufficiently comprehensive".[235]

Because this research project is set in a framework of governance and governmentality, the case of private corporations concurring with the state in a preeminently public function such as security, is adequate to explore the process and effects of indicator construction. This example allows us to think of indicators in the middle of the divide between the national and international, public and private divides of law, and addresses one of the key aspects of the state as sovereign: the monopoly of violence. Of course, there is nothing special about the discontinuities in the claim to such monopoly: private parties exert violence in all kinds of settings without breaching the law. And violence can be a legitimate business. Following Kinley and Mirray's reasoning, private security and military companies are initially regulated like any other legitimate business: a legal entity in the realm of private law is created, it is limited by whatever regulations are available, for instance, for the ownership, and use of weapons, staff may be contracted within the

231 David Kinley & Odette Murray 'Corporations to kill: prosecuting Blackwater' in Simon Bronit Miriam Gani & Saskia Hufnagel Shooting to kill. Socio legal perspectives on the use of lethal force (Hart Publishing, Oxford/Portland, 2012) pos 7590 [Amazon Kindle]

232 Kinley & Murray (n224) pos 7614 citing US department of state Report on personnel protective services 2007 https://2001-2009.state.gov/documents/organization/94122.pdf , p. 5 para. 4

233 US Department of State (n225) p. 5 para 15

234 US Department of State (n225) p. 5 para 16

235 US Department of State (n225) p. 5 para 17

protection of labor laws, or as private professional consultants, they all pay taxes, and the corporation's proprietary information is protected by industrial property laws. These attributes can and do stand on the way of public oversight. This is the case because private business is meant to be governed by their shareholders, and can act through corporate governance mechanisms; and he public, who can actually exert their power as consumers to support or withdraw their support from specific businesses. This setting does not work in the oversight of private businesses that deploy personnel across the world to perform military or security functions. Their shareholders push for grater gains; despite the fact that these enterprises have a regulation in their home countries, and they are subject to host country law, there is not a clear definition of what actually counts as "law" to regulate corporate action; and the public who live the consequences of these arrangements have no power as consumers. Information cannot flow to points of oversight due to confidentiality issues. The control of markets is simply not present in this setting.

The first challenge in the regulation of PMSCs is the extraterritorial application of criminal law—a well established power of states in international law, yet one exerted unevenly, as the US Department of state in the Blackwater report, could find no legal instrument to hold the corporation accountable under US law—even before considering the practical implications. The Military Extraterritorial Jurisdiction Act of 2000 was applied to four former employees of Blackwater for the Nisour square massacre in 2007, and they have appealed challenging the use of this act as a basis for jurisdiction.[236] Criminal liability of legal persons is highly contested in international and comparative law—hence corporations cannot be easily held criminally liable. Civil cases initiated on the basis of the Alien Tort Statute were more effective and the corporation settled the claims between 2010 and 2012. Employees also face considerable hurdles to espouse claims against military contractors, notably the application of state immunity to contractors, and the application of an exception to justifiability on the basis of the "political question" doctrine, which excludes sovereign acts from court supervision.[237]

236 'Former Blackwater Guards Appeal Sentence in Iraq Shooting Case' Wall Street Journal, January 17 2017 https://goo.gl/BPtMYn

237 Kinley & Murray (n224) pos 7686

2.2.5 Private military and security companies at sea: the Gulf of Aden

Arguably, contractors hold the status of mercenaries in international humanitarian law, and are therefore not subject to the benefit of the prisoner of war status in the Geneva Conventions, because they operate outside the military chain of command, and would probably not be regarded as 'combatants'.[238] Rather, they may be considered 'civilians' taking part in hostilities. In terms of international liability for states due to the wrongdoing of employees of private security entities, the common threshold of "effective control" is usually not met, or claimed not to be met; hence states are able to untie themselves of otherwise sticky situations. A contractual relationship between the state and private PMSCs is usually not enough.[239]

I have reviewed cases for the application of accountability mechanisms for private security companies at land. The situation is perhaps more complex at sea, for instance, regarding the protection of vessels from piracy off the coasts of Somalia. In the context of piracy in the high seas, the protection of vessels was carried out by both public and private entities. The "vessel protection detachments" (VPN), which are law enforcement officials commissioned by the state on board of vessels; and private maritime security companies (PMSC's). The use of private maritime security companies produces strong reactions, since it entails the abdication of the state of its responsibility to safeguard private merchant vessels. [240]

In 2010, the International Maritime Organization endorsed the adoption of the 'Best Management Practices to Deter Piracy in the Gulf of Aden and Off the Coast of Somalia', drafted collaboratively by a group of interested parties in the private sector, in 2010, stipulated that whilst the use of security guards was at the discretion of the company, it was not recommended. The European Union clearly advices that the use of armed or unarmed private security contractors on board is a matter for the flag state to authorize. The recommendation is for Military Vessel Protection Detachments to be used, following a risk assessment.[241]

238 See section Error: Reference source not found Error: Reference source not found, p. Error: Reference source not found

239 Kinley & Murray (n224) pos 7759

240 Anna Petrig 'The use of force and firearms by private security maritime security companies against suspected pirates' (2013) 62 ICLQ 667

241 Best Management Practices for Protection against Somalia Based Piracy. Suggested Planning and Operational Practices for Ship Operators and Masters of Ships Transiting the High Risk Area (Version 4 – August 2011)

The International Code of Conduct is useful as a guidance for the conduction of operations by PMSCs but is not definitive, inasmuch as the operations are not specifically directed to off land situations.[242] The interim guidelines issued by the International Maritime Organization acknowledge the jurisdiction of the flag state, that of the coastal state and that of the country where operations take place—in accordance with the UN convention on the law of the sea. Also, the guidelines include among the basic requirements for private companies, the "quality management standards", issued by the International Standards Organization.[243]

By 2012, it was clear that the function of private security companies on board of vessels, whether armed or unarmed, is simply at a legal vacuum that has been addressed only partially by the private measures and standards we have discussed earlier. Indeed, the Secretary General reported to the Security Council that "[a] key outstanding issue is the regulation of sea-based private security contractors and their activities in counter-piracy operations."[244] Areas of concern included use of force and detention practices. The International Maritime Authority issued "revised interim recommendations for flag States" in 2015. There, the use of ISO standards discussed above are recommended in the case the flag state supports the use of private security companies on board of vessels.

2.3 The failings of public law and the emergence of private standardization

These developments lay against the background of the United Nations Working Group on Mercenaries, where a proposed draft convention was presented as an annex to its 2010 report. Either because of a matter of lag, or just as evidence of the separation between top-down and bottom-up regulations, the proposed draft conventions sets out to choose these primary goals:[245]

(Witherby Publishing Group Livingston 2011) https://goo.gl/mgXT9E

242 International Maritime Organization 'Interim Guidance to Private Maritime Security companies providing privately contracted armed security personnel on board ships in the high risk area MSC.1/Circ.1443, 25 May 2012 'https://www.steamshipmutual.com/Downloads/Piracy/PCASP_MSC.1Circ.1443.pdf para. 2.1

243 International Maritime Organization (n235) para. 3.2.6

244 UN Security Council 'Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia' UN Doc S/2015/776 12 October 2015 para 51, 52

245 UN General Assembly 'Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination Chairperson/Rapporteur: José Luis Gómez del Prado' UNGA HRC 15 sess. UN Doc A/HRC/15/25, 2 July 2010 article 1.1.a, 1.1.b

> reaffirm and strengthen State responsibility for the use of force and reiterate the importance of its monopoly of the legitimate use of force within the comprehensive framework of State obligations to respect, protect and fulfill human rights, and to provide remedies for violations of human rights;
>
> to identify those functions which are inherently State functions and which cannot be outsourced under any circumstances;

The difficulty of referring to the state as the center where the use of force is regulated, translated into the draft convention into a language that calls for a degree of control states no longer exert– because of their tendency to hire or allow others to hire private security or military services. The draft convention defines "inherently state functions" as:

> functions which are consistent with the principle of the State monopoly on the legitimate use of force and that a State cannot outsource or delegate to PMSCs under any circumstances. Among such functions are direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees and other functions that a State Party considers to be inherently State functions. [246]

Interestingly, the draft convention seems to long for the Austininan sovereign discussed in section 3.2.1, and later proposes that the sovereign "cannot outsource or delegate" such functions to private contractors. The proposed draft convention then establishes the rule that each state party "bears responsibility for the military and security activities of PMSCs registered or operating in their jurisdiction, whether or not these entities are contracted by the State."[247] This principle, desirable as it may be, is hard to square with general international law on state responsibility, where the state is responsible for the actions of its agents and for injuries caused

246 UN General Assembly 'Report of the Working Group on the use of mercenaries' (n239) 2. (I)
247 UN General Assembly 'Report of the Working Group on the use of mercenaries' (n239) 4.1

directly as a result from its own omissions. Case law on the matter has not yet recognized that states are generally liable for actions of private parties, but only those who act under the state's "effective control".[248] These principles for state responsibility are well established in international law and reflect the traditional view of the state as sovereign and as the center of the international system. To its merit, the proposed draft pointed at the need for states to regulate private contractors in the field to ensure that they carry out their due diligence obligations so that their intervention does not cause directly or indirectly, the breach of human rights.

The regulations are of the utmost importance to structure relationships with de facto mercenaries which may intervene in the overthrow of governments, support for foreign occupation, modification of state borders, and the targeting of civilians. An important question, however, is whether more can be done, on top of the provisions on criminal and civil liability for natural and legal persons in domestic law, as provided by the proposed draft convention.[249]

Along these developments, multiple efforts to regulate the market of private companies on security and military services have emerged in the past decade. The "hard" part of these regulations, as proposed by Halliday and Shaffer, would correspond to the clarity of the language they use, and in particular, to the transparent indicators they adopt for purposes of auditing and certification.

2.3.1 Private human rights indicators: due diligence versus substance

In the case of private maritime military and security companies, the gap between "law for profit" and human rights standards is palpable. According to the analysis of the "Measuring Business & Human Rights" project at the London School of Economics, the lay of the legal field includes:[250]

248 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), International Court of Justice (ICJ), 11 July 1996, available at: https://goo.gl/7XqH9C [accessed 10 July 2017]; Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, available at: https://goo.gl/XF4q2a [accessed 10 July 2017]

249 UN General Assembly 'Report of the Working Group on the use of mercenaries' (n239) article 13.5, 13.6

250 Irene Pietropaoli 'The use of human rights indicators to monitor private security companies operations', Sept 29, 2014 [blog] https://goo.gl/h4jdNZ

- International Code of Conduct for Private Security Service Providers (ICoC)[251] directed to contractors with no maritime specific operations;
- Voluntary Principles on Security and Human Rights (VPs)[252] directed towards extractive industries with security operations;
- American National Standards PSC.1,[253] PSC.2[254], PSC.3[255] and PSC.4[256]
- Industry Stability Operations Association (ISOA) code of conduct[257]
- Guidelines for Private Maritime Security Companies (ISO/PAS 28007:2012) [258]

Standardization is used in certification procedures, where private corporations must prove that they comply with the standards. In other words, private indicators are aimed at measuring "the member company's compliance to the set of principles or standards.", as opposed to "the human rights impacts of the company"[259]. For instance, the set of eleven indicators for Voluntary Principles on Security and Human Rights: Performance Indicators [260] provide for the following indicators:

251 ICoA International Code of Conduct (n205)

252 Voluntary Principles on Security and Human Rights https://goo.gl/XnYjKz; The Initiative Of The Voluntary Principles On Security And Human Rights Governance Rules https://goo.gl/9UM4rr

253 ASIS/ANSI PSC1-2012 Management System (n208)

254 ASIS/ANSI PSC1-2012 Conformity Assessment (n209)

255 ASIS Maturity Model for the Phased Implementation of a Quality Assurance Management System for Private Security Service Providers https://goo.gl/84m21E

256 ASIS Quality Assurance and Security Management for Private Security Companies Operating at Sea Guidance https://goo.gl/3sRLzV

257 International Stability Operations Association. Code of Conduct https://goo.gl/d6Yj8e

258 ISO Ships and marine technology -- Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) ISO 28007-1:2015 https://goo.gl/FTH7RR

259 I Pietropaoli (n243)

260 Salil Tripathi, William Godnick and Diana Klein 'Voluntary Principles on Security and Human Rights: Performance Indicators' International Alert June 2008 https://goo.gl/sQUMwH

1. Evidence of Risk and Impact Assessment Conducted According to Internationally Accepted Best-Practice
2. Comprehensiveness of Stakeholder Consultations
3. Strategic responsiveness[261]
4. Evidence of Mainstreaming VPs in relationships with security forces
5. General Evidence of Staff Training
6. Evidence of Training for Public Security Forces
7. Evidence of Training for Private Security Contractors
8. Scrutiny of Human Rights Record of the Public and Private Security Providers
9. Evidence of Monitoring Mechanisms
10. Evidence of Record-keeping and Oversight of Equipment Transfers
11 Evidence of reporting human rights abuses

Table 8. Voluntary Principles on Security and Human Rights: Performance Indicators

These indicators are composed to gather evidence of indirect measures, mostly whereby corporations discharge their due diligence: that staff ha been trained, that outreach activities were conducted, that records are kept. None of these measurements actually gather information about human rights impacts on the ground. I have discussed earlier how the standards put forward by the private sector tend to travel. For instance, the International Code of Conduct Association, has admitted ISO and American National Standards as sufficient for their own certification. Omissions, therefore, cannot be corrected unless new standards are drawn. The most important omission in the case of transposition of ISO and ANSI standards to IcoA, is that the Code of Conduct explicitly endorses the United Nations principles of the use of force by law enforcement agents. Yet, as substantive standards are not contained in the due diligence approach of the private sector, we will have to wait for the development of “measurable and objective” standards to be developed. The other flaring omission is the absence of any reference to the human rights

261 Tripathi, Godnick and Klein (n253) at p. 7: “VP Participants need to be able to demonstrate the due diligence that has informed their actions when human rights issues come to their attention either via internal analysis or external stakeholder consultation.”

indicator framework proposed by the United Nations High Commissioner for Human Rights and published in 2012.

2.3.2 Human rights indicators in transnational legal orders

Transnational governance is usually located "beyond the reach of the national state and below the legal regime of international law".[262] Further, "global markets create regulations for themselves—independent of politics."[263] The transnational arena is characterized by the deployment of numerous actors (self) empowered to make new rules: beyond the state, private actors and hybrid arrangements are set up to settle the boundaries of an area of practice. The type of rules we encounter is quite different from that typical to the nation state , like standards for an industry set by the International standards organization. Third, boundaries are blurred between private and public, binding and non- binding law. These factors open questions on the field of legitimacy.[264]

Examples of transnational regulation include standard setting, adoption of codes of conduct as a form of self regulation, (company codes, trade association codes, multi-stake holder codes, intergovernmental codes) as a tool for "governance by reputation".

> "deterritorialization"[265], relative normativity, a change from top down to bottom up normality, and the trend to informality[266].

Shuppert goes on to suggest some procedural requirements as elements of the process for standard setting, which include the elaboration of drafts, consensus in the standard committee, consultations, and a ratification vote. He points at the ISO IEC code of good practice for standardization. I was unable to consult the standard because it is a proprietary document. I was however, able to access the ISEAL Credibility Principles and Standard-Setting, which enumerates a series of principles relevant to the adoption of standards. For instance, their

262 Gunnar Folke Shuppert 'New modes of governance and the rule of law. The case of transnational rule of law' in *Rule of Law Dynamics* [Amazon kindle] os 2772
263 GF Shuppert (n255) pos 2786
264 GF Shuppert (n255) pos 2799
265 GF Shuppert (n255) pos 2923
266 GF Shuppert (n255) pos 2923

credibility principle states with ten values: (i) sustainability, (ii) improvement, (iii) relevance, (iv) rigor, (v) engagement, (vi) impartiality, (vii) transparency, (viii) accessibility, (ix) truthfulness, and (x) efficiency. Their "improvement principle, stands for "Standards scheme owners seek to understand their impacts and measure and demonstrate progress towards their intended outcomes"[267] ISEAL is an alliance of private entities and over 400 stakeholders participated in the definition of their code. The code regulates standard setting for standard owners.

The transnational environment is easily represented by the cases we have explored involving private military and security corporations, whether at land or at sea:

1. A multitude of actors are involved in regulation. There are multiple rules governing the use of force in inter-state relationships and against civilians or combatants in armed conflict, coming from the international arena;
2. There are [corresponding] rules in domestic jurisdictions to implement [some] of these norms;
3. General international human rights law allows for pretty explicit rules concerning the "Drittwirkung" effect of human rights rules, which means that all private relations must be interpreted within the human rights framework;
4. In the business environment, private entities normally are "legal persons" whose "personality" is recognized across the world, via international agreements which grant recognition to legal entities. These agreements allow for the existence of transnational corporations.

1) Standard setting entities can be private or public, national or international—meaning that they can have state participation, or not; and the legal regime they were "born" into, can be either international or national.
2) Apart from all economic and political considerations that may explain why standard setting entities exist, and how the "governance by schemes work, these entities have a

267 ISEAL Alliance Setting Social and Environmental Standards. ISEAL Code of Good Practice version 6.0 December 2014 https://goo.gl/DisDi6 p 6: The code "specifies general requirements for transparent and accountable preparation, adoption and revision of sustainability standards"

meaning within the legal world, they draw up contracts, make all sorts of transactions. Certification itself is a private contract where the certified entity agrees to be audited and to make changes to adopt the certifier's standards. These operations may be boring from a political perspective, but they are part of the normative framework we call transnational.

3) Public standards owners use the regular authority of the law within or beyond the state to set these standards; which can be subject to human rights provisions, and can be challenged in domestic courts if they clash with rights rules.
4) Standards often translate into the adoption of indicators. Or rather, indicators often mean a standards has been adopted. These standards must become explicit for the indicator to enter the regulatory framework.
5) Indicators that have no relation to human rights, should not be named using the term "human rights", as they do not carry that purported authority.
6) Indicators that come to exist outside the law can enter the law by the use law-like entities make of them—like the United Nations treaty bodies requesting a particular performance to be displayed and proved by way of an indicator, of discrimination or health.
7) Indicators born within the law, need to make their way to explicit their legal pedigree;
8) In any event, all indicators that relate to human rights, need to be explicitly linked to the human rights rule; and the standard they implicitly or explicitly invoke, needs to comply with the rules.
9) The fact remains, however, that the development of indicators for human rights in the field of security and criminal justice–and the standards that lie behind them—are not in the same world yet. Indicators or standards belong today to the world of development, of business risk, of management or In the best case, to social sciences. They have not really entered the realm of law. Even if the International Code of Conduct for Private Security Companies endorses "soft" law concerning human rights, this endorsement has been adopted in the world of management. But not in the world of law—the ANSI PSC1 standards do not reflect a legally relevant practice that speaks of the compliance with a human rights law.

10) I share Shuppert's view that "transnational law" is possibly not a "new" law. And today, it hardly seems a form of "new" governance, because the practices and theories around them seem to have settled. I wonder whether an old legal theory, based on the notion that agents have powers conferred or recognized by [one] legal system, can be tweaked to show us the network of normative acts of all kinds, that are today intertwined across jurisdictions.

2.4 What we hide behind the things we count

Despite the developments in measurement on the human rights field, indicators associated with security and criminal justice are in their infancy. Whereas indicators for social, economic and cultural rights have a wealth of literature to reflect upon, civil rights relevant to due process are stuck with the history of measurement of the power or the security of the state.

1. First, the finely intertwined international bureaucracy in the business of statistics was born with a development perspective—and the latest developments in international human rights indicators are built to favor a bridge between law and development. Despite of the merits of this endeavor, the choice of framework clouds the precision and clarity that indicators call for. Although the ends of the indicators we have discussed in this section are relatively transparent, the mixture of the arenas they intend to serve, yield a non-transposable measurement of rights related measures.
2. On the one hand, business indicators still inform purported global indicators related to "law and order" dimensions, as evidenced by the passage from private business consultants in the 1970s to the first Doing Business indicators in the World Bank, and later to the use of these World Bank approaches in purportedly neutral World Justice Project index for the rule of law. These indicators seem to be built around a law-for-profit approach. At the same time, similar bureaucracies invest in the development in indicators that are aimed to foster public investment in foreign aid, to enhance development efforts. These "law-for-development" indicators sometimes make an

odd choice of dimensions which seem to exclude a clear due diligence approach; and they also fail to relate to legal standards clearly.

3. Last, private sector indicators to regulate an inherently public function, like the use of force, do not even pretend to be connected to any legal measure of human rights, and rather seek to measure activities related to due diligence in human rights-preparedness, and connections to local stakeholders.
4. It seems clear that human rights indicators are a slim field, quashed under the drive of business and development forces.
5. The most important feature of these developments, though, is the relationship between the indicators developed in the public sector and the developed by private corporations and informally endorsed by states. Whereas efforts are being made by all parties to clarify the content of rules and the extent of their obligations, there seems to be a fatal disconnect: rights indicators are not the currency today, despite the general discourse concerning rights as a goal for development, as a framework for business, and as a generalized set of norms of almost universal acceptance. This is evidenced by the difference in language and approach form all four corners of the world of indicators: global business, global development, individual companies and rights institutions.
6. One of the salient issues in the current context, is the difficulty to transit into a transnational regulatory framework, and the need to cling to a ‘purely’ international approach to precise and enforce rules. Should we not strife to build an understanding of legal problems that accounts for the relationships between all the sources of regulation that are available today, as opposed to attaching a certain pedigree to ones at the cost of outlawing others? Perhaps we should make an effort to translate our state-centered legal discourse, to one that can more easily “travel” across jurisdictions., thus allowing to accumulate different layers of authority, instead of discarding them.

7. Also, in grasping more deeply the legal or political issues around indicators, we can also aspire to define the space where useful knowledge is produces in the exercise of indicator construction. Perhaps heuristics can be used to reduce uncertainty and flux in the determination of indicator content. Facts, referred to in rules, and then translated into indicators, can be a useful door to navigate the divide between law, and science, across governance and governmentality.

3 A bridge to observe law-governance-governmentality. power, hierarchy and diffusion

Human rights indicators are here treated as data that quantify or qualify compliance with human rights rules. The measurement conveyed by indicators is typically treated as objective and apolitical, precise, transportable. The treatment of human rights indicators render them rather akin to superconductors,[268] as they channel power from one realm of social authority, to another, without resistance. The apparent neutrality of science and institutional arrangements, are conducted through law, as an unlimited power grid. These remarks underlie the question of "what distinguishes a good bad human rights indicator, from a bad one?". This is a question as much about law, as it is about science, and about management. Human rights indicators in the field of security and crime control are an oddity in the field—perhaps because they point at a discontinuity in the narrative of rise of human rights as a trait of modern and industrial societies.

From the perspective of law and legal systems, I will explore whether a network based notion of the legal system can help us track the chain of transnational authority that travels across jurisdictions, regardless of the public or private nature of agents; and whether this notion can help us uncover and put back together, the compounds of non-legal authority that are the currency today in global governance. I will use the example of human rights indicators. Throughout, I will make an effort to keep tabs on what may count as legal, as scientific and managerial. I will use this chapter to introduce the background against which my project is proposed: (i) governance as a peculiar managerial environment; (ii) legal theory as a device to grasp the field for those tools; (iii) and governmentality as a framework that accounts for the discontinuities in an otherwise inexplicable lack of interest in the tools that governance has created for tracing compliance with human rights in the field of criminal justice and security.

Law trades on classifications. In ways similar to the divide between public and private, national or international categories that law has so openly embraced and promoted, law easily

268 I took this analogy by Todd Foglessong

admits a division between knowledge produced in an expert fashion (regularly, scientific knowledge) from "lay" knowledge—regular testimony. Law would easily admit a hard distinction between nature—and possibly, our ways of learning about it—and social orders. Governance studies open important avenues to explore the usefulness of these divides. In particular, the hard division between the knowledge about science and the knowledge about society can be looked at as a joint process of creation.

Legal classifications, however, are not immediate transpositions of the natural world. We gain explanatory power by thinking of natural and social orders as being produced together."[269] Some areas of life cannot be properly explained by " self-contained" fields of knowledge. Hence:

> co-production is shorthand for the proposition that the ways in which we know and represent the world (both nature and society) are inseparable from the ways in which we choose to live in it.[270]

The interest in this interaction seems often forgotten in critical studies, in favor of other areas of interest, like "race, class, gender, ideology, interests and power."[271] Co-production has been used in connection to other concepts, such as fuzzy-set theory, and the theory of complimentary pairs ,to explore better explanations for "hybrid authority", that is, institutions that hold or derive their authority in a triangle of law, science and politics.[272] I will set out with this notions of co-production in mind to remind us that the complexities of the issues at hand cannot be grasped with any one side of this triangle individually.

3.1 Governance

Law and the modern state are not coequals. Law is not a modern concept, although the nation-state is. Some of us still live today under the spell of "modernity" in law, but this is only

269 Sheila Jassanoff 'The idiom of co-production' in Sheila Jsanoff *States of Knowledge: The co-production of science and social order* (Routledge London 2004) p 2 [questia]

270 Jassanoff 'The idiom of co-production' (n262) p 2 [questia]

271 Sheila Jassanoff 'Ordering knowledge, ordering society' in Sheila Jsanoff *States of Knowledge: The co-production of science and social order* (Routledge London 2004) p 18 [questia]

272 Oren Perez 'The Hybrid Legal-Scientific Dynamic of Transnational Scientific Institutions' (2015) 26 European Journal of International Law 391

contingent, as far as the law is concerned. The cultural history of law includes the antique civilizations, and the crystallization of typical western legal concepts dating back to Roman law. The attributes of power that shaped and propelled the use of legal instruments for particular objectives, are perhaps best discussed outside the realm of law.

Law is a good power grid—it can transfer power effectively across agents. Power struggles can become legal struggles, because forms of power and law are compatible, and for the past two hundred years, they have been aligned even; but they are distinct. Law is only one among many conductors of power across agents. In a way, law is a technology of trust and distance—as a superconductor, the grid conducts information and embodies commitments that enable trust, and provide parties with the certainty they need to for transactions to be secured. This is how many people conduct transnational transactions frequently—and remain unaware of the multitude of transnational transactions they benefit from every day. Just as power seems to some, a pervasive and unavoidable glue in social relationships, I would like to explore the analogy of superconductivity or interstice to picture the role of law among social orders.

For about 25 years, the relationship between law and the state has developed in a way that seems difficult to square into an ever growing network of standards, regulations, instructions and measures, that reach private parties across national and international jurisdictions. Law outside traditional state-centered arrangements has challenged the legal mind to a point of making law seem irrelevant. I wish to explore whether law in the context of the use of measurements, can remain a useful expression of social relationships, and an important tool in the toolbox of regulation. In particular, I wonder whether we can grasp these regulatory processes from the perspective of persons who may be affected by their legal enforcement.

Studies in governance take note of current, non-traditional command-and-control forms of exerting power. Governance is related to " governing with and through networks." It can be defined with four core traits: (i) governance is applied to a multitude of actors, including public and private entities; (ii) these actors have constant interaction, they have shared purposes, and therefore need to exchange resources; (iii) network actors interact on the basis of trust; (iv) actors interact independently from the state.[273] The consequences for public administration can be

273 R. A. W. Rhodes 'Understanding Governance: Ten Years On' (2007) 28 Organization Studies 1247 p. 1246

identified as (i) the strengthening of the executive; (ii) the "hollowing out" of the state, meaning a reduced power of the state, and the executive in particular, to act on "command" and hence prefer "diplomacy";[274] The governance challenge was early perceived as relevant to law as shrinking policies sought to reduce the reach of the state apparatus, and thus enhance its operation as allied to other non-state actors. Governance has been identified with "any strategy, tactic, process, procedure or program for controlling, regulating, shaping, mastering, or exercising authority over others in a nation, organization or locality."[275]

Governance is a multifarious concept. Rhodes identified a set of meanings where the term "governance" is used for: (i) "minimal state" acting through markets; (ii) "transparency, integrity and accountability" as core means of control, akin corporations; (iii) "new public management"; (iv) "new public management […and] liberal democracy" brought together in "good governance"; (v) "socio-cybernetic system" featuring "interactive socio-political" forms of government; or (iv) "self-organizing networks" that develop their own policies.[276] Meulemnan observers how these notions associated with "governance" highlight not only the network relationships between governments and social actors, but also hierarchical relations and those generated through markets. Thus, he adopts the following definition:

> Governance is the totality of interactions, in which government, other public bodies, private sector and civil society participate, aiming at solving societal problems or creating societal opportunities.[277]

The expression of the role of law in governance seems sometimes downplayed in the literature, whose focus seems to be "public" law. In the area of "economic governance", law is perceived as playing a role around institutions enforcing the rules of the game to "craft" and "maintain" markets. From this perspective:

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274 Rhodes 'Understanding Governance' (n266) p. 1247

275 Nikolas Rose *The power of freedom: Reforming political thought* Cambridge University Press Cambridge 1999, p. 15

276 Louis Meulemnan *Public Management and the Metagovernance of Hierarchies, Networksand Markets. The feasibility of desogning and managing governance style combinations* (2008 Physica Verlag Heidelberg) p9

277 Meulemnan (n269) p 11

> Governments are only one source of such institutions. Others are contracts, commercial businesses, private sector hierarchies, voluntary associations, courts, clans and communities.[278]

Yet, at the same time, law is the language of many of these arrangements: laws set up governments, provide the basis for contracts, commercial transactions, courts, and provide support for private relationships. In the field of corporate governance, by-laws and contracts to design these arrangements are all a product of law. Although "good governance" is properly managerial, as it relates to new public sector management practices, some of its principles are associated to principles enshrined in bright legal lines, like transparency, or accountability. The focus on governance through networks relies heavily on the impact of private relations to intervene in public matters. These relationships are nonetheless shaped by legal instruments, like contracts; and require legal institutions to be enforced. These examples show how different perspectives on governance call for a wide perspective of legal matters, to reflect the shape of these relationships effectively.

In terms of the relations between jurisdictions, governance reflects a "vertical shift from nation-states to international public institutions with supranational characteristics", which implies a shift from national to supranational "governments" but also "courts".[279] The inverse relationship also gained visibility in the international relevance of sub-national entities. "Horizontally", courts gained relevance as opposed to the sole actions of the executive and the legislature.[280] Apart from their regular role in controlling state action, courts are also in charge of solving private relationships, which were increasingly connected to public services formerly controlled by the state. The change in the private sector has been shaped by the growth of hybrid private-public organizations, contributing to the horizontal shift in the exercise of executive

278 Kees Van Kersbergen & Frans Van Waarden ''Governance' as a bridge between disciplines: Cross- disciplinary inspiration regarding shifts in governance and problems of governability, accountability and legitimacy' (2004) 43 European Journal of Political Research 143 https://goo.gl/hui3rw 146

279 Van Kersbergen & Frans Van Waarden ''Governance' as a bridge between disciplines' (n271) p 153

280 Van Kersbergen & Frans Van Waarden ''Governance' as a bridge between disciplines' (n271) 146

power. Other shifts in the private sector implied the growth in hierarchical styles of economic relations, increasing concentration of markets.[281]

One trait, important for this study, was the substitution of national standardization bodies in favor of international standardization. The international face of the wave was called “global administrative law”. National policies of state reduction and a new style of management, called “new public sector management”, reached in international organizations. Forms of administrative authority were typically displacing formal decision making processes, delegating important portions of deliberation in technical organs that would draw standards within the rules. The situation was sharply visualized in relation to transnational phenomena, like Internet regulation (or governance), climate change, and any other topic that involves multiple jurisdictions and the power of many agents who belong to different worlds: governments, public enterprises, transnational corporations, international and sub-national entities, states and non-governmental organizations.

Measurement is one form to exert such hybrid authority. Measurements technically coupled into broad rules or principles, adopted in fora without state authority—not even delegated state authority–but which are endorsed, received, picked up, by regular state authorities. Critical perspectives stress the main factors of knowledge production with “distinct power effects”, “inasmuch as indicators change the nature of governance and of power interactions”.[282] I have already referred to this authoritative definition of indicators as “a named collection of ranked ordered data that purports to represent the past or projected performance of different units.[…].[283]

In the dark, among dense network of regulations, across jurisdictions and with different actors, indicators are like a lightning bolt. They apply an enormous amount of energy onto one or two spots, briefly and intensely. They are so bright, and the background is so dark, that they blind

281 Van Kersbergen & Frans Van Waarden ‘‘Governance’ as a bridge between disciplines’ (n271) 153

282 Kevin E Davies, Benedict Kingsbury, and ally Engle Merry ‘Introduction: The Local-global life indicators: law, power and resistance’ in Sally Engle Merry, Kevin E. Davis & Benedict Kingsbury The Quiet power of indicators. Measuring governance, corruption and the rule of law (Cambriudge UP New York 2015) [Amazon Kindle] ‘Indicators defined’ pos 286

283 Davies, Kingsbury & Merry (n275) pos 286

our senses. These measurements are pervasive. Their construction and meaning are obscure because they compress together several layers of knowledge, whose authority they apply conjointly.

In addition to the cognitive processes observed by Landman, Kingsbury and his colleagues stress the cultural dimension of indicator construction. The activities related to conceptualization, definition, application, seem neutral and cognitive. But they are also cultural, they are performed in an environment charged with political consequences.

Indicators have entered the field of "experimentalist governance",[284] defined as "a recursive process of provisional goal-setting and revision based on learning from the comparison of alternative approaches to advancing them in different contexts." As a form of gaining control over undetermined categories, with a multitude of agents, indicators are used to reduce indeterminacy, and in that degree, to provide certainty.

These features of the changing face of public authority, explain how traditional "command and control" styles of government are retreating. Among other reasons, one of the factors that made governance such am attractive noun, and such a problematic one in the field of law, was the received tradition of sovereignty—an attribute of the "legal person" we call "state ", and which is still today the source, or ultimate source of every rule we call legal. Indeed, a strong source of authority in legal thinking today still holds on to some features of law that were spelled out at the same time that the ideology of the state was defined and gained momentum.

3.2 Global administrative law and transnational legal orders

Governance studies reached the arena of international law early in the turn of the millennium. The field developed into a murky sub-field called "global administrative law" as a consequence of the observation of increasing "transgovernmental regulation and administration" in the face of the limits of national legal orders to address the issues autonomously.[285] These regimes of

284 Jonathan Zeitlin 'Transnational Transformations of Governance. The European Union and Beyond. Inaugural lecture (Vossiuspers UvA, Amsterdam 2010) pp 5-6 [Drive]

285 Benedict Kingsbury, Nico Kisch, Richard B Stweart 'The emergence of global administrative law'(2005) 68 Law and contemporary problems 15 https://goo.gl/53fBcG p. 16

transnational regulation are administrative in character, and started off without a direct control from national legal orders. Their decisions were susceptible of enforcement directly upon individuals. International regulation has been increasingly issued by private, rather than inter-governmental bodies. Hybrid bodies also became popular.

The legal form of governance if therefore fluid. From a legal perspective, these changes in the source and force of legal rules, was called "global administrative law":

> define global administrative law as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make[286]

The realm of such sub-field of law was justified since the actions addressed here are typically different from international legislative or judicial action. Rule making became identified as the action of standard setting in international regulatory bodies. In Kingsbury-Kisch-Stewart's taxonomy, global administrative law develops standards in the fora of (i) intergovernmental administration, including the Financial Action Task Force, the World Bank's "good governance" measures; (ii) in the case of transnational networks, national standards are recognized on a basis of cooperation, without binding force; (iii) in distributive administration, national standards play a direct role in the implementation of international law, as in the case of environmental law. Regulation in these areas may have an extra-territorial component. (iv) hybrid administrative bodies also participate in standard setting, like ICANN, the Internet Corporation for Assigned Names and Numbers, a non-for-profit entity incorporated under California laws, with a multi stake holder structure, including a governmental advisory body, and a mechanism for participation for the community at large. ICANN ended its contract with the US government ion 2016;[287] (v) Private administrative bodies also contribute to the exercise of standard setting. Kingsbury and his colleagues signal to the prominent example of the World

286 Kingsbury, Kisch, Stweart 'The emergence of global administrative law' (n279) p. 17

287 ICANN Bylaws For Internet Corporation For Assigned Names And Numbers | A California Nonprofit Public-Benefit Corporation (as amended 1 October 2016) https://goo.gl/WG3ZRi

Anti-doping agency, a private entity whose determinations are used in the International Court of Arbitration for Sport.

Transnational legal orders are not easy to define. Denis Patterson uses as an example of a transnational legal order, the Lowen case in an arbitration award derived from Chapter XI of th North America Free Trade Agreement, and the implied powers of the federal government of the United States to force compliance at the state level, with that award.[288] The classification of these sorts of problems are perhaps not the best to exemplify transnational legal orders, since the problem of compliance in the United States at the state level, is probably a peculiarity derived from United States law and the powers of the federation. From the standpoint of international law, however, this is not an issue. I believe the examples I have chosen in chapter 2 are better suited to highlight the situation in transnational legal orders, as they involve multiple jurisdictions without many contact points in international treaty law.

3.2.1 The legal mind challenged by governance

Let us reconsider the cases involving forms of police brutality or negligence, or some form of gray area in the use of force by law enforcement officials of G4S in the Palestine wall, or the migration detention center in Papua New Guinea, or the Blackwater incident, or the problem of policing the Gulf of Aden to prevent piracy in the high seas. Private actors intervene in these situations across national and international jurisdictions, in tasks that are closely connected to the sovereign functions of the state: security and crime control. Their regulation is hidden from plan sight, because there is a lag between the public law framework for these activities, and the market that has developed in the field. Private regulation is an alternative to such public law framework.

One way to look at these cases would be to dismiss them as non-legal inasmuch as they were heard in non-judicial fora. The “real” case was heard by the criminal courts in Papua New Guinea—or nowhere at all in the case of Palestine—which, of course, would not be so relevant since Palestine is not a state. This perception parallels one notion of law that does not help us

288 Denis Patterson ‘Transnational governance regimes’, in Jörg Kammerhofer & Jean D’Aspermont (Eds) *International legal positivism in a postmodern world* (CUP Cambridge 2014) [Amazon Kindle]

highlight the issues: imagine the “objective and measurable standards” implementing the ICoCa code were already in place for specific topics, like use of force in law enforcement. The transnational corporation would effectively direct its employees to follow one particular way to implement international human rights standards; and legal consequences would follow from there for employees, subjects involved in law enforcement actions, states and shareholders in the corporation. So far, one important topic limiting regulation and control over the activities of these entities is their slim connection to state authorities, since they operate as contractors. This, however, does not bar the fact finding mechanisms inside the corporation, or the determinations of these public, institutional fora, to have an impact on what it means to abide by law, or what it means to act outside the limits of the law. An “objective and measurable standard” will probably be used in the near future to make these determinations.

This is important, because in many contexts the legal profession would be ready to dismiss these developments as irrelevant, because they involve the authority of the state only in a muted way. The received tradition in legal scholarship was dominated by positivism for a good part of the twentieth century. In various shapes, some form of positivism can be perceived in the background of academic or professional legal debate—particularly in international law. The forms we identify as associated to positivism, though, are perhaps reminiscent of a particular way to frame the relationship between law, the state, and violence. Historically, positivism can be associated with the rise of our modern and industrial societies. In its historical context, some typically positivist theorists have sought to provide a clear notion of what law is—and most importantly, what it is not. I would like to offer a brief description of what this tradition looks like in its most elementary, traditional form, as championed by John Austin.

This tradition distinguishes positive law (the appropriate matter of jurisprudence) from various objects law is aligned with “by analogy”.[289] What law is, is comprised by “laws proper or properly so called”, which are “commands”. Others are “laws improper”. The sum of proper and improper laws comprise (i) the laws of God, (ii) laws of morality, (iii) laws called so

289 John Austin The province of jurisprudence determined (Forgotten Books, Kentucky 2012) p V

metaphorically, (iv) and positive laws. Jurisprudence was devoted to these "positive laws".[290] At this point in time:

1. Law is posited in a hierarchical environment: Positive laws are "set by political superiors to political inferiors".[291] positive law or law existing by position is the sum of laws from political superiors to political inferiors;[292] Laws are set by intelligent and rational beings to intelligent and rational beings.[293]
2. Law proper is separate from nature: Laws of God are actually the laws of nature.[294]
3. Rule following avoids evil consequences: "if you express or intimate a wins that I shall do or forbear from some act, and if you will visit me wiry an evil in case I comply not with your wish, the expression or intimation of your wish is a command".[295] "If you cannot or will not harm me...your wish is not a command" [296]
4. Evil consequences are proportional to rule following: "The greater the evil to be incurred in case the wish be disregarded, and the greater the chance incurring it on that same event, the greater, no doubt, is the chance that the wish will not be disregarded" [297]
5. Only evil consequences are relevant to law: rewards should not be comprised within the term "sanction", despite Bentham's position.[298]
6. Only sovereigns posit law to underlings: "Laws are posited by a sovereign or body of sovereign persons to a member or members of the independent political society wherein that person or body is sovereign or supreme"[299]

290 J Austin (n282) p V
291 J Austin (n282) Lecture 1, p 2
292 J Austin (n282) Lecture 1, p 2
293 J Austin (n282) Lecture 1, p 4
294 J Austin (n282) Lecture 1, p 2
295 J Austin (n282) Lecture 1, p 6
296 J Austin (n282) Lecture 1, p 7
297 J Austin (n282) Lecture 1, p 8
298 J Austin (n282) Lecture 1, p 10
299 J Austin (n282) Lecture 4, p 199

7. Only one master or sovereign can be legitimate, to the exclusion of all others: Habitual obedience must be rendered by the generality or bulk of its members to one and the same determinate person, or determinate body of persons. [300]
8. International law is only a manner of speech. It is not properly law. Whether a given government be or be not supreme is rather a question of fact than one of international law. "A government reduced to subjection is actually a subordinate government, although the state of subjection wherein it is actually held be repugnant to the positive morality which obtains between nations or sovereigns."[301]
9. Convention (among sovereigns) cannot hold. An original covenant cannot be the source of authority in democratic societies. Among his various arguments, he supposes these are the assumptions underneath the covenant hypothesis: (I) "where there is no convention, there is no duty", and (ii) every convention is necessarily followed by a duty" [302]

Hierarchical, sovereign, unique centers of power seem to enshrine everything that governance is not—or everything governance is a reaction to. This description seems to be what many current writers have in mind when they think of the displacement of the state as the center of authority. Although this discussion was easily disregarded in American legal realist frameworks, international legal scholars have closer connections with these arguments. International legal scholarship struggles today with the voluntaristic challenge in ways that many strands of non-positivist legal scholars in domestic settings would find difficult to understand.

Almost at the same time that the notions of law and the modern state were developing, new technologies of exerting power in government appeared, that did not exist in antiquity. Counting was one of them. Although measurement of state-related functions has been in place for antique societies, statistics developed as a tool for government shortly after the French Revolution. Despite this tradition in measurement, today we have no thoroughly developed

300 J Austin (n282) Lecture 4, p 204
301 J Austin (n282) Lecture 4, p 223
302 J Austin (n282) Lecture 4, p 371

system to count human rights compliance in the field of security and crime control. Like the *adunation* of France, today, an avalanche of numbers in the field of human rights is an increasing tendency.

Human rights measurements reflect a particular way of understanding "objective and measurable standards", which in turn translate into numbers, indicators for human rights compliance. These measurements are developing in the public and private sectors. My interest in criminal justice and security was related to the special connection these activities hold with the modern state. I expected to find an avalanche of numbers for these activities I could analyze and write about. After all, the common narrative of human rights in history tends to draw an ascending line describing a continuum evolving from the eighteenth century, and measurement seemed the last stage in this development. Hence, why would we not have in place "objective and measurable standards" for rights involved in the most traditional and uncontroversial state functions? This is where the governmentality framework comes into play.

3.2.2 Formalism as management in law and bureaucracy

The classical idea of law I just described above, has been further associated with the notion of "formalism". Formalism is well known for its criticism in American realist jurisprudence, where "broad principles" entail "whole edifices of legal doctrine", that "compelled results in individual cases". Langdell was the most important name associated to this form of thinking about law. The doctrine was used by the judiciary to undermine legislation that sought to alleviate the consequences of the "industrial expansion" that followed the American civil war.[303]

Weber also had a term for formality in law, perhaps slightly different from the American perception. "Formal justice" guarantees the maximum freedom of the interested parties to represent their formal legal interests. […] Formal justice is thus repugnant to all authoritarian powers, theocratic as well as patriarchic, because it diminishes the dependency of the individual upon the grace and power of the authorities."[304] Weber readily admired the limitations of formal

303 John Henry Schlegel American legal realism and empirical social science (North Carolina University Press, Chapel Hill & London 1995) [Amazon Kindle] p 20

304 Max Weber Economy and Society. An outline of interpretive sociology Guehther Roth (ed) (U California Press Berkeley 1978) 812

justice upon substantive justice. “Formalism” relies on a relation between law and formal languages that reduce discretion and increase predictability.

