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Measuring the Unmeasurable: Foreign Aid and the Rule of Law

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MEASURING THE UNMEASURABLE: FOREIGN AID AND THE RULE OF LAW

NATALLIA KARKANITSA*

This article provides an analysis of the international indexes and rankings that assess and compare the rule of law globally. It first starts with a discussion on the necessity of the international measurements of the rule of law in context of the foreign aid allocation to developing countries. Then, this article defines the rule of law and explains its relationship with governance and human rights. This article further reviews three rule of law indexes from the World Bank, the World Justice Project, and Bertelsmann Stiftung and Sustainable Development Solutions Network, using the position of Belarus in these measurements as a case study. Building on the critical aspects of the rule of law indicators, this article provides an alternative framework to assess the quality of institutions, which might be a more efficient measure of governance in the framework of foreign aid distribution and evaluation.

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I. INTRODUCTION

Global development rankings and indicators have been steadily multiplied by international organizations and widely researched by scholars.¹ The emerging “indicator culture” places a high value on numeric data as a form of knowledge and basis for decision making.² However, as noted by the New York University project on global indicators, a comparative study of their actual use as a technique of

1. See, e.g., Andrew Dawson & Liam Swiss, *Foreign Aid and the Rule of Law: Institutional Diffusion Versus Legal Reach*, 71 BRIT. J. SOCIO. 761, 762–64 (2020) (examining how foreign targeted rule of law policies affects legal reform within countries); Inder SUD, REFORMING FOREIGN AID: REINVENT THE WORLD BANK 10–12(2017) (critiquing the current form of governance of the World Bank in providing foreign aid to countries to ensure better deliver of development); SALLY ENGLE MERRY, THE SEDUCTIONS OF QUANTIFICATION 1–26 (John M. Conley & Lynn Mather eds., 2016) (analyzing ethnographically how global indicators focused on violence against women, trafficking in persons, and human rights violations are produced and used); MICHAEL J. TREBILCOCK & MARIANA MOTA PRADO, ADVANCED INTRODUCTION TO LAW AND DEVELOPMENT xi (2014) (scrutinizing the relationship between legal institutions and development outcomes); Kevin E. Davis et al., *Introduction: Global Governance by Indicators*, in GOVERNANCE BY INDICATORS GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 3 (Kevin E. Davis et al., eds., 2012) (asserting that the organizations and agencies are increasingly producing and using global governance indicators at a rapid pace).

2. ENGLE MERRY, *supra* note 1, at 9.

global governance is missing.³ Similarly, there is not enough research on the interpretation of indicators in the process of the distribution and evaluation of foreign aid (also referred to as official development assistance), in promotion of governance reforms and assessment of their outcomes.⁴ Anthropologist Marilyn Strathern formulated a rule, often referred to as a Goodhart's law, which holds that a measure that becomes a target ceases to be a good measure.⁵ Goodhart's law speaks to one of the key risks of quantitative measurements of governance and rule of law—data manipulation for a better ranking of the country.⁶ This article poses a fundamental question on the relevance and efficiency of global rule of law measurements in the context of the implementation of foreign aid programs.

Historically, the countries that initially received funding from the International Bank for Reconstruction and Development had high functioning institutions and human capital despite the ravages of war.⁷ So, the purely economic considerations of the Bank in its decision-making worked well for these countries as the funding helped facilitate a transition from a wartime to peacetime economy.⁸ However, the long term achievement of sustainable development has required a

3. See generally Davis et al., *supra* note 1, at 4 (“Yet the increasing use of indicators has not been accompanied by systematic study of and reflection on the implications, possibilities and pitfalls of this practice.”).

4. See Davis et al., *supra* note 1, at 4 (discussing how the expansion of the use of indicators has not been met with an appropriate critical evaluation).

5. See Marilyn Strathern, ‘Improving Ratings’: *Audit in the British University System*, 5 EUR REV. 305, 308 (1997).

6. See, e.g., WORLD BANK GROUP, *DOING BUSINESS 2020* 77–85 (2020) (comparing two indicators for economies, one that measures by an individual score and another by ranking all countries together, and demonstrating how the success of a country is dependent on the indicator used as the score-based indicator captured how a country's economy changed over time, whereas the ranking-based indicator merely showed change relative to other countries).

7. For the purposes of this article the World Bank (WB) includes both International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA).

8. See *Digitized Records of the World Bank's First Loan*, WORLD BANK, <https://www.worldbank.org/en/archive/history/exhibits/Digitized-Records-World-Bank-First-Loan> (showing the World Bank's first loan was to France because of France's “importance . . . in the economic position made it particularly fitting that France should be the first country whose reconstruction the Bank should play an active part” as “France is vital to Western Europe because of her size and her productive capacity”).

multidimensional approach, including economic, social and environmental aspects built on good governance, rule of law, and human rights.⁹

Promotion of legal reforms as a development strategy started in the 1950s, when many former colonies became independent and the providers of foreign aid to these countries were committed to a modernization of their laws and institutions.¹⁰ More recently, empirical studies of the impact of governance on development show that the rule of law has a large effect on development outcomes.¹¹ Hence, since the 1990s a significant part of the official development assistance has been channeled to governance reforms, while the rule of law has become a mandatory component of most development programs.¹²

Heads of states first promoted the connection between rule of law and sustainability at the United Nations (“U.N.”) World Summit in 2005.¹³ This international consensus was confirmed by a statement at the 2005 World Summit Outcome that good governance and the rule of law were essential for sustained economic growth and sustainable development as well as the eradication of poverty and hunger.¹⁴ In the meantime, the “aid-institutions paradox” of how to improve dysfunctional institutions of the countries receiving foreign aid and sustain their progress remains relevant.¹⁵ That is why the provision of foreign aid is often conditioned on rule of law reforms, which are still

9. See, e.g., TREBILCOCK & MOTA PRADO, *supra* note 1, at 45 (detailing the economic perspective of law and development as a multidimensional approach to development).

10. *Id.*

11. *Id.*

12. See *id.* (“Reflecting this view of the relationship between the rule of law and development, beginning in the 1990s there has been a massive surge in development assistance for law reform projects in developing and transition economies involving investments of many billions of dollars.”).

13. Elyse Wakelin, *Rule of Law and the UN Sustainable Development Goals, in PEACE, JUSTICE AND STRONG INSTITUTIONS, ENCYCLOPEDIA OF THE UN SUSTAINABLE DEVELOPMENT GOALS* 822, 823 (Walter Leal Filho et al. eds., 2021).

14. G.A. Res. 60/1, World Summit Outcome, ¶ 11 (Sept. 16, 2005) [hereinafter World Summit Outcome].

15. See TREBILCOCK & MOTA PRADO, *supra* note 1, at 202–03 (describing the paradox assessed by long-time aid practitioners in which in some developing countries aid aimed to fix dysfunctional institutions has instead perpetuated them).

criticized for being transplants of norms or institutions from the Western countries that fail to work as expected or even disrupt the social order in developing countries.¹⁶

Barry R. Weingast, Professor of Political Science at Stanford University, studied the challenges of transplanting the rule of law to the developing countries.¹⁷ He concluded that the failure of introducing the rule of law is partly attributed to the absence of perpetuity as states lack a continued commitment to honor the established constitutional rules or sustain rights and institutions.¹⁸ Weingast relied on a conceptual framework, developed together with Douglass C. North and John Joseph Wallis, which distinguished between the natural states, limited access orders, and open access orders.¹⁹ However, the proposed framework and most of the scholarship does not explore the role of public participation in sustaining the gains of rule of law reforms, and this article aims to fill this gap and emphasize the importance of public participation, especially in the projects of the international technical assistance.

