

# 1

## Introduction

A multi-stakeholder Task Force on Justice that brought together United Nations (UN) member states, civil society and international organizations in 2019 released a report that estimated a global justice gap of 5.1 billion people.<sup>1</sup> This number, which makes up over two-thirds of the world's population, was estimated to be of those people who are without meaningful access to justice. The gap has three dimensions that looked at the living conditions of people, matters of dispute resolution and opportunity deprivation to lead a secure life. First, at least 253 million people live in conditions of extreme injustice, of which 12 million are stateless, 40 million work in conditions of modern slavery and 203 million live in conditions of such insecurity that it is difficult to pursue justice. Second, over 1.5 billion people are unable to resolve their justice disputes on account of challenges of the civil or administrative system or unresolved criminal matters. Third, over 4.5 billion people are excluded from political, economic and social opportunities that are provided by the law on account of being unable to access a legal identity, lack of land tenure and informal employment. These are startling figures, which indicate the sheer magnitude of the challenge that confronts those working to address barriers to access to justice. This large exercise also demonstrated a move towards quantifying justice, as a method to articulate these barriers in order to emphasize the urgency

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<sup>1</sup> Task Force on Justice, *Justice for All Report: Final Report* (New York: Center on International Cooperation, 2019), 18, <https://www.justice.sdg16.plus/report> (accessed 2 July 2019).

2 | Designing Indicators for a Plural Legal World

for action. Rule of law indicators and measurement frameworks<sup>2</sup> have become increasingly popular and widely used to evaluate the capacities of legal systems. This is so because *inter alia*, indicators are seen to increase the diagnostic capacity of policy makers to identify bottlenecks in the legal system,<sup>3</sup> enable empirically based solutions for justice reform, and enhance the capacity of civil society to monitor justice delivery. By examining regional variations among various legal systems, analysing elements of state practice and law making, and drawing linkages between access to justice, good governance and democratic validity, these indicator frameworks speak to the question: is the rule of law increasing globally? Through the data collected and subsequently analysed, these indicators are used to indicate and signal a way to assess the state of justice and legal institutions around the world.<sup>4</sup> In doing so, as I will discuss in the course of this book, these indicators acquire considerable power through their ability to frame, highlight and make concepts knowable that are otherwise abstract and theoretical.<sup>5</sup>

The processes of building indicators for measuring justice systems raise several critical issues, such as the role that they play to build a global law project, which would aspire to establish common rules and universal guidelines for the functioning of dispute resolution systems.<sup>6</sup> The methods through which these tools are standardized as unambiguous measures for otherwise complex and dynamic problems raise questions about the power

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<sup>2</sup> Please note that the terms ‘measurement frameworks’, ‘quantification tools’ and ‘indicators’ are used interchangeably in this book.

<sup>3</sup> ‘Justice systems’ and ‘legal systems’ are used interchangeably in this book to relate to the different types of institutions, users, procedures and values that make up the system through which justice is delivered.

<sup>4</sup> Sally Engle Merry, ‘Measuring the World: Indicators, Human Rights, and Global Governance’, *Current Anthropology* 52 (2011): S83–S95.

<sup>5</sup> Steffen Mau, *The Metric Society: On the Quantification of the Social* (Cambridge: John Wiley & Sons, 2019); Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (Chicago: University of Chicago Press, 2016); Debora Valentina Malito, Gaby Umbach and Nehal Bhuta (eds.), *The Palgrave Handbook of Indicators in Global Governance* (Cham: Springer, 2017).

<sup>6</sup> Benoît Frydman and William Twining, ‘A Symposium on Global Law, Legal Pluralism and Legal Indicators’, *The Journal of Legal Pluralism and Unofficial Law* 47, no. 1 (2015): 1–8.

relations at play between those measuring and those being measured.<sup>7</sup> A poor conceptualization of indicators also has implications at a political, economic and social level, since they are not just instruments of knowledge but also instruments of governance.<sup>8</sup> These implications can be seen in the way human rights violations are identified, the quantum of foreign aid to be given is determined in development programming, and how justice sector reforms are recommended.<sup>9</sup> Researching these frameworks will give us an idea into how the methodology and concepts used in the indicators are developed, how the information from the indicators is applied, and how the data and findings influence the proposals for reforming the delivery of justice and legal institutions around the world.