Yet, the Civil Code is presented by Weber as “free from the intrusion of, and intermixture with, non juristic elements and all didactic, as well as all merely ethical admonitions: casuistry, too, is completely absent.” The Code, Weber continues, seems to possess “an extraordinary measure of lucidity as well as a precise intelligibility in its provisions”[305]. This comes at a cost: legal thinking has been brought to accept as rules the restatements contained in the Code without “formal juristic qualities”, with no “substantial consideration”. The conviction was that of creating a “purely rational law”.

Weber grants “modern” law a few characteristics: its “particularism”–the fact that there a wide ranging fields of law, to be applied to particular situations. His example is the determination of the scope of application of the Commercial Code in Germany.

To describe the attributes of modern law, Weber identifies four stages in the development: (i) revelation through “law prophets”; (ii) operation of “legal honoratiores”; (iii) law imposed by “secular of theocratic powers”; and (iv) “systemic elaboration of law and professionalized administration of justice” “specialized juridical and logical rationality and systematization”.[306] Weber also observes the important relationship between economic interests, e.g., from those involved in the commodity market, to know and anticipate what the costs of the process would be, and hence the creation of specialized forms of law and process were created.[307] Weber describes the modernization of law as follows:

1. In terms of process, free evaluation of proof has tended to withdraw this issue from juristic thought.
2. In terms of substantive law, the “growing logical sublimation” of legal thought “has meant everywhere the displacement on dependence on external tangible formal characteristics with increasingly logical interpretations of meaning in relation to the legal

305 M Weber Economy & Society (n297) p 865
306 M Weber Economy & Society (n297) p 882
307 M Weber Economy & Society (n297) p 882

norms themselves, as well as in relation to legal transactions. Weber refers to elements like "the real intentions" of the parties to an instrument, or their attitudes, like malice or good faith.

An important feature of Weber's bureaucracy in the field of the administration of justice was if professional style: full time appointed officials whose living was made from public funds, fully employed in the enterprise of applying the law to particular cases. The hierarchical ideal as depicted by Damaska is intended to trace the Weberian ideal type: there is a "special province" of law that belongs to the officialdom; decisions made as a professional need not the personal support from officials to be actually made. Rather: "judgments become pronouncements of an impersonal entity".[308] In the institution, "power comes from the top". Minutia are handled by minor officials. Coequals cannot agree on settling disagreements, but superior officials must decide. Only "at the top of the authority pyramid (assuming it is not monocephalous) that clashes of opinion are necessarily resolved by accommodation".[309] The hierarchical structure requires that all decisions by underlings are susceptible of review and reversal by superiors: "[o]fficial discretion is anathema".[310] Rule following, however, is as strict as organizations may tolerate. Damaska insists on the notion that all organizations resist the temptation to push for rule following when negative results are foreseen. "Revolutionary legality" and "rule of law" are two different, even if related, standards.[311]

Damaska identifies two kinds of legalism: logical and pragmatic. He compares these with Weber's analytic and synthetic methods—where only modern law is properly synthetic (codified) and holds the principle of non-liquet ("gapless" law).[312] For Damaska, pragmatic legalism as opposed to logic legalism seems to characterize the application of standards strictly related to the facts, as opposed to standards where their ordering potential and the implied coherence seem to be favored respectively. Weber seems to allude more clearly to the system of precedent as

308 Mirjan Damaška The Faces of Justice and State Authority: A Comparative Approach to the Legal Process (Yale UP, 1986) 19

309 Damaska (n301) 19

310 Damaska (n301) 20

311 Damaska (n301) 20, fn 5

312 M Weber Economy & Society (n297) vol. 2 Ch VIII sect 9 "the categories of legal thought" 654-6

opposed to codified law. Whether these characterizations are fair today, the most salient feature of these types of reasoning are their implications for bureaucracy in Damaska, and the identification of the principle of non liquet as a truly modern feature of legal systems. Non liquet seems to carry an ideological dimension, related to the duty of judges to think of law as an all encompassing set of propositions. This ideological position can be contrasted with an operational duty of judges to decide each and every case presented before them. Whereas the ideological portion of this statement might be read as strengthening formalism, the duty of judges to decide cases does not carry a formalist perspective of its own. The role of formalism in the 19th century probably did not allow for this distinction, as the project intended to deprive the judiciary from its arbitrary power.

Damaska sets the origin of the notion of hierarchy in justice institutions in close connection with the development of the structure of the church, to reflect "the structure of celestial government". As early as the 11th century, a conviction existed that consistency across multiple sources of law should be discovered and articulated.[313] Logical legalism, for Damaska, emerged as a result of two factors: scholars being "offended by the messy details", and hierarchical decision-making settings, common to canon law students who would feed ecclesiastical authority.[314] Later, as the allegiance turned from the person of the Prince to the state, precedent became a "more precise text of the law", as expressed by Montesquieu. Long before the French Revolution, bureaucracies were firmly in place. The Revolution, though, called for powers to be separated—hence, the judiciary was to be brought under control, to avoid legislation. The judiciary should speak the law—not think the law.[315]

A modern idea of law, as opposed to a theory of law for a postmodern world, juxtaposes the ideas of law and state—to attach in tandem the legal system to the juridical person of the state. This is not a requirement of law. Law existed long before the state in a modern sense—and clearly, it continues to live after the exclusivity or supremacy of the Austinian sovereign has lost traction. Modern law, however, did come at the time of the rejection of the feudal or religious

313 Damaska (n301) 31
314 Damaska (n301) 31
315 Damaska (n301) 37

authority in favor of the secular authority: “quod principi placuit habet vigorem” – What the prince wants has the force of law.[316] This was the preferred way of substituting authority in the jurisdictions where Roman law was formally incorporated. Where this was not the case, the identification of formal sources of law was preferred as the method to promote the notion of internal and external sovereignty—the exercise of power to the exclusion of any other power. These transitions were proper of the post revolutionary France—along with the introduction of written constitutions which would set out the system of sources of law. These ideas are characteristically modern, and despite the fact that they coexist in time with the development of the national state, they are not interchangeable. The state has been a transient framework to inscribe law.

Domestic legal scholarship might find these remarks futile, as the theory has run aground under the inertia of legal realism. Yet, international legal scholarship cannot toss this argument aside: in a way, the very existence of international law supposes the existence of the state. Set out in the second half of the 19th century, formalism, as applied to international law, includes the narrative of writers who find a source for binding law, on the will of the states—some times resembling the German unification in the late nineteenth century. Attempts to systematize concepts of international law around the notion of the will of the state are recognized primarily by their didactic potential.[317]

3.2.3 Fluid law. A new place for legal scholarship

Within critical theory, arguably Foucault intended to react to the Marxist perspective on law as the formalization of power, where power was an attribute of the dominant class. In a Marxist perspective, law would be explained as the result of the capitalist inputs into unequal power configurations. Arguably, in Foucault’s perspective, law is one among many arenas where power is exerted. In this sort of critical literature, power is not an attribute of an agent, but a network of relations, technologies, devices.

316 JH Merryman & Rogelio Pérez Perdomo The Civil Law Tradition. N Introduction to the Legal Systems of Europe and Latin America (Stanford UP; Stanford, 2007) (3 ed) Chapter IV Sources of law, p 49

317 Martti Koskenniemi *The gentle civilizer of nations: The Rise and Fall of International Law 1870–1960* (Cambridge UP Cambridge 2001) 165-8

As a reaction to a voluntaristic, formalist approach to law—which in turn suppose an idea about hierarchies and public structures—a few assumptions can help us think about the law in the new context of governance. I will have these elements in mind as I make my way through the layers of authority involved in the development of these "objective and measurable standards" to measure human rights compliance in the field of security and crime control:

1. Law is a distinct field of practice, or knowledge. There is something distinctive about it we lawyers recognize. When explaining it to non-lawyers, we explain options to get a result, we help people anticipate consequences for them and other, assuming someone can secure state action in their favor—or against them.
2. Law displaces disagreements to other fields. Law is about identifying rules that will define a course of action within the field. These resolutions are sometimes useless in other fields.
3. Law is meant to preserve, stabilize fluid relationships to reduce anxiety and promote certainty.
4. Law has a symbolic authority because it acts in tandem with other sources of authority—scientific or political authority. Law is not interchangeable with the state, even though much contemporary theory is built around the caricature of the identification of these terms. Law is not true or false, not is it a "truth preserving" device, such as logic. Truth is proper to other fields. Law acts in tandem with those other fields and thus applies a combined force, often implicitly.
5. Law can be understood as a network for power relationships—one network among many others. Not much has changed since Austin: the basic notion about law is still the expression of an act of will. One identified agent, acting alone or in conjunction with others, expresses a will that something be done. This is why we can say that law expresses power relations between a norm-positing agent and a normative subject to whom the command is addressed. This is a transparent way how power is expressed. Yet, this is not distinctive about law.

6. What is distinctive about law is that it tracks these series of commands and helps us distinguish commands that can be relied upon to prompt third patry action—from those that cannot. Whether this is useful is a matter for the particular situation we wish to address. This is a problem for the relevance, rather than the existence of the legal field.
7. Discipline and punish is inadvertently a theory of law inasmuch as it identifies the full network of power centers where normative agents may express their power to issue commands. Law is particular, however, because it helps us navigate the infinite number of rules and relationships people enter into, every minute, everywhere. The notion of a legal system can easily be transposed to any setting where commands are issued. The attribute of "legal" comes only if we wish to discriminate where state action can ultimately be prompted. Again, whether state action is interesting or required is something the legal field is probably not well suited to respond.
8. On top of these layers of power relationships–those that can be recognized as legal and those that need not be–there are two other issues to define governments: the definition of a problem and the setting of objectives. Both these questions should not be set by law. Law can—and often does–integrate these notions, but these are not questions that can be ultimately set by law. Law often claims to set these issues. Rather, the legal field should say that within the legal field, such or such are the problems of legal objectives to be admitted or pursued.
9. The legal field is inert—as conductors should be. Agents push the power through the web. In a world without these legal networks, power relationships would find other forms of expression, for sure. Law as a network of such relationships is at least determined or determinable. We can argue within a relatively limited field and thus, level the field of uneven relationships.
10. All complications aside, the legal field is still identifiable, and in this way, distinct even if concurrent with other social fields. The most antique device we lawyers have found to account for this difference is the very old theory of the sources of law. Other than this pedigree, few alternatives explain how we actually and ideally explain how something is

law—and how something is not. This distinction is crucial for action within the legal field. Again, whether action within the field is of value, is not a legal question. It is important to note, however, that despite our best intentions, many aspects of the legal field operate because an agent is pushing for it, even against our will, and they are a force acting upon us. We may be unaware, or unwilling participants. Yet, we take part.

11. There is a very practical implication for this question: if government or private action is to be applied upon me, I wish to know why. Even today, law is the ultimate horizon for those subject to the power of governments—and a potent tool for those subject to the power of non-governmental agents.
12. Indicators appear as a tool for the post-modern world—yet they are built from the remains of the modern world: law and science. Is there any use for them?
    1. Indicators about law are interesting and dangerous because they pass as legally authoritative when in reality, they seek to settle extra-legal questions: (i) they are built in a horizon of improvement towards a set goal-.-without recognizing that the goal is exclusively one within the legal field proper. But this may not be an acceptable social goal; (ii) also, indicators work in tandem with scientific authority—inadvertently.
    2. Indicators are also fashionable because they are designed for a governance framework where plenty of power centers are admitted, and not only state power centers. Indicators claim to seek information across power domains.
    3. Indicators are also set for institutional structures that need to be managed. Again, this is unproblematic, as long as the goals for management are admittedly an open question that must be set—or whose sources —can be identified, rather than assumed.
    4. Indicators, therefore, can be useful tools provided we unmount the many layers of authority that they collapse into a single figure or set of figures.
13. The most elementary notion of a norm requires an act of will on the part of a norm-giver, and a meaning conveyed to a norm-subject. Every imperative can be described in a similar process. Would our description of law not gain power by focusing on the norm-givers and norm-subjects, with the notion of building a continuum, across jurisdictions?

On top of this layer of purported legal authority, we can also draw the vertical layers of purported scientific or managerial authority, that use law as a power conductor as well.

3.3 Management, Managerialism

The Peace of Westphalia first, and the French Revolution later, constitute the typical starting points for public management. At the time, management interest stopped being identified with the Prince's interests. The transition occurred from German cameralism to the Rechstaadt and the Code Napoleon: bureaucrats became servants of the state rather than the Prince. Law became the tool to contain bureaucracies, to ensure continuity.[318] Law was relied upon to contain bureaucrats, displacing the space devoted to Staadtswissenschaftten. The Code Napoleon, along with the creation of the Counseil d'Etat and the system of Prefects named by the central government, brought about the *adunation* of France–the enforcement of the metric system.[319] One century later, the challenge in Europe was laziness, lack of imagination in bureaucracy—government as an obstacle to business. Continental bureaucrats were bound by law, to crush discretion. For contrast, John Stuart Mill would challenge the idea of a centralized, "dominant bureaucracy".[320] American scholars perceived a different culture in the United States: federalism, separation of powers and the bill of rights set them apart from other management traditions. Against the backdrop of these deep differences in political traditions, a brief sketch of administrative theories suffices to show how information and efficiency compete for the center of managerial approaches.

Measurement as a practice in government was long-standing and regular, although modest activity. Historians have placed emphasis on increased measurement practices in government in modern Europe. The possibility of reducing complex social facts to quantifiable

318 Lawrence Lynn Jr. 'Public management. A concise history of the field' in Ewan Ferlie, Laurence E. Lynn Jr., and Christopher Polli (eds) The Oxford Handbook of Public Management (Oxford UP, Oxford 2007) 27, p. 27 33

319 Desrosières (n31)

320 JS Mill *Principles of political economy with some of their Applications to Social Philosophy* (1909 7th ed) https://goo.gl/3RtDdm

simpler phenomena has been linked to the administrative capacity of the modern state. Increased quantification was the trait of late 19th century bureaucracy. This habit of quantification is different from the occurrence of indexes and rankings in the early 21st century. Out of 95 indexes identified by Cooley, 83 are present since the 1990s and 66 since 2000.[321]

Cooley identifies three factors leading to this proliferation of indexes and rankings: (i) the practice of performance measurement; (ii) the increased network of international governance; and (iii) the increased communication technologies. The adoption of new performance measurement techniques in the public sector is linked to "new public sector management". In a way, the effect of this new management, either in the public or the private sector produced an effect in the international arena. Measurements in the domestic arena were adopted for transnational phenomena, with both public and private entities as an audience. The need for simplification in management, probably justified, produces a number of unexpected outcomes in the international forum: organizations in charge of measurements and rankings are subject to scrutiny. Information production and consumption in this oversimplified way brings alive concerns over "governmentality" and "planification".[322] These issues will be explored when discussing the complexities of measurement in its social–as opposed to cognitive dimension.[323]

One face of the explosion of quantification is defined by the "audit society". The increase of auditing is a trait of modern social organizations. Human rights monitoring is one form of audit. Within the frame of principal-agent theory, auditing is a practice where the agent owes accountability to the principal; second, the relation should merit auditing, in a case where principals are unaware of the agent's actions. Verification here aims at reducing the risk created by the agent, for the principal. These conditions are fulfilled within the context of human rights. Monitoring is a form of auditing, which relies heavily on the information provided by the "agent", that is, the government which is subject to the monitoring process. Modern human rights instruments provide for enhanced auditing allowing for in situ visits and follow up

321 Alexander Coley 'The emerging politics of international rankings and ratings. A framework for Analysis' at Introduction in Alexander Coley & Jack Snyder *Ranking the world: Grading states as a tool for global governance* (Cambridge University Press, Cambridge 2015) [Amazon Kindle] p. 9

322 Coley (n314)

323 See below, Chapter 6 'A modest meaning for indicators and measurement' p. 215

mechanisms to facilitate deeper, better quality information exchange. Even though auditing can be recognized as an important activity for the security of developed organizations or systems, there is a possibility of obscuring actual risk situations if institutions engage in superficial "verification rituals".[324]

The action of management is sometimes used to describe actions or decisions outside the field of law. Managerialism can be interpreted as a trend in corporate governance in the second half of the twentieth century, characterized by the undivided power of managers, to the exclusion of stock-holders.[325] Translated into the public sector, the term usually means the application of "scientific management" or "free-to-manage" principles from the business world, to the public sector, under the dub-name of "new public sector management"[326] There has been some discussion on how the managerial model may affect justice institutions, and the dangers of a managerial approach to justice—that is, economy, efficiency, and effectiveness–where the fairness of the proceedings is at stake. This is particularly difficult in areas of law not easily connected to financial stakes.[327] In the context of international relations, managerialism has been used as alternative to formal rules, responsibility and government.[328]

Martti Koskenniemi advocates for a "culture of formalism" in international relations, in a plea to bring legal definition to power relationships in the international arena, and thus challenge managerialism. Marti Koskenniemi sees formalism as a risk captured by Weber, whose alternative was the ethics of responsibility—to balance "formalism" and religious naturalism.[329] The need to identify law and state produced a mixture of legal theory with theory of the state. A new field of knowledge emerged, where "[t]he really acting agency was the historical State that was the legal system's "creator" or "carrier." The State, so the argument went, was a factor in the world of Sein that through its will and power brought about the legal world of Sollen"[330] In the

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324 Michael Power *The audit society. Rituals of verification* (Oxford UP New York 1997) [amazon kindle] 123

325 Stephen Bainbridge *The New Corporate Governance in theory and practice* (Oxford UP Oxford 2008) p.1

326 Christopher Wood 'A public management for all seasons' (1999) 69 Public Administration 1 p. 6

327 JJ Spigelman Chief Justice of New South Wales *Address to the Family Courts of Australia*, Sydney 27 July 2001

328 See, Chapter 5, 'Human rights measurement absent from governmentality' p. 179

329 Koskenniemi *The gentle civilizer of nations* (n310) 78-9

330 Koskenniemi *The gentle civilizer of nations* (n310) 249

face of this tradition, in the early decades of the 20th century Kelsen's Pure Theory was born pure from this sociological mixture: the only thing that actually exists is a group of people doing things. To the Pure Theory, "There simply [is] no "State" at all outside the juridical realm."[331]

Koskenniemi explicitly praises the political stance of the Pure Theory.[332] Kelsen himself observed that "the Pure Theory of Law has prompted an impassioned resistance rarely seen in the history of legal science, a resistance that cannot be explained by the material differences it brings to light. For these differences are based in part on misunderstandings, which, in addition, frequently appear to be less than completely unintentional".[333] Kelsen explains the disagreement with scholars at the time as related to the separation of law and politics, as described in his theory: "the dispute […] is about giving up the deeply rooted custom of making political demands in the name of legal science".[334]

In his genealogy for international legal scholarship, Koskenniemi seems to long for a culture of formalism where arguments are made available to the parties in a debate, "a practice that builds on formal arguments that are available to all under conditions of equality.", where personal "preferences should be justified, instead of taken for granted" […][335] The message seems to be that:

> there must be limits to the exercise of power, that those who are in positions of strength must be accountable and that those who are weak must be heard and protected, and that when professional men and women engage in an argument about what is lawful and what is not, they are engaged in a politics that imagines the possibility of a community overriding particular alliances and preferences and allowing a meaningful distinction between lawful constraint and the application of naked power.[336]

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331 Koskenniemi *The gentle civilizer of nations* (n310) 243

332 Koskenniemi *The gentle civilizer of nations* (n310) 249

333 H Kelsen *Introduction to the problems of legal theory: a transaltion of the first edition of the Reine Rechstlehre or Pure Theory of law* (1997 OUP Oxford) [Oxgord Scholarship Online] p 1-2

334 Kelsen Introduction to the problems of legal theory (n326) p 2

335 Koskenniemi *The gentle civilizer of nations* (n310) 501

336 Koskenniemi *The gentle civilizer of nations* (n310) 501

This was the project of the scholarship discussed in The Gentle Civilizer of Nations—a project which has not yet delivered its promise in international law. In the path, Kelsen is just one particular way of looking at law, domestic or international, which successfully separated law from power, but rejected advancing any ideas of how they relate to each other. The main flaw of the Pure Theory in this perspective was the resulting abandonment of all value rationality in favor of an empty vessel that can be driven at the whim of those with powerful positions. The project of international legal scholarship, therefore, would be ill served by a blind adherence to the results of the Pure Theory. This statements echo Koskenniemi's position on the critique of the Pure Theory.

Other investigations into formalism picture the effects of a field that guarantees its own reproduction. Bourdieu's The Force of Law represents a valuable horizon to integrate these stances on law and social organization.[337] There is a fertile field to examine the implications of this analysis, especially upon forms of organizational structures.

Further analysis is required to explore the extent to which the disciplinary society described by Foucault and referred here as the starting point for modern and industrial ideals for the exercise of power, are consistent with the Weberian analysis of social institutions like the church, or the army.[338]

337 Pierre Bourdieu 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 Hastings Law Journal 805

338 e.g., John O'Neill 'The disciplinary society: from Weber to Foucault' (1986) 37 The British Journal of Sociology, pp. 42-60

3.4 Measurement as governmentality

Measurement and the need to know, go hand in hand with administrative structures. The climax of the police state was carried out by Napoleon, who aspired to be able to see every minute detail in the state. The administration form of Cameralists was coupled in Foucault's account, with forms of discipline focused in the details of conduct, in prison, schools, hospitals.[339] The key transformation from Cameralist stratification was transformed in the nineteenth century to the disciplinarization of the state—the participation of private parties in the function of discipline. [340] This shaped the rationality of security as a function of the modern state. Foucault identifies areas where individuals started to carve out roles that played a part in government: social hygiene, social work, medicine, statistics; the combination (cross-fertilization) of fields of knowledge: criminal anthropology and accident insurance; the protected spaces of autonomy within public institutions; delegation of authority to private parties; and the consultation of "social allies" in tasks like standard setting. These interventions compete with the monolithic notion of "the state" as a single unity. [341]

Rather than identifying statistics with a technology, Gordon classifies statistics as "furl" for geopolitical technologies "in the same way as the knowledge of individuals spirals in and out of disciplinary practices". Qualifications like "national decline, social degeneracy or national deficiency are only possible because of statistics.[342] Statistics are the incentive to generate a special form of knowledge suited for the determination of risk. While judicial reasoning makes determination in hindsight, risk determination is forward looking. This technology, with a long standing tradition in health care insurance, entered the areas of criminal justice and mental health in the 1990's:

339 See Chapter 7 below for the connection between goal setting and administrative structures, p. 244

340 Colin Gordon 'Governmental rationality: an introduction' in Graham Burchell & Colin Gordon & Peter Miller (Eds.) *The Foucault Effect . Studies in governmentality* (U Chicago Press, Chicago 1991) p. 27

341 Colin Gordon 'Governmental rationality' (n333) p. 36

342 David Garland 'Governmentality' and the problem of crime: Foucault, criminology, sociology (1997) 1 Theoretical criminology 173 180

> Strategies of care and control fix increasingly upon ‘population flows‘ rather than individual cases, ushering low-risk groups to low-cost care in the community, reserving institutional care for groups defined as high risk.[343]

The shift embraced as new public sector management, roughly corresponds to the concepts of “action at a distance”, “governing through freedom”, and “the active subject of power”, which can be related to concepts developed around studies in governmentality.[344]

At the same time, a move away from social defense seeks managerial responses to a faulty reasoning. While little supports the conclusion that social defense succeeded, the basis for the starting point regarding crime control was deficient. Today, like over a hundred years ago, criminal transgressions are a part of social life. Pasquino observes that “in recent decades the governance of crime has come to be problematized in new ways, partly in reaction to chronically high crime and the failure of criminal justice controls”[345] This point resonates intensely from Ferrari’s promotion of social defense as a response to the increase in crime according to statistics. Back in the 1990s with the new public sector management movement, the interest of these frameworks was to increase the effectiveness of government at a lower cost, using the potential of non-governmental relations and additional sources of (delegated) power. Garland identified the economic rationality around crime control, comprising: (i) “analytical” language in terms of choice, risk, rewards, which used to be foreign to the criminological field; (ii) objectives set in “compensation, cost-control, harm-reduction”and (iii) technologies including “audit, fiscal control, market competition and devolved management”. At the time, the notion emerged around a *homo prudens*, the victim as a supplier of opportunities, and the rational persons whose incentives could be manipulated to reduce risk of crime.[346] The predominant logic was described as “insurance-based”, focusing upon “reducing or displacing the costs of crime, upon prevention rather than punishment and upon minimizing risk rather than ensuring justice”. These logics should not be confused with an analysis that “turns discipline as a new touchstone of truth”. Very

343 Garland ‘Governmentality’ (n335) p 182
344 Garland ‘Governmentality’ (n335) p 183
345 Garland ‘Governmentality’ (n335) p 185
346 Garland ‘Governmentality’ (n335) p 185

powerful narratives of parole and community services in the 70s and 80s seemed to suppose the inevitability of the state an the disciplinary action of different centers of power, as an example of "the dispersion of discipline". Critics of these perspectives focus on the importance of the method of governmentality, as opposed to the numerous iterations of disciplinary contexts. Discipline and Punishment is not so much about the prison, but about the transformation of the Benthamite economic subject into the *homo criminalis*.[347]

In Gardlan's words, "[i]n contrast to other criminologies, which assumed that each individual offender could be identified and corrected, these theoretical frameworks view crime as a normal, mundane event"..."rather than the disruption of normality"[348] The predominant attitude identifies the limits of government with regard to crime, in similar terms to the action of government to "secure" the economic process. Garland equated this to a process of discipline in Foucault's terms: "the carcinogenic situation, governed by the manipulation of interests and the promotion of mechanisms of self-regulation".[349] Garland would identify this process as "governing at a distance".

The notion of governing at a distance is reminiscent of Latour's " acting at a distance". Acting at a distance means the attribute of a point in a process of accumulation of knowledge, which can act upon other points in the periphery of the accumulation cycle.[350] In the cycle of knowledge accumulation, we "bring home" unfamiliar events or places. This allows us to "act at a distance" upon such distant objects. In the case of statistics, we have explored how Porter calls numbers a "technology of distance".[351] In Latour's example of cartography, the process of acting at a distance transforms the relationship between the formerly unknown objects (e.g., an island in China) and the subject (a cartographer in France). The subject masters the formerly distant objects with the help of devices that "mobilize" those objects (precise travel diaries, samples,

347 Pat O'Malley and Mariana Valverde 'Foucault, Criminal Law, and the Governmentalization of the State' in Markus D Dubber Foundational Texts in Modern Criminal Law (OUP 2014) p 322

348 Garland 'Governmentality' (n335) p 186

349 Bruno Latour *Science in Action. How to follow scientists and engineers through society* (Harvard UP Cambridge 1987) Chapter 6 "Centres of Accumulation" 222

350 Latour (n342) 223

351 Porter *Trust in numbers* (n4) pos 700 on the common aims of law and science regarding the need for both law, and the metric system to be effective across distance and being capable of enforcement by strangers.

charts).[352] Like drawings, diaries or samples, “probes” are also a device to transport, “mobilize” objects. Latour uses the example of the electrical impulses read off the ground to determine the presence and depth of oil. These devices allow objects from diverse fields of knowledge to be combined.[353] Inventions are valuable, because the enhance our ability to mobilize, stabilize or combine objects we wish to know—computer codes, dyes, a printing press….

In the context of criminal justice policy, prudentialism, criminogenic zones, or other contemporary developments, were important technologies that allowed the action to “govern at a distance”. Although these techniques are hardly new, they do combine a set of tools and tactics that allow “governing a nation by exerting a kind of intellectual mastery over it.”[354]

This technology applied to criminality sounds interesting in terms of effective action to prevent breaches of the penal law. Yet, as we have seen, these efforts did not grow conjointly with the perspective of victims of state crime, wither in the form of human rights violations, or even international crimes.

3.5 Human rights indicators as discontinuity

Another simple observation from the developments described above is the fact that statistical considerations were relevant as the expression of the strength of the state, or its ability to pursue normalcy, but they have usually functioned as the Prince’s mirror –with a twist: the mirror was not meant to produce total, universally accessible knowledge. This knowledge was not meant to deliver the image of state authority for the purposes of self restraint. Although drawing parallels from the birth of social defense to the development of human rights law is probably a *non sequitur*, the idea of an analogy can at least be entertained.

Against this background, the discourse of human rights, a relatively new one, only started encountering criminology some 50 years ago, on the question of the identity of “real criminals”. By the early 90s, clear gaps between human rights and criminology were identified, like a close

352 Latour (n342) 224

353 Latour (n342) 226

354 Nikolas Rose and Peter Miller ‘Political power beyond the State: problematics of government’ (1992) 43 British Journal of Sociology. 173

relation to the analysis of interests, which was still detached from central human rights definitions and values.[355] Cohen points at the fact that the discourse of atrocity has a tendency to hide crimes from public observation, though "the unwillingness to confront abnormal or disturbing information" .[356] These messages resonate in the presence of actions with devastating consequences where the application of certain legal categories are taboo. This point of contact between human rights and criminology echoes the drive to discard certain members of society due to their action. These ideas fit perfectly Fleur Johns' analysts of legality in international law– the legal treatment of some legal categories has the exact effect of building tabooes, with the added effect of hiding serious human rights violations from plain sight. Yet, at the same time, these notions of taboo seem not properly identified with actual values and practices, but seem aspirational horizons we would like to build consensus around.

For human rights to parallel the development of classification and counting that criminal law underwent, rights rules would require the push of self preservation that seems present in industrial governmentality. Also, while criminal categories cast away members of society regarded as abnormal, human rights rules have the benefit of impersonality—they are addressed to the juridical person of the state; their primary goal is not to punish, but to provide for a particular action or result. The fact that they are always addressed to the state possibly sets them in the blind spot of statisticians. This is more clearly the case of rules intended to shield the population from criminal actions from the state. The drive for strength and self preservation we appreciate in some expressions of social defense, are difficult to translate into extrajudicial executions, torture, arbitrary detention or punishment.

The construction of taboos and the absence of state preservation in governmentality, also account for an explanation of why crime statistics have not properly developed in conjunction with the popular and rich field of human rights. One example can be found in the history of

355 Stanley Cohen Human rights and crimes of the state. The culture of denial 542 in Eugene McLaughlin, John Mucie &Gordon Hugues criminological perspectives. Essential readings (2nd ed) (Sage London, Thousand Oaks, Delhi 2003)

356 Stanley Cohen Human rights and crimes of the state. The culture of denial 547 in Eugene McLaughlin, John Mucie &Gordon Hugues criminological perspectives. Essential readings (2nd ed) (Sage London, Thousand Oaks, Delhi 2003)

torture. The abhorrence of torture was a feature of classical criminal law. The substitution of torture for the modern forms of punishment and discipline perhaps brought about the idea of taboo in modern legal systems. The substitution of the body as the center of punishment has not translated into the exclusion of the practice, but only the idealization of the existence of a consensus around the prohibition of torture. The legal profession in the most extreme cases, has learned to circumvent the contemporary limits imposed by human rights law. The phenomenon, however, is still hidden, and It remains elusive to preventive practices. The blurriness of the boundaries drawn by these rules, presents a sharp contrast with the boundaries drawn by statistics about crime. This contrast possibly lies on top of a fissure, a discontinuity in the narrative of human rights development.

The triangle between law, governance and governmentality, thus, serves as the framework to ask the question: what makes a better human rights indicator in the field of security and crime control? First, we need to pose the question from the perspective of governance in transnational, fluid, networked regimes, across institutions. Second, we need to ask the question within the horizon of pragmatic needs in social institutions. The form of power distribution within institutions is a matter of choice. Third, traditional legal divides are not necessarily useful in these contexts. Hard or soft, national or international, public or private, these tracks are all open to find continuity in real, complex situations, where public and private entities acting at a distance upon multiple jurisdictions, collide at the expense of unwilling participants.

Simply put, a voluntaristic perspective about law would easily toss away the problems caused by G4S in Palestine or Papua, on the argument that soft standards like the Code of Conduct or the National Contact Point guidelines are not legally relevant. This seems difficult to reconcile with both, a networked environment, and the observation that power centers, unsurprisingly, are not neutral. Governmentality, therefore, helps us delimit the third side in our triangle to understand how a networked system of relationships, thrives. Human rights in the field of security and crime control seem to move under a different logic than other forms of traditional regulation, like criminal law. State preservation is not an apparent motive underlying

human rights discourse or implementation. This is an important factor to consider while learning about human rights measurement.

In the following three chapter, I will explore the perspectives of governmentality, scientific authority and management that are so entangled in the activity of indicator construction. First, I will explore the meaning of statistics as a technology of power, then, I will examine the basis for scientific authority that connect indicators with forms of “objective knowledge, and finally, I will explore managerialism as a third face of “measurement as mind-set”.

4 A springboard for an impure theory of law

The examples of the guards in the Palestine Wall, the Papua migration detention center, the Blackwater incident and the policing the Guff of Aden, all highlight the networked environment presented by governance, and the resolute but implicit perspective of power from governmentality studies. While governance and governmentality have a common layout of networked power flows, governance highlights a drive for management, while governmentality sheds light on statistics as a technique. Both themes also highlight the role of scientific authority and governance through information. The managerial approach, combined with a strong appeal to scientific authority, make law seem irrelevant: why would we prefer to have recourse to a hierarchical, exclusive, centralized form of power, when political and social realities so challenge this arrangement? I have proposed reasons that connect indicators for human rights in the fields of security and crime control, to areas of practice foreign to law. This becomes a problem where indicators are packaged into the form of a legal item, or are pushed along the power network of law. In this chapter, I will approach issue of how to think of facts in indicators, in tandem with the legal framework we use to understand them. For decades, legal theory has either separated itself from fact, or neglected such separation. I wonder whether we can use this relationship, and turn it into a passage from what realists criticized as the insider view of law, to non-legal approaches to law. To do this, I will briefly account for the position of measurement and facts in realist or empirical legal studies or theory, and then will move to explain how classical positivist ideas can help us distinguish, yet, relate law and fact.

The relevance of a legal question to explain human rights indicators in the field of security and crime control is not obvious. Much has been written on the side of critical legal studies as applied to international law, that has called into question whether a positivist theory of law is useful at all. Suffice it to say for now, that the questions asked under either positivist or critical approaches are different and complementary: critical perspectives, however, cannot do without the content of law. Positivist approaches decidedly look into the definition of such contents .[357]

357 Klabbers, NPIL in a postmodern world

As Koskenniemi has described the phenomenon, regardless of the benefit good or bad intentions can derive from the same legal regime, it is naive to think we can do without law. The field of international relations (and all the relations within) is already legalized, there is no such thing as outside-of-law, "the assumption that there might be a sphere of ''pure'' non-law (of politics, economics, strategy, etc.) is ideological: with every political decision-maker, there comes a legal advisor [...]"[358] Better yet, a culture of formalism, "in a thoroughly policy-oriented legal environment, […] may sometimes be used as a counter-hegemonic strategy."[359]

Perhaps only a naturalist theory of law would insist on the need to join our notions of what is and what ought to be. A naturalist theory, for example, would probably not raise the question of how indicators –as statements of fact—are placed together or within a scheme of interpretation built out of legal rules.

Yet, "theory influences the existence of its object". We are free to choose a standpoint, as far as we are ready to acknowledge that legal theory is different from zoology: we are not in the business of classifying existing social facts. Or theories constitute the social fact: "A zoologist classifying butterflies does not create them; a legal theorist by proposing a theory can 'decide' what is to be a norm."[360] This awareness makes it difficult to take this analysis under a "realist" or "naturalist" perspective, where "might makes right".[361] Where power accounts for all actions, indicators are an interesting sociological tool—but law has nothing to say about them. Maybe for self-preservation, as a lawyer, I see indicators as the result of scientific or technical authority, mixed with political authority, all under a cloak of legality shielding this cognitive product from criticism. A "might makes right" approach cannot fully capture the layers of power and complexity that go into this problem.

I will therefore, pursue two goals in the following pages: (I) to discuss in depth how theory of law can obscure or help us unveil the relationship between law and other fields of knowledge that are collapsed together into indicators of human rights compliance; and (ii) to state why the

358 Koskenniemi 'Preface to the reissue' From Apology to Utopia p. xiv

359 Koskenniemi From Apology to Utopia p. 602

360 Jörg Kammerhofer 'Uncertainty in International Law A Kelsenian perspective' (Routledge Oxon, New York, 2011) p. 260

361 Koskenniemi From Apology to Utopia 227

preservation of the legal realm is relevant in the framework of governance, to highlight relevant legal relationships.

4.1 Indicators in the blind spot of sociological or realist jurisprudence

The managerial mindset implies the conception of law as a means to an end. This seems close to Brian Tamanaha's definition of pragmatist jurisprudence.[362] The "managerial mindset" as described by Martti Koskenniemi:[363]

> To think of public power in utility-maximizing terms can neither account for respect for human beings nor for the emergence of the kingdom of ends. If individuals, and by extension states, treat each other as instruments of pleasure, as is true of the rational egoists of natural law or present-day law and economics, the result may be an equilibrium that is at best bearable though unlovely, […] in constant danger of slipping toward the capture of the state by special interests. Kant lacked the critique of "governmentality" when he was attacking the preceding generation of natural lawyers, who had been trying to build a political theory on the quintessentially modern notion of the *homo economicus*. But he saw no less clearly than Foucault the effects of the turn from sovereignty to the disciplinary power of economics, technology and science. Is the alternative to skepticism really the reduction of human beings to functional structure, Leviathan understood as a calculation machine?

Indicators, here described as a technology in the context of governmentality, look like a tool that can only live or be understood within a pragmatist jurisprudence: one where law is a means to an end. The general trend of the turn to indicators, has been described as a new phase of legal realism:

362 Brian Tamanaha *Law as a means to an end. Threat to the rule of law* (Cambridge UP, New York, 2006) chapter 4 'instrumentalism of the legal realists' p 60-76

363 Martti Koskenniemi, 'Constitutionalism as mindset: Reflections in Kantian themes about international law and Glottalization' (2007) 8 Theoretical Inquiries in law' 9 https://goo.gl/okPchcat 24.

> The general phenomenon of indicators and rankings is one of the principal current challenges to academic law, including jurisprudence. Adequate critique, and where appropriate development, requires normative, conceptual and empirical inputs. To what extent do current ones measure acceptable aspirations, let alone realities, of the law in action? One reason why jurisprudence should be interested in indicators is to understand the extent to which legal phenomena and the discipline of law may be under pressure because of these phenomena[364]

I will attempt here to assess how realist jurisprudence grasps the richness of dimensions offered by indicators. The deliberate cohesion of law and fact can serve many important research purposes. Yet, lightly discarding the 'legal' dimension can come at a great cost.[365]

Arguably, there is no such thing as "American legal realism" as a uniform school of thought.[366] The American legal realism movement, championed by Holmes' statement about law as a predictor of what courts will do, is founded on a positivist tradition. Friedman actually discusses realism as a part of the chapter on positivism—from the positivist tradition of James and Dewey, according to which law was best understood as an empirical science. Although empirical research at Yale did seek to establish how law worked, it's motivation was to seek ammunition for law reform, sometimes at the expense of methodological concerns brought in by social scientists. Other researchers had no interest on law reform but did pursue the investigation of the actual practice of law and citizens' attitudes towards it. This type of research did not gain pedigree as part of the social sciences, and remained a realm for legal scholars.

Rather than a philosophy, Friedman attributes Llewellyn the description of Realism as a movement. Rather than offering a position on the relationship between is and ought, the movement "assumes" the traditional divide between law as it is and as it ought to be; but it turns

364 William Twinning, 'Legal R/realism as legal theory: ten theses', in S. MacAuley and E. Mertz (eds.) *The New Legal Realism. Translating Law-and-Society for Today's Legal Practice* (Cambridge UP, 2016) p. 121

365 Koskenniemi 'Constitutionalism as mindset' (n356) at 14 criticizing Goldsmith and Posner who charge against he habit lawyers have of "describing actual behavior as law".

366 Schlegel *American legal realism* (n296) p. 4; the author at Ibid, p. 5 explains how history has assisted in the creation of a homogeneous perspective choosing authors and topics, like Jerome Frank and Carl Llewellyn, rule skepticism and prediction of decisions; and many authors were rated as implementers of Pound's sociological jurisprudence via their empirical research.

to law as a means to social ends. In other words, perhaps realism in this version uses law as its object of study, to make a value judgment of means-to-ends. Friedman states that "there must be a much greater emphasis on the social impact of law...in relation to the particular part of the community which is affected"[367] From this perspective, I can only speculate that indicators can be understood as predictors of outcomes: indicators would measure social facts. And somehow, these facts would support a conclusion of how to change the law. I will turn later to this question on the Cook- Moore debate.

The program involves the use of empirical information about the personality of judges and the available remedies, "to predict with more certainty what courts will do".[368] Pound proposed to study the actual impact of law on society to learn about ways to improve law: knowledge should be derived from the application of methods from other social sciences. Lewellyn proposed to create a realist jurisprudence where social scientific methods would account for the determinants of judicial decisions. In a critical letter from Roscoe Pound to Lewellyn, Pound characterizes realism as a faith in masses of numbers to which meaning is attached. Pound observes that accumulated data, on their own, lack meaning. They acquire meaning in relation to the purpose with which they were captured: mass numbers do not turn a piece of work into scientific.[369] Pound recommends research on specific instances of rules or legal institutions in action.[370] Yet, Pound is also the target of criticism: "pragmatist theories of justice such as that of Pound himself purport a method of measuring social facts as a theory of justice".[371] Thus, despite assuming the traditional divide between law and fact, the idea that facts are the life of law, is still present today as the only relevant aspect of legal life.[372] This sort of differentiation between facts and norms was blurry in the realist movement, despite the clear separation between is an ought, expressly as a separation between law and morals.[373]

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367 Wolfgang Friedman *Legal Theory* (5th ed) (Columbia UP New York 1967) 297

368 Friedman (n360) 297

369 Roscoe Pound 'The call for a realist jurisprudence' (1930-1931) 44 Harvard Law Review 697 701-2

370 Pound (n362) 710

371 Julius Stone *Law and the social sciences in the second half century* /University of Minnesota Press, Minneapolis 1966) at 6

372 See Ureña (n38)

Realists charged not necessarily against positivism in science, but against formalism. Stone dubbed the fight as "the revolt against formalism".[374] Formalism had for too long pushed for "excessive reliance on logic, abstraction, deduction, and the analogies of mathematics and mechanics"[375] Stone finds five theoretical origins for American realism: (I) Dewey's pragmatism: "ideas are plans of action, and not mirrors of reality"; -(ii) Veblen's economic institutionalism; (iii) Holmes' insistence on judge made law; (iv) Beard's economic history as determining the development of social institutions; and (v) a new idea about the role of history in helping us understand the present. Holmes' predictive theory of empiricism, challenged critics of Lewellyn's divorce between is and ought. Lewellyn's position was criticized because of its apparent departure from the internal analysts of law.[376]

There is a particular tension in legal realism, on the object of legal knowledge, the method for knowing and thus, with the relationship between law and other forms of knowledge. Empirical legal studies are not synonymous with American Legal Realism, but there is a definite exchange between the method of empirical research, and a theory of law that advocates for an empirical turn to legal thought. It appears some early researchers wished to apply social research methodology in their work, but failed to attract interest and curiosity from social scientists. This is the case of Cook and Moore. Both took Dewey's preference for empirical studies on law, as either the need to use empirical research methods on legal topics, or as the detach of doctrinal legal studies.[377] The first generation of empirical legal research, either from sociological jurisprudence or realism, did not go too far. An important chapter in the development of the realist view was the choice on an interpretation on Dewey's pragmatism. Wheeler Cook sought

373 Stone (n364) 6, Citing Lewellyn's "divorce between is an ought"; see Wilfrid E. Rumble, 'Legal Positivism of John Austin and the Realist Movement in American Jurisprudence', 66 Cornell L. Rev. 986 (1981) Available at: http://scholarship.law.cornell.edu/clr/vol66/iss5/4 p. 1010 referring to its temporary for those who have the intuition that a change in the law is necessary

374 Stone (n364) 14; Morton White *Social Through in America. The revolt against formalism* (Oxford University Press Oxford 1976) p. 15-16 in relation to Holmes' frustration with the treatment of law as a formal language and the insufficiency of deductive logic to predict the determinations of legal institutions.

375 Stone (n364) 15

376 Schlegel *American legal realism* (n296) pos 5053

377 Schlegel *American legal realism* (n296) Pos 275

empirical legal scholarship as tied to legal reform. Underhill Moore had a different perspective: there was no science outside the empirical forms of knowledge.

