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**The Law of Indicators on Women's Human Rights:
Unmet Promises and Global Challenges**

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The Law of Indicators on Women's Human Rights: Unmet Promises and Global Challenges

*Marta Infantino**

Abstract

Global indicators on human rights (HRs) aim to measure HRs scores against HRs standards. In other words, they aim to measure legal phenomena against legal benchmarks.

Despite HRs indicators' reliance on legal knowledge, lawyers have so far neither made substantial contributions to their production, nor studied in depth the legal implications of their uses. The current state-of-the-art in the world of HRs indicators is the result of an ongoing process led by bureaucrats, economists, statisticians, and activists with limited legal training. It is these actors who are developing a new body of professional knowledge, and a new technology of governance based on knowledge.

In the field of indicators on women's HRs – on which the paper focuses –, lawyers' absence is particularly striking.

On the one hand, lawyers are missing the opportunity to analyze who produces the indicators, under what pressures, and for what purposes – that is to say, the opportunity to understand the regulatory environment in which indicators' producers and users operate, and to identify the accountability mechanisms that are (and should be) applicable to them.

On the other hand, lawyers' participation in the substantive discourse underlying the production of indicators on women's HRs has until now been minimal, if any. Lawyers have so far kept themselves away from acting as translator from local practices and global HRs standards. Yet the production and use of these indicators badly need lawyers at ease with the legal cultures under examination, as well as with the international HRs legal discourse which is supposed to be applied to them.

The aim of the paper is therefore to explore what contribution law and lawyers can make to the world of indicators on women's HRs, with regard to both its institutional landscapes in which, and the legal methodologies through which these indicators are produced and used.

Keywords: Comparative Law, Global Administrative Law, Human Rights Indicators, Women's Human Rights

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1. Human Rights Indicators without Lawyers

In the last few decades, indicators have burst out as a strategic tool for knowledge production and global governance¹. The number of actors – IGOs, states, hybrid organizations, non-governmental and private entities – involved in either the production or the use of indicators is constantly increasing. Today, indicators furnish demographic, economic, environmental, financial, and social data about the world's societies. Data are employed for purposes ranging from guiding the choices of public and private investors, to informing decisions on the allocation of

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¹ S. Cassese and L. Casini, “Public Regulation of Global Indicators”, in K. Davis, A. Fisher, B. Kingsbury, S.E. Merry (eds.), *Governance by Indicators. Global Power through Classification and Rankings* (OUP, New York, 2012) p. 465, p. 466; K. Davis, B. Kingsbury, S.E. Merry, “Introduction: Global Governance by Indicators”, *ibidem*, p. 9, pp. 9-21; S.E. Merry, “Measuring the World: Indicators, Human Rights, and Global Governance”, 52 *Current Anthropology, Supplement* (2011) p. 83; M. Bussani, *Il diritto dell’Occidente. Geopolitica delle regole globali* (Einaudi, Torino, 2010) pp. 64-66.

foreign aid, to easing the monitoring burden on institutions charged with the implementation of national and/or international programs.

In the new culture of measurement through indicators, there is a growing tendency to develop global HRs indicators². As we will see later on (para. 2), these indicators may be universal or regional, thematic or general, based on quantitative or qualitative data. They may be produced by IGOs, states, non-governmental bodies, or private entities. Their objectives may be as diverse as documentation, compliance assessment, and control of the implementation of public policies or support of claims against HRs' duty-bearers³. Yet, whatever their object and scope, a common feature of all HRs indicators is that lawyers (understood in their broadest sense, including not only practicing lawyers, but also scholars and legal advisors) have until now neither made substantial contributions to their production nor adequately studied the legal implications of their use. The current state-of-the-art in the (study of the) production and use of HRs indicators is the result of an ongoing process led by bureaucrats belonging to IGOs, governments and hybrid organizations; development economists; statisticians; and HRs activists, with limited legal training or with a training focused on international law only. It is these actors who are developing a new body of professional knowledge, and a new technology of power. Lawyers have so far had almost no say in this transformation⁴.

The absence of lawyers does not mean absence of law, though⁵. Pioneering studies on global administrative law have recently demonstrated that there are some common approaches and well-entrenched patterns of behavior in the production and use of global indicators, which create and reinforce practices about how indicators should be prepared and employed. Legal actors involved in the production and use of indicators perceive these practices as binding and generally comply with them.

This is why we may well say that, on the one hand, there is some kind of (soft, unofficial) global administrative law governing initiatives on indicators, and, on the other hand, that the effectiveness of this law seems to go unaffected by the lack of legal expertise in the production and use of indicators. Yet there are many good reasons for advocating that lawyers should take a clearer stand on the regulatory framework and institutional landscape in which HRs indicators are produced and used. Informal law is only stable and predictable insofar as the strongest and the weakest actors in the system have converging interests and act

² On the emergence of HRs indicators from the 1970s onwards, see R. Barsh, "Measuring Human Rights: Problems of Methodology and Purpose", 15 *Hum. Rts. Q.* (1993), pp. 87-90. For the debate over what a HRs indicator is, see below, para. 2.

³ On the HRs indicators' features on the basis of which a taxonomy of them may be built, see below, para. 4.

⁴ M. Ignatieff and K. Desormeau, "Introduction", in Carr Center, *Measurement and Human Rights: Tracking Progress, Assessing Impact. A Carr Center Project Report* (2005), at <hks.harvard.edu/cchrp/pdf/Measurement_2005Report.pdf> (last access, August 16, 2012), pp. 1-3.

⁵ Among others, see R. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)", 39 *Am. J. Comp. L.* (1991) p. 1, pp. 7-9; M. Bussani, *Il diritto dell'Occidente*, pp. 8-9.

under the same restraints. When these requirements are not met, the informal regulatory regime may incline towards regulatory outcomes that many would deem undesirable⁶. It is therefore reasonable to wish that, as a knowledge-based form of governance, the production and use of HRs indicators be based on mechanisms, principles, and practices that promote or otherwise affect the overall transparency of indicators and allow the debate to lift the veil on the strategies pursued by their producers. But this is not all. In the case of HRs indicators initiatives, lawyers' contribution is needed beyond the investigation of the regulatory patterns which apply, or should apply, to the indicators' producers. Because of their object, HRs indicators display an inherent connection with legal culture(s). Indeed, indicators dealing with HRs more or less tacitly reflect assumptions as to both the appropriate ways in which to interpret societies' legal cultures, and the appropriate legal standards against which to measure them⁷. As legal appreciations, these evaluations (also) require knowledge of local cultures under examination and the global standards that should be applied to them. In other words, they require lawyers capable of acting as translators between the legal cultures of indicators' generators and those of indicators' targets, of expressing and handling the legal standards to which the indicator refers.

In the light of all the above, this paper aims to investigate the normative patterns of HRs indicators, using indicators on women's HRs as a case study for understanding what contribution the law and lawyers can make to the production and use of HRs indicators (and, to the limited extent that different kinds of indicators may be compared, of global indicators generally⁸) as a technology of global governance. Accordingly, we will start by sketching out what HRs indicators are (para. 2) and analyzing the concerns that they raise (para. 3). We will then explore, through the lens of indicators on women's HRs, some attempts to develop mechanisms of administrative law at the global level (para. 4), and see in what directions lawyers may pursue the global administrative law approach further to strengthen the regulatory and accountability regime surrounding HRs indicators (para. 5). The analysis will lead us to explore the role that lawyers, and especially comparative lawyers, may play in enabling the local-global translation, and in setting up an intercultural dialogue between local and global HRs legal layers (para. 6). Conclusion will follow (para. 7).

⁶ M. Bussani, *Il diritto dell'Occidente*, p. 75.

⁷ N. Thede, "Human Rights and Statistics—Some Reflections on the No-Man's-Land Between Concept and Indicator", 18 *Statistical Journal of the U.N. Economic Commission for Europe* (2011), pp. 259-273; N. Kabeer, *The Conditions and Consequences of Choice: Reflections on the Measurement of Women's Empowerment*, Discussion Paper No. 108 (United Nations Research Institute for Social Development, Geneva, 1999), pp. 30-31.

⁸ K. Davis, "Legal Indicators: Potential and Perils" (2012), p. 9, and E. Dunlop, "Indications of Progress? Assessing the Use of Indicators in UNHCR Operations" (2012), pp. 5-7; both the papers were presented at the VIII Viterbo GAL Seminar, which take place in Rome on June 14-15, 2012, and are on file with the author.

2. Human Rights Indicators: Defining the Field

Attempts to develop tools to measure HRs scores around the world can be traced back to U.S. activism in the 70s. It was 1972 when a U.S.-based, non-governmental and non-profit organization, Freedom House, published the first edition of its annual publication on civil and political rights⁹. In 1982 the American Statistical Association transformed into a standing committee its Ad Hoc Committee on Scientific Freedom and Human Rights, created after Carlos Noriega's and Gabriela Mellibovski's disappearance in Argentina in the late '70s¹⁰. One year later, the practice of HRs ranking was further developed by the British HRs campaigner Charles Humana, who published in 1983 the first edition of his *World Human Rights Guide*, where he assessed the condition of HRs in a number of countries¹¹. Soon thereafter, the trend gained momentum at the international level. In 1990, the first edition of the United Nations Development Programme's Human Development Index (and the Human Development Report which included it), elaborated by the Pakistani Cambridge- and Yale-trained professor Mahbub ul Haq in collaboration with his Cambridge classmate Amartya Sen, was published¹². Though it may be questioned whether development indicators are the same as HRs indicators¹³, what is sure is that by now there are a fairly wide number of local and global initiatives on HRs indicators, and an ever-growing body of economic and statistical literature on the methodological problems which these initiatives must confront.