## Indicators from the bottom up

This book addresses the study of legal indicator frameworks as they relate to contexts of plural legal orders consisting of state and non-state justice systems. Through its attention to debates of legal pluralism, the book inquires whether existing indicator frameworks perpetuate a particular notion of a well-functioning justice system and investigates whether these

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<sup>7</sup> Merry, 'Measuring the World'; Kevin Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds.), *Governance by Indicators: Global Power through Classification and Rankings* (Oxford: Oxford University Press, 2012); Richard Rottenburg, Sally E. Merry, Sung-Joon Park and Johanna Mugler (eds.), *The World of Indicators: The Making of Governmental Knowledge Through Quantification* (Cambridge: Cambridge University Press, 2015).

<sup>8</sup> See generally Kevin E. Davis, Benedict Kingsbury and Sally Engle Merry, 'Introduction: Global Governance by Indicators', in *Governance by Indicators: Global Power through Quantification and Rankings*, ed. Kevin Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry, 3–28 (Oxford: Oxford University Press, 2012).

<sup>9</sup> Merry, 'Measuring the World'. See generally Sally Engle Merry, Kevin E. Davis and Benedict Kingsbury (eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (Cambridge: Cambridge University Press, 2015). In Chapters 2–3, I will examine the impacts that indicators have as instruments of governance and knowledge and how they are used by international organizations, development agencies and civil society organizations to develop policies and programs as part of their development efforts. These include organizing capacity-building training for legal officials, developing new legal and administrative procedures and designing new institutions.

4 | Designing Indicators for a Plural Legal World

indicators advance a state-centric form of measurement grounded in western normative considerations. The book explores whether legal indicators are able to capture local legal systems that already exist in plural legal orders or whether the targets and values that they prescribe are inapplicable to the contexts of plural legal worlds. The book offers an alternative path to developing indicators that maps the experiences and realities of justice users and how they resolve their grievances through plural and competing dispute resolution processes.

In the ensuing chapters, I explore whether the current discourse on legal indicators offers holistic articulations of how justice systems function or, if instead, it offers an institutional approach to justice that does not take sufficient account of the aspirations of the justice user. I will also explore how procedural and substantive considerations of justice are balanced when evaluating justice systems through indicators, and if these indicators also account for the cultural considerations that arise in plural legal orders.

A core aspect of this book is to examine how indicators capture the legal needs of people from plural legal orders and countries in the Global South by examining the language, concepts, ideas and narratives that emerge from these regions.<sup>10</sup> I will explore the realities of how the law and dispute resolution work in practice in contrast with how they are constructed in existing indicator frameworks. In doing so, I seek to study whether the indicators construct standards that reflect a global consciousness or whether they instead seek to impose a particular jurisprudential discourse that perpetuates certain norms and institutions.

In the course of the book, I reflect on how indicators and metrics have become pervasive in the shaping of understandings of legal systems. In this context of the widespread use of indicators, I argue that it is important to not just critique indicators but persist and offer a different strategy to show that the construction of indicators can be developed to account for plural and diverse legal contexts and social worlds. This is why I introduce the idea of persistence in the book, which is a strategy to engage with dominant

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<sup>10</sup> I will examine the Global South as a political and epistemic space which is in contestation with the Global North over what is valuable, significant, inclusive and fair. It is relational. Because there is a Global North, there is a Global South. As a space, it is where the marginalized and invisibilized acquire voice and dignity in distinct and multifaceted ways. Therefore it is not a geographical area but a philosophy of justice with a plurality of knowledge and lived experiences.

understandings of indicators, and offer a different framing that aims to be more representative and inclusive. I do this by arguing that more diverse and varied voices and concepts must be included which pluralize the conversation around legal indicator frameworks and find place in their development. In doing so, I argue for building indicators that are built in a more grounded and reflexive manner, and that integrate the messiness of how it is realised.

