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Abstract

This paper explores the influence of economics on the demand for, and deployment of, indicators in the context of the World Bank's investment climate campaign. This campaign is characterised by an emphasis on marketization, mathematization and quantification, which are respectively the normative, analytical and empirical approaches-of-choice in mainstream economics. The paper concludes that economics generally, and indicators in particular, have brought a certain discipline and energy to the field of law and development. But this 'progress' has often been at the expense of non-economic values and interests, and even of our ability to mourn their loss.

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Introduction

‘Call a thing immoral or ugly, soul-destroying or a degradation of man, a peril to the peace of the world, or to the well-being of future generations; as long as you have not shown it to be “uneconomic” you have not really questioned its right to exist, grow and prosper’ (Schumacher 1993 [1973]: 27).

Economics imperialism—the ‘colonisation’ by economics of ‘the subject matter of other social sciences’—is a well, if not widely, recognised phenomenon (Fine and Milonakis 2009, 1). The economic approach—analytical, empirical, normative¹—is increasingly used, by economists and other social scientists, to describe, measure and judge an ever-wider range of social life. In recent years, economics has arrived on the shores of law and development—that is, practice and inquiry focused on law as a means, end, obstacle or irrelevance to improvements in the lives of the (locally or globally) relatively poor (materially or otherwise). Indeed, it is in large part because ‘economists have become more attuned to the potential economic functions of legal institutions’ that law is a key landmark in ‘the new intellectual terrain’ of development (Davis 2004, p. 2). In keeping ‘with “evolutionary-institutionalist” economic thinking’ the ‘institutional capacity to enforce law’ took on ‘a new prominence’ in development theory and practice (Taylor 2005. See also Twining 2009: 253-4).

The invasion has gathered strength with the unfurling of the ‘investment climate’ banner, under which states, including their laws and legal institutions, are assessed primarily as determinants of foreign investment flows. The World Bank Group² has, for at least 20 years, campaigned for foreign direct

¹ William Twining has usefully observed that most academic study of law involves some combination of the analytical (concepts), the normative (values) and the empirical (facts) (Twining 2009, 226). Following his lead, I use the term ‘economic approach’ to refer to the analytical, normative and empirical characteristics of that discipline.

² The World Bank Group is made up not only of multiple institutions, but also of multiple individuals whose attitudes towards indicators vary (Thanks to Richard Messick for

investment (FDI) as a source of capital and technology for development. For the last 15 years, it has argued that legal systems (both laws and the manner in which they are implemented) are important determinants of FDI flows. By 2001, the Bank regularly referred to legal systems as components of ‘investment climates’—a ‘portmanteau phrase’, which lumps together the ‘law, politics, economy and infrastructure’ of a given nation or sub-national region (Perry-Kessaris 2008b). The ‘enhancement’ of investment climates is a ‘corporate priority’ of the Bank (World Bank Investment Climate website) and the term has entered into the common parlance of news outlets from the BBC to The Economist and the Financial Times.³

Indicators are the weapons of choice for the knights of investment climate discourse. The World Bank has itself pioneered a range of data sets, of which two are of particular interest for the present purposes.⁴ The Doing Business and Enterprise data sets were both initially produced by the Bank’s erstwhile Rapid Response Unit—think British SAS or US Navy SEALs—using national and sub-national surveys. While the Doing Business Survey claims to measure administrative and judicial procedures ‘objectively’, drawing on the observations of experts, the Enterprise Survey is intended to measure them ‘subjectively’, drawing on the perceptions and expectations of foreign

this point). References to the ‘The World Bank’ should therefore be taken as references to the stated corporate policies and activities of the institution that overlay and manage those divergent views.

³ In the UK, the BBC carried a report in September 2009 focused exclusively on the UK ranking in the World Bank’s Doing Business index. See also a report on Doing Business by The Economist http://www.economist.com/node/14413372?story_id=14413372; BBC news stories on Indonesia (<http://news.bbc.co.uk/1/hi/business/2804247.stm>) Russia (<http://news.bbc.co.uk/1/hi/business/10349679.stm>); Financial Times on Congo <<http://www.ft.com/cms/s/0/41ddf834-860b-11df-bc22-00144feabdc0.html>>

⁴ The Governance Indicators, a meta-data set aggregating a range of other indicators that was created by the World Bank Institute, have also had a significant impact. See Perry-Kessaris 2003 for details.

investors.⁵ The Bank uses these indicators to benchmark both legal systems, and its own ability to 'improve' them.

The impact of these indicators on broad swathes of research and policy has been substantial. They have been 'widely publicized by the media, heavily promoted ... and often used for motivating policy and defining "best practices"'; including '[e]xaggerated claims...about their consequences for foreign investment and economic development' (Arrunada 2009:2).

Meanwhile, in academic circles, the popularity of indicators has, for example, forced comparative lawyers 'to consider the continuing relevance' of their discipline and to ask whether it might 'be replaced by economics and statistics' (Michaels 2009: 766).⁶

The influence of economics in the study and practice of law is hardly a secret. Positive, negative and careful attention has also been paid to its influence in the field of law and development and closely related fields (See Rittich 2006, Michaels 2009, Sarfaty 2009, Trebilcock 1993, Morgan 2003). Even the role of economics in the manufacture and peddling of legal indicators has been the subject of isolated commentary over the years. For example, it has been observed that economists 'influence' the 'form and style' of legal indicators (Twining 2009: 253-4); that their 'intended audience is an economics and policy one, which does not seek noisy, messy data from law' (Taylor 2005: 19. See also Perry Kessaris 2003 p.689 and Legrand 2009, p. 2). This paper takes the debate forward by identifying three distinctive dimensions to the

⁵ See the websites dedicated to each survey at <http://www.doingbusiness.org> and <http://www.enterprisesurveys.org>.

⁶ For example, in August of 2010 the Hague Institute for the Internationalisation of Law and the World Justice Project co-organised a 'closed door' seminar on the topic, the proceedings of which are to appear in the *Hague Journal of International Law* < <http://www.hiil.org/news/latest-news/2010/09/01/hiil-co-organised-seminar-on-the-use-of-indicators-in-the-field-of-rule-of-law/>>. The next month saw a conference on Indicators as a Technology of Global Governance at the Institute for International Law and Justice at New York University Law School <<http://www.iilj.org/research/IndicatorsProject.asp>>. Both were attended by employees of the World Bank.

economic approach--normative, analytical and empirical—and their corresponding imprints on the demand for, and deployment of, indicators. In so doing the paper reveals the phenomenon of economics imperialism in the field of law and development to be deeper, broader and more troubling than most have suspected.

Before going on to cast the first stones of my argument, it is right and proper to admit that lawyers are not without imperial sin. Law has its warmongers who seek to remap every (social) thing in the binary terms of legal/illegal; to legislate, judicialise and bureaucratise their way to world domination. But those campaigns have been chronicled elsewhere. For example, as Boaventura de Sousa Santos observed in 1987:

As we approach the end of the century and start thinking *fin de siècle*, ...Habermas has spoken of the excessive colonisation of the life-world (*Lebenswelt*) by law. Nonet and Selznick plead for a responsive law and Teubner for reflexive law. In all these theories there is a call for a new metamorphosis of the law, one that will bring it back again to its proper and natural limits, whatever they may be (de Sousa Santos 1987: 280).

A confession of greater significance to the present context is that law and lawyers often make marvellous enablers and collaborators. So while the invasion at the centre of this paper has been achieved using the tools of *economics*, it has been willingly assisted by plenty of non-*economists*.

The remainder of this paper begins with a potted history of economics imperialism. It then traces the barren craters, and the odd newly verdant pasture, left by indicators on the field of law in development. It identifies three features of the investment climate campaign over which the influence of the economic approach is clear, and in which indicators play a key role. Those features are marketization, mathematization and quantification, and they reflect the normative, analytical and empirical approaches-of-choice in mainstream economics. The paper concludes that economics, and indicators in particular, has brought a certain discipline and energy to the field of law and development. But this 'progress' has often been at the expense of the non-

economic values and interests that are equally central to genuinely comprehensive development; and even of our ability to mourn their loss.