These developments notwithstanding, there is still no agreement as to what a HRs indicator is. Different professional communities have different ideas about what indicators (should) do, which in turn result in broader or narrower definitions of what indicators are. Theoretical controversy has arisen as to whether: (i) mere statistics on HRs may qualify as HRs indicators¹⁴; (ii) the structurability of the indicator in rating scales for cross-country comparison should be listed among HRs indicators' characteristic features¹⁵; and (iii) conceptual differences between

⁹ See Freedom House's website: Our History, at <freedomhouse.org/content/our-history> (last access, August 16, 2012).

¹⁰ J.L. Bodin, "Foreword", in J. Asher, D. Banks & F.J. Scheuren (eds.), *Statistical Methods for Human Rights* (Springer, New York, 2008), p. vii.

¹¹ C. Humana, *World Human Rights Guide* (Hutchinson, London, 1983).

¹² UNDP, *Human Development Report* (OUP, New York-Oxford, 1990), at <hdr.undp.org/en/media/hdr_1990_en_front.pdf> (last access: August 16, 2012).

¹³ See below, fn. 14.

¹⁴ For the affirmative, see OHCHR, "Indicators for monitoring compliance with international human rights instruments: a conceptual and methodological framework", HRI/MC/2006/7, 11 May 2006, p. 3, par. 7; OHCHR, "Using Indicators to Promote and Monitor the Implementation of Human Rights", 6 June 2008, HRI/MC/2008/3, p. 8-9, par. 13; OHCHR, "Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council", 26 April 2011, E/2011/90, p. 3, par. 2; in the literature, M. Green, "What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement", 23 *Hum. Rts. Q.* (2001) p. 1062, p. 1065.

¹⁵ For some, HRs indicators' objectives necessarily include comparative and ranking assessment: A.J. Rosga and M.L. Satterthwaite, "The Trust in Indicators: Measuring Human Rights", 27 *Berkeley J. Int'l L.* (2009) p. 253, pp. 280-281; J.V. Welling, "International Indicators and

the notions of 'HRs' and 'development' should prevent the use of statistics and indicators on the latter for the measurement of the former¹⁶.

This is not the appropriate place to discuss the merits of these academic debates. For the purpose of this paper, there is no reason to limit our survey to indicators narrowly defined. Hence, in the following pages 'HRs indicator' will mean any numerical piece of information which provides its users with data relevant to HRs rules.

According to mainstream HRs literature, HRs indicators may be (a) universal or regional, depending on the extension of their geographical coverage. They may be (b) general (on the entire spectrum of HRs) or thematic (on women's HRs, on gender equity, on violence against women). They may (c) overlap with indicators used for other purposes, or referred exclusively to HRs issues (and then they may be focused on economic, social and cultural rights only, or civil and political rights, or both). Depending on the type of data used and the methodology employed to gather them, HRs indicators are classified as based on (d) quantitative data (i.e., data which focus on numbers) or on qualitative information converted into numbers¹⁷, and/or as consisting of (e) events-based data on human rights violations; socio-economic and other administrative statistics; household perception and opinion surveys; or data based on expert judgments¹⁸. Finally, HRs indicators meant to monitor states' compliance with HRs obligations are often divided into (f) structural, process and outcome indicators. Structural indicators refer to the ratification of legal instruments on HRs protection; process indicators refer to the policies to be implemented to promote HRs, and outcome indicators to the efforts already made to advance the concerned populations' enjoyment of

Economic, Social, and Cultural Rights", 30 *Hum. Rts. Q.* (2008) p. 933, p. 941, p. 945. Others disagree, and stress that HRs indicators are not generally viable for cross-country comparisons, since they have often to be adjusted in light of the uniqueness of the contexts to which they are applied: OHCHR, "Report of the United Nations High Commissioner for Human Rights", p. 7, par. 14; A.-M. Fröberg and M. Scheinin, "Report of Turku Expert Meeting on Human Rights Indicators", paper presented at the Turku Experts meeting on Human Rights Indicators held at the Turku Expert Meeting on Human Rights Indicators held at the Abo Akademi, Turku, Finland, on 10-13 March, 2005, available at <web.abo.fi/institut/imr/research/seminars/indicators/> (last access: August 16, 2012), pp. 7-8.

¹⁶ Cp., for the terms of the debate, S. McInerney-Lankford and H.-O. Sano, *Human Rights Indicators in Development. An Introduction* (The World Bank, Washington D.C., 2010) pp. 16 *et seq.*; S. Fukuda Parr, T. Lawson-Remer, S. Randolph, "Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment", *U Conn., Econ. Rights Working Papers*, Paper n. 2/2008, at <digitalcommons.uconn.edu/cgi/viewcontent.cgi?article=1361&context=econ_wpapers> (last access: August 16, 2012), pp. 2-3, and M. Green, "What We Talk About When We Talk About Indicators", p. 1084, p. 1089 (see the latter two articles also for the observation that development statistics and indicators are invariably used in the evaluation of countries' HRs score).

¹⁷ In general, R. Malhotra and N. Fasel, "Quantitative Human Rights", pp. 2 *et seq.*; focussing on women's HRs, S.E. Merry, "Measuring the World", p. 86; S. Goonesekere, *CEDAW Indicators for South Asia* (Centre for Women's Research-CENWOR, Columbia, 2004) p. 7, pp. 10-11; J.V. Welling, "International Indicators", p. 950.

¹⁸ T. Landman and E. Carvalho, *Measuring Human Rights* (Routledge, New York, 2010) pp. 36-40; A.-M. Fröberg and M. Scheinin, "Report", pp. 3-4; R. Malhotra and N. Fasel, "Quantitative Human Rights", pp. 5-21.

human rights¹⁹.

Such distinctions ought not to be overemphasized. Compartmentalizing indicators on the basis of the nature of the rights concerned – economic, social and cultural, or civil and political – may in fact end up being artificial, if not meaningless, for assessments of economic, social and cultural rights, and of civil and political rights can rarely be disentangled one from another. Similarly, quantitative and qualitative data tend to be interrelated with one another. Qualitative data often assume as background knowledge some quantitative data, and quantitative data may be linked to qualitative ones²⁰.

Much more important, from our perspective, is to understand, and accordingly classify, the reasons for which reasons the networks of subjects involved in HRs indicators' initiatives originate, participate in and make use of indicators themselves. As we will see (para. 5), it is in facilitating such understanding and such classification that lawyers, and especially global administrative lawyers, have a crucial role to play. Yet, to appreciate why this understanding and classification are essential to capture the abstract and 'living' regulatory landscape of HRs indicators, we first need to explain what HRs indicators promise, and what problems they pose.

3. Promises and Problems of Human Rights Indicators

3.1. Promises

Nobody doubts that HRs indicators come with many benefits. Like any other indicator, they have the advantage of transforming complex information into a single number, the significance of which is immediate to its users. Because of their inherent simplicity, indicators may reduce the policy-makers' burden of processing information in the course of decision-making²¹. Since indicators (are deemed to) draw on scientific methodology applied by impartial experts, they may help replace policy- or value-laden judgments with rational decision-making, based on scientific findings. Moreover, easy readability of indicators, especially when coupled with their accessibility and dissemination, may make both results and decisions adopted on the basis of indicators intelligible and to some extent transparent to the general public²².

Other benefits are peculiar to the HRs field. As some commentators have emphasized, numbers facilitate inter-temporal and inter-unit comparisons, a trait

¹⁹ S. McInerney-Lankford and H.-O. Sano, *Human Rights Indicators in Development*, pp. 18-19; R. Malhotra and N. Fasel, "Quantitative Human Rights", pp. 22-28; J.V. Welling, "International Indicators", p. 935.

²⁰ See Draft GWH Guidelines on Gender Relevant Indicators in Health Research, 2003, at <who.int/gender/en/indicintro220803.pdf> (last access: August 16, 2012), 2.

²¹ S.E. Merry, "Measuring the World", pp. 86-87; A.J. Rosga and M.L. Satterthwaite, "The Trust in Indicators", p. 255.

²² K. Davis, B. Kingsbury, S.E. Merry, "Introduction", 8.

which may prove extremely useful in the monitoring of states' compliance with HRs obligations. On the one hand, by capturing progress over time, HRs indicators provide a user-friendly tool to test States' performances against HRs standards²³. On the other hand, indicators bear the imprimatur of objectivity, thus helping define universally applicable standards of accountability for States²⁴. Since many international institutions charged with measuring states' compliance ask states to produce and present their own indicators, employing indicators helps transform the role of supranational institutions from authorities charged with judging states' policies to bodies that register and record performance, easing the institutional dialogue between supranational HRs bodies and states²⁵.