Cook had interpreted Dewey to mean that (i) science drew together empirical knowledge and problem solving objectives; (ii) the syllogism is a method of ordering thought, rather than a human thought process; and (iii) using a syllogism to solve a new problem, meant that one would find new meanings or create new categories.[378] Cook's separation of these three theses allowed him to focus on legal empirical research in the agenda of law reforms, without solving the question of the "insider's view" to the legal phenomena, ie, the work of those who followed the case method, and who expected empirical research to be presented in the form of other legal rules. Cook's position was to push for the realist view on judicial decision-making but was not so interested in making sense of the results of empirical research. Cook's separation of Dewey's premises brought another problem: legal empirical research would be untouched by the "awful morass of statistical method in which social science still finds itself"[379] Empirical research under this school produces studies like the Commission of Justice Administration in New York State, and others to identify litigation costs, backlog, and so forth.

Moore's perspective was to reunite Dewey's three contributions, into a critique of non-empirical knowledge. Hence, Moore's version of Dewey attached to a notion of truth about the law. Moore also dropped the internal perspective on law, by adhering to Holmes' prediction of what judges will do. Even though Moore's studies were adequate to show the gap between law in the books and law in action, they were lacking in powerful explanatory ideas, and there was no real clarity as to what should do after getting the information produced by the study.[380] There was no theory that allowed the results to be differentiated or interpreted. The tools of European sociology were unavailable to the movement at the time, due to language or disciplinary barriers.

For a number of reasons, Cook's version of Dewey triumphed in American academia. Cook never abandoned his case law method—so close to the internal perspective–nor did he expect others to do so. The relationship of science and law remained as an appendix of "law and

378 Schlegel *American legal realism* (n296) pos. 5016
379 Schlegel *American legal realism* (n296) pos. 5090
380 Schlegel *American legal realism* (n296) Pos 5203

… “, at arms length, without fully challenging, upsetting or divesting the “insider’s view”. This is Schlegel’s appraisal, even after the revamping of empirical legal research received large amounts of funds, which today translate into the funding of the American Law and Society Association.[381]

Realism and empirical legal studies are either movements or theories about measuring the world with law in mind—either to learn how it works, or to change it. Yet, the unsolvable question of how to relate the insider’s perspective with the outsider’s is unresolved. The question is revealed acutely if we understand the history of indicators as one about management, and knowledge, under the garment of law.

A new strand of legal realism has developed in the past decade, based on the benefits of big data, but attached to Dewey’s pragmatism, and empiricism. In hindsight, the original project in realism was to solve the problem of lost authority, substituting it with the new authority of nascent social sciences:

> Having lost faith in the ability of tradition and doctrine to rationally guide the development of the law, and armed with a vision of law as an instrument of social engineering, the legal realists argued that the law ought to be guided by reliable knowledge of its consequences on the social world – the sort of knowledge that the new social sciences promised to provide.[382]

The fluidity of transnational regimes, entails that “transnational legal processes” apply American legal realism to a conception of law as a process of continuous decisions, as opposed to a stable system of rules.[383] This approach comes close to the “managerial approach”, which views law as one tool in the box of compliance. The tension identified by Lang in old legal realism persists in new legal realism—or rather, persists as a form of governance in new legal realism, which operates under critical, more flexible ideas of the construction of social science, than its predecessor:

381 Schlegel *American legal realism* (n296) Pos. 5675

382 Andrew Lang ‘New Legal Realism, empiricism, and scientism: the relative objectivity of law and social science’ (2015) 28 Leiden Journal of International Law 231 p. 4

383 von Bogdandy, Dann & Goldmann ‘Developing the Publicness’ (n173) p. 18

> that the mode of mixed legal-scientific techno-governance which this ambivalent turn produced provided a number of practical tools for dealing pragmatically with the challenges to scientific authority thrown up in the second half of the 20th century – without the need to turn to reflexivity. In a world in which both legal formalism and scientific empiricism had been fundamentally undermined as sources of objectivity, this mode of governance has been able to continue to satisfy the practical demand for objective decision-making in particular sites of governance, with only a relatively minor and sometimes barely perceptible shift in the meaning of objectivity.[384]

The still unresolved form of connecting the views of law from the inside and from the outside, open the question on which field should accommodate. I will offer a perspective on what accommodation would look like from the outside.

I will explore some of these issues, from the standpoint of the usefulness in the preservation of law as a field of practice—as distinct of fact. This field of practice must be defined in terms of its relation to other fields of practice, if we are to understand some points of contact for the construction of indicators. The door I have chosen to travel from law to other fields of practice , is the interaction between law and fact. While many fields of knowledge deal with the interaction between power centers, around which human conduct gravitates, the realm of law is distinct in the explicit nature of the will of parties in legal transactions. Also, legal relationships are unique in the role centralized state institutions play in their shaping and enforcement. I wonder how we can transit from a state-centered theory of law, to one where networked relationships are better captured. The description of this project shares some aspects of the project of “new international legal positivism” in the disregard for formalism, the acknowledgement of multitude of actors beyond the state, the importance of integrating-non-legal analysis, although distinguishing clear lines, while insisting on the problem of

384 Lang (n375) p 12

ascertainment of legal norms.[385] Although the project of new international legal positivism is undefined yet, the concerns of its proponents resonate with the questions I wish to formulate. Concentrating in the role of facts in legal practice, will hopefully illuminate a passage from the disciplinary corners of law, to the points of contact with other disciplines. The relationship of facts with law can account for the interstice to transit across disciplinary fields.

To my knowledge, the only theory that distinguishes and bring together facts and rules is von Wright's logic of norms. That theory is consistent with Austin's speech act theory, and I believe von Wright's stance on legal thought is clearly anchored in Kelsenian legal theory. These devices together, can account for the network of normative acts in a governance environment, and can capture the complexity of an ever growing and tightening network of power relationships beyond the state. I believe these theories can be read in the light of the attributes of governance or transnational legal orders, and still preserve their explanatory power.

4.2 The distinction between facts and norms. Classical positivism

In earlier sections, I have drawn a picture of 'formalism', 'formal justice' or a 'culture of formalism'. None of these terms equate to 'positivism'. The strand of positivism I will explore commits only to the existence of norms as 'posited' by a norm-giving agent, and to the separation between law and morals. I will discuss here the implications of this perspective on the separation of law and fact. The next chapter will touch on some implications for the construction of of knowledge about law, and knowledge about social sciences. Regularly, legal theories of different flavors, offer a different accounts of the relationship between Is and Ought—or between facts and norms. Some legal theories are focused on the effect of downplaying the distinction of law and fact. Indicators are a creation of social science, where regular scientific knowledge methods apply. What happens if we wish to build indicators about some facts, that speak about law?

The traditional Is | Ought divide is championed by Hume in well known extracts from the Treatise on Human Nature:[386]

385 Jeremy Telman 'International legal positivism and legal realism' in Kammerhofer, D'Aspermont (Eds) *International legal positivism in a postmodern world* (CUP Cambridge 2014) [Amazon Kindle]

> I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprised to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason.

According to Hume, the world of natural inferences is essentially different to the world of practical inferences. The use of the former to justify the latter is unjustified. Whether this is an accurate reading of Hume is a matter of dissent. Literature points at the source of the question: the problem that requires a presupposed premise of the type “we must abide by God’s commands”, as a premise to the command that “god requires us to do ‘x’. How can we go from is to ought? asks Mcintyre. An option would be the following:

> If you wish to pass from a factual statement to a moral statement, treat the moral statement as the conclusion to a syllogism and the factual statement as a minor premise. Then to make the transition all that is needed is to supply another moral statement as a major premise.[387]

386 David Hume, *Treatise on human nature* (1896 ed) https://goo.gl/yMWF16 book III, Part I, section I, last paragraph

387 Alasdair C. MacIntyre ‘Hume on "is" and "ought"’ (1959) 68 Philosophical Review 451

Yet, it seems clear that Hume himself advocated for the transit from an is to an ought. For instance, advocating for pragmatic justifications to follow rules of justice because “their observance is to everyone's long-term interest;” or the assumption that “there is no one who does not gain more than he loses by such obedience.” Macintyre explains these statements actually “derive an "ought" from an "is"[388] and therefore, point to a different reading of the separation thesis.[389]

Other sources for the separation of is and ought are summarized by von Wright as the impossibility to derive imperatives from descriptive propositions (Poincare) or the impossibility to conclude prescriptive conclusions from purely descriptive statements (Hare).[390] Von Wright identifies three approaches to the is | ought debate:

> The first position I shall call cognitivist (or descriptivist). According to it, some norms are true, such that in their case one can truthfully say that something or other ought to or may be. One can, moreover, distinguish two forms of this position according to whether the truths are held to be contingent empirical facts to be ascertained through observation of the social reality or whether they are thought of as a kind of necessity to be grasped through reflection on the nature of law and morality. I shall call the two positions naturalist and non-naturalist cognitivism (descriptivism), respectively[391]

The third position, von Wright calls “prescriptivism”–and corresponds with positivistic legal theories, where rules exist because an agent creates them through a voluntary act. Naturalist and non-naturalist descriptivism are distinct in their treatment of facts: non-naturalist positions would remove norms from “contingent facts”–possibly in the guise of Kantian categorical imperative.[392]

388 Macintyre (n380) 457
389 Macintyre (n380) 457
390 Georg Henrik von Wright ‘Is and ought’ In Stanley L. Paulson (ed.) *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford University Press 1999) 367
391 von Wright ‘is and ought’ (n383) p 367
392 von Wright ‘is and ought’ (n383) p 368

Regular accounts of the relationship between is and ought attempt to make room for facts within a consistent legal theory. Hart's distinction between the internal and external points of view would fit this distinction; as would Weber's distinction between norm and fact. This framing of the question of law is traditional in the opposition between natural legal theory, positivist legal theory and realist legal theory. In the network analogy, a legal theory sheds light on certain human interactions: interactions occur, legal form is an interpretation. Norms, under many constructions, are necessarily in both Is and Ought worlds. They are facts to which we attach a particular meaning; acts with a particular, socially construed effect.[393] This divide is consistent with the theories that assert that laws are posited, ie., they require some form of human action to be created. Naturalistic positions would argue that the attribute of 'law' requires the attribute of value provided for beyond positive law.

If we accept that there is value in distinguishing facts from norms, describing the world is not the place of legal theory. Legal theory can only help us define the realm of law. To uncover the different layers of authority that go into the design of compliance indicators, the relation between norms to be complied with, and facts that fit into a judgment of compliance, are the essence of these tools, meant to operate in a highly technocratic environment.

The most basic statement of positivist legal theory is the distinction between law and fact. I will propose the use of tools from the realm of logic as a guidance in the choice of facts that amount to compliance with a rule. This is dangerous territory for several reasons: first, logic is the straw man in legal formalism, so long rejected in legal theory as a threat to bring back the prominence of formal lamguages. Second, the help we can get from logic in the construction of indicators, hardly seems efficient: logic can only be one part in an argument in favor or against the facts that go into the construction of particular indicators—yet, I argue this is a very important step in the legitimacy of indicator construction.

There are many elements in Kelsen's Pure Theory of Law which speak of the tenuous nature of the relationship between law and fact: Kelsen addresses the relationship of law and reality in the following passage:

393 Robert Alexy *Theory of Constitutional Rights* (Oxford UP, Oxford, 2010) p. 14

> If the validity, that is, the specific existence of the law, is considered to be part of natural reality, one is unable to grasp the specific meaning in which the law addresses itself to reality and thereby juxtaposes itself to reality, which can be in conformity or in conflict with the law only if reality is not identical with the validity of law. Just as it is impossible in determining validity to ignore its relation to reality, so it is likewise impossible to identify validity and reality.[394]

Reality and law, however, are both multivocal terms in the Pure Theory of Law. A scheme of relevant distinctions between law and fact that helps understand how this description is both helpful and limited, contains the following items: (i) Commands in general originate in a fact: an act of will. The existence of a norm can be traced to a fact; (ii) Facts are the object of judgments of legality or illegality; (iii) effectiveness as facts that comply with law; (iv) Law as limited by facts: norms are only possible where human action is relevant. Relevance of human action is limited by the laws of nature; (v) Law, as the set of all norms in a legal order, NOT determined by a fact, but by a presupposed "norm". I will explore these attributes of the fact – law relationship below.

4.2.1 The production of law as a result of an empirical fact

Legal production has two steps: (I) on is rooted in nature and to have a "natural" existence", we perceive some facts with our senses; (ii) the other, as a result of an interpretation of such fact:

> For if you analyze any body of facts interpreted as "legal" [...] two elements are distinguishable: one, an act or a series of acts-a happening occurring at a certain time and in a certain space, perceived by our senses: an external manifestation of human conduct; two, the legal meaning of this act, that is, the meaning conferred upon the act by the law.[395]

Yet, not every act of will is relevant to the production of law. Only those facts that we perceive by our senses, and are legally determined to produce law:

394 Hans Kelden (Max Knight trans) *Pure Theory of Law* (UCalifornia Press, Berkeley 1967) [Amazon Kindle] pos 3779

395 Kelsen 'Pure Theory' (n387) pos. 175

> the acts by which legal norms are created come into consideration as objects of legal cognition only so far as they are determined by legal norms; and the basic norm, the ultimate reason for the validity of these norms, is not created by a real will at all, but is presupposed in legal thinking [396]

All acts of will may be susceptible of an interpretation as a command of some sort; but among those, only a limited set–defined by another rule of law–are to be considered a law-creating facts. Whether we look at law from the inside or the outside, we need to define the object first. Perhaps this can be dismissed as the insider's definition of a legally relevant act.

4.2.2 Reality as the matter of valid, value judgments

Reality is the object of a "value" judgment performed whenever we assess consistency of human action to that which is prescribed by law. Law imposes one kind of meaning upon reality, to qualify it as lawful or unlawful:

> What turns this event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation. The specifically legal meaning of this act is derived from a "norm" whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm.[397]

Such judgments are only possible in a wider legal order, if commands are not only an act of will imposed by force upon one individual; but acts of will objectively interpreted by the community as a whole. Subjective "ought" can derive from any circumstance where one expresses her will about somebody else's conduct, and such will is accompanied by some form of threat–a command backed by a threat, as John Austin would have it. Yet, in order to be called a norm, such command must be also objectively mandatory:

> "Ought" is the subjective meaning of every act of will directed at the behavior of another. But not every such act has also objectively this meaning; and only if the act

396 Kelsen 'Pure Theory' (n387) pos.48
397 Kelsen 'Pure Theory' (n387) pos. 203

> of will has also the objective meaning of an "ought", is this "ought" called a "norm."[398]

A thin notion of "objective" would suffice here: the meaning of an act of will is objective inasmuch as it is anchored in a common, pre-existing understanding, and can thus be imposed upon an unwilling party. "Objectivity" in this sense, can be adapted to a constructive notion, as opposed to a per-determined, modern, scientific sense.[399] An objectively mandatory command can only be distinguished from a subjectively mandatory command in reference to another norm: a norm which determine such act of will is valid– hence providing it with objectively binding force:

> Therefore, the objective validity of a norm which is the subjective meaning of an act of will that men ought to behave in a certain way, does not follow from the factual act, that is to say, from an is, but again from a norm authorizing this act, that is to say, from an ought.[400]

Hence, the existence of a norm is not identified with the existence of an act of will–and the subjective meaning attached to it–but to the fact that an objective meaning may be attached to it: that is, its validity. This attribute distinguishes the existence of norms from those of natural facts– that is, the act of will which poses the norm:

> By the word "validity" we designate the specific existence of a norm. When we describe the meaning or significance of a norm creating act, we say: By this act some human behavior is ordered, commanded, prescribed, forbidden or permitted, allowed , authorized. If we use the word "ought" to comprise all these meanings, as has been suggested, we can describe the validity of a norm by saying: something ought to, or ought not to, be done. If we describe the specific existence of a norm as

398 Kelsen 'Pure Theory' (n387) pos.268

399 Later, I will address what Kuhn calls "text-book measurement", which unveils how non-constructive meanings of objectivity are naive. See below, 6 'A modest meaning for indicators and measurement, p. 215

400 Kelsen 'Pure Theory' (n387) pos 291

> "validity" we express by this the special manner in which the norm –in contradistinction to a natural fact–is existent.[401]

"Truth" as a judgment is usually attributed to propositions of the descriptive world. It is used in this theory as substitute for "valid".[402] I think we do not need to attribute to the Pure Theory, the commitment of formalistic legal theories to one objective, and logically determined outcome from the legal system for every case.

4.2.3 Fact as correspondence between a rule and an action: compliance, effectiveness

The connection between law and fact exists also in regard to the conduct agents display, which we judge of lawful or unlawful. The relationship between the (valid) norm, and the conduct displayed is referred to as "effectiveness":

> Since the validity of a norm is an ought and not an is, it is necessary to distinguish the validity of a norm from its effectiveness. Effectiveness is an "is-fact"the fact that the norm is actually applied and obeyed, the fact that people actually behave according to the norm. To say that a norm is valid, however, something else than that it is actually applied and obeyed; it means that it ought to be obeyed and applied, although it is true that there may be some connection between validity and effectiveness.[403]

Validity, qua norm existence, cannot be equated to effectiveness. Kelsen limits himself to say that "there may be some connection" between these two concepts, without committing to one particular connection.

The relation between law and fact in the term "effectiveness" is further obscured by the difficulties posed by the limits on the universe of that which makes sense to regulate:

> A norm that is not obeyed by anybody anywhere, in other words, a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum

401 Kelsen 'Pure Theory' (n387) pos 311

402 Kelsen 'Pure Theory' (n387) pos 468 in reference to the existence of a Christin ruleth requires everyone to love ones' friends and hate one's enemies. Such rule is "untrue".

403 Kelsen 'Pure Theory' (n387) pos 323

> of effectiveness is a condition of validity. "Validity" of a legal norm, however, presupposes, however, that it is possible to behave in a way contrary to it: a norm that were to prescribe that something ought to be done of which everyone knows beforehand that it must happen necessarily according to the laws of nature always and everywhere would be as senseless as a norm which were to prescribe that something ought to be done of which one knows beforehand that it is impossible according to the laws of nature.[404]

Kelsen seems to equate the relationship of validity to instances of factually impossible norms. It can be easily be observed that these examples of validity, seem rather off the mark. The reason why we cannot call these mandates norms at all, is because they provide no opportunity for human action to actually produce an outcome. Laws of nature take away any possibility of performance. Impossible changes or necessary changes have no relation to human action. No agent is relevant or required in those rules. These examples really do not clarify the idea of effectiveness, which is only relevant in cases where a norm is complied with.

Later, Kelsen will come back to this idea to assert non-compliance as a required condition for a norm to be a norm–in other words, in-effectiveness is as much a condition of norms as effectiveness.

A basic tenet of the Pure Theory is that the world of 'Is' and 'ought' are separate worlds. The life of facts is independent from the life of acts of will we interpret socially as commands. Kelsen further exemplifies this with the idea that effectiveness is related to the by and large conduct of people regarding one particular rule:

> A legal norm becomes valid before it becomes effective, that is, before it is applied and obeyed; a law court that applies a statute immediately after promulgation – therefore before the statute had a chance to become "effective"–applies a valid legal norm.[405]

404 Kelsen 'Pure Theory' (n387) pos 320
405 Kelsen 'Pure Theory' (n387) pos 333

Another way of describing this relation is that we are only able to pass judgment. on effectiveness after a norm has born. Before a norm exists, we may only describe social reality. Only after a norm has become valid, may we properly predicate "effectiveness" of such norm. This, however, seems at odds with the statement that a judge applying a new norm does so "before the statute had "a chance to become "effective"". Such statement seems to suggest that effectiveness means a "change" in a pattern of human conduct. The statement obliterates two points of Kelsen's own definitions: (i) validity is not causality. Not in a factual way. Statutes need not "have a chance to become "effective""; and (ii) all we do when we predicate legality or illegality of a given action, is its correspondence with a norm–not the ability of the statute to transform a pattern of human action. That seems a perfectly adequate question for non-legal disciplines to answer.

This latter meaning of the term "effectiveness", however, seems to be rejected by Kelsen:

> since in the foregoing pages the validity of a social order has been distinguished from its effectiveness, it should be noted that a social order prescribing rewards or punishments is effective in the literal sense of the of the word insofar only of the behavior conditioning the reward is caused by the desire of the reward, and the behavior avoiding the punishment is caused by the fear of punishment. However, it is useful to speak of an effective order also if the behavior of the individuals by and large corresponds to the order, that is to say, if the individuals by and large by their behavior fulfill the conditions of the rewards and avoid the conditions of the punishments, without regard to the motive of their behavior. Used in this way the concept of effectiveness has a normative, not causal meaning.[406]

"Effective" refers to the causation of an effect. A normative order is effective if the "desire of the reward" or "fear of punishment" caused the behavior displayed by individuals. Regardless of the importance of this statement, whether law is effective in his sense is not a legal question–rather a sociological or economic one. The reason for this, according to the tenets of the Pure Theory, is that causality is a relationship pertaining to the world of 'is'. Legal theory would limit

406 Kelsen 'Pure Theory' (n387) pos 596

itself to ascertaining the existence of the 'ought' statement. Effectiveness, therefore, seems the outsider's perspective, advocated for in the realist movement.

Kelsen's ideas on effectiveness are fundamentally unchanged from the Pure Theory to the General theory of norms. If at all, the relationship from effectiveness to particular norms is clarified; and the relationship of "condition" is clarified as one of possibility, rather than concept. Revisiting effectiveness, Kelsen explains in the General Theory of Norms that:

> The usual view is that the effectiveness of a normative order consists in the fact that its norms which command a certain behavior are actually observed and, if not observed, then applied.[407]

Kelsen accounts for the convenience of such structure by signaling the easier result: commending a hero is easier than being one; criticizing a liar is easier than avoid lying.[408] Despite the multitude of factors leading to compliance (or non-compliance) these motives are [most of the time] irrelevant. Effectiveness means application "by and large"–rather than on every single occasion. Remarkably, Kelsen points at the possibility of non-compliance as the condition for relevance of norms.[409] Effectiveness is to Is as validity is to Ought. For instance, desuetude is an instance of loss of effectiveness and validity derived from the extinction of the possibility of application.[410] Effectiveness is a condition of validity inasmuch as to be valid, the norm must be effective, or the possibility for effectiveness must exist.[411]

In addition to effectiveness, the act of positing of a norm –an Is– is another condition of validity: "But we cannot say that a general norm is effective if concrete states of affairs of the relevant kind do occur, but the courts do not become aware of them for some reason or other".[412]

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407 Hans Kelsen *General Theory of Norms* (Oxford OUP 1991) p 138
408 Kelsen 'General theory' (n400) p 138
409 Kelsen 'General theory' (n400) p 139
410 Kelsen 'General theory' (n400) p 139
411 Kelsen 'General theory' (n400) p 141
412 Kelsen 'General theory' (n400) p 141

4.2.4 Facts as logical limits to law-conditions and consequences

An “act of will” relevant to norm creation must refer to human action. The idea that an act of will may command the elements of nature to behave in a certain way seems foreign to the idea of norm creating acts.

That norms relate to human action implies a series of conditions:

> Let us take the statement: “The norm refers to a certain human behavior.” If by this behavior we mean the behavior that constitutes the content of the norm, then the norm can also refer to other facts than human behavior–however, only to the extent that these are conditions or (if existent in reality) effects of human behavior. For example, a norm can prescribe that in the event of a natural catastrophe those not immediately affected are obliged to render aid to the victims as much as possible. If a legal norm establishes the death penalty for murder, then the delict as well as the sanction do not only consist in a certain human behavior–directed towards the death of another human being– but also in a specific effect of such behavior, namely the death of a human being, which is a physiological event, not a human behavior. Since human behavior, as well as its conditions and effects, occur in space and time, the legal norm must refer to space and time.[413]

Identification in time and space must be at least discernible in the legal norm–even if we conclude that every time, everywhere, one must refrain from behavior ‘p’. More importantly, though, Kelsen points at the logical limitations that the laws of nature impose on the content of laws: laws do not command of natural catastrophes that they ought to arise or not. Laws refer to human action in those contexts. Neither do laws prescribe whether a particular medical fact ought or not bring about the death of a human being. Laws relevant where human conduct is required to make a situation happen.

Kelsen’s distinction between conditions and effects in this passage is perhaps insufficient to compare his terminology to von Wright’s initial and end state of affairs; but also with

413 Kelsen ‘Pure Theory’ (n387) pos 345

conditions of application. These three ideas seem suitable to cover the notions of conditions and consequences.

The parallel between Kelsen's and von Wright's terminology may be also seen in the following passage where Kelsen underscores the necessity of non-compliance as a logical condition for a norm to exist:

> As mentioned in another connection, the possibility of an antagonism between that which is prescribed by Norm is something that ought to be and that which actually happens must exist; a norm, prescribing that something ought to be, which one knows beforehand must happen anyway according to a law of nature, is meaningless – such norm would not be regarded as valid.[414]

The result of the possibility of non-compliance is that effectiveness as a test of validity or existence in a broader sense must always assume that non-compliance is a possibility. The question that remains open, though, is whether non-compliance is a condition of fact, or only a logical condition:

> However, a legal order does not lose its validity when a single legal norm loses its effectiveness. A legal order is regarded as valid, if it storms are by and large (that is, actually and debate). Nor does a single legal norm loses its validity if it is only exceptionally not effective in single cases.[415]

In this connection, an important point is made by Kelsen on the logical or factual dimension of effectiveness:

> The described relationship between validity and effectiveness refers to general legal norms. But also individual legal norms (judicial decisions, decrees) that prescribed an individual coercive act lose their vanity if they are permanently unexecuted and therefore ineffective, as has been shown in the discussion of the conflict between two legal decisions[416]

414 Kelsen 'Pure Theory' (n387) pos 3762
415 Kelsen 'Pure Theory' (n387) pos 3762
416 Kelsen 'Pure Theory' (n387) pos 3772

Conflict ultimately means that two norms may not be complied with at the same time. As a matter of logical necessity, conflicting norms will yield one ineffective norm, and one effective norm. The validity of both, however, is not necessarily questioned or destroyed, Solutions to norm conflict do not necessarily imply the declaration of void rules. Legal systems have many solutions where rules remain part of the system.

Another interesting consequence of the limitation that facts pose upon the legal order is a minimum of choice for every individual. Kelsen states that:

> Even under the most authoritarian order there exists something like inalienable freedom; not as a right inmate and natural, but as a consequence of the limited possibility of positively regulating human behavior[417]

This role of facts implies that there is a logical impossibility for the legal order to interpret explicitly every human action. Yet, this logical impossibility is a legal principle in Western legal regimes–and is an important component in the concept of rule of law: citizens are allowed to do anything that is not otherwise prescribed for; authorities, however, are allowed to do only what their powers explicitly prescribe for.

4.2.5 Facts excluded from the definition of a legal order. Hierarchy as contingent.

By ”law” we mean “orders of human behavior”.[418] Rather than a logical limit to the content of laws, Kelsen concludes that “modern” law excludes regulations regarding anything but human behavior. He briefly accounts for animistic contents in antique legal regimes,like the regulation of the killing of an ox responsible for killing a man. More interestingly, he posits the requirement for a criterion of unity that will allow the identification of a legal order:

> An “order” is a system of norms whose unity is constituted by the fact that they all have the same reason for their validity; and the reason for the validity of a normative order is a basic norm–as we shall see–from which the validity of all norms of the order are observed. A single norm is a valid legal norm, if it

417 Kelsen ‘Pure Theory’ (n387) pos 888
418 Kelsen ‘Pure Theory’ (n387) pos 673

> corresponds to the concept of "law" and is part of a legal order; and it is part of a legal order if its validity is based on the basic norm of that order."[419]

This statement may be interpreted as pointing to the first constitution of a state. Or simply, a rule in the regular way Kelsen defines it: the meaning of an act of will. Kelsen describes the dynamic and static principles of norm creation.[420] An oversimplification of these definitions would be that the static principle of norm creation operates as the logical inference of all rules from one general rule which prescribes human behavior. The dynamic principle, however, is characterized by the identification of norms via the creation of organs with norm creating powers; which may in turn create other organs with other norm creation powers.

Kelsen uses an interesting example to distinguish the static and dynamic principles in legal orders:

> in both cases the reason for the validity is not that God or his son issued a certain norm at a certain time in a certain place, but the tacitly presupposed norm that one ought to obey the commands of God or his son[421]

This means that the positing of an act of will–even if supra-human–cannot be valued as an objective ought without the existence of a norm that allows for such value to be established. An organ must be designated and powers must be attributed to it.

This "hierarchical" structure of the legal order seems intuitive–although sometimes inviting to confusion.[422] The image created though this "hierarchical" order is one of a straight line of power conferring rules, which so far may well start at the "material" constitution of any state. It is important to observe, however, that "hierarchical" does not seem paramount in the attributes of the legal system. "Hierarchical" appears only 4 times in the Pure Theory, and "hierarchy" appears 12 times. It is true that a bottom-down structure can be read into Kelsen's theory, but I believe we can also take this reading out of the theory without many major changes. Actually, when referring to the hierarchy of international law versus domestic law, Kelsen

419 Kelsen 'Pure Theory' (n387) pos 673
420 Kelsen 'Pure Theory' (n387) pos ch V,s. 34
421 Kelsen 'Pure Theory' (n387)
422 Kelsen 'Pure Theory' (n387) pos ch V, s. 35 a)

explains how this relationship is a matter of perspective. Why would we not be allowed to extend the same courtesy to other forms of organization of the contents of law? This is the reason why I believe the structure in the Pure Theory can be used to explain chains of validity that pierce the limits of the state legal order, and into other legal orders, ie., transnational legal orders.

Yet, as a necessary, logical consequence of the commitment that Kelsen makes concerning the relationship between law and facts, the validity of a rule–be it a constitutional rule–may not derive from a fact–but from another rule. A "higher" rule:

> the question why a norm is valid, white an individual ought to behave in certain way, cannot be answered by ascertaining a fact, that is, by a statement that something is; that the reason for the validity of a norm cannot be a fact . From the circumstances that something is cannot follow them something ought to be; and that something ought to be cannot be the reason that something is. The reason for the validity of a norm can only be the validity of another norm. A norm which represents the reason for the validity of another norm is figuratively spoken of as a higher norm in relation to a lower norm.[423]

Yet, chains of validity must have a starting point. One ruler Rex must be empowered to enact any power conferring rule. This logical "cap" to successive links in a chain of validity is called the "Basic norm" or Grundnorm– that which sets the duty to obey the laws enacted in exercise of whichever organ, under the dynamic principle of law creation:

> the acts by which legal norms are created come into consideration as objects of legal cognition only so far as they are determined by legal norms; and the basic norm, the ultimate reason for the validity of these norms, is not created by a real will at all, but is presupposed in legal thinking.[424]

This important attribute of the Basic norm is a subtle, but important distinction between modern natural law theories and the Pure theory: under the pure theory, any extra-human authority is rejected as a source of binding legal rules.

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423 Kelsen 'Pure Theory' (n387) pos 3433
424 Kelsen 'Pure Theory' (n387) pos 529

Kelsen's multi-layered notion of the relationship between facts and law is very powerful to appreciate how these two dimensions are so far apart. The theory, at the same time, is constant reminder of how law and fact have necessary connections. There are no rules without norm-positing acts; nor are there rules outside the possible worlds defined by the logical possibilities of the world that is. These traits are useful in the definition of indicator content: indicators about rules must be related to rule content. Rule content must be connected to a norm positing act, and must also lie within the limits of logical possibility of the world agents can act upon.

These rich commitments to the relationship between law and fact, provide guidance to choose indicator contents. This guidance is completed by the theory of action put forward by von Wright.

4.3 Von Wright's logic as a heuristic for a transit between facts and norms

The consequences of the sharp is | ought divide makes it difficult for the Pure Theory of Law to plausibly introduce the possibility of a logic of norms. We must explore the viability of the project before jumping in. Logic, confined to truth or falsehood characterizations simply cannot be applied to these entities. Also, even if we aspire to a contradiction-free legal system, this cannot mean that agents will not express contradictory desires. A logic of "norms", in the sense of a rationally bound norm giving agent, seems unfeasible. Norm giving agents perform acts of will when they posit a norm. Logic as applied to rules, simply means that two contradictory desires expressed as rules will not both be satisfied at the same time–without any particular implication upon the actual valid elements within the legal order.

We do not need to suppose a *homo juridicus* akin the *homo economicus*, rational and contradiction free. Nor is this work a calling to go back to Langdellian formalism! Rather, logic of norms can be applied to the sense, the meaning of an act of will by a norm giving agent, performed from the perspective of the norm subject. Logic could never discard the problems of interpretation, but can work as a heuristic in the face of alternatives. Regardless of whether a norm giving agent may be rationally, logically bond or not, norm-subjects–those to whom norms are addressed–are limited by factual reality: two contrary mandates are simply impossible to

satisfy at the same time and place. This is a way of interpreting the logic of norm-propositions as studied by von Wright and Alchourron. Norm descriptions are von Wright's answer to the matter of whether logic can actually be applied to norms. Rather than using logic to analyze an act of will, von Wright proposes the use of logic around the possible worlds described by the states of affairs norms predicate about, as well as the actions required to comply with the command.[425] The varying definitions of normative action, norm prescriptions and norm-lektons, raises the question of the elements suitable for norm analysis in von Wright's deontic logic.[426]

von Wright plainly rejects the idea that ought statements may be derived from is statements–not logically at least, for the very simple reason that logic is a truth preserving function. And prescriptions cannot reasonably be said to express any true or false statements:

> We can now give to the traditional Is-Ought problem a slightly new formulation: Can prescriptions follow logically from descriptions? We can supplement this with the converse question: Can descriptions follow logically from prescriptions? And we can add a third question: Can prescriptions follow from other prescriptions?
>
> I think that the answer to all three questions is a firm 'No'. The reason is simple: Logical consequence is a truth-preserving relationship.[427]

425 Cfr. Carlos E. Alchourrón & Eugenio Bulygin 'von Wright on deontic logic and the Philosophy of law' in Paul Arthur Schilpp & Lewis Edward Hahn *The Philosophy of GH von Wright* (Open Court Publishing Company, Illinois, 1989) p. 665 690; Georg Henrik von Wright *Norm and Action. A logical enquiry* (Routledge and Kegan Paul, London, 1963) https://goo.gl/1x1hWb Chapter X, s. 5

426 According to Alchurrón and Bulyguin, von Wright's system is designed to analyze prescriptions; while many problems would be solved if the system were to analyze nor-descriptions: (i) the idea of non-contradiction as a condition for norms to exist within a normative system; (ii) the idea of non-contradiction among system norms as the impossibility of deontic logic; (iii) a potential solution to the problem of validity. Plainly put, the possibility to distinguish symbols applied to norm-descriptions and norms, would allow the iteration of deontic operators. This, in turn, would allow for the qualification of norms of "higher-order", which are ultimately needed to find a strong permission for a norm-giving authority. Whether higher order norms are allowed for, the question remains whether norms or norm-descriptions should serve as the object of analysis. According to A&B, the complications of norm analysis can be circumvented by analyzing simply norm descriptions. Practically, this would entail the analysis of norms as communicated by the norm giving authority, Alchourrón & Eugenio Bulygin (n418)

427 von Wright 'is and ought' (n383) p 371

How would it be then feasible to use logical relationships when discussing norms, if the truth function must be so clearly rejected as a content of norms? This problems has been dubbed the"Jorgensen dilemma". "Jorgensen's dilemma is the most significant problem of deontic logic"[428]. The challenge to this argument may only be presented in one of three ways: (i) indeed, norms are not capable of truth or falsehood, and hence logic is not applicable to them; or (ii) norms are capable of truth or falsehood and logic applies to them; or (iii) norms are not capable of truth or falsehood, yet logic applies to them nonetheless, because logic is not limited to the realm of truth or falsehood.[429]

The problem of the applicability of logic to legal norms is relevant not only because I have chosen to propose this method as one that can shed light upon a particular issue of indicator construction. The problem is important also, because the basic tenets of a legal theory that accounts for the relationships of is | ought have been set forth in the Pure Theory of Law . Yet, it has been Kelsen himself who has acutely challenged the project of deontic logic altogether. As explained by Navarro & Rodriguez, the later writings of Kelsen in 'General Theory of Norms' point in the direction of attacking four alternatives to Jorgensen's dilemma–hence, leaving the dilemma untouched:

(i) the identity between prescriptive and descriptive statements;

(ii) the applicability of logic to the descriptive portions of prescriptive statements;

(iii) the applicability of logic to norm-prescriptions–even if in a different guise from von Wright's or Bulygin's;

(iv) the use of "validity" instead of "truth" as the preserved, hereditary property via logical argument;

As in the second edition of the Pure Theory of Law , Kelsen maintains the contingent observation that legal systems usually contain apparently contradictory requirements–such contradiction has in fact, no impact upon the supposed validity of both rules. The impact of such contradictions may manifest only as the lack of application of one of the contradictory rules–hence deriving in its lack of efficacy–not validity: "individual legal norms, although logically

428 Pablo Navarro & Jorge Rodríguez Deontic logic and legal systems (Cambridge UP, New York, 2014) , fn 45
429 Navarro & Rodríguez (n156) fn 46

derivable from general legal norms plus certain facts, are not valid without an institutional decision",[430] is how Navarro and Rodriguez rephrase Kelsen's argument on the applicability of logic to norms. The challenge misses Jorgensen's dilemma. Navarro and Rodriguez point out that the form how norms come to existence is not a logical problem, but an ontological one. Hence, whether the inference of a particular norm brings about the existence of another norm or not, is not a challenge against the applicability of legal norms.

Also, as pointed out by Navarro and Rodriguez, the applicability of logic to legal systems is already assumed by Kelsen when defining the static principle of norm creation.[431] Norms, he says, may be derived from general legal norms. This principle is relevant to all contents of modern constitutions which are not properly power conferring rules—e.g., mostly rights related norms. The static principle of norm creation comes together with the dynamic principle –that consisting of norm creation via the identified organs and the powers granted to them in the constitutions.

Navarro and Rodriguez also suggest that the exclusion of logic from the realm of law has a dramatic effect upon Kelsen's theory, since such exclusion would deprive norms of their "guiding function". to model human conduct. Such effect would come from the fact that norms are acts of will, aimed at guiding human behavior. If logic is inapplicable to norms, norm-subjects would be deprived of the mechanism they need to assume one particular way of action because it has a particular deontic qualification. Yet, this criticism assumes two difficult steps: (i) a causal relation between norms and human behavior–which is in itself a difficult assertion; and (ii) that the "guidance" norm-subjects get from acts of will comes via a rational, logical process. This assumption seems at odds with the starting point of this discussion: whether logic is applicable to a world different from the world that is. Challenging the "guidance" subjects get from norms on the basis of the lack of applicability of logic, seems a circular argument.

Suffice it to say that despite the fact that Kelsen endorses Jorgensen's dilemma, there seem to be good reasons to say that he was also admitting that there is some logic applicable to norms, so much so, that despite the effect upon their validity, norms may sometimes require

430 Navarro & Rodríguez (n156) p 53

431 Kelsen 'Pure Theory' (n387) Sect 34 (b) 'The Static and the Dynamic principle"

contradictory conducts. For instance, Von Wright asserts Kelsen's interest in logic: "he looked for support in logic for his idea that a legal order is of necessity closed, that is, that there are no 'gaps' in the law, and for the idea that a legal order must be free from 'contradictions'."[432]

4.3.1 What is the realm of deontic logic and how it relates to the is | ought debate

The distinction between facts and norms we are using here, is related to an empirical, descriptive dimension as divergent from a form of communication where we can issue or identify a desire about someone else's conduct. The descriptive function reveals something that happened, or something someone said. The imperative form of communications conveys the message that someone wants something from someone else. These distinctions are sometimes hard to square with "normative" theories of law: we can describe what the law is, and we can pass judgment on how it should be. This, however, entails a description of the contents of law—rather than the use of an imperative form. This is how Lewellyn's divorce from is and ought would be used here.

von Wright observes that there are descriptive and prescriptive interpretations of normative acts: a prescriptive interpretation means that the agent is normatively required to display a given conduct. The descriptive interpretation means that there is a norm that exists to that effect.[433] The summary of von Wright's reasoning is as follows: normative statements assert whether action 'p' is deontically qualified (agent ought to p, or -p, or is allowed to 'p'). Generally speaking, the truth-ground of a normative statement is the existence of a norm:

(i) 'Norm-proposition' is the statement that a norm 'n' exists;

(iI) the truth of norm propositions depends on whether such norm actually exists;

(iii) the existence of a norm is a fact;[434]

von Wright attributes this apparent ambivalence of prescriptions–which may often be expressed as predictions of states of affairs–to Ingemar Hedenius.[435]

To challenge the implications of the is | ought debate to discuss the possibility of deontic logic, von Wright wonders if descriptions can derive from prescriptions. He makes reference to

432 von Wright 'is and ought' (n383) p 372
433 Von Wright 'Norm and Action' (n418) Chapter VI, s. 9
434 Von Wright 'Norm and Action' (n418) Chapter VI s. 10
435 Von Wright 'Norm and Action' (n418) Chapter VI s. 9

the Kantian “Ought implies can” position. Von Wright describes a role for deontic logic that reconciles both the idea that Jorgensen’s dilemma cannot be surmounted; and the idea that norms do holds some relationship to facts, enough to allow the application of truth values.

The first point to deal with is what we mean when we say that two norms contradict each other:

> Calling norms contradictory is a signal that something is 'unsatisfactory' about them. In order to see what it is we must, I think, reflect on the purpose of norms and of norm-giving activity such as legislation.[436]

This statement makes reference to the notion of a “rational” law-giver. Nothing prevents law-givers from enacting contradictory legislation. Yet,there exists a factual impossibility for norm-agents to comply with two contradictory mandates at the same time. Since von Wright openly concedes the accuracy of Jorgensen's dilemma, he summarizes the role for deontic logic as follows:

> Deontic logic, to put it in a nutshell, is the study of logical relations in deontically perfect worlds. The fact that norms are neither true nor false constitutes no obstacle to this study. Deontic logic is not concerned with logical relations between prescriptions (norms) but with logical relations between the ideal states the descriptions of which are implicit in norms.[437]

Norms carry implicit descriptions of ideal states. These ideal states correspond with the world that would be if the norm were complied with. The normative order as a whole may be said to “verify” a set of propositions that are true if norms are fully complied with:

> The myth demolished, what remains of the 'realm' is a description of an alternative, 'ideal' world constituted by the norm-contents of a given normative code or order. This description can, point by point, be compared with reality and will then normally be found to be partly true, partly false of our real world. Calling the

436 von Wright ‘is and ought’ (n383) p 373
437 von Wright ‘is and ought’ (n383) p 375

> description false does not mean that it describes what is sometimes called a 'false ideal'. It means that the actual world is not perfect, the ideal not realized.[438]

In these circumstances, the role of deontic logic is to "expound and make clear the exact nature of the ideal state of affairs which the law envisages". Von Wright's description of the role of logic is effective because it is "a solution which both preserves the undeliverability of the ideal from the real and accords to the existence of norms the same robust reality as other (social) facts."[439] In a similar vein:

> Norms prescribe something and do not describe anything. But the content of norms, that is, that which norms pronounce obligatory, permitted, or forbidden, may be said to describe an ideal world. Between the constituent parts of it logical relations can obtain. The formal study of such relations is the subject-matter of deontic logic, also called, somewhat misleadingly, the 'logic of norms'."[440]

The way the content of norms are descriptive, seems best explained with von Wright's core concepts for a logic of change and action. I will discuss these elements below.

4.3.2 Change in states of affairs along time

All norms have actions as their subject matter. All actions have changes as their subject matter. Change is the underlying notion of action. Change refers to states of affairs that begin or cease to exist–or remain the same in the absence of such change States of affairs are individual inasmuch as localized in a given place and time. Generic states of affairs can be repeated in different occasions.[441]

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438 von Wright 'is and ought' (n383) p 375

439 von Wright 'is and ought' (n383) p 375

440 von Wright 'is and ought' (n383) p 39; subsequent sections of von Wright's paper challenge arguments like Searle's on the changing nature of the is | ought divide due to speech-acts. Despite the relevance of acknowledging these performative use of language, the impact of speech acts upon the is | ought debate must be set in perspective: is certain speech acts have legal effects, that is because a norm exists which requires such speech acts to be performed.

441 GH von Wright *Un ensayo de lógica deóntica y la teoría general de la acción* 2nd ed (UNAM-IIF México 1998) II, s. 3)

States of affairs cannot be and not be in the same occasion. In a given place and time, the coexistence of a state of affairs and its negation is logically impossible. The rules of logic preclude from predicating proposition ‘p’ and the negation of said proposition at the same time and pace. Once we have settled on a meaning of a legal rule, we can visualize how law cannot operate is the same state of affairs is and is not at the same time. Logic would call for a refinement in interpretation, so that the same state of affairs is maintained throughout the enterprise of interpretation.