Economics imperialism

The story of economics imperialism begins with an act of secession—or was it expulsion? When Adam Smith published *The Wealth of Nations* in 1776, the field was dominated by the ‘easy mingling’ of economic and social topics. This peaceful coexistence was disrupted by Ricardo’s introduction in the nineteenth century of a ‘much more abstract analysis’. A ‘battle of methods’ (*Methodenstreit*) ensued in which the abstract-deductive approach won a ‘victory’ so ‘devastating’ that those Germans and Austrians who continued to cleave to a ‘historically and socially oriented’ approach were largely reclassified—effectively downgraded—from economists to economic historians.⁷ Throughout the nineteenth century, economic sociologists such as Weber and Durkheim worried away at the asocialisation and ahistoricisation of the increasingly dominant abstract-deductivist model. But for the first half of the twentieth century, ‘sociologists increasingly shied away from economic topics—which they perceived to be the domain of professional economists’ (Swedberg and Granovetter 1993, 3-4).

What is distinctive about the ‘economic approaches’ that survived this battle of methods? Just as there are many different ‘approaches’ to law—doctrinal, sociological, critical to name but a few; so there remain many different economic ‘approaches’-- institutional, behavioural, neoclassical and so on. But just as there is something essentially legal about, for example, identifying the *ratio decidendi* (a concept) in a court judgement, privileging proportionality (a value) in determining whether a kick might be excused as an act of self defence, and taking note of the date on which a treaty comes into force (a

⁷ Although this is not the place for a fulsome account of the history of economic thought, it is essential to note that Austrian economics, as epitomised in Frederick von Hayek’s 1944 cautionary tale of state inefficiency *The Road to Serfdom* continued to be influential among, for example, neo-liberals.

fact); so there is something essentially economic about, for example, identifying the point at which utility is maximised (a concept) for a consumer of sausages, privileging efficiency (a value, although some would deny it to the grave) in determining how to allocate water resources, and taking note of the number of chickens sold in Wichita in 1972 (a fact).

Not only did the victorious abstract-formalist economists revel in their isolation in the 'economic' sphere, they then began to push back into other 'social' spheres. Law was given a civilised economic once over as early as 1937, when Ronald Coase initiated transaction costs economics with his observation that business people could reduce their costs by adopting different legal forms—contracts, partnerships, firms and so on. Social interactions could now be regarded as costs, and law as cause or an effect of them. Matters became somewhat more aggressive thereafter. When Gary Becker launched his campaign (mid-1950's to present) to treat every (social) thing 'as if' it were a market—using the neo-classical micro-economic model of rational utility maximisation to explain and predict all human behaviour—most economists were sceptical. He had, quipped George Akerlof, learned to spell banana but not when to stop (Fine 2006 p. 7). However, within a few years, Becker's acquisitive stance was but a slightly garish outpost of the increasingly taken-for-granted economics imperialism.⁸ For example, Public Choice, in which economic approaches are used to analyse the politics, was a well-established discipline by the mid-1960s.⁹ In 1983 Becker was offered a joint appointment at the Sociology Department at Chicago University—giving, in his view, 'a signal to the sociology profession that the rational choice approach was a respectable theoretical paradigm' (Nobel Prize Biography). By 1987 he was president of the American Economic Association (Swedberg and Granovetter 1992, 1-2), and by 1995, Richard Posner could be imagined leaning confidently, languidly back in his chair as he opined that:

⁸ For a history of economics imperialism see Milonakis and Fine (2009) and Fine and (2009).

⁹ Leading figures include James M. Buchanan. For a brief introduction see Mercurio and Medema 1997 Chapter 3, for a fuller account see Mueller 2003.

‘...Max Weber, “the principal founder of sociology”, was a functionalist with a “useless methodology” and that “American sociology of law... has no theory in the scientific sense. It might do worse than borrow theory from economists such as Gary Becker who work on topics in sociology... and from sociologists... who place rational choice at the centre of their sociological theories” (Cotterrell forthcoming. Quoting Posner 1995:266, 268 and 278).

Becker’s temerity in elaborating ‘*the economic approach to human behaviour*’ energised economics imperialism in two ways (my emphasis). First, it reinforced the impression that in the battle of economic methods, only one (the asocial, the ahistorical, the fittest?) had survived, behind which all troops could safely unite. Second, it set out a terse analytical framework by which parachuting economists could orient themselves in the yet-to-be conquered social wilderness. Becker declared that three assumptions, ‘used relentlessly and unflinchingly, form the heart of the economic approach’. These are first, that individuals seek to maximise (utility, profit, etc); second, that markets ‘with varying degrees of efficiency coordinate the actions of different participants—individuals, firms, even nations—so that their behaviour becomes mutually consistent’; third, that the preferences of actors (individuals, firms, states and so on) are stable (1976:5). Although plenty of productive debate and innovation has challenged the boundaries of these assumptions in the ensuing years (for example, behavioural economics, information theoretic economics), and there are schools of economic thought that eschew at least some of them (for example, the ‘new’ economics as exemplified by the New Economics Foundation), and still other schools that are especially avid in their support of them (for example, the neoliberal and Austrian schools) they remain the preconditions of all remotely mainstream economic analysis--always present, sometimes suspended, sometimes extended.

One inherently multi-disciplinary field in which the dominance of economics has been particularly stark is that of ‘development’. Development--a notoriously contentious and slippery notion, variously regarded as essential, impossible and objectionable--can be defined as any attempt to improve (in

the eyes of the developer) the lives of the relatively (locally, nationally, regionally, internationally...) 'poor' (financially, culturally, socially...)¹⁰ Continuous improvement or 'progress' has been the battle cry of development since Harry Truman coined the notion of 'underdevelopment' on the day he took presidential office in 1949 (Esteva 1992, p. 6). Development activities reflect many of the forms of intervention characteristically made by governments worldwide, except that they are always done by the relatively rich to the relatively poor. It is therefore unsurprising that development has mirrored the general submission to economics imperialism, albeit with a time lag. Indeed, Arturo Escobar has proposed that '[o]f all those figures associated with development and with the production of development knowledge', the development *economist* always 'stood out clearly above the rest' (Escobar 2005, p. 141). Development economics was for a time 'protected' from the ahistoricisation and asocialisation afflicting mainstream economics, thanks to the commitment of some key figures, such as W. W. Rostow (of Stages of Growth fame) and Robert McNamara (who brought a focus on basic needs to the World Bank), to interdisciplinarity. 'But this was to change, and dramatically, with the rise of neoliberalism'. First, the state was now regarded as a hotbed of wasteful, self-serving, manipulation ('rent-seeking'). Second, the market became the sole reliable 'mechanism for achieving development'. Third, development economics lost its status as a distinct branch of economics. 'Exactly the same universal principles' were thought to apply across developing and developed countries. Historical differences and variations in 'social and economic structure' were categorised as forming the environment--'exogenous factors'--within which *homo economicus* goes about maximising utility' (Fine 2006, p. 4-6). Indeed Escobar has argued that development came to be about not only 'upgrading' and 'modernization,' but also the introduction of the rationality of *homo economicus* to the developing world (2005, p. 141). Viewed in this way, development is both a manifestation, and a *means*, of economics imperialism.

¹⁰ This proposed definition reflects my attempt to accommodate the widely divergent views on development and is necessarily loose.

As their bravado grew, economists dipped their toes, waded, then swam ever further from the jetties of trade, finance and investment eventually 'discovering', à la Columbus, the shores of law and development. The field had previously been populated by a band of socio-legal Weberians—at least until their much-vaunted self-estrangement in the mid-1970s (See Carty 1992; Trubek and Galanter, 1974). Beginning in 1989, these territories have been progressively cleared of the socio-legal debris, then replanted with the seeds of individual rational utility maximisation that are characteristic of Chicago-inspired law and economics, and remapped with the symbols of 'good governance' and 'rule of law' which are characteristic of new institutional economics.

Leading the charge on this new frontier was the World Bank Group, so that 'today, any serious intellectual discussions' on law and development must address the contribution of the Bank (Faundez 2009:180). The history of its involvement has been told elsewhere (see for example Decker 2009). Some scholars have questioned the extent to which the Bank can be said to have a coherent legal reform strategy (Santos 2006), or to be innovators or dominators in the provision of legal reform (Hammergren 2009). Certainly other international financial institutions are also involved in the legal reform project generally, and specifically in the creation of indicators—for example, the Asian Development Bank and the European Bank for Reconstruction and Development. But there is no doubt that it has been the chief inventor and sustainer of the campaign for 'better' investment climates. It is also true that the influence of economics on the demand for, and design and deployment of, indicators has been especially noticeable at the World Bank.