This is not all. By condensing complex phenomena into numbers, HRs indicators may make visible occurrences and show patterns of HRs violations that would otherwise go unperceived²⁶. To this extent, they may help publicize otherwise obscure events, identify groups most affected by a particular HRs violation, and clarify who should be held responsible for it²⁷. Furthermore, putting situations into numbers may help highlight the indivisibility, interdependence, and interrelatedness of human rights, for indicators may shed light on the correlations between (the enjoyment/violation of) different rights. For instance, indicators on maternal mortality have in the past help show that high rates of maternal mortality are strongly related to low rates of literacy and education among women, thus substantiating the claim that the deprivation of the right to education undermines women's enjoyment of their right to health²⁸.

3.2. Problems

All the above notwithstanding, HRs indicators' drawbacks are numerous as well.

(1) First of all, HRs indicators challenge a reasonable, philosophical aversion to quantifying human suffering. As it has been observed, a "basic ethical presupposition underlying the HRs movement is that as long as a single prisoner remains in unjust confinement, or a single child dies of a preventable condition, it is complacent to speak of progress for prisoners or children in the aggregate. Unsure how to square this conviction with the more utilitarian task of setting benchmark of success, the HRs community has traditionally avoided the endeavor altogether, preferring instead to measure rights problems and progress

²³ A.J. Rosga and M.L. Satterthwaite, "The Trust in Indicators", p. 255.

²⁴ A.J. Rosga and M.L. Satterthwaite, "The Trust in Indicators", pp 280-281.

²⁵ J.V. Welling, "International Indicators", pp. 941-944; S. Goonesekere, *CEDAW Indicators for South Asia*, p. 8.

²⁶ J.V. Welling, "International Indicators", pp. 945-946; R.P. Claude and T.B. Jabine, "Exploring Human Rights Issues with Statistics", in T.B. Jabine and R.P. Claude (eds.), *Human Rights and Statistics. Getting the Record Straight* (Univ. of Pennsylvania Press, Philadelphia, 1992) p. 5, p. 6; R.J. Goldstein, "The Limitations of Using Quantitative Data in Studying Human Rights Abuses", *ibidem*, pp. 35-36.

²⁷ R.P. Claude and T.B. Jabine, "Exploring Human Rights Issue with Statistics", p. 5, p. 6.

²⁸ OHCHR, "Report on preventable maternal mortality and human rights", 16 April 2010, A/HRC/14/39, p. 30, par. 30.

anecdotically, focusing on individual story, the illuminating testimonial. We are, in general, very uncomfortable with the measurement of general trends”²⁹.

(2) Philosophical resistance aside, it is commonplace to note that the flip side of HRs indicators' simplicity is that, through the conversion of complex and contextually-variable phenomena into a compressed numerical packaging, HRs indicators tend to ignore specificity and context in favor of standardized, numerical knowledge³⁰. In the HRs field, this kind of knowledge may easily turn out to be meaningless, or even counter-productive³¹. The creators of HRs indicators have to define the right they are going to assess, and when/how it is breached; moreover, they decide what should be counted, that is to say, they have to identify which factors are the best proxies for showing the occurrence of a violation³². Because of these unavoidable choices, HRs indicators implicitly make assumptions and incorporate values in spite of the lack of any consensus on either the reasons or the methodology underlying them³³.

(3) Many commentators have pointed to the difficulties of gathering reliable data on HRs. Indeed, HRs data, especially from less wealthy countries, may be problematic and expensive to obtain³⁴. True, when data are not available, indicators are usually based on estimates. Yet reliance on estimates may be problematic in itself. Because of indicators' general claim to being scientific, indicators based on estimates tend to give the (unfounded) impression that they are as reliable as those based on real and accurate data³⁵. But what about “real” data? In the HRs field, especially for indicators monitoring compliance with HRs obligations, data are often gathered through State-controlled structures, even if the target of the indicator is the state itself. In these cases it is reasonable to assume that states will not be willing to display their own breaches and to incur the shame associated with low HRs scores. In other words, the less compliant the State is, the less likely it is that it will provide complete and reliable data³⁶.

(4) Yet problems with HRs indicators are not only due to the data providers'

²⁹ M. Ignatieff and K. Desormeau, “Introduction”, pp. 3-4.

³⁰ S.E. Merry, “Measuring the World”, p. 86.

³¹ OHCHR, “Report of the United Nations High Commissioner for Human Rights”, p. 8, par. 18; A.-M. Fröberg and M. Scheinin, “Report”, pp. 6-8; R.J. Goldstein, “The Limitations of Using Quantitative Data”, pp. 54-56.

³² M. Ignatieff and K. Desormeau, “Introduction”, p. 3; R. Barsh, “Measuring Human Rights”, pp. 100-102.

³³ M. Ignatieff and K. Desormeau, “Introduction”, p. 3; R. Barsh, “Measuring Human Rights”, pp. 100-102. For some examples of the perils of generalised knowledge in the field of women's HRs, see OHCHR, “Report of the United Nations High Commissioner for Human Rights”, p. 8, par. 17; A.J. Rosga and M.L. Satterthwaite, “The Trust in Indicators”, pp. 285-286 (both on girls' right to education); N. Kabeer, *The Conditions and Consequences of Choice*, p. 14 (with regard to women's access to land), p. 15 (on women's inheritance rights), pp. 22-23 (on violence against women), and pp. 26-27 (about women's use of contraceptives).

³⁴ A.-M. Fröberg and M. Scheinin, “Report”, p. 8; R.J. Goldstein, “The Limitations of Using Quantitative Data”, p. 41.

³⁵ K. Davis, B. Kingsbury, S.E. Merry, “Introduction”, pp. 8-9; S.E. Merry, “The Problem of Human Rights Indicators”, p. 86.

³⁶ A.J. Rosga and M.L. Satterthwaite, “The Trust in Indicators”, p. 268; R. Barsh, “Measuring Human Rights”, p. 99, p. 105, p. 115; R.J. Goldstein, “The Limitations of Using Quantitative Data”, p. 41, pp. 45-47.

ability to gather reliable information. It has been noted that HRs indicators tend to boost their targets' 'rank-seeking' behavior, that is, to induce them to pursue policies designed to improve the performance in the indicators rather than to improve real performances³⁷. More generally, from the point of view of those who draft, prepare, and publish HRs indicators, recourse to the indicators may shift the internal (and external) attention from policy decisions underlying the phenomena described by the indicators to decisions about what should be measured, and how³⁸. Such a shift – from policy claims to measurements – may help indicators' generators conceal behind numbers their regulatory assumptions about what a good society is, about what success is, and about what problems are to be overcome³⁹, making it difficult for interested parties and the general public to openly discuss and contest the assumptions that the indicators silently carry with them⁴⁰.

(5) Challenging a HRs indicator is in itself a complicated task. Targets of indicators, often poor States, who are dissatisfied with an indicator's result may be discouraged from lodging their complaints against indicator's generators, like international governmental or non-governmental organizations, because denouncing the indicator's flaws may easily prove to be a bad strategy for improving their rates in the short-term⁴¹. Furthermore, any critique effort requires resources – to understand how the indicators' figures have been created, to fund the research for counter-data, to establish a contact with the indicators' generator – whose costs may simply be too high⁴².

HRs indicators' heavy reliance on scientific methodology often insulates them from scrutiny by those who wish to criticize their contents, and generally by whomever has no training in development economics or HRs statistics. Indeed, it is not rare that interested parties unfamiliar with HRs indicators' methodology misinterpret their findings, repeatedly using clearly inappropriate statistics, or using appropriate statistics in inappropriate ways⁴³.

(6) Negative effects of indicators' scientific complexity do not end here. It has been observed that HRs indicators' scientific obscurity favors the technicalization of policy choices. As noted before, shifting from policy-laden judgments to indicators-based decisions often transforms political debates over the phenomena to be measured into scientific discussions about the best methodology to employ in measuring them. The shift transfers power from political élites to apparently depoliticized scientific élites, who become charged with regulatory functions

³⁷ S. McInerney-Lankford and H.-O. Sano, *Human Rights Indicators in Development*, p. 16.

³⁸ S.E. Merry, "Measuring the World", p. 88.

³⁹ K. Davis, B. Kingsbury, S.E. Merry, "Introduction", p. 10; M. Ignatieff and K. Desormeau, "Introduction", p. 3.

⁴⁰ K. Davis, B. Kingsbury, S.E. Merry, "Introduction", p. 10. See also K. Pistor, "Re-Construction of Private Indicators for Public Purposes", in K. Davis, A. Fisher, B. Kingsbury, S.E. Merry (eds.), *Governance by Indicators*, p. 165, p. 166.

⁴¹ N.K. Dutta, "Accountability in the Generation of Governance Indicators", 22 *Fla. J. Int'l L.* (2010) p. 401, pp. 449-450.

⁴² N.K. Dutta, "Accountability", pp. 447-448.

⁴³ R.J. Goldstein, "The Limitations of Using Quantitative Data", p. 48.

without bearing political responsibility⁴⁴. Such epistemic communities are usually self-reinforcing: the highly sophisticated skills they require make them closed networks, whose members are experts who cross-refer to each other's findings, and exert an ever-growing demand for equally expert assistance⁴⁵.