The indicators and other forms of statistical knowledge have been central to the exercise of state power, as modern states require knowledge of the characteristics and capacities of the population for

16. See Julio Faundez, *Douglass North's Theory of Institutions: Lessons for Law and Development*, 8 HAGUE J. ON RULE L. 373, 411 (2016) (noting Douglass North's critique that developing countries face a "daunting task" of implementing institutional changes transplanted indiscriminately from Western countries that took centuries, and many tries, to achieve those same institutional characteristics).

17. See Robert L. Nelson & Lee Cabatingan, *A Preface and an Introduction*, in GLOBAL PERSPECTIVES ON THE RULE OF LAW 4 (James J. Heckman et al. eds., 2010) (pointing to Weingast's research on transplanting "rule-of-law institutions" to developing nations).

18. See Barry R. Weingast, *Developing Countries and the Rule of Law*, in GLOBAL PERSPECTIVES ON THE RULE OF LAW 28, 28–36, 46 (James J. Heckman et al. eds., 2010) ("Central to creating the rule-of-law is creating a perpetual state whose institutions, rules, and policies do not depend on the identity of current officials or dominant coalition. The problem with natural states in the developing world is that almost none have perpetual states.").

19. See *id.* (juxtaposing the order of developed states and developing states as open access and natural state, respectively, and asserting that the institutions reformers wish to transplant into developing states are from open access orders in developed states and so they do not work in the natural state of developing countries).

its control.²⁰ As the role of international institutions in governance increases, the significance of indicators also increases.²¹ This article examines whether rule of law indexes could provide a realistic measurement of country governance, specifically the ones created by the World Bank, the World Justice Project, and Bertelsmann Stiftung and Sustainable Development Solutions Network.

This article proposes that governance, specifically, the rule of law, should be measured by the quality of institutions, and bilateral and multilateral donors could use it for the distribution of foreign aid and evaluation of its transformative outcomes. The article concludes by suggesting an alternative framework I developed as a tool to assess the quality of institutions.

A. SHOULD THE RULE OF LAW BE MEASURED?

Policymakers, international organizations, civil society, and academia use the international rule of law rankings and indicators to monitor the performance of countries and advocate for governance reforms.²² For foreign aid donors, the international measurements are even more useful as they need to prioritize development assistance, draft programs, and evaluate their outcomes in the recipient countries. The quality of governance has become an important determinant of the success of development programs.²³ The World Bank promotes its Worldwide Governance Indicators (WGI) project under the motto: “If you cannot measure it, you cannot improve it.”²⁴ These indicators help design, implement, and assess governance reforms.²⁵ So, the rule of

20. ENGLE MERRY, *supra* note 1, at 43.

21. *See id.*

22. *See* WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2021 9 (2021).

23. *See, e.g.*, USAID, RULE OF LAW POLICY: A RENEWED COMMITMENT TO JUSTICE, RIGHTS AND SECURITY FOR ALL 4–29 (2023) (centering the rule of law as in USAID’s development program and outlining the policy goals of USAID concerning the rule of law in global governance).

24. *See* Lord William Thomson Kelvin, Lecture on Electrical Units of Measurement (May 3, 1883) in OXFORD ESSENTIAL QUOTATIONS (Susan Ratcliffe ed., 4th ed. 2016) (“When you can measure what you are speaking about, and express it in numbers, you know something about it; but when you cannot measure it, when you cannot express it in numbers, your knowledge is of a meagre and unsatisfactory kind: it may be the beginning of knowledge, but you have scarcely, in your thoughts, advanced to the stage of science, whatever the matter may be.”).

25. *See* Daniel Kaufmann et al., *The Worldwide Governance Indicators*:

law measurement has become a useful tool for foreign aid programs monitoring and evaluation.

However, the limitations of the international indicators and rankings cause the risks of their potential misuse and misinterpretation because they start a life of their own after a public release.²⁶ The authors of the Rule of Law Index of the World Justice Project, for example, mention that they cannot be responsible for any decisions that are influenced by the rankings, but that they ensure the score reflects a real rule of law situation and its change over time.²⁷ The late anthropologist, Sally Engle Merry, Professor of the New York University Interdisciplinary School of Governance, was correct in stating that the easiness of using quantified rankings for different policy matters often outweighs the complicated work of substantive data interpretation.²⁸ So, the social aspects of indicators are ignored in the face of trust in numbers and the value of technical rationality.²⁹

In this regard, some countries started opposing the global ranking exercises; for example, Luxembourg challenged the ranking of economies in its comment to the new Business Ready (“B-READY”) project of the World Bank.³⁰ This new flagship report is aimed at assessing the business and investment climate in economies worldwide following the discontinuation of the Doing Business reports.³¹ Luxembourg further clarified that a single score for a

Methodology and Analytical Issues 2 (World Bank Pol’y Rsch, Working Paper No. 5430, 2010) (“The Worldwide Governance Indicators (WGI) are a long-standing research project to develop cross-country indicators of governance.”).

26. See RULE OF LAW INDEX 2021, *supra* note 22, at 183.

27. See *id.* (listing these limitations and encouraging users to use the index alongside other instruments in policymaking).

28. See generally ENGLE MERRY, *supra* note 1 (arguing that indicators seem more appealing to policymakers as they provide simple, seemingly objective and rational knowledge of a certain aspect of development but that such reliance on ease overshadows nuances in the data).

29. See *id.* at 5.

30. See BUSINESS ENABLING ENVIRONMENT (BEE) PROJECT: DEC GLOBAL INDICATORS GROUP (DECIG), WORLD BANK GROUP, PUBLIC CONSULTATION CONSOLIDATED COMMENTS 2 (2022) (“Luxembourg wishes to be recorded as opposing the ranking exercise, as it does not believe that it adequately captures the business environment in the country, and that a single score is therefore misleading.”).

31. See *id.* (outlining the aims of the B-READY project and how it will differ from the Doing Business indicator).

business environment was misleading, and a much more nuanced approach was needed, such as the executive summaries for all countries, with a narrative on the areas for improvement and highlights of progress.³²

The rule of law measurements, therefore, in addition to being a common good, pose multiple risks especially as they have become a tool of global governance.³³ The rule of law is a “transnational industry that constitutes a multi-billion dollar enterprise” that has been accompanied by the creation of multiple indicators aimed at measuring this phenomenon.³⁴ Official development assistance (“ODA”), also referred to as foreign aid, is government aid that promotes and specifically targets the sustainable development and welfare of developing countries.³⁵ The ODA totaled 185.9 billion U.S. dollars in 2021.³⁶ The reforms in governance often require more of a political will than the funding, but the donors still rely on the measurements of efficiency, impact, and sustainability of the sponsored programs.³⁷

The quality of institutions should be at the core of governance and rule of law measurement. In the 1990s, both the development thinking and the activities of international organizations were influenced by the work of American economist, founder of the new institutional approach, Douglass North.³⁸ He defined institutions as “the rules of

32. *Id.* at 5.

33. See generally Davis et al., *supra* note 1 (analyzing the increasing use of indicators in global governance and the impacts of rankings and measurements on countries and institutions).

34. Julinda Beqiraj & Lucy Moxham, *Reconciling the Theory and the Practice of the Rule of Law in the European Union Measuring the Rule of Law*, 14 HAGUE J. ON RULE L. 139, 142 (2022).

35. See *Official Development Assistance*, ORG. FOR ECON. COOP. AND DEV. (OECD), <https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/official-development-assistance.htm>.

36. *Id.*

37. See ORG. FOR ECON. COOP. AND DEV. (OECD), *AID PREDICTABILITY – SYNTHESIS OF FINDINGS AND GOOD PRACTICES 14* (2011) (emphasizing the dual importance of both donor resources and the political will of the recipients).