This book unfolds through three steps of analysis to address the following central aims:

- 1 It examines the impacts of quantification in law, and how indicators have emerged as an important device and vocabulary for understanding legal systems.
- 2 It discusses the lack of an engagement with questions of legal pluralism and epistemologies of the South in the development of legal indicators, and how this results in a myopic understanding of how legal systems function in diverse contexts.
- 3 It draws together the above and recommends a bottom-up framing of indicators to advance an approach of measuring access to justice in resolving disputes by using a Justice Capabilities Framework.

After a brief introduction to signpost some of the arguments for the use of indicators in the law, I provide brief explorations of the three steps of analysis in this book.

### Indicators and the law

A key argument for the use of indicators in law is that both within the same jurisdiction and between jurisdictions there is a lack of vocabulary and tools for comparison to understand and evaluate the institutional challenges that constrain the delivery of justice. This includes the efficiency of judges, independence of courts, experiences of users, and accountability and transparency of procedures and practices in these institutions. Indicators help evolve a 'common understanding' and a 'shared sense' of the complexities and challenges that confront a legal systems by determining the contours of terms such as 'access to justice' and 'rule of law', and establishing how such concepts can be measured.<sup>11</sup> A crucial aspect to this process is to

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<sup>11</sup> Canadian Bar Association, 'Access to Justice Metrics: A Discussion Paper', 2013, [http://www.cba.org/CBAMediaLibrary/cba\\_na/images/Equal%20Justice%20-%20](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20)

6 | Designing Indicators for a Plural Legal World

understand if it is possible to ‘make access to justice a quantifiable concept instead of a broad aspiration’.<sup>12</sup> This ability to standardize multifaceted phenomena unambiguously and impersonally, by labelling and naming them, is one of the key influences and powers of an indicator.<sup>13</sup>

The rise in legal indicators can be attributed, among other things, to the increased globalization of legal systems, the universalization of human rights, increasing judicial borrowing and donor investment in building legal systems, and a more economic and management based outlook to the functioning of legal systems.<sup>14</sup> With the globalization of legal systems, indicators are used as devices to justify the pollination, and in most cases transplantation of ideas and values, because of the perception of their rigour and neutrality.<sup>15</sup> As Porter has argued, ‘quantification is well suited for communication that goes beyond the boundaries of locality and community’, and hence it can logically be seen as a technical tool to further a particular project in different contexts.<sup>16</sup> In this regard, one part of this technical outlook, which will be developed later in this book, is the role of formalism in law, and how the prominence of the state in legal systems and its ways of regulating and governing have an influence on the development of legal indicators and their subsequent use in evaluation.<sup>17</sup>

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Microsite/PDFs/Access\_to\_Justice\_Metrics.pdf (accessed 28 September 2018).

<sup>12</sup> Martin Gramatikov, Maurits Barendrecht and Jin Ho Verdonschot, ‘Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology’, *Hague Journal on the Rule of Law* 3 (2011): 349–379.

<sup>13</sup> Nehal Bhuta, Debora Valentina Malito and Gaby Umbach, ‘Introduction: Of Numbers and Narratives—Indicators in Global Governance and the Rise of a Reflexive Indicator Culture’, in *The Palgrave Handbook of Indicators in Global Governance*, edited by Debora Valentina Malito, Gaby Umbach and Nehal Bhuta, 1–29 (Cham: Springer, 2017); Merry, Davis and Kingsbury, *The Quiet Power of Indicators*.

<sup>14</sup> Tor Krever, ‘Quantifying Law: Legal Indicator Projects and the Reproduction of Neoliberal Common Sense’, *Third World Quarterly* 34, no. 1 (2013): 131–150. In Chapters 2–4, I will examine how indicators are playing an increasing role in impacting how decisions are being made due to their capacity to influence how information is framed and distributed.

<sup>15</sup> See generally Malito, Umbach and Bhuta, *The Palgrave Handbook of Indicators*.

<sup>16</sup> Theodore M. Porter, ‘Preface’, in *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life*, vii–xii (Princeton: Princeton University Press, 1995), ix.

<sup>17</sup> David Restrepo Amariles, ‘Legal Indicators, Global Law and Legal Pluralism: An Introduction’, *The Journal of Legal Pluralism and Unofficial Law* 47, no. 1 (2015): 9–21.