Invasion by indicators

The investment climate campaign is a form of 'meta-regulation'—that is, 'it is part of the taken-for-granted context within which legal reforms are made in client countries of the World Bank'. Its meta-regulating effect is both 'thin', in that 'it applies economic values' and methods 'to assess the validity of the methods by which laws are made and enforced'; and 'thick' in 'it expects that

law will promote a liberal market economy (Perry-Kessaris 2008 Ch 1. Citing Morgan 2003).

The indicators at the heart of the investment climate campaign are, to draw on the terminology of Davis, Kingsbury and Merry (2010), a ‘technology of governance’ used for the purposes of regulation, but in place of law. The World Bank is a ‘governor’ of the promulgator-user variety, creating Doing Business and Enterprise indicators with its ‘name and imprimatur’ and using them to evaluate, and thereby govern, both legal systems and itself.

Specifically, the Bank uses the indicators to evaluate the performance of administrative and judicial institutions against the standard of what it regards as a ‘good investment climate’; *and* to evaluate its own efforts to ‘improve’ such investment climates. The indicators are also used by ‘the public’, namely those civil society, private and state actors who have an interest in investment or, less commonly, in the performance of the World Bank. The World Bank derives the power to govern performance in investment climates from its ‘economic’ and ‘legal authority’ as a lender; and from its ‘scientific’ and ‘moral authority’ as a long-standing leader in the theory and practice of development economics, although all forms of its authority are ‘contested’ by states and by civil society actors.

Figure 1 maps the influence of the economic approach in the investment climate campaign—normative (values and interests), analytical (concepts and relationships) and empirical (facts and methods), as well as the central role played by indicators. The following sections elaborate upon this map, suggesting that the investment climate campaign reflects three commitments of mainstream economics: a normative commitment to marketization (Ready); an analytical commitment to mathematization (Aim); and an empirical commitment to quantification (Fire).

[Figure 1 about here]

Ready: Marketize

The first step of any campaign is to rally the troops and win over hearts and minds. The investment climate campaign issues its call to arms in the competitive, commodifying terms of the market. This is no great surprise given

that the World Bank, like other financial institutions, is ‘the natural territory of economists and finance specialists’, whose ‘principal concerns are macroeconomic’, whose ‘charges are to reduce poverty and facilitate economic growth’, and whose ‘principal inhabitants, therefore, are professions which proffer expertise in markets’ (Halliday 2010, 31-2).

The tendency to treat legal systems ‘as if’ commodities competing for the attentions of foreign investors, their ‘value’ signalled by Doing Business and Enterprise indicators, is a manifestation of the *normative* commitment of mainstream economics to marketization. In (economic) theory, such marketization ought to produce all manner of good things, most importantly: competition. A ‘market’ consists of buyers and sellers of a product. Where there are multiple consumers (investors) and multiple producers (states) of multiple products (legal systems) there will be competition among them, resulting in ‘better’ legal systems. This argument ‘is based upon implicit appeal to the biological analogy of natural selection.’ So, ‘just as competition, working through the market, induces efficient outcomes in a static framework, the result over time will be an institutional framework conducive to growth and development. Only the “fit” will survive’ (Harriss, Hunter and Lewis 1995 p. 11. Cited in Perry 2002). This theory relies on problematic assumptions about the preferences, expectations and behaviours of both producers (states) and consumers (investors) of legal systems.

First, the theory assumes that investors actively shop around for the ‘best’ legal system in which to do business, and share common beliefs that the ‘best’ legal system is one that is cheap and quick, as well as common understandings of what ‘cheap’ and ‘quick’ look like. As I have set out at length elsewhere, these assertions are both implausible, for reasons more and less comprehensible to economists; and dangle too far above the empirical ground to merit classification as proven (Perry 2001, 2002, 2003, 2008). I will only add a reference to Pierre Legrand’s (2009) recent observation that:

‘Any argument that one law is ‘better’ than another because it entails lower transaction costs (or for any other reason) is but a claim for someone’s understanding of what makes law ‘better,’ based on that

someone's understanding of the meaning and relevance of transaction costs (or whatever) (p. 4).

There is no doubt that marketisation does indeed cause states to engage in a relentless competitive process that Veronica Taylor (2005) has dubbed the 'law reform Olympics'. The publication of indicators serves to continuously pit states against each other, and against their historical selves; the successful being rewarded with finance, technical assistance and praise (See also World Bank, 2004a, p. 53 and Govindarajan Committee, 2002b, pp. 35-6). Success stories are reproduced on the Doing Business website and in special publications with titles such as *Celebrating Reform 2007*. The Doing Business website also includes a link on its front page to historical data, to encourage states to improve in time for the next measurement--although that plan is often scuppered by changes in methodology which the Bank determines render the data incomparable over time, which is why, for example, the startling achievements of Georgia (see below) are not apparent on the Doing Business website.

The legal system 'as if market' game is mirrored in the increasing tendency to speak of an international 'market' for legal services, which has sent France and the UK, to name but two, scurrying in search of unique selling points of their legal professions.¹¹ There is also a strong emphasis on the idea that the customer is always right. For example,

'The Doing Business reports played a crucial role in alerting the French legal community to the fact that law has become an instrument of economic domination, that there exists a real market for law, and that in a number of sectors, [the French] need to reform [their] law, if only to "sell" it better' (Kerhuel and Fauvarque-Casson 2009, 812-13)

¹¹ In 2009, President Nicolas Sarkozy commissioned a report on the French legal profession. He emphasised the need for efficiency in the legal system, the report spoke of the need to push the French legal system globally (Kerhuel and Fauvarque-Cosson 2009, p.816). In 2002, the then Lord Chancellor's Department hosted an international symposium on 'Legal services markets' including academics from the UK and the US.

The problem, in the words of political philosopher Michael Sandel, is that '[m]arkets leave their mark.' They 'are not mere mechanisms. They embody certain norms', and 'presuppose' and 'promote, certain ways of valuing the goods being exchanged'. So when economists 'assume that markets are inert, that they do not touch or taint the goods they regulate' they are making 'a mistake'. The most superficial type of 'mark' is illustrated in Sandel's example of a nursery which seeks to incentivise parents to pick their children up on time. It introduces a charge for lateness. The parents, now interpreting accommodation of lateness as a service for which a fee can be paid, are more late, more often (Sandel 2009). Much deeper marks were noted by E. F. Schumacher in his *Small is Beautiful* of 1973 (echoing Karl Polanyi's *Great Transformation* of 1947):

'In the market place, for practical reasons, innumerable qualitative distinctions which are of vital importance for man and society are suppressed...[I]n The Market [,e]verything is equated with everything else. To equate things means to give them a price and thus to make them exchangeable. To the extent that economic thinking is based on the market, it takes the sacredness out of life, because there can be nothing sacred in something that has a price' (Schumacher 1993, pp.30-1).

The implication for the present purpose is that the marketisation of legal systems leaves a mark on legal systems, those who produce them, and those who use them. The first mark is left on our understanding of what law is for. When we think of legal systems as commodities, and investors as their main audience, we devalue, or even forget about the other 'sacred' social functions of law. Roger Cotterrell has long argued that law is more than a resource for the maximisation of benefits to individuals. It is also an essential 'communal' resource for the support of the full Weberian spectrum of relations--not only individuals, and not only of instrumental investment relations, but also of loving familial, faithful religious and respectful traditional interactions (Cotterrell 1997, 2006). The World Bank's Independent Evaluation Group

(2008)¹² hovered close to the same point when it argued in its review of the Doing Business project that ‘any research relating the regulatory environment to economic outcomes is necessarily partial’, because, among other things, what benefits investors ‘may not be good for...the economy and society as a whole.’ Where interests are in competition, the ‘balance...is a matter of political’, not economic, ‘choice’ (p. 51). But the effect of meta-regulating investment climate discourse is that the economics is in effect *doing the choosing*.

The problem became clear to me when I studied the role of the Indian legal system as a communal resource in investor-government-civil society relations. I began my account of that research with the following theoretical dissatisfactions with the investment climate campaign:

[T]he discourse of ‘investment climates’ is far too investor-centric to serve as a framework for assessing the role of host state legal systems in investor-government-civil society relations. For a start, an understanding of the legal needs of civil society and government actors is essential even to an investor-centric approach, because their perceptions and expectations of legal systems will inform their legal strategies, which in turn will affect foreign investors. Furthermore, we need and ought not to begin and end with the perceptions and expectations—supposed or actual—of foreign investors. Foreign investors are, quite obviously, not the only actors to whom state legal systems are addressed. Government and civil society actors (among others) are also potential consumers, and targets, of state legal systems. (Perry-Kessaris 2008, Chapter 1).