This rule of non-contradiction, familiar from propositional logic lies at the starting point of the logic of change: for generic states of affairs (where either place or time are not defined), T expressions are built as follows:

a. a state of affairs ‘p’ lies on the left of letter ’T’ (for ‘time’);
b. another description of a state of affairs lies on the right of ‘T’;
c. both descriptions relate to states of affairs in the same place and at contiguous moments in time.

Hence, the expression “– p T p” would be read as ‘–p, then p’, meaning the creation, extinction (pT–p), persistence (pTp) or non-existence (–pT–p) of state of affairs ‘p’.[442] These expressions serve the purpose of connecting two descriptions of the world in two contiguous spots in a time-line.

Thus described, “change” means the succession in time of two images, two pictures, where we predicate about the creation, extinction or continuity of a particular attribute in them.

4.3.3 Action and agency to prompt change[443]

The condition for a rule of the state to exist, is human action. Where action is not possible, rules lack any sense.

The elements of a theory of change fall short of a description of action. A description of –pTp, where ‘p’ stands for ‘the door is closed’, cannot account for the difference between an agent

442 von Wright *Un ensayo de lógica deóntica* (n434) Chapter II, s. 3

443 Frederick Stoutland ‘von Wright’s theory of action’ in Paul Arthur Schilpp & Lewis Edward Hahn *The Philosophy of GH von Wright* (Open Court Publishing Company, Illinois, 1989) p. 305; GH von Wright *Un ensayo de lógica deóntica y la teoría general de la acción* 2a edición (UNAM-IIF México 1998)

who closes the door, or the wind causing the door to close. This is why von Wright introduces the idea of a modifier that stands for 'action', next to the description of a change in states of affairs.[444]

The bringing about or prevention of changes in states of affairs is the basic definition of an action. The 'interference' with the world to alter the course of nature, by definition, must be carried out upon one state of affairs, described by proposition 'p' at time=1; and another state of affairs 'p' at a contiguous moment, time=2. Interference must be deliberate, as opposed to a change that would present itself without such interference, by a natural event. For the interference to be qualified as one, failed attempts to achieve state of affairs 'p' at time=2

In order to distinguish von Wright's stance from other streams in the theory of action–and thus, qualify its merits– Stoutland explains von Wright's theory into three elements, which allow for an easier comparison with Platonic and Aristotelian strands of the theory of action. :

a. The initial state;

b. The end-state;

c. Thirdly, we must be told the state in which the world would be "[...] independently of the agent;"[445]

The notion of a state of affairs at time=2 must be described in terms of the change it represents in respect of state of affairs in time=1. Proposition 'p' at time=2 must be also put in terms of the outcome were the agent not to intervene. "Every description of an action contains, in a concealed form, a counter factual conditional statement."[446]

The possibility of action is provided by the facts: in a particular place and time, a door is closed, the idea of an agent closing the door lacks significance. Similarly, the idea of an agent closing a door in a particular place and time where heavy wind will in all probability cause the door to be closed anyway, also lacks significance. Therefore, von Wright combines state of affairs (a) and (c) above, as the condition for action, the occasion for an agent to successfully intervene in the world.[447]

444 von Wright *Un ensayo de lógica deóntica* (n434) Chapter II, s. 5
445 von Wright Un ensayo de lógica deóntica (n434) II, s. 5; Stoutland (n436) 306
446 Stoutland (n436) p 307
447 von Wright Un ensayo de lógica deóntica (n434) II, s. 5)

Also, von Wright brings along the idea of result, which combined with the occasion defines the "nature of action",[448] Not only do we need the idea of what the state of affairs on the right of 'T' will be. Even if action is indeed possible–because the change is not brought about without the intervention of the agent– "result" (another way of calling proposition 'p' at time=2) must thus be distinguished from "consequence". Counterfactuals are introduced in von Wright's calculus as 'i-expressions'. On the left of an I-expression, the state of affairs stands for a description of the word where an agent exists. On the right hand side, the state affairs corresponds to the state of affairs resulting in the absence of an intervention by such agent.[449]

A consequence (in a cause-effect relation) would qualify as changes in states of affairs simultaneous to 'p' , but described by a different proposition 'q'. The opening of a door may be called 'p'; a fly entering the room, r the change in temperature in the room might be designated by describing a change in proposition 'q'. The core qualification of consequences and results, is whether the agent intended them: "It is a bad mistake to think of the act(ion) itself as a cause of its result".[450] An act, however, can cause its consequences: its consequences will be (among) the effects caused by the occurrence of the act's result."[451]

In what sense does von Wright relate to other theories of action, and how does this fit with the relationship between agents, their intervention and the transformation those bring about?

Stoutland describes the causal theory of action as follows:

> an agent performs intentional act A if and only if: (1) a (the result) occurs because of the agent's mere behavior, (2) the agent desires something which he believes his behavior will bring about, and (3) this desire and belief cause his behavior. [452]

Applying these categories to the opening of the door, a causal theory of action would function as follows: "(1) if the door opens because of his behavior, (2) if he desires to let in some fresh air and believes his behavior (which caused the door to open) will bring that about, (3) if

448 von Wright Un ensayo de lógica deóntica (n434) II, s. 6)
449 von Wright Un ensayo de lógica deóntica (n434) II, s.6)
450 Stoutland (n436) p. 307 quoting Georg Henrik von Wright *Explanation and Understanding*
451 Stoutland (n436) p 307
452 Stoutland (n436) p 310

this desire and belief cause that behavior."[453] The concurrence of element (1) in von Wright's theory can be readily identified.

Stoutland describes the theory of agency as (1) the change occurring because of the agent's behavior; (2) the agent intended to achieve the result; and (3) "his behavior is caused by the agent himself in intending (or aiming at) a".[454] The distinctive character between the causal and agency theories if the difference on point (3): the agent's behavior "was caused by something the agent himself caused in intending that the door open (though this causing is not intentional)." More specifically:

> The proximate cause of the behavior in the act is neural events but these are caused ultimately, not by any events at all (even desires or beliefs) but by the agent himself, who causes them in aiming at the result of the act.[455]

The agency theory explains not only "event causality"–as the causal theory–but also, agent causality. Plainly, von Wright's theory is aimed only at event causality–the relevant aspect of action theory is to distinguish changes brought about by agent's intervention, from others that merely occur.

More fully, causal and agency theories clash at accounting for the role of causality. Agency theory displaces event causality and introduces "teleology of agent causality". Simplicity in von Wright's theory does away with the conflict between causal and agency theories: "[o]ne way of illuminating von Wright's thesis is to note that whereas the causal and agency theories lay down three conditions for intentional action, he lays down only two."[456] GH von Wright deliberately casts out agent casualty in view of its "unsurmountable difficulties".[457] Regardless of its characterization as a mental event, intention must be found in the action itself, since "we just see behavior as action."[458] In a way, action is the direct perception of intention: "[...] what we see (directly) is not mere behavior but intentional action: we see behavior as aimed at an end. [...]

453 Stoutland (n436) p 310
454 Stoutland (n436) p 311
455 Stoutland (n436) p 311
456 Stoutland (n436) p 312
457 Stoutland (n436) p 313, quoting Georg Henrik von Wright *Explanation and Understanding*, 191)
458 Stoutland (n436) p 314

such seeing is not inferring the mental causes of their behavior." The "meaning" of actions regarding intent, resembles meaning in language:

> An agent's intending something by his behavior is similar to a speaker's meaning something by an utterance. Sounds are not words because of their causes but because of their place in a language, their role in a language community, and the specific context in which they are uttered.[459]

The relevant question for norm analysis, is whether von Wright's theory is well suited to grasp acts of unintended outcomes, be them results or consequences. Legal norms regulate outcomes, distinguishing whether they were intended or not. The intention of such outcomes can only be ascertained with reference to actual conduct displayed by the agent, regardless of what the agent may construe or communicate concerning her such intentions.

4.3.4 Logic of Norms

The elements of a theory of action are conditions for a theory of prescriptions. The notion of change, paired with the characterization of an act or a forbearance relevant to produce that change has already been discussed. The next layer of analysis is the addition of a deontic modifier to the act or forbearance required to bring about the change. The elementary deontic modifiers denote obligation, prohibition and permission. Vast discussions surround the interchangeability of these modifiers. These discussions are relevant inasmuch as a strong parallel exists with modal logic: all, any, none. All, any and none have clear relations; all three are susceptible of expression in terms of others. The extent to which deontic modifiers enjoy the same properties is a matter for discussion. [460]

In any event, von Wright introduces six elementary components to every norm: "the character, the content, the condition of application, the authority, the subject(s), and the occasion."[461] Apart from these "components" or "ingredients", prescriptions (laws of the state) must have promulgation and sanctions.

459 Stoutland (n436) p 314
460 See, e.g., Alchourrón & Eugenio Bulygin (n418)
461 Von Wright 'Norm and Action' (n418) Chapter V, s. 1

The formulation of a norm would look like this:

O [d (p T –p)]

The six components of norm analysis provide for a rich, yet manageable approach to norms in general. First, the character of norms relates to the deontic modifier: obligatory, forbidden, permitted: O (obligatory), P (permitted), –p (not permitted / forbidden). In the example above, “obligatory” qualifies the action described within the brackets.

Second, the letters d or f stand for “action” or “forbearance”. These letters refer to the kind of intervention displayed by the agent. Such intervention refers to the “change” described by the transition described by “p T –p”.

The combination of the type of intervention, the change itself, constitute the “content” of the norm-kernel. Suppose in this example ‘p’ stands for “the door is open”. The change in question would bring about the opposite state of affairs “the door is closed”. The intervention is an action. The agent closed the door.

The “condition of application” entails the state of affairs combines the initial state of affairs where the transition started, as well a the state of affairs preset without the intervention of the agent. In this case, the condition of application refers to the door being open, ie., the initial state of affairs–and the same state of affairs, since no strong wind will close the door. An important discussion is whether the condition of application would include additional propositions that would complete the existence states of affairs ‘p’, e.g., the existence of a door, a wall where such door would be placed, a building where he wall plays a role…

This question is relevant to define what constitutes a condition of application for the norm kernels subject to analysis. No prescription exists in a vacuum.

Subjects, authority and occasion are simpler attributes of the norm-kernel. Subjects are simply the agents to whom the norm is addressed–and whose intervention is expected to produce the change. Authorities are the agents who perform the “normative action”, ie., the action which brings about the existence of the norm. Occasion is the time and space qualification to the performance of the action.

The combination of these ingredients means that the content includes everything in the prescription that does not belong to another ingredient. In the example of the door closed by the agent, one could argue that the condition of application requires, for instance, that the agent be granted access to the door; or any of the consideration mentioned earlier: that a door exists, on a wall, in a building, etc.

4.3.5 The method of norm analysis

Logic of action in von Wright is unique in relating the world of 'is' and the world of 'ought'. Any change in a state of affairs generated –or prevented–by the interference of an agent, is the necessary predicate of a norm. By definition, norms have actions as their object; and actions, in turn, require a change in states of affairs as their subject. The reverse process yields that the world of 'is' must exist by necessity, in order to provide for the condition of existence of any norm. A mandate whose object is not an action thus described, is not a norm in von Wright's terms.

These are the conditions for the logic of norms to operate. As a scheme for the analysis of norms, these conditions set also the condition for any proper description of the change as the object of any compliance indicator.

Action is required to generate or stop a change in states of affairs from happening. "[...] many acts may quite appropriately be described as the bringing about or effecting ('at will') of a change. To act is in a sense to interfere with 'the course of nature'."[462]

Deontic logic stems from the divide between the world of 'is' and 'ought'. Although imperfect,the separation of 'laws of nature', 'laws of the State' and 'laws of logic'[463] yields powerful distinctions.

Attributes like obedience or compliance are foreign to the laws of nature. These 'laws' are such inasmuch as descriptions of the world we perceive. Nature is not compelled to comply with it's own mandates. In the case of a discrepancy, inaccurate descriptions merely need to be

462 Von Wright 'Norm and Action' (n418) Chapter III, s. 2
463 Von Wright 'Norm and Action' (n418) Chapter I, s 2

changed to fit the facts. ‘True’ or ‘false’ are the adjectives we use to characterize these “laws” of nature”. Does water boil at 100 °C?[464]

A definition of “law of the state” is usually explained in terms of its difference with a law of nature. The implications of such difference are the conditions of the logic of action. Contrary to descriptive statements, prescriptions, rules, or “laws of the state” are intended to effect a change in human action. “Their aim is to influence behavior.”[465] This tradition is peculiar since the statement that such rules are ‘true’ or ‘false’, cannot be answered. Such characterization would be as difficult to grasp as the idea that water “ought to” boil at 100 °C. By definition, therefore, prescriptions, commands, rules, must be transmitted from a law-giver to an agent, with the intention that such command will be followed and conduct will be thus influenced.[466]

Yet, the command itself cannot correspond to any description of the world. Commands require a world of ‘is’ as an object–upon which the conduct they refer to, may be displayed. Yet, the world of ‘is’ remains untouched by the utterance of a command. Prescriptions, commands, rules, live in a separate universe from the world of ‘is’. Only an agent–who happens to act in compliance or contravention of said command–can touch the world of is with her actions.

Von Wright’s theory completes the guidance to choose norm contents for indicator construction, and shares many traits with the project of indicator construction. First, the theory is meant to explain the idea of human action as directed by norms, and to do that, von Wright commits to the effect of human action as an intervention in the natural world. Only active interventions that bring about a change in the world, are relevant as norm content. Like indicators, norms predicate about a change in nature. Second, the definition of norm content requires the interpreter to hold a minimum consistency between a description of the world—i.e., as states of affairs-- and the outcome of human action that norm content is expected to regulate. There is little sense in defining the outcome of rules, without a notion of the world where agents are expected to act upon. Like indicators, norm analysis requires a clear picture of the theatre of human action, and a distinction of the factors we can act upon, and those that change without

464 Von Wright ‘Norm and Action’ (n418) Chapter I, s. 2
465 Von Wright ‘Norm and Action’ (n418) Chapter II, s.3
466 Von Wright ‘Norm and Action’ (n418) Chapter I, s. 5

human intervention. Third, agency is always about human action. In a similar vein to the Pure Theory, norm content must be thought of as the result of concrete agents intervening in the world —as opposed to abstract, juristic persons. Like indicators, norm analysis requires the identification of the agents that are liable or expected to perform the actions we wish to track. Fourth, the model works for any combination of elements of legal authority, whether soft or hard law. Like indicators, this form of norm analysis is not committed to a particular form of law, but works for any normative expression, and is therefore suitable tor environments of relative normativity.

4.4 Law as a non-hierarchical network for power conduction

Hierarchy can be displaced from Kelsen's legal theory, to use its basic concepts to trace networked power relations. This is already done in his description of the relation between domestic and international law. Austin and von Wright probably have stronger views on hierarchy. The condition of superiority of the law-giving authority is supposed by von Wright:

> Ability to command is thus logically founded on a superior strength of the commander over the commanded. Occasionally genuine commanding is possible even when this presupposition is not fulfilled.[467]

This assumption follows the Bentham-Austin tradition[468] The idea of superior force as a condition to cast the law-giving authority can be substituted by a Kelsenian approach, as Alchurrón and Bulyguin suggest.[469] Von Wright's theory is best used if we suppose the idea of organ and competence in Kelsen's Pure Theory. The outright benefit of this substitution is that validity and binding force of rules subject to norm analysis may be merely supposed by virtue of the legal framework itself. An important drawback of the use of a Bentham or Austin like explanations for authority, is that they require reference to actual facts to establish whether an "authority" actually exists. Such observations are generally impossible to make in the abstract analysis of norms von Wright describes. Particularly, these facts cannot be observed ante facto,

467 Von Wright 'Norm and Action' (n418) Chapter VII, s. 15
468 Alchourrón & Eugenio Bulygin (n418) 672
469 Alchourrón & Eugenio Bulygin (n418) p. 665

ie., before the superiority of the authority to impose an effective sanction can be actually observed. This notion seems close to what Nico Krisch calls “solid” authority, in opposition to “liquid authority”, characterized by “a high degree of dynamism, with actors, sites and weights constantly shifting, making it difficult to pinpoint, to grasp, and to control”. Von Wright’s authority, therefore, would require a complement from fluid settings, to suit the needs of governance environments.[470] Without hierarchy as a condition, law can be transformed to trace relationships in transnational legal orders. This is handy to understand the flux of power where indicators travel. In a networked environment.

Usually, a cloak of legality covers indicators for human rights in the context of security or crime control. They are used as a shorthand for a standard. In turn, a standard can be a rule. So indicators can stand for rules. Yet, they have the form of an assertion about the way the world looks like—and therefore, they do not predicate about the rule they carry implicitly. For instance, the ANSI standards for compliance with use of force in human rights law, merely account for the conduct of activities related to training and record keeping. Although these activities may be legally relevant to rule compliance, they are not the core activities associated with the rules on use of force. The rules in question protect the integrity of individuals, and in particular, of individuals who encounter law enforcement officials.

An easy way out is to cast indicators as proof, or fact, as opposed to law. Let us consider this option. We have seen hoe the Committee on Economic, Social and Cultural Rights called for a 10% reduction in the gap for child mortality and life expectancy. Or how the CEDAW Committee has called for statistical information on the gender gap in political participation. In international law, practices can become law. What kind of law would that be, if the CESCR called for an increase of 1% in the reduction on inequality per year of this or that rights? Or what would it mean if the Parliamentary Committee in Australia reckoned that ‘n’ percentage points in the staff trained in use of force procedures in the G4S corporation, amounted to the discharge of their due diligence, on the basis of a not yet existent ANSI standard? These instances do not seem comfortable scenarios to call indicators ‘proof’, or ‘fact’: in this context, these figures convey legal authority.

470 See Nico Krisch ‘Liquid authority in global governance’ (2017) 9 International Theory 237 p. 256

From a legal perspective, the question is how entities clearly identifiable as legal norms, may be related to these other entities we call indicators. Since indicators designate facts–facts that aim at describing in shorthand a slice of social reality–and norms designate the meaning of an act of will (someone's expression about how someone else should act), the question seems necessary: are compliance indicators collapsing social facts and legal rules together in one expression?[471] The question also seems relevant: a context of governance and governmentality implies that centralized procedures to define standards are not necessarily available. Without a formal source to choose from, to the exclusion of any other, is there a way of choosing better standards or indicators than others? Like laws, indicators live outside the drawing board where they are born. and their implicit standards have a real impact on individual decisions.

It seems that a lot of current literature in legal theory concerned with governance, assumes the "static" theory of law, focused on commands issued by one sovereign with the ability to threat the use of force. This theory is associated with a voluntaristic explanation of how states enter into legal relationships. This approach dominated public international legal institutions for decades.[472] This flat, static theory of law does not serve the purpose of explaining how legal relationships are intensely dynamic. The power that diffuses across human interactions is nor a product of law,; rather, law seems to operate more like conductor of power. Thus, our ability to spot certain relationships as legally relevant, implies our ability to capture change. For different reasons, Klabbers calls for the abandonment of this perspective, in favor for "presumptive legal positivism", where the Lotus principle is reversed.[473]

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471 Hector Fix suggested this scenario early in the process of this work. At the time, I could not see a use for an entity in transit between law and fact.

472 The best known statement of this view is paragraph 44 of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) https://goo.gl/YrrMbq: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed"; The principle was endorsed by the International Court of Justice not so long ago in Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, available at: https://goo.gl/6wBGWz [accessed 12 July 2017]

473 Jan Klabbers, International legal positivism and constitutionalism in Jörg Kammerhoffer, Jean D'aspremont *International legal positivism in a post-modern world* (Cambridge UP Cambridge 2014)

Everything “normative” consists of an expression about human conduct—someone expresses their desire of how someone else should act—and the legal order has an interpretation for such expressions and such conduct: a legislative decision, a court judgment, a contract. Regardless do the form these expressions take, we can tell the form.

To be powerless in legal terms, means that a person has no mechanisms (no Knobs or buttons) to apply pressure in her counterpart to get the action she expects. In this exchange, someone is powerless vis-à-vis someone who has many alternatives to force an outcome in their favor, though legal institutions. Generally, agents are presumed to have the power to act under the cloak of legality, through contracts, courts, and so forth. The extent to which actions can be covered under a legal garment, is limited by provisions akin to “rules of the game”: legal persons are limited to act within the powers they are conferred in by-laws; public officials in that capacity are limited by their legal powers. Creating or changing the law is a “move” in the game.–through contracts, laws, executive decrees, court orders. These actions are not “legal” because they are “binding”, or vice versa. We see first a particular action that purportedly requires someone to do something; and then we evaluate how or whether such action is connected to other agents’ actions: whether I am being attacked by a gang member, or visited by the tax collector, remains a relevant question today. Despite realist claims, ascertaining the difference requires an explanation.

Why do private corporations in the field of security abide by given standards to decide whether they are complying with the rules of the use of force? In legal terms, they have entered into a contract with the standards owner, to be audited and to receive something in exchange—like a license or a certification. They are not bound to enter into a legal contract, they are not bound to comply with it. Rather, they choose to use the standard as proxy. Why is G4S bound to conduct their activity in accordance to the rules on use of force adopted by the United Nations? In a way, because they chose to work in Australian controlled facilities, Australia is a party to that treaty and is likely to use these standards in the interpretation of the legal framework applicable to the dispute. Can the private standards G4S applies, trump the regulations adopted by the UN in an Australian court? Perhaps. Yet, a better question is, to whom are those standards

applicable? In legal terms, most certainly not to third parties, because they are a contract. But what will happen if countries around the world start to behave as if the standard were a clean translation of UN rules for the use of force by law enforcement officials?

The legal world can be pictured like a 3D visualization of a large social network.[474] Among all human interactions available, we can tell some are in the legal game. The game is important because it of the power conducting attribute of the legal network. Clearly, other forms of power conduction schemes exist: economics, religion. Law is purportedly a network that levels access for everyone.

We can tell that a transnational corporation, like G4S, is legally based in one place because that legal regime regulates the articles of incorporation and its by-laws; the same bundle of economic interests acts with different limits and regulations, for instance, as a majority shareholder of an Israeli created firm. The actions of the transnational corporation regarding territories outside the jurisdiction of Israel, adds another layer of regulation. In total, G4S is estimated to command an intense net of relationships for over 500,000 people across the world in the networks associated with over 100 different legal regimes. The density and wide distribution of relationships around G4S makes it an important actor. But so is an organization outside the law, like a criminal organization. The relationships around that the head , members and victims of that organization can also be highlighted in a legal network as acts for which a sanction is prescribed for some actions; and for some others, the organization plays in the game as any other economic agent. In this visualization, law is merely a system to highlight real world relationships, where power is pushed across the network by some agents, against or in favor of other agents. Power across the network is limited to the legal options awarded to agents, but is also determined by all sorts of extra-legal factors. Law is not meant to explain all human interaction, but it is meant to explain whichever interaction, past, present or future, using the network itself as a point of reference.

474 For instance, https://www.youtube.com/watch?v=HIko0cdWtrU for a visualization of agents and their pull on other agents. Each agent is represented by a dot, surrounded by smaller or larger dots. Another example is https://www.youtube.com/watch?v=xZ3OmlbtaMU for the network of an ecosystem;

In response to a hard and soft law divide in international law, as reviewed by Goldmann, international doctrine on the field has applied the notion of "relative normativity" for over a decade, to shift from an "absolute" theory of law, to one where entities can be set in a continuum with more or less authority—legal authority. His approach is one of purpose of the concept of law, and favors this ductile version as constitutive of the international legal order. A taxonomy of relative normativity has been provided earlier.[475] The concept bears some resemblance to the notions of "liquid authority" by Nico Krisch.

The paradigm of relative normativity seems powerful to capture the complexity of the legal life outside the realms of the traditional regulation of the sources of law. In practical terms, though, the adaptation of this classical cannon, is possible. One concern about the relative normativity theory, is that the reach of international administrative law by definition, exists within a transnational environment. Hence, a theory alternative to the sources of law would fail miserably without a clear line as to what can count as a rule for individuals' rights to be affected on the basis of these administrative actions. An adaptation of the traditional cannon to find delegated powers, whether implicit or explicit, would be helpful in this context.

The example of the United Nations Sanctions Committee is revealing: whether the measure to bring a person into the list of sanctions is adopted under implied powers, or explicit authority, the arrangement of these powers is such, that the question is not relevant in the context of adjudication. If these measures cannot be challenged on the basis of whether there are legal grounds to recognize the limits of the powers of these organs, our theory would recognize all sorts of arbitrary actions—under the argument that the measures appear to be law-like entities that constitute a proper basis for action that touches upon rights of individuals.

Relative normativity seeks to produce a fluid notion that accounts for all kinds of entities that cannot fit into the sources theory. Yet, Goldmann proposes that "nobody doubts that instruments outside the scope of the sources doctrine are not susceptible to giving rise to damages or claims before international courts."[476]

475 See table 3.1.2 Table 7. Von Bogdandy and Goldmann taxonomy: governance by information, p. 63
476 M Goldmann 'Inside Relative Normativity' (n170) 676

This visualization of legally highlighted interactions, is relevant to law in terms of actions, actual interactions between persons in the world that affect the way things are—with the facts in the world.

4.5 Indicators under an impure theory of law

The ideas I have sketched here point to a path we can follow to cross over to the 'dark side' of law—whether you are a realist or a positivist, the divide between law and fact tends to obscure the juncture between these two worlds. An impure theory of law can be built around the notion of this interstice, preserving the world of law and fact untouched, yet communicated coherently. Neither the separation thesis, nor the pragmatic perspective need to be challenged: a doorway for law and fact to communicate, can provide some assistance.

So what are the implications for indicator construction? Many. First, indicators relevant to rules suppose a norm or a more modest version of a rule, like a standard. These norms or must be explicitly linked to the strands, so that we can challenge the power of the indicator to reveal the relevant behavior the rule is about.

1. Indicators about rules express the states of affairs required to describe human action: a closed door and an open door to describe the action of opening the door.
2. The states of affairs need to be legally relevant. Whether the percentage or trainees in G4S who have attended use of force courses, is only relevant to a rule if the rule requires that staff are trained in such and such way. Similarly, an decrease by 10% in inequality for child mortality, is relevant if attached to compliance of a norm. The legal context of the norm, supposed in the indicator, opens the field for contestation.
3. Despite the fact that there can be many adequate interpretations of the norm, they all need to account for the change in state of affairs the rule speaks of. What exactly does it mean to use force proportionally when securing a suspected pirate on board of a vessel? Or to quash a mutiny in a detention center? Or what do we know about the legal system to infer that such and such conducts would satisfy due diligence requirements to prevent human rights violations?

4. To use this tool, we do not need to commit to the Austinian sovereign, nor to formalism, or hierarchical legal orders. I have explained earlier what I think hierarchies come from and thus, they are not within the operation of law—but of society. Law does not impose these hierarchies, but can easily be used to describe the network I have used earlier as an analogy for what counts as law and non-law.
5. Even as realist would concede, law set the ground to recognize those whose actions can set the rules. At least, this mush is needed for law to discuss whether a given indicator are about law or not.

Koskenniemi criticized Kelsen's theory in part, because of his lack of commitment to meaning. On Koskenniemi's view, Kelsen did not incorporate interpretation in into the realm of the law. Be that as it may, positivism offers a relatively precise technique to make a description of the chains of authority whereby "the meaning of an act of will" are conducted from the spot of their creation to the spot where the agent is in possibility to comply. The agent's ability to perform the act depends upon many factors. One of them, is that the agent is located in a physical circumstance where she can actually adopt the command. As Foucault would say, power is only power if exerted upon free agents.

To determine whether the agent is at all free to comply, logic is a useful device. Legal logic is an antique instrument, built around the incorporation of Roman law into the "embodiment of right reason" with its medieval reception.[477] Denis Patterson has proposed that postmodernist can be conceptualized as opposed to modernist theories of language where representation and expression are competing, mutually exclusive uses of language. Language as representation, he argues, requires depicting a state of affairs that can qualify the correspondence between true and false statements. Patterson compares this view to Quine's holistic theory of language theory, which broadly means that the determination of meaning cannot be a function of any word in particular, but of the relation of a particular word or statement across all the other statements we believe are true.[478]

477 M Weber Economy & Society (n297) p 854

The limits of language as representation aside, the fact is that logical analysis does not establish truth—rather, it preserves truth, despite the choice of method we use to determine whether words have a meaning via a representation, or their sense is determined otherwise. If agents believe that a particular expression is true, via representation or otherwise, logic preserves truth for future statements carrying that content. The representation theory in von Wright, although modern in Patterson's account, can help us dissolve disagreements, as we can point at the process where our comprehension of the content of law became obscure or suspect usually, because precision is valued in the practice of law, alternatives to the theory of sources of law have used precision in a scale of soft or hard law.[479]

Maybe we can do without law altogether. But in the meantime, law as a tool can be useful to identify whether if someone imposes their will upon us, we can tell whether we are being disciplined, or simply mugged.

1. If the parties to the disputes involving G4S or similar entities in Papua, in Palestine of in the Gulf of Aden, wish to claim damages on account of the corporation's ill treatment of detainees, for instance, or their destruction of evidence to investigate the events, or the torture they suffered, they will probably claim that a human right was breached. In this situation, the corporation can offer as proof the certification process they have undergone to comply with codes of conduct or standards. The discussion will then turn to the standards and indicators that follow therefrom. It will be a legal discussion. The tools I suggest here can help us frame that controversy.
2. The same applies for states being disciplined, or cases being decided on the grounds of indicators adopted bu the treaty bodies of the United Nations human rights treaty system.

478 Denis Patterson 'From post modernism to law and truth' (2003) 26 Harvard Journal of Law & Public Policy 49 p 52; See p 61 "law and truth" for a depiction of the example where we go from legal assertion to legal truth. Once Patterson has rejected the idea that language has a representation and expression function, there is no need for him to account for the fact that he is lightly describing a legal claim as "true", and his premise is the content of a legal rule.

479 Helmut Philip Aust and Georg Nolte 'International law and the rule of law national level' in Michael Zürn, André Nollkaemper, Randall Peerenboom *Rule of Law Dynamics in international and transnational governance* (Cambridge UP Melbourne 2012) [Amazon kindle]

These indicators need to be contested in whichever for a are available. Because they speak about the law, and they can carry a process of “norm settling” we need to anticipate.

3. Also, beyond the legal fora, the power of these indicators is such that states will eventually adopt them, perhaps to regulate their own security corporations. The indicator will now be vested in a different authority, but it will nonetheless remain a slippery indicator. The same arguments apply.

5 Human rights measurement absent from governmentality

The current trend in quantification has been critically characterized as the consequence of emerging New Public Sector Management in Britain in the 1980's and France in the 1990's. The core difference of traditional claims of objectivity in government measurement and new public sector management, is "feedback". Independent agents build their own measurements, which later have an impact on policy decisions.[480] The political implications of this shift seem to lead to self-control, self-auditing and responsibility.[481] The force of this recent wave on quantification was enhanced by the end of the Cold War and the fall of the USSR as a counterbalance to neo-liberal policies.[482] Interestingly, Martti Koskenniemi calls this the "takeover of the managerial mindset":

> Formal rules yield to the amorphous "regulation" emerging from a heterogeneous variety of sources and actors. "Government" becomes "governance," and the language of legal "responsibility" is transformed into assessments of "compliance." "Disputes" become "management problems," and the question of lawfulness is replaced by that of "legitimacy," uncertainly situated between legal formality and political justice but reducible to neither and existing mainly as a feeling of legitimacy, a warm sense of contentment looking for no further justification.[483]

Characterizing indicators as governmentality sheds light on the pull for "governing by information", their nature as a result of a fluid network of agents, their soft power geared towards nudging, as opposed to punishing. This characterization seems to rather continue and accentuate the a trend that originated in the 19th century, yet that seems to operate only for certain fields of private or public action—but not for the containment of state authorities (human rights) in the fields of crime control and security. Knowing what we know about the thrive to measure in

480 R Rottenburg & SE Merry (n13) pos 383

481 Is common to see self auditing as the main element in regulation of climate change markets, for instance. See The Economist, VW scandal

482 R Rottenburg & SE Merry (n13) pos 303

483 M Koskenniemi, 'Constitutionalism as mindset (n356) 14

modernity and industrial societies, one would expect a ripe field of measurement for democratic societies—a term usually found in human rights documents. This, however, does not seem to be the case. This chapter poses the question on why some measurements take priority on the public sphere, and thus exclude others from ever being developed.

Statistics are an odd form of measurement. As opposed to pure knowledge gathering devices, statistics have the aim of render vast amounts of information manageable, so that data can be used as a "basis for action."[484] Technocracy means that the data will make choices for us: hence, the power of statistics in society comes from what numbers reveal, but also in what they conceal. The existence and power of indicators depend both, on their construction within an epistemic community, but also on the actual power of institutions to gather, and process the information required. [485] Institutions are in place to gather and process information about the people and things relevant to current governmentality. Arguably, a new governmentality based on preservation of rights should build the mechanisms and bureaucracy to gather information relevant to the questions relevant to rights protection. Governmentality today is not quite in line with these aims—hence, the absence of proper measurement in this field. Today, the questions we ask are still about the breach of some aspects of criminal law, which is there to protect the state's defined interests.

Numbers are socially construed as objective, naturally corresponding with reality. Indicators tend to be taken for granted, as corresponding with some social reality. Indicators, however, are by definition a reduction of reality. By definition, indicators are skewed descriptions. They are not "neutral representations of the world, but novel epistemic objects of regulation, domination, experimentation and critique".[486] Contemporary measurement has two tasks in mind: (i) to reduce complexity; and (ii) to reduce the appearance of bias. The process of quantification reduces complexity essentially by creating a taxonomy where units can be counted. Classification is thus an essential part of the quantification process. Simplification through classification enables observers to read the world "at a distance".[487] The choice of

484 Desrosières (n31) 13
485 R Rottenburg & SE Merry (n13) 322
486 R Rottenburg & SE Merry (n13) pos 345
487 R Rottenburg & SE Merry (n13) pos 403

elements that describe complex realities can be easily observed in the Human Development Index, by the United Nations Program on Development; or the Rule of Law Index, by the World justice project.

The “avalanche” of numbers we see today from private, public and hybrid transnational arrangements, mimics the birth of statistics as a technology of government in the 19th century. While that growth consolidated the industrial state, the current growth shows the demise of the state as the central actor in power today. This development shows the persistence of law-for-profit, and development economics, but also the rise of others, like Vera, whose interests are not necessarily aligned with business or the Global north. The growth of indicators is indeed, the birth of a transnational platform, with opportunities for local intervention not yet in place. The process also shows how due process rights have remained in the periphery until rather recently, and even today their introduction into the world of indicators remains a managerial one, tailored to pursue the development agenda. The nature of counting as a technology of governmentality will shed light on the rationale behind the production of figures, which will in turn clarify how we need to change or approach if rights are to make it into the forefront in this process.

The history of statistics plays a role of explanation in the development of measurement for civil and political rights, as opposed to that of economic, social and cultural rights. The items measured in the early stages of this history can show us how figures purporting to measure ‘humanity’, in reality refer to something else: deviancy, the power of the state, the power of production, and other relevant dimensions for the industrial state. A modern critique of these measurements should bear in mind the context and purposes of human rights measurement, as opposed to development figures which have heavily relied on antique time series for population statistics.

Measurement, quantification, metrology, are traditional tools of modern government. The need to measure and quantify the world for the purposes of public policy has long been a part of government practice. During the 19th century, measurement exploded as a generalized practice aiming at objectivity and precision in different realms of public life.

Statistics was a trait of the state police function. To identify "all the capacities and resources measures related to wealth- to increase the wealth of the population and the state; of population and territory"[488] Early in the 17th century, information was recognized as a core task for the state and its police function–to know the life of individuals so to take care of them; and to let the state know the extent of its resources. "To be exercised, power needs to know".[489]

Statistics became a major tool for government through the isolation of the field of 'economics.' Before that, they served only the purposes of the monarch in a hierarchical power structure, circumscribed to the juridical realm of sovereignty. Economy brought statistics to other aspects of government, not exclusive to the sovereign.[490]

At the end of the 19th century, statistical thinking had established itself as a powerful machinery–both as a powerful tool for natural and social science, and also a strong component of bureaucracy.[491] For some, the joint force of medicine and law in the 19th century brought a new form of public authority based on the control of deviancy and crime. While at the beginning of the 19th century "[s]ocial laws act from above over individuals in the same inexorable power as the laws of gravity", by the end of the century free will was squared with scientific uncertainty.[492] Along the 19th century, counting activities helped create categories of people, types of bureaucracies, pretty much creating "the class structure of industrial society." Counting the extension and health of the population was an important attribute of the industrial state–to provide "a stable social order".[493] But more important than counting, was creating the categories into which people and things were counted. Social classes, professions, deviants were invented. The ideology that came with the power to measure, has been called "high modernism" around the by the end of the 19th century. "State simplifications" were to express the desire for a well

488 Pasquino 'Theatrum Politicum' (n1) 113

489 Pasquino 'Theatrum Politicum' (n1), 115

490 Michel Foucault 'Governmentality' in Graham Burchell & Colin Gordon & Peter Miller (Eds.) *The Foucault Effect . Studies in governmentality* (U Chicago Press, Chicago 1991) p. 97, 99

491 Ian Hacking, 'How should we do the history of statistics, 181 Ian Hacking, How should we do the history of statistics' in Graham Burchell & Colin Gordon & Peter Miller (Eds.) The Foucault Effect . Studies in governmentality (U Chicago Press, Chicago 1991) 181, 182

492 Hacking, 'the history of statistics' (n484) 182

493 Hacking, 'the history of statistics' (n484) 183

administered and knowable nature. Infrastructure was already in place for the state to cast a wide net of measurements, and cultural projects were in a position to act upon the assumption of these measurements.[494]

Measurement in the late 18th and early 19th centuries saw the advancement of administration as opposed to knowledge of the world. Standardized measures were bureaucratically imposed in France and the United States. This was necessary to transform "local skills into generally valid scientific knowledge".[495] For instance, a square land grid was imposed by land surveyors in the United States, to facilitate keeping track of land claims. The grid implied that the rivers and mountains would not be set as detailed boundaries. This did not mean to impose administration upon nature, but to facilitate administration from places far away without the need for local skill. The grid is and similar tools are not the only form of quantitative knowledge. It is a very convenient form.[496]

5.1 "To be exercised, power needs to know"

The history of statistical thinking combines the development of scientific measurement and experimentation, as well as a tradition in government administration, which were initially separate from each other.[497] In science and technology, probability calculations aimed at taming uncertainty.[498] Desrosieres traces the development of administrative practices to the need to manage different, yet equivalent spaces, keeping track of a number of events recorded according to "standard norms".[499] In any advanced society, power comes with the force to determine legitimate measures.[500]

494 James C Scott *Seeing like a state. How certain schemes to improve the human condition have failed* (Yale University Press, New Heaven, 1998) ch 3, 4 [Amazon Kindle]

495 T Porter *Trust in numbers* (n4) p. 21 [Questia]

496 T Porter *Trust in numbers* (n4) p. 22 [Questia]

497 Desrosières (n31) 9

498 See section 5.3 'Epistemic implications of measurement: determinism and its erosionEpistemic implications of measurement: determinism and its erosion', p. 195

499 Desrosières (n31) p. 10

500 Kudla (n152), p. 18

I will start with a collection of scenes in the historical development of statistics, to show how this technology has been inherently modern, and today transposed to the networked environment of governance. From Germany, Britain and France, the practice lies at the core of our understanding of our modern, industrial societies. Most of my references come from Desrosieres and Porter, the best known authors to reconstruct the history of measurement.

5.1.1 German “descriptive statistics”

German descriptive statistics were common by the end of the 18th century. Their aim was to present systematic descriptions of a number of diverse features of each of the regions in the country. The attribute underlying their production was “the combined expression of numerous features”.[501] The nomenclature was made available for each individual state, for the Prince to make decisions.[502] Schlözer in 1660 was the first author to advocate for the use of precise figures, as opposed to a narrative form. He said that “[s]tatistics is history without motion. History is statistics in motion”[503] The suitability of these systematic descriptions were aimed at easing education, decision making. The need for this system has been linked to the fact that for the second half of the eighteenth century, Germany was divided up into three hundred states after the Thirty Year War. There was an urgent need to know these regions in detail, in a way that would facilitate the tasks of government.[504] In the early 19th century, the idea was introduced to use tables to use two dimensions in a page – rows for each state and columns for literary descriptions. Controversy arose regarding the reduction of such descriptions and the choice of criteria to compare.[505]

Tables in German statistics were built from the perspective of the state. They were not meant to include civil society with a role of oversight and participation in interpreting the figures. This is a crucial distinction from British political arithmetic.[506] The German term Statistik

501 Desrosières (n31) 19
502 Desrosières (n31) 19
503 Desrosières (n31) 19
504 Desrosières (n31) 29
505 Desrosières (n31) 21
506 Desrosières (n31) 22

was used for the first time in 1749. By 1791 it was translated into English by Sinclair, who aimed at capturing the quantum of happiness, as opposed to matters of state, as in Germany. By 1829 Hawkins defined "statistics" as the "application of numbers to illustrate the natural history of man in health and disease"[507] In France, by 1820, statistics were understood as numerical information about society. The notion of political arithmetic in Britain was far more focused than the German Statistik. Political arithmetic was linked to "centralizing bureaucracy".

Early statistics were presented as "direct and incontrovertible proof"[508] of certain propositions. Some examples include the campaign for public education based on the illiteracy of 67% of prison inmates; the power of the abolishment of death penalty to bring down crime rates; or the use of hygienics which associated death and disease with crime and revolution;[509] or concerning the progress brought by freedom in Britain and the northern United States.[510]

5.1.2 Political arithmetic in Britain

Britain practiced three steps in parochial records of births and deaths, to "stabilize and prove" the existence of a person and her relationships:

keep written records,
scrutinize and assemble them in a predetermined
interpret them according to "numbers, weights, and measures"

Practical experts in given fields of work developed specific knowledge they used in a practical field of life, and offered it to government officials and expert knowledge. As opposed to German statistics, British translation of life into figures was aimed at solutions, rather than to theoretical descriptions. Further, as opposed to Germany, British stats political arithmetic originated outside of the state. Indeed, the project of a census in the second half of the eighteenth century was halted due to attacks as an undue governmental intrusion in private life.[511]

507 Theodore M Porter *The rise of statistical thinking, 1820-1900* (Princeton University Press, Princeton, 1986) 23-4
508 Porter Rise of statistical thinking (n499) 28
509 Porter Rise of statistical thinking (n499) 28-30
510 Porter Rise of statistical thinking (n499) 37
511 Desrosières (n31) 24

5.1.3 "*Adunation*" of France: acting at a distance

The most palpable effect of measurement in the modern world was the enforcement of a new measurement system in Napoleon's France.[512] French statistics were different from Britain and Germany because there, government was highly centralized already by early 17th century. Evidence exists of regular accounts submitted to the monarch to show him the power of his provinces–a metaphorical extension of his own body. These accounts would eventually divide into two documents: a summary description of the land with core figures and a longer and more detailed document intended for administrators.[513] "The analysis was conducted from the point of view of the king and his power", and therefore, not related to society.[514] By late seventeenth century, precise figures for taxation purposes were commonplace. Later, statistics with no immediate fiscal purpose were developed: births, marriages and deaths–the origin of population trends in the registry office; prices of agricultural and industrial products; and in 1775 and 1786, criminal condemnations, the ancestor of Quetelet's moral statistics.[515]

These figures were national in character, did not require to pass through local descriptions, and were intended exclusively for government consumption.

In the 20 years that followed the French Revolution, five changes introduced the modern state and became amalgamated with administration: (i) the metric system was introduced, and weights and measures were standardized; (ii) French language became generalized and some provincial dialects were abandoned; (iii) the universality of the rights of men was announced, and nobility titles and professional guilds were abolished; (iv) the Napoleon civil code was adopted; and (v) the territory was divided into departments.[516] All these are features of modernism—and reflect the urge to administer natural and social life.