38. See Robert H. Bates et al., *The New Institutionalism. The Work of Douglas North [sic]*, in *INSTITUTIONS, ECONOMIC GROWTH, AND PROPERTY RIGHTS: THE LEGACY OF DOUGLAS NORTH*, 50–65 (Sebastian Galiani & Irai Sened eds., 2014) (noting that both academia and policymaking institutions were influenced by the work of Douglass North).

the game in a society, or humanly devised constraints that shape human interaction.”³⁹ This definition and the new institutional approach largely shifted the attention of the World Bank from technical economic issues towards broader institutional concerns under the motto “governance matters.”⁴⁰ The development was further re-conceptualized as the pursuit of human development, largely promoted by the U.N. Development Program, and as freedom realized in the enhancement of people’s capabilities.⁴¹

North, however, was skeptical about development assistance being capable of resolving economic and political problems faced by recipient countries.⁴² In his view, institutions embody human intentionality, so they are not natural and hence, cannot be expected to operate in accordance with predetermined plans.⁴³ A discrepancy between the growing amount of official development assistance allocated for governance and a diminishing rule of law trend around the globe causes reasonable doubts about efficiency of governance reforms promoted by the foreign aid.⁴⁴

Sally Engle Merry, Kevin E. Davis, and Benedict Kingsbury, professors at New York University, provided a deep overview of

39. See DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 3 (1990).

40. See Faundez, *supra* note 16, at 373–78 (tracing North’s impact on the development regime which began to focus on issues of governance and their tie to development).

41. See David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 7 (David M. Trubek & Alvaro Santos eds., 2006) (reconceptualizing development as freedom with policies that decenter economic growth and instead focus on the pursuit of human development which includes income, political, social, and legal growth).

42. See Faundez, *supra* note 16, at 411.

43. See *id.* at 386 (“North adheres to the view that institutions are the product of intentional human action and are not predetermined by economic or any other logic.”).

44. See WORLD JUSTICE PROJECT, *RULE OF LAW INDEX 2022* 8 (2022) (observing that despite the recognized important of rule of law around the world, the rule of law is facing numerous challenges as violence, corruption, and impunity continues to pervade the world); USAID, *RULE OF LAW POLICY: A RENEWED COMMITMENT TO JUSTICE, RIGHTS AND SECURITY FOR ALL* 5–7 (2023) (indicating that USAID’s committing to rule of law have never been more urgent as “illiberal threats to the systems of democratic society . . . abound”).

major global indicators of legal governance and identified four phases of their development and use over time: (1) conceptualization of the indicator; (2) production; (3) source of knowledge; and (4) assessment.⁴⁵ The first phase, conceptualization of the indicator, is critically important, as it demonstrates what the authors of the methodology consider as a good society, a target towards which the current situation is assessed.⁴⁶ So, absence of a consensus on the definition of governance and rule of law will impact the measurement of these phenomena.⁴⁷ Though if the quality of institutions is measured, it is less dependent on theoretical divergences as soon as the evaluators agree on a set of institutions as well as their key characteristics.

Indicators in the field of development are often conceptualized following a scheme of structure-process-outcome.⁴⁸ A statutory law in this scheme is a structure; its implementation is a process; both should lead to the rule of law as an outcome.⁴⁹ The outcomes are usually hard to measure, and the indexes tend to assess the structures and processes and draw conclusions from these about the overall outcomes.⁵⁰ In a suggested alternative framework of measurement of the quality of institutions, the existence of institutions is already an outcome, and the index should help evaluate their quality.

The indicator production phase depends on the availability of data and resources to collect it.⁵¹ The order of the phases is important but

45. See Sally Engle Merry et al., *Explainer: How Indicators Have the Power to Shape Our World*, THE CONVERSATION (June 17, 2015, 12:36 AM), <https://theconversation.com/explainer-how-indicators-have-the-power-to-shape-our-world-43065> (outlining the four phases of the development and use of indicators to measure governance and rule of law practices overtime).

46. See *id.* (describing the first phase of the development and use of indicators as the conceptualization of the indicator).

47. See *id.* (discussing how conceptualization feeds into measurement).

48. See *id.* (explaining the four headings under which the conceptualization of indicators can be analyzed as the identity of the actors and institutions who create the indicator; the expertise of the creator; the temporality of the creation process; and the resources available to those creating the indicator).

49. See *id.* (illustrating a conceptual framework for crafting indicators that largely aligns with the structure-process-outcome method).

50. See *id.* (assessing the causal effects of indicators is almost impossible to do with any precision).

51. See *id.* (emphasizing that indicators depend on data which is hard and

is nonetheless impacted by the limitations of a producing organization; thus, if the data or resources are limited, authors might limit the theoretical framework of the indicator.⁵² For example, in the World Bank project on Women, Business and the Law, the scope of research is quite restricted, as evinced by the comparability of the data.⁵³ This data includes only codified law, the situations of women living in the main business cities, lawful citizens, and heterosexual cisgender women in a monogamous first marriage registered with the appropriate authorities.⁵⁴ However, a lot of vulnerabilities remain beyond the stated assumptions that cannot be seen through the prism of a generalized global ranking. Engle Merry justly warned that the quantification of the data made things visible, though, at the same time, the unmeasured aspects became fully neglected, so a failure to assess vulnerabilities might make them even worse as they go unnoticed by the policymakers and foreign aid donors.⁵⁵ In this regard, the new Women, Business and the Law 2.0 has introduced a framework for measuring the implementation gap to assess the *de facto* outcome of the law for women. Another example of the indicator's dependence on data and resources could be a use of outdated surveys to maintain the global status of the ranking, because the authors prioritize the number of countries in the report over its sensitivity to the latest changes of context.⁵⁶

The third stage of an indicator as source of knowledge points out that interpretation of the global ranking must be the task of a multi-profile team of specialists, including comparative lawyers,

expensive to acquire).

52. See *id.* (characterizing the influence of resources on both the motive and methods of measurement for indicators).

53. See *Women, Business and the Law, Methodology*, WORLD BANK, <https://wbl.worldbank.org/en/methodology> (illustrating a conceptualization of an indicator for women as being constrained by eight different assumptions).

54. See *id.* (highlighting the demographics of the women in the study).

55. See ENGLE MERRY, *supra* note 1, at 218–19 (cautioning that the use of data may lead to “distorted development planning by narrowing the focus to a few features, ignoring the interconnectedness among them”).

56. See RULE OF LAW INDEX 2022, *supra* note 44, at 185 (noting the number of countries covered in the 2022 data and the fact that data may be outdated due to rapidly changing circumstances, may include measurement errors, and may fail to detect small changes in a country's situation overtime).

economists, and anthropologists.⁵⁷ The final stage of assessment of the indicator's impact is difficult to measure. Although it is known that the indicators are used for policy reforms and foreign aid programs, it is hardly possible to predict whether they persuade decision makers to follow any models.⁵⁸

The 2022 Rule of Law Index, produced by the World Justice Project, demonstrated that adherence to the rule of law fell in sixty-one percent of countries around the globe.⁵⁹ Fragility of this concept is even greater in the European Union ("E.U." or "the Union"); the Union asserts that the concept should be maintained as the highest value of the Union.⁶⁰ Leuven Jan Wouters, a professor at Katholieke Universiteit Leuven, noted that there is an asymmetry between the declared foundational nature of this value and the limited authority of the Union for enforcement of Article 2 of the Treaty on European Union, both in the pre-accession phase and within the EU's membership.⁶¹ As further highlighted by Fernanda Nicola, Professor at American University Washington College of Law, the ongoing rule of law crisis in the European Union has caused the national courts of Poland and Hungary, *de facto* courts controlled by the respective governments, to challenge the supremacy of the European law.⁶² The developing authoritarian governments in the European Union tend to reconstruct the national identities—traditional, religious and social values—that they then use as a trump card against the liberal

57. See Engle Merry at al., *supra* note 45 (discussing that the third phase of the development and use of indicators involves applying the indicator as a source of knowledge to inform understanding, develop hypotheses, or form conclusions).