¹² This is an ‘independent unit within the World Bank’ which ‘reports directly to the Bank’s Board of Executive Directors’ as is responsible for assessing ‘what works, and what does not; how a borrower plans to run and maintain a project; and the lasting contribution of the Bank to a country’s overall development’: Independent Evaluation Group (IEG) website <http://www.worldbank.org/ieg/> visited 23 March 2010.

The validity of those theoretical misgivings was confirmed by the empirical reality in India. Not only was the investment climate campaign diverting attention from the interests and values that underpin non-economic relations; it was actively undermining the ability of law to support those non-economic relations.¹³ Furthermore, viewed through a sociologically-informed lens, the investment climate campaign proved to be disconcertingly linear, with little exploration of the possibility of interactions among and between laws, legal institutions and humans. Of course an instinctive and well-exploited economic understanding of the self-reinforcing effects of indicators is clearly discernable—as performance improves, so there is an incentive to improve performance. But investment climate discourse takes no account of the complex, reflexive interactions that take place between and among investment, state, civil society and legal system actors—not least the use, abuse and avoidance of law (Perry-Kessaris 2008).

The second set of marks left by marketisation can be categorised as ‘indicator politics’ (Derosieres 2007, 136)—those wasteful, distracting efforts at one-upmanship to which humans appear to be so prone. For example, as I have reported elsewhere (Perry-Kessaris 2008a, 126-7), a former World Bank Country Director for India remembered in an interview how in 2004 one Chief Minister had demanded an emergency Sunday morning meeting at the

¹³ In that study I established a theoretical framework for exploring the role of host state legal systems (courts and bureaucracies) in mediating relations between foreign investment, civil society and government actors, and then demonstrate the application of that framework in the context of the south Indian city of Bengaluru (Bangalore). Drawing on the ‘law-and-community’ approach of Roger Cotterrell, I identified three mechanisms through which law might, in theory, ensure that social relations are productive: by expressing any mutual trust which may hold actors together, by ensuring that actors participate fully in social life and by coordinating the differences that hold actors apart. I found that each of these legal mechanisms was discernible in Bengaluru. However, their operation was limited and skewed by their extent to which actors use, abuse and/or avoid them. Furthermore, those legal mechanisms were being eroded as a direct result of the World Bank’s ‘investment climate’ discourse, which privileges the interests and values of foreign investors over those of other actors.

Director's residence to express his dismay at the indicators produced for his state. In the State of Karnataka, two former Chief Ministers passed the indicators grenade back and forth between them accusing each other of complicity in making it 'the most corrupt state in India in 2004', and demanding 'clarifications' from the Bank.¹⁴ Meanwhile, the same Doing Business report was 'like an electric shock to the French (and French related) legal community' for this 'country steeped in its legal tradition, was rated forty-fourth (behind Jamaica, Botswana, and Tonga) and considered one of the legal systems least conducive to economic growth' (Kerhuel and Fauvarque-Cosson 2009, 811). Various conferences, commissions and other defensive and retaliatory mechanisms of more and less productive value were launched in response. A longer-term perspective on the law reform Olympics might have given some much-needed, albeit perverse, reassurance to the French. For in a 2003 study I found that the US or the UK consistently ranked 'worse' than at least one South Asian nation across a range of legal indicators manufactured between 1999 and 2002 (Perry-Kessaris 2003). Neither country was as shocked as France at their supposed inferiority. Perhaps the Anglo-American blow was cushioned by the contemporaneous lauding in the infamous 'legal origins' literature of the common law as fundamentally more efficient than civil law.¹⁵ But my point is that all of this is surely a diversion from the professed aim of the game—namely, 'improving' the lives of the relatively 'poor'.

Perhaps the most extreme form of indicators politics is cheating—that is, deliberately targeting reforms towards improving indicators, rather than legal systems. Economists tend to be somewhat coy about this topic. They prefer the term 'gaming', which to my ear implies a degree of admiration or at least studied ambivalence about the strategy in question. But who among us is thrilled by the prospect of Olympic athletes striving to go 'swifter, higher,

¹⁴ Perry-Kessaris 2008a p. 127 citing the *Times of India* in 2005.

¹⁵ See La Porta, Lopez-de-Silanes and Shleifer (2008) for a summary of the LLSV perspective.

stronger' by dipping into performance-enhancing drugs? On that note, how impressed can one be by Georgia's literally incredible rank of 11th easiest place to do business in the world in 2010, not to mention its meteoric rise (overtaking Japan and Germany among many others) from 112th in 2004, via a best reformers award from the World Bank in 2007?¹⁶

Good things can come from measuring performance. For example, I would certainly be moved to action if I found that students were switching away from courses I teach and I pay close attention to student comments about my teaching. But there is always a danger of—perhaps even a propensity towards—things going too far, especially when quality is put on a competitive, war-like footing. It is not the fault of economists that humans sometimes want to cheat, but they are to be chastised for their willingness to create an environment in which cheating becomes a strategy rational above most others. Indeed, chastisement does not really go far enough: their very own, much coveted, theory of individual rational utility maximisation predicts that cheating will occur wherever it can be done (here due to the impossibility of measuring accurately, see below), and is to the advantage of the cheater (here due to the fact that rankings may bring rewards).¹⁷ So why risk it?

Aim(?): Mathematize

At its best, mathematical analysis summarises, clarifies and renders transparent relationships—whether hypothesised or proven—between concepts. The basic theory behind investment climate discourse is that the amount of foreign investment flowing into a country depends, among other things, upon the effectiveness of that country's legal system. Were it not so influenced by economics, the basic theory behind the investment campaign could be represented in a diagram of the kind set out in Figure 2. Instead it

¹⁶ The achievement is not clear from the Doing Business Survey which does not list the pre-2007 ranking. But it is noted on various other websites and in the CIA's country profile <http://www.usaid.gov/locations/europe_eurasia/countries/ge/georgia.pdf>. It was pointed out by a member of the audience at the NYU Indicators Conference in 2010.

¹⁷ Thanks to an anonymous reviewer for laying this point bare for me.

tends to be set out a format akin to the formula below, in which, suffice it to say, y_i represents investment flows and R_i represents the effectiveness of the legal system

$$\log y_i = \mu + \alpha R_i + \varepsilon_i$$

[Figure 2 about here]

The habit of representing legal systems as variables in a development economics equation, their places held by indicators, is a reflection of an *analytical* commitment of contemporary mainstream economics to mathematization. A former president of the American Economics Association is quoted as calculating that in 1940 'less than 3 percent' of the pages of the *American Economic Review* included even 'rudimentary mathematical expressions' (Milonakis and Fine 2009: 123). From that point on, the 'scientific program' of mainstream economists has been fetishistically to 'reformulate verbal ...arguments into symbols and variables and diagrams and fixed point theorems and the like' (McCloskey 2002, p.11). By 1990, nearly 40 percent of the refereed pages of economics were to 'display mathematics of a more elaborate type' (Milonakis and Fine 2009: 123) apparently in pursuit of a pseudo-scientific sense of certainty, control and continuity. The contemporary economic paper or lecture rarely takes long to slip from sentence to formula, from happiness to Q^* , from wondering to knowing, from real world to 'blackboard economics' (Coase 1998. Cited in Perry-Kessaris 2003 p. 65). Where it is possible to substitute 'an elegant and exact formula' such as ' $E = mc^2$ ' or, to give a somewhat less elegant example from economics, $1 + i_{usa} = (e_{forward} / e_{spot}) (1 + i_{france})$, called "covered interest arbitrage" for a 'clumsy fact or numerical approximation', then one surely ought to do so (McCloskey 2002, 13-4). However, when mathematization simply reinvents a verbal wheel, mysticising the common-place, it is more than irritating. It excludes members of the colonised disciplines who may not be technically qualified to navigate their newly re-labelled terrain.