The first large-scale projects of building legal indicators began around the 1970s where Merryman and Friedman, in association with the United States Agency for International Development (USAID), attempted to understand how law and legal institutions functioned in the development process. They sought to build ‘a new body of theory and method—a “social science” of law and development—to provide the intellectual framework for effective study, research and understanding’.<sup>18</sup> One of the objectives of the project was to study legal systems quantitatively.<sup>19</sup> From the 1980s, the World Bank began developing measurement tools with the purpose of promoting neo-liberal markets, increasing fiscal discipline, free trade and limited state intervention through projects such as the Country Policy and Institutional Assessment exercise, which is a planning tool to assess a country’s effectiveness in utilizing development assistance.<sup>20</sup> In its framework, it conceived of law as being a tool for economic development and offered a comparative and quantifiable study of legal systems around the world by focussing, at a macro level, on whether legal systems protected property rights and ensured legal certainty.<sup>21</sup> More recently, projects such as the ease of doing business index and the governance indicators of the World Bank, where the functioning and measurement of legal reform are seen from the purview of governance, have increasingly been used as illustrations of how the rule of law is conceived. These frameworks are used as benchmarks in order to evaluate the regulatory environment for business activity as well as the deficit in governance measured in terms of accountability and transparency. However, with the growth of a policy impetus on the rule of law being essential for economic growth and the eradication of poverty and sustainable development,<sup>22</sup> the rule of law is

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<sup>18</sup> John Henry Merryman, ‘Law and Development Memoirs II: SLADE’, *The American Journal of Comparative Law* 48, no. 4 (2000): 713–727.

<sup>19</sup> Ibid.

<sup>20</sup> David Restrepo Amariles, ‘Transnational Legal Indicators: The Missing Link in a New Era of Law and Development’, in *Law and Policy in Latin America*, ed. Pedro Borges Fortes, Larissa Boratti, Andres Palacios Lleras and Tom Gerald Daly, 95–111 (London: Palgrave Macmillan, 2016).

<sup>21</sup> Ibid. See also Philipp Dann, ‘Institutional Law and Development Governance: An Introduction’, *Law and Development Review* 12, no. 2 (2019): 537–560.

<sup>22</sup> United Nations General Assembly, ‘Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Level A/

now also being seen as an end in itself.<sup>23</sup> As a concept, therefore, the rule of law is now being understood as a measurable value that can be studied independently rather than as a subset of governance or democracy.<sup>24</sup>

From this discussion, I wish to show—through particular episodes—how law has been increasingly quantified and a vocabulary has emerged around it.<sup>25</sup> In the following chapters, I will conduct an assessment of six prominent indicators that measure the rule of law, which are developed by different organizations: the World Justice Project Rule of Law Index, the Democracy Barometer, the World Bank Worldwide Governance Indicators, the United Nations Rule of Law Indicators, the Ibrahim Index of African Governance, and the Hague Model of Access to Justice. The assessment of these indicators will provide an insight into how the rule of law is conceptualized in these different tools, as well as explore the methods through which data are collected and assessed. In analysing these factors, I will investigate whether certain qualities of justice systems are idealized and given prominence over others, and what the implications of such decisions can be on evaluating the institutions and people's experiences with justice in resolving disputes.

### The impacts of quantification in law

In order to understand the impact of quantification, the book investigates the advancement of indicator frameworks that have emerged as critical vocabulary for understanding concepts such as the rule of law, access to

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Res/67/1', 2012, A/Res/67/1, <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf> (accessed 7 May 2020).

<sup>23</sup> David M. Trubek and Alvaro Santos, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice', in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos, 1–18 (Cambridge: Cambridge University Press, 2006).

<sup>24</sup> René Uruña, 'Indicators and the Law: A Case Study of the Rule of Law Index', in *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law*, ed. Sally Engle Merry, Kevin E Davis and Benedict Kingsbury, 75–102 (Cambridge: Cambridge University Press 2015).

<sup>25</sup> This book does not seek to provide a history of legal indicators but rather a socio-legal exploration of the use and impact of these tools as they relate to contexts of legal pluralism.



justice, freedom, governance and democracy and in evaluating how legal systems function across the world.