Epistemic communities in the field of HRs indicators are mostly made up of development economists and HRs statisticians, with less technical contributions coming from IGOs' and states' bureaucrats and HRs practitioners. We already pointed out the absence, in such communities, of lawyers. Lawyers' absence in the HRs field is particularly striking, when one considers that HRs indicators measure HRs scores against HRs standards, that is to say, measure (also) legal phenomena against legal benchmarks. They pose problems that development economists and HRs statisticians alone cannot resolve⁴⁶, since they require interpreting the (legal) cultures under examination and translating these (legal) culture's local languages into international legal HRs language, and ultimately into numbers⁴⁷. They require comparative lawyers, with knowledge of local and global legal cultures, to act as interpreters and translators from one world to the other. However, comparative lawyers have so far kept themselves away from initiatives about HRs indicators. But this is not all. Lawyers are needed, and missing, in other parts of HRs indicators initiatives. As noted at the beginning, few lawyers have so far devoted their attention to the regulatory patterns of behavior developed by the actors who participate in HRs indicators-making, and to the different forms of regulatory habits that accompany their use. Until now, only a few legal studies have investigated the principles which should inform either the HRs indicators-making processes or their use by international and national actors. A notable exception to lawyers' indifference to indicators is that of the 'global administrative law' scholarly movement, which has recently started articulating its response to concerns about the regulatory regimes of indicators generally⁴⁸. It is therefore to the global administrative approach to HRs indicators that we turn our attention in the next section. This will allow us to see how the efforts of the lawyers trained in GAL investigation may help understand and shape the regulatory frameworks which govern HRs indicators' activities.

⁴⁴ K. Davis, B. Kingsbury, S.E. Merry, "Introduction", pp. 11-12, p. 18; S.E. Merry, "Measuring the World", p. 88; A.J. Rosga and M.L. Satterthwaite, "The Trust in Indicators", p. 302.

⁴⁵ K. Davis, B. Kingsbury, S.E. Merry, "Introduction", pp. 11-12, p. 18.

⁴⁶ R.J. Goldstein, "The Limitations of Using Quantitative Data", p. 35, p. 51.

⁴⁷ S.E. Merry, "Transnational Human Rights and Local Activism", 108 *Am. Anthr.* (2006) p. 38, pp. 38-51; see also S.E. Merry, "Tensions between Global Law and Local Social Justice: CEDAW and the Problem of Rape in Fiji" (2004), at <brandeis.edu/ethics/pdfs/internationaljustice/otheractivities/JAC_Merry.pdf> (last access: August 16, 2012), pp. 3-11, and below, para. 6.

⁴⁸ In general, K. Davis, B. Kingsbury, S.E. Merry, "Introduction", p. 15, p. 20; S. Cassese and L. Casini, "Public Regulation of Global Indicators", p. 465 *et seq.*

4. The Emerging Global Administrative Law(s) of Women's HRs Indicators

GAL-trained lawyers are in the best position to capture the regulatory practices and patterns surrounding the production and use of HRs indicators.

From the GAL perspective, the institutions generating indicators are global administrative bodies involved in a governance-by-knowledge activity⁴⁹. They act as regulatory bodies, controlling or supervising their targets by means of rules and regulations; affect matters of particular public significance; codify and establish patterns of behavior; and produce standards which lead to judgments by some actors (e.g., intergovernmental bodies, aid agencies, private investors) regarding the fitness of other entities for support⁵⁰. The de facto regulatory power of indicators' generators raises typical public law issues which characterize global administrative regimes, concerning demands (and responses to those demands) for *transparency, participation, reason-giving, review, and legality*⁵¹. The GAL approach to global indicators would, through hard law initiatives or as the outcome of a spontaneous ordering of the global administrative space, impose some procedural obligations upon the transnational networks of actors involved in the production and use of global indicators, requiring them to be transparent about the methods and information used to create the indicators, to introduce structured forms of participation for society at large, to provide reasons for their decisions, to accept some review by external actors in problematic cases, and to follow established patterns of behavior⁵².

In the HRs field, GAL approach has the path-breaking significance of rejecting the state-centered vision that is traditional to HRs, as a form of international law. International HRs law, by giving individuals and groups a voice in the international legal system, challenges the idea that states are the only actors who may hold rights under international law, but still, in its less controversial form, targets states as the ultimate duty-bearers⁵³. To the contrary, procedural GAL principles target whatever body and whatever actor participates in a global administrative initiative, therefore questioning the fundamentals of current thinking in international HRs law⁵⁴.

⁴⁹ S. Cassese and L. Casini, "Public Regulation of Global Indicators", pp. 466-467; K. Davis, B. Kingsbury, S.E. Merry, "Introduction", p. 20; N.K. Dutta, "Accountability", p. 421 (for indicators on governance); A.J. Rosga and M.L. Satterthwaite, "The Trust in Indicators", p. 314, nt. 233 (for indicators on HRs).

⁵⁰ N.K. Dutta, "Accountability", p. 421.

⁵¹ For a detailed account of the meaning of these principles in the GAL perspective, S. Cassese, *The Global Polity, Global Dimensions of Democracy and the Rule of Law* (Global Law Press, Sevilla, 2012) pp. 113-174; B. Kingsbury, N. Krisch, R.B. Stewart, "The Emergence of Global Administrative Law", 68 *L. & Contemp. Probs.* (2005) p. 15, pp. 37-44.

⁵² S. Cassese and L. Casini, "Public Regulation of Global Indicators", pp. 467-469; K. Davis, B. Kingsbury, S.E. Merry, "Introduction", p. 20.

⁵³ O. Chinedu Okafor, "Attainments, Eclipses, and Disciplinary Renewal in International Human Rights Law: A Critical Overview", in D. Armstrong (ed.), *Routledge Handbook of International Law* (Routledge, New York, 2009), p. 303, p. 305.

⁵⁴ M. Riegner, "Measuring the Good Governance State: A Legal Reconstruction of the World Bank's 'Country Policy and Institutional Assessment'" (2012), p. 5 (with regard to international law in general), paper presented at the VIII Viterbo GAL Seminar, held in Rome on June 14-15,

Yet, it is not only from the theoretical point of view that GAL-trained lawyers may successfully recur to GAL principles to describe the regulatory patterns of HRs indicators' initiatives. In many cases, GAL principles reflect practices about HRs' indicators as well. While it is undeniable that the whole process of producing and using HRs indicators clearly displays an accountability deficit in the growing exercise of transnational regulatory power of HRs indicators' producers and users, GAL-trained lawyers can easily show that there are attempts to develop, more or less spontaneously, a global legal order in which administrative law rules address decisions and standards elaborated by transnational administrative bodies at work on and with HRs indicators. Sometimes recourse to GAL principles is best understood as a form of spontaneous internalization of social expectations about indicators' regulatory patterns; in other cases, it seems to be the result of the regulatory competition between global indicators' generators and users for legitimacy and authority⁵⁵. In some other instances, internalization and competition seem to work together to boost the accountability of indicators' producers and users. Whatever the reason for the compliance, the point remains that many global administrative bodies have begun to adopt administrative law decision-making and rule-making procedures which embody the five core GAL principles of *transparency, participation, reason-giving, review* and *legality*. Let us see some illustrations.

As to *transparency*, one cannot but mention the World Bank's (WB) decision in 2005 to disclose and make available to the public its internal reports on Country Performance and Institutional Assessments (CPIAs). In essence, CPIAs are quantitative indicators that guide the International Development Association – the WB's branch which provides financing on a concessional basis – in the allocation of development funds. CPIAs indicators implicitly deal with issues on women's HRs, insofar as they focus, among other aspects, on a country's “policies for social inclusion and equity”, including gender equality⁵⁶.

Participation plays a major role in many HRs indicators' initiatives. The process of preparing the indicators is often open to the members of the same epistemic community to which the indicators' generators belong⁵⁷. On the implied assumption that an authoritative network of collaborations may enhance the legitimacy of the indicator itself, many HRs indicators make clear that they have been drafted with the aid of a plethora of international actors. For instance, the three major development indicators – the United Nation Development Program (UNDP)'s Human Development Index, the United Nations Statistics Division (UNSD)'s Millennium Development Goals Indicators, and the WB's World Development Indicators – clearly state that the work of compiling them has been

2012, and on file with the author.

⁵⁵ S. Cassese and L. Casini, “Public Regulation of Global Indicators”, p. 468; K. Davis, B. Kingsbury, S.E. Merry, “Introduction”, p. 20; N.K. Dutta, “Accountability”, pp. 455 *et seq.*

⁵⁶ CPIA Policies for Social Inclusion/equity, 2011, at <data.worldbank.org/indicator/IQ.CPA.SOCL.XQ> (last access: August 16, 2012). On these indicators, in general, S. McInerney-Lankford and H.-O. Sano, *Human Rights Indicators in Development*, p. 22; N.K. Dutta, “Accountability”, p. 410.

⁵⁷ K. Davis, B. Kingsbury, S.E. Merry, “Introduction”, p. 14.

carried out taking into account data and suggestions provided by other supranational bodies⁵⁸. Other times, the participatory efforts extend to subjects outside the epistemic community of indicators' producers, or are directed towards indicators' targets⁵⁹.