58. See Mihaela Serban, *Rule of Law Indicators as a Technology of Power in Romania*, in *THE QUIET POWER OF INDICATORS* 214 (Sally E. Merry et al., eds., 2015) (describing the defensive, rather than productive, use of indicators by policymakers).

59. See *RULE OF LAW INDEX 2022*, *supra* note 44, at 8 (highlighting that the rule of law has declined in sixty-one percent of countries between 2021 and 2022).

60. See Jan Wouters, *Revisiting art. 2 TEU: A true union of values?*, 5 *EUR. PAPERS* 255, 274 (2020) (emphasizing the importance of "upholding the fundamental values that are the basis for the EU's constitutional design").

61. See *id.* at 276 (discussing the past and present challenges that are fundamental to upholding the EU's constitutional design).

62. See Fernanda G. Nicola, *The Anti-Authoritarian Dialogue of the European Court of Justice: Re-politicization and Self-Doubt*, 3 (forthcoming 2022) (on file with author).

framework of the E.U. law based on individual rights and freedoms.⁶³ In these circumstances, strong national institutions should be a safeguard against recessionary forces. Through institutions we understand not only the state authorities, but equally broad public participation, public oversight, representation, which are all means through which rights holders take part in governance. In 1965, United States President Lyndon B. Johnson said, “the vote is the most powerful instrument ever devised by the man for breaking down injustice.”⁶⁴ I would extend this to public participation in governance in its broader sense, which is an efficient safeguard of the rule of law.

Inder Sud, who worked at the World Bank for thirty years, rightly pointed out that almost every developing country has been the recipient of aid from the World Bank or other bilateral and multilateral international donors.⁶⁵ Yet, he concluded that the amount of foreign aid often has little to no correlation to the countries’ economic development or progressive political changes.⁶⁶ Professor Robert Cassen of the London School of Economics, at the same time, stated that even when the projects of international assistance fail they have “net positive externalities, such as demonstration effects and policy changes.”⁶⁷ Meaningful public participation and the inclusion of the most vulnerable groups into the project design, development, and implementation would be exactly the mentioned positive externality, as it would help to create a culture of public participation in decision-making.⁶⁸ This, in turn, could lead to fundamental changes in policies

63. *Id.*

64. Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 409 PUB. PAPERS 840, 842 (Aug. 6, 1965).

65. See SUD, *supra* note 2, at 137, 139 (describing how in her forty years of experience at the World Bank, she saw some aid-receiving countries both reduce poverty or continue to struggle, and that “[t]here is virtually nothing in most developing countries that has not received funding from some donor at one time or another”).

66. See *id.* at 143–45 (criticizing the evaluations of the World Bank on development outcome as claiming successes that happened before the implementation of a program or that happened while a country was already improving economically, and overall branding foreign aid programs by the World Bank as “failures”).

67. See *id.* at 144–45 (citing ROBERT CASSEN, DOES AID WORK? (1986)).

68. See ROBERT CASSEN, DOES AID WORK? 42–44 (2d ed. 1993) (describing efforts to include and implement local resources and actors in the process of

and long-term strategies, once it is uprooted in the civil society.⁶⁹

B. DEFINING THE RULE OF LAW

The concept of rule of law is so vaguely defined in scholarly articles as well as national and international legal acts that this term seems to be used to describe any positive political and legal system, particularly in Western societies.⁷⁰ Promotion of the rule of law reforms often becomes an objective of foreign aid that is provided to low- and middle-income countries.⁷¹ However, an evaluated discrepancy between the effectiveness of foreign aid in supporting adoption of statutory legislation versus its implementation calls into question the definition of rule of law in the framework of official development assistance.⁷² Therefore, international organizations, as major providers of foreign aid, should avoid treating the rule of law as a legal transplant, but instead perceive it as a legal transfer.⁷³ The rule of law requires an institutional framework established at the country level, and foreign aid actors should take into account all social consequences of their introduction.⁷⁴

executing foreign aid).

69. *See id.* (detailing the outsized benefits provided by including local, often poor, members of the population in the economic development pursued by foreign aid).

70. *See* Beqiraj & Moxham, *supra* note 34 at 140 (noting different rule of law definitions and interpretations).

71. *See* Dawson & Swiss, *supra* note 1, at 766 (noting that “at least implicitly, state-level legal reforms are often not an end in themselves, but are pursued to promote order by affecting the authority and influence of the law within society.”).

72. *See* Dawson & Swiss, *supra* note 1 at 761–62 (proposing the question of whether aid supports rule of law implementation over time and concluding “that aid’s role in the spread and institutionalization of world society models of the rule of law appears more consequential to the diffusion process of state institutional structures than to its impact on rule of law outcomes”).

73. *See generally* Ralf Michaels, “One Size Can Fit All” – *On the Mass Production of Legal Transplants*, in ORDER FROM TRANSFER COMPARATIVE CONSTITUTIONAL DESIGN AND LEGAL CULTURE 56–80 (2013) (arguing that a “one size fits all” approach can serve as a successful law reform strategy and that legal transfers, not transplants, do not always have to be country-specific).

74. *See generally* Gunter Frankenberg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 INT’L J. CON. L. 563 (2010) (noting that constitutions are globally similar with the differences being found in the local context and political, economic and historical traditions proving that the concept of legal transfer is an achievable success).

The rule of law is characterized as a value, principle, and norm, as well as a political and social philosophy, which was developed by Plato and Aristotle, followed by John Locke, Montesquieu, and others.⁷⁵ It has been used in its narrow sense, as a procedural guarantee, as well as in a wide one, including substantive rights and procedural safeguards. British judge, Lord Bingham, defined the rule of law narrowly, meaning “that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”⁷⁶ This definition includes the three most common characteristics of the rule of law: publicly available legislation, legislation implemented without discrimination, and legislation adjudicated in the courts.⁷⁷ The International Development Law Organization (IDLO) applies a wider definition to the rule of law as a principle of governance in which all persons and entities, including the state itself, are accountable to the law; it also encompasses both procedural fairness as well as fair and just outcomes.⁷⁸ Indeed, the just outcomes should be defined as a target of the rule of law implementation.

The rule of law as a value or principle of a higher rank determining the overall development of the state’s governance is rarely described as such in constitutions or other national legal acts; so, its interpretation appears mostly in courts’ rulings, parliamentary debates, and *travaux préparatoires*.⁷⁹ The notions of *Rechtsstaat* in Germany and *etat de droit* in France refer to the political systems in which the powers are established and effected by the governing legal order.⁸⁰ Article 28 of the German Constitution prescribes that the

75. See Jeremy Waldron, *The Rule of Law*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 19, 2023), <https://plato.stanford.edu/archives/fall2023/entries/rule-of-law> (tracing the development of the rule of law as a concept through historical thinkers such as Aristotle, Locke, and Montesquieu).

76. Beqiraj & Moxham, *supra* note 34 at 140.

77. See *id.* at 140–41, 152, 157 (discussing the core components of the rule of law definitions).

78. See INT’L DEV. L. ORG. (IDLO), STRATEGIC PLAN 2021-2024 14 (2020) (defining the rule of law as one that “encompasses both procedural fairness and fair and just outcomes” and “incorporates the substantive elements of justice”).