Through an examination of the concepts and methods that indicators adopt, this book will study the politics that indicators promote and the silences that are reinforced as a result of their development and deployment. It will also ask questions about the narratives that emerge from these indicator frameworks and the impact that such narratives have on law and development reform. For instance, if legal indicators are designed to capture the data that focuses on factors such as the number of cases pending, the number of judges per population, the speediness with which cases are resolved, the independence and accountability of judicial institutions and the resources allocated for the judiciary, then through such factors one can deduce that there is an emphasis on rule-of-law institutions and how they function. This hypothetical indicator, for instance, would explore how institutions work, how effective the administration is and what the hindrances and barriers to justice are, as seen from the supply side or an institutional perspective. This empirical evidence would, in turn, determine how policy makers who use indicators should respond. I study such lifecycles of indicators and examine the impact they have on the people, institutions and regulations that are influenced by them.

A starting point of this exploration is to examine the key arguments that critics of the use of quantification in the law have raised, and review these critiques through an analysis of how indicators project particular meanings, offer a sense of trust, and have the power to influence actions and decisions.<sup>26</sup> I have sought to systematize different critical perspectives on indicators because these offer an important vocabulary for the evaluation of different challenges, whether in terms of power structures, epistemological diversity or policy application that emerge through the construction, development and deployment of indicators. This thematic organization of the challenges of indicators is purposeful, as I seek to engage with the concerns that indicators bring and use this as a basis to offer a response. After offering a more general critique of indicators, I then move into specific concerns that emerge in the use of legal indicators for contexts with legal pluralism.

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<sup>26</sup> Chapter 2 provides an overview of different critiques based on previous work that examined how indicators impact and influence ways of seeing and knowing the world.

## The absence of an engagement with legal pluralism

For numerous people living around the world, transactions and interfaces with justice involve interacting with multiple legal systems that have different capacities, rules and criteria for legitimacy.<sup>27</sup> The existence of legal pluralism as a matter of ordinary practice has been a challenge for development practitioners for many years.<sup>28</sup> This is because it is seen as a limitation towards building societies based on a strong state and the rule of law. With the repeated failure of development interventions that focus on an institutional, top-down approach to justice reform, greater attention is now being paid to legal empowerment to better capture the heterogeneity of justice users.<sup>29</sup>

I engage with the concept of rule of law as it is designed in legal indicators and study whether it is productive as a framework and concept for measurement of dispute resolution in plural legal orders. I assess how the concept of rule of law has been used in development cooperation work, including the promotion of rule of law for judicial reform and institution building. I, thereafter, examine a turn to legal pluralism in development cooperation work and the implication that this has for the concept of the rule of law.<sup>30</sup> I argue that debates on the rule of law in the context of law and development reform will also have an impact on discussions surrounding

<sup>27</sup> John Griffiths, 'What Is Legal Pluralism?', *The Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 1–55.

<sup>28</sup> Brian Z. Tamanaha, Caroline Sage and Michael Woolcock (eds.), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge: Cambridge University Press, 2012); Julio Faundez, 'Legal Pluralism and International Development Agencies: State Building or Legal Reform?', *Hague Journal on the Rule of Law* 3, no. 1 (2011): 18–38.

<sup>29</sup> Brian Z. Tamanaha, 'Introduction: A Bifurcated Theory of Law in Hybrid Societies', in *Non-State Justice Institutions and the Law: Decision-Making at the Interface of Tradition, Religion and the State*, ed. M. Kötter, Tilmann J. Röder, Gunnar Folke Schuppert and Rüdiger Wolfrum, 1–21 (London: Springer, 2015); Peter Albrecht and Helena Maria Kyed, 'Introduction: Non-State and Customary Actor in Developing Programs', in *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform*, ed. Peter Albrecht, Helene Maria Kyed, Deborah Isser and Erica Harper, 3–22 (Rome: IDLO and DIIS, 2011).

<sup>30</sup> Ronald Janse, 'A Turn to Legal Pluralism in Rule of Law Promotion?', *Erasmus Law Review* 6 (2013): 181–190.