Nowadays, it is fair to say that many HRs indicators display the diffusion of a culture of *reason-giving*. All the major global development indicators carefully list their meta-data, that is, information on each indicator's definition, rationale, methods of computation, data sources, disaggregation levels, periodicity, and limitations⁶⁰. The United Nations High Commissioner for Human Rights (OHCHR), when compiling its indicators for States to monitor their compliance with HRs obligations, advised States to do the same⁶¹.

The discourse is different regarding the principle of *review*. To my knowledge, at the present time, no HRs indicators' initiative provides either complaint procedures or review by independent authorities. However, embryonic manifestations of the principle of review may be seen, for instance, in the use of State-made indicators by the United Nations Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee)⁶², as well as in the widespread establishment of some good practices, such as that of providing people who want to submit observations, updates or comments with easy ways to contact those who are charged with the drafting and updating of HRs indicators' results.

In light of all the above, it is clear that at least some actors involved in HRs indicators' initiatives are aware or perceive that an indicator's transparency, openness to participation, reasoned findings, and reviewability are features which confer some *legality* on their actions, therefore strengthening their legitimacy and authority. Thus, one may dare say that a global administrative law culture within HRs indicators' initiatives is slowly emerging.

The rise of regulatory practices such as the ones just described, and their infusion into the daily administration of HRs indicators' activity, makes the parallel emergence of a global administrative scholarship devoted to study the patterns of indicators' global administrative law a necessity, if not an urgency. Yet, lawyers' contribution to the field may, and perhaps should, go beyond that. On the one hand, there are some specific features of HRs indicators which invite us to deepen our understanding of the way in which their 'government through technology' works, in order to better assess how GAL principles are, and may be, useful to the

⁵⁸ UNDP, *Human Development Report 2011. Sustainability and Equity: A Better Future for All* (Palgrave-Macmillan, New York, 2011) pp. v-vi; MDGs, *The Millennium Development Goals Report 2012* (United Nations, New York, 2012) p. 0, p. 68; World Bank, *World Development Indicators* (World Bank, Washington D.C., 2012), pp. xii-xxi (see also, with specific regard to women, World Bank, *World Development Report 2012. Gender Equality and Development* (World Bank, Washington D.C., 2011), pp. xvi-xvii, pp. 373-375).

⁵⁹ S.E. Merry, "Measuring the World", p. 88; A.J. Rosga and M.L. Satterthwaite, "The Trust in Indicators", pp. 280-281; S. Goonesekere, *CEDAW Indicators for South Asia*, p. 7, p. 8.

⁶⁰ UNDP, *Human Development Report 2011*, pp. 167-176; MDGs, *The Millennium Development Goals Report 2012*, p. 68; World Bank, *World Development Indicators*, pp. 391-405.

⁶¹ OHCHR, "Report of the United Nations High Commissioner for Human Rights", p. 8, par. 20.

⁶² S. Goonesekere, *CEDAW Indicators for South Asia*, p. 7, p. 8.

evolution of the regulatory environment in which they operate. On the other hand, any structural and procedural approach to the study of the law of HRs indicators needs to be complemented by the analysis of the methodological and substantive problems at the core of HRs indicators' initiative. Measuring a legal culture against a legal yardstick requires deep knowledge of what is measured and of the units of measurement; it requires the work of legal comparatists. But this is an opportunity that lawyers so far have missed.

5. The Future of Global Administrative Law for Indicators on Women's Human Rights

As our survey on women's HRs will show, HRs indicators are not all equal. Organizations and individuals who are affected by, or otherwise have a stake in, HRs indicators' initiatives are driven by diverse interests, and interact in complex ways. HRs indicators are therefore created within normative frameworks and through dynamic collective processes that differ significantly from one another⁶³. These differences are not the ones mentioned above, in para. 2, with regard to the type of data on which indicators focus, or to the substantive or geographical breadth of their inquiry. What I am referring to here are other features of HRs indicators – such as the internal structures of the networks involved in initiatives on indicators, the conditions of their production, their prospective and effective uses – which are relevant in understanding and identifying the different regulatory regimes in which global HRs indicators do, and should, operate. The size and structure of the network of actors who participate in the making of, or are affected by, a given HRs indicator, the pressures that lead them to participate in it, and the purposes for which it is designed and used are indeed elements whose interaction influences the regulatory standards that are (or should be) applied by and to HRs indicators' producers and users⁶⁴. It is therefore on the interrelationship of these characteristics that GAL-trained lawyers could focus their attention, in order to better understand the regulatory patterns that govern HRs indicators' activities. Let me explain why.

5.1. Networks

Who are the actors involved in the initiatives about indicators on women's HRs? Common GAL understandings of the institutional structure of indicators' initiatives distinguish indicators' generators from indicators' targets and indicators' users. If applied to HRs indicators, however, such trichotomy would be at its best an oversimplification of the complex network of actors who usually participate in, or are affected by, the indicators. The picture is far more complicated than that.

⁶³ S. Cassese and L. Casini, “Public Regulation of Global Indicators”, p. 466; K. Davis, B. Kingsbury, S.E. Merry, “Introduction”, p. 4, p. 6.

⁶⁴ S. Cassese and L. Casini, “Public Regulation of Global Indicators”, pp. 466-467.

In the field of indicators on women's HRs (but this holds true for HRs indicators in general as well⁶⁵), it is common that the institution which asks for the indicator to be established is different from the institution that drafts the indicator, and which in turn may differ from the one that actually elaborates the results reported in the indicator. To get the data and work them out, the institution charged with the elaboration of the results usually relies on the methodology developed, the reports prepared, and the information collected by a large network of other actors, which may include indicators' targets and users as well. The result is that, on the one hand, the creative contribution of what from the outside can be identified as the indicator's generator to its drafting can be far less significant than one may think. On the other hand, institutions which apparently are unrelated to an indicator, or appear to be merely its prospective or eventual addressees are often (more or less) active contributors to the process which leads to the indicator's production⁶⁶.

Needless to say, the relationship between the subjects within a HRs indicators' network – those who ask for the establishment of the indicator, those who draft its guidelines, those who collect and report information, those who elaborate the indicator's results, those who are its intended targets, and those who make use of it – may take different configurations. Sometimes these figures coincide to a greater or lesser extent. At one extreme, we may have an institution which commits itself to draw indicators on its own HRs performance. When the United Nations Children's Fund (UNICEF) uses self-established indicators to measure the impact of its programming to improve girls' education in various countries⁶⁷, UNICEF is the one which requests, produces and uses them. At the other extreme, all these roles may be filled by different subjects. For instance, to measure states' compliance with HRs obligations, the inter-committee meeting of treaty bodies (ICM, a collective organ which represents all UN treaty bodies, including the Committee on the Elimination of Discriminations against Women), asked the OHCHR to develop some HRs indicators to be complied with and implemented by states. Here the actor that took the initiative establishing the indicators (ICM) is different from the one that prepared their text (another UN organ, the OHCHR), from those that were expected to furnish the data and elaborate the indicator's results (the States), and from those that were its intended users (the treaty bodies). The separation between the subject who requires/prepares the guidelines for the indicators' production and the subject who actually prepares and publishes the indicator is very common in the field of compliance indicators, that is, indicators meant to monitor states' compliance with HRs obligations. In such cases, the

⁶⁵ T. Büthe, "Beyond Supply and Demand: A Political-Economic Conceptual Model", in K. Davis, A. Fisher, B. Kingsbury, S.E. Merry (eds.), *Governance by Indicators*, p. 29, pp. 30-32.

⁶⁶ S.E. Merry, "Measuring the World", p. 88. Consider, for instance, how, when dealing with issues on (women's) HRs, the UNDP's Human Development Index, the UNSD's Millennium Development Goals Indicators, and the World Bank's World Development Indicators all rely on statistics and indicators prepared by UNESCO: *cp.* UNDP, *Human Development Report 2011*, p. 168, p. 171; MDGs, *The Millennium Development Goals Report 2012*, p. 68; World Bank, *World Development Indicators*, p. xvii, p. 411.

⁶⁷ UNICEF Education Section, *Girls' Education: A Framework for Action* (UNICEF, New York, 2000) p. 7, as reported by A.J. Rosga and M.L. Satterthwaite, "The Trust in Indicators", p. 257.

subject which requires/prepares the guidelines for the indicators is usually a supranational body charged with the function of monitoring countries' HRs performances, while the subject which prepares and publishes the indicator is usually the state, which is also the indicator's target. The reasons for this structure are twofold. On the one hand, the structure is deemed to allow the maintenance of a fair balance between the pressure for universally applicable indicators and the need of considering HRs in context. On the other hand, the direct involvement of states, the indicators' targets, in the indicators' production is expected to promote the development of a culture of respect for HRs and compliance with HRs rules, as well as to foster a climate of collaboration between the states and the requesting institutions⁶⁸.

It should be now clear why the trichotomy of producers/targets/users easily turns out to be unhelpful in understanding the women's HRs indicators-making processes and their (existing or would-be) regulatory frameworks. In the initiatives on women's HRs indicators, sites of power are distributed throughout a network of actors, who exercise varying degrees of authority. If accountability has to be proportional to the power enjoyed by the subject whose accountability is under question, the search for greater accountability in the global administrative space of women's HRs indicators mandates GAL lawyers to investigate the distribution of power within the network of entities which, to different extents, have contributed to the indicator's enterprise.