Mathematization can also be destructive. First, like other forms of 'metaphorical language', mathematics may simply hollow out the analysis and 'constrain' the 'vision' of the analyst 'so that their reading of social reality may

be quite different from those using other metaphors and other languages.’ Second, while some economic metaphors are *‘illustrative’*, others serve to *‘constitute the very lens through which we view the world’* (Bronk 2009: 22-3). The slip from illustration to constitution can sometimes occur simply through familiarity. As Deidre McCloskey (1998) explains, some metaphors, such as Becker’s treatment of children as ‘durable goods’ are still ‘live’ meaning that they remain ‘conscious and surprising’, exerting a ‘structuring effect’ of which ‘we are aware.’ But others, such as the metaphor of ‘equilibrium’, have been with us long enough to become ‘half-dead—that is, no longer consciously recognised.’ The danger is that ‘we may become oblivious to the extent to which it structures and constrains our vision’ (Bronk 2007:23. Citing McCloskey 1998).

An excellent example is provided in the construction by economists of so called ‘Rule of Law’ indicators which all too often seek to measure the protection of property rights, which is the obsession of economists, rather than the equal application of the law to all regardless of position, which is what lawyers tend to regard as the core component of the rule of law (See Davis 2004 and Taylor 2005). How many earnest conversations must have been held at cross-purposes as a result? Another clear example is provided by a terrifyingly popular paper by Acemoglu et al. (2001) on ‘the colonial origins of development’, in which they propose, among other things, the following equation:

Per capita income in colonial Africa= property rights + other factors

Unfortunately, the authors were unable to find an indicator to directly ‘measure’ the ‘institution’ of protection against expropriation in colonial times. So they chose a proxy indicator (an ‘instrument’), namely mortality among settlers, thinking that better institutions (including property rights to protect against expropriation) must be associated with lower mortality. As Aldashev (2009) points out, that choice of proxy is highly problematic, for there are plenty of reasons for high mortality rates that are entirely unrelated to the protection of property rights. But the paper remains extremely influential, and has helped to set in concrete a particular interpretation of how ‘strong’ property rights ‘matter’ to development.

Third, mathematization seems to divert attention from both the lack of theory and the lack of facts. Although economists may have identified a number of legal and economic concepts which they regard as central to law and development, the precise nature of the relationships between these concepts, and their connection to economic development remain both incompletely theorised and un-proven. For example, John Ohnesorge (2009) has observed that corporate law reform focuses on the development of 'equity markets as a source of external finance', assuming that external finance results in successful corporations, when in fact, 'data from a country like South Korea during rapid development' would call that into question (p. 1632).⁷ Moreover, each incidence of mathematization helps to render the dominant structure of the debate ever more taken-for-granted. As Ben Fine has observed, international financial institutions such as the World Bank frequently take 'complex issues X and Y' and 'imagin[e] that...by combining them...the complexities can be set aside and the issue settled by running a simple econometric model ... relating the two.'⁸ A clear pattern has emerged such that 'where X is a policy variable and Y is...a goal', the policy variable X always relates to 'stabilization and structural adjustment, and, more recently, to the rhetoric of poverty alleviation, good governance, country ownership and so on'. He points to a study by a World Bank economist that investigated the possibility of achieving objective Y, the identity of which will 'be revealed in a moment'. The study explained that to achieve Y would require '(i) sound macroeconomic policies (ii) structural policy reforms, and (iii) modifying further the system of incentives faced by individuals.'⁹ The prescription of this familiar triad 'can only come as a surprise to the soft-boiled'. However, 'even the most cynical will surely be surprised to learn that Y is, in this case, "reversing the spread of the HIV/AIDS epidemics and mitigating its impact!"' (Fine 2006, xx-xxi).

Finally, it is important to note that an obsession with mathematics risks rendering economics (as well as colonised and collaborating disciplines) useless to the real world. 'Mathematics is not identical to counting or statistics.'¹⁰ Indeed, 'most maths has nothing to do with actual *numbers*.'¹¹ Mathematics consists of attempts to prove, deductively 'why/whether'.

Quantification, which is the subject of the following section, consists of attempts to identify, inductively, 'how much' (McCloskey 2002, p. 9).¹⁸ As Deidre McCloskey has observed, each of these activities is an inherently 'virtuous' and essential component of any attempt to study the real world:

An inquiry into the world must think and it must look. It must theorize and must observe. Formalize and record. Both. That's obvious and elementary. Not everyone involved in a collective intelligent inquiry into the world need do both: the detective can assign his dim-witted assistant to just observe. But the inquiry as a whole must reflect and must listen. Both. Of course (McCloskey 2002, p. 37).

However, a 'secret sin' of economics is that it relies too heavily on 'qualitative theorems...which *look* like theorizing' and appear to involve the same 'tough math' that 'actual theorizing would', but too often offer nothing but 'pure thinking, philosophy' to which no number could ever 'conceivably be assigned'. The 'theorizing' involves repeated amendments to assumptions so that 'the "results" keep flip-flopping, endlessly, pointlessly.' This excessive mathematization is worsened by the fact that the theory is not 'disciplined by any simultaneous inquiry into how much' (quantification), in particular because of the excessive reliance on the notion of statistical significance, on the subject of which I will say a little more below (McCloskey 2002, p. 41 and 44). The point here is that in order for such mathematization to have any real world significance, it needs to be supported by numbers. To the extent that the variables to be measured are inherently qualitative, such as legal systems, they must be numericised. To the extent that something cannot safely be numericised—a possibility explored in the following section—it ought not to be mathematised.

¹⁸ As Deidre McCloskey puts it 'Why does a stone dropped from a tower go faster and faster?' Well, $F = ma$, understand? "I wonder Whether the mass, m , of the stone has any effect at all." Well, yes, actually it does: notice that there's a little m in the answer to the Why question' (2002, p. 10).

Fire: Quantify

A legal fact may be represented by ‘a paragraph of text... a series of striking photographs or a video recording’. Alternatively it might be represented numerically, in the form of an indicator (Davis, Kingsbury, Engle Merry 2010, pp. 2-3). The tendency of the investment climate campaign to produce and deploy indicators to evaluate legal systems is a reflection of the *empirical* commitment of mainstream economics to quantification.

The preference for quantification grew across the social sciences in the 1920s and 1930s as ‘a way of claiming status’. Indeed in those heady days, ‘even the social anthropologists...counted coconuts.’ Towards the tail end of the socio-legal heyday of law and development in the 1970s, the SLADE project at Stanford collected ‘a vast amount of social and legal data’ which lay dormant after *The Self-Estrangement* (Twining 2009: 251-3).¹⁹ But from the beginning and ever-after, it was the economists—‘oh, the economists, how they counted, and still count’ (McCloskey 2002 p. 5).

The economically super-charged decision to take legal quantification ‘Over the Top’ is rooted in the attempt to marketise public services, and the demand came ‘mainly from outside the scholarly community’ (Twining 2009: 253-4). The 1980’s saw an erosion of the belief that the quality of public service could effectively be regulated by a commitment to civic duty and a respect for hierarchy among bureaucrats (Derosieres 2007, pp.135). The solution was to marketise—to introduce to the public sector the ‘best’ of the private sector. But ‘public policies...do not have available accounting criteria such as “market share” or profitability in order to judge their capacity to satisfy users’ needs, or simply their efficiency.’ So, the search was on for indicators ‘that could play a role more or less similar to the cost accounting, operating accounts and balance sheets of commercial firms’ (Derosieres 2007, pp.123 and 135). Writing in 2000, Twining observed that, although ‘nearly all public and private

¹⁹ See John Henry Merryman (2000) ‘Law and Development Memoirs II: SLADE’ *The American Journal of Comparative Law*, Vol. 48, No. 4 (Autumn, 2000), pp. 713-727. Stable URL: <http://www.jstor.org/stable/840912>.

institutions are increasingly part of a “performance culture”, dominated by targets, benchmarks, indicators, and league tables’, there was a ‘relative dearth of regular, systematically compiled statistics about legal phenomena at regional, global, and other supra-national levels’ (Twining 2009: 254-6). Then came the flood. States and inter-governmental organisations such as the EU and later the World Bank, were soon engaged in the ‘construction and negotiation of *new equivalence spaces*’ and ‘*agreeing* procedures for the quantification of the means and ends of intervention’ (Derosieres 2007, p. 135). As ‘a large bureaucracy subject to the accountability techniques of the regulatory state’, the Bank must convince its masters that ‘the shift from hard infrastructure (roads, dams, hospitals and schools) to soft infrastructure (judges, customs officials, legal aid and human rights organisations) is a meaningful one’ (Taylor 2005, 10. See also Ginsburg 2000). For example, the Country Assistance Strategies in which the Bank identifies areas in which it intends to offer ‘support’ to a given counter are, the Bank itself notes, ‘increasingly results-focused’ and include ‘clear targets and indicators’ by which ‘to monitor Bank Group and country performance in achieving stated outcomes’.²⁰ For example, the 2001 CAS for India identifies two ‘program priorities’ for World Bank activities in the country, of which the first ‘A: Strengthening the enabling environment for development and growth’, in particular the subsidiary component Strategic Objective A2(c) ‘competitiveness in industry and services’,²¹ was the primary outlet for the

²⁰ World Bank CAS website <<http://go.worldbank.org/1SOQVO7GV0>>

Visited 21 May 2010. For an overview of how the Bank measures results see: World Bank How We Measure Results website <http://go.worldbank.org/ZETAB6VBA0>.