512 Kudla (n152) p 19 in relation to the precedents of Charlemagne and the Renainssance.
513 Desrosières (n31) 26-27
514 Desrosières (n31) 27
515 Desrosières (n31) 27
516 Desrosières (n31) 31

These changes entailed that the measurements, judgments and encoding became in theory, independent of local factors.[517] They became "transportable, generalizable, respectable" regardless of the locality where they were taken from:

> The administrative and judicial forms of encoding were indispensable in lending an objective consistency to things that could not otherwise be counted: marriages, crimes, suicides, and later on, businesses, work-related accidents, and the number of people unemployed.[518]

Like any other system of measurement, the implementation of the metric system, however, required the application of social controls, and the preservation of archstandards—like the meter in Paris. The publicity of measurement standards and the application of supervision measures was required.[519]

During this period, two conflicting styles in statistics emerged in France: a German descriptive style of reporting; and a British, table summary style of reporting. "In one case, the aim was to put across a simple and easily remembered message, to produce things that can be used readily, on which constructions of another rhetorical nature–for example, political or administrative–can be based; Peuchet's remark about the "wealth, forces, and power of the empire" is of this order. But on the other case, emphasis is placed on the technique and professionalism involved in producing and interpreting results that are neither gratuitous nor transparent."[520] In 1800, Chapel launched a survey for prefects, called "memoirs of the prefects" were officially published until 1806–then privately during the first three decades of the century. These accounts have been considered "heteroclitc, incomplete documents unserviceable as a source of numerical data."[521]

517 Desrosières (n31) 32
518 Desrosières (n31) 32
519 Kudla (n152) p. 79.
520 Desrosières (n31) 39
521 Desrosières (n31) 40

A change in the distribution of the land was not enough. It was necessary to change the words and the tools used to describe the "telescoping of rival analytical grids, expressed in rather mulled fashion by the prefects' pens."[522]

Desrosieres links the need to act on things, as the moving factor to name and describe them. A new grid for society was created through new measuring systems. He uses the example of the change from the states general to other ways to classify population: nobility, clergy and third state were translated into : i) real estate owners; ii) those living from proceeds of their real estate; iii) monetary income; iv) employed or paid by the state; v) mechanical or industrial work; unskilled or casual laborers; vii) beggars.[523] This new grid was published for prefects to use.

The grid excluded important sectors of the population: it did not have room for corporation members who, strictly speaking, did not earn any wages, but were skilled workers; nor did the grid have room for urban, "enlightened" people. These drawbacks of encoding are only traceable through the prefects' surveys, despite the fact that the surveys may be of little value in the task of constructing reliable time series. The creation of these new categories, even if imperfect, was an important political achievement at the time: "[t]he country to be described must be "aduanated" first.[524]

This *adunation* effect of statistics, partly as a consequence of method, also reflects non-scientific, but social, contextual choices. Law trades in classifications. In a way, law like statistics, can become unaware of the force laws impose with the creation of artificial classification. The impact can only increase if both, numbers and laws act together to create classes of things and persons.

5.2 Political economy of measurement

Numbers are technologies of trust. Inasmuch as strategies for communication, numbers allow for information to be carried across distance and culture. Numbers provide a framework of trust in contexts where there is no personal reason to trust. Through numbers, we can afford to evade

522 Desrosières (n31) 41
523 Desrosières (n31) 42
524 Desrosières (n31) 44

other important issues.[525] Measurement is a perfect example of "acting at a distance", in Latour's language.[526] Reliability of numbers associated to scientific truths are based on the general claim of replicability of experiments.[527] There are serious challenges to this claim. One challenge is that, the feasibility of delivering numbers as objective results cannot be distanced completely from the social process around these practices.[528] The truth remains that very few people are actually able to witness scientific experimentation–and thus to say that scientific laws derive from reliable experiments. Technologies of trust are required to translate these seldom observed experiments and measurements into objective statements.[529]

The rise of measurement saw scientists in the 19th century abandon concepts in favor of precision in data. Temperature measurement in the 18th century did not require exact knowledge of the nature of heat –either as a substance or as the result of motion, the thermometer rose with an increase in temperature.[530] All scientists consumed data regardless of their theoretical orientation. Adorno and Horckheimer call this "the replacement of causation with probability, and concept with formula"[531] The implications for causality and probability will be discussed in the next section, as epistemic consequences of the avalanche of numbers of the 19th century. Formulas track what we know. Representations merely speculate. The advantages of this position include (i) "rigorous certainty". Examples of Horckheimer's assertion include Hertz with a mathematical description of electricity–maybe as a reaction to multiple attempts from other scientists at the time to "represent" the phenomenon of electricity. Hence, in some fields there was something to be gained by representation through formulas, as opposed to "deep" understanding of the phenomena; and (ii) cause neutrality–which is proven by the all-encompassing project of the Vienna circle and its "Encyclopedia of Unified Science", championed by Neurath. Pearson is an example of this. He practically founded mathematical

525 T Porter *Trust in numbers* (n4) p 272
526 See Ch 1
527 Sergio Sismondo *An introduction of Science and Technology Studies* 2nd ed (Blackwell Western Sussex, 2010) p. 109 discussing the difficulty of transferring knowledge for the construction of the TEA laser.
528 T Porter *Trust in numbers* (n4) pos 361
529 T Porter *Trust in numbers* (n4) pos 430
530 T Porter *Trust in numbers* (n4) pos 498
531 T Porter *Trust in numbers* (n4) pos 318-20

statistics and brought them to biology, social science and government–a place for "scientifically illiterate gentlemen and aristocrats"[532] According to Pearson, correlation is just a convenient way to summarize experience –and the "taming of human subjectivity".[533] Pearson thought that every phenomena presents unexplained variations. Hence, all we find are really correlations. There is no "perfect lawlikeness".[534]

Numbers provide a cloak of objectivity. In government, the appeal of numbers comes from the instant cloak of objectivity that covers arbitrariness: "Quantification is a way of making decisions without seeming to decide".[535]

One way of thinking about measurement and indicator production, is to apply the analogy of markets, to visualize the complexities of interactions of indicator production and consumption. Even though it is admitted that simple and complex knowledge activities, like measurement, are properly "local achievements",[536] the fact remains that indicator production and consumption occur within the context of financial power to develop statistical institutions, with the power, resources or leverage to gain access to data from multiple jurisdictions. The shape of these markets cannot be appreciate or determined within the confines of objective measurements, but on the relationships that develop around them.

The history of statistics inspires us to think about measurement in its political dimension. The impact of measurement in private and public management is sometimes assumed to be obvious: management sets values, usually the bottom-line. Measurement-for-profit, however, is sometimes passed as management-for-profit in the public sector. This "for-profit" is only a way of speaking about the demands of the modern state to consolidate its power, and most importantly, to "format" our way of thinking abut society in terms of either deviancy regrading law and health. The risks of measurement without due regard to social, political or economic implications of the impact of these measurements, has been recently explored in the growth of private data suppliers, for profit ("big data"), as opposed to public data suppliers, for power. The

532 T Porter *Trust in numbers* (n4) pos 558
533 T Porter *Trust in numbers* (n4) pos 582
534 T Porter *Trust in numbers* (n4) pos 581
535 T Porter *Trust in numbers* (n4) pos 336
536 Science and technology studies 109

risk of the cloak of neutrality in measurement can be seen in techniques for crime prevention that can be associated to prudentialism, including some forms of geolocation like Compstat—the use of geographical referencing of criminal incidence to deploy police officers—and thus act on a self-fulfilling prophecy.[537]

Measurement entails reduction. Quantification means value of that which can be quantified, and rejection of that which cannot.[538] Numerical expression conceals the exercise of power and authority in ways familiar to regulation:

> Yet rigorous definitions and specialized meanings are crucial to this avoidance of ambiguity. In John Ziman's more ambivalent formulation, the language of number may be contrasted to "normal, natural language", with "its loopholes such as ill defined terms or ambiguities of expression," which permit one "to slip out of the noose of a line of reasoning! Scientific claims, like legal documents, "have to be written in a complex, formalized (and utterly repellent) language"[539]

De-localization of markets already required the creation of standard rules for accounting. Accountants and auditors opposed standardization of quantification methods, and appealed to the need to preserve expert knowledge in the way companies run their books and determine life with insuring. Yet, accounting became necessary because of the enlargement of trade areas and business operations beyond local markets.[540] Accounting started to preside over bankruptcies to ensure creditors assets would be managed fairly. Later, public companies were audited to ensure shareholders of sound finances and investments. These activities were valued because auditors were both expert and independent–objective, in a word.[541] Yet, the profession emerged rejecting tables as the ultimate tool for auditing: "professional judgment" was meant to be the professions most important asset.[542]

537 Cathy O'Neil Weapons of Math Destruction. How big data increases inequality and threatens democracy (Crown New York 2016) Chapter 5 [Amazon Kindle]; William Davies 'How statistics lost their power – and why we should fear what comes next' The Guardian 19 Jan 2017 https://goo.gl/UKYxmh

538 T Porter *Trust in numbers* (n4) pos 518 quoting Horckheimer and Adorno

539 T Porter *Trust in numbers* (n4) pos. 1750, fn 2, quoting Ziman, "reliable knowledge"

540 T Porter *Trust in numbers* (n4) pos. 2090

541 T Porter *Trust in numbers* (n4) pos. 2097

542 T Porter *Trust in numbers* (n4) pos. 2110

Law, then, imposed market-driven standardization in accounting. Regulation turned complex accounting indispensable. Originally, small firms would do with simple book-keeping techniques. But taxation and other rules required more sophisticated accounting methods.[543] These methods were important once business partners could no longer meet, due to growing international enterprises.[544]

Also, increased need for trust in large markets, pushed for standardization and its regulation. Yet, experts found an opportunity to set up self-regulated mechanisms to circumvent the attack on their professional autonomy. The Depression in the United States brought about the need to standardize accounting, to improve investor trust. Standardization brought a way to enable trust, yet government regulation entailed the loss of autonomy in the profession.[545] As a reaction to regulation, accountants set up private, self-regulating bodies to come up with self established standards. Objectivity in accounting is attached to a community of practice: for every measure, there is an alternative. Measurement which produced the most reliable results across several practitioners would be deemed more reliable. Hence, the adoption of measurements by consensus was deemed as the most powerful tool the profession held against government bureaucrats.[546] The aim was to minimize the risk of subjective discretion.[547]

Accounting faced its own problems with concept definition. If definitions are not clear enough, taxes would not be defensible in a court of law for income, investment, or other financial categories:

> The preferred bureaucratic and legal ways of dealing with these issues is the promulgation of rules. As is the case with scientific laws, art and judgment are required to connect those rules or laws to the actual phenomena of experiment, observation or economic life. But whereas scientists generally benefit from the order that this shared culture makes possible, economic actors strive perpetually to undermine it. Hence the presuppositions of accounting rules must themselves be

543 T Porter *Trust in numbers* (n4) pos. 2136
544 T Porter *Trust in numbers* (n4) pos. 2139
545 T Porter *Trust in numbers* (n4) pos. 2150
546 T Porter *Trust in numbers* (n4) pos 2202
547 T Porter *Trust in numbers* (n4) pos 2204

> codified and published, and so on until the whole Malthusian cascade presses up against the supply of paper and patience.[548]

Political resonance of quantitative objectivity reflected in cost accounting, needed to gain trust in management of war economy, where supply for government might affect prices in unknown ways. Cost accounting would allow for a fair price to be set. Even if inefficient, the method guaranteed trust and hence, political gain.[549] By early 1970s, accounting rules had been made public. Auditing culture became central in Britain as the idea of social networks and personal trust became too thin, and expert judgment needed to be shown to the public. Cost-benefit analysis became paramount in determining large scale policy decisions, like the location of the London airport.

These events illuminate the relation between statistical measurement and management styles: the push for accounting rules was transposed from the private to the public realm, in an attempt to provide the public, with the certainty numbers had provided the market. A for-profit approach was passed for a common benefit approach. The drive behind standardization in accounting rules, was the preservation of expert knowledge, and the assistance of public regulation overcame the pressures of lack of confidence during difficult times. One can appreciate how the scientific authority o expert knowledge, combines with the power conduction network in public regulation, to reduce resistance.

5.2.1 Universalism and rule of law through measurement

There is a close connection between the aspirations of science and the State. Both aspired in the late eighteenth century to the rule of law, to take decisions away from intimate personal knowledge, in favor of decisions “effective over great distances and enforceable by strangers.”[550] The construction of the metric system is an example of such connection. Universalism imbued the design of the metric system. Another example is the classification of elements into the periodic table: Greek names were adopted for the by Lavoisier, with an aspiration of “perfect

548 T Porter *Trust in numbers* (n4) pos 2226
549 T Porter *Trust in numbers* (n4) pos 2235-2242
550 T Porter *Trust in numbers* (n4) pos 696

objectivity". The "meter" was supposed to be 1 / 10,000 of the distance from the pole to the equator–a natural, neutral measure. This was perceived as transcending the limits of personal authority[551]

Measuring procedures become standardized through a difficult bureaucratic process. Bureaus were in charge of providing information to officials about "specifications and tolerances for all kinds of measures". They intersect science and regulation. Standards are specially important in areas like environmental pollution–to control choices by economic agents regarding the method they use to measure pollution. There is today regulation to measure everything.[552]

Statistics create social constructs. Statistical thinking contributed to the construct of society as a construct. "Society" was a concept in part a statistically construed: crime and suicide rates were considered throughout the nineteenth century the very proof of the existence of "society" as a proper entity separated from individuals.[553] Crime rates and unemployment rates were invented in 1830s and 1900 respectively. Their invention at "a condition of society involving collective responsibility".[554] Once categories are created, they tend to remain and they become harder to challenge. They can also be politically contested. [Creation of measures like the bottom-line]

Statistics are also connected to power. Measurement has an important political dimension, attached to the regulation of measurement procedures. Take, for instance, the separation of information required for quality measurement in wheat, and creation of a centralized exchange system through state regulation. Also, political objectives are pursued through measurement. For instance, population figures were discussed following Rousseau's claim to growth of population as sign of prosperity.[555]

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551 T Porter *Trust in numbers* (n4) pos 689

552 T Porter *Trust in numbers* (n4) pos 727

553 T Porter *Trust in numbers* (n4) pos 928

554 T Porter *Trust in numbers* (n4) pos 930

555 JJ Rousseau, The Social Contract, Book III, Chapter 9: 'The signs of good government': "What is the purpose of any political association? The preservation and prosperity of its members. And what is the surest sign of their preservation and prosperity? Their number and their population·-growth·. That's the sign you are looking for. Other things being equal, the unquestionably best government is the one under which the population increases most, without external help from naturalizing foreigners or establishing colonies. The government under which the population shrinks is the worst. Over to you, Calculators—count, measure, compare!"

Measurement was also important to the rule of law.[556] Bias seems expelled from the realm of science. Pearson, for instance, saw scientific education as one to favor moral education. The elevation of moral rules above individual desires.[557] Yet, the history of quantification has also a trait of elitism and exclusion of women. Quantification was the weapon of choice to investigate les miserables– those excluded from the elite, boxed into boxes like “workers”, “unemployed”, “prostitutes”. The power of statistics is inseparable from their claim to objectivity.[558] Their power clings from the authority of scientific objectivity, most clearly held by mathematics.

Local measurement left room for negotiation, abuse, and fraud. Local measures changed from place to place. There were always ways to make less grain fit into a given measure. Uses depended on the value of the grain and the privilege position of the merchant. Uniform measurement, also coming into Russia and China brought the economy away from privilege and discretion into the rule of law and equality. Imposing uniform measures took a great deal of government power to enforce.[559]

5.3 Epistemic implications of measurement: determinism and its erosion

The epistemological problem of statistics was at the core of the avalanche of numbers in the 19th century. The problem of statistics is divided into the prescriptive and descriptive approaches: do we debate about the method we use to measure an object? Or do we argue about the definition and existence of the object itself? Durkheim said “think of social facts as things” either because this states the truth, or as a choice of method? Prescriptive and descriptive points of view in statistics are expressed in terms of the epistemic and frequentist points of view about statistic. These views follow the distinction between an epistemic and an ontological perspective in nature. Limited data correspond either to a limit in the information we have today, or about the uncertainty that nature holds regardless of infinite information:

556 T Porter *Trust in numbers* (n4) pos 1750
557 T Porter *Trust in numbers* (n4) pos 1767
558 T Porter *Trust in numbers* (n4) pos.1870; Ian Hacking Biopower and the avalanche of printed numbers 1635
559 T Porter *Trust in numbers* (n4) pos 679

> In the epistemic perspective, probability is a degree of belief. The uncertainty the future holds, or the incompleteness of our knowledge of the universe, leads to wagers on the future and the universe, and probabilities provide a reasonable person with rules of behavior when information is lacking. But in the frequentist view, diversity and risk are part of nature itself, and not simply the result of incomplete knowledge They are external to mankind and part of the nature of things. It falls to science to describe the frequencies observed.[560]

The process of characterization, representation and procedures we have seen earlier, is described by Desrosieres as the result of a twofold process: (i) a social procedure of "recording and encoding"; and (ii) a cognitive procedure that reduces large numbers of characteristics into only a few manageable ones. "Attributes of an object" and "parameters of a model" correspond respectively to a frequentist and epistemic views.[561]

Earlier I presented Adorno and Horkheimer's point regarding the "cause neutrality" produced by statistics. This section goes further into the rise of probability as the main form or reasoning in the late 19th century. I will do this following Ian Hacking's Taming of chance. The political process we see in public institutions was only a manifestation of a deeper development in forms of acquiring knowledge. The revolution was taken into scientific fields developing at the time. A full history of these attitudes is presented in Desrossieres The rise of statistical thinking, but I am mostly concerned here about the consequences for the exercise of public authority.

Fallibility is at the heart of measurement theory—and measurement history. Before the avalanche of numbers in the 19th century, the question posed by philosophers was how to transit from subjective probability to objective probability—how to derive knowledge from discrete facts that may or may present some regularity. "Probability" meant degree of consent proportionate to the evidence of things and witnesses" Leibniz and Bernoulli, mathematicians and jurists, combined these degrees of conviction to range from incredulity to complete

560 Desrosières (n31) 7
561 Desrosières (n31) 11

conviction.[562] The degrees of certainty included mathematical certainty, to physical certainty of sensations, to moral certainty of testimony and conjecture. “Moral certainty” was considered the lowest level where we find most things. At the time, methods to evaluate probabilities included (I) equal probabilities, as in physical symmetry or games of chance; (ii) observed frequency of events, concerning observed events during a period of time with enough stability, such as mortality rates; and (iii) subjective certainty of belief, associated with judgment.

> In the seventeenth century, if a judge was asked to settle a conflict involving the occurrence of subsequent, and therefore unknown events, his decision would require the litigating parties to agree that their expectations were equivalent. in that case, probability–the ratio between expectation and wager–appeared as a measurement on which agreement could be based.[563]

These methods recall the divide between ontological and epistemic probabilities; objective probability, connected to states of affairs, and subjective probability and reasons to believe. Locke and Hume proposed a mechanism of iteration of experiences. The late 18th and early 19th centuries saw the introduction of the methods of the least squares and average calculation to reduce deviation in measurement in geography, geometry or astronomy. These methods acknowledged the fallibility of single measurements for both description and prediction. This is a theme: judges, astronomers, geometers and prefects, all are relevant to measurement: measured decisions, precise measures, enforceable measures. These all have in common that they allow for agreement. They link objectivity with “technologies of intersbjectivity”.[564]

Probability initially had two meanings – associated to “reasons to believe” and as opposed to chance, in an epistemic tradition. Bayes in the late 17th century was interested in the decisional aspect in the classical era of probability, and the probability of causes. Later, in the 19th century, frequentists were not interested in this approach but in the nature of things and the uncertainty inherent to the world. In the epistemic perspective, chance as a solution of a problem of justice or equity was allowed when no equitable solution can be found–judges may then resort

562 Desrosières (n31) 53
563 Desrosières (n31) 65
564 Desrosières (n31) 66 (citing hacking 1991)

to chance. If a person must give someone a superfluous possession, and two persons appear to be in equal circumstances, is it not the equitable solution to draw lots?[565]

Decisions based on chance and uncertain outcomes was generally questioned and perceived as a source of unjustified gain. Where it was allowed, procedures were available to draw lots, for instance, to divide property.[566] In cases where a risk was involved in an aleatory contract (future) the risk would justify the gain, and differentiate it from usury or loans with interest in general.

This was the beginning of Pascal's though on probability: how to divide the stack in the middle of the game. How to make a fair division of the stack, how to plan for a fair contract if the game or the operation are stopped.[567] Pascal's calculation was aimed at comparing equivalent expectations. Yet, those expectations revealed not to be of the same nature. Jurists in the seventeenth century were trying to make comparable expectations in aleatory contracts and this was taken up by geometers to think of a solution that would allow them to ponder outcomes of different weights and sizes. [568]

The time to re-frame free will came along with a discussion across the aisle of two forms of knowledge accumulation: statistics of tradition.[569] This discussion was set in the field of medicine, which operates in very similar ways to law: decisions in the medical field must be tailored to the particular conditions of each case. Yet, generalization is a form of knowledge. Both law and medicine found their development cross-cut by the tensions of case-by-case decisions, and the need to generalize or to benefit from accumulated knowledge. Obviously, the fields of medicine and law are very different regarding the forms of knowledge they require—scientific knowledge is not nearly as important to law, than it is to medicine. Yet, they have in common their practical nature as applied fields.

A mass of statistics on crime and suicide evolved to reveal a regular occurrence in suicide and its causes. Causes of death were tracked and refined. Yet, both fields were related to madness

565 Desrosières (n31) 47
566 Desrosières (n31) 47
567 Desrosières (n31) 48
568 Desrosières (n31) 49
569 Desrosières (n31) 83

—motives in 1821 were tagged as causes a year later. All sorts of social conditions were "causes" with predisposition, which constituted causes for suicide. These statistics belonged to the medical statistics. But four years later, the ministry of justice was already publishing statistics on crimes, prosecutions and convictions. [570] By the mid 1830s, law and medicine shared a field of knowledge: madness as a cause for suicide and crime. "Moral statistics" were born from this collaboration, between the medical and the legal fields. Detailed criminal statistics reflected a relation between high education sections, and high crime rates. This proof challenged the traditional wisdom that associated crime to degeneracy, poverty and poor education. The new correlation tender to assert that wealth attracts crime. "moral analysis" was the term used to this type of argument.

At the time, medicine was perceived as an art, based on "intuition and instinct" of the doctor. The room for a "numerical method" which would count success of a particular course of treatment across patients, was divisive. Traditional doctors would insist on the absence of any room to apply this knowledge, since every decision was based on "personal" knowledge, judgment. Other doctors were open to the possibility of using this "numerical method".

These debates had an impact on policies framed through legislation:

> The public health movement and its liaison with the GRO provide an exemplary case of the concatenation observable in other cases: debates and private surveys in the reformist milieu independent of the state are taken up by dad hoc parliamentary commissions and resulted in new legislation , which itself gives rise to a specialized statistical bureau.[571]

Debates around unemployment were brought about by data compiled by trade unions. Thereafter, a debate was generated leading to the distinction between inept, poor and unemployed people. These discussions were held in the context of amendments to the 1834 Poor Law in Britain.[572] The attitude that brought statistics close to legislation, was not favored everywhere. For instance, Bismarck changed the role of the Prussian bureau of statistics to

570 Ian Hacking Taming of Chance ch. On legislation
571 Desrosières (n31) 171
572 Desrosières (n31) 172

remove it from its functions as an advisor to legislation, to become an academic institutions which published scholarly articles regularly. This change has been compared to Hitler's attitude towards statistics.[573]

The paradigmatic thinker of the 19th century statistical thinking was Quetelet. He advocated the creation of "social physics"–a predecessor to Comte's social mathematics. The "error law", used by Galton in the turn of the 19th century, was translated into the deviations from the "average man" in 1844. The deviation from the "average man" turned the error law into a distribution formula, arguably more powerful interesting than mean values.[574] Quetelet was a champion of determinism in society. Measurement, in his view, would identify the laws that act upon people, like gravity upon bodies—and thus, aimed at identifying the traits of humanity. In 1831, Quetelet introduced the term "social mechanics", a direct predecessor to Comte's social physics.[575] a statistical law was identified for a description of the curve for the relationship of number of births and deaths per year . The formula described the line perfectly. The line is an example of a statistical law, which was thought of as an "analogy of the regularities in plant and animal life". Quetelet advocated for an understanding of the world where "periodic events" such as tides, flowering of plants, terrestrial magnetism, and events in the life of man constitute "a unified set of phenomena".[576]

Quetelet's moral statistics aimed at subjecting human conduct to law-like regularities. Quetelet and others observed with surprise regular crime occurrence by 1827, even when the regularity of population statistics was the matter for admiration since the late 18th century. Laplace and Bernoulli made population ratios a matter of probabilistic theory. These findings, though, did not seem to apply to irrational conduct, such as crime. There is a regularity in large numbers: "Probabilistic events of any sort can be expected to give rise to stable ratios if repeated often enough". Bernoulli proved this, Laplace repeated it, but Quetelet's surprise, for instance, in criminal statistics, shows that this rule was unexpected for irrational events. Early on, demographic regularities were dubbed "natural theology". Probability was perceived as part of

573 Desrosières (n31) 83
574 Porter Rise of statistical thinking (n499) 7
575 Porter Rise of statistical thinking (n499) 47
576 Porter Rise of statistical thinking (n499) 44

the “natural history of man”.[577] Regularities applied to crime, as a result of the applicability of such regularity in large groups, which would not be applicable in single individuals. Yet, the regularity was ideologically charged: it was responsible for holding society together. Also, the laws of nature are forever excluded from human action[578]

Quetelet’s system was centered on two main concepts: the “law of large numbers”–which was Poison’s version of Bernoulli's theorem. This Quetelet chose as the fundamental rule of social physics.[579] The “average man” equals the sum of all regularities in a country, a “type” of the nation. A third notion was the average moral man, a “penchant” for crime Ratio of crimes and courageous acts.[580] The average moral man would represent, e.g., the propensity to be responsible for a crime in an x range of age, better than assigning responsibility exclusively to some wicked members of society. The basic assumption in the average moral man is that constant causes equal constant results. Regularities in crime are constant and will continue to be so long as conditions remain.[581] This position presented some philosophical difficulties:

> if individual differences were deviations from an ideal "average" and if society was ruled by "laws," then free will was reduced to "a capricious element acting within a narrow circle of possibilities." Thus, he said: "The crimes which are annually committed seem to be a necessary result of our social organization. . . . Society prepares the crime and the guilty is only the instrument by which it is accomplished."[582]

Determinism was in full gear at the time, and despite the methodological approaches Quetelet experimented with, his conclusions were circumscribed by his framework. Quetelet claimed that the regularities we observe in nature, are also to be found in the events of human life: births or deaths; and also in voluntary events like marriages, crime and suicide remained

577 Porter Rise of statistical thinking (n499) 51
578 Porter Rise of statistical thinking (n499) 52
579 Porter Rise of statistical thinking (n499) 52
580 Porter Rise of statistical thinking (n499) 53-4
581 Porter Rise of statistical thinking (n499) 54
582 Daniel Headrick When information came of age. Technologies of knowledge in the age of research and revolution 1700-1850 (Oxford university press, New York, 2000) p. 83 [questia]

constant. The necessary order in large numbers fund in crime, suicide and marriage, was invoked to apply statistical methods in physics or economics.[583]

Methodologically, Quetelet ran into the problem of the difference between observable characteristics and indicators. There are observable characteristics, observation yields data that can then be described. This is quite different from gathering observable data to infer non-observable characteristics.[584] An example of this is Quetelet's conclusion that uneducated people are more prone to commit crimes. His data came exclusively from criminal statistics, and he had no data available for the characteristics of the general population. The reasoning Quetelet offered was based on the representation of certain population groups in criminal tendencies, as opposed to the representation of a sector of the population, among those indicted or convicted for a crime. This form of sorting information out, led Quetelet to assume criminality as a the effect of an underlying tendency. His mindset was deterministic.[585] Indicators about social facts are arguably not related to a physical events we can distinguish through our senses. Temperature can be discussed socially – it is common to have sensations about heat or cold. Social facts, however, are complex and subject to a multitude of interpretations. For instance, the increase in population was long viewed as a sign of good administration[586]. Hume attributed a value to large populations: there must be more population where there is the most happiness.[587] Studies in population calculation long preceded Malthus wrote on the topic.

Morgan and Cornewall used notions following Quetelet's average moral man as, eg., the basis upon which legislation could be traced. Mill referred to statistics in his "inverse deduction method" as to infer from statistical regularities – "what is true of approximately all individuals is

583 Porter Rise of statistical thinking (n499) 6

584 Paul Lazarsfeld 'Notes on the history of quantification in sociology' in Henry Woolf *Quantification. The history of the meaning of measurement in the natural and social sciences*. (Bobbs Merrill, Indianapolis, 1961) 167, at 174 [Questia]

585 Paul Lazarsfeld 'Notes on the history of quantification in sociology' in Henry Woolf *Quantification. The history of the meaning of measurement in the natural and social sciences*. (Bobbs Merrill, Indianapolis, 1961) 167, at 176 [Questia]

586 Porter Rise of statistical thinking (n499) 20

587 David Hume "The populace of ancient nations" in *Essays, moral, political, and literary*, para. II.XI.4 available at http://www.econlib.org/library/LFBooks/Hume/hmMPL34.html

true absolutely of all masses".[588] Also Durkheim, followed Quetelet on the idea that statistical laws determine an amount of certain actions in society, as opposed to determining the conduct of particular members of society. Durkheim also wrote within a deterministic framework, that is, translating laws of nature into society–as opposed to a probabilistic framework, which would emerge later in the century.[589]

The fact that a given number of people are considered liable of a crime every year, or that a given number of people jobs, that an industry has a given surplus, and so forth, are not referred to a univocal object. Numbers to define such measures are complex, and often require that we make some choices, concerning what liability or crime mean; what does it mean to be employed– a person with a part time job a few days a year, or a full time job throughout the year; or even how surplus is calculated in a given year. Arguments in the history of statistics include the statement that population growth is the ultimate goal of the state; that public education is the cause of crime reduction; that greater rates of population with insanity is the mark of urbanization.

The deterministic mindset was subverted and substituted by the probabilistic mindset. The 19th century produced the familiarity of the general public with "aggregate numbers and mean values" to approach variation. Porter quotes Hertz saying that "[s]ystems consisting of numerous autonomous individuals can be studied at a higher level than that of the diverse atomic constituents". This is what Porter calls "the statistical view of nature"[590], built on the basis of numerical social science. By the end of the 19th century, Maxwell applied both, the error law and distribution of variation to the "distribution of molecular velocities in a gas".[591] Similar applications can be found in Galton in the field of biology and the studies on heredity. The consequence of the distribution of divergences from the average man in Quetelet, led to Ian Hacking's "erosion of determinism".[592]

588 Porter Rise of statistical thinking (n499) 66
589 Porter Rise of statistical thinking (n499) 69
590 Porter Rise of statistical thinking (n499) 5
591 Porter Rise of statistical thinking (n499) 7
592 Porter Rise of statistical thinking (n499) 8

5.4 Measurement in governmentality and biopolitics

A powerful narrative for these developments can be frames by Foucault's governmentality and biopolitics: the "conduct of conduct" and the

In the modern and industrial society, human life is a matter of power. Together with the function of the human body as a machine for production, the human body was the center of reproduction: the "biopolitics of the population"--measures and statistical operations, directed at the entire social body. Hacking "the numerical manipulations of the body politic are and always were dusty, replete with dried up old books"[593]

"Statistical data do have a certain ideological neutrality" between ideologies. Historically, the development of information about population and deviancy "form an integral part of the industrial state". The historical taming of chance, the erosion of determinism, only created a competition for power–it was not free will that emerged, but the possibility for bureaucracy to control. "The bureaucracy of statistics imposes not just by creating administrative rulings but by determining classifications within which people must think of themselves and of the actions that are open to them".[594] For Hacking, the birth of biopolitics is "the transition of the counting of hearths to the counting of bodies."[595] An important result was that the establishment and growth of statistical bureaucracies towards the middle of the 19th century.[596] This development can be mirrored today in the calls for international cooperation for the professionalization of statistical bureaucracies across the world, to comply with information requirements from international organizations.[597]

What is special about the growth of measurement, if we had early criminal statistics since the 18th century? The 19th century created free will in a form compatible with the idea of modern power. Power supposes the existence of an agent upon whom external "technologies" operate.

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593 Ian Hacking Biopower and the avalanche of printed numbers Pos. 1470-84

594 Hacking, 'the history of statistics' (n484) 194; Similarly, Ian Hacking Biopower and the avalanche of printed numbers in Vernon W. Cisley & Nicolae Morar *Biopower. Foucault and beyond* (U Chicago Press Chicago 2016) 1606

595 Hacking Biopower (n584) pos 1505

596 Hacking Biopower (n584) pos 1527

597 See sections 1.2 and 1.3, pages 10 and 15

By the beginning of the 19th century, the Benthamite subject was essentially utilitarian, free to follow the dictates of pain and pleasure. Science and the subject were determined by unknown, yet knowable forces. By the end of the 19th century, the agents was free to be subjected to discipline. Determinism was substituted by the "taming of chance"–probability and uncertainty were mastered.

"Laws" about society, in the form of sociological laws, are today cast in the form of statistics. This is possible because during the 18th century, chance was "tamed". Taming occurred across many fields of knowledge. One prominent field was "moral science", which appeared by 1830 and flourished throughout the century. This "moral science" set out to identify the empirically and en masse, immoral behavior."[598] By the end of the 19th century, Durkheim managed to 'found his argument on the sheer regularity and stability of quantitative social facts about statistics and crime'. [599] The concepts and categories of criminal law we track today, were born in 1820 wit the list of causes of death put together by William Farr. These categories are alive in much of the world since they were adopted by the World Health Organization. These categories draw the border of legal and illegal death.[600]

At the beginning of the 19th century, probabilities represented our ignorance of facts, as opposed to facts in nature. Facts were measured against laws of economics and moral laws were used to find "perturbations" from troubling causes, which needed to be addressed. Consistent with the notion that inconsistencies revealed our ignorance of facts, Poisson's law of large numbers, was first used to study the results in jury trials. One of the issues of determinism, of course, was the impossible explanation for free will—if laws act upon us so that 4 in every 10 will commit suicide, there seemed nothing left for human intervention. Despite the operation of laws determining deviancy, we (not they, les misérables) "could change the boundary conditions and so change the conditions under which the population could evolve."[601]

598 Hacking, 'the history of statistics' (n484) 182

599 Hacking, 'the history of statistics' (n484) 182

600 Hacking, 'the history of statistics' (n484) 183. Hacking adds that the classification of the time, really created the class structure of the industrial society.

601 Hacking, 'the history of statistics' (n484) 188 referring to Dickens' Hard times as the best critique of statistical thinking at the time.

The power of indicators is subtle because they are ground on the notion of probability. Indicators do not reflect the condition of every possible item to be measured. They are statistical in method. Despite the fact that they still count things similar to those in the 19th century, they do so with a different perspective. They are not intended to describe the laws of human society. Even if they seek to track compliance, they would not seek to state a regularity–like behavior that would describe the 'normal' country, like Quetelet described the 'normal' man. The "erosion of determinism" in the 19th century, meant that we traveled from "physical laws of nature", like Condorcet would say, to explain the behavior of economics, to a universe governed by chance, and that there were irreducible statistical laws of society, like Durkheim said. Something happened during the 19th century, where we learned the conditions for the theory of quantum mechanics, for instance—a world governed by chance, was yet susceptible of human discovery.

The developments in social and natural science in the 19th century brought possibilities of control through information, unknown to the modern state. In the early years of the 19th century, there was a belief on the rules for social life, in the same way as Newton used rules for physics.

5.4.1 Security and measurement as governmentality

I wish to inscribe the questions on indicators in a triangle between law, governance and governmentality. The connection of governmentality to law, however, is not straightforward. Perhaps at the same time that the governance discourse arose, Michele Foucault's "governmentality" lectures were first translated into English. The power of the combined description of the world under these two concepts is exciting, and has generated a vast literature. Governmentality is "a way or system of thinking about the nature and practice of government".[602] Government in turn is "the conduct of conduct".[603] Whether Foucault's writings have an explicit connection to law is contentious. Arguments have arisen for and against Foucault's assumption of the classical theory of law I offered before. Nickolas Rose and Mariana Valverde explicitly argued against such interpretation and rather seem to argue for Foucault's silence on the matter.

602 Colin Gordon 'Governmental rationality' (n333) p. 3
603 Colin Gordon 'Governmental rationality' (n333) p. 3

Whether this is the case, is unimportant here.[604] The point hat needs to be made is that these elements of a sketch of Austin's world survive today. A contemporary discussion on governmentality calls for the acknowledgement that not even Austin could have depicted the King issuing commands to the people. This theory of law, and others that have built upon some of its basic assumptions, have increased significantly our understanding of how law can be understood as a very complex network of power relations. In fact, this particular complexity was signaled as the reason why Foucault did not necessarily have the picture of the King in mind; but rather could appreciate how law enshrined a dense network of relationships.[605] Other challenges to the application of Foucaltian dimensions to law are posed by O'Malley and Valverde. Questions include whether "law" can be defined as an object with universal characteristics, the contradiction between its fluid, changing nature, and it's effect as a "brake on transformation". "Old habits die hard", say O'Malley and Valverde, grimly announcing that this debate will continue.[606]

Earlier, I have loosely stated that law precedes the state. There is no need to identify these two ideas. They were born independently in history. At the same time, Foucault builds the notion of governmentality around the practices that precede, explain or shape institutions—as opposed to the theory of the state that derives practices from institutions. This would probably suit the relationship between the micro-physics of power in Discipline and Punish as evolved in his writings on governmentality, with society as a whole: "power is only power (rather than mere physical force or violence) when addressed to individuals who are free to act in one way or another". Power "presupposes rather than annuls their capacity as agents.[607]

The ideas of law, state, and their relationship to physical violence, are typical of the beginnings of the 19th century. One important point in the development of governmentality is the emergence of police state, outgrowing the raison d'Etat, and to become the "knowledge of the state's strength".[608] The strengths is measured towards prosperity: "the state's wealth and power

604 Nichkolas Rose & Mariana Valverde 'Governed by Law?' 1998 7 Social & Legal Studies 541-551 p 542
605 O'Malley and Valverde Foucaul' (n340) 327
606 O'Malley and Valverde Foucaul' (n340) 328
607 Colin Gordon 'Governmental rationality' (n333) p. 5
608 Colin Gordon 'Governmental rationality' (n333) p.14

lies in its population, in the strength and productivity of all and each".[609] Police sciences are also "a knowledge of in exhaustively detailed and continuous control".[610] Raison d'etat and police state form an ethical and epistemological combination, setting the goal, the notion of success and "prosperity" for the political entity.

The establishment of this horizon for success emerged from a historical process, closely tied to the perspective of total knowledge of the conditions that influence such success. Measurement is one form to pursue knowledge. The early per-liberal police state represented the use of stoic ethics as an ethics of command and control. The population was educated into a life of work and frugality. "to obey meant not a mere abnegation of servitude of the will, but an active form of life-conduct".[611] Despite the aspirations of the police state, Adam Smith made clear that knowledge available to the state was limited. In response to the Economic Table proposed by Quesnay, the table where all economic activities in the state would be recorded, Smith launched the "invisible hand"as a device to account for the fact that the totality of transactions and interests moving within the state is simply not available for the full knowledge of anyone—not individuals, nor the state. "The infinitude of the state's power to know is an immediate consequence of its limitation of its power to know."[612] The Kantian expression of the limits to knowledge finally separated the unity formed by raison d'etat and police science. "The regularities of economic or commercial society display a rationality which is fundamentally different in kind from that of calculative state regulation."[613] The next stage is meant to "reinstate governmental reason" once the impossibility of total knowledge has been uncovered.[614]

Security became then the function of liberal government. Discipline is the technology for the body of individuals; security is the function of government for society as a whole. Security operates in ranges of acceptability, as opposed to rigid standards. Security emerges with the supposition of the economic agent who responds to individual interests; and its clash with the

609 Colin Gordon 'Governmental rationality' (n333) p. 10
610 Colin Gordon 'Governmental rationality' (n333) p. 10
611 Colin Gordon 'Governmental rationality' (n333) p. 13
612 Colin Gordon 'Governmental rationality' (n333) p. 16
613 Colin Gordon 'Governmental rationality' (n333) p. 16
614 Colin Gordon 'Governmental rationality' (n333) p. 16

juridical subject who forms part of the social contract to delegate or permit the operation of state power upon her.[615] The subject of interest perpetually outflanks the scope of the act of self-imposed limitations which constitutes the subject of law".[616] Power acts upon the body, security upon society; economic interest is individual, juridical interest preserves the power of the collective to act upon the individual. Security, and the knowledge required for the state to provide it, emerge at the interstice of the interests of the economic agent and the legal agent.

We inherited the "subject of law" from the Enlightenment. The path to follow in the nineteenth century was to transform this rational, logically defined subject of law, capable of entering into the social contract, into a "social" person, a "normal" person. As we shall see later, normalcy was an invention of early statistical definitions in the twentieth century. Measurement as a vehicle for total knowledge in the pursuit of security, yielded the notion of a standard, normal person in society. This notion was introduced at the same time that the disciplinary force of society pushed away the abnormal, defective, disabled, criminal. Measurement yielded normalcy and deviancy. I will deal with these implications fully in chapter 6 on the cultural implications of measurement and statistics.[617]

Am outstanding product of this cultural environment in the 19th century was creation of criminology. The "governmentality" that has driven public attitudes towards crime have not realty changed much since classical criminal law was developed in the late 18th century. We still conduct government as if our task was to track either the effects of growth and industrialization and progress, or the undesirable outputs of modern society, or other similar explanations. The focus on government statistics tends to be the identification of breaches to criminal law and the punishment criminals have received. No serious transformation has occurred from public institutions as to the value they create with their activities. The activities defined in this way seem to have no impact on the frame created by human rights, where people have rights that the state must ensure—both against private and official action. Not only was the compilation of statistics one task of governmentality proper. The suspect of those statistics was intimately

615 Colin Gordon 'Governmental rationality' (n333) p. 20
616 Colin Gordon 'Governmental rationality' (n333) p. 21
617 See below, chapter 6, p. 179

related to the definition of the strength of the state: who was able to work, how many bodies were available to work, how many people were diseased, and so forth. In sum, how strong was the state workforce. Along with these figures, an "avalanche of numbers", to use Ian Hacking's expression, appeared regarding the criminal person. The translation of the subject of law into the social man required a translation of the significance of mental illness.. or criminality for that matter. Abnormal beings are nos susceptible or regular deterrence practices, as proposed by the utilitarians during the Enlightenment. "Social defense" emerged as an expression of "neutralization and prophylaxis", as the foundation of deterrence had been deemed untenable.[618]

5.4.2 Statistics: constructing and counting deviancy

Statistics are one important framework to construct and count deviancy in the mid and late 19th century. The maturity of ideas concerning normalcy and deviancy solidified around notions of criminal law and transgression. Statistics played a role along changes in criminal law theory that yielded the perspective of social defense against transgression.

By the end of the nineteenth century, for instance, a person who commits a crime is morally or mental defective, ie, "not normal".[619] This is different from the conception of criminal breach in the early 18th century. Modern penal law, founded within the triangle of law, crime and punishment, was born out of the need to limit absolute power, to promote compliance with law, the preference for legislation, and the inhibition of special decrees ("bills of attainder", in the United States Constitution). Free will, as the condition for the social contract and the basis for the legal order, supposes any member of society is able to breach the law—even criminal law. No special condition is required. Legal consequences following the breach of criminal law in a classical framework would be conceived of as just an implication "of a bad calculation".[620] The construction of classical penal law, the micro-physics of power, is enshrined in the "inexorable and integral inefficacy of justice", that discrete yet uninterrupted threat".

618 Colin Gordon 'Governmental rationality' (n333) p. 29

619 Pasquale Pasquino 'Criminology: the birth of a special knowledge in Graham Burchell & Colin Gordon & Peter Miller (Eds.) *The Foucault Effect . Studies in governmentality* (U Chicago Press, Chicago 1991) 251 p. 236

620 Pasquino 'Criminology' (n137) p. 238

By the end of the nineteenth century, this ideal was abandoned. A new breed was born in criminal anthropology: *homo criminals*, a naturally evil being, against which society must protect herself. The criminal was deemed a "waste product of social organization".[621] The abandonment of Bentham's utilitarian perspective where punishment would work as a deterrent, was supported on two arguments: (i) criminal statistics indicate that crime continued to raise; and (ii) the mechanism of deterrence was thought of for a rational subject able to enter into the social contract—but a criminal is not a person of this sort: "one may say that he does not think at all".[622] Attention shifted from the implications of free will to the identification of society as a victim of crime. Social defense was born. Both, the identity of the person who commits a crime, and the meaning of the reaction of the state had changes—and the paradigm needed to be removed from the horizon of the social contract. The criminal, as a waste product, could be managed; and punishment was merely the regulated reaction of society.[623]

These frameworks show the role of the association between classification and counting – that is, statistics. The implications are very practical, and visible in approaches to management. The echoes of these debates can be appreciated in the definition of criminal policies in the New Public Sector Management approach, which in Britain lead to the adoption of "prudentialism". Situational crime prevention was associated as a preference to modify the environment where in rational choice settings an agent is free to commit or not commit a crime. Prudentialism shifts the burden of protection to the victim and supposes the nature of the agent, very much like the liberal, classical criminal school. The association with the New Public Sector Management is gratuitous. A clear mandate to reduce the form and cost of state intervention was the stated goal of Thatcherism—a government perspective that was spread across the globe. The core value of cost effectiveness seemed to take priority over any other consideration. [624]

The managerial implications of total knowledge can be appreciated by contrast to the economic rationality of the Benthamite subject. Economic familiarity of the Benthamite subject,

621 Pasquino 'Criminology' (n137) p. 238

622 Pasquino 'Criminology' (n137) p. 240

623 Pasquino 'Criminology' (n137) p. 246

624 Pat O'Malley Risk, power & crime prevention 449 in Eugene McLaughlin, John Mucie &Gordon Hugues criminological perspectives. Essential readings (2nd ed) (Sage London, Thousand Oaks, Delhi 2003)

entails departure from the law would occur when the benefits outweighed the ills and pains. In prison, the logic of the Panopticon was to outweigh the benefits the prisoner would see in departing from regular conduct—but only minimally. The Panopticon would show the asymmetric power relations between ruler and the prisoner. Power became pervasive and supported on non-official sources that foster self-discipline.