79. See *id.* (asserting that important substantive rights, including human rights standards, are interpreted by the judiciary).

80. See *The Rule of Law—Dynamics and Limits of a Common European Value*,

constitutional order of the federal units—*Länder*—should conform “to the principles of a republican, democratic and social state governed by the rule of law[.]”⁸¹

The main limitation of these legal notions becomes evident in authoritarian regimes, with Nazi Germany as an extreme example of a state strictly governed by statutory rules that were initially unjust.⁸² Another example is the rule of law in China, where this principle is restrictively understood from a legalistic point of view, mostly related to the investments, trade, and economic relations, and fully separated from the human rights discourse.⁸³ However, the rule of law should be viewed as inseparable from human rights as a substantive foundation of this principle of governance; otherwise, it risks becoming a void “rule by law.”

The Universal Declaration of Human Rights explicitly frames the rule of law as serving to protect human rights.⁸⁴ European Union member states treat the rule of law as the highest value of statehood. In the European Union, the rule of law is a founding value, along with respect for human dignity, freedom, democracy, equality, and human rights.⁸⁵ The Council of Europe pronounced the principle of rule of law as a requirement for membership, together with the enjoyment of human rights and fundamental freedoms by all persons within its jurisdiction.⁸⁶ The other regional human rights systems have a less

COUNCIL OF EUROPE (Sept. 20, 2019), <https://www.coe.int/en/web/dlapil/-/the-rule-of-law-dynamics-and-limits-of-a-common-european-value> (defining the terms ‘Rechtsstaat’ and ‘Etat de droit’ in the political context).

81. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY [CONSTITUTION] May 23, 1949, art. 28 [hereinafter German Constitution of 1949].

82. See Eric W. Orts, *Positive Law and Systemic Legitimacy: A Comment on Hart and Habermas*, 6 *RATIO JURIS* 245, 256 (arguing that the mere presence of laws, as in Nazi Germany, does not inherently mean that the “rule of law” in a country is strong).

83. See generally Eric W. Orts, *The Rule of Law in China*, 34 *VAND. J. TRANSNAT'L L. REV.* 43, 46, 50–51, 56 (2000) (defining rule of law in China and arguing that increased trade with China will develop its legal and political systems).

84. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948) (asserting that the rule of law should include the protection of human rights).

85. See Consolidated Version of the Treaty on European Union art. 2, Dec. 13, 2007, 2012 O.J. (C. 326) 17 [hereinafter Treaty on European Union] (emphasizing the values of the European Union).

86. See Statute of the Council of Europe, art. 3, May 5, 1949, 87 U.N.T.S. 103,

explicit focus on the rule of law. Although the African Charter on Human and Peoples' Rights does not mention the rule of law, the African Commission has interpreted its mandate as promoting and protecting the rule of law in Africa.⁸⁷ The Organization of American States requires its members to effectively exercise representative democracy,⁸⁸ while the Inter-American Court of Human Rights has stated that representative democracy "is based on the rule of law which presupposes that human rights are protected by law."⁸⁹

Most of the human rights instruments, therefore, recognize that the rule of law principle is tightly linked to human rights standards.⁹⁰ However, foreign aid programs are often criticized for asking countries to follow a predetermined script through a metaphor of human rights and its grand narrative, including the rule of law.⁹¹ In this regard, rule of law reforms should be designed by applying comparative law methods, which do not just bring transplants, but improve the existing institutions or nudge creation of new ones.⁹² Hence, the rule of law is a sophisticated concept which does not have

E.T.S. 1 (mandating that the members of the Council of Europe must uphold the rule of law including human rights and fundamental freedoms).

87. See Jamil Ddamulira Mujuzi, *The Rule of Law: Approaches of the African Commission on Human and Peoples' Rights and Selected African States*, 12 AFR. HUM. RTS. L. J. 89, 89–111 (2012) (noting that the African Commission on Human Rights and Peoples' Rights values the protection and promotion of human rights in Africa even though "rule of law" is not explicitly stated in the Charter).

88. See Org. of Am. States (OAS) Charter, art. 3 [hereinafter OAS Charter] ("The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.").

89. The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6, ¶ 8 (May 9, 1986).

90. See generally *What is the Rule of Law?*, UNITED NATIONS, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law> (demonstrating "the UN's commitment to the rule of law as a principle of governance and acknowledges the interrelatedness of the rule of law with all human rights.").

91. See generally Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201, 243 (2001) (arguing that human rights movements must "abandon the SVS [savages, victims, and saviors] metaphor if there is going to be real hope in a genuine international discourse on rights").

92. See Brian Z. Tamanaha, *The Primacy of Society and the Failure of Law and Development* at 3–4 Cornell Int'l L. J., Wash. U. Sch. of L. Working Paper No. 10-03-02, 2010) (describing the endemic failure of transplanted institutions).

a single conventional definition in the legal doctrine.⁹³ American researchers, Mila Versteeg and Tom Ginsburg, conclude in their comparison of rule of law indicators that they are more frequently defined by the measurement strategy rather than conceptualization.⁹⁴

The international development rankings measuring the rule of law should take a more granular approach and define the criteria of this term for an efficient monitoring of the transformative outcomes of foreign aid. The Worldwide Governance Indicators of the World Bank measure the rule of law by “perceptions of the extent to which agents have confidence in and abide by the rules of society, in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.”⁹⁵ The World Justice Project defines the rule of law as “the durable system of laws, institutions, norms, and community commitment that delivers accountability, just law, open government, as well as accessible and impartial justice.”⁹⁶ The U.N. does not have a single definition of the rule of law, but one U.N. Secretary-General Kofi Annan’s reports defined it as “a principle of governance in which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards.”⁹⁷

As we see, although there are some similarities between the abovementioned definitions of the rule of law, there is a striking absence of a common approach to identification of this concept, which makes it a hard thing to measure.⁹⁸ The rule of law should be measured

93. Mila Versteeg & Tom Ginsburg, *Measuring the Rule of Law: A Comparison of Indicators*, 42 L. SOC. INQUIRY 100, 104 (2017).

94. See generally *id.* at 100–37 (2017) (noting that the measurement strategy explains the convergence between the indicators, as opposed to the differences in conceptualization).

95. Kaufmann et al., *supra* note 25, at 4.

96. RULE OF LAW INDEX 2022, *supra* note 44, at 14.

97. See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) (defining the rule of law and recognizing it is central to the U.N.’s mission).

98. See Versteeg & Ginsburg, *supra* note 93, at 104 (recognizing “the theoretical literature does not offer a single definition of the RoL and is characterized by substantial conceptual confusion”).

by the quality of institutions, a concern that this article will unpack in the following sections.

C. ANALYSIS OF THE RULE OF LAW INDEXES

This section examines the rule of law indexes and rankings, produced by the World Bank, World Justice Project, as well as the SDG Index and Dashboard from a sustainable development report drafted by Bertelsmann Stiftung and the Sustainable Development Solutions Network. The position of Belarus is reviewed in each of these measurements as a case study.

1. *Worldwide Governance Indicators*

The World Bank measures the rule of law by perceptions of the actors' confidence in and obedience to the rules of society.⁹⁹ The Worldwide Governance Indicators represent a unique project of the World Bank, which produces six composite indicators of broad dimensions of governance: (1) voice and accountability; (2) political stability and absence of violence; (3) government effectiveness; (4) regulatory quality; (5) rule of law; and (6) control of corruption.¹⁰⁰ The governance itself is broadly defined as "the traditions and institutions by which authority in a country is exercised."¹⁰¹

The Worldwide Governance Indicators (WGI) are produced by an aggregation of thirty one individual data sources produced by population surveys, public and private entities, including think tanks, non-governmental organizations, international organizations, private sector firms, and the U.S. Department of State.¹⁰² The indicators are generated by applying a methodology of the unobserved components model, which is applied based on an assumption that the real governance is difficult to measure and what can be observed is only

99. See Kaufmann et al., *supra* note 25, at 4 (defining the rule of law in terms of societal respect for economic and social institutions as one of six dimensions of governance).