²¹ Also relevant is Strategic Objective A1(b)—‘Improving government effectiveness: governance reform’—which notes the existence of ‘too many staff in positions with value added’, and an increased level of ‘political interference on bureaucracy’. It prescribes, among other things, the development of ‘monitorable indicators for measuring government effectiveness’. Indicators identified included ‘improvements in civil service efficiency and

investment climate campaign.²² Under this heading, the Bank assessed India's business environment as 'unpredictable, discretionary and burdensome'. It proposed to 'work with selected state governments on deregulation and improvement of the investment climate' and 'engage the central government through policy dialogue and advice on reforms that fall within its purview'- including entry and exit regulations (World Bank 2001 pp. 27 and Annex B9 p. 5). Using a standardised matrix format, the CAS 2001 lists the targets against which its progress on Objective A2(c) can be measured as, among other things, increased FDI, faster clearances and 'improved feedback on business environment from surveys' (World Bank 2001, Annex B9 p. 5). The Bank thereby committed itself directly to measuring FDI levels, clearance times and other aspects of the business environment; and indirectly to measuring its measurement—to measure the extent to which the surveys measure the business environment.

Needless to say, the Bank monitors its own performance in measuring and 'improving' the Indian investment climate. The standardised Country Strategy Outcomes Matrix that appear as an annex to every CAS and CAS progress report has on each occasion revealed that measurements have been made, and that investment clearances are faster (World Bank 2003, 2004, 2007, 2009). The trouble is that the achievement of a target is only as good as (a) the target itself and (b) the method used to measure its achievement. With respect to (a), we should remember that the 'goodness' of measurement and of speed *per se* are open to question in a broader social perspective. With respect to (b), we should bear in mind that, for example, while foreign investment in India has increased substantially since investment climate reforms began, it is impossible to know whether the increase is the result of

productivity' and 'improved public perceptions of the probity and integrity of the civil service' (Annex B9 p. 2).

²² The second priority was 'B: Supporting Critical Pro-Poor Interventions', which included 'Promoting Education and Health for All' and 'Accelerating Pro-poor Rural Development' (CAS 2001 pp. 28-31).

the reforms; and that it is unclear how much two days faster or slower 'matters' in the context of investment clearances.²³

There is much to commend quantification. It 'has an inbuilt tendency to homogenise and to simplify' and in so doing, 'it facilitates large scale comparisons and generalisations' (Twining 2009: 258). As Arrunada puts it in relation to the Doing Business indicators '[s]cience requires measurement' (2009:2).²⁴ Indeed, some 'important questions can only be answered numerically', and 'many other questions are at least helpfully illuminated by numbers'. Many who 'fear numbers, dislike them, dishonor them' do so because they are 'confused and irritated by them'(McCloskey 2002 pp. 5-6). Such wilful non-believers might well be more than converted by spending but a moment under the truly exhilarating influence of Hans Rosling, in whose hands development statistics are transformed from stern but baffling warnings to instruments of profound enlightenment.²⁵ But sometimes scepticism is justified, for quantification can go far too far, becoming 'a nitwit's, or the Devil's, tool' (McCloskey 2002 pp. 6).²⁶

The problem of how to quantify the qualitative—how to integrate the rhetoric of statistics and probability with 'other means of knowledge and action...has been overcome, not logically,...but socially.' That is, 'people' have '*agree[d]* to compare the incomparable' and to treat 'heterogeneous situations as

²³ Annual FDI flows to India were US\$236 million in the pre-liberalisation year of 1990. Annual FDI was more than 10 times that figure in 2000 after a decade of liberalisation and 20 times higher in 2002 when reforms were being introduced. By 2008, when administrative reforms had been in place for more than five years, annual FDI had soared to over 170 times the 1990 level.

²⁴ I have myself dabbled in quantification (Perry 2000a, 2000b, 2001 and 2002) but with an ever- and increasingly critical eye (Perry-Kessaris 2003, 2008a and 2008b).

²⁵ Video samples of what Rosling calls 'the joy of stats' can be found on the website for the innovative Gapminder software that he developed with his son and daughter-in-law: <http://www.gapminder.org/videos>.

²⁶ For a review of the pros and cons of comparative law by numbers see Siems 2005.

equivalent *for practical ends*' (Desrosieres, 2007, 117)²⁷ It is a 'socially and cognitively creative' process which occurs in '*contact zones*, or mediation points, between the rhetoric of statistics and other rhetorics' (Desrosieres, 2007, 119 and 122. See also McCloskey 2002, pp. 7-8). First, 'that which was previously expressed in words' is numericized. Numericization '(just as one says "dramatization[...]"') involves the application of 'conventions' of 'equivalence' which have emerged from a tangle of 'comparisons, negotiations, compromises, translations, registrations, encodings...and calculations' (Desrosieres 2007, 122). For example, the notion of an 'investment climate' evolved out of the discourse among policy makers regarding good governance and private sector-led development. That notion was then numericized with reference to conventions as to what equates to governance of foreign investment—for example, cost of contract enforcement as a percentage of the claim amount, number of days and number of procedures. Second, that which has been numericised is measured. For example, in 2009 the cost of such enforcement in India was calculated to be 46 procedures, 1420 days, and 36.9 percent of the claim (Doing Business website as at 14.07.10). Investment climate has thereby been quantified—'ma[d]e into a number', had a 'figure' 'put' on it (Desrosieres 2007, 122). Finally, a decision is made as to how much the numbers 'matter'. For '[m]attering is a human matter' which 'does not inhere in a number.' Facts do not 'lie around' like pebbles. 'It is our human decision to count or weigh or mix the pebbles in constituting the pebbly facts' (McCloskey 2002 p. 7-8, 44 and 54). For example, how much would it 'matter' if contracts were enforced in 42 procedures instead of 46, or 300 days instead of 1420, or for 36.7 instead of 36.9 percent of the value of the claim?²⁸ In many cases economists (and other social sciences and medics) encase their decisions as to what 'matters' in the terminology of 'statistical significance'. A detailed exploration of the problems posed by statistical significance is beyond the scope of this paper.

²⁷ Thanks to Carolina Olarte for pointing me to this source.

²⁸ 'Mattering' is also decided by the use of statistical significance, for a damning review of which see McCloskey 2002.

Suffice it to say that the decision as to when a number is to be regarded as 'significant' is just that: a decision.

The methodology underlying legal indicators has been contested from the beginning by individuals (See Perry-Kessaris 2003 and 2008, Davis 2004, Taylor 2005, Arrunada 2009), by the Bank's own Independent Evaluation Group (2008), by members of an international society of Francophile lawyers and by members of the French judiciary (See Kerhuel and Fauvarque-Casson 2009, p.817) to name but a few.²⁹ But to no avail, it seems, since the indicators continue to exhibit a 'striking', lack of 'sophistication' (Twining 2009: 6). There is no doubt that a 'price' is paid for the 'conversion from words to numbers' (Derosieres 2007, 123). Quantification takes forward the process of metaphoricization that begins with mathematization. It serves to 'constrain, reduce and delimit the space of possible interpretations of the world', and simultaneously 'reconfigures the world, creating new objects that enter human social circulation' (Derosieres 2007, p. 121). Indicators 'tend to become "reality" by an irreversible "ratchet effect"' by which the 'conventions' behind the numericization 'are forgotten' and the 'quantified object' (indicator) is naturalized' (Derosieres 2007, 122). These 'objects' are both 'resistan[t] to criticism' and capable of encouraging social cohesion 'by encouraging (and sometimes forcing)' people to use them in favour of 'some other language' (Derosieres 2007, 123). For example, very little attention is paid to the standard error of indicators—that is, to what extent do these indicators corroborate each other, and are we sure that if we conducted the surveys again we would get the same result? One set of indicators about which we do have some such information is the World Bank's Governance indicators. As I have shown elsewhere, and as the producers themselves note, the numbers are not at all reassuring (Perry-Kessaris 2003, pp. 13-4). Yet these empirical

²⁹ For a detailed review of French critiques see Kerhuel and Fauvarque-Casson 2009, who note in particular volume I of the critique by the Association Henri Capitant des Amis de la Culture Juridique Française (2006) of the Doing Business Indicators. See also a critique of the Bank's (related) governance indicators by economists at the OECD: Arndt and Oman, 2006.

missiles are regularly used by the Bank and others to determine just about anything from who should get aid, to whether China was a suitable venue for the Olympics—just Google it and see.