Yet, a more powerful reading of Discipline and Punish interprets these features as the elements of a method for "'strategic knowledge' of a generalized regime of governance", with three steps: the construction of a problem, the choice of techniques and the setting of outcomes:

> what government understood as the problem to be fixed and the nature of the world that had produced it (the "problematic"); the technologies and techniques that were to be applied to the problem in order to change things for the better; and the ideal outcomes that were intended to be produced by this program of governance.[625]

The characterization of the Panopticon as a power diffusion device is probably weak in the managerial implications this device produces. The construction of a class as something that needs to be fixed, the means available to government and the setting of outcomes come closely into the realm of management. Statistics were central in this development and continue to hold a paramount place in our culture. Human rights indicators are no exception.

5.5 Governmentality and human rights indicators

Rosga reminds us that despite the interesting effect of the governmentality literature, governmentality seems to assume that the subjects of government rationality are individuals by and large. Yet international human rights indicators are not addressed to individuals but to governments, and therefore the implications of this literature should be taken with a grain of salt.[626] Bearing this in mind, the implications for indicator construction are enormous. Here are some ideas and challenges:

625 O'Malley and Valverde 'Foucaul' (n340) p. 320
626 Rosga & Satterthweite 'Measuring Human Rights' (n130) p. 314

1. Governmentality describes a framework to articulate the exercise of power, as distinct in the modern and industrial society, tied to the *homo economicus*: the power of the state was based on the power of bodies to produce. Counting hearths became the counting of hearts. The measure of the body politic, therefore, was not a means to learn, but to act. This was the simplest motivation for what current literature calls “governing by information”
2. Statistical thinking rose with the counts of crime and health. The fields of law and medicine built an array of categories for counting social facts that go alive until today. Statisticians counted crime populations, crime rates as figures for deviancy, mental health. The effect of causes of death remains today as the core expression of the combined power of law and medicine. These categories have shaped modern and industrial society. We have tried to use this data to learn about new categories. But the base categories remain the same.
3. Modern power is characterized by its ability to determine measures. The exercise of power in local governments can be related historically to the effective control upon measure units. Today, it is commonplace for public management to be translated into numbers, for accounting, auditing and more recently to audit performance. Numbers are historically associated to power–the prince determines which measures are legitimate.
4. The temptation of mathematical authority is so powerful, that generalizations based on numbers even served the purpose of identifying natural laws that would define the “average man” as that defined as a boilerplate of human attributes, based on statistical regularities. This seems the way how we use statistics today, in language at least, to paint a picture of the image of rule of law, or efficient courts, or law abiding law enforcement officials.
5. We also have learned that statistics do not impose regularity, but more likely describe frequency. In a chaotic world, in given circumstances, probabilities of a given outcome may vary. Despite our figures of speech, statistical thinking, which is at the heart of the current use of human rights indicators, cannot “draw a picture” of a standard object.

Rather, dispersion is measured from a standard or rule, which tend to have a tenuous relation to explicit standards.

6. Despite the fact that the modern state was born with the notion of universal rights, and the prohibition of torture as a paramount feature of public power, the measurement of state power really has not taken in the values of a limited authority. Rather, state measurements were born to enable “action at a distance” from the sovereign, and later, as a means to construct society classified in those who abide by the law, are mentally sounds, and can work. These broad categories are still in place today. And the measurements of a limited authority are still lagging.

6 A modest meaning for indicators and measurement

If you cannot measure, your knowledge is meager and unsatisfactory" - Kelvin @ University of Chicago

Current literature on human rights indicators or indicators in international law and relations, discuss the power relationships involved in creating and using indicators. The act of reducing complex social phenomena to some figures and concepts is a source of illegitimacy.

There is value in analyzing what is it that we do when we bring "indicators" to the human rights table. What happens to rules so that they can be translated into figures? Are indicators a kind of measurement? Can they measure things that have no corresponding object in nature? How can we define the "objective" information? This chapter presents a reflection in measurement and quantification as a form of knowledge. Indicators are not only the vehicle to deliver "specific information" about objects related to human rights rules; but also a process to convey quantitative information that locates relevant states of affairs within a logical space constructed from human rights regulation. The logical space where indicator information must be set, is the legal framework for human rights, inasmuch as these are used here as rules, legal rules. I believe that similar exercises need to be explicit about the transformation of rule language into policy frameworks. The elements of such logical space was presented above, on section 4.3.

The first step in this analysis is to investigate the activity of measurement. Indicators in general, and human rights indicators in particular, are a form of measurement. In its simplest form, measurement is a process to assign numbers or other elements on a scale, to objects or phenomena, in a systematic way. Quantitative indicators assign numbers to social phenomena that have a relationship to human rights norms. The process of measurement, even if in just one simple iteration, is complex. Reading numbers off a thermometer entails more than just reading numbers on a stick with mercury inside. The process of measurement requires that an explanation be built around the meanings of numbers assigned to perceivable phenomena. An

explanatory apparatus is needed to interpret measurement and to bring sense into the numbers. Some numbers have today widely accepted social meaning, like the measurement of time in hours and minutes; temperature in in Fahrenheit or Celsius degrees tells us something. This meaning is not inherent to numbers. What is the process of human rights measurement like? I start by using Kuhn's explanation of normal science measurement to explain how our preconceptions of measurement need to be addressed and made explicit before inquiring into the nature of measurement in the social sciences.

The measurement of other phenomena, like unemployment, or GDP may have a well known meaning. But other measurements are not so clearly interpreted. What does it mean to have one case of police brutality we count as torture, and what does it mean if we have none? Or why is it important that trials last 7 months or 2.5 years in average? The meaning for these figures lacks a social, shared meaning, like GDP. The meaning of figures attached to objects or phenomena is context dependent, and socially constructed. The logical space to provide this meaning, can be grabbed from the legal framework, which is itself a social construct, where an important dimension for the existence of human rights is displayed. These considerations come from the notion that measurement is a form of representation, which I take from van Fraassen.[627]

The process of measurement in the social sciences shares features with that in the physical sciences. The process involves the choice of salient features to identify phenomena, the choice of a way to represent the measure of such phenomena, and the application of procedures to implement the measurement process. I take this process from Nancy Cartwright.

There is a political dimension to these concerns, captured by the governmentality dimension in measurement, discussed in chapter 5. The bridge from measurement in the physical world and the social world needs to be addressed as well. Porter and others explore the growth of statistical thinking in the nineteenth century and the contribution the use of statistics in politics and social affairs, brought into the physical sciences. Originally, the use of numbers in the social and political world was immerse in a deterministic view of the world, where the Quetelet style of

627 Other measurement theories compete with the the idea of measurement as representation, and are more focused on procedures and methods. I have not studied these theories. Marcel Boumans (2016) Suppes's outlines of an empirical measurement theory, Journal of Economic Methodology, 23:3, 305-315, DOI: 10.1080/1350178X.2016.1189124

thinking would seek for causal connections for the regularities we find in social life. Then, Ian Hacking explores the challenge to determinism evidenced by the beginning of the probabilistic world by the end of the 19th century. The challenge was produced by Hertz's experiment to determine the quantum location for atomic particles. This event signals the start of a probabilistic world where numbers were no longer used as a way to find causes, but to approximately describe the behavior of observed phenomena.

These conceptual decisions about how to interpret the process of measurement, are historically constructed. In fact, the history of measurement in the nineteenth century is of interest to many writers who track the appearance of statistics in government, and then their relationship with the physical sciences at the end of the century. This is why I devoted a chapter to elements in this history, to understand how measurement is not so much similar to a mathematical operation, but rather resembles a process where we build a representation– sometimes using the language of mathematics. The salient moments in this history are the *adunation* of France, as a political process whereby a national standard measurement system was enforced, the contribution of Quetelet to the the logical implications of counting births, deaths and crime rates, or the impact on insurance companies. These salient moments in the nineteenth century have an implication for the way we perceive numbers and measurement–our textbook objectivity, borrowing from Kuhn's textbook science.

6.1 Number, measurement, objectivity and precision as myth

"All is number", is a statement attributed to Pythagoras[628]. Together with Pythagoras' work on geometry and ratios, numbers were perceived as the fundamental, ultimate reality. Regularities, and patterns in numbers could be found in natural phenomena. For some Pythagoreans, numbers were even used as the basis for a metaphysical system of belief. For a long time, science and philosophy have struggled with the relationship between numbers and objects. The language of description is usually recognized as an independent form of expression, different to formal

628 David Lindberg, The beginnings of western science. The European Scientific Tradition in Philosophical, Religious and International Context Prehistory to AD 1450 (2nd ed) (U Chicago Press, Chicago, 2007) [Amazon Kindle] pos 676; T Porter *Trust in numbers* (n4) pos 524

language, such as arithmetic or logic. Yet, in society numbers are also related to our everyday reality. Today, numbers are pervasive. Numbers "regulate" every aspect of day-to-day life. The measurement of time[629], temperature[630], wealth or knowledge are closely tracked for all sorts of decisions in personal and public life.

In it's simplest form, measurement is a cognitive activity whereby numbers are aligned to phenomena in order to get information. "Indicators"–multiple dimensions measured at once for the same phenomena– are a form of representation for measurements of *Ballung* concepts–akin to fuzzy sets that require multiple features to represent a "family resemblance", as opposed to a precise set of features.[631] Indicators as a means of representation share with other kinds of representation, all the difficulties of measurement. Measurement as a concept has been largely ignored in philosophy, until fairly recently.[632] The simple image of measurement as assigning numbers to magnitudes needs to be explored in more detail to appreciate how our simple operations like reading temperature off a thermometer, are related to more complex operations, such as deciding whether propensity to civil war has increased or decreased in a particular country. Measurement theory, typically explored for the physical sciences, poses additional challenges when dealing with phenomena that have no counterpart in the natural world so as to describe them with a true or false description based on our observations of nature. The same applies to measurement for rule compliance–especially if these rules include principles, which have a broad and imprecise nature.

Quantification became a popular tool possibly at the same time that it arrived into the social sciences, by the end of the 18th century.[633] Quantification and measurement were popular because this opened opportunities for experiment replication, it allowed the construction of

629 David Landes, *Revolution in time. Clocks and the making of the modern world* (Harvard University Press, Massachusetts, 1983); Dan Falk, *In search of time. The science of a curious dimension* (St Martin's Press, New York, 2008)

630 Hasok Chang *Inventing Temperature: Measurement and Scientific Progress* (Oxford university press 2004) [UNAM]

631 Nancy Cartwright & Eleonora Montuschi *Philosophy of social science. A new introduction* (Oxford University Press 2014) 273 [Amazon Kindle]

632 cfr Eran Tal 'Making Time: A Study in the Epistemology of Measurement' Brit. J. Phil. Sci. 67 (2016), 297–335 [UNAM]

633 Hacking, 'the history of statistics' (n484) 186 [relying on Kuhn]

evidence to test theories. It offered an opportunity to reduce bias in personal impressions and cultural differences.

One explanation for knowledge in general, is that humans make representations. Ian Hacking says that: "[h]uman beings are representers. Not *homo faber*, I say, but *homo depictor*".[634] Depiction means to construct a theory that accounts for the facts that present themselves in a disconnected and incomprehensible way, to our senses. Inasmuch as measurement generates some sort of knowledge,[635] it is a cognitive activity,[636] and a form of such representation. Measurement is information gathering through a two-fold activity. On the one hand, measurement is reading a number on an object that is used as an instrument. On the other hand, measurement is the product of such "end-state" in a thermometer, as projected into the logical space built within a theory. Such location of the object in a logical space entails information gathering. The same information gathering applies in social sciences, to build scientific information. Observation of an instrument with a scale may produce no knowledge without the logical space provided by a theory to interpret this observation.

Quantitative data produced as the result of the measurement process, has a singular appeal. Numerical data seem to have a particular strength, unseen for other sources of information in public debate. Why do numbers seem so powerful and appealing in public discussion? Quantification became the ultimate tool for scientific investigation only in the nineteenth century. The measurement techniques stemmed from the paradigm of rationality–order. Ordering objects according to a scale.[637]

Only for historical reasons, measurement became common practice in the scientific method for classical physical sciences in the 17th and 18th centuries–and then into the Baconian sciences in the late 18th and 19th centuries. Thomas Kuhn traces back the growth of measurement in the physical sciences as a practice in the seventeenth century; with an important

634 Ian Hacking, *Representing and Intervening. Introductory topics in the philosophy of natural science* (Cambridge University Press Cambridge 1983) 132

635 Cartwright (n621) p 265; Bas van Fraassen, Scientific representation. Paradoxes of Perspective (OUP 2008)

636 Chang, (n620)

637 Michael Foucault *The Order of things. An Archeology of Human Sciences* (Les Mots et les Choses Trans) (Vintage Books New York 1994) ch. 3

impact on the Baconian sciences: heat, electricity, magnetism and chemistry.[638] Kuhn's characterization of Baconian sciences as those where experimentation took a prominent role, should bear in mind Kuhn's argument concerning the limits of numerical data for the construction of new knowledge. Ian Hacking claims that the use of statistics in the early 19th century generated the tools for their application into physical sciences. Along with these developments in science, political and practical reasons boosted what Ian Hacking calls an avalanche of numbers in the late 18th and 19th centuries.

The current value of numbers and quantification may stem from what Thomas Kuhn calls "textbook measurement"–which also paints a broad picture of the appeal of numbers in non-scientific (statistical) communities. Such caricature of the function of measurement in science – and knowledge in general– is possible because of the myth of measurement, quantification, and precision, as important steps in our understanding of the world. Numbers are perceived as the source of information to construct scientific theories in the physical sciences; or as we will see later on regarding social phenomena, as a source to draw regularities concerning human behavior.

6.2 Measurement: textbook and scientific

The literature on indicators is generally clear on the criticisms on the perils of interpreting measurement accurately. Materials in the last decade include examples of measurement in the field of human rights, as a tool to advance human rights causes, for instance, by providing proof that a phenomenon exists. For instance, the measurement techniques used in surveying anonymous bodies in local cemeteries in Argentina offered an irrefutable proof that an abnormal pattern of deaths existed in a very specific period of time, and that this pattern needed to be accounted for.[639] Researchers had a theory in mind. Then they created an approach that would

638 Thomas Kuhn 'The Function of Measurement in Modern Physical Science' (1961) 52 Isis 161 at 186: "cluster of research areas that owed their status as sciences to the seventeenth century's characteristic insistence upon experimentation and upon the compilation of natural histories, including histories of the crafts. To this second group belong particularly the study of heat, of electricity, of magnetism, and of chemistry"

639 Clyde Collins Snow and Maria Julia Bihurriet 'An Epidemiology of Homicide: Ningún Nombre Burials in the Province of Buenos Aires from 1970 to 1984' in Thomas B. Jabine, Richard P. Claude *Human Rights and Statistics: Getting the Record Straight* p.328

identify and possibly measure the theory. They created a form of representation for persons disappeared during the Argentinian dictatorship. At best, the numbers resulting in surveys or other forms of measurement may help illustrate a fact that calls for an explanation–rather than providing us with the material for a theory that will result from those facts. This distinction was produced as a slow process in the social world and the social sciences during the 19th century, which Hacking refers to as the erosion of determinism. There are no laws of social confirmation that we can observe manifest in the human condition. Rather, events in social life need a theory to account for them. Once we have a theory, then we can recognize it in facts displayed before us.

The narrative of measurement for the purposes of divulging scientific knowledge, is usually written from the perspective of knowledge that has already been acquired; a narrative from the perspective of a learning process, that has concluded and yielded a given theory or law of nature. From this perspective, Kuhn describes the textbook measurement process, pretty much as a mathematical function – an input, a set of operations and an output.[640] The process would imply the input of a series of statements that describe the theory in question; (ii) a set of logical and mathematical machinery to process those statements, along with the specification of "initial conditions" to which the theory is applied; and (iii) an output:

The crank is then turned; logical and mathematical operations are internally performed; and numerical predictions for the application at hand emerge in the chute at the front of the machine.[641]

Two sets of figures are reported: one for the outcomes expected from theory; and one containing figures produced by the actual measurement.

But, what is the appeal of figures in this way, one set developed from theory, and one set developed from practice? Kuhn identifies two main reasons why we turn to numbers under the textbook measurement myth. Data are turned to, apparently for two reasons: (i) we believe in numbers as a test of theory. But most importantly, (ii) as a source of new scientific knowledge:

640 Kuhn Measurement (n628) 163-4
641 Kuhn Measurement (n628) 163-4

> Some people seem to take for granted that numerical data are more likely to be productive of new generalizations than any other sort[642]

In reality, testing theories seems a rather unusual application of measurement, reserved for some scientific circles, during the development stages of breakthrough experiments. Normal measurement in scientific development does not usually have the ability to produce new knowledge, or to confirm existing theories.

The ability of numbers to become the source of new theories and scientific discoveries seems a strong value attached to the "textbook measurement" schema. The appeal of numbers is apparent if perceived as a source of information to generate theories and scientific knowledge by applying the logical and mathematical machinery backwards:

> laws and theories are forged directly from data by the mind–then the superiority of numerical to qualitative data is immediately apparent. The results of measurement are neutral and precise[643]

The reasons for the appeal for numbers are not entirely accurate. Measurement as replicable experiment, is only present in textbook measurement. Examples in the history of science include many experiments that could never be replicated; whose quantities were never recorded because the centrality of scientific experiment was not in vogue, or where results extend over a range of values.[644]

The power of numbers can find its source not only in textbook science. Thomas Kuhn refers to experiments where outcomes include a range of values, as an example of why measurement tables are relevant in scientific theory: they represent a range of values around which reasonable agreement exists–they clarify what can be expected of the particular theory.[645] Textbook measurement reflects what the scientific community at the time believes it knows–where knowledge is understood as this "reasonable agreement".[646] The power of the idea of a

642 Kuhn Measurement (n628) 164

643 Kuhn Measurement (n628)165

644 Sergio Sismondo *An introduction of Science and Technology Studies* 2nd ed (Blackwell Western Sussex, 2010) p. 109 discussing the difficulty of transferring knowledge for the construction of the TEA laser.

645 Kuhn Measurement (n628) 166

646 Kuhn Measurement (n628) 167

reasonable agreement upon which the scientific community expresses “knowledge” is this: as opposed to textbook measurement, where numbers are expected to conform to theory, normal science is built around varying interpretations of measurements, figures and experiment results. The facts produced by measurement have no meaning of their own:

> They must be fought for and with, and in this fight the theory with which they are to be compared proves the most potent weapon. Often scientists cannot get numbers that compare well with theory until they know what numbers they should be making nature yield.[647]

This flexibility in explanation can also be appreciated in the fact that theory most of the time expresses a potential reading of facts. When genius reshapes our understanding of the world, e.g, general relativity, this happens despite the fact that the theory itself cannot be proven at the time. Making theories possible means creating the mathematical or empirical proof it requires. Measurement is thus, not the basis for a new theory most of the time, but the other way around: theory leads the production of new experiments and tools to establish that the theory and its implications are congruent with reality. We build theories, then measure the world not to test the theory but to fully express its implications. These measurements in an adequate range provide for the reasonable agreement that the theory implies. The clarification of these implications is constructed in a process or “mopping up” the space for the theory to gain concrete interpretations.[648]

Kuhn offers a beautiful expression to account for Galileo’s theory of uniform acceleration:

> sent men to the very border of existing instrumentation, an area in which experimental scatter and disagreement about interpretation were inevitable, then no genius would have been required to make it.[649]

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647 Kuhn Measurement (n628) 171
648 Kuhn Measurement (n628) 168
649 Kuhn Measurement (n628) 172

Kuhn adds the example of Dalton's atomism, and points out there was no accurate measurement to support the theory for a long period of time. Kuhn translates these examples into social sciences by saying that "[t]here are self-fulfilling prophecies in the physical as well as in the social sciences."

The most important point to be made about textbook measurement, is that numbers themselves are scarcely a source for interpretations of the world as it is. Rather:

> new laws of nature are so very seldom discovered simply by inspecting the results of measurements made without advance knowledge those laws. Because most scientific laws have so few quantitative points of contact with nature, because investigations of those contact points usually demand such laborious instrumentation and approximation, and because nature itself needs to be forced to yield the appropriate results, the route from theory [175] or law to measurement can almost never be traveled backwards. Numbers gathered without some knowledge of the regularity to be expected almost never speak for themselves. Almost certainly they remain just numbers.[650]

The mere aggregation of measurement results does not in itself constitute new knowledge. We do not derive theories from observations. Rather, vast amounts of theory are needed to make the measurements speak to us. Again, "nature undoubtedly responds to the theoretical predispositions with which she is approached by the measuring scientist. But that is not to say either that nature will respond to any theory at all or that she will ever respond very much."[651] Only when we have a set of statements that serve as interpretation for the world, can we fruitfully identify anomalies that may yield new aspects of new theories.[652] Succinctly: "The road from scientific law to scientific measurement can rarely be traveled in the reverse direction."[653]

The power of theory to thrust measurement is enormous. Kuhn remarks that accurate measurement of phenomena in the fields of electricity, chemistry, heat and magnetism was not

650 Kuhn Measurement (n628) 176
651 Kuhn Measurement (n628) 176
652 Kuhn Measurement (n628) 179
653 Kuhn Measurement (n628) 189-190

possible until a better qualitative understanding of phenomena was present–and then only after the measurement instruments were built with these theories in mind.[654] This only happened in the late 18th and 19th centuries. Kuhn calls the effect of measurement in the Baconian sciences as a "second scientific revolution".

There was a time in the 19th century, where statisticians sought to derive laws from observations of natural facts: the moral man would represent all the attributes of the average population–in France. We no longer look at social facts this way. I will discuss this in later sections.

6.3 Measurement as a form of scientific representation[655]

The literature on philosophy of science produced in the past ten years has started to address the issue of measurement. One important contribution is Bas van Fraassen's Measurement as representation. Paradoxes of perspective.[656] Measurement "is an endorsing term". Calling something a measurement implies a positive ("correct or valuable") qualification about the particular representation it produces. Measuring means to "gather information" via "something

654 Kuhn Measurement (n628) 190 "For a more fundamental quantification, magnetism, like electricity, awaited the work of Coulomb, Gauss, Poisson, and others in the late eighteenth and early nineteenth centuries. Before that work could be done, a better qualitative understanding of attraction, repulsion, conduction, and other such phenomena was needed. The instruments which produced a lasting quantifi-cation had then to be designed with these initially qualitative conceptions in mind.58 Furthermore, the decades in which success was at last achieved are almost the same ones that produced the first effective contacts between measurement and theory in the study of chemistry and of heat.59 Successful quantification of the Baconian sciences had scarcely begun before the last third of the eighteenth century and only realized its full potential in the nineteenth.That realization-exemplified in the work of Fourier, Clausius, Kelvin, and Maxwell-is one facet of a second scientific revolution no less consequential than the seventeenth-century revolution. Only in the nineteenth century did the Baconian physical sciences undergo the transformation which the group of traditional sciences had experienced two or more centuries before"

655 A critique of measurement as representation can be found in Ernest Adams 'On the nature and purpose of measurement' (1966) 16 Synthese 125, pointing out at the insufficient attention that representation theory pays to the underlying reasons or purposes of measurement. "have neglected to consider what it is that measurements are made for, and in so doing have been led to conclusions as to what measurement ought to be which are in serious disagreement with what scientists do"

656 van Fraassen (n621)

that functions as an instrument."[657] Gathering information is also perceived as a positive qualification for an activity.

Plainly, the facts of the world, like magnitudes, rarely speak to us in a clear voice to reveal theories about them. We look for ways to explain such facts, as magnitudes, and wrap them in theories that allow us to grasp their implications. We wrap the world around our ways of understanding the facts. In a perhaps more radical view than Kuhn, Bas van Fraassen explains what we mean by measurement as an artifact of representation.

Measurements as representations allow for some distortion. Theories are models or representations. Measuring is also representations:[658] "measuring locates the target in a theoretically constructed logical space". Representation is successful not only through resemblance. Purposeful distortion can also function as a tool for representation.[659] Representation requires that certain features are favored over others. Accurate representation may require in some cases that reality be distorted to favor some features upon others.[660] In representation, an object may be drawn to appear like this or that other object. Resemblance exists inasmuch as we recognize the original object; and distortion is sometimes required to express a perspective, a point of view. Other instances of tolerated, purposeful distortion, are caricatures. Caricatures are excellent examples of context dependence. The depiction is clear enough to allow the character to be recognized–and distorted at the same time. Resemblance and distortion play a role in communication, and require social context to be interpreted.[661] Some forms of representation require selective representation for their effectiveness.[662] Thus, accuracy in representation, despite our intuition, is really "context dependent".

Van Fraassen writes from the standpoint of Bildtheorie.[663] To depict is to predicate. Even further, a depiction is like a sentence:[664] in a depiction, an object is denoted–its name is. Also, the

657 van Fraassen (n621) 158
658 van Fraassen (n621) 2
659 van Fraassen (n621) 13
660 van Fraassen (n621) 14
661 van Fraassen (n621) 15
662 van Fraassen (n621) 18
663 van Fraassen (n621) 1
664 van Fraassen (n621) 16

object is depicted as such or such other thing–a predicate is included. Hence pictures are analogous to propositions. Whether depictions are a new object, or just the representation of the depicted object, is again a highly contextual decision. As in Catylus' dilemma, it is important to make our goal explicit: is the depiction being used because we value the object being depicted? Or is the representation itself the object we value? Context is needed to answer this question as well.

Accuracy in representation is context dependent, but not arbitrary. Van Fraassen reminds us constantly of the relevance of context in the determination of accuracy. Rather than the Master in Humpty Dumpty's exchange with Alice about the source of the meaning of words, van Fraassen uses the formula "Z uses X to depict Y as F", to underscore that (i) a subject Z; (ii) makes the depiction of an object Y; (iii) through a device or resemblance of x; (iv) with the purpose of F.[665] A more elaborate name for "context" as the means where depictions acquire meaning, van Fraassen uses the "system of representation". The choice of the system of representation we use for a given object in a given context, is also system dependent. We choose a system of representation according to its internal rules. "Meaning is bestowed upon the depiction by the subject."[666] The subject bestows a particular use to a representation within a system of representation.[667] In the selective representation process, "[i]f the selection or the highlighting is indicated by signs placed in the artifact itself, these too need to be meaningful to play their role"[668]

The idea that theories–in science or otherwise–are depictions where selective representation can play a role, further enhance the departure from "textbook measurement" as described by Kuhn. Measurement, according to van Fraassen is not just a step related to theory construction. Measurement itself is also a form of representation, where the tool of selective representation is also available. Like in the example of the Baconian sciences, measurement was

665 van Fraassen (n621) 22

666 van Fraassen (n621) 23

667 van Fraassen (n621) 22: "When Descartes created his method of coordinates, it is not as if he was just using an already extant way of representing spatial shapes and motion. But it is true that in his initiative, to use known numerical equations in this way, he bestowed a role on already familiar equations that they had not had before."

668 van Fraassen (n621) 31

not possible without a sufficiently developed theory of the phenomena to be measured, and without the instruments that were sensitive in a relevant way.

6.3.1 Logical space

To measure means to locate an object in a logical space. Measurement was defined in the 19th century as the process of assigning numbers to magnitudes.[669] As Eran Tal explains, a current strand in theory of measurement would identify measurement as a process, "an interaction with a system to represent aspects of such system in abstract terms." This definition is consistent with van Fraassen's: "measuring locates the target in a theoretically constructed logical space."[670]

First, a region of logical space is "a set of possible worlds".[671] Location means two steps: (i) to identify, e.g., a map, as akin to a measurement instrument; and (ii) self location within that measurement instrument. Self location in this case is required for the purpose of location with a particular direction. Purpose dictates that certainty of a particular direction must obtain before the map can be truly appreciated as representation.[672] A similar effect results from simpler operations, like classifying or calling an object this or other way. Classification "bestows" the object with semantic content, within the "norms of rationality".[673]

Logical space as a product of theory is in flux. Measurement stabilizes the logical space after a series of experimentations and accompanying measurement.[674] The logical space, as we have presented it before, is composed or sets of contiguous moments in time where states of affairs are described. A picture, in van Fraassen, represents a state of affairs within the logical space.

The notion of "logical space" as relevant to measurement here, can be used in connection with the elements of deontic logic I discussed earlier in relation to the content of rules we wish to represent in an indicator. In von Wright's nomenclature, a state of affairs is required for change

669 Eran Tal 'Measurement in Science' in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition),, https://goo.gl/ce3Wpk

670 Van Fraassen (n621) 2

671 Van Fraassen (n621) 519 note 33 ch 4

672 Van Fraassen (n621) 84

673 Van Fraassen (n621) 84, quoting Wilfrid Sellars

674 Van Fraassen (n621) 127 on empirical evidence and the stabilization process.

to take place. Logical space in the logic of change requires two states of affairs in order to build the logical space. Van Fraassen recalls Wittgenstein's description of the logical space in the Tractatus:[675]

> 1.13 The facts in logical space are the world.
>
> 2.013 Everything is, as it were, in a space of possible atomic facts. I can think of this space as empty, but not of the thing without the space.
>
> 2.0131 A spatial object must lie in infinite space. (A point in space is an argument place.) A speck in a visual field need not be red, but it must have a color; it has, so to speak, a color space round it. A tone must have a pitch, the object of the sense of touch a hardness, etc.
>
> 2.202 The picture represents a possible state of affairs in logical space.

To adapt this terminology to the logic of change, we must know the descriptions of two states of affairs continuous in time regarding the same object. Within the logical space provided by theory, measurement means to locate an object within the theory-laden dimensions.[676] Theory provides the logical space, the operational rules for the location to occur. According to Hacking, individual sentences are not representations. Theories are.

In terms of the logic of change, a theory–a conjunction of statements adequate to express the deontic character of a particular transformation concerning a state of affairs. Without this theory, the observation of an event cannot be made sense of, it cannot be fully represented in connection with identically qualified transformations in states of affairs. Another consequence is that we need the measurement of one initial and one final state of affairs–because this is the requirement for this type of theory.

In some cases, the location of the object occurs not in a point of the logical space, but within a region of such space. This occurs when logical space is built as a scale. The construction of the logical space is itself a process. During such process, the coordination problem may arise, ie., the construction of measurement instruments and the circular reference produced when

675 Van Fraassen (n621) 164
676 Van Fraassen (n621) 164

locating objects within the scales of those measurement instruments. Yet, this is only temporary. Once a theory stabilizes and confidence is gained upon the measuring system, the theory itself will provide a line for genuine measurement.[677]

A simplified view of measurement –e.g., the assignment of numbers to magnitudes–can be misleading. Measurement is not necessarily a one step action, but a process. Multiple actions of collecting single data, e.g., measurements of length or otherwise–will be analyzed to produce a table of frequencies. This analysis can materialize the stable result for theory to provide a logical space for future measurements.[678]

Theories, models, are built to fit observable phenomena.[679] Multiple models can predicate about the same phenomena.[680] Since logical space is provided by theories and not objects, an object may be located in more than one logical space.[681] For indicators, this means that the same fact can speak about as many logical frameworks as we need–one for human rights rules, one for management strategy, one for economic theory, and so on.

6.3.2 Measurement as representation

Van Fraassen distinguished processes from within and from above in measurement. Measurement from within involves the multi-layer process required to produce a theory. Once theory has stabilized, we can see measurement "from above". The view from above is a "resting point" and as such, is only momentary. [682] Only at the resting point are there classifications in place provided by the theory, that need to be applied before objects can be measured.[683] Thus,

677 Van Fraassen (n621) 165
678 Van Fraassen (n621) 167
679 Van Fraassen (n621) 169-70: "A theoretical model MT fits an experimental model ME just in case MT has some state s such that the Function pms contains the surface (p.170) state of ME, relative to the given identification of the measurement setups as measurement of the physical magnitudes m."
680 Van Fraassen (n621) 168
681 Van Fraassen (n621) 173
682 Van Fraassen (n621) 141
683 Van Fraassen (n621) 142

classification in this resting point is theory laden: to assert that “This is an X-measurement of quantity M pertaining to S” implies a system characterized by quantity M.[684]

An oversimplification of measurement would have us believe that measurement comprises one action whereby a number is assigned to an object, a magnitude.[685] A typical example is to “read” a thermometer–to see the numbers next to the point where the mercury in the shaft has stopped. This one-action measurement is adequate in contexts where no much accuracy is required. But to produce a graph that provides the logical space to locate future measurements, we must include the sum of all individual readings, in all relevant places, the analysis and summary for those data.[686] Those steps even if far removed from the individual reading, are also called measurement.

The process of stabilization described here resonates from Kuhn’s consensus, as opposed to textbook science. Stabilization can occur once the theory has evolved in relation to measurements.

6.3.3 Representing and recasting truth

Systems of indicators are aggregation of measurements which sometimes use many systems to build their respective logical spaces. As such, indicator systems would be ineffective in trying to capture truth. Rather, these systems should aim at grasping a better representation of complex social facts they aim to capture. Representations in this context are public. No private representations are included–such as Kantian judgments. Representations are not single sentences, propositions; but theories as a whole. Hacking notes that Hertz, from whom Wittgenstein’s picture of philosophy was derived for his Tractatus, “invites the next generation of positivists, including Pierre Duhem, to say that there is no truth of the matter – there are only

684 Van Fraassen (n621) 144. But Hacking ‘Representing? (n624) 176 says: “There have been important observations in the history of science, which have included no theoretical assumptions at all. The noteworthy observations of the previous chapter furnish examples.”

685 Van Fraassen (n621) 166

686 van Fraassen (n621) 167. “the data model summarizes the relative frequencies found; the surface model ‘smoothes'—in fact ‘idealizes'—this summary still further so as to replace the relative frequency counts by measures with a continuous range of values.” p 167

better or worse systems of representation, and there might well be inconsistent but equally good images of mechanics."[687]

Representation is not about truth. It is about competing accounts of facts. Even what the facts are, can be contested. These competing representations can assist in establishing what the important facts really are. For instance:

> The new normal science may have interests quite different from the body of knowledge that it displaced. Take the least contentious example, namely measurement. The new normal science may single out different things to measure, and be indifferent to the precise measurements of its predecessor. In the nineteenth century analytical chemists worked hard to determine atomic weights. Every element was measured to at least three places of decimals. Then around 1920 new physics made it clear that naturally occurring elements are mixtures of isotopes. In many practical affairs it is still useful to know that earthly chlorine has atomic weight 35.453. But this is a largely fortuitous fact about our planet. The deep fact is that chlorine has two stable isotopes, 35 and 37. (Those are not the exact numbers, because of a further factor called binding energy.) These isotopes are mixed here on earth in the ratios 75.53% and 24.47%.[688]

So multiple representations may exist. One may prove more useful than other for a particular purpose. The challenge in choosing representations to fit in indicator systems is exactly how to pick among many theories, how to use them simultaneously if required, without inviting confusion; and thus, how to achieve the best possible picture of a very complex social reality.

The basic problem is this: empirical science requires observations based on theories, but empiricist philosophy demands that those theories should be justified by observations. And it is

687 Hacking, Representing (n624) 144
688 Hacking, Representing (n624) 8

in the context of quantitative measurement, where the justification needs to be made most precisely, that the problem of circularity emerges.[689]

Indicators related to legal elements have precisely the same problem, since coordination is a typical issue in legal theory used to distinguish legal utterances from other sorts of speech or action. Coordination is a problem in measurement with the example of the construction of the standard meter embodied in the platinum bar to be kept in the French State Archives. But the same bar is used to define what counts as an utterance relevant to build the logical space for that meter in legal terms.[690]

6.4 Measurement in the social sciences

Measurement as a complex process goes well beyond the assignment of numbers to magnitudes. The complexity of the process holds for social sciences, as in physics or other natural sciences. Yet, social sciences have an additional dimension of complexity: their results can be "hotly contested" because the object social science measures are socially constructed. There is no natural object we usually call poverty or unemployment.[691]

Social phenomena can be fuzzy. Their measurement requires from us to pin down a common concept: "coding", ie., "assigning the object to a specific class using articulated criteria".[692] The impact of measurement in social sciences has important political implications. These implications are not present in physical sciences.

In order to build categories where we can classify social phenomena, a definition is required. Then such definition must be operationalized via a set of features we can count as sufficient for the category to apply. Thus, measurement means to assign a number to a unit –like we would expect in the physical sciences–or to put a unit within a specific category–our starting point in social sciences.[693] Measurement is thus the assignment of numbers to things in a

689 Chang (n620) 221

690 The metro in Paris is a typical reference to circularity in the definition of the "rule of recognition" which divides law from non-law–in the case of indicators about legal rules, the metro in Paris–or its legal counterpart–needs to be used to identify which elements of discourse can be used to build the logical space to interpret facts.

691 Nancy Cartwright & Rosa Runhardt, Measurement, in Cartwright & Montuschi (n621) 266

692 Cartwright & Runhardt, Measurement (n681) 265

693 Cartwright & Runhardt, Measurement (n681) 267

systematic way, in three steps: (i) characterization; (ii) representation; and (iii) measurement procedures.

6.4.1 Characterization

Characterization requires that a category be defined useful for the purpose we pursue. Categorization is purpose sensitive: why do we need to make this particular measurement? To assess the relationship between, e.g., conflict and rape? Or to determine the probability of armed conflict? The challenges we must be prepared for include the social construction of concepts in the social sciences. These concepts are relevant to human behavior and they usually require the researcher to define a type–an item or a set of items in mind which will be covered by the category as typical examples.

Then, the concepts we decide to use lack clear boundaries. They are *Ballung* concepts. They bear a family resemblance among different concepts, among which we find sufficient overlap. They are properly described within the features of fuzzy sets.[694] In order to enable good information gathering for research categories should group elements that have sufficient points of contact apart from belonging to such category.

At the core of *Ballung*en concepts we find the notion of uncertainty as a necessary component of language. Uncertainty cannot be avoided:

> There is no way to establish fully secured clean, protocol statements as starting point of the sciences. There is no tabula rasa. We are like sailors who have to rebuild their ship at sea, without ever being able to dismantle it at dry dock and reconstruct it from the best components. Only metaphysics can disappear without trace. Imprecise “verbal clusters”are somehow always part of the ship. If imprecision is diminished at one place, it may well reappear at another part to a stronger degree.[695]

694 Cartwright & Runhardt, Measurement (n681) 268

695 Otto Neurath, in Thomas Ubel *Empiricism at the crossroads. The Vienna circle's protocol-science debate* 2007 Open Court Publishing USA p 419

These *Ballung* concepts play an important role in our understanding of science as a description of the world. As Cartwright explains:

> Pierre Duhem argued that science itself is exact even though the facts we confront cannot dictate an exact scientific description. [...] Otto Neurath, for example, urged a Positivist view … that we can only compare scientific representations with other representations, not the world itself. But scientific representations ...should be exact. This contrasts with the concepts that describe the evidence for science and in terms of which science will be put to use. These are "*Ballung*en": dense clusters with rough edges.[696]

Fuzziness is an ontological claim about the world as is. It's epistemological counterpart is error. This characterization stands in contrast to Cartwright and Neurath on fuzziness as an attribute of representation–clear in *Ballung* concepts.[697]

Conceptualization of fuzzy concepts seems unnecessary in the realm of quantitative measurement. Instead, researches focus on the operationalization of these concepts – leaping into the representation as opposed to the characterization phase as described by Cartwright. Operationalization means "finding 'indicators' comprised of numerical data that are correlated with each other and thus with the unmeasured, latent variable"[698] Measurement procedures are then used for coding cases. The "measurement model" generates the "data score" for cases vis-a-vis the concept or variable we need to measure.[699] This process is different from Cartwright's characterization-representation-procedure system. Here, characterization seems rather a result of coding through measurement, rather than for measurement. Goertz uses examples as the Global terrorism database, where authors deliberately exclude characterization.

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696 Nancy Cartwright 'Reply to Paul Teller' in Stephan Hartmann, Carl Hoefer and Luc Bovens (Eds.) *Nancy Cartwright's Philosophy of Science* (Routledge 2008 New York) 118

697 Gary Goertz, James Mahoney, 'Concepts and measurement: Ontology and epistemology', (2012) 51(2) Social Science Information 205–216, p 205

698 Goertz (n687) 207

699 Goertz (n687) 207

Simplification is a required step in measurement. Yet, in the construction of indicators, we see that: "[u]nlike the attributes that constitute a concept, indicators are optional, substitutable and not necessarily definitional. Different indicators are all measures of the same conceptual entity…"[700]

The relationship between attributes and concepts must be distinguished from that of indicators and variables. Variables are causal to indicators. Attributes have a semantic relation to concepts. Goertz et al argue that attributes and concepts are used in qualitative research–and this relationship even determines the quality of the research; whereas variable / indicator language is used in quantitative research.[701] The causal relationship is perceived as a requirement in quantitative research.

Fuzzy logic states that "'Set membership' is a way to associate meaning to numbers in the zero to one range." and thus connects semantics and measurement.[702] Fuzzy-set membership can be traceable to a value of an observation. Fuzzy set membership can be analogous to "assessing the extent to which a case corresponds to an 'ideal-type'. Ideal types serve to "calibrate" membership tests.

Legal theory sometimes argues for a criterion of fuzziness as appropriate in law, to distinguish legal rules from other kinds of normativity. Yet, The application of legal rules to facts seems more of a *Ballung* concept operation–there are clear definitions with rough edges. Legal practice sheds light on the facts covered by such legal concepts. Those facts. Therefore, should be taken into consideration when building the logical space required for indicators in human rights. Fuzziness seems inadequate as a mechanism to apply particular legal terms to particular sets of facts, since there is normally no ideal type for those concepts but an internally required definition which gains detail as it is applied to different fact patterns. In these cases, cases are not fuzzy in the sense of ranging from 0 to 1 in correctness, but the particular instances are 0 or 1, where the borders of the concept are rough.

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700 Goertz (n687) 208

701 Goertz (n687) 209; "For example, the usefulness of a thermometer as a measure of temperature depends on a causal theory of heat expansion." Goertz says the same applies to the theory of latent variables in social sciences.

702 Goertz (n687) 209 - fuzzy set membership is thus ontological, rather than epistemological.

6.4.2 Representation

Representation means assigning a model to "read" the phenomena in the world. Representation means, e.g., defining temperature in terms of a series of contiguous numbers. Forms of representation vary and must be chosen according to the object we seek to represent. Nancy Cartwright defines four types of representation, following Stanley Smith Stevens: [703]

> (i) a numeral scale. A numerical scale can include a binary scale for 'yes' or 'no'. Numbers here are used as a substitute for labels and there is no intrinsic relationship between them: 2 is not two times 1.
> (ii) Ordinal scale: numbers ranked successively from lowest to highest, regardless of the intervals between them.
> (iii) Interval scale: the continuum is divided into even spaces numerically separated.
> (iv) Ratios: a numerical sale with a zero point.