100. *Id.*

101. *Id.*

102. See *id.* at 2, 29 (measuring and displaying governance using data captured from public surveys, commercial businesses, government sources, and nongovernmental organizations).

an imperfect indication of it.¹⁰³

The authors of the WGI methodology claim that this data set permits a meaningful cross-country comparison over time.¹⁰⁴ Without comparing Belarus to other countries, we would look at two figures representing the trend of the rule of law development of the country over ten years. Figure 1 demonstrates the rule of law development trend along with the changes in other dimensions of governance.¹⁰⁵ Figure 2 shows how a percentile rank of Belarus has changed from 1996 to 2021.¹⁰⁶ A comparison is made between the trend dynamics to an actual country context and made a conclusion about the relevance of this measurement, especially if it is used to showcase the development for over twenty years.

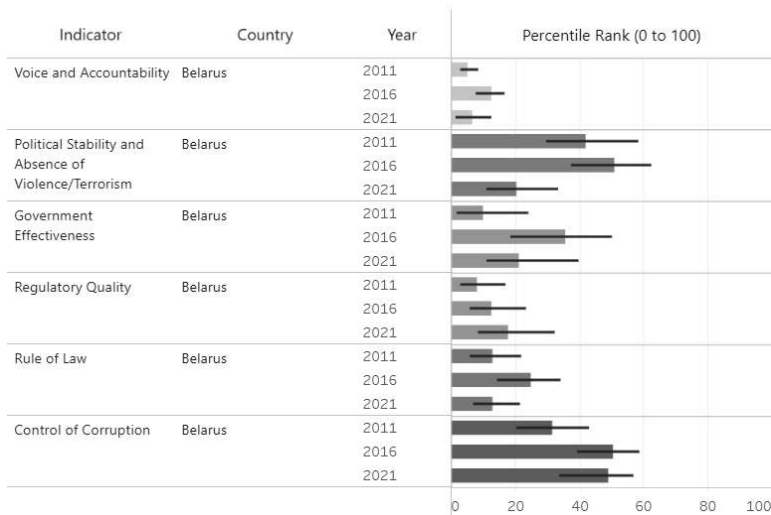


Figure 1. Worldwide Governance Indicators of Belarus in 2011-2021¹⁰⁷

103. See *id.* at 2, 16 (highlighting that the selected methodology used to measure governance considers the uncertainties of aggregate signals through standard errors and confidence intervals and recognizes the imperfect nature of the indicators).

104. See *id.* at i (asserting that despite difficulties in measuring governance, the Worldwide Governance Indicators provide relevant global comparisons).

105. *Worldwide Governance Indicators*, THE WORLD BANK, <https://www.worldbank.org/en/publication/worldwide-governance-indicators/interactive-data-access>.

106. *Id.*

107. *Id.*

Figure 1 illustrates the trends in six dimensions of governance in Belarus from 2011 to 2021. All dimensions, except regulatory quality, demonstrate an equal spike in 2016 with a rollback in 2021, often to the level of 2011 or even lower as in the political stability dimension.¹⁰⁸

The demonstrated trend of improvement in the regulatory quality in Belarus in 2011-2021 raises some issues of its credibility. Regulatory quality, according to the WGI methodology, captures perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development.¹⁰⁹ The observed reduction in foreign direct investment net inflow to Belarus since 2011 and closure of businesses may show that the data sources aggregated by WGI do not actually capture a real situation of the private sector development because they are focused on statutory legislation rather than *de facto* outcomes.¹¹⁰

The WGI produces a percentile rank of the country for every dimension of governance, ranging from the lowest, at 0, to the highest, at 100.¹¹¹ Figure 2 demonstrates a longer trend of the rule of law development in Belarus from 1996 to 2021, based on its percentile rank.¹¹²

108. *Id.*

109. See Kaufmann et al., *supra* note 25, at 4.

110. See *Belarus Foreign Direct Investment 1992-2023*, MACROTRENDS, <https://www.macrotrends.net/countries/BLR/belarus/foreign-direct-investment> (showing that Belarus foreign direct investment inflows have decreased and shown little growth since 2011).

111. See Kaufmann et al., *supra* note 25, at 12 (reporting the WGI data through units of the governance indicator and global percentile rates).

112. *Worldwide Governance Indicators*, THE WORLD BANK, <https://www.govindicators.org/interactive-data-access>.



Figure 2. Rule of law rank of Belarus in 1996-2021, Worldwide Governance Indicators¹¹³

Interestingly, the twenty-year trend of Belarus's rule of law ranking demonstrates that the above mentioned spike in 2016, with a rank of 25.00 percent, is just slightly higher than the 24.12 percent in 1996.¹¹⁴ This comparison clearly shows an absence of considerable improvement in rule of law, but a return to a starting position with subsequent deterioration after 2020.

The reflected improvement of the rule of law in 2016 could be explained by some positive developments in the area of human rights. For example, the Belarusian authorities engaged with U.N. human rights mechanisms, including the Universal Periodic Review and treaty bodies, prepared to ratify the Convention on the Rights of Persons with Disabilities, and adopted the first national Human Rights Action Plan during this period.¹¹⁵ However, as noted by Miklós Haraszti, Special Rapporteur on the situation of human rights in Belarus, 2016 was also marked by the elimination of pluralism, as well

113. *Id.*

114. *Id.*

115. See WOLFGANG SENDER, COUNTRY REPORT: FIRST NATIONAL HUMAN RIGHTS PLAN 1 (2016) (explaining the first Human Rights Action Plan that Belarus has adopted to improve relationships and perception of the country).

as the criminalization of any civil activity without prior approval from the authorities and absence of private broadcasting.¹¹⁶

Getting back to the WGI, an applied model of unobserved components seems to provide the best possible signal of governance in a country, measured solely as a perception rather than a reflection of some deeper notion that is difficult to observe directly.¹¹⁷ The WGI aggregates multiple sources of data from experts and households as well as both private and public entities, trying to reflect both the laws and the practice, although not in every component.¹¹⁸ The methodology also explicitly reports the margins of error, which still allow a cross-country comparison.¹¹⁹ The WGI allegedly influences the ways in which governance reforms are designed, implemented, and assessed,¹²⁰ which is why this article will further unpack some of the shortcomings of this measurement.

2. Rule of Law Index

The Rule of Law Index (“the Index”) is produced by the World Justice Project, a non-profit organization founded by the American Bar Association but independent since 2009.¹²¹ It promotes a multidisciplinary approach to the rule of law and is well-known for producing a unique index devoted solely to the rule of law, which is broadly defined as a durable system of laws, institutions, and norms.¹²²

116. See Press Release, U.N. Office of the High Commissioner for Human Rights (OHCHR), Human Rights Council Discusses Situation in Belarus (June 21, 2016) <https://www.ohchr.org/en/press-releases/2016/06/human-rights-council-discusses-situation-belarus> (highlighting the lack of certain rights that existed through several generations in Belarus such as pluralism and freedom of expression, association, and assembly).

117. See Kaufmann et al., *supra* note 25, at 9 (“The premise underlying this statistical approach is straightforward—each of the individual data sources provides an imperfect signal of some deeper underlying notion of governance that is difficult to observe directly.”).

