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Human Rights Indicators and the Sovereignty of Technique

1. Introduction

Mary Robinson once envisioned a "science of human dignity"[1] based on the use of statistics in monitoring human rights. For good or ill, the quest to construct this science is well underway: the monitoring of human rights performance is increasingly dominated by a culture of indicators, benchmarks, and statistical measurement. Perceived as a way to more accurately assess compliance, and to better elaborate the content of rights, indicators in particular have come to occupy a central role in the agenda of the UN treaty-based mechanisms. At the same time, there is a trend amongst human rights advocates to devote ever-increasing time and energy towards the creation of more powerful, useful and specifically tailored statistical methods for measuring human rights performance.

This marks a significant shift in emphasis away from what might be called the "traditional" approach to human rights monitoring, which was largely (though by no means entirely) carried out as a discursive or narrative-based process. States Parties would describe their efforts made towards the protection and promotion of human rights, and treaty body members considered those efforts based on their own expertise and judgment alongside reports from local advocates and NGOs. The better approach is increasingly seen as being a process resembling an audit, certifying that relevant indicators are produced, and produced in the correct disaggregated fashion, and assessing the accuracy of data.

It would be an exaggeration to say that this signifies a rift in 'the human rights community', if such a thing exists. Most of those who support an increased role for indicators see them as simply another tool in the arsenal of human rights monitoring to go alongside

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[1] M. Robinson, speech at the launch of the AAAS Science and Human Rights Coalition (2009), available at http://www.aaas.org/page/mary-robinson (accessed 25/03/2015)

existing mechanisms. Yet there is a concern that indicators are transforming "from a tool to a paradigm"[2] - that rather than being complementary to traditional methods, they could come to dominate or supplant them. Indeed, there is a sense that this is already taking place, particularly given developments within the Office of the High Commissioner for Human Rights (OHCHR) and its efforts to systematise and standardise the uses of indicators within the UN treaty body system. Likewise, developments in academia in the field of statistical measurement of human rights have proliferated, with, undoubtedly, an attendant opportunity cost regarding other varieties of research. Some scholars have expressed concern with the apparent shift towards audit-based procedures; a shift which marginalises questions of human judgment and instead focuses on methods of verifying whether and how data is produced.

This article argues that this shift can be readily attributed to a strong Rationalist propensity, as Michael Oakeshott would have described it, present within the move towards indicators. That is, the push for ever-more accurate and pervasive statistical measurement is strongly characterised by the application of technique: by ever greater centralisation, uniformity, and certainty. This means that, as with all Rationalist projects, it tends to grow increasingly Rationalist over time, and its Rationalism comes to dominate and crowd out other methods of thinking.

The move to indicators is ripe, then, for analysis from an Oakeshottian perspective. The analysis presented here encompasses existing concerns about the domination of human rights monitoring and discourse by indicators - the dangers of unanticipated consequences and the chilling effects indicators have on conversation and dialogue - but also provides an explanation for why the project continues to grow; why it appears to represent not just a supplementary tool to traditional human rights monitoring, but rather the transformation of a tool into a paradigm which displaces other perspectives. It begins by describing the shift

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[2] International Council on Human Rights Policy, Report on Workshop: *No Perfect Measure: Rethinking Evaluation and Assessment of Human Rights Work* (Jan, 2012), at 3.

towards the use of indicators in the monitoring of human rights, before explaining why this shift can be described as having a strong propensity towards Rationalism. It then considers some of the pernicious consequences of this, before explaining why its Rationalist propensity is so expansionist and transformative.

2. The Human Rights Indicator Project

It is difficult to think of areas in the public sphere in the developed world, or in international governance in general, which have not come to be characterised by the use of purportedly objective, mostly numerical measures indicating achievement or performance, and resultant league tables and rankings. Some prominent examples listed in a recent collection on indicators[3] are the Programme for International Student Assessment, which measures the educational achievements of 15-year-old students across the OECD;[4] the state fragility index used by the US Agency for International Development (USAID);[5] and the yardsticks for the quality of national laws regarding corporate bankruptcy used by the World Bank and the European Bank for Construction and Development when making decisions on lending.[6] In the domestic sphere, examples from the literature are the *US News and World Report*'s ranking of US law schools;[7] performance indicators used by the Audit Commission to produce national league tables for local authorities in England and Wales across various

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[3] K. Davis, A. Fisher, B. Kingsbury, and S. Merry (eds.) *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford University Press, 2012).

[4] Bogdany and Goldmann, "Taming and Framing Indicators: A Legal Reconstruction of the OECD's Programme for International Student Assessment", in *Governance by Indicators*, *supra* note 3, at 52-85.

[5] Bhuta, "Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order", in *Governance by Indicators*, *supra* note 3, at 132-162.

[6] Halliday, "Legal Yardsticks: International Financial Institutions as Diagnosticians and Designers of the Laws of Nations", in *Governance by Indicators*, *supra* note 3, at 180-215.

[7] See e.g. Espeland and Sauder, "Rankings and Reactivity: How Public Measures Recreate Social Worlds" 113 (1) American Journal of Sociology 1 (2007).

National Indicators;[8] and the Research Assessment Exercise (now Research Evaluation Framework) used within the audit of British higher education institutions.[9]

The field of international human rights is no exception to the general trend towards the use of indicators and quantitative measurement. Indeed, in recent years indicators have become something of a fad amongst advocates of economic, social and cultural rights, and are often presented as a remedy to a perceived sense of those rights' marginalisation.[10] The shift to indicators is often seen as having come into being alongside a broader move towards an improved conceptualisation of economic, social and cultural rights over the past several decades.[11] This is not to say, however, that the realisation and monitoring of civil and political rights has fallen outside of its purview.

Human rights indicators and benchmarks have been in use since at least the early 1990s, when the Special Rapporteur on the Realization of Economic, Social and Cultural Rights recommended considering how indicators might be used in measuring progression towards the realisation of such rights.[12] Within the UN treaty body system this largely took place in an *ad hoc* fashion as treaty bodies developed their working methods and interpretations of treaty provisions. For instance, the Committee on Economic, Social and Cultural Rights (CESCR) in 1999 issued its General Comment No. 13 on the Right to Education, in which it suggested that there was a minimum obligation for state parties to create a national education strategy allowing monitoring through the use of indicators and benchmarks.[13] At the same time, however, there have been efforts to make the production of indicators and their usage more systematic and widespread. A reader familiar with the

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[8] Discussed in Tsoukas, "The Tyranny of Light" 29 (9) Futures 827-843 (1997), at 837-838.

[9] See e.g. Strathern, "The Tyranny of Transparency" 26 (3) British Educational Research Journal (2000), at 309-321.

[10] See e.g. Welling, "International Indicators and Economic, Social and Cultural Rights" 30 HRC 933 (2008).

[11] *Ibid*, at 936-937.

[12] Report of the Secretariat: Report of the Seminar on Appropriate Indicators to Measure Achievement in the Progressive Realization of Economic, Social and Cultural Rights, UN GAOR World Conference on Human Rights, UN Doc. A/CONF.157/PC/73 (1993).