It is, therefore, reassuring and significant in equal measure that in July 2010, the Vice Presidents of the World Bank endorsed the development of a new Oversight Process for Ranking Indicators. A document outlining the Process was duly circulated in November of the same year, against the following ‘background’:

Over the years, the Bank has produced a variety of indicators, which provide the basis (explicitly or implicitly) for cross-country rankings, primarily of government policies, regulations and actions. Several of these indicators have been quite useful in benchmarking countries, catalyzing dialogue about reforms, and providing incentives for countries to improve performance. The process of preparation and publication of indicators has however been subject to different degrees of internal oversight, raising concerns about possible reputational risk associated with the robustness of the methodology, the consistency with the Bank’s development mandate, and the communication process leading to their publication (World Bank November 29, 2010).

Under this new ‘corporate framework for oversight and quality control’ any ‘new products and associated indicators’ are to be reviewed in a five-stage procedure. Furthermore, any existing ‘products’ which have not undergone ‘extensive external and internal evaluations processes’ may be also be reviewed (World Bank November 29, 2010).³⁰ Time will tell what impact this

³⁰ First the ‘concept’ is to be reviewed by an *ad hoc* World Bank Group Review Committee for compliance with the Bank mandate; second, ‘methodology and quality assurance’ will be reviewed by the Council of Chief Economists; third, a broad process of World Bank Group ‘review and participation’ will be undertaken, including input from client countries; fourth those responsible for ‘communications’ will be notified so that they might prepare a dissemination strategy; and finally Corporate Relations will be involved in the ‘publication’ stage (World Bank, November 29, 2010). Thanks to Richard Messick for bringing this development to my attention.

laudable attempt at quality control will have on the volume and nature of indicators produced by the Bank.

Conclusion

If imitation is the sincerest form of flattery, re-making—which is what economists have done to parts of law—is surely the sincerest form of snubbery. Karl Polanyi famously observed that a ‘market economy’—that mythical ‘economic system controlled, regulated and directed by markets alone’, so beloved of mainstream economics—is only possible in the context of ‘a market society’. By this he meant that it would be necessary to ‘subordinate the substance of society itself to the law of the market’ (Polanyi 2001[1947]:74-5). ‘With the “great transformation” brought about by “neo-liberalism” and “globalisation” in the last few decades, Polanyi is currently en vogue again’ (Frerichs forthcoming, p. 1). Many have interpreted Polanyi to mean that industrialisation did in fact ‘dis-embed’ economy from society, did in fact subordinate society to economy, not only rendering society ‘dependent on the economy’ but also ensuring that society ‘itself adopted the logic of markets’ (Frerichs forthcoming 14). In fact, Polanyi was convinced that such subordination is both impossible and immoral. For him society is not and can never be embedded the *economy*. However, that is not to suggest that one ought not to worry. For a belief in dis-embeddedness—in the overwhelming benefits of marketization and its ancilliary mechanisms of mathematization, and quantification—is part and erroneous parcel of the mainstream *economics* in which academics and policy makers are increasingly (analytically, normatively, empirically) embedded.³¹

This paper has identified three aspects of the investment climate campaign that can be read as manifestations of economics imperialism. The benchmarking of legal systems ‘as if’ commodities competing for the attentions of foreign investors, their ‘value’ signalled by Doing Business and

³¹ For an excellent analysis of the ‘embeddedness’ debate which far more nuanced than I have suggested here, see Frerichs 2010.

Enterprise indicators, is a manifestation of a *normative* commitment of mainstream economics to marketization (Ready). The representation of legal systems as variables endogenous to a development economics equation, their place in the formula held by Doing Business and Enterprise indicators, is a reflection of an *analytical* commitment of mainstream economics to mathematization (Aim). The production and use of indicators to 'measure' legal systems reflects an *empirical* commitment of mainstream economics to quantification (Fire).

I do not seek to suggest that indicators, foreign investment or economics are fundamentally evil, misguided or even undesirable--only that each has its limits. So economics ought to complement, not crowd out other approaches; and indicators ought to be crafted and presented in context of other forms of empirical data. For example, the World Justice Project's Rule of Law Index seeks to value the full range of legal concerns from human rights to economy, draws information not only from elite experts but also from the general population, and measures countries not against each other but against themselves.³² Furthermore, legal reform programmes ought not to be directed mostly or solely at foreign investors. Law is more than a private resource for individuals. It is also a 'communal resource' for the support of multiple forms of social relations, economic and otherwise, local and global (Cotterrell 2002 p. 643).³³ It is for lawyers, drawing on the reserves of ancillary disciplines, to issue a counter call to arms that trumpets law as community, not as commodity.

Just as the British might be credited with bringing the railway to India--along with countless less useful, less pleasant novelties--so economics must be credited with bringing some benefits to the field of law and development. On a

³² <http://www.worldjusticeproject.org/rule-of-law-index/>. The Director of the project, Juan Botero, is a veteran of the Doing Business Project.

³³ Specifically, law *expresses* the trust that holds actors together, 'draws actors in further by ensuring their *participation* in social life' and '*coordinate[s]* the differences that hold them apart' (Perry-Kessaris 2008).

superficial level, some World Bank lawyers doubtless puffed up with pride at the belated acknowledgement that law might have a role to play beyond securing the terms of development loans. Furthermore, even if one found indicators to be entirely without inherent merit, one would be forced to acknowledge that they have generated important and thoughtful debates about what makes a 'good' or a 'better' legal system.³⁴ Moreover, good economics will have forced some lawyers to confront important facts, such as the sacrifices that must be made elsewhere in order to fund legal reform. For example, economists can show how many units of education must be lost in order to fund a unit of legal reform, or of judicial reform to fund legislative reform (what is the marginal cost of education as compared to the marginal cost of legal reform etc). Such maps can inform the thinking of those lawyers (and others) who bother to read them, so that they can be less naive in debating and choosing between reforms. What good economics does *not* do is to either *obfuscate* the choice by consciously or otherwise imposing a (normative, analytical or empirical) fog of war, or *make* the choice. What good lawyers (and others) must not do is to allow themselves to be bamboozled by the fog, or to have their choices made for them. This requires that they recognise investment climate discourse and its indicators for the fundamentally economic (marketising, mathematizing, quantifying) technologies of governance that they are, and, where appropriate, resist.

References

- G. Aldashev (2009) 'Legal Institutions, Political Economy, and Development', *Oxford Review of Economic Policy*, 2009, vol. 25(2): 257-270
- C. Arndt and C. Oman (2006) *Uses and Abuses of Governance Indicators* Paris: OECD.
- Association Henri Capitant des Amis de la Culture Juridique Française (2006) *Les droits de tradition civiliste en question À propos des Rapports Doing*

³⁴ Thanks to Richard Messick for this point.

Business de la Banque Mondiale Volumes I and II. Paris.

<<http://www.henricapitant.org/node/74>>

G. Becker Nobel Prize Biography

http://nobelprize.org/nobel_prizes/economics/laureates/1992/becker-autobio.html

A. Carty ed. (1992) *Law and Development* Aldershot: Ashgate.

K. E. Davis (2004) 'What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?' NYU Law and Economics Research Paper No. 04-026.

Available at SSRN: <http://ssrn.com/abstract=595142>.

B. de Sousa Santos (1987) 'Law: A Map of misreading. Towards a postmodern conception of law' ' *Journal of Law and Society* 14:3, p. 279.

A. Desrosières (2007) 'Comparing the incomparable: the sociology of statistics' in J. P. Touffut ed. *Augustin Cournot: modelling economics* Cheltenham: Edward Elgar, Chapter 7.