118. See *id.* at 5.

119. *Id.* at i.

120. See Daniel Kaufmann et al., *The Worldwide Governance Indicators Project: Answering the Critics* 1 (World Bank, Pol’y Rsch. Working Paper No. 4149, 2007) (asserting that “the WGI have in recent years become among the most widely-used indicators of governance by policymakers and academics”).

121. *About Us*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/about-us>.

122. RULE OF LAW INDEX 2022, *supra* note 44, at 14, 216.

In this context, the rule of law comes close to a concept of governance, as it is defined by WGI.¹²³ The Index is a leading source of original first-hand data on the rule of law because it is based on the surveys of households, legal practitioners, and experts,¹²⁴ but it does not include any research of the law on the books.

The key factors of the rule of law, measured by the Index, include: (1) constraints on government powers; (2) absence of corruption; (3) open government; (4) fundamental rights; (5) order and security; (6) regulatory enforcement; (7) criminal justice systems; and (8) civil justice systems.¹²⁵ The Index stands out because it includes a substantive element of fundamental rights as one of the factors of the rule of law; however, it should not be equal to the other measured components; instead, it should be a foundational principle. The Index methodology defines the following foundational principles of the rule of law: accountability, just law, open government, and accessible and impartial justice.¹²⁶ So, the conceptual framework of the Rule of Law Index is very broad and treats the rule of law as the system of governance.

A country's overall score is calculated as an average eight rule of law factors.¹²⁷ Unpacking some of the factors, especially the order and security, can lead to a conclusion that they should not contribute equally to the overall score.¹²⁸ The order and security factor considers whether crime is effectively controlled, civil conflict is limited, and

123. See Kaufmann et al., *supra* note 25, at 4 (defining governance as “the traditions and institutions by which authority in a country is exercised. This includes (a) the process by which governments are selected, monitored and replaced; (b) the capacity of the government to effectively formulate and implement sound policies; and (c) the respect of citizens and the state for the institutions that govern economic and social interactions among them.”).

124. See RULE OF LAW INDEX 2022, *supra* note 44, at 183 (asserting that the WJP Rule of Law Index is the most precise representation of factors that form the rule of law due to the high volume of variables drawn from households, legal practitioners, and diverse experts).

125. *Id.* at 15.

126. *Id.* at 14.

127. Beqiraj & Moxham, *supra* note 34, at 159.

128. See Michaela Saisana & Andrea Saltelli, *Rankings and Ratings: Instructions for Use*, 3 HAGUE J. ON RULE L. 247, 262 (2011) (finding that in the Rule of Law Index, order and security and open government are the least influential factors).

people resort to violence to redress personal grievances.¹²⁹ Though the number for a factor of order and security should not be added to the overall score by increasing its value but weighted against protection of fundamental rights and freedoms, this analysis leads to the conclusion that a simple average score of the rule of law factors is not the most efficient measurement of this complex issue.

3. *SDG Index and Dashboard*

The SDG Index and Dashboard are included in the annual Sustainable Development Report, which has been prepared since 2016 by the Bertelsmann Stiftung and the Sustainable Development Solutions Network under the overall supervision of Jeffrey D. Sachs.¹³⁰ The authors of the report have created a unique methodology that helps mitigate the lack of data for the measurement of official global SDG indicators adopted by the U.N. Statistical Commission, but still benchmarks and compares the countries and incentivizes them towards achievement of the SDGs.¹³¹ The report presumes that the SDGs represent a useful operational tool for policy action and an alternative framework for their measurement that could complement the U.N.'s efforts at an SDG monitoring framework, as well as identify the needs for investments, research, and policy reform.¹³²

The SDG Index and Dashboard give equal weight to each goal and assess the performance on all seventeen SDGs.¹³³ The visual

129. RULE OF LAW INDEX 2022, *supra* note 44, at 18.

130. JEFFREY D. SACHS ET AL., SUSTAINABLE DEVELOPMENT REPORT 2022 vi (2022).

131. Guillaume Lafortune et al., *SDG Index and Dashboards: Detailed Methodological Paper* 4 (September 2018), <https://raw.githubusercontent.com/sdsna/2018GlobalIndex/master/2018GlobalIndexMethodology.pdf> (explaining that the SDG Index benchmarks countries against the Sustainable Development Goals); David Horan, *National Baselines for Integrated Implementation of an Environmental Sustainable Development Goal Assessed in a New Integrated SDG Index*, 12 SUSTAINABILITY 1, 8 (2020) (explaining how the SDG Index uses U.N. statistics where possible, but also utilizes other data when the U.N. data is insufficient).

132. Guillaume Lafortune et al., *supra* note 131, at 5.

133. Jeffrey Sachs et al., *SDG Index and Dashboards - Global Report* 34 (July 2016), https://s3.amazonaws.com/sustainabledevelopment.report/2016/2016_sdg_index_and_dashboards_report.pdf [hereinafter 2016 SDG Index] (explaining the equal weighting of the SDGs in the SDG Index).

representation is a “traffic light” color scheme—green, yellow, orange, and red—illustrating how far a country is from achieving a particular goal.¹³⁴ The overall score signifies a country’s position between 0 and 100, which is the highest value to be reached by 2030.¹³⁵ However, Goal 16, which is aimed at building effective, accountable, and inclusive institutions should be treated not as an equal among others, but with a separate cross-cutting status, like fundamental human rights, which are also not adequately reflected in the SDGs.¹³⁶ Otherwise, the policy interventions towards decent work and economic growth will not produce the desired outcomes due to the institutions’ inability to achieve the results and sustain the gains.¹³⁷ For example, environmental action will not be a success without a developed institution based on public participation.¹³⁸

The SDG Index and Dashboards use various data sources, including the official statistics reported by national governments to international organizations,¹³⁹ which is different from the other rankings and indexes. One third of the data comes from non-traditional sources, namely think tanks, academia, and non-governmental organizations.¹⁴⁰

134. See Guillaume Lafortune et al., *supra* note 131, at 8 (illustrating a country’s SDG progress based on a color scheme from green, yellow, orange, to red, with green representing the maximum threshold and red the bottom 2.5th percentile).

135. 2016 SDG Index, *supra* note 133, at 14.

136. See Kempe Ronald Hope Sr., *Peace, Justice and Inclusive Institutions: Overcoming Challenges to the Implementation of Sustainable Development Goal 16*, 32 GLOB. CHANGE, PEACE & SEC. 57, 77 (2020) (explaining how SDG 16 is a cross-cutting goal, requiring peace and peacebuilding in order to be connected to the other goals); Steven Bernstein, *The United Nations and the Governance of Sustainable Development Goals*, in GOVERNING THROUGH GOALS: SUSTAINABLE DEVELOPMENT GOALS AS GOVERNANCE INNOVATION 214, 216 (Norichika Kanie & Frank Biermann eds. 2017) (explaining how human rights have not made it into the SDGs).

137. Cf. *A ‘Bold New Agenda’ Is Falling Short: The Perils and Promises of SDG 16* 6, SDG16 DATA INITIATIVE, <https://www.idea.int/sites/default/files/2023-12/SDG%2016%20Data%20Initiative%20Report%202023-Online.pdf> (explaining how SDG 16 is an enabler of other SDGs, so that failure to meet one of the goals, such as SDG 16, would hurt the ability to achieve other Goals).

138. See *id.* at 37 (explaining how, for example, progress on environmental governance requires strong institutions with broad participation).

139. See *id.* at 14 (pulling data from official and non-official data sources that include national governments, international organizations, research institutions, Universities, NGOs, and sources within the private sector).