[13] CESCR, General Comment No. 13, para. 52, UN Doc. E/C.12/1999/10 (1999).

literature on quantitative measurement of human rights performance will be aware of a number of such projects. These include the SERF Index developed by Fukuda-Parr and others,[14] Landman's concepts of rights in principle, practice and policy and their subdivision into indicators,[15] and the project to develop a specific suite of indicators for the right to health.[16]

By far the most significant such effort, however, has been the project undertaken by the UN's Office of the High Commissioner for Human Rights, initially at the behest of the chairs of the treaty bodies themselves, to systematise the production and usage of human rights indicators. Beginning in 2005 and culminating in the 2012 *Human Rights Indicators: A Guide to Measurement and Implementation*,[17] this project has resulted in a conceptually unified approach which aims to produce a core set of "universally relevant" human rights indicators and a generally applicable method for generating them. This has three main pillars. First, the preference is for the quantitative over the qualitative: "[F]act based or objective indicators, in contrast with judgement-based or subjective indicators, are verifiable and can be easier to interpret when comparing the human rights situation in a country over time and across populations."[18] By the same token, qualitative indicators based on expert judgements are considered to be unreliable, unrepresentative, lacking in transparency, and generally of a "limited purpose".[19] The guide subdivides indicators into four categories labelled A, B, C and D, and considers A - indicators that are quantitative and objective - to be the most useful.[20] Even where intrinsically subjective phenomena are being measured, the preference is for quantitative data which might emerge through statistically representative surveys (one

[14] See http://www.serfindex.org/about/.
[15] Landman, "Comparative Politics and Human Rights" 24 (4) HRQ (2002) 890; see also Landman, "Measuring Human Rights: Principle, Practice and Policy" 26 HRQ (2004) 906.
[16] See e.g. Backman, et al, "Health Systems and the Right to Health: An Assessment of 194 Countries" 372 (9655) The Lancet (2008), at 2047.
[17] OHCHR (2012).
[18] *Ibid*., at 17.
[19] *Ibid*., at 67-68.
[20] *Ibid*., at 19.

example being "percentage of individuals who feel safe walking alone at night"[21]). Where indicators based on expert judgment are to be used, they are in the first place to be coded in order to convert them into numbers or symbols which can be tabulated and counted.[22]

Second, in order to "concretise" the content of each right and make explicit the link between the normative standards of a given right and its indicators, it was decided that attributes - usually around four in number - ought to be identified within each right. The aim was to provide a way to break down the many different rights in a way which facilitated the easy selection and measurement of indicators. For the right to life, the main example given, these attributes were "arbitrary deprivation of life", "disappearances of individuals", "health and nutrition", and "death penalty".[23] The same approach, it was suggested, should be taken with all rights - drawing from all of the 9 international human rights treaties to determine a handful of attributes, which could then be used as the basis on which indicators might be selected.[24]

Third, it was made clear that the framework ought to revolve around Donabedian's model of structure-process-outcome[25], which had originally been created in order to evaluate quality of care in health services. The essential aim is to create a set of structural, process, and outcome indicators for each attribute of each right, which would in effect measure a given state's commitment, effort, and results respectively. This would help "unpackage the narrative on the normative content of a right", "demystify the notion of human rights and take the human rights discourse beyond the confines of legal and justice sector discussions", and so on.[26]

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[21] *Ibid*.

[22] *Ibid*., at 66.

[23] OHCHR, Report on Indicators for Promoting and Monitoring the Implementation of Human Rights (2008), UN Doc. HRI/MC/2008/3, para. 7.

[24] *Ibid*.

[25] See e.g. Donabedian, "The Quality of Care: How Can It Be Assessed?" 260 (12) Journal of the American Medical Association (1988) 1743.

[26] OHCHR, *supra* note 23, para. 9.

The sample indicators on the right not to be subjected to torture or cruel, inhuman or degrading treatment serve as an illustration of the OHCHR's aim.[27] As usual, the right is divided into a handful of separate attributes: "Physical and mental integrity of detained or imprisoned persons", "Conditions of detention", "Use of force by law enforcement officials outside detention" and "Community and domestic violence". Each of these has a common set of structural indicators, which include "international human rights treaties relevant to the right…ratified by the State", "Date of entry into force and coverage of the right not to be tortured in the constitution or other forms of superior law", and "Date of entry into force and coverage of domestic laws for implementing the right not to be tortured, including code of conduct on medical trials and scientific experimentation on human beings". The indicators then become subdivided into further structural, process and outcome indicators. Taking one of the attributes, "Community and domestic violence", a structural indicator is "Date of entry into force and coverage of specific legislation on community and domestic violence"; a process indicator is "Proportion of women reporting forms of violence…against themselves or their children initiating legal action or seeking help from police or counselling centres"; and an outcome indicator is "Incidence and prevalence of deaths and crimes related to community and domestic violence…in the reporting period". For that single right, across the four attributes, there are 10 structural indicators, 19 process indicators, and 9 outcome indicators provided. This is broadly illustrative of the 14 rights which are examined in the guide.

The OHCHR's approach has now begun to be adopted across the UN treaty bodies, and the production of indicators and the collection and disaggregation of data with indicators in mind can only be expected to draw increasing time, attention and resources - from governments, practitioners and academics alike.

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[27] OHCHR, *supra* note 17, at 91.

At the same time, however, there is a certain level of resistance against the move towards indicators - not least from some members of the treaty bodies themselves, who have been described as "lukewarm".[28] Quantitative measurement of human rights has been viewed as problematic almost since its inception,[29] and just as the indicator project has gathered momentum, so have concerns expressed about it. Indeed, it is rare to find an academic article written about the subject which has not acknowledged severe problems with, at the very least, reliability of statistics, data collection, and disaggregation.[30] More seriously, some scholars have seen in the project a shift in focus towards audit: a change in emphasis from judgment-based decision-making to an exercise in verification and checking. A reconceptualization of the role of the treaty bodies, in other words, away from judgment-based, subjective assessments of state parties' performance and specific, contextual recommendations, towards objective evaluation of data collection methods and verification of outcomes. This brings with it the concern that monitoring through indicators ignores the complexity of what human rights represent - that no level of quantitative measurement or benchmarking can displace the "pesky, irreducible core of human judgment" which must always be the final arbiter of which policy is implemented, how resources are allocated, and how choices are prioritised.[31] That is to say, both the nature of human rights monitoring and the nature of human rights practice is highly dependent on context and hence human judgement and expertise, and this cannot be replaced simply with the use of more and better indicators and benchmarks.

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[28] S. Merry, "Chapter 4: The Problem of Human Rights Indicators" (2012) at 46. Unpublished - available at http://www.law.uvic.ca/demcon/2012%20readings/Chapter%203%20Problem%20of%20HR%20indicators.pdf (accessed 25/03/2015)

[29] See e.g. Barsh, "Measuring Human Rights" 15 HRQ 87 (1993).

[30] See for instance the otherwise relatively uncritical articles by Felner, "A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability" 9 SUR (2008) 109, at 131-132, or de Beco, "Human Rights Indicators for Assessing State Compliance with International Human Rights" 77 Nordic Journal of International Law (2008) 23.

[31] Rosga and Satterthwaite, "UN Indicators in Critical Perspective", in Kingsbury et al, *supra* note 3, at 297-317.

What explains the rise in the use of indicators, despite these concerns? And why should proponents of human rights view it with such caution? This article argues that all of these questions can be answered by considering the move towards indicators as a project characterised by a propensity towards Rationalism.

3. Oakeshott and Rationalism

Oakeshott defined Rationalism by reference to a character - the Rationalist. He describes this person as standing, at all times, for independent thought free from obligation to any authority except for reason: "He believes…in the open mind, the mind free from prejudice and its relic, habit. He believes that the unhindered human 'reason'…is an infallible guide in political activity."[32] This makes him, on the one hand, partially a sceptic, because he never hesitates to subject any opinion, habit or belief to the power of his reason; he has no capacity or willingness to accept the "mysteries and uncertainties of experience" or the traditional knowledge of his society at face value. Yet on the other hand he is also an optimist: he has absolute faith in the power of reason and rational argument to solve mankind's problems, through the pursuit of universally valid answers.[33] His political activity consists in bringing the "social, political, legal and institutional inheritance of his society before the tribunal of his intellect" - a project of innovation and construction; of solving problems and scrubbing clear the *tabula rasa* of the "irrational scribblings of tradition-ridden ancestors".[34] Nothing is to be accepted merely because it exists or has existed for generations, but only because it passes the test of reason.