B. Fine (2006a) 'The New Development Economics' in Jomo K. S. and B. Fine (2006) *The New Development Economics: After the Washington Consensus* London: Zed Books.

B. Fine (2008) 'Development as Zombieconomics in the Age of Neo-Liberalism' Paper for the 35th anniversary conference for the Center for International Development Issues, CIDIN, Radboud University, Nijmegen, Netherlands, September 2008. <http://eprints.soas.ac.uk/5622/1/fransrevv.pdf>

B. Fine and D. Milonakis (2009) *From Economics Imperialism to Freakonomics*. London: Routledge.

S. Frerichs (Forthcoming) 'Re-embedding neo-liberal constitutionalism: A Polanyian case for the economic sociology of law' in C. Joerges and J. Falke (Forthcoming) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Market* Oxford: Hart. Citations are to draft manuscript.

T. Ginsburg (2000) 'Review Essay: Does Law Matter for Economic Development? Evidence from East Asia' 34(3) *Law and Society Review* 829

G. Hadfield, 'The Second Wave of Law and Economics: Learning to Surf' in Megan Richardson & Gillian Hadfield, eds., (1999) *The Second Wave of Law and Economics*. Sydney, NSW: Federation Press.

T. Halliday (2010) 'Legal Yardsticks: International Financial Institutions as Legal Diagnosticians and Remedial Agents' Paper presented at the Conference on Indicators as a Technology of Governance, NYU, September 13-14 2010.

L. Hammergren (2009) 'With friends like these: can multilateral development banks promote institutional development to strengthen the rule of law?' in A. Perry-Kessaris ed. (2009) *Law in the Pursuit of Development: Principles into practice?* Abingdon: Routledge-Cavendish, Chapter 12.

J. Harriss, J. Hunter and C.M. Lewis eds. (1995), *The New Institutional Economics and Third World Development* London: Routledge.

Independent Evaluation Group (2008) 'Doing Business: An independent evaluation. Taking the measure of the World Bank-IFC Doing Business Indicators' Washington DC: World Bank, XVII
<<http://go.worldbank.org/CYH45V15G0>>.

D. Kaufmann, A. Kraay and P. Zoido-Lobaton (1999) 'Governance Matters', Policy Research Working Paper 2196 The World Bank Development Research Group, Macroeconomic Growth and the World Bank: Institution Governance, *Regulation and Finance* October 1999.

A. Kerhuel and B. Fauvarque-Cosson (2009) 'Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law' 57 Am. J. Comp. L. 811-830.
<http://ssrn.com/abstract=1623446>

R. La Porta, F. Lopez-de-Silanes, & A. Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 J. Econ. Lit. 285

P. Legrand (2009) 'Econocentrism'. Focus: Economics and Comparative Law.' *University of Toronto Law Journal* (Spring, 2009) 59 Univ. of Toronto L.J. 215.

B. du Marais, D. Blanchet, A. Dorbec, 'Des indicateurs pour mesurer le droit? Les limites méthodologiques des rapports Doing Business' ["Indicators in Order to Measure Law? The Methodological Limits of the Doing Business Reports."] (Paris, La documentation française, Collection Perspectives sur la justice, 2006). <<http://www.ladocumentationfrancaise.fr>>

D. McCloskey (2002) *The Secret Sins of Economics* Chicago: Prickly Paradigm Press. Available at: <http://prickly-paradigm.com/paradigm4.pdf>.

N. Mercurio and S. G. Medema (1998) *Economics and the Law: From Posner to Post-Modernism* Princeton New Jersey: Princeton University Press.

R. Michaels (2009) 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' *The American Journal of Comparative Law* 57: 765.

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2731&context=faculty_scholarship

D. Milonakis and B. Fine (2009) *From Political Economy to Economics* London: Routledge.

B. Morgan, (2003), *Social Citizenship in the Shadow of Competition: The bureaucratic politics of regulatory justification*, Dartmouth: Ashgate.

D. C. Mueller (2003) *Public Choice III* Cambridge: CUP.

A. Ogus (2006) *Costs and Cautionary Tales: Economic insights for the law* Oxford: Hart.

J. K. M. Ohnesorge (2009) 'Legal origins and the tasks of corporate law in economic development: A preliminary exploration' *Brigham Young University Law Review* 1619.

A. Perry (2002) 'Multinational enterprises, international economic organisations and convergence among legal systems' *Non-State Actors and International Law* 2: 23–39, 2002. Available at SSRN <http://ssrn.com/abstract=665001>.

A. Perry-Kessaris (2003a), 'Finding and facing facts about legal systems and FDI in South Asia' 23:4 *Legal Studies* 649-89.

A. Perry-Kessaris (2003b), 'Decision making in a regulatory environment: Representing the butterfly' in Hatchard, H, and Perry-Kessaris, A, (eds) *Law and Development in the 21st Century: Facing Complexity* London: Cavendish.

K. Rittich (2006), 'The future of law and development: Second-generation reforms and the incorporation of the social' in Trubek, D. M. and Santos, A. (eds.), *The New Law and Economic Development: A critical appraisal*, New York: Cambridge University Press, pp. 203-52. M. Sandel 'Markets and Morals'. Reith Lectures 2009: A New Citizenship. Broadcast on BBC Radio 4, June 9, 2009 <<http://www.bbc.co.uk/programmes/b00kt7sh>>.

M. M. Siems (2005) 'Numerical comparative law - Do we need statistical evidence in law in order to reduce complexity?' *Cardozo Journal of International and Comparative Law*, Vol. 13, pp. 521-540, 2005. Available at SSRN: <http://ssrn.com/abstract=514142>.

V. L. Taylor (2005) 'The law reform olympics: Measuring the effects of law reform in transition economies'. Available at SSRN: <http://ssrn.com/abstract=893682>. Also published in T. Linsey ed. (2007) *Law Reform in Developing and Transitional States* Routledge.

D. M. Trubek and M. Galanter (1974), *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, *Wisconsin Law Review* 1062.

World Bank (2001) *Country Assistance Strategy for the Government of India* <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/08/10/000094946_01072804152899/Rendered/PDF/multi0page.pdf>

World Bank (2004) *Country Assistance Strategy for India* September 2004. Washington DC: World Bank <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/09/20/000160016_20040920102445/Rendered/PDF/293740REV.pdf>

World Bank (2007) *Country Strategy Progress Report for India for the Period FR 2005-2008*. Washington DC: World Bank. <[36](http://www-</p></div><div data-bbox=)

wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/05/23/000020439_20070523093700/Rendered/PDF/39796.pdf>

World Bank (2010) 'Oversight Process for Ranking Indicators'. Issued 29 November, 2010.

Figure 1: The economic approach in the investment climate campaign

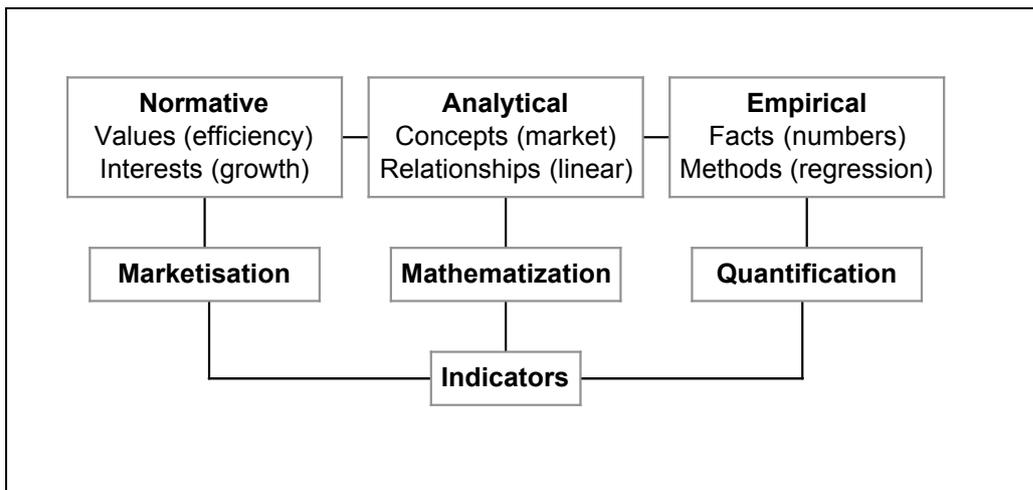


Figure 2: A visual metaphor for investment climate discourse