140. See *id.* (pointing out that the SDG Index and Dashboards consist of 35% non-official data).

Thus, the report stands out as a comprehensive assessment of the countries' progress towards all SDGs.¹⁴¹

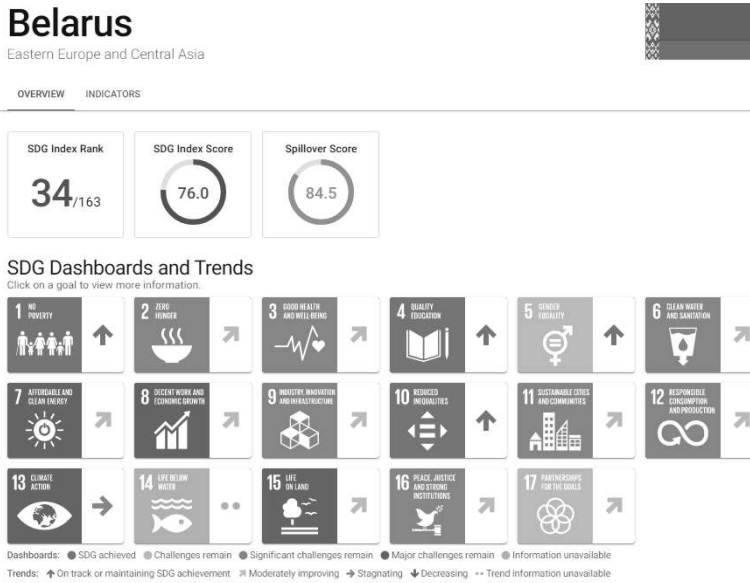


Figure 3. SDG Index and Dashboard of Belarus in 2022¹⁴²

Figure 3 demonstrates that the SDG Index score for Belarus in 2022 is seventy-six, which can be interpreted as the percentage of achievement of all goals, putting the country quite high at 34th place among 163 assessed states.¹⁴³ According to the SDG Dashboard in 2022, Belarus has significant challenges in reaching most SDGs, including SDG 16.¹⁴⁴ The country has major challenges (“red lights”) in implementing the SDGs related to clean energy, climate change, life on land, decent work, and economic growth, so these sectors are

141. Douglas Beal et al., *What Companies Can Learn from World Leaders in Societal Impact 10*, BOSTON CONSULTING GRP. (April 2019), https://web-assets.bcg.com/img-src/BCG-What-Companies-Can-Learn-from-World-Leaders-in-Societal-Impact-Apr-2019-R_tcm9-218137.pdf (explaining that the SDG Index is a comprehensive assessment of countries' progress towards the SDGs).

142. *Belarus*, SUSTAINABLE DEVELOPMENT REPORT, <https://dashboards.sdgindex.org/profiles/belarus>.

143. *Id.* (showing Belarus's overall score in the 2023 SDG Index).

144. *Id.* (showing the SDGs where Belarus's score is facing challenges).

advised to be prioritized in the reforms.¹⁴⁵ SDG 16, which aims to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels” is moderately improving according to the SDG.¹⁴⁶

SDG16 – Peace, Justice and Strong Institutions			
Homicides (per 100,000 population)	2.4	2019	● ↑
Unsented detainees (% of prison population)	9.2	2018	● ↑
Population who feel safe walking alone at night in the city or area where they live (%)	61	2019	● ●
Property Rights (worst 1–7 best)	NA	NA	● ●
Birth registrations with civil authority (% of children under age 5)	100.0	2020	● ●
Corruption Perception Index (worst 0–100 best)	41	2021	● ↗
Children involved in child labor (% of population aged 5 to 14)	1.0	2019	● ●
Exports of major conventional weapons (TIV constant million USD per 100,000 population)	1.0	2020	● ●
Press Freedom Index (best 0–100 worst)	50.8	2021	● →
Access to and affordability of justice (worst 0–1 best)	0.6	2020	● ↑

Figure 4. SDG 16, SDG Index and Dashboard of Belarus in 2022¹⁴⁷

As noted above, the SDG Index and Dashboard weigh all SDGs equally and apply the alternative indicators to the official U.N. indicators for the measurement.¹⁴⁸ The choice of indicators and their achievement targets could be one reasonable point of critique of the methodology.¹⁴⁹ SDG 16 is marked as “moderately improving” in

145. *Id.* (showing the SDGs for which the SDG Index has given Belarus a “red light”).

146. See SACHS ET AL., *supra* note 130, at 23 (illustrating that there is a moderate increase of peace, justice, and strong institutions in Belarus).

147. *Belarus*, *supra* note 142.

148. 2016 SDG Index, *supra* note 135, at 34 (explaining the equal weighting of the SDGs in the SDG Index); Lafortune et al., *supra* note 131, at 7 (explaining that the SDG Index uses alternative data when U.N. data is insufficient).

149. See Jose Manuel Diaz-Sarachaga, *Is the Sustainable Development Goals (SDG) Index an Adequate Framework to Measure the Progress of the 2030 Agenda?*, 26 SUSTAINABLE DEV. 663, 669–70 (2018) (critiquing the SDG Index for its choice of indicators, suggesting that the 2017 SDG Index may not be wholly reliable).

Belarus, but as seen in Figure 4, only five factors are measured for this SDG.¹⁵⁰ These five factors could hardly lead to a comprehensive conclusion on the improvements in peace, justice, and the quality of institutions.¹⁵¹

The analyzed rankings of Belarus in the WGI and the Index demonstrate a deteriorating trend in the rule of law.¹⁵² However, both measurements observed a spike in 2016, which demonstrated positive developments in the rule of law and human rights.¹⁵³ Despite this, the SDG assessed the progress of Belarus towards SDG 16 as moderately improving in 2022. The next section will present a critical approach towards each analyzed measurement of the rule of law.

II. THREE CRITIQUES OF THE RULE OF LAW MEASUREMENTS

All reviewed indexes and rankings lack a comprehensive measurement of both the law on the books and its implementation.¹⁵⁴ The global nature of the rankings and limited resources for data collection pushed authors to rely on old surveys to have more countries in the report.¹⁵⁵ Two more complicated points of critique of the

150. *Belarus*, *supra* note 142 (showing Belarus's score for SDG 16 for 2023 and the factors that make up this score).

151. *Cf. id.* (showing the factors that the SDG Index utilizes for analyzing SDG 16).

152. *World Governance Indicators*, WORLD BANK GROUP, <https://www.worldbank.org/en/publication/worldwide-governance-indicators/interactive-data-access> (showing how in the WGIs, Belarus has declined in its rule of law score in recent years); Ted Piccone, *Rule of Law Continues Five-Year Decline, but Bright Spots Emerge*, BROOKINGS INST. (Oct. 31, 2022) <https://www.brookings.edu/articles/rule-of-law-continues-five-year-decline-but-bright-spots-emerge> (explaining Belarus's continued decline in the Rule of Law Index).

153. *World Governance Indicators*, WORLD BANK GROUP, <https://www.worldbank.org/en/publication/worldwide-governance-indicators/interactive-data-access> (showing how in the WGIs, Belarus has declined in its rule of law score in recent years); *Belarus*, WORLD JUSTICE PROJECT RULE OF LAW INDEX, <https://worldjusticeproject.org/rule-of-law-index/country/2016/Belarus> (showing Belarus's increase in its Rule of Law Index score in 2016).

154. *See* András Jakab and Lando Kirchmair, *How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way*, 22 GERMAN L. J. 936, 938 (2021) (explaining how rule of law indices do not measure laws on the books).

155. *Cf.* Alina Mungiu-Pippidi, *Challenges and Innovations to the Rule of Law*

reviewed measurements are related to the equal weights of rule of law components in their methodology as well as no conceptual framework to assess the quality