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[32] Oakeshott, "Rationalism in Politics", in *Rationalism in Politics* (Methuen, 1962) at 1-36, at at 4.
[33] *Ibid.*, at 1-3.
[34] *Ibid.*, at 5.

Oakeshott's rationalism has a number of different characteristics. First, it views all problems as being resolvable; it transforms the sphere of political action from the open-ended and conversational to "something more like an argument, which demands a conclusion".[35] Politics is that of "felt need" – continuous resolution of crises through the application of reason.[36] It is not a project of making do, or careful amendment of traditional rules and practices, but the use of rationality unclouded by "the fumes of tradition" to construct new rules, new inventions, new solutions.[37] It is the politics of the blank slate: a preference at all times for the well-reasoned solution based on abstract rationality over the messy but tried-and-tested.

Second, rationalism has within it what Oakeshott calls a "doctrine of human knowledge", the result of which (or perhaps the cause) is a preoccupation with certainty.[38] He examines this through an extended musing on knowledge and how it can be sorted into two separate categories which are akin to the ancient division between *technē* and *epistēmē*. That is, knowledge is generally divisible into two sorts: practical knowledge (knowledge that is generated by and contingent on practice), versus technical knowledge or technique (knowledge that is formulated into rules). The difference is that between the craft of a chef and the recipes contained in a cookery book; or between the skill of driving a car and the rules contained in the Highway Code. Nobody supposes that the knowledge a good cook has is confined to what can be contained in a book; he also has what Polanyi would have referred to as 'tacit knowledge'[39] – what he has learned through practice (how different tastes combine, how much salt to add to a particular dish, how to replace ingredients with others, and many unspoken rules of thumb). Essentially all human activities – driving, cooking, painting, writing poetry, science – are comprised, according to Oakeshott, of both of these

[35] Candreva, *The Enemies of Perfection* (Lexington, 2005), at 28.
[36] Oakeshott, *supra* note 32, at 5.
[37] *Ibid.*, at 4-7.
[38] *Ibid.*, at 7-13.
[39] Polanyi, *Personal Knowledge* (1958).

types of knowledge: the formal rules which must generally be learned and which compromise technique, and the informal, experiential, tacit understanding of the craftsman or practitioner. And the technical and practical can never be separated or used as a replacement for each other. Thus a pianist acquires technique (how to read music and so forth) but also artistry; a chess-player learns style and insight a well as what the potential moves are, and a scientist acquires intuition about profitable avenues to explore as well as the theory of his field.[40]

The Rationalist, according to Oakeshott, believes that all real knowledge is technical knowledge, and therefore that practical knowledge is not really knowledge at all – it is rather a "nescience which would be negligible if it were not positively mischievous".[41] While practical knowledge seems imprecise and uncertain - a matter of opinion – and therefore not to be trusted, technical knowledge is clear and absolute. The Rationalist therefore holds reason sovereign; he believes in the "sovereignty of technique". Concomitantly, he believes in certitude: technical knowledge gives the appearance of being certain, in that it is self-contained, not being predicated on prior knowledge, prejudice, preconceptions – or traditions. In its certainty it is complete and providing of "order and distinctness".[42] It is the reduction of the "tangle and variety of experience" to a "set of principles" that can be assessed upon rational grounds.[43]

And third, as a result of both its capacity to provide final resolutions and its certainty, and likewise its skepticism of tradition and its suspicion of practical knowledge, Rationalism tends to have as one of its goals the purging of habit and prior prejudice. Since technical knowledge has the appearance of being self-contained, and since the Rationalist believes in the supremacy of technical knowledge, other forms of knowledge can be removed. Indeed, this is desirable, to avoid being governed by "nescience". In other words, the Rationalist

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[40] Oakeshott, *supra* note 32, at 7-13.
[41] *Ibid.*, at 11.
[42] *Ibid.*, at 6.
[43] *Ibid.*

expects and desires certainty, believes that technical knowledge is the only kind of knowledge which can provide it, and hence requires the expurgation of anything which may hinder it: like the desire of Voltaire to have good laws by burning all existing laws and starting afresh.[44] The Rationalist, then, as well as viewing problems as permanently resolvable, also believes in the certainty of technical knowledge to provide such resolutions – and as a result also believes in the scrubbing-out of what comes before it.

Readers sometimes come to the conclusion that Oakeshott is developing something of a straw-man in his portrayal of the Rationalist[45] (or, worse, is simply using the figure as a kind of stand-in for socialists, progressives or liberals).[46] Others view it as outdated – a reaction against the world in which Oakeshott lived, with its recent history of domineering ideologies and its reformative, progressive post-war fervour.[47] Others still construe his position as being nihilistic – a refutation of reason itself.[48] Yet Oakeshott was keen to emphasise that Rationalism was not merely a phenomenon of the era in which he was living and writing. This is because, far from being a doctrine or a philosophy, Oakeshott's description of the Rationalist is really a personification of a certain conception of knowledge.[49] His essay is not to be understood, then, as a polemic against a certain class of people or ideas, but rather against a certain *method of thinking*. It is a propensity rather than a person. Moreover, it is a propensity present in everyone and everything: in politics, Rationalism had "come to colour the ideas, not merely of one, but of all political persuasions, and to flow over every party

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[44] *Ibid.*, at 5.

[45] See e.g. Kettler "The Cheerful Discourses of Michael Oakeshott" (1964) 16 World Politics 483, 488.

[46] See e.g. citations in Candreva, *supra* note 35, at fn. 3, 4 and 5.

[47] See e.g. Franco, review of *The Politics of Faith and the Politics of Skepticism*, 91 American Political Science Review 439 (June 1997).

[48] See e.g. Berns, "Rationalism in Politics" [Review] 57 (3) The American Political Science Review (1963), at 670-671.

[49] Candreva, *supra* note 35, at 53.

line",[50] and it was discernable in all fields of human activity. And at the same time, however, it was nowhere absolute or complete and the propensity could only ever be partially embraced; the Rationalist is a non-existent extreme. Or, rather "the Rationalist is no-one, and yet he is everyone".[51] Oakeshott's critique is not of a person, a political persuasion, or a movement, but of a tendency which we all share, to some degree or other.

Oakeshott's description of the Rationalist and Rationalism provide us with a compelling account for the international human rights system's move towards the use of indicators, as the next section makes clear.

4. The Propensity to Rationalism in the Indicator Project

The rationalist character of the use of indicators to measure human rights performance is uncontroversial, if we use the word "rational" in its ordinary meaning. Indeed, it seems unlikely that any of those engaged in the advocacy or production of indicators would disagree: the language of the OHCHR is of systematisation, objectivity, and science; a prominent recent volume on the measurement of human rights is almost explicit in stating the case for a neutral, empirical approach which sets to one side foundational, philosophical or normative concerns.[52] Using the term in its dictionary meaning, the approach is self-consciously *rational*, or purportedly so.

Oakeshott's Rationalism, however, has certain important characteristics. He did not simply mean, by 'Rationalism', to refer to anything that purported to be objective or scientific. He was referring to a more specific mode of thinking which was constructed around the use of reason unfiltered by tradition or habit to provide resolutions to problems

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[50] Oakeshott, *supra* note 32, at 6.
[51] Gee and Webber, "Rationalism in Public Law" (2013) 76 (4) MLR 708, 712.
[52] Landman and Carvalho, *Measuring Human Rights* (Routledge, 2010), at 1.

and "felt needs"; the preoccupation with certainty, finality and uniformity that comes from the sovereignty of technique; and the desire to expurgate prior prejudice and override the practical, traditional, and experiential. It is the application of abstract and universal technical knowledge to any and all problems - or the use of premeditated principles to arrange a political community.[53] Put this way, the move towards indicators clearly has something of the character of Oakeshottian Rationalism about it.