5.2. Pressures

Speaking of global indicators generally, it has been authoritatively suggested that a major distinction between indicators is whether they are binding or voluntary⁶⁹. The very proponents of this categorization, however, warn to take it with caution, for indicators in themselves can be neither binding nor voluntary⁷⁰. Rather, it is their establishment, the preparation of the guidelines supporting their drafting, the collection and the elaboration of the data, or their publication and their use, which may be binding or voluntary. Given the plurality of actors who usually participate in the indicators' endeavors, what often happens is that, within the same initiative, some actors' contribution is to some extent mandatory, while that of others is not⁷¹. Moreover, the divide between what is binding and what is not is often difficult to draw⁷². When the production of/participation in a HRs indicator is perceived as the socially accepted way to reassure third parties – partners, donors, monitoring institutions – about the seriousness of one's commitments, the choice of producing/participating in the making of the indicator becomes voluntary in

⁶⁸ A.J. Rosga and M.L. Satterthwaite, "The Trust in Indicators", pp. 280-281; S.E. Merry, "Measuring the World", p. 88; S. Goonesekere, *CEDAW Indicators for South Asia*, p. 7, p. 8; J.V. Welling, "International Indicators", p. 937, p. 957.

⁶⁹ S. Cassese and L. Casini, "Public Regulation of Global Indicators", p. 467.

⁷⁰ S. Cassese and L. Casini, "Public Regulation of Global Indicators", p. 467.

⁷¹ S. Cassese and L. Casini, "Public Regulation of Global Indicators", p. 469.

⁷² S. Cassese, *The Global Polity*, pp. 25-26.

name only. Internalization of, and spontaneous compliance with, established social practices may thus blur the distinction between what is mandatory and what is not⁷³.

Yet, despite its shortcomings, the binding/voluntary dichotomy suggests a line of differentiation which GAL scholarship may find useful in understanding the circumstances surrounding the production and use of women's HRs indicators. It is indeed undeniable that the many actors involved in global indicators' initiatives act under different sources of constraints⁷⁴. Sometimes indicators are freely created or referred to by their generators or users; at other times, production of or consideration for them may be somewhat mandatory. Let us consider some examples.

As I have already said, the preparation of/participation in initiatives on women's HRs indicators is often voluntary. For instance, the United Nations Statistical Division (UNSD), on behalf of the UN Secretary General, drafts and updates each year the Millennium Development Goals (MDGs) Indicators, whose goal 3 ('Promote gender equality') and goal 5 ('Improve maternal health') are specifically concerned with women⁷⁵. The UNSD does so because the Secretary General, out of no obligation other than deference and courtesy, committed himself to the General Assembly to present an annual report, with indicators, on the world's progress towards the MDGs⁷⁶. It is often out of any hard or soft obligation that international and national actors, in producing their own indicators, adhere to the guidelines provided by some other agencies. For example, the OHCHR's indicators (many of which deal with women's HRs⁷⁷) have been developed in 2008 to serve as a guide for States in the preparation of their own HRs indicators, but States are free to disregard them.

At other times, the establishment of/participation in an indicator's endeavor is mandated by some authority.

Authority may stem from traditional, 'hard' legal obligations. Many argue that Art. 10(f) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which requires States to take measures to ensure "the reduction of female student drop-out rates" to guarantee equal enjoyment of the right to education between men and women, indirectly obliges States to collect disaggregated data on drop-out rates⁷⁸.

⁷³ For some observations on this point, with regard to the donors, see S.E. Merry, "Measuring the World", p. 83; R. Malhotra and N. Fasel, "Quantitative Human Rights Indicators – A Survey of Major Initiatives", paper presented at the Turku Experts meeting on Human Rights Indicators held at the Turku Expert Meeting on Human Rights Indicators held at the Abo Akademi, Turku, Finland, on 10-13 March, 2005, available at <web.abo.fi/instut/imr/research/seminars/indicators/> (last access: August 16, 2012), p. 1, fn. 3.

⁷⁴ S. Cassese and L. Casini, "Public Regulation of Global Indicators", p. 469.

⁷⁵ MDGs, *The Millennium Development Goals Report 2012*, pp. 20-25 (Goal 3) and pp. 31-37 (Goal 5).

⁷⁶ UNSG, Report of the United Nations Secretary General, "Road map towards the implementation of the United Nations Millennium Declaration", Annex, "Millennium Development Goals", 6 September 2001, A/56/326, p. 53, par. 305.

⁷⁷ See what states are invited to provide under the OHCHR's indicators: OHCHR, "Using Indicators", p. 24-26.

⁷⁸ R. Malhotra and N. Fasel, "Quantitative Human Rights", pp. 3-4; A.-M. Fröberg and M.

Authority may arise from institutional arrangements. The OHCHR developed its set of HRs indicators (which include indicators on women's rights) in 2008 following a 2006 request from the ICM, the inter-committee meeting of treaty bodies, which asked it to elaborate a framework for the use of statistical information by states⁷⁹.

In other cases, authority may be expressed by a contractual or quasi-contractual obligation, as when funding is distributed on the condition that its beneficiary produces HRs indicators on issues determined by the fund provider. Bargains between NGOs and their donors often require the former to report to the latter using indicators⁸⁰, and similar reporting clauses are frequently included in development loans as well. Suffice it to think that, since 2010, in order to track the impact of the financed activities on women and gender equality, the European Bank for Reconstruction and Development (EBRD) asks its clients to fulfill ten performance requirements, some of which cover HRs issues as gender equality⁸¹. Finally, authority may take the form of invitations and 'soft' commands, whose binding force derives from good practices and institutionalized patterns of behavior. In its General Recommendations – which are not formally binding over states parties to the Convention⁸² – the CEDAW Committee stressed that “statistical information is absolutely necessary in order to understand the real situation of women in each of the States parties to the Convention”⁸³, and invited states parties to the Convention to compile statistics on domestic violence, and to provide the Committee with quantitative data showing the percentage of women enjoying rights in relation to political and public life⁸⁴.

In light of all the above, it should be clear why it is important for GAL scholarship to assess the reasons for which institutions and other actors participate in the indicators' endeavors. Such an assessment would help understand the regulatory environment in which indicators operate, and the extent of freedom and

Scheinin, “Report”, p. 3.

⁷⁹ Chairpersons of the HRs treaty bodies on their seventeenth meeting, “Report”, 19 August 2005, A/60/278, p. 9, (g).

⁸⁰ M. Ignatieff and K. Desormeau, “Introduction”, p. 8.

⁸¹ See for instance the European Bank for Reconstruction and Development’s Performance Requirements and Guidance for Clients (date n.a.), at <ebrd.com/pages/about/principles/sustainability/requirements.shtml> (last access: August 16, 2012).

⁸² As to the CEDAW Committee’s General Recommendations, R.L. Johnstone, “When Private and Public Meet: Three CEDAW Committee Views on Intra-Familial Violence”, in A. Di Stefano (ed.), *Gender Issues and International Legal Standards. Contemporary Perspectives* (ED.IT, Catania, 2010) p. 47, p. 48.

⁸³ CEDAW Committee, General Recommendations Nos. 9 and 12 (1989), at <un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (last access: August 16, 2012); for a comment on CEDAW committee’s strategies as to HRs statistics/indicators, A.J. Rosga and M.L. Satterthwaite, “The Trust in Indicators”, p. 276, fn. 79; A.-M. Fröberg and M. Scheinin, “Report”, p. 7; R. Malhotra and N. Fasel, “Quantitative Human Rights”, pp. 4-5.

⁸⁴ See CEDAW Committee, General Recommendation No. 19 (1992), at <un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19> (last access: August 16, 2012), para. 24, lett. (c), and CEDAW Committee, General Recommendation No. 23 (1997), at <un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23> (last access: August 16, 2012), para. 48, lett. (d).

responsibility that is (and should be) given to the actors involved in these initiatives. To nobody's surprise, in a fluid regulatory environment such as the global administrative one, questions about 'reasons why' often turn into questions about 'reasons for', which we now examine.

5.3. Purposes

Women's HRs indicators lend themselves to a variety of uses. It goes without saying that any classification should be taken with caution: some of these uses may be intended by the indicators' drafters; others are not. Some uses are stable over time; others change. Some of these uses may, to a greater or lesser extent, overlap and not be distinguished from one another. Anyway, analyzing what uses women's HRs indicators lend themselves to should be deemed worthwhile in the GAL perspective, insofar as different uses of power call for the application of different regulatory disciplines of those uses and of different accountability standards for their users.

HRs indicators may be intended to serve a plurality of purposes. In principle, they may be 'purely' informative, and simply aim to document situations or events related with HRs. HRs indicators may be created and employed by academics and scientists to test and demonstrate their assumptions⁸⁵. They may be used by policy-makers to diagnose HRs contexts and plan HRs policies and programs⁸⁶. HRs indicators prepared by NGOs are often meant to "name and shame" their targets, that is to say, to leverage public opinion and pressure states (and increasingly non-state actors) to be accountable for their behaviors⁸⁷. At the national level as well as in international fora, victims of HRs violations, HRs activists, and NGOs may refer to these indicators to substantiate their claims in public debates, and to support their requests against duty-bearers⁸⁸.

In practice, however, HRs indicators are often established to attain more specific goals.