A different representation corresponds for "indicators", adequate for *Ballung* concepts. The characteristic of these concepts is the contribution of two or three factors to their definition, and the choice of one of them as essential, over the rest. Relevant features are measured and presented discretely.[704] Cartwright uses as an example the tables of indicators for social exclusion in the European Union.[705] Indicators are advantageous because they provide the opportunity of tracking several aspects of a concept at once. They are inadequate to provide information for comparisons across time or across units. That purpose is best served by an index that can be constructed from a table of indicators.[706]

The implication that the pairing of characterizations and representation can yield infinite measurements, is problematic for three reasons: first, the concern about "cherry picking" the measurement that makes our object look best; second, the difficulty of gathering knowledge

703 Cartwright & Runhardt, Measurement (n681) 272

704 Cartwright & Runhardt, Measurement (n681) 274

705 Cartwright & Runhardt, Measurement (n681) 274, Three layered indicator: 7 lead indicators - lower sec ed, proportion of people w no basic amenities. Pop 18-64 lower sec ed. Prop overcrowded housing, Local factors each state sets – %elderly alone w/o siblings / children

706 Cartwright & Runhardt, Measurement (n681) 274: EUROSTAT Sustainable development indicators. Social inclusion indicators [not in table] https://goo.gl/HhPxUy

when measures end up measuring different things; and third, the moving target makes it difficult to make useful comparisons. [707]

> All this drives us to try to devise common metrics for central social science concepts–one way of characterizing, representing and proceduralizing this is widely used, researched and reported.. But as we noted, that can distort what we mean, fail to be fit for purpose, and lack nuance, detail and accuracy.[708]

6.5 Implications for indicator construction

Indicators need to be demystified. There are historical, but alto technical reasons why indicator construction is not a neutral cognitive process. Numbers associated to measurement are not real. The complexity of social reality cannot be properly communicated by the measurement of a sometimes arbitrarily chosen magnitude. At the same time, the power of indicators and measurement in social life is an established fact that even precedes the establishment of the modern state. Measurement and statistics have accompanied the growth of science and bureaucracy. The specific intent of information for management and administration s also a part of our lives today.

The first step we need to take to divest indicators of their almost magical symbolism, is to grasp the difficulties of the cognitive process we go through when we assign a number to a magnitude.

The first important observation is that the power of indicators in relation to the generation of new knowledge is not necessarily due to the measurements indicators convey. Rather, it is due to the underlying theories indicators are read against. Whether a particular number of people are subject to torture in a given place; whether a number of officials undergo training to learn about torture; or the amount of money spent in these efforts; do not communicate anything on their own. These magnitudes require a full theory and context to interpret what parts of reality have

707 Cartwright & Runhardt, Measurement (n681) 275
708 Cartwright & Runhardt, Measurement (n681) 276

been emphasized, which have been omitted, and what the picture looks like with these figures, most probably beside others reporting the same measurement.

Whether a set of measurements is revealing or robust, depends entirely on the theory we intend to use as a framework for interpretation. The logical space where the numbers will be laid down, precedes the layout of the numbers themselves. Indicators in this way, do not speak so much about reality, as they do about the theory we use to read reality.

Indicators, therefore, are not necessarily in the realm of truth but of pertinence, fit–to the theory we use. Of course it is possibly to incur in measurement errors. But more than these errors, we need to find indicators that can provide us with a notion of direction in a map, than speak about the phenomenon we try to measure. In a way, this discussion resembles one in the realm of legal practice, when we speak about proof. The notion of proof relate to the production of an object or a testimony that will be suitable to convince others that a particular fact happened. Indicators have that in common with law. They are pending from the salient features of a theory. Our theory must be well suited to predicate about reality in that particular theory.

The traditional steps in indicator construction in the social sciences need to be looked at from the perspective of measurement theory to emphasize the notion of logical space. Definitions, classification, categorization, depend on the construction of the proper logical space where measurements will be set. Obscuring or downplaying the perils of definitions turns on to the mechanical or technical aspect of indicators. These elements of technology seem necessary. However, the construction of the logical space where these operations will take place is perhaps the most important element of indicator production.

I claim that human rights indicators need to be built from the logical space provided by law. Also, this operation will allow us to connect indicator production with the operation of bureaucracy–both the main creator and consumer of indicator information.

6.6 Co-production

Co-production has been discussed as a form of interaction between law and science in the determination of scientific knowledge in the field of law–including scientific information for

policy purposes, expert witness testimony in trials, or other forms of scientific proof.[709] Indicator production is a special case of co production, where the law determines not only the way how science is received in the legal forum, or the process followed for such integration, but law also determines the facts that are scientifically relevant.

1. One way of dealing with the political force of numbers in indicator production id to understand how the theory behind the measurement itself, becomes constructed. The logical space required for the construction of the theory can broadly correspond to the states of affairs captured in von Wright's logic of change. This process can be a heuristic in content determination, along with other features in the cognitive and social process of indicator construction.
2. Numbers have at least one knowledge and one power dimensions. Numbers discussed here, are about power and knowledge at the same time. Power relationships associated to numbers, are well established in the literature. So is the urge to pursue objectivity. Against this background, human rights measurements are used to project a purportedly objective authority based on the objectivity of quantification. Awareness of these dimensions, helps us understand how the authority of science combines with the authority of law to produce the least resistance in human rights indicators.
3. Yet, measurement is not predominantly a process to find answers, but to find questions. Measurement serves the purpose of allowing for the creation and perfection of new instruments, to push the extent of our current knowledge, rather than as the source of new scientific laws. Thus, measurement is better appreciated as part of a process, than as a verification of an end result.
4. Measurement requires a process of representation. Before measurement can happen, we draw a picture of objects that we wish to define through measurement. The representation is then acted upon. These representations are often indeterminate categories which are defined in the process of measurement itself. This is particularly the case in *Ballung* concepts.

709 Jassanoff 'The idiom of co-production' (n262)

5. Representation, in turn, is also required to transit into the world of action. Representations are required to figure out the object of prescriptions. Representations delimit the particular action covered within the reach of a norm.
6. Measurement can generate valuable information. There is value in generating information about phenomena associated with human rights compliance. Information allows us to make value judgments. Measurement generates data that can potentially clarify or assist such value judgments.
7. Measurement is common in the process of scientific discovery. Scientific communities have a system in place to determine the quality of the process and conclusions used by scientists. These systems are independent of law. Assigning numbers can mean counting (10 cups of rice). Or stating a relationship between two measurements (1 cup of rice per person). Or applying a scale, like an outcome of 40 in the GINI coefficient. Is there a common feature to these measurement processes? Many examples are well documented in the history of science to explain how difficult it has been for scientists to reach measurements for phenomena such as magnitude. Simple magnitudes, such as length, may be measured after a process whereby scales are defined and homogenized. Temperature took more work. To measure temperature, the realization that scales are arbitrary, and that twice the figure in the scale does not mean twice the temperature. The most common measures we use today in everyday life, are thus, constructed in a process of refinement of an artifact– a scale. There are no scales in nature–not even for natural phenomena.
8. Circularity is a valid concern in the construction of a scale. The concern increases if we try to make scales for socially constructed phenomena.
9. Numbers usually describe the is world. Not the ought world. A world of difference exists between, the statement “Riceland produces 3 cups of rice per capita per day”, to the prescription “Riceland ought to make three cups of rice available to each person under its jurisdiction every day”. If we know that RIceland in fact makes 3 cups of rice available to each individual every day, or that some have 5 cups, where others have none, a value

judgment is required to say whether an average is enough to say that the assertion is true; or whether the prescription is complied with. Whether Riceland has complied with human rights by depriving prisoners from rice completely, calls for another layer of complexity in these value judgments. Is rice a right for prisoners, or only proper nutrition? Human rights are social constructs that belong to a realm where nothing is, and everything ought to be. Prescriptive language is the quintessential form of language used not to describe the world. Nothing in the prescriptions we associate with human rights belongs to the realm of the natural world. Conversely, all in these formulations belongs to a socially constructed world–the world of ought.

10. Prescriptions prescribe about something we can relate to, here, in the world we can see and touch. Yet, it is also apparent that we can actually never “touch” a rule. In some contexts, some people tend to attribute causal connections to norms. Yet, we know that causality is a dimension applicable only to the world that is. The logical space we draw from a picture of the actions implied in a rule, can help us transit the legal process towards the measurement process.
11. Numbers are called to capture a moving target when applied to rights. Human rights in international law are broad principles which have been interpreted by courts and other entities in the face of concrete facts in cases, for the last 70 or so years. The apparently simple structure of broad principles belies the deep and intricate process of treaty interpretation. All this is forsaken in favor of simplicity and brevity required in the choice and use of indicators. In such brevity, very little can be said about the theory that lies behind the choice and composition of indicators. Clusters of numbers associated with one treaty provision produce, even if involuntarily, a univocal interpretation of such treaty, and they imply a hierarchy of content and importance.

7 Between “managerialism as mind-set” and the need to manage

Human rights indicators today serve both legal and management communities. Like any other set of indicators, in their construction, there is always an underlying logic about dimensions that are worth measuring. In this chapter I present some alternatives to understand why this logic is present and how it operates. Economy and international market regulation play an important role. A move from economic individualism, away into the pursuit of public value, can be the starting point of management strategy; as well as an alternative to the underlying framework of human rights indicators. Within the legal theory I have chosen, indicators are plausible inasmuch as they can be related to the action of particular agents, or aggregates of agents in government agencies. Public administration or public management, present a quite different story. There is an important connection between the use of indicators, approaches to measurement, and theories of management. I have discussed how measurement is one face of the modern and industrial state. Here, I will explore how knowledge is the currency for the effectiveness of such management–in particular, the knowledge of how much of something is spent, produces, delivered.

From the perspective or legal norms, states of affairs in connection to legal rules are performed by state organs [agents] who discharge explicit functions [acts or omissions] provided for by law. Following the insider’s view of law I have sketched out before, the state is integrated by the sum of a multitude of organs with a myriad of different attributions. In the early 19th century the disposition of state officials was very different from today. Today we are used to large, professional bureaucracies committed to the performance of all the tasks implied by the legal order. Since legislation has no power of its own–the expression of an act of will is nothing but the expression, rather than an act of will– for things to happen, agents must produce or fail to produce states of affairs. The agents who produce these states of affairs need to be organized and instructions need to be explicit so that these agents can tell what their purview is, and what are the principles that govern the decision they need to make in particular cases. Or from a different

perspective, agents need to be told what to do within the range of functions and alternatives delegated to one particular agency through legislation.

The "takeover by the managerial mindset" is perceived to favor non-state-exclusive "regulation" over state-driven "formal rules; governance takes over government; and responsibility is abandoned in favor of "compliance"; legitimacy replaces lawfulness.[710] Although Koskenniemi used these words to describe the takeover in international relations, I believe it suits to describe the literature on measurement more broadly, and is worth discussing in this wider context.

As argued earlier in discussing the activity of measurement, there is an epistemic dimension to indicator construction. These epistemic traditions can be also traced to the study of public administration. Epistemic traditions or approaches are important in expressing what kind of information is displayed in indicators, and particularly, what sort of role–if any–they play in decision-making. Methodological debates in public administration entail different perspectives in what constitutes useful information to build knowledge in the field. Interpretivists seeks to read meaning into reality as a whole–including [legal] texts–through their culture and experience. The reliance in the objective nature of indicators would probably clash with the foundations of this epistemic approach–where objectivity is not considered a value in knowledge, but rather a fiction that needs to be uncovered. Rationalists seek to build knowledge analyzing reality in an attempt to explain human action. The rational approach would probably admit the evidence presented by indicators merely as descriptive statistics, but would not rely on them for any explanation of the issue observed. Empiricists believe the only source of knowledge can be the perception of reality through our senses. This approach would probably admit the use of indicators to get information that explains an event.[711] The positivist tradition as championed by Compte and later by the Vienna Circle came into public administration means that beliefs must be verified by experience. In research, beliefs "must be driven by logically derived hypotheses that are tested and verified with such methods as regression analysis in its various forms".[712] In yet another stream of

710 See, Chapter 5, 'Human rights measurement absent from governmentality' 179

711 Norma M. Riccucci *Public Administration: Traditions of Inquiry and Philosophies of Knowledge* (Georgetown UP, DC 2010) 117-20

712 Riccucci (n701) 120

thought, post-positive research would admit the truth of outcomes until falsified by subsequent research, The would qualify knowledge as probable but not absolute.

These epistemic approaches do not necessarily overlap with administrative practices. Yet, there are useful relations between these approaches and some stages in the development of practical approaches to public administration. The traditional approach is explained in Citing Elinor Olstrom, New Synthesis explains citizens in this framework are wrongly perceived as "helpless and incapable".[713] Public policies and services designed as top-down delivery systems deplete social capital and make citizens dependent on governmental action.

Strategy "remains the best word we have for expressing attempts to think about actions in advance, in the light of our goals and capacities"[714] Strategy relates to the balance between goals, means and methods, about identifying objectives and the methods and means to achieve those objectives. "Strategy" as a practice became known first as the attribute of action opposed to force – force and guile, were two complementary areas of performance for men of state: to outnumber or outsmart the opponent, to persuade, to plan backwards from the ultimate objective. The attachment of loyalty to facts is mixed: either the goal would justify deceit or practical imagination, and the mastery of rhetoric, the ability to offer an alternative way to look at reality: "words as action, analyzing reality and showing how it could be reshaped, were the only way of controlling actuality".[715] Truth plays an important role in strategic thinking in the Greek tradition, for instance, through Plato's distinction between philosophers and sophists. Later, Machiavelli would keep the distinction between the abilities of the fox and the lion. As a pragmatist, he would explore the exercise of power without deceit or cruelty, which came at the expense of legitimacy.[716] In the realm of private business, management became a popular term in the 16th century. Maneggiare lay between control and administration–dealing with a situation insusceptible to control; but with enough room for a good manager to obtain a greater benefit

713 Jocelyne Bourgon A New Synthesis of Public Administration. Serving in the 21st century (McGill-Queen's University Press Canada 2011) [Amazon kindle] 24

714 Lawrence Freedman Strategy: A History (Oxford UP Ocford 2013) p x

715 Freedman (n704) 37

716 Freedman (n704) 53

than another less skilled manager.[717] A manager's position entailed accountability to owners, who were entitled to make ultimate choices. As ownership became diluted among stockholders, managers needed to rely on their ability to frame issues and persuade the outcome of voters. Another creature of the 19th century, management rose steeply as a field of knowledge with the creation of business schools: Wharton School, Pennsylvania in 1881 and the Harvard Business school in 1908.[718]

Like other 19th century creatures, the classical approach to administration supposed the rational behavior of agents. Taylor's "scientific management" envisioned an optimal way to manage: for instance, measuring time required for workers to deliver on particular outcome. Optimal management should encourage workers to adhere to the most efficient timing; it should dispose of workers in the most efficient way; and it should take away all discretion. All decisions should be already made, before workers were involved. Explicitly, Taylor stressed the inability of workers to understand the larger implications of managerial decisions, and should therefore be restricted to doing what they were told to do.[719] Taylor's core value was efficiency, which he perceived as a national objective. Later in the early 20th century, Taylor's ideas were used as legal standards by Louis Brandeis, who would later become Supreme Court justice in the United States. In the Eastern Rates Case in 1910, Brandeis acting before the Interstate Commerce Commission as counsel for an association of corporations, opposed to railroads operators who sought permission to increase rates. Mr. Brandeis brought as witnesses several managers advocating for the Taylor model, who claimed to calculate increased profits by the application of scientific management methods.[720] Brandeis coined the term "scientific management" upon Taylor's ideas.

717 Freedman (n704) 460-61

718 Freedman (n704) 461

719 Freedman (n704) 462

720 John Rogers Commons, et al., *History of Labour in the United States* vol. III (photo. reprint, 1966) (1935) Reprints of Economic Classics p 309 [Hein Online]

7.1 Hierarchical, top-down, scientific management and bureaucracy

In the 19th century, management became a science. Management is as much a tool for governmentality as statistics. I will discuss here some elements of classical and scientific management theories that illuminate the choices behind traditional structures of organization, especially why hierarchy, uniformity, and precision are valued. Some of these choices face a crisis confronted with networked environments. Other values, however, are firmly in place, like precision and government through information. Also, the classical perspective is that law a boundary for state action, but not for private agents.

7.1.1 Classical bureaucracy: hierarchy and uniformity

The classical view of administration comes together with Weber's classical view of bureaucracy, a salient feature of money economy. There are three main components to Weber's bureaucracy: rules, hierarchy and infrastructure (files). First, Weber is connected to Wilson's perspectives on the strengthening of the executive. Weber proposes a three-prong approach to identifying modern bureaucratic institutions; (i) official duties are assigned, (ii) power to issue commands is stable, and coercive means are predictable, (iii) rules determine regular discharge of state functions, including qualification for public office.[721] Only modern societies display "permanent authorities" with "fixed jurisdiction". These ideas resonate in Kelsen's views of "organ" and "competence".[722]

Second, bureaucracy is organized to allow for a hierarchical line of command, where the public can have a remedy against the determination of lower officials, via a higher bureaucrat. Hierarchical bureaucracies can be private or public. Third, modern bureaucracy is managed via [written] files. Officialdom, infrastructure and files add up to a bureau. The public realm–that pertaining to the officialdom–is clearly separated from officials' private life and domicile. These notions resonate in Kelsen's description of the legal person who acts either in public or private law, with a will and patrimony separate from investors or executive officers.

721 M Weber Economy & Society (n297) Chapter XI "Bureaucracy" p 956
722 Kelsen, Pure theory (n387) ss. 30

Modern bureaucracy seems like a truth preservation device. It was better suited than the previous model, administration by notables, to manage large populations. Benefits included precision, unambiguity, unity, strict subordination.[723] Some of these values resonate with those recognized in large corporations in a capitalist society: "rational efficiency, continuity of operation, speed, precision, and calculation of results."[724] Legislation, hierarchy and record keeping produce precision. Precision as a value is reflected in Weber's ideas for both private and public corporations:

> This subordination is most strictly developed in the discipline of modern officialdom. A precision similar to the precision of the contractually employed official of the modern Occident can only be attained — at least under very energetic leadership — where the subjection of the officials to the lord is personally absolute, where slaves, or employees treated like slaves, are used for administration.[725]

Weber identifies three types of "legitimate domination". There are three grounds for such legitimate domination. One of them is rational grounds on the basis of a "belief on the legality of enacted rules Legal authority is exerted by the "legally established impersonal order".[726] Legal authority exists on the basis of three independent assumptions:

1. legal rules can be adopted by consensus or imposition on the basis of expediency or "value rationality";
2. law is a "consistent system of abstract rules [...] "administration of law" [...] "is the application of these rules to particular cases; the administrative process in the rational pursuit of the interests which are specified in the order governing the organization within the limits laid down by legal precepts and following principles which are capable of generalized formulation and are approved in the order governing the group, or at least not disapproved in it."

723 M Weber Economy & Society (n297) s6 The technical superiority of bureaucratic organization over administration by notables 973

724 H. H. Gerth & Wright Mills From Max Weber: Essays in Sociology (OUP New York 1949) https://goo.gl/1Voucm 'The man and his work' 49

725 Gerth & Mills (n714) VIII Bureaucracy p. 196 at 208

726 M Weber Economy & Society (n297) v1 215.

3. the person in authority is subject to law;
4. authority is obeyed inasmuch as subject belong to the group and obey the law,rather than the person in authority.[727]

Along with subjection to law, hierarchy is a defining trait of officialdom. Also, officials may be held to apply technical rules or norms.

The role of knowledge in rational authority is overwhelming. Precision comes together with stability, discipline, reliability. For Weber, "technical efficiency" is synonymous with professional bureaucracy: "[t]he only choice is one between bureaucracy and dilettantism in the field of administration".[728] Later, "[b]urocratic administration means fundamentally dominance through knowledge".[729] "[T]he dominance of precision machinery in the large production of goods" is the parallel chosen by Weber to describe how everyone but the head of a private enterprise are subjected to bureaucratic control–similar to the precision machinery in mass production.[730] Similar images are drawn later on the relationship to professional bureaucracy to administration by notables, akin to the effect of machine production to manual production.[731]

Expertise and formalism are positive values in Weber's bureaucracy. Technical expertise is to be favored broadening the range of candidates to the public service solely in the interest of technical competency, to pursue the lengthiest period for technical training and a "dominance of a spirit of formalistic impersonality", "without hatred or passion, and hence without affection or enthusiasm". "The dominant norms are concepts of straightforward duty without regard to personal considerations"[732] This sort of formalism is probably close to what Koskenniemi has in mind as an advocate of a culture of formalism in international relations. Formalism is the line of least resistance to prevent arbitrariness. At the same time, sophisticated bureaucrats may exert their function in a utilitarian stroke, yet they will do this in the form of regulation.

727 M Weber Economy & Society (n297) v1, p. 217
728 M Weber Economy & Society (n297) v1, s5, Monocratic Bureaucracy 223
729 M Weber Economy & Society (n297) v1, s5, Monocratic Bureaucracy 225
730 M Weber Economy & Society (n297) v1, s5, Monocratic Bureaucracy 225
731 M Weber Economy & Society (n297) v2, Ch. XI. Bureaucracy. s5. Technical superiority 973
732 M Weber Economy & Society (n297) v1, s5, Monocratic Bureaucracy 225

Professional administration means the "objective" discharge of business primarily means a discharge of business according to calculable rules and without regard for persons"[733]. Similarly, professional bureaucrats make choices without regard to passion. This is how politics and administration are essentially opposite:

> To take a stand, to be passionate —ira et studium—is the politician's element, and above all the element of the political leader. His conduct is subject to quite a different, indeed, exactly the opposite, principle of responsibility from that of the civil servant. The honor of the civil servant is vested in his ability to execute conscientiously the order of the superior authorities, exactly as if the order agreed with his own conviction.[734]

This reaches the extent of following superior orders despite the personal judgment of officials. This ability to exclude individual judgment is the backbone of the system's sustainability. This attribute has been interpreted as allowing for ideal bureaucracy to serve any master–legitimate governments or occupying forces.[735]

As regards the role of justice and justice administration, Weber supports the notion of "formal and rational objectivity" of administration as opposed to the "personal discretion" of previous forms of administration. "Matter-of-factness" and "expertness" are words Weber also uses to describe bureaucracy's ideal type.[736] Perfect bureaucracy would be indestructible, according to Weber. Also, bureaucracy dominates through the monopoly of information in the guise of state secrets, to prevent competition and to monopolize the technical expertise and isolate it from society.[737]

Public administration and market are connected: government must be "discharged precisely, unambiguously, continuously and with as much speed as possible." On the one hand, private enterprises champion models to increase "precision, steadiness, and, above all, speed of

733 M Weber Economy & Society (n297) v2, Ch. XI. Bureaucracy. s5. Technical superiority 975

734 Gerth & Mills (n714) 'Politics as a vocation' 95

735 Vincent Ostrom *The Intellectual Crisis in American Public Administration* (2nd ed) (University of Alabama Press Tuscaloosa 1989) 27

736 M Weber Economy & Society (n297) v2. B. Bureaucratic objectivity, raison d'etat and popular will, 988

737 Osttrom (n725) 28-29

operations". Also, the speed with which information is spread with the "new service of the press" requires a more agile tempo for administrative action. These values also enshrine objectivity.

A quick restatement on Weber's type of rational authority is bounded by law, organized hierarchically, with a streak of impersonality based on objective knowledge to make precise and speedy decisions, to pick up the pace required by the industrial society of the time. This characterization highlights the forms of government that networked governance has challenged, as well as the governmentality behind power through knowledge. Most precisely, it highlights the role of law as a boundary for authority.

7.1.2 Scientific management: efficiency and uniformity

Wilson was a champion of the classical approach to management. The classical approach in Woodrow Wilson's writings would look for (i) the center of the system; (ii) the entity or authority holding central power; and (iii) which agencies exert such authority:

> Once the center for the exercise of sovereign prerogative is identified, the structure of authority can be unraveled and the symmetry of social life in that political order can be understood."[738]

Wilson's approach involved a realism of sorts. The federal constitution would tell a "literary theory" of how the political system is built–the notion of separation of powers, checks and balances, would be a primary layout of the administration. Yet, power resided in the federal Congress. Law, rather than bounded rationality, would be only a starting point of the lay of the political land. Wilson's public administration was the proper execution of public law. The basic propositions in the classical approach to administration are:

1. One power center is always identifiable. Power diffusion reduces responsibility
2. Constitutional law defines the structure and attributions of the center of power.
3. The object of administration is set in the realm of politics–but administration lies outside such realm.
4. There is one "good administration". Uniformity in administrative function across governments yields a similar in their structure

738 Osttrom (n725) 21

5. Bureaucratic structure should be hierarchical and professional. Administration should be hierarchically ordered, constituted by professionally trained public servants
6. Efficiency, the least cost for the greatest benefit,will be obtained through hierarchical organization

Weberian bureaucracy has plenty in common with Wilson's approach. Power originates and must be concentrated in one point, structures must be hierarchical to favor efficiency and favor uniformity, bureaucracy must be professional, politics should not taint administration,

Efficiency is paramount among the values in the classical approach to administration: "what governments can properly and successfully do" and "how it can do these proper things with the utmost possible efficiency and at the least possible cost either of money or of energy."[739] Efficiency is also determined by the arrangement's ability to fix responsibility: "[t]o be efficient it must discover the simplest arrangements by which responsibility can be unmistakably fixed upon officials".[740] A clear embracement of Wilsonian theories occurred in 1937 when the US President's Committee on administrative management issued a report endorsing efficiency and hierarchy as the core features of public administration. Efficient management was thought as a universal principle and compared to that of an efficient piece of machinery.[741]

Wilson's preference from congressional authority seems to propose an ideal horizon where administration is bounded by law, but also can produce an adverse result, hiding administrative discretion from plain sight. The idea that there must be one best way to manage, overlaps with the idea that there is one only way to read the law. These readings are an important source of resistance towards networked systems of government, and difficult to reconcile with the actual life of the law–and its application by administrative bodies. Rather, the result of shielding the administration from discretion is to allow the accumulation of power in the "least dangerous branch" of government.

739 W Wilson 'The study of administration" 1887 2 Political Science Quarterly 197 https://goo.gl/g3XmdB p 197
740 W Wilson (n729) 213
741 Osttrom (n725) 30

Scientific management and the “one best way” matured with Frederick Taylor. He turned the field into science.[742] Times strained industrial society and inequalities threatened to dismantle it. This is one reason why scientific objectivity offered one way for fairer relationships.[743] Scientific management became popular throughout the 20th century, with great success in the manufacturing industries. Along with Wilson and Taylor, Gulick and Urwick also promoted the science of administration to be mastered through the “principles of administration”. This was the way to “efficiency in government”, akin Taylor’s efficiency of production in the private sector.[744] At the time, other contributors explored the possibility of enunciating the fundamentals–principles–of management. Contemporary to Taylor, Henri Fayol, an engineer born in Istanbul and emigrated to France, coded the principles of his experience as a manager.[745]

Despite it’s popularity, the suitability of scientific management to public administration is contested. While scientific management remains applicable for industries where precise repetition is required, the tenets of modern public administration seem at odds with these constraints of application. Scientific management is not suited for areas where discretion is valued.[746]

Efficiency was preserved by Gluck, a member of the committee but who explored alternatives to a traditionally hierarchical organization, by suggesting a network of units could operate with relative autonomy under a “holding company”. Efficiency was also endorsed by Simon, But he endorsed this value, to cap other principles used in the traditional understanding of public management: specialization, unity of command. Simon would advocate for decision making model where perfect information would allow choice among several strategic options, where the outcome could be predicted:

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742 Riccucci (n701) 7

743 Freedman (n704)464

744 Riccucci (n701) 8

745 Fayol’s principles can be summarized as follows: (1) Division of work, (2) authority and responsibility, (3) discipline, (4) unity of command, (5) unity of direction, (6) subordination to general interest; (7) remuneration; (8) centralization at the top of the organization; (9) line of command for hierarchical top-down communication; (10) order in staff selection and job organization; (11) equity; (12) job stability; (13) initiative; (14) esprit de corps; from H. Fayol, *General and Industrial Management*, trans. C. Storrs, London: Pitman, 1949.

746 Bourgon (n703) 12

> "making is to consider different strategic alternatives, to anticipate the probable consequences that would follow factually from those alternatives. Given a complete and consistent set of factual premises and a complete and consistent set of value premises, the criterion of efficiency would imply that there is only one alternative that is preferable to all others."[747]

In other words, organizations help optimize human choice within the constraints of "the psychology of choice".[748] These notions of choice and psychological constraints open the door for considerations of alternatives to legal tools to "nudge" agents into particular choices.

Later, by the late 1930's and the development of the "human relations" school, efficiency remained an important value. Efficiency and effectiveness were the two guiding values pursued by Pareto's equilibrium. "Efficiency" was understood in this scheme as the ability to satisfy individuals in the organization; effectiveness involved the ability to meet goals.[749] Pareto, in line with Mayo, would suggest the importance of respect and cooperation in the determination of organizational goals.

7.1.3 Structure as choice, measurement as management strategy

After classical management, other theories have moved away from rational authority and have opened to a more pragmatic approach in management.

Herbert Simon, who casted doubt on the idea that rational, efficiency maximizing decisions could actually be reached. Rather, he supported the idea that administrators' goal is to "satisfice": to make decisions that satisfy and suffice the concrete situation.[750] Simon also believed on the need to measure and track changes in administrative behavior. Administrative behavior can be objectively evaluated.[751] This empirical basis for judgment on institutional performance was meant to exclude values and moral considerations–only facts should matter.

747 Osttrom (n725) 37
748 Osttrom (n725) 37
749 Freedman (n704) 472
750 Riccucci (n701) 8
751 Riccucci (n701) 9

Along with the spirit of the time, Simon promoted logical positivism to seek verifiability or validity.[752]

Performance measurement, understood as a stage in the development of administrative approaches, bringing in information and styles from the private sector, with an underlying reliance on efficiency as a value to be pursued. This underlying assumption must be brought to the forefront, like any other assumption relevant for indicator construction or interpretation. Waldo pointed out how administrative matters may sometimes lend themselves to scientific inquiry, but quite often they are controlled by questions of value. Waldo squarely separated the questions asked by natural science and by administration: natural science asks "what is the case", while administration requires an answer to the question "what should be done?". In particular, Waldo would advocate for democracy as a value that should control administration over the value of efficiency. Waldo makes the case for the dilution of value neutrality behind the notion of efficiency as the backbone of a science of administration.

During the 1950s, Alfred Chandler, built a theory around strategy: "the determination of the basic long-term goals and objectives of an enterprise and the adoption of courses of action and the allocation of resources necessary for carrying out these goals"[753] Strategy, in Chandler's view, is important to identify the driving forces behind structure in large organizations. After observing either geographical expansion, vertical integration or product diversification in these large corporations, Chandler observed that these methods of expansion were strategies, for which structure in the organization should be adapted. On the one hand, strategy is "the determination of the basic long-term goals and objectives of an enterprise, and the adoption of courses of action and the allocation of resources necessary for carrying out these goals."

For Chandler, strategy impacts organizational structure: methods of expansion, changes in an economic environment, and the history of administrative though are relevant to assess structure transformations. Administration involves executive action, decision related to "coordinating, appraising, and planning", as well as resource allocation, and therefore, is not like

752 Riccucci (n701) 10

753 Alfred Chandler *Strategy and structure. Chapters in the History of the Industrial Enterprise* (MIT Press Cambridge 1984) 13

any other production activity.[754] Structure is "the design of organization through which the enterprise is administered."[755] Structure is composed of (i) lines of authority and communication and (ii) "the information and data that flow through these lines of communication and authority."[756] Chandler points at the importance and relative little discussion on the variations i different instruments to convey information across organizational structures.[757] I believe this is on pace where indicators need to find its purpose and place. Chandler's point is important: structure is a choice relevant to strategy. Hierarchical, top-down, uniform and precise institutions valued in classical management theory, are a choice, relevant to an implicit strategy.

Chandler planted the seed for "strategic planning", which would later transform into management by numbers. Andrews at the Harvard Business School developed the SWOT analysis (strengths, weaknesses, opportunities and threats). The design process flows typically top-down, without due regard for the input of learning during implementation. [758] Critics have observed the stringent nature of the process apparently based on perfect knowledge–even when strategy is exactly defined by decisions in an environment we cannot fully know or control. The SWOT analysis was not designed to be sensitive either to ground conditions, not to multi-nodal knowledge production. Again, a networked environment with multiple agents seems difficult to square with these principles. Almost at the same time, Charles Thornton "epitomized rationalism in decision making, deploring reliance on intuition and tradition," and promoted reliance on organizational charts and cash flows rather than industrial processes.[759] After Thornton, McNamara became the leader of the group for almost a decade. In 1960 he was appointed president of Ford Motor Company. But a few weeks later, he left to become Secretary of Defense. After eight years, his critics said his modern style of analytical management "was derided for his relentless focus on what could be measured rather than what actually needed to be

754 Chandler (n743) 8
755 Chandler (n743) 13
756 Chandler (n743) 14
757 Chandler (n743) 382
758 Freedman (n704) 500
759 Freedman (n704) 501

understood". The next decade saw the further strengthening of strategic planning across bureaucracy in the private and public sectors.

Measurement as strategy was criticized by Minztberg: strategic planning confuses strategic thinking with the implementation of numbers. He suggests the right place for planners is to provide the right information to inform a vision, rather than a plan: "formal analyses or hard data that strategic thinking requires"and thus, "support strategy making by aiding and encouraging managers to think strategically". The problem lies on the usual version of strategic planning, which tends to promote formalism. The analytic process of strategic planning stands in stark contrast to strategic thinking, which involves synthesis, "intuition and creativity." In sum, strategic planning stands on false premises: (i) the world cannot be predicted to any major degree; (ii) Strategic planning has chosen ""hard data," quantitative aggregates of the detailed "facts"" [...] "neatly packaged and regularly delivered"; yet, the ability of this information to inform strategy separate from and ground floor tactics, cannot even comply with Taylor's requirement to have strategies build upon deep knowledge of the work involved in the ground floor; and (iii) the formalization of analytic procedures may be powerful in reading data, but formalized, electronic computing cannot "internalize", "comprehend" the information in a way that is essential to creativity.[760]

The critique of assumptions behind strategic planning seem to point to a more profound, not clearly stated assumption operating behind the notion of strategy as applied to the world of management: rational individualism. From the 19th century onwards, the notion that humans respond to maximize on single objective, has produced profound implications for the design of management theories. So far, we have seen how efficiency to maximize products of minimize costs was present since Taylor and keeps reappearing as a key player to account for the targets in boardrooms–public or private. The automatic transition from public to private sector management seems counterintuitive, bearing in mind how law divides the public and the private sphere of rules; and how classical bureaucracy theories rely on public authority as the greatest

760 Henry Mintzberg 'The Fall and Rise of Strategic Planning' Harvard Business Review, Jan-Feb 1994 https://hbr.org/1994/01/the-fall-and-rise-of-strategic-planning

asset of government institutions. Strategic planning, however, seems to cast away this distinction. In favor of rational individualism.

7.2 Economic theory: “new” public sector management

Indicators are both an expression of a technology existing long before today; and a specific expression of that technology that challenges modern notions of legal power. The managerial transition comes under the name of “new public sector management”. The trend started in the late 20th century, and became popular in many democracies, reinforcing underlying values of the classic model: efficiency as in scientific management, separation between administration and politics, and between public policy design and implementation.[761] The classic model saw citizens “as voters and taxpayers”[762]. Citizens were users of services, and the government played the role of provider of services. The new public management paradigm grew against the background of the classical paradigm in administration, which essentially dominated until the late 20th century. At the time, private management was exploring with ideas in the 1970s to face increased competition.

Starting in the 1980’s, new concerns emerged, along with practices meant to face these challenges. Economics fueled theories about public administration bringing in economic individualism into politics–public choice theory–or principal-agent issues leading to distrust.[763] In the seminal article by Christopher Hood, ‘A public management for all seasons?’, the following factors are identified in the wave for renewal in public management:

> (i) The increasing size of government and the corresponding concern on how to prevent or retract this tendency; (ii) a tendency to view public service as subsidiary, and a tendency towards privatization; (iii) increased reliance on information

761 A top down approach can be seen in many government agencies in Mexico The institution responsible for migration policy design is organically detached from the institution that executes the policy. Discretion in prosecution is defined at the top, in the AG’s office.

762 Bourgon (n703) 24

763 Gary S. Marshall & Chad Abresch ‘New public management’, Global Encyclopedia of Public Administration, Public Policy, and Governance [version Date: 06 July 2016]

> technology in public service operations; and (iv) the internationalization of the public management agenda into a more governmental cooperation.[764]

Hood identifies seven attributes to typical new public sector management policies across several OECD countries: (i) discretion for top managers, to hold them accountable via personal responsibility; (ii) performance standards and goals through the use of preferably quantitative indicators–to increase accountability through clearly stated goals and clearly measurable outcomes; (iii) a focus on outcomes as opposed to procedures–rewards need to be tied to measured performance as an incentive to increase productivity; (iv) a preference for management units, breaking from the Weberian monolithic authority in bureaucracy, to increase manageability; (v) use of competitive tools in public contracting and tendering; (vi) increase in flexibility in hiring and rewards, as an example of private sector management techniques, moving away from strict hierarchy and "military" style; (vii) cutting costs.

After its emerging stage in the 1980s and its peak point in the 1990s, NPM was in its advanced age in the turn of the century. The evolved version of New Public Sector management, has been described as endorsing stronger versions of these attributes: (i) strong focus on outputs; (ii) more measurement and quantification, commonly as "performance indicators"; (iii) stronger and leaner specialized organizations; (iv) contractual relations instead of hierarchical relations; (v) intense market-like environment for public service delivery; (vi) blurring of previously crisp frontiers between private and public sectors.[765]

New public management is associated with market-oriented governance.[766] Portability to any political setting, and political neutrality are the two main strengths in NPM. Hood points out how different settings lead to different results when combining public choice, transaction cost and principal-agent theory–coherent and analytical in New Zealand, pragmatic neo-Taylorism in the United Kingdom and Australia. By the mid 1990s, NPM seemed to have a greater impact in national than international bureaucracies.[767]

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764 Christopher Hood 'A public management of all seasons? (1991) 69 Public administration 3-19 p. 3

765 Barry Bozeman *Public values and public interest. Counterbalancing economic individualism* (Georgetown UP, Washington, 2007) 78 citing Hood (n754)

766 Bozeman (n755) 69

767 Hood (n754) 8

Indicators are a tool for management inasmuch as they shed light on the activities of an agent whose principal has given authority to perform certain tasks. In the case of public law, the broadest perspective can see any government official as an agent of the public to perform a certain task. In any setting:

> A key question in the principal–agent relationship is the optimal level of monitoring. On the one hand, if the principal invests no resources in monitoring, it is plausible [...] that the agent will not perform at a high level. On the other hand, monitoring has its cost in terms of the principal's resources and can be viewed as a transaction cost not contributing directly to the production of goods and services.

The construction of indicators for monitoring, is a cost of transaction, inasmuch as it requires resources to be developed for principals to know what agents do and how they are discharging their duties.[768] Bozeman frames the principal-agent problem in the public sector as one where principals, e.g., legislatures, have incomplete information concerning the performance of agents upon whom they have delegated a function. Also, bureaucracies have imperfect information about agents within bureaucracy. This is why principals need monitoring and information to help change this imbalance .[769]

International bureaucracies have a traceable impact on the flourishing of NPM: it was advanced as a tool in the international arena, both by the United Nations Development Program and the Organization for Economic Cooperation and Development. NPM was treated as "a simulacrum of the allocation of resources by competitive markets".[770] This reading of a management style has had profound implications for the use of measurement in governance. This is a fair conclusion, considering the importance of the field for the work of international cooperation agencies.[771]

The rise of strategic management in the public sector is related to education in Harvard and Princeton, in the 1970s and 1980s where the term "public management" was adopted to

768 Bozeman (n755) 58-9
769 Bozeman (n755) 58-9
770 Laurence Lyyn Jr. 'Public Management. A concise history of the field' p 44
771 David Mathiasen, 'International Public Management'

promote strategic thinking in the public policy process, with a rational bureaucrat in mind.[772] At the same time, the emergence of a "new public management" was born out of the marriage of public choice theories with production engineering and management. The decline in "new public sector management" as a practice or an ideology, or a theory, has to do with the political environment which not so many NPM reforms survived–or were never actually fully embraced in powerful OECD countries.

When the second wave of law and economics was displayed, the leading economic theory favored the value of institutions, as proposed by Douglas North. However, "there was little hard empirical evidence to support the notion that the asserted relation between private rights, markets, and growth held true around the world".[773] The evidence was gathered from indicators developed by private corporations to assess their risk exposure in foreign countries. More importantly, these indicators "transposed from descriptive indicators about investment conditions into normative tools for policy reforms".[774] The data was taken from the risk assessment tools generated since the 70's, for private business compiled for years by the Business Environment Risk Intelligence and the International Country Risk Guide, aimed for the consumption of private corporations. Like the Freedom House scorecard, BERI relied on in-house evaluation of secondary data. ICRG employed surveys oft heir own consultant network.[775] The originally subjective measures used for country risks were transformed by economists into "objective" measures for institutional reform. Literally, these risk measures were declared to be "proxies for "institutional efficiency".[776] And this is one way how institutionalism became associated with these business risk proxies, giving birth to the Bureaucratic efficiency index and the political stability index. Although the relation may not be exactly the same, it is worth noting that the adoption of development indicators to measure compliance with the human right to health calls also for a leap of faith–because using health indicators as a measure for rights compliance,

772 Riccucci (n701) 37

773 Katharina Pistor Re-Construction of Private Indicators for Public Purposes in Davies et al *Governance by indicators* (n6) p. 171

774 Pistor, n(763) 171

775 Pistor, n(763) p. 167

776 Pistor, n(763) 171 citing Mauro, "Corruption and Growth," 682.

deserves at least an explanation of the reasons for taking measures from one context and transposing them to another.

7.3 Management values

I have presented several examples of management perspectives which have economic individualism as its starting point. The values associated to economic individualism are well suited to market environments. Yet, critics make the point that the central value in management need not be economic individualism. There is another antique, though slippery, notion: the "public interest". Publicness can be seen as an alternative target for management: "Managing publicness takes public values as its starting point and public interest ideals as its objective."[777] Publicness is defined not by ownership, but in a private–public continuum where entities are more public or private, depending on the degree of governmental or market authority they endure.[778]

One definition of public values involves a "normative consensus" –meaning agreement on a value judgment on what should and should not be the case, as opposed to how things actually are–about three things: (i) rights for citizens, (ii) duties of citizens; (iii) "the principles on which governments and policies should be based."[779]

In the management logic, certain values are usually coupled with a set of indicators, and roughly correspond to management stages or ideologies:[780]

	Sigma values	Theta values	Lambda values
Failure	Waste	Malversation	Catastrophe
Currency	Money– time	Trust	System survival
Emphasis on controlling...	output	Process	Process, input
Information	Compartmentalization,	Segmented	Rich exchange, loosely

777 Bozeman (n755) 8
778 Bozeman (n755) 8
779 Bozeman (n755) 132
780 Hood (n754) 11-14

	tightly linked to goals		related to goals
Goals	Fixed away from execution	Incompatible	Multiple, collective

Table 9: Management values

Hood distinguishes three types of values relevant to management systems: sigma, theta and lambda values, focused on avoiding waste, malversation, and catastrophe, respectively.

1) Sigma values “match resources to defined tasks”. Success is measured in a waste–frugality continuum. Inventory control, payment by results, or cost engineering are typical “expressions”. Waste is avoided by identifying clear goals, and by focusing on output, rather than input or process. Hood argues that the structure compatible with sigma values will separate thinking from executing, units will be “tightly coupled” with information.
2) Theta values are concerned with honesty and fairness. They seek to avoid bias, inequality, abuse of office, arbitrariness. Hood proposes a rectitude–malversation continuum. Popular vote to recall elected officials and anti-corruption mechanisms are typical measures, classical to administrative law and management practices. Interestingly, theta values can be measured from a sigma value perspective: dishonesty can usually lead to waste of resources–as their use is diverted from clearly set goals. An “independent adversary bureaucracy” is commonly used to lie on top of sigma value controls to reinforce identification. Other elements like “angels’ advocates” or freedom of information laws satisfy this need as well.
3) Lambda values relate “resilience, endurance, robustness, survival and adaptivity”. The exclusion of private parties from central strategic activities is related to these type of values. The continuum in this case is for resilience–catastrophe. Typical measures in Lambda values are back-up systems to guarantee continuity in case of failure. In terms of structure, the implication of lambda values may suggest a need for greater importance of input and process, to ensure complete information and avoid the risk of incomplete information; space for new ideas as opposed to strict rule following, avoidance of

"narrow compartmentalization"; and the acceptance of error and mistakes as a source of learning.

The bottom line is this: both, classical, and "new" public management perspectives are particularly focused on sigma type values. This implication is important for "managerialism as mindset": the mindset implies sometimes a choice of sigma over theta or lambda values. In particular, if we appreciate how strategy can be related to structure, we can anticipate how the form of public organizations may favor one particular set of values, and exclude others. More saliently, in the case of lambda values, many of the choices in structure mean a necessary waste of resources, as they are not oriented to outcomes, but process or input.