In the first instance, and most prosaically, the use of statistical indicators can certainly be conceptualised as the application of technical knowledge to a single, big, perceived problem: what Landman and Carvalho refer to as the "large and variable gap between the expectations for human dignity outlined through human rights standards and the reality of the precariousness of those rights as they are variously enjoyed around the world".[54] That is, there is one large and pressing issue in the field of international human rights law - the disparity between agreed obligations and actual performance - and this can, it is argued, be resolved by the use of objective measurement. As Welling puts it, in a passage which neatly summarises this view:

> By improving the accuracy and comprehensiveness of data relating to the status quo, international indicators assist states parties in better understanding the current situation... By providing feedback on the outcomes of state policy, international indicators can inform decision making and suggest areas for future policy change at the governmental level… Illuminating the current conditions will thus help state members to better understand the consequences of their policy decisions as well as how they might improve their ability to satisfy ESCR commitments.[55]

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[53] See Oakeshott, "Political Education", in *Rationalism in Politics*, *supra* note 32, at 111-136.
[54] Landman and Carvalho, *supra* note 52.
[55] Welling, *supra* note 10, at 944.

Objective measures, that is, supposedly allow for making objective judgments about progress, which can only be to the good since it will provide information on what has been achieved and what remains to be achieved, and thus equip relevant parties with the necessary knowledge to make progress. A set of other advantages logically follow from this given, and are summarised in Landman and Carvalho's book as allowing contextual description and documentation, classifying and categorisation, monitoring of compliance, mapping and pattern-recognition, secondary analysis, and advocacy.[56] This would all have the general ancillary benefit of making the work of the monitoring bodies more efficient and streamlined.[57] Many of these benefits are mentioned in the OHCHR Guide,[58] and it is not unusual to see advocated in the literature a fostering of a "culture of statistics" within the international human rights system in general, with many of these benefits in mind.[59] Even where skepticism is raised about the possibility of measuring human rights performance empirically, and the underlying assumptions behind the production of indicators, there usually remains a sense that what are needed are simply better indicators used in different ways.

The usefulness of indicators in this respect, however, is even greater from a purposive perspective. Indicators "link the conceptual discussion about human rights compliance to implementation practices".[60] They do not merely measure human rights compliance in the abstract; they also instigate movement in pre-determined directions and supply ready-made policy goals. Implicit in any indicator is a final destination or, at the very least, a direction of travel. The indicator "Proportion of women reporting forms of violence…against themselves

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[56] See Landman and Carvalho, *supra* note 52, at 4-5.
[57] See Welling, *supra* note 10, at 942.
[58] See OHCHR, *supra* note 17.
[59] See e.g. Thede, "Human Rights and Statistics: Some reflections on the no-man's land between concept and indicator" Statistical Journal of the United Nations ECE 18 (2001) at 259-273, at 271.
[60] McInerney-Lankford and H. Sano (eds.), *World Bank Study: Human Rights Indicators in Development* (World Bank, 2010), at 14.

or their children initiating legal action or seeking help from police or counselling centres" has

within it an implied goal of improving that proportion and an ultimate target of increasing it

to 100%. But it also readily lends itself to benchmarks - increasing the proportion from 5% to

10% and so on, and indeed the OHCHR guide makes great play of benchmarking not merely

in human rights monitoring but also in the performance monitoring of development

programmes and government policy interventions as a whole. The use of human rights

indicators in governance, then, is not merely a method of measuring compliance but a

measure of building certain human rights targets and goals - and indeed, norms - into

government policy. For human rights advocates this is clearly something which is

intrinsically desirable.

At the same time, indicators imply the existence of ideals.[61] The World Bank makes

their normative character explicit: "In a sense, they are also *communicative instruments*

[emphasis in original]".[62] They are not merely data, but also statements of what is desirable.

This means that they can express values; the adoption of a set of universal indicators "would

be a high-profile reinforcement of the claim that those human rights set out in international

law are indeed universal".[63] This gives indicators a certain political usefulness. Human rights

indicators - especially if standardized and universalised - give substance to the normative

position that human rights are available to all individuals on the basis of interrelatedness,

interdependence and indivisibility.[64] But, of course, individual indicators also have a

normative function in expressing not only a purportedly empirical measure of compliance or

performance regarding a certain right, but also a vision of what that right ought to mean and

what its functions ought to be. The indicator "Proportion of women reporting forms of

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[61] Kingsbury, "Introductory Remarks" Panel on Indicators in International Law, 106 American Society of International Law Proceedings 243 (2012), at 243.
[62] World Bank Study, *supra* note 60.
[63] Raworth, "Measuring Human Rights", in Gruskin et al (eds.) *Perspectives on Health and Human Rights* (2005) 393, at 403.
[64] See e.g. OHCHR, *supra* note 17, at 10.

violence…against themselves or their children initiating legal action or seeking help from police or counselling centres", for instance, makes a clear statement about the content of the right being measured. It makes explicit that this right is not merely concerned with the traditional focus on the judiciary and the criminal justice system, but includes the prevention or punishment of domestic violence. It also makes explicit, through a structural indicator, that specific legislation on community and domestic violence is a desirable mechanism for doing so. Irrespective of whether this interpretation is to be welcomed, it illustrates the power of an indicator to make statements about the width and scope of a given right. This can, of course, be done as much through State-specific indicators as it is through universal ones, though it may be noted that the setting of 'attributes' by the OHCHR has much of this character: in defining the attributes of a given right, it is not merely expressing empirically what it considers the nature of that right to be, but is implicitly including and excluding areas of public and private life from its scope.

It is apt, then, to think of the indicator project as being a response to a set of "felt needs" - whether for more information and measurement *per se*, for the goal of human rights 'mainstreaming' in policy and budgeting generally, for clarification and elaboration on the nature and content of rights, or indeed for expressing normative values. These in turn serve the larger felt need of bringing States' behaviour in line with their obligations, and to express certain standards and ideals. Moreover, it is a response which attaches great importance to the Rationalist principles of certainty and uniformity.

Of course, no UN body has taken the view that a universal standardised set of indicators to apply always and everywhere is required. While the OHCHR's stated position is that the "core content" of human rights ought to be monitored through the use of universal indicators, its desire is not for a complete and concrete suite of indicators for every single

human right in every single state party to every treaty.[65] Yet while there may never be a complete set of universal indicators, it is nonetheless the case that what has been advocated is the universal *use* of indicators and a universal *framework* guiding their use. Uniformity and certainty, in other words, manifest themselves not at the level of direct implementation, but at the level of conceptualisation: it is in the overarching structure of the international human rights system in which uniformity and certainty appear.

The desire for certainty most clearly finds its expression in the emphasis on objectivity. As Merry puts it, much of the power of indicators lies in their capacity to "convert complicated contextually variable phenomena into unambiguous, clear, and impersonal measures".[66] The objective transforms the nebulous into the concrete. Much of the indicator literature advances the argument that all forms of data - qualitative and quantitative, subjective and objective - are in some respect mutually reinforcing, but there is generally an implied or express preference for the quantitative and the objective. While qualitative and quantitative data may be viewed as complementary, the qualitative and the subjective is often represented as in some sense inferior in usefulness, primarily because it is lacking in certainty, and thus in need of reformulating in such a way that it can be numerically measured - repackaged so the subjective becomes less so. The OHCHR's guide, with its four quadrants of indicators ranked A-D, puts this most starkly, but a similar implicit hierarchy is present elsewhere - as in, for instance, de Beco's 2008 article, which seems to place household perception data below socio-economic data and events-based data in terms of its usefulness for monitoring human rights performance, and expert judgments lowest of all,[67] or Mokhiber's desire to bring subjective measures within the rubric of data such as

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[65] See OHCHR, "Report on Indicators for Monitoring Compliance with International Human Rights Instruments" 18th meeting of chairpersons of the human rights treaty bodies, UN Doc. HRI/MC/2006/7, para. 28.