Some HRs indicators are meant to facilitate governmental and non-governmental organizations' monitoring of states' compliance with, and fulfillment of, their HRs commitments⁸⁹. To make just one example from the governmental side, this is the case of the 12 HRs indicators developed by the OHCHR to facilitate the reports of

⁸⁵ See for instance the statistics collected in B. Simmons' book *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP, New York, 2009), to sustain her claims that ratifying HRs treaties can change the dynamics of domestic politics, provided that the government is a stable democracy or a stable autocracy.

⁸⁶ S. McInerney-Lankford and H.-O. Sano, *Human Rights Indicators in Development*, p. 1; J.V. Welling, "International Indicators", p. 945.

⁸⁷ J.V. Welling, "International Indicators", p. 935, p. 945.

⁸⁸ N. Thede, "Human Rights and Statistics", pp. 260 *et seq.*

⁸⁹ S. McInerney-Lankford and H.-O. Sano, *Human Rights Indicators in Development*, p. 1, p. 14, pp. 18-21; A.J. Rosga and M.L. Satterthwaite, "The Trust in Indicators", p. 257; A.-M. Fröberg and M. Scheinin, "Report", p. 1; R. Malhotra and N. Fasel, "Quantitative Human Rights", p. 1, fn. 3.

States parties to UN HRs Conventions before UN treaty bodies⁹⁰.

Other HRs indicators become a tool to measure the impact and/or the success of a HRs program. Sometimes they are an instrument of self-control: governmental and non-governmental organizations, for instance, keep track of the number of people trained, or the number of meetings held, as proxies for the internal measurement of the accomplishment of their mission⁹¹. More often, the obligation to produce HRs indicators with program-monitoring purposes is imposed by donors or financial institutions on the beneficiaries of their funding. As we have seen, the EBRD measures its clients' performance (among other things) based on sex-disaggregated indicators on the impact of the clients' policies on women's empowerment and gender equity⁹².

HRs indicators are also commonly employed to evaluate the overall condition of the prospective beneficiaries of funding, as a way to predict their performances in the future and their ability to repay the funder⁹³. The best-known example is that of the WB's CPIAs⁹⁴, which have been replicated, at the regional level, by the Asian Development Bank (ADB)⁹⁵ and the African Development Bank (AfDB)⁹⁶. It is rarer that HRs indicators are expressly advocated for countries' comparative and ranking assessment⁹⁷, but this sometimes happens, especially with HRs indicators derived from development indicators⁹⁸.

The list of possible uses of (women's) HRs indicators does not end here. Among the unintended consequences of HRs indicators one should list at least their use in the production of other indicators⁹⁹. Sometimes the results are borrowed by imitation: e.g., we have seen that the WB's model with CPIAs has been adopted by other international financing institutions. On other occasions the transplant is the effect of an active collaboration between the entities which participated in the

⁹⁰ OHCHR, "Using Indicators", p. 3, par. 2; p. 19, par. 41.

⁹¹ The use of these measures, then, tend to transform the way in which these organizations do their work: M.L. Satterthwaite, "Rights-Based Humanitarian Indicators in Post-Earthquake Haiti", in K. Davis, A. Fisher, B. Kingsbury, S.E. Merry (eds.), *Governance by Indicators. Global Power through Classification and Rankings*, p. 365, esp. pp. 368-374; S.E. Merry, "Measuring the World", p. 84, 90; M. Ignatieff and K. Desormeau, "Introduction", p. 8.

⁹² EBRD, Gender Toolkit, Matrix 1, Issues Relevant to Performance Requirements (2010), at <ebrd.com/downloads/sector/gender/Gender_Toolkit_Matrix1.pdf> (last access: August 16, 2012) pp. 3-5.

⁹³ A.J. Rosga and M.L. Satterthwaite, "The Trust in Indicators", p. 257; R. Malhotra and N. Fasel, "Quantitative Human Rights", p. 1, fn. 3.

⁹⁴ On these indicators, in general, N.K. Dutta, "Accountability", p. 410.

⁹⁵ Asian Development Bank (ADB), "Refining the Performance-Based Allocation of Asian Development Fund Resources" (2008), at <adb.org/Documents/Policies/ADF/Performance_Based_Allocation/Refining-Performance-Based-Allocation.pdf> (last access: August 16, 2012), p. 1, p. 2, p. 18.

⁹⁶ African Development Bank Group (AfDB), "2011 – Country Policy and Institutional Assessment" (2011), at <afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2011%20Detailed%20CPIA-FOR%20DISCLOSURE__SS.xls> (last access: August 16, 2012).

⁹⁷ But see J.V. Welling, "International Indicators", p. 941.

⁹⁸ See, e.g., the HDI, on which S. Fukuda-Parr, "The Human Development Paradigm: Operationalizing Sen's Ideas on Capabilities, 9 *Feminists Economics* (2003) p. 301, p. 305.

⁹⁹ In general, see S.E. Merry, "Measuring the World", p. 86.

indicator's creation, and the outcome of reliance which some of them place on the work of the others¹⁰⁰. It is worth noting that such phenomena are far from being unusual in the global administrative world, where diverse global regulatory regimes often establish mutual interconnections and linkages with one another, give rise to institutional isomorphism, and end up constituting enormous conglomerations of interdependent legal orders¹⁰¹.

For now, there are no in-depth empirical studies on the uses of women's HRs indicators. Such lack of knowledge may easily lead to misunderstandings of these indicators' actual impact. For instance, one may conclude, from the above survey, that (women's) HRs indicators are an important tool for financial institutions, such as the International Development Association, to assess the economic, political and social soundness of states as candidates for funding. Yet the conclusion would be misleading, because its assumption is wrong. As the WB candidly admits, the women's HRs variable counts for less than 0.05 per cent of the overall index on countries' conditions¹⁰².

Rectifying misleading assumptions, and building a mass of empirical knowledge, about potential and effective uses of HRs indicators is badly needed. Indicators in themselves are just measurements; it is their use which can turn them into tools of global governance, expressing and reinforcing their authority and range of influence. Identifying who uses indicators, when, and for what purpose, would therefore enable GAL scholarship to illuminate who, and for what decisions, takes into consideration the HRs scores produced by some other actors. From this point of view, investigating the uses of HRs indicators would help GAL lawyers clarify the layers of regulatory patterns in the global administrative space, how they form and change, and where they impact.

Understanding the features of women's HRs indicators – who participate in them, under what pressures, for what purposes – helps determine the global administrative mechanisms that govern their production and use, and identify where, how, and to what extent the spontaneous global regulatory framework should be reformed.

As we have just seen, HRs indicators are embedded into different normative contexts in which they are produced and used by different actors, who are exposed to different constraints and incentives. Some of these indicators are part of a global regulatory regime which provides a framework for states' or other actors' actions; others establish guidelines to be followed by international and/or national agencies; and still others impact directly upon civil society at the local level¹⁰³.

¹⁰⁰ See for instance the list of sources of the GDI: UNDP, *Human Development Report 2011*, p. 171.

¹⁰¹ S. Cassese, *The Global Polity*, p. 24; B. Kingsbury, N. Krisch, R.B. Stewart, "The Emergence of Global Administrative Law", p. 15.

¹⁰² International Development Association (IDA), "Disclosing IDA Country Performance Ratings", August 9, 2004, IDA/R2004-0210 (2004), at <siteresources.worldbank.org/IDA/Resources/disclosingIDACPR.pdf> (last access: August 16, 2012), p. 28.

¹⁰³ These macro-distinctions among global administrative regimes are drawn by S. Cassese, *The Global Polity*, p. 20.

The initiative by which an international organization commits itself to report the improvements of its policy for women's HRs for an internal or external audit has little to do with (and calls for regulatory practices which have little to do with those applied to) indicators produced or used by donors or funders to identify their funding's potential beneficiaries. The regulatory framework which defines states' choices in producing indicators for monitoring HRs compliance before IOs is not the same which applies to the production, by those same states, of HRs indicators to report before regional financing institutions¹⁰⁴. The networks and incentive mechanisms underlying IGOs' purely inforamatory indicators on women's HRs on the basis of states' reports resist comparison with those characterizing women's HRs indicators prepared, through internal inquiries, by the personnel of an international financial institution to decide future funding allocations.

In light of such diversity, it becomes clear that GAL lawyers could fruitfully pursue the GAL approach in research focused on (women's) HRs indicators. GAL methodology, especially when coupled with other approaches, such as the anthropology of IOs and the sociology of bureaucracies and of professional communities, is best equipped to further study the institutional networks which support the success of HRs indicators' initiatives, and the administrative mechanisms which govern (and should govern) their activities. Investigating why (women's) HRs indicators are produced and used, by whom, and for what purposes, could be the first step towards explaining current regulatory and non-regulatory patterns of behavior, and suggesting to what extent they could and/or should be modified, and how.

6. Translating Local Practices into the Global Discourse

The focus of GAL studies is on (existing or possible) principles, procedures and mechanisms relating to transparency, participation, reasoned decision-making, and assurance of legality in global governance. GAL studies do not deal with either the merit of, or the methodology applied in reaching, the decisions respecting the GAL principles, procedures and mechanisms. Women's HRs indicators, however, need lawyers (mostly comparative scholars and lawyers) to support and complement GAL studies through an appropriation of the substantive discourse underlying indicators' initiatives. Let us see why.