Within the boundaries of favoring sigma type values, new public sector management was intended to offer an alternative to classical management. As an alternative to classical bureaucracy, the management model has implications for law. New Public Management has been described as inconsistent with the goals of classical administrative law, inasmuch as administrative law is set in a hierarchical order, due process, rules, standards and systematicity. New Public Management is characterized by including the centralized, hierarchical order as part of the management problem.[781] Also, New Public Management assumes that the government's most important activity is to provide services–but this perspective governments of governmental activity is too limited. In the American tradition, the role of law is to "tame" discretion. New Public Management tends to find one actor responsible for a decision, whereas traditional management relies upon the hierarchy and uniformity of the legal system.[782]

7.3.1 Public and private management are different, but related

"Managerialism" in the public sector entails the "portability of management practices", the "premise that management practices deemed successful in the private sector are equally

781 Anthony Bertelli 'Law and Public administration' in Ewan Ferlie, Laurence E. Lynn Jr., and Christopher Polli (eds) The Oxford Handbook of Public Management (Oxford UP, Oxford 2007) 149

782 Bertelli (n771)

applicable to the public sector."[783] The idea of law as a boundary for public authority in a Weberian bureaucracy type, differs widely from a private economic agent who can use law to secure transactions, but acts freely within the boundaries of law. Without rendering the distinction trivial, broader appreciation of administrative discretion in public authorities, and a more stringent, regulated market, bring public and private agents slightly closer together in the classical public--private continuum. The relation between private and public management is problematic. In a more palpable way than private entities, public organizations channel their authority through the network of law. Ultimately, they compete in the political arena. Private organizations are only negatively bound by law, they compete in regulated markets, and are accountable to their boards. These differences need to be considered when translating management principles across sectors. Traditionally, law plays the role of a differentiating factor between private and public sector management. Governmental authority is an important asset for public managers:[784]–although private sector enterprises also have a dash of authority to implement the mandate of shareholders. Yet, "[t]he most fundamental distinction between public and private organizations is the rule of law. Public organizations exist to administer the law".[785] Even though authority can seem like a resource, I would like to focus on how it is actually a constraint:

> Managers of private firms can generally take any action, establish any policy, or use any means of operation not specifically prohibited. Public managers, in contrast, may not do so in the absence of specific grants of authority[...]." For the private organization, it is a matter of 'go until I say stop'; but to the public manager the message is 'don't go unless I tell you to.'[786]

783 Gary S. Marshall and Chad Abresch "New Public Management" in A. Farazmand (ed.), Global Encyclopedia of Public Administration, Public Policy, and Governance,, Springer Switzerland 2016

784 Samuel Walker *Taming the system. The Control of Discretion in the Criminal Justice System 1950-90* (Oxford UP Oxford 1993) [questia] 328 note 6 [questia]

785 James W. Fesler, Donald F. Kettl *The Politics of the Administrative Process* (2nd ed) (Chatham House Chatham 1996) 10 [questia]

786 Fesler & Kettl (n775)

Ultimately, there is always a framework against which a manager or the public can judge whether administration is successful. The source or mechanism to define this framework is the object of great debate in the fields of economy and administration.

Management through information is classic: it developed in the 19th century among positivist approaches, joining measurement and quantification as the proper way towards knowledge and decision-making. Contemporary, "modern" law also impacted management: "Public authority" as referred to in the realm of management means that the public produce rules via the democratic process, which constitute the mandate for public managers. "Public administration thus exists to implement law." From the perspective of international institutional law, the impact of "public authority" in international organizations, means two things:

> Public law, at least in a liberal and democratic tradition, concerns the tension between unilateral authority and individual freedom, and is a necessary requirement for the legitimacy of public authority, which is both constituted and limited by public law[787]

And consequently:

> any kind of governance activity by international institutions, be it administrative or intergovernmental, should be considered as an exercise of international public authority if it determines individuals, private associations, enterprises, states, or other public institutions.[788]

Despite the best intentions of classical management theories, uniformity by law in public management is unattainable and undesirable: the satisfaction of needs for which the state is ultimately responsible, is at the backbone of public authority. The management notion behind the idea of public value, calls for the admission of discretion in the public sector: officials make choices. Discretion cannot be suppressed, but it can be tamed to steward institutions towards public value creation.

787 von Bogdandy, Dann & Goldmann 'Developing the Publicness' (n173) p 5
788 von Bogdandy, Dann & Goldmann 'Developing the Publicness' (n173) p. 5

Discretion is the legal dimension to foster lambda type values in public institutions. Institutions compete, thrive or fail in the pursuit of the satisfaction of these needs. The degree of satisfaction of such needs, determines the value the institutions brings to the table. The elementary ways to "create value"–to make the institution worth to their constituents– is (i) to produce or deliver required services; and (ii) to set up a form of management that satisfy the public need for order, efficiency and transparency:

> Public managers can also create value by establishing and operating an institution that meets citizens' (and their representatives') desires for properly ordered and productive public institutions. They satisfy these desires when they represent the past and future performance of their organization to citizens and representatives for continued authorization through established mechanisms of accountability. We might think of this activity as helping to define rather than create public value. But this activity also creates value since it satisfies the desires of citizens for a well-ordered society in which fair, efficient, and accountable public enterprises exist. The demands of citizens, rather than of clients or beneficiaries, are being met[789]

In a way, these two faces of public value are analogous to private sector audiences: clients who buy products need to be satisfied, and so shareholders need to be satisfied that the enterprise is efficient and thriving.[790] State-centered perspectives would conclude that the political arena remains the ultimate forum to judge what "public value" means. The important distinction public value theory offers, is the explicit incorporation of greater flexibility in the determination and pursuit of public value: non-state actors are not only a source of value determination as taxpayers or voters, but are a source of value themselves. This idea can help us shift state-centered perspectives to networked, hybrid environments, without assuming the market as the ultimate arena for value determination.

789 Mark H Moore *Creating Public Value: Strategic Management in Government* (Harvard UP, Cambridge 1995) [questia] 53

790 Moore (n779) 54

7.3.2 Beyond needs: public value as the source of management strategy

"Public value" is meant as "value from and for the public". The term is akin to "common good or "public interest". One extreme would say that "public value is what the public values", as opposed to mere reduction of value to facts and figures. Public value first came known as a heuristic of framework proposed by Moore in Creating public value.[791] There, a public manager is thought of as one who seeks opportunities to create value for the public. The transfer of this heuristic to a wider research context calls for the need to define value. Epstein relates the notion of value to that of need. And then, "[a] "value" would be an experience based on evaluation of any object against basic needs."[792]

"Value" is a vague concept, seldom defined in specialized academic literature on management. The idea of "public value" is attractive as a result of two strands in public management: (i) Moore's "Creating public value" as an alternative to New Public Sector Management; and (ii) Public Values and Public Interest: Counterbalancing Economic Individualism by Barry Bozeman, taking stock of the notion of public interest as a classical concept in politics.[793]

Despite its elusiveness, a useful concept of value for management purposes should capture: (i) not defined by the object, but by the subject –subjects value something; subjects attribute a positive or negative meaning to something. Value is a relationship, rather than an object itself. The inherent subjectivity of the notion of value distinguishes the function of law as an objective source of value–where the only notion of value is validity.[794]

What constitutes a positive or negative attribute of performance in public institutions? The value attributed to the behavior of public institutions is context specific. The attributes considered positive in the public sector can change over time. "Public value" can be defined as:

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791 Moore (n779)

792 Timo Meynhardt "Public value" H. Anheier, S. Toepler (eds.), *International Encyclopedia of Civil Society* (Springer Science+Business Media, 2010) p 1279

793 Mark R Rutgers 'As Good as It Gets? On the Meaning of Public Value in the Study of Policy and Management' (2015) 45 (i) American Review of Public Administration 29 at 30

794 See 4.2, The distinction between facts and norms. Classical positivism, p.138

"priorities, internal compasses or springboards for action – moral imperatives" [...] "implicit or explicit guidelines for action, general scripts framing what is sought after and what is to be avoided [...], social agreements about what is right, good to be cherished".[795]

In another definition, public value refers to benefits citizens must receive as a result of the activity of public authority:

> those providing normative consensus about (a) the rights, benefits and prerogatives to which citizens should (and should not) be entitled; (b) the obligations of citizens to society, the state and one another; and (c) the principles on which governments and policies should be based.[796]

The public value approach implies that citizens can be a source of determination and creation of public value. This notion helps explain why public expenditure, eg., on public education, does not necessarily account for quality in public education. This is demonstrated with the result of the OECD PISA testing. Apparently, societies where education is better valued, can contribute to the creation of such value, beyond public expenditure.[797] The new scheme where citizens are placed at the level of public value creation, is called "co-production". Under this framework, hierarchy between public service providers and users is phased out in favor of coordination.

A new approach to management in the public sector holds on to the idea that public value ("public results of value to society") is the business of public institutions. The renewed approach to public management means that public value is calculated as the sum of policy and civic action.[798] Further, public policy value can be assessed at the agency, system or societal levels: agency results are the traditional unit to measure efficiency and accountability of users and taxpayers. System value covers inter-agency collaboration. Societal results sum up contributions from government, private sector providers and citizens, and reflect the value overall across societies. These are commonly the object of OECD and other intergovernmental organizations. Civic value relates to what OECD and other have dubbed the "open and inclusive government"

795 Toon Kerkhoff 'Public Value Dynamics' in A. Farazmand (ed.), *Global Encyclopedia of Public Administration, Public Policy, and Governance* (Springer Switzerland 2016) quoting (Oyserman 2001: 16148, 16150–16151)
796 Bozeman (n755) 132
797 Bourgon (n703) 26
798 Bourgon (n703) 36

axis. Tis dimension involves providing public service consumers better access to services, by increasing the array of options for delivery. Other values include “stronger voices” for consumers of public services, to shape their purpose. Also, this dimension covers “expanded choices”, which means the flexibility to allow consumers to determine which way of delivery is better for them. One important question is whether these practices can be translated away from economic individualism.

The public value approach is based on the notion that (i) values consistent with economic individualism are a policy choice, consistent with market values; (ii) the fact remains that there are goods and services that are away from the market economy and citizens endure “public value failure” when “neither the market nor public sector provides goods and services required to achieve public values”. Public values are those ranges of rights, duties for citizens, and principles for public management, as discussed above.[799] Public values are in this way not complimentary to market values. Indeed, “[w]hether or not the market is efficient, is there nonetheless a failure to provide an essential public value?”[800]

The sources to identify public value can be multiple: direct opinion surveys from citizens and public servants, any available literature. Sometimes, public value can be inferred from proxies, like agency statements.[801] I would like to point at legal sources as one important place to look for evidence of public values. Maybe these legal sources are not adequate sources for critique, but at least they provide a setting of important, broad objectives citizens look for in the form of entitlements and obligations–and as such, as limits to government action. In passim, Bozeman sets constitutions and public law as a possible source of public value, when distinguishing the managing in the public interest, and managing publicness. He advocates for the centrality of public values, as opposed to an element managers need to navigate alongside other restraints to managerial action.[802]

From a public value perspective, public management should be controlled by “a focus on infusing public value into policy and management and, concomitantly, avoiding public value

799 Bozeman (n755) 144
800 Bozeman (n755) 144
801 Bozeman (n755) 142
802 Bozeman (n755) 177

failure." This perspective unites market failure and public value failure, as complimentary. The focus for managers should lie on the value that lacks attention from both public and private sectors. From this perspective, public value is the starting point of a management strategy, and not a goal to be achieved within the constraints of political or administrative realities.

There is a tendency to define public value in a circular way. For instance, public value has caught terms like "rule of law". Rather than falling into this circular definition, we can make do with the notion that law is a required source for the definition of public value. And any other source of definition needs to fall within the limits of law, at least for the executive branch. The legislature, however, has different constraints and will require other sources for inspiration. International human rights rules, however, are usually available to legislatures as a matter of law–constitutional law.[803]

Critics of the public value approach predict its failure on the grounds of the shared premises with managerialism.[804] Others point at the oversimplification that underlies the tenets of the public value approach, e.g., the univocal nature of goals and accountability in the private sector as controlled by bottom line.[805]

7.3.3 Multi-nodal value definition and governance

A sharp distinction between value providers and consumers hinders the flow of authority across networks. Multi-nodal value creation is incompatible with this distinction. Yet, indicators fit perfectly into the problems of principal –agent theory. Public value offers a new paradigm. Instead of single goals, public value seeks multiple goals and allows for citizens' preferences; evaluation through quality of services. Instead of the aggregation of individual interests, public

803 Rutgers As Good as It Gets? On the Meaning of Public Value in the Study of Policy and Management American Review of Public Administration 2015, Vol. 45(1) 29–45 p 38 citing Kairyst, D. (2003). Searching for the rule of Law. Suffolk University Law Review, 36, 307-332.

804 Patrick Overeem & Berry Tholen After Managerialism: MacIntyre's Lessons for the Study of Public Administration Administration & Society 43(7) 722–748 (2011); William N. Dunn & David Y. Miller A Critique of the New Public Management and the Neo-Weberian State: Advancing a Critical Theory of Administrative Reform Public Organiz Rev (2007) 7:345–358

805 Paul Davis & Karen West What Do Public Values Mean for Public Action? Putting Public Values in Their Plural Place American Review of Public Administration Volume 39 Number 6 November 2009 602-618 p. 603

value allows for the expression of collective goals. Performance is not measured on outputs, but but also satisfaction, trust and legitimacy. Accountability is not only vertical via performance or market mechanisms; but also through citizen oversight. Services are delivered not preferably through the private sector, but via multiple alternatives selected pragmatically.[806]

The application of the public value framework, along within a governance framework characterized by circumventing a hierarchical approach to the exercise of authority, leaves behind the principal-agent theory in the following ways:[807] (i) policy conception and execution are not necessarily discrete stages. Goal definition is approximative in a number of iterations; (ii) there is a "centrally oriented learning" process from local experiences; (iii) it is "flexibly formalized", so neither bureaucratic, nor informal; (iv) accountability does not equal compliance with a rule but by "a good explanation for choosing one way of advancing a common project". The last point, the relevance of law in this model, resonates with a simple idea of criminal law, where strict definitions are required, and punishment follows misbehavior. Law does not work this way. Open ended terms are defined in practice, and this conception of management in reality is an elementary definition of discretion.

Social scientists value these distinctions as separating this practice from NPM or "interactive" government, and call it "experimentalist governance". In a context of multi-layered authority, indicators are used in such schemes.[808] Rather than controlling implementation from the top down, experimentalist governance uses stakeholder participation, but most importantly, it recognizes the open ended nature of the principles to be implemented– such as "good water status". The method to develop rules of public law in this field comprise four steps:

1. Two levels of units, central and local, have provisional metrics to determine achievement. Metrics are set in collaboration with civil society organizations. 'good water quality', 'safe food', and 'sustainable forests'.
2. Local units are free to choose the means to achieve targets
3. Local units provide periodic information and exchange with other local units
4. Goals, metrics are revised continuously

806 Janine O'Flynn From New Public Management to Public Value: Paradigmatic Change and Managerial Implications The Australian Journal of Public Administration, vol. 66, no. 3, (2007) pp. 353–366 p 361

807 Zeitlin (n277) p 9

808 Zeitlin (n277) 5-6

For instance, the Water Framework Directive in the European Union provides for "good water status" as a goal, where "the methods, tools, metrics, and values for its assessment" are left open for the implementation process. A policy created by water directors, the Common Implementation Strategy, develops guidelines and indicators for implementation. Member states report on the implementation of the directive; and the European Commission gathers information and uses scorecards and benchmarks resulting from the peer-controlled Common Implementation Strategy.

This process of benchmarking, scorecard construction and implementation without sanctions, is supposed to be built within the boundaries of legality. The Directive deliberately uses an open ended concept, that is then defined in practice. Courts have participated in the process of determining open ended concepts, as a key feature of their work. Open ended concepts are not problematic from a legal perspective. The question is whether these concepts, through their quantification in benchmarks and scorecards, are related to law in a novel way through quantification.

Experimentalist governance is thus understood as "a set of practices involving open participation by a variety of entities (public or private), lack of formal hierarchy within governance arrangements, and extensive deliberation throughout the process of decision making and implementation."[809] The salient features of this model are the intervention of lower level agents, who know the local conditions, and who have ample discretion to implement broad principles. Incentives come in the form of peer pressure and penalties for non-cooperation.

Other examples of this scheme in contemporary practice point to the system set up by the Convention on the Rights of Persons with Disabilities, due to four important features: (I) addressees and their organizations have a central role in monitoring the implementation of the treaty; (ii) a national monitoring mechanisms, included in the monitoring system in the main treaty, as opposed to the Optional Protocol to the Convention Against Torture; (iii) an express right of persons with disabilities to have the state collect statistical information concerning the situation of persons with disabilities; and (iv) a commitment to hold a yearly conference of

809 De Burca 'New Models of Pluralist global governance' 45 International law and politics 723 p. 738

member states.[810] The subject-matter of the convention and the specificities of its drafting reveal an unprecedented intervention of interested parties, ie., persons with disabilities. The Convention is clear in its drafting and it text concerning the exclusive role that persons with disabilities have, to speak regarding measures that affect them. No other treaty has been so explicit in the need for this participation. The need for a national monitoring mechanism was included for the first time in the Optional Protocol to the Convention Against Torture, in turn inspired by the European torture prevention system.[811] The mechanism certainly operates in a way that challenges rigid definitions of national and international jurisdiction. The need to gather information is exclusive to this treaty, although the Committee has not issued any particular guidance on what this information should look like. Like the Water Framework Directive, the national mechanisms are relied upon because of their more horizontal nature, as opposed to a top-down approach. These national mechanisms also rely heavily on locally produced data to follow up on treaty implementation. Even if not explicitly intended in the treaty, national mechanisms can exist in sub-national jurisdictions.

The techniques are novel. Rather than relying on language to reduce, define, implement, these institutions in a way rely on numbers and measurements to provide meaning to legal concepts. As pointed out earlier. This practice has been in place for some time in some international treaty bodies. The examples here transcend the use of figures for rule implementation, to the collection of figures as an element of institutional design.

7.3.4 Indicators and public value

The traditional, classical perspectives on management and bureaucracy grew against the background of the industrial state. I have presented several perspectives on how management and bureaucracy sought to be tamed in the classical approach. Hierarchy, separation between thinking and doing, separation of administration and politics, are some of the core elements of the classical approach to government. This perspective came at a time when the statistical revolution

810 De Burca (n799) 750

811 Renate Kicker 'The European Convention on the Prevention of Torture compared with the United Nations Convention Against Torture and its Optional Protocol' in Geir Ulfstein *Making Treaties work. Human Rights, Environment and Arms Control* (Cambridge university press 2007) 91-111

was completed, and hence the need to gather information was considered a required practice for the exercise of power within and across institutions.

The influence of the economic agents in the private sector at the time of the classical approach, was enormous. Large private corporations managed to grow and subvert competition , and in many cases, they managed to curb government action to protect market competition. The values of efficiency and cost reduction, as well as consistency, were simply amused for authors in the classical era. The growth of the industrial state and the emergence of bureaucracy existed against the background of markets. At the time, information gathering geared up towards satisfying these needs, was automatic.

Changes in the marked environment brought a reinforced, renewed look and feel to traditional public sector management, to insert more aggressively private sector practices that had become popular in an era of fierce competition. The basic assumptions of traditional public management remained unchanged, though. What Hood identifies as sigma type values remained crucial to the achievement of state goals, with a focus on results at lower costs, and blind trust on markets. These management principles filter necessarily on the values chosen to gather information of government activity. We have seen how the complex process of generating indicators entails a partial view of phenomena. New Public Sector Management brought a stronger focus on the monitoring mechanisms that existed before, with a profound emphasis on sigma type values.

This rationale influences public officials today when selecting the information they need to achieve the institution’s goal. Implicit in their choices, there seems to be a need to achieve efficient, cost abating bureaucrats with little room to imagine an alternative way of thinking about their institution or the needs of their constituency. Although Hood mentions in passing that international institutions did not seem affected by these views on management, it seems impossible to separate management practices in the domestic arena from those executed by government officials in their appointments as international bureaucrats. These values, in fact, seem to influence the choice of some international indicators. Pretty much in the vein of representation in measurement theory covered earlier, the choice of values is not itself ill-

oriented. Problems arise, however, when these values relevant to the theory of interpretation of measurements, remain undisclosed or implicit.

Against this background, bureaucracy has other alternatives. One of them is the notion of public value, as a substitute for market value which rules in traditional and new public sector management. This perspective is important, because no matter how we conceive of indicators, public law is administered and applied by bureaucrats all over the world. Professional bureaucrats need to be managed, institutions need to be managed in order for services to be delivered, especially in the cases of public value failure.

Public value theory offerers a way out for a new understanding of a free range of options both limited by our best interpretation of human rights law, and open to discretion within the limits of law. Pressing decisions need to be made by public managers continuously. These decisions need to be tracked with indicators that speak to those complexities in a legally bound environment–but not bound by any law, or plainly rule of law in the Weberian sense, but rather, by human rights law with clear recognition of discretion for public officials.

7.4 Managerial indicators for justice

Organizations need to be managed. Yet, the leading tendencies in management for justice institutions call for a reflection on why we have chosen the current and most common types of indicators as relevant for security or justice institutions.[812]

The public-private divide obscures the continuum in management choices. As we saw earlier, the market for private military security services, in land and sea, supplement public regulation, as none has been developed to regulate these situations. Yet, these industries adopt this regulation in the form of management choices, like the development and implementation of indicators that prove whether corporations comply with their due diligence. From the perspective of the public, whether the management is public or private should not be relevant, as long as indicators reflect the full extent of rights within the legal framework. In that context, there would even be areas where experimentalist governance techniques could be appropriate and useful. At

812 See, Section 1.4.2 ‘Access to justice as management‘, p. 49; section 2.3.1 ‘Private human rights indicators: due diligence versus substance‘ p. 88

the same time, private sector management legitimately follows the principles of economic individualism and is meant to follow sigma values explored above (Table 1, p. 176.) The challenge is to introduce other values typical to public authority, into the business framework, to account for the peculiarity of the business activity.

Management techniques hardly remain local. The preceding account lays out sources for major international trends in management. Management is also one government technology used by some powerful agents and transferred to others. Management techniques, like economic or development indicators, are anchored in the policies of the World Bank, or other intergovernmental organizations, as a vehicle to enhance regularity in government practices in receiving countries. Management practices imply the "invisible infrastructure" for the conduction of market economies. Total Quality Management, public criticism of government expenditure, or fiscal problems triggered the concern to transpose management techniques into developing countries.[813] At the same time, development agencies are within the government structure of powerful states, where techniques like New Public Management is applied, and inevitably transfered into both, international development and foreign country management practices. One vehicle for transfer is the adoption of new public management strategies exclusive for foreign aid, which in turn are implanted in the receiving country as a general rule.[814]

I discussed earlier the trend of diffusion of managerial practices from global institutions to national bureaucracies.[815] The case of court management statistics is a palpable example of an implicit process of integrating values into justice institutions. The framework of economic individualism imposes choices in indicator and measurement design, that remain implicit most of the time. This framework of preferred sigma values explored above, make measurement appear actuarial. For instance, in the field of access to justice, Sally Engle Merry notes how the actuarial, accounting style in international development can have consequences to diminished

813 David Mathiassen 'Internaitonal Public Management' in Ewan Ferlie, Laurence E. Lynn Jr., and Christopher Polli (eds) The Oxford Handbook of Public Management (Oxford UP, Oxford 2007) 643, 647-49

814 Ron Kerr 'For instance, Transferring New Public Management to the Periphery. UK International Development Organizations Applying Project Technology to China ' (2009) 38 Int. Studies of Mgt. & Org., pp. 58–77.

815 See 1.4.2 'Access to justice as management' p. 49

accountability.[816] She relies on Rotenburg's account, who concludes that "juridical accountability does not work if it is reduced to technical and financial accounting and both are disconnected from discursive accountability. The organizational field of economic cooperation is strangely removed from any discursive accountability".[817]

The administration of justice has legal constraints related to requirements to conduct proceedings in a certain fashion–certain hearings must be held, within legally defined time frames. The pull for an economic perspective on the use of resources in the justice system comes from many sources–sometimes from within the justice system, in a direct confrontation with other rights which are paramount, like adequate time for defendants in criminal cases to prepare their defense. For instance,[818] the Criminal Procedure Rules adopted in the United Kingdom in 2005, transposed the principle of proportionality from the civil cases to criminal courts, enshrining the "overriding objective" that cases be dealt with "justly".which includes a number of rules, including "dealing with the case efficiently and expeditiously.[819] An elegant translation of "time is money" appears in the following quotation from Lord Justice Judge in the Jisl decision [2004]:

> ...Resources are limited. The funding for courts and judges, for prosecuting and the vast majority of defense lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial; and, no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody, and the

816 SE Merry 'Firming up soft law' (n112) pos 9682

817 Richard Rottenburg 'Accountability for development aid" In Herbert Kalthoff, Richard Rottenburg and Hans-Jürgen Wagener (eds.) *Facts and figures. Economic representations and practices* (2000) 16 Jahrbuch Ökonomie und Gesellschaft 143 https://goo.gl/RxJoad, at 163

818 Mike McConville, Luke Marsh 'Adversarialism goes West: Case management in criminal courts' The International Journal of Evidence & Proof 2015, Vol. 19(3) 172–189, p. 177

819 Criminal Procedure Rules 1.1 (2) (e) http://www.legislation.gov.uk/uksi/2005/384/part/1/made

> witnesses in trials which are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control.

The authors go on to describe a case where a barrister West was disciplined by a judge on the account that he did not discuss the evidence in the file with his client–evidence which had not been made available to him yet, and despite the fact that the defendant wished to plead not guilty. The case illustrated the active management by the judge to push for a plea bargain, despite the fact that the defendant wished to plead not guilty. The judge even uttered implications regarding the nature and content of the evidence in the file during the hearing, violating his duty to remain impartial.[820]

Administration matters come with the definition of the justice system. Management issues are the driving force behind some major system changes. For instance, Switzerland recently created the position of the public prosecutor to substitute the investigating judge, along with a large range of opportunities to increase prosecutorial discretion for early resolution of cases.[821] Choices that appear as pure management decisions have a deep impact on the structure of criminal procedure. As a salient feature of legal traditions, elements of criminal procedure have migrated across traditions, in some cases due to management pressures. One example is the transformation of the principle of legality in Switzerland and Germany, where a growing number of tools to allow for cases to be closed in early stages of the procedure; or without the initiation of a procedure. By definition, prosecutorial discretion is limited in these continental systems. Prosecutorial discretion in Switzerland on the basis of competing cases where a more important interest is at stake.[822] In the German criminal process, discretion is allowed: "Dismissal without consequences is possible in cases of minor guilt and lack of public interest in prosecution",[823]

820 McConville & Marsh (n808) 178

821 Gwladys Gilliéron *Public Prosecutors in the United States and Europe. A Comparative Analysis with Special Focus on Switzerland, France, and Germany* (Springer International Publishing Switzerland 2014) p 9-13

822 Gilliéron (n811) 190: "if the criminal offense is, in light of the other criminal offenses with which the accused is charged, of negligible importance to the determination of the sentence or measure,109 or if an additional sentence that is likely to be of little consequence would be imposed in combination with a pre-existing sentence, or if an equivalent sentence imposed by a foreign court would have to be taken into account when imposing a sentence for the offense being prosecuted."

823 Gilliéron (n811) 270

including some minor drug offenses or juvenile cases, in cases of mediation and compensation to the victim.[824] The French legal system allows for a wide discretion for prosecutors to dismiss cases without filing charges.[825]

Similar concerns are manifest in managerial judgment in civil procedure in the United States; and was transposed to international criminal justice with the aim to reduce time to disposition. The managerial style in international tribunals empowers judges to intervene concerning the "mode and presentation of witnesses and evidence",[826] limit the prosecutor's case, require the limiting of witnesses, or limit the time for production of evidence.[827]

Measurement in institutions is only possible through the construction of a value framework. Values, like efficiency, have an enormous pull within institutions. Like in any other institution, law is not so much a boundary, as a network: choices can and should be made, channeled through the network, but within the boundaries of an explicit, non-arbitrary notion of institutional success. The implication of court management statistics on the construction of human rights indicators is not a prominent topic in the literature. The available evidence, though, does not reflect a positive relation between these measurements and institutional reform on the ground. For instance, in the case of Romania, the application of the standards proposed by the European Commission for the Efficiency of justice is yet another instance of how actors in Romania perceive the use of indicators as unproductive. "From a Romanian perspective, however, it does not matter whether the indicators are […] part of the Council of Europe's reports, because the process and reports are the same: Romanian bodies provide the raw data according to a set questionnaire and predetermined methodology, […] which is then processed,

824 Gilliéron (n811) 272

825 Gilliéron (n811) 296

826 Jessica Peake 'A Spectrum of International Criminal Procedure: Shifting Patterns of Power Distribution in International Criminal Courts and Tribunals' 2014 26 Pace International Law Review 182 204: citing Maximo Langer & Joseph W. Doherty 'Managerial Judging Goes International but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms' (2011) 36 Yale Journal of International Law 241; "a mechanism used in U.S. domestic civil procedure, which refers to an apparatus that encourages judicial activism to promote expediency by requiring judges to play an active role in both pre-trial and trail proceedings"

827 Peake (n816) 205

analyzed and interpreted “out there” in Brussels or Strasbourg.[828] There is similarly, little national control over the end result, which further hinders any interest that might exist in indicators” The situation in the Romanian case is not eased, since other sources of indicators are used in the form of targets that must be achieved, for instance, the requirement to reach the average mark for corruption in Europe.[829] Reports point at the perception that the use of indicators is shallow and misses the point of truly important dimensions, like the life of formalism over substance in the justice system, the perception of the “rise of unaccountable judiciary”, or the absence of transparent case-law.[830] The rather alarming perspective is that the use of indicators tends to solidify the meaning of terms. In the case of “quality of justice” which in reality is the generic quality of services, the effect is a source of concern.

In a somewhat different setting, the effect of the managerial approach in justice institutions has a flatly demoralizing effect.

1. Hierarchy, uniformity, efficiency and precision are traditional values classical management theories have favors for over a century. All these are policy choices. These decisions are not necessarily set up by law. Rather, they are grounded on tradition. Structure, therefore, in part follows strategy. Structures can change.
2. Strategic thinking in management is not interchangeable with strategic planning, or management through information.
3. On top of classical management, economic individualism has framed new management theories to reduce governments, increase accountability on the basis of public information, and the reduction of costs.
4. Values in governance and governmentality need to be set explicitly. Historically, management values from the private sector have exported efficiency as a core value into

828 Mihaela Serban ‘Rule of law indicators as a technology of power in Romania’ in Sally Engle Merry, Kevin E. Davis & Benedict Kingsbury *The Quiet power of indicators. Measuring governance, corruption and the rule of law* (Cambriudge UP New York 2015) [Amazon Kindle] Pos. 6743; A similar account of ineffective measurement in justice institutions, can be found in Johanna Migler ‘By their own account: (quantitative) accountability, numerical reflexivity, and the National Prosecuting Authority in South Africa’ in Richard Rottenburg, Sally Engle Merry, Sung-Joon Park & Johanna Mugler *The World of indicators. The making of governmental knowledge through quantification* (CUP Cambridge 2015) p. 76

829 Serban (n818) Pos 6533

830 Serban (n818) pos 6476

the public arena, setting aside the fact that there government-for-profit sounds counterintuitive definition of government values.

5. The mixture of private, for-profit values, and public values, occurs in the history of management where we have mixed management styles with values, such as consistency or predictability. Public hierarchical management styles have sought to reduce uncertainty, even if this means enhancing discretion.
6. Managers make decisions within the boundaries of law, and extra legal values. Law can either seek to eliminate discretion, or prevent arbitrariness. Values not determined by law include efficiency or effectiveness. Indicators sometimes bring together legal values but shape them into administrative values without acknowledging the difference.
7. Management information needs to keep track of dimensions relevant to the institution, not only in terms of inputs and outputs, but also for resilience and development, like flexibility and space for new voices. These more elusive values are also captured by structure choices away from the hierarchical paradigm.
8. Public or private institutions, to be managed towards values different from economic individualism, need to focus on these other set of values. Multi-nodal organization is key to capture input from a flexible array of agents.
9. Indicator construction in this context must strike a delicate balance between the attainment of goals set by law, and by public value choices, and the crude fact of limited resources. Public value is, however, the leading factor to build an effective strategy. Efficiency is only one aspect of such strategy, but not the value that determines the strategy.
10. Management in relation to criminal justice and crime control requires an explicit effort to identify public value, within the limits of law, and these values must be translated into actions from identifiable agents, whose actions are tracked by the indicator. Beyond the development or public health indicators that have so heavily influenced the construction of international indicators, justice must explicitly address the relation between figures and rights.

Concluding remarks and further research. Away from modernity as mindset.

Rather than coming up with criteria to choose better indicators than others, I have attempted to understand the reasons behind the appeal of indicators, and of some indicators in particular over others. This has brought me to an path between law and a number of forms of social authority: the notions of state, science, and management. This exercise has forced me to touch the glass bottle of legal language, and slowly pierce the veil of the insider's view on law, to walk the interstice between forms of social authority. Let me summarize the lessons I have learned from my work as follows:

1. "There is nothing so practical as a good theory". Getting to know things and getting to act upon things are usually considered separate types of knowledge. Away from this divide, this work is about bridging across traditional binary ideas concerning the place of law in society. It involves elements of a notion of law, explicitly connected to facts and meant to act upon them. Indicators are at the same time about knowledge and about action.
2. I explored classical issues on legal theory: (i) the relationship between the world that is, and the world that ought to be; (ii) the notion of the sources of law; (iii) the identity of the state and the legal system. Rather than the "authority of law", law can be seen as the network, and power as the energy running through it, produced by the imbrications of large lattices of social authority: science, government, management. The relationship between law and fact must be revised, to account for the joint action of legal and social authority.
3. The background of indicators took me from the United Nations High Commissioner on Human Rights, to the implementation of the metric system in Napoleonic France. The attitude Koskenniemi has dubbed "managerialism as mindset", seems closer to "modernity as mindset". Among other things, "managerialism" is intended to capture a transition from formal to informal rules, from hierarchical to networked environments. An alternative is to use a wider framework, simply "modernity as mindset", to better understand the values evidenced in the appeal and practice of indicator construction

today. I will use this expression to refer to Foucault's theory about forms of authority in modern an industrial society. My work is rather superficial still. Further attempts in this project should allow me to explore the implications of science, and medicine in particular.

4. International law has long argued for its full membership into the "legal" world, sometimes through a re-definition of the idea of "legal". The traditional background of voluntarism in the 19th century has become a typical straw-man to challenge even today. The alternative to a "social contract" style for the source of validity for international law, seems sometimes opposed to realism in international relations studies: we are better off without a theory that sweeps naked power under the rug, into a guise of legal authority. States cannot be tamed, political power will never be actually regulated, but only steered, nudged into action. Against this background, new developments are difficult to square into the voluntaristic—cynical grid. Most importantly, the era of states as lone riders of power in the international arena seems over. All sorts of collectives exert equally or more power than states themselves via formal or informal fora. International business steers regulation with a force we are still uncomfortable with. Persons have such a prominent role in international regulations of any sort, they can hardly be ignored. Multi-layered power structures are so common today, that the voluntaristic idea of international law seems of little use.
5. Modern ideas about scientific knowledge give figures a halo of objectivity. Figures, however, are just the expression of a formal language. Statistic s or indicators, however, are truth claims, of have an implicit truth claim. Like any other truth claim, numerical claims may have a factual basis. The meaning of "2" for torture, due process, democracy, governance, or any other social construct, is problematic. This difficulty is also associated with the issue of standardized measurement, as a political practice in the late 18th or early 19th centuries. The adoption of the metric system in France had as a consequence that local measures fell out of practice. We often fail to realize that standardization in measurement is a process, and not merely a cognitive process, but a social or political

one. “2” for torture is problematic today, but so was “n” temperature degrees for fever before standardization occurred. We are only at the start of the curve for “2” for torture, because we never actually put any work into learning how to measure this category.

6. From the management perspective, the idea of agents aligned in networks rather than hierarchies, lies behind the notion of “governance”. From a social theory perspective, the fact that the state acts in connection with agents aligned in networks, rather than hierarchies, resonates in the writings of Foucault. The diffusion of power centers that put pressure on individuals to normalize their behavior in all kinds of private and public settings, stems from a fair reading of ‘Discipline and Punish’. So does the idea of techniques for the exercise of authority in his writings on governmentality. In a way, there is nothing surprising about governance as a phenomenon. Governmentality, rather than just pointing at the practice of power through networks, illuminates a series of key practices for the exercise of power, in some cases predating the modern state. Indicators become relevant only against the background of the momentum in the exercise of power through networks. This does not mean that power has only today started to enter these network-like structures. Rather, it seems the network approach was not as prominent before. Today, we would simply miss plenty without this approach.
7. Management styles are historically or culturally linked to forms of exerting state’s authority, including security and criminal justice. Values in public administration also affect legal structures. Hierarchy, uniformity and precision have been inherited and preserved in a joint action between management and law, for over a century. Measurement in private business translates into its most important concept: the bottom line. The bottom line approach to success in government entails a linear approach to the performance of public functions: hierarchical and uniform. Networked environments require different approaches to define values and to communicate power across agents. In a Weberian framework, law defines functions, while economy defines the extent to which governments can deliver services. In a world of imperfect knowledge, governments can also have discretion, through flexible, dynamic institutional standards.

8. After modernity, do we need law at all? If the preeminence of the modern, industrial state is at odds with today's world, is law still relevant? The is | ought debate seems comprised in the concept of indicators about rules, simply because indicators speak about the world as it is, but they are conceived in a measurement dimension that stems from the world as it ought to be. How, if at all, can we build indicators that speak of rules without some form of commitment to the expression, or the representation of what the rule means? Also, it so happens that rule compliance –the world that ought to be–is determined by the limits of the world that is. The world that is, can be sometimes described within the limits of logic: for lawyers, a person found innocent of a crime, might have committed the crime, but the legal alternative is only two-fold: guilty or not. Something we recognize as a rule cannot be fulfilled and violated at the same time by the same agent. Indicators must take stock of these limits, as they collapse in tandem the power to know and describe the world, and the power to wish that someone behaves in a particular way. Whether logic is the ultimate arbiter of these conflicts, is unimportant here. Suffice it to say that logic can function as a heuristic for these purposes: appraising the limits of our actions, is essential to appraising the reach of any rule. These limits combined set out the maximum breath for indicator construction, and forces us to relate them to particular actions from identifiable officials. Indicator content that cannot be traced to norm content in this way, cannot provide information on rule compliance.
9. Therefore, I find several ways how indicator construction can fail their purpose of assessing progress, informing policy or increasing transparency.
   (a) Indicators, like any form of measurement, suppose a rule, a standard, as the logical space for their interpretation;
   (b) Indicators about rules must be content-related to rules. The measurement setting must be compatible with the breath covered by the rule. Rule interpretation can become the logical space where indicators are inscribed. Such interpretation must identify actions and agents in charge of bringing about changes in the world of fact;

(c) Justice institutions can derive little benefit from counting elements of reality where no explicit intention exists to measure the implications for rights compliance. The power of numbers to clarify also implies their power to confuse.

(d) Indicators can inadvertently assume expressions of progress or success without a theory of the source for such expressions—e.g., cost effectiveness, transparency, or other values can be used as a component of an indicator, without a clear source;

(e) Indicators can sometimes ignore the fact that the field they cover is networked—state and non state actors across jurisdictions also count;

(f) Indicators about rules must take a stance on what the rules mean in order to choose and measure the object effectively;

(g) Indicators can fail in their use, and the message they purportedly communicate: adding numbers to human rights rules ("2" for torture cases) does not necessarily entail the same clarity as "2+2=4". Standardization as a goal may be legitimate, but not one mandated by legal rules;

My work so far is just the lay of the land of a much deeper set of issues, that concern the way we know, learn, practice law, and the way we know, learn and practice other areas of expertise, and how they are connected. In the end, whether we can build better indicators for human rights, requires that we tame tradition: a widespread concept of law as hierarchy and force, the driving forces in market and state, the power of text-book measurement and the notions of science that come with it, and our beliefs of how public institutions behave. After all, law can only Chanel the power that is excreted from these fields of knowledge. The work lacks in conceptual consistency. I have taken ideas from many fields of knowledge, without reflecting on the contradictions these thesis may generate internally. Even if such contradictions arise, they should be the matter for further work. In many ways, this is only a sketch for further inquiry.

Regarding the application of human rights indicators, more time is needed to learn about their actual legal consequences. So far, a lot of this information is speculative, since I have not had access to actual cases decided on the basis of indicators. The information presented here is just a door to open a discussion. Regardless, the discussion is there: the implications of our

concepts of law, science and public institutions need to change for us to be able to grasp new realities. The world has changed deeply in recent decades, and our modern or industrial understanding of it, is not enough.

Among the deficiencies in this work, I find the few direct references to Foucault, the need for a more robust framework on governmentality to highlight the connections between measurement, law and economy; especially for the context of international development. stronger connections between governmentalaity and security, in concrete examples of the construction of Giorgio Agamben's *homo sacer*, through measurement; and explicit connections with other critical positions to the role of law and the language of rights as an adequate tool to promote change for individuals and communities.

The items left off for further research are plenty. For the purposes of our understanding of law, there is an important project missing: how to connect legal theory with other fields of knowledge, not without rendering the field irrelevant. For this, I believe Science and Technology studies are an important path. Science and technology studies offer a very powerful analysis on the relationship of law and science. Yet, concrete deductions on the implications of measurement, in both scientific and legal terms, is an opportunity for development. In particular, further analysis can explain how indicators are used as evidence in legal for a, and what this means to the relationship of "good science" and "law". The diverging effect of indicators put into different legal categories, is also unaccounted for.

This may also lead to further discussion on how to or limit the field of law, if we have to let go the institutional forms of creation we have relied upon for the past two centuries. Here, I have only sketched what I perceive as the dominant discussion concerning the nature of law, from an international law perspective. A tighter response is needed to explore whether we can still live with a positivist perspective on law, and yet meet our anxiety caused by "informal law", as dubbed in international legal theory today. In other words, can we keep a clear-cut approach to define law and distinguish it from other forms of social organization, and at the same time acknowledge and account for law-like entities outside the canonical sources of international law?

Interestingly, an avenue of discussion may be in the relation between new legal positivism and realism. The relationship between is and ought also yields results if law is divested from its hierarchical components. Law in governmentality is characteristically pluralistic. This intuition can be expanded to respond to postmodern challenges to a positivist tradition, or rather to understand how positivist perspectives can still offer useful reflections on how the object of field we call law, can be handled in network environments.

As contemporary relatives to modernity, law and liberal economics have shaped our world for centuries. If law can be brought into the 21st century with a new concept and a different value in the social arena, what can happen if legally relevant economic relations are accounted for in a different, perhaps more complex way than the *homo economicus*. (i) How would risk transfer, social capital, care, as key concepts in legal transactions, as opposed to individual interest driven, symmetrical relations?; (ii) what can we learn from the elimination of the public-private divide in law and legal forms? How do private and public agents co-habit in the governance environment? Can we keep our notions of organized and certain legal relationships if we remove the state as the center for legitimacy?; (iii) further detain on the connections between law and development in the use and conception of indicators for human rights

In any event, it is also worth asking whether our networked world has a place for law as a discrete social field. Does it make sense to attach to law as a discrete social field? Or would we be better off tossing it aside as a point of contact across fields? (i) how far can we take the analogy of law as an interstice between lattices of authority?; (ii) how far can we take the analogy of indicators as devices to eliminate friction and drag, to take elements of one realm of social authority to another, as a vehicle to reduce opposition?; (iii) Can both national and international rules be appreciated under a new post-realist and post-positivist light, advancing to a non-state centered legal network? Are there any gains from this approach?; (iv) New international legal positivism or realism, relative normativty, liquid authority, and a better structured dialogue with classical critical legal studies literature.

Knowledge production and communication need to account for the limitations of theoretical research and the relevance of realities of the field. How our assumptions about

knowledge and learning are reproduced in institutions, and whether particular institutional arrangements are better than others to reproduce particualr notions about knowledge. These issues are connected with the idea of “personal knowledge” from Michael Polyiany, and connected to Shön’s “reflective practitioner”. Traditional, hierarchical structures seem most apt to reproduce technical rationality. Shön’s “reflective practice” seems to require a different type of arrangement where individuals can learn as they go, and institutions that can be built upon that knowledge.

Institutional forms are also connected to the ways we inherit and reproduce canonical forms of practice. Institutional arrangements seem connected to this effect as well. This hinders innovation. The same information in a hierarchical structure will only serve to pass a message from top down. In a networked organization, information may serve other institutional learning procedures. In terms of organizational theory: despite laws and measures, how are institutional arrangements meant to preserve and stabilize hierarchical authority, and to what extent can institutional arrangements unleash the power of participants in non-hierarchical organizations?

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