[66] Merry, "Measuring the World: Indicators, Human Rights and Global Governance" 52 (3) *Current Anthropology* (2011), 583, at 584.

[67] de Beco, *supra* note 30, at 34-38.

opinion polls and other more 'objective' measures of public confidence.[68] As well as being more accurate and clear, a crucial element cited as an advantage of using quantitative indicators is that they provide consistency: unlike the subjective opinion of an expert, an indicator allows close tracking of performance over time, permitting accurate assessment of improvement or failure.[69]

Yet the desire for uniformity and certainty also manifest themselves as broader guiding principles, both within the initial impetus towards the wider use of indicators, and their continuing expansion. Obviously, the OHCHR's efforts are straightforwardly an attempt to systematise and universalise the production and use of indicators: if not to achieve uniformity at the level of individual indicators used, then to achieve it in the form of a "common approach".[70] But there is also an aspect of the drive towards indicators which seeks not merely to measure but also to map: if not to definitively set out in concrete terms where the limits of each right lie and what their respective characteristics are, then at least to rationalise the process by which this could be determined.

5. The Consequences of the Rationalist Propensity

The indicator project, then, can be aptly described as possessing a strong propensity towards Rationalism. This analysis now turns to the potential consequent pernicious effects - which, indeed, have been identified by scholars who are sceptical of the move to indicators.

The first of these, the production of unintended consequences, is obvious and something that Oakeshott dealt with briefly. This is not the concern that Rationalist

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[68] Mokhiber, "Toward a Measure of Dignity: Indicators for Rights-Based Development", conference paper for "Statistics, Development and Human Rights", International Association for Official Statistics, 2000.
[69] See Malhotra and Fasel, "Quantitative Human Rights Indicators - A Survey of Major Initiatives", presented at the Expert Meeting on Human Rights Indicators, Turku, Finland, March 2005, available at http://www.gaportal.org/resources/detail/quantitative-human-rights-indicators-a-survey-of-major-initiatives
[70] OHCHR, *supra* note 17 at 30.

endeavours will necessarily result in bad outcomes (although this certainly may be the case[71]); it is rather that, being weighted towards only half of the available sphere of knowledge (the technical), Rationalist projects can only at best be half-right. They must therefore result in unforeseen effects. While Oakeshott did not use this language, he was clearly here alluding to something similar to Merton's "unanticipated consequences of purposive social action"[72] - a theme which scholars have subsequently teased out of Oakeshott's work.[73] That is to say, an approach which is at best half-right will also be at best half-wrong, and often in such a way that its proponents cannot recognise.

Unanticipated consequences must manifest themselves in the indicator project because both the measured and the users of measures have the tendency to change their behaviour as a result of the measurement concerned. Measures "create social worlds" by causing people to think and act differently.[74] Power, in his work on audits, divided such reactions into decoupling and colonisation.

In the first instance, there is a strong incentive for the subjects of audit to attempt to render the process "ceremonial" - to produce comfort in the auditing body through ritualized compliance and the production of "auditable form" rather than actual substance.[75] In other words, States may simply "buffer away" the monitoring process through going through an ineffectual but apparently exhaustive set of checking and measurement, issuing of technical guidance, production of measures and metrics, and so forth.[76] While, as Power argues, such

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[71] See, for instance, Barsh, *supra* note 29; S. Morse, *Indices and Indicators in Development: An Unhealthy Obsession with Numbers* (Earthscan, 2004); or Bhuta, "Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order", in Davis *et al*, *supra* note 3, 132, at 147-149.

[72] Merton, "The Unanticiated Consequences of Purposive Social Action" 1 (6) American Sociological Review (1936) 894.

[73] See e.g. Teles and Kaliner, "The Public Policy of Skepticism" 2 (1) Perspectives on Politics (2004) 39.

[74] Espeland and Stevens, "Rankings and Reactivity: How Public Measures Recreate Social Worlds" 113 American Journal of Sociology 1 (2007)

[75] Power, *The Audit Society* (OUP, 1997) at 96.

[76] See also Meyer and Rowan, "Institutionalised Organisations: Formal Structure as Myth and Ceremony", in Powell and DiMaggio (eds.) *The New Institutionalism in Organizational Analysis* (Chicago University Press, 1991) 41-62.

efforts can never be completely successful, they shift the focus away from the proper moral concern (in the case of human rights, protection of individual human beings) to something altogether more abstract and ultimately often meaningless: the creation of auditable outputs to satisfy external monitors as an end in itself.[77] To this might be added the opportunity cost of diverting resources and time towards the creation of auditable performance (indicators, standards, measures, and associated data collection and disaggregation) as opposed to the actual protection of individual citizens' human rights.

In the second, precisely the opposite concern is that the values and practices of audit permeate an organization - or a State - to such an extent that it creates new mentalities, new strategies, and new goals which interact in hitherto unknowable or unpredictable ways. Actors change their behaviour and activities in the name of these new values, and they do so in complex ways which may result in unintended and undesirable outcomes. Power uses the example of the Research Assessment Exercise in UK universities, which caused academics to prefer publishing in journals to books, and to prefer not to spend time doing the activities which were not measured, such as editing books and reviewing publications.[78] While these effects are not catastrophic for higher education or research in the UK, they are certainly different from what was desired or intended. We can expect similarly unpredictable effects to take place wherever audit takes place - with the danger not being that they are necessarily negative, but that they are unknown and unknowable *ex ante*.

As Power puts it, decoupling and compartmentalisation are inevitable because individuals are "infinitely more complex and adaptable than normalizing attempts to measure and control them"[79], but at the same time colonisation-through-audit must also always be expected, because motivations will always tend to become aligned with targets. This, at its

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[77] Power, *supra* note 75, at 121.
[78] *Ibid*., at 100.
[79] *Ibid*., at 120

worst, produces an indicator culture which simply creates a game-playing mentality for the audited, and "reverse effects" in which the production of auditable performance actually undermines the initial aim.[80]

Of greater concern to Oakeshott, however, was that the twin desires of the Rationalist, on the one hand for uniformity and certainty, and on the other for the application of principle distilled from experience, would diminish and displace discourse; that they would close conversation through the application of reason to finding the best or correct course. And indeed this danger is immanent in the human rights indicator project.

In the first place, if the content of rights has been determined through attributes, and delineated through specific indicators, then there must be a chilling and finalizing effect on conversation and dialogue - for if a set of indicators and attributes define a given right's content, then what need is there to discuss alternative visions of that right? There are merely numerical measures by which to assess performance. This, indeed, was foremost among Oakeshott's concerns; whereas unintended consequences are almost mentioned as an aside, he was particularly anxious that the aim of Rationalist projects was to provide finality and certainty, rather than a continual making-do.

The capacity for indicators to reduce and close off conversation has been widely acknowledged. Rosga and Satterthwaite, for instance, identify the dangers associated with internationally-agreed indicators "artificially [closing] the gap between international law and domestic policy",[81] whereby national political discourse and contestation about rights is simply bypassed through the manifestation of apparently neutral and objective indicators, agreed in supra-national fora, in domestic policy. The OHCHR's guide, indeed, is explicit about this in its advocacy of the introduction of indicators into national human rights action

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[80] *Ibid*.
[81] Rosga and Satterthwaite, *supra* note **Error! Bookmark not defined.**, at 308.

plans, development strategies, and budgeting:[82] national budgets being fixed in line with internationally agreed targets, whether one agrees with a given target or not, indisputably terminates or sublimates political conversation surrounding the use of public funds.