Like other indicators, HRs indicators import and transmit knowledge about societies' cultures. Like other indicators, HRs indicators presuppose interpretative stands on what should be measured, and against what standards. As many other indicators, HRs indicators rely on normative, value-based analysis, insofar as they imply an assessment of what HRs are, and of the conditions under which HRs are enjoyed or infringed¹⁰⁵. From this perspective, the production and use of HRs indicators (as those of other indicators) require lawyers at ease with both the legal cultures of the societies investigated, and the international HRs legal discourse

¹⁰⁴ For a similar observation, S.E. Merry, "Measuring the World", p. 88.

¹⁰⁵ S. Fukuda Parr, T. Lawson-Remer, S. Randolph, "Measuring the Progressive Realization of Human Rights Obligations", p. 1, p. 7, p. 31.

which applies to them. In other words, they require comparative lawyers. Being trained in comparative law, comparatists are endowed with skills which make them the best suited to provide those involved in HRs indicators' initiatives, especially in the indicators-making phase, with reliable understandings about the legal systems under examination.

Without comparatists, the local/global confrontation risks at best becoming a wasted dialogue. This risk is far from being theoretical. As HRs feminists have long noted, the mainstream HRs discourse – within which HRs indicators are usually drafted – tends to suffer from oversimplification of the realities it refers to. For instance, in international HRs debates, women from less rich countries are often portrayed as leading an essentially truncated life, based on them being ignorant, poor, uneducated, tradition-bound, domestic, family-oriented, victimized, and so on¹⁰⁶. According to the same voices, strategies for women's HRs are often constructed as delivering resources for (what the deliverer conceives as) women's empowerment, without taking into account what these women are actually want or are interested in. Thus, in the same mainstream picture, HRs empowerment is often conceived as enabling women to invest their money in successful enterprises, to fight marital violence, to send children to school, to improve the health and nutrition of their families, and to participate in familial and political decisions¹⁰⁷. Although we may all agree that these goals are the most valuable, such an approach, rather than launching an open-ended process of social transformation, tries to impose a path for change which may not express values that are relevant to the reality it seeks to change¹⁰⁸. To this extent, such an approach frustrates, or greatly limits, the realization of HRs discourse's full transformative potential.

It is not necessary to embrace a feminist position to see that HRs activism (too) often comes at the expense of the complexity of local practices. The anecdote reported by anthropologist Sally Engle Merry about the CEDAW Committee and the problem of rape in Fiji is a vivid illustration of the way in which the local and the global (badly) interact¹⁰⁹. In 2002, as part of her project on HRs, Prof. Merry witnessed a hearing of the CEDAW Committee in New York. At that hearing, a governmental official from Fiji was presenting his country's national report, in which the government expressed criticism towards the Fijian courts' acceptance of the practice of bulu bulu, a traditional, village-based form of reconciliation for the case of rape. The official described the custom as follows: “the Fijian custom of bulu bulu (apology and recompense/reconciliation) is accepted by courts as a reason not to impose a charge or custodial sentence on a convicted rapist. In some cases, the victim's father accepts the apology and the victim has little say in the

¹⁰⁶ N. Kabeer, *The Conditions and Consequences of Choice*, p. 41; C.T. Mohanty, “Cartographies of Struggle: Third World Women and the Politics of Feminism”, in C.T. Mohanty, A. Russo, L. Torres (eds.), *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1991) p. 1, pp. 5-6; Ead., “Under Western Eyes: Feminist Scholarship and Colonial Discourse”, pp. 56-66, p. 72.

¹⁰⁷ N. Kabeer, *The Conditions and Consequences of Choice*, p. 41.

¹⁰⁸ N. Kabeer, *The Conditions and Consequences of Choice*, pp. 40-42.

¹⁰⁹ S.E. Merry, “Tensions”, pp. 2-11.

outcome”¹¹⁰. In the following discussion, members of the CEDAW Committee challenged the custom itself, and some of them proposed its ban¹¹¹. Following the hearing, there was a follow-up between the Fijian government and the CEDAW Committee, which ended with a suggestion from the latter to the former to pay more attention to the practice of bulu bulu¹¹². The interesting point is that, when the anthropologist tried to better understand what bulu bulu is, she discovered that it was a practice seldom used for rape. When used for rape, it was “typically a strategy for apologizing to the family of the victim and sometimes offering restitution such as arable land. The apology is delivered to senior males in the family, and the victim is rarely consulted about whether she wishes to accept it. It is possible for this ceremony to enable her to marry, however, and somewhat diminish the stigma of sexual violation. Moreover, in some cases, the senior males of the offender's kin group hold the offender accountable, reprimanding him or punishing him with violence”¹¹³. As Merry notes, neither the Fijian report, nor the government official and the NGOs representatives who were present at the hearing, made clear how fundamental and widespread the practice was in the villages, nor how often or how long it had been used for rape¹¹⁴. For its part, the Committee moved quickly from condemning the use of bulu bulu for rape to condemning the custom altogether, because many members of the committee assumed that the problem that they were confronting was one of a custom embedded in traditional culture. “They were inclined to condemn the entire practice, not just its use in rape cases. They talked about bulu bulu as a barbaric custom of handling rape by compensation, an example of a harmful traditional cultural practice that needs to be changed to improve the status of women. The custom was defined as a violation in and of itself rather than as one inappropriately applied to a particular kind of offense and used to derail more severe legal penalties”¹¹⁵.

With the appropriate distinctions, similar misinterpretations of the significance of local practices as well as their relevance to global standards may occur in the making of women's HRs indicators. This is, for instance, what may happen when indicators on marital violence are established without taking into account local understandings about what inter-spousal duties are, and about the remedies that marital violence may trigger in the given community¹¹⁶, or when indicators on gender discrimination are drafted without exploring women's own adherence to local practices associated with, say, preference for a son and discrimination against daughters in the allocation of food and basic healthcare¹¹⁷. Too often, these local understandings and practices are relegated to the margins of legal phenomena, and too often their role in shaping practices, expectations, and

¹¹⁰ S.E. Merry, “Tensions”, p. 3.

¹¹¹ S.E. Merry, “Tensions”, p. 3.

¹¹² S.E. Merry, “Tensions”, p. 4.

¹¹³ S.E. Merry, “Tensions”, p. 7.

¹¹⁴ S.E. Merry, “Tensions”, p. 11.

¹¹⁵ S.E. Merry, “Tensions”, p. 11.

¹¹⁶ UN Expert Group Meeting 2007, 18.

¹¹⁷ N. Kabere, *The Conditions and Consequences of Choice*, p. 7.

strategies is, at best, superficially analyzed by global rulers¹¹⁸. To the contrary, whoever participates in an initiative on HRs indicators should be aware of, and familiar with, the whole range of legal layers which, outside and within the West (are not captured by positive law, but) control large parts of reality, ranging from personal status to family relationships, from property rights to the distinction between encouraged and prohibited conduct, and to the methods of dispute resolution¹¹⁹. Since these layers govern not only intra-family or kinship relations, but more broadly a woman's status in society and her ability to step outside socially-prescribed roles, awareness of and familiarity with them appears to be a preliminary step to any study about the legal system in which they operate. In the case of indicators on women's HRs, comparatists are needed to identify, against local backgrounds, the deeply entrenched rules and practices that shape human relations and influence behaviors and choices; to refine, within local contexts, HRs standards, values, and targets; to interpret them in light of local cultural standpoints. It is up to comparative methodology, ideally coupled with other approaches, such as the sociological, the ethnographic and the anthropological ones, to smooth the dialogue between local and global self-understandings, and help identify how local and global practices and rules could be interpreted to talk with one another.

7. Conclusion

Women's HRs indicators, as any other HRs indicator, call – at the substantive level – for the understanding of local and global legal cultures, as well as – at the procedural level – for the deepening of the study of the regulatory patterns, principles, and mechanisms which support the production of uses of the indicators themselves. Yet, in spite of these indicators' dependency on legal expertise, lawyers have so far kept themselves aloof from acting as translators between local and global legal cultures, and from investigating in depth the regulatory landscape in which women's HRs indicators, and indeed HRs indicators generally, operate. Against this background, GAL scholars' interest for global indicators-making processes seems very promising. It promises the study and the development of a global administrative culture of HRs indicators. More importantly, it promises to attract lawyers', especially comparative lawyers', attention to their potential, and up-to-now unrealized, role in this field. Lawyers, especially comparative lawyers, could put at the disposal of indicators' initiatives their experience in studying, collecting, translating and comparing legal cultures. Their future in women's HRs global indicators is there to come.

¹¹⁸ K. Pistor, A. Haldar, A. Amirapu, "Social Norms, Rule of Law, and Gender Reality. An Essay on the Limits of the Dominant Rule of Law Paradigm", in J.J. Heckman, R.L. Nelson, L. Cabatingan (eds.), *Global Perspectives on the Rule of Law*, (London-New York, Routledge-Cavendish, 2010) p. 241, pp. 251-263.

¹¹⁹ M. Bussani, "A Pluralist Approach to Mixed Jurisdictions", 6 *J. Comp. L.* (2011), p. 247 *et seq.*