Yet in a sense the closing-off of dialogue and conversation is a much more subtle and pervasive process, associated not with the outright and absolute introduction of human rights indicators wholesale into domestic policy but with the creation of, to paraphrase Kingsbury et al, a technique of global governance. It has been persuasively suggested[83] that indicators are part of what Rose refers to as a method of "governing at a distance" - a representation of how political power becomes reconfigured so as to provide for the autonomy of individual actors while at the same time governing their conduct through supposedly neutral measures - "the instrumentalization of a regulated autonomy".[84] Governing at a distance, in other words, is governance which does not regulate actors directly, but rather attempts to link their behaviour to political objectives, and is particularly useful - or indeed crucial - where systems are decentralised. Indicators in the sphere of international human rights, it seems, are a mechanism for achieving this: they allow State actors to have autonomy within a largely decentralised system while at the same time aligning their behaviour towards certain political goals (i.e. predetermined conceptions of human rights) through the use of apparently apolitical measures and standards.[85] So, indeed, the cloak of neutrality is of particular usefulness to the marketing of indicators: it is precisely because they depoliticise what would otherwise be highly contested choices that they are most useful. As Rosga and Satterthwaite point out, indicators purport to offer technical answers to what would otherwise be extremely difficult questions, and this makes indicators presentable as a kind of neutral exercise which

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[82] OHCHR, *supra* note 17, at 103-132.

[83] By e.g. Davis, et al, "Indicators as a Technology of Global Governance" 46 (1) Law and Society Review 71 (2012), at 81.

[84] See Rose, "Governing 'Advanced' Liberal Democracies", reproduced in Miller and Rose, *Governing the Present* (Polity, 2008) 199, at 212-213.

[85] On this point, see also Satterthwaite, "Indicators in Crisis: Rights-Based Humanitarian Indicators in Post-Earthquake Haiti" 43 NYU Journal of International Law and Politics (2010) 865.

ought to be voluntarily accepted, rather than an assertion of authority and power.[86] This is useful in securing voluntary compliance on the part of what are commonly referred to as "human rights stakeholders", and persuading States to submit to the supervision of the treaty bodies and the OHCHR on the basis that this supervision is merely technical and therefore non-threatening. But by extension this can only have the effect, and indeed is often designed to have the effect, of removing human rights from the sphere of domestic conversation and debate.[87] This in turn distances human rights from the very stakeholders who have most at stake: ordinary citizens.

The language and mentality of audit reinforce this denuding of discourse. For debate is not, of course, entirely ended by the adoption and creation of indicators. Rather, much remains to be discussed both in their creation and the application of the broader conceptual framework. But this discussion, taking place as it does away from domestic politics in the realm of international experts and technicians, submerges political questions in technical arguments surrounding how and what to measure, how to collect data, and so forth.[88] While political considerations are immanent in the process, they are left unexplored. Moreover, because quantitative measurement produces a sense of definitiveness and objective reality in the indicators it produces, it conceals the underlying socio-political claims the indicators may represent.[89] That is, in deciding what to include or exclude in a given indicator, the producer is making decisions, implicitly, about what is or is not desirable - and this can only be a political, value-based process, especially in a field such as human rights. This means that depoliticizing, through the application of technical standards, what would ordinarily be politically contested, may provide a sense of neutrality and objectivity, but it is a false sense. It removes socio-political values from the public realm and embeds them in the construction

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[86] Rosga and Sattherthwaite, *supra* note 31, at 311.
[87] See for instance Felner, *supra* note 30, at 133-134.
[88] See Merry, *supra* note 66, at 588.
[89] See Davis et al, *supra* note 83, at 87.

of indicators - which shifts the balance of power towards the experts engaged in that process.[90] The scope of influence of politicians, and politics, is correspondingly reduced, and the focus moves away from the ethical towards manner - from content to form.[91]

This means, in turn, that technique replaces the difficult process of moral and political education which Oakeshott held so important. "The morality of the Rationalist is the morality of the self-conscious pursuit of moral ideals, and the appropriate form of moral education is by precept, by the presentation and explanation of moral principles."[92] This can be seen very clearly in the way in which indicators are intended to transform the administration of human rights law at the domestic level into, essentially, an exercise in discourse-free checking: once the indicators have been agreed, human rights performance can apparently be assessed objectively, with quantitative improvements across the various metrics demonstrating that compliance is taking place and the human rights situation is improving. The questions of whether it actually is, and what that means, are sublimated beneath the audit process, but, more importantly, so are questions of morality and the field of moral education. Rather than the slow, flexible evolution of the moral traditions and habits of a community through political conversation, there is instead simply the blunt application of the precept. Rather than a concept of a given right developing organically within the society in question, instead there is the displacement of localised rights and rights dialogue[93], and the suffocation of local idioms.[94] Instead of injustice being framed around the individual, it is framed around failure to perform against targets or the mere failure to produce auditable performance itself. Instead

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[90] *Ibid*.

[91] See Jacobsson, "Standardization and Expert Knowledge", in Brunsson and Jacobsson (eds.) *A World of Standards* (OUP 2002), at 46-48.

[92] Oakeshott, *supra* note 32, at 35.

[93] See e.g. Mazzone, "The Rise and Fall of Human Rights: A Sceptical Account of Multilevel Governance" 3 (1) Cambridge Journal of International and Comparative Law (2014) 929.

[94] See e.g. Hafner-Burton and Ron, "Seeing Double: Human Rights Impact Through Qualitative and Quantitative Eyes" 61 (2) World Politics (2009) 360, at 393-394.

of being a discourse about establishing what is right and wrong - or just - in given cases or a given policy, the matter of enshrining and protecting human rights instead becomes a task for management.[95]

Ultimately, this also has the effect - and, as has been seen, often the stated intention - of diminishing the role of the subjective, experiential, and practical in the protection of human rights and the assessment of its performance. It represents the reduction, as Oakeshott put it, of "the tangle and variety of experience to a set of principles".[96] The Rationalist view of experience is a limiting one. It accepts only experience that has been converted into a formula, not the wider sense of experience cumulating within a society into traditions and habits which, though mysterious or opaque, contain its accumulated practical knowledge. This leads the Rationalist, indeed, to cut himself off from tradition and in turn become "apt to attribute to mankind a necessary inexperience in all the critical moments of life";[97] to paternalistically ignore local and contextual wisdom in the name of certain and uniform objective measurement - to seek to extract knowledge from its context and its history.[98] The power of indicators to reduce and submerge the complexities of contextual phenomena into standards and categories is a ready example of the capacity for Rationalism to act in this way, as is the reduction of subjective, expert narrative into quasi-objective measures through coding into numerical representations, or the reduction of lived experience to survey data which transforms the rich tapestry and complexity of communities and individuals into quantitative measures such as "percentage of individuals who feel safe walking alone at night". It is the imposition of the simplicity of principles onto the "tangle and variety" of

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[95] See Koskenniemi, "International Law: Constitutionalism, Managerialism and the Ethos of Legal Education" 1 European Journal of Legal Studies (2010)
[96] Oakeshott, *supra* note 32, at 2.
[97] *Ibid*., at 3.
[98] Merry, "Measuring the World: Indicators, Human Rights and Global Governance" 52 Current Anthropology (2011) 84.

lived experience. It is to ignore how matters are currently "attended to", and instead to approach matters as a social engineer.[99]

Removing moral discourse from the sphere of human rights and driving it into "what is measurable instead of what matters"[100] then has the effect of depriving the human rights movement of its power as a mechanism for justice - and also diminishing its potential through focusing on what is measurement-friendly. The unpredictable, ungovernable, chaotic nature of changing social norms, which may seem dormant for decades before undergoing dramatic shifts, is lost amidst the need to demonstrate structure, process and outcome. Denuding the human rights movement of discourse by shifting the emphasis towards verification and audit strips away its political power: the end result is the draining away of its spirit. Instead of Kant's moral politician, the "genuine republican" seeking to act in the right way based on the context of the society in which he lived, there is instead simply the development and application of professional technique.[101] Instead of narrative, the telling of stories "that keep alive and strengthen the ideas of freedom, equality and universality", there is a managerial sensibility which sees its role as verification of performance towards outcomes agreed amongst a caste of international experts, rather than justice.[102]

6. The Transformation from Tool to Paradigm

Yet most advocates of the use of quantitative data in the measurement of human rights see a continued role for the subjective and experiential complemented by the use of indicators: the OHCHR's Guide itself describes indicators as a "tool to support" narrative or judicial

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[99] See Oakeshott, "Scientific Politics" 1 Cambridge Journal (1947-48) 347, at 355.
[100] ICHRP, *supra* note 2, at 4.
[101] Koskenniemi, *supra* note 95.
[102] ICHRP, *supra* note 2, at 3, describing how donors typically adopt the view that human rights practitioners have "too broad a justice perspective".

assessments,[103] and this perspective is fairly common. As Thede describes it, the majority

"see the usefulness of a combination of analysis and quantified data, the latter being a useful

complement to the former but never under any circumstances being able to stand on its

own."[104] And there are, indeed, alternative visions for the use of indicators which suggest

how the technical knowledge provided by statistical measures can supplement the intuitive

and tacit practical knowledge of the practitioner, rather than supplant it.

An extensive example of such a process is provided by Stone in the form of "locally

usable near real time 'active indicators'", used by the Jamaican Constabulary Force to mine

data regarding raids and searches in order to establish best practices, or by the Attorney

General of Lagos State to establish how many prisoners were on pre-trial detention in prisons

and for how long, to focus resources on the elimination of bottle-necks.[105] Here, quantitative

data in the form of indicators is used in a decentralised fashion by local professionals and

experts to notice patterns and find hidden discrepancies or misallocations of resources in

order to improve their work. Stone contrasts this with the many "carcasses of failed indicator

projects" littering developed countries – the results of resistance to the exercising of external

power on the part of local agencies ("those in positions of immediate and legitimate

authority", as Stone puts it), and of constant shifting priorities forced by new indicators

demanded by governmental ministers, donors, or UN agencies.[106] Rather, Stone describes the

use in Jamaica and Lagos of indicators which are designed specifically for use by an official

with formal authority over those expected to produce the outcome being measured – for

instance, the Commissioner of the Jamaican Constabulary Force.[107] This enables close,

responsive, timely measurement for a clear purpose – improving the effectiveness and

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[103] OHCHR, *supra* note 17, at 4.
[104] Thede, *supra* note 59, at 270.
[105] Stone, "Problems of Power in the Design of Indicators of Safety and Justice in the Global South", in K. Davis, A. Fisher et al (eds.), *supra* note 3, at 282-294.
[106] *Ibid*., at 281-283.
[107] *Ibid*., at 285.

efficiency of police raids – and, crucially, ensures that data is examined at the level of operational responsibility by those in positions of legitimate authority, not national or international figures who are far away from the actual practice in question (both literally and figuratively) and who lack accountability and hence legitimacy in the eyes of those working "on the ground". Other examples from the Philippines and Colombia demonstrate how human rights indicators can be developed and used locally, even where created in response to international standards or principles, to provide information about local needs.[108]

These, it seems, could be examples of Oakeshott's description of the combination of the technical and the practical made real: the tacit, intuitive, experiential nature of the practitioner supported and enhanced by the application of statistical tools in a bottom-up, contextual process carried out at the most decentralised level possible – and the approach certainly holds promise in the field of human rights.

Given this possibility, then, it seems churlish, even disingenuous, to describe the move towards indicators as being in danger of crowding out less technical methods of monitoring human rights. Construed as simply being supplementary to and supportive of judgment-based, subjective assessments, where is the harm in an increased use of indicators, moderated by common sense?

The danger is that the Rationalist tendency is always at risk of becoming dominant. Perhaps the greatest concern is simply that the desire for ever greater acquisition of technique will accelerate - and that it will consequently come to subvert the experiential, practical knowledge, analysis and assessments of the locally-embedded expert. Despite best intentions, in other words - despite human rights practitioners taking the view that quantitative measures

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[108] See Casiple, *supra* note **Error! Bookmark not defined.**, and Urueña, "Internally Displaced Population in Colombia: A Case Study on the Domestic Aspects of Indicators as Technologies of Global Governance", in K. Davis et al (eds.), *supra* note 3, at 249.

and indicators are simply complementary to human judgment about how to best protect

human rights in a given context - it may be that the Rationalist tendency will nonetheless turn

monstrous (not least because of financial considerations, which will always prioritise

measureable "impact"). Merry describes in compelling terms how, at the treaty body level,

"indicator culture" has come to be the default mode of monitoring human rights

performance[109], and in the UK the Equality and Human Rights Commission's work has come

to heavily revolve around the use of indicators in a "measurement framework".[110] At a recent

workshop organised by the ICHRP the participants expressed the concern that "evaluation

methods and frames of impact assessment [are] exerting a disproportionate pressure on the

narratives and practices of human rights work, distorting priorities, objectives and

processes."[111] Or, as Gready puts it, "as human rights practice increasingly adapts to the

technocratic requirements imposed by external actors, it will distance itself from its

normative foundations."[112]

Why should this be so? Oakeshott's final, and most pressing, concern was that

Rationalism would perpetuate itself: that the field of morality and moral education would

become more and more a matter of the acquisition of technique. This was, primarily, because

of the view the Rationalist had towards practical knowledge. Seeing it as inferior to technical

knowledge, he begins to neglect it, if not to actively attempt to extirpate it. And because of

this, he "dries up [his] mind" - he sees the only solutions to perceived problems as the

application of yet more technique. "All the Rationalist can do when left to himself is to

replace one rationalist project in which he has failed by another in which he hopes to

[109] Merry, *supra* note 28.

[110] Equality and Human Rights Commission, available at http://www.equalityhumanrights.com/about-us/our-work/key-projects/equality-measurement-framework (accessed 25/03/2015).

[111] ICHRP *supra* note 2, at 3.

[112] Gready, "Reasons to be Cautious about Evidence and Evaluation: Rights based approaches to development and the emerging culture of evaluation 1 (3) Journal of Human Rights Practice (2009), at 383.

succeed."[113] The political content of human rights - the goal of justice for the individual against the power of the State - becomes stripped away by the need for better measurement and better performance based on what can be measured.[114]

The concern, then, is not that anybody advocates the replacement of judgement-based assessment by the use of purely objective-seeming statistical measures, indicators and benchmarks. It is rather that the Rationalist propensity sees the resolution of problems as purely being a matter for the application of technique, rather than the more difficult, time-consuming and decentralised - *uncontrolled* - method of developing practical knowledge. Instead of the slow, steady, quiet evolution of moral principle, and of the tacit, experiential knowledge of the expert, the default position comes to be that quantitative measurement provides the cure for all ills. Once the culture of statistics and indicators enters the mainstream, it becomes difficult to reverse. Where practical knowledge is seen as "nescience", the only solutions postulated will be technical in nature: the only cure for Rationalist failures will be more Rationalism. And this describes with great accuracy the response to the problems associated with the indicator project, which are characterised by, if anything, an even greater tendency towards Rationalism than the project itself.

Indeed, it seems that the temptation towards centralisation and certitude in the production and use of indicators is almost inescapable once the indicator culture has taken hold: the Rationalist tendency, unable or unwilling to leave too much space for the practical, for the experiential, for the tacit, always prefers the application of technique. This is most evidently the case for those who view the use of globally-determined quantitative measures as essential to the realization of human rights: "While the criticisms and challenges to the creation of international indicators for ESCR are informative," as Welling rather revealingly puts it, "they do not justify allowing the international community to remain uninformed about

[113] Oakeshott, *supra* note 32, at 32.
[114] ICHRP, *supra* note 2, at 4.

the deficiency of ESCR protection and access around the world."[115] In other words, indicators may have their flaws, but the solution can only be the generation of more data which the "international community" can utilise. The cure is only ever technical in character; it is the production of frameworks and systems by which techniques of indicator creation and usage can come to be implemented. The alternative is for the "international community" to be *uninformed*.

So the first step in the next stage of rights-based development is identified as "the compilation of an internationally agreed and scientifically adequate list of core development indicators for civil and political rights, based on international standards";[116] the solution to conceptual problems surrounding economic, social and cultural rights is presented as being the development of more detailed suites of indicators by the CESCR so as to give "concrete meaning" to those rights;[117] and the solution to discrepancies between agreed minimum standards for humanitarian relief due to differing local contexts is presented as "[describing] the gap between the standards and indicators listed in the handbook and the ones reached in actual practice…[and explaining] what needs to be changed…".[118] The OCHCHR's Guide, which acknowledges the limitations of the use of indicators in its opening pages, argues that the solution is stronger involvement of human rights stakeholders in their production.[119] The problems associated with being half-right are often resolved, that is, through the application of technique; through ever more Rationalistic responses.

The tendency of Rationalism to perpetuate itself is also apparent even where the entire indicator project is viewed with scepticism. Thede, for instance, while acknowledging the dangers of "statistical mystique", the value-laden nature of indicators, the difficulty or impossibility of capturing values in numerical form, and the prospect of a "productivist"

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[115] Welling, *supra* note 10, at 958.
[116] Mokhiber, *supra* note 68, at 9.
[117] de Beco, *supra* note 67, at 40.
[118] "Humanitarian Charter and Minimum Standards in Disaster Response", Sphere Project (2004), at 8-9.
[119] OHCHR, *supra* note 17, at 4.

approach undermining human rights themselves, still comes to the conclusion that what is required is to "establish what are the component aspects of each right, what the relationship of each component is to the overall respect of that right, and finally what are the indicators that can generate meaningful information about one or the other of the components of that right" - in short, a "theory to link concept to indicator".[120] In other words, those issues are to be resolved with the application of reason to reach solutions: precisely the type of efforts undertaken by the OHCHR to centralise and systematise a conceptual framework for determining and measuring the attributes of each and every human right.

Merry, meanwhile, in a careful and considered analysis of the problems associated with human rights indicators (noting that they are unrepresentative, dependent on the cooperation of States Parties to the treaties, dependent on ranking to have any effect, decontextualized and ahistorical, and lacking a sanction mechanism for failures of implementation) comes to the apparent conclusion that what is required is simply more 'powerful' indicators permitting ranking, punishment for lack of achievement, and above all "clear theory embedded in the indicator"[121] - more simplification, more clarity, and more streamlining. The problems associated with the application of technique are cured by the application of yet more of it.

And despite an extensive and considered critique of the development of the indicator project, Rosga and Satterthwaite similarly propose a solution which boils down to the production of a set of outcome indicators produced by the treaty bodies, the OHCHR, and NGOs, and applied universally. Here, the approach adopted by Fukuda-Parr et al, i.e. "ranking countries by measuring the relationship between the extent to which a population enjoys fundamental economic and social rights and the resource capacity of the State to fulfil

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[120] Thede, *supra* note 59, at 268.
[121] Merry, *supra* note 28.

ESR obligations"[122] is cited as promising - though how this approach avoids the pitfalls identified by the authors is not made clear. Political conversation at the domestic level is to continue, but only if framed around the universally-applicable Donabedian model, with the power to determine structural and process indicators devolved to the national level - outcome indicators having been centrally mandated. In addition, indicators must be created to measure political participation, so as to avoid the bypassing of political discourse in domestic politics.[123] The solution to the pitfalls of governmentality, it turns out, is more of it: what is required is the utilization of indicators to permit global governance to interface with the governed more directly.[124]

The Rationalist propensity's tendency to propose Rationalist solutions is well illustrated by the fact that even Stone is still tempted, ultimately, to suggest that what is required is an "iterative method" for the construction of global indicators. That is, unwilling to entirely leave the production and use of indicators to practitioners or experts, whether liaising across borders or otherwise, Stone eventually to the proposition that there ought to be a "system or framework of indicators that can be used across countries, in very different national contexts".[125] While this ought to be produced from the "bottom up", the character of the Rationalist still lurks in the background, in that the end result seems to remain a globally-produced and universally applicable system. The Rationalist propensity is unsatisfied with any approach which does not, ultimately, lead to the uniform and certain application of principle, however this is produced. While there is promise, then, in the notion of indicators produced and consumed by those in positions of legitimate authority, as Stone suggests, there

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[122] Fukuda-Parr, Lawson-Remer, Randolph, "Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment" (2008). Economics Working Papers. Paper 200822. Available at http://digitalcommons.uconn.edu/econ_wpapers/200822.
[123] See Rosga and Satterthwaite, *supra* note 81, at 312-314.
[124] *Ibid*., at 315.
[125] *Ibid*., at 292-294.

must come with it a wariness of Rationalist tendencies towards uniformity and certainty in different guises.

Conclusion

Describing the indicator project, and the indicator culture which surround it, as Rationalist gives us a fruitful method for understanding not only its flaws but also its growth. What, then, is to be proposed? One obvious critique of Oakeshott's position is that, as elsewhere in his work, he seems to present a bleak scenario in which matters have progressed too quickly and too far in the wrong direction to ever be reversed.[126] He appears to present us with a vision of a Rationalist tendency which grows ever more pronounced until there is space for nothing else. This article considers that vision to be compelling, but at the same time recognises that there is considerably more nuance both to Oakeshott's position and to the current status of human rights monitoring. In fact, there always remains the possibility of reverse so long as there is the "positive power" of defence against overweening Rationalism.[127]

　　First, this must take the form of a greater awareness of the importance of balance between technical and the practical knowledge. There must be a greater acknowledgement of the importance of the role that the "pesky, irreducible core of human judgment" has to play in the monitoring of human rights performance. Human societies are complex, and their niceties in many ways defy quantitative measurement; the necessity for the kind of tacit, practical knowledge that only comes about through deep familiarity with the subject matter cannot be overstated. Attempting to monitor performance through technique - especially if technical methods come to dominate the landscape - will always fall foul of the tendency to be, at best, half-right: ignorant of the intuitive, tacit, subjective understanding of what is best that comes

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[126] See in particular "The Tower of Babel", in *Rationalism in Politics*, *supra* note 32.
[127] Oakeshott, *supra* note 32, p. 35.

about only from experience and practice, and hence leading to poor decisions and unintended consequences.

Second, there must be a greater level of scepticism about solutions to the problems associated with Rationalism which themselves hold technique to be sovereign. It is tempting, when faced with concerns about the misuse of statistics, the growth of technocracy and international governmentality, and the denuding of moral discourse associated with the turn to human rights audit, to propose - as amply illustrated by the examples in the previous section - even more technocratic solutions which cede yet more power to the processes in question. This temptation must be resisted, or at the very least questioned; the pitfalls of a preoccupation with technique will not be avoided by the application of more of it.

And third, this article has summarised some of the dangers associated with indicator projects constructed at the international level, divorced both from domestic and local political discourse and the work of local human rights practitioners. In particular, it has expressed strong concerns with the notion that either indicators themselves, or systems for producing and utilising them, should become universal and uniform - that the Rationalist desire for certainty, centralisation and the application of precept should come to dominate. Rather, the preference must surely be for human rights indicators that are used in a manner similar to that which Stone describes: created by and for local actors who have operational responsibility and accountability for what is being measured. This may go against the prevailing tendency amongst those interested in the international monitoring of human rights, which finds it deeply unsatisfactory and indeed even dangerous to see the conceptualisation and measurement of human rights as something in need of decentralisation. Yet this article demonstrates why such a rebalancing is needed; the risk otherwise is of diminishing moral discourse in human rights and thus removing discussion about what rights are, and what they

protect, from the conversation of human societies – a prospect which cannot but be

detrimental to their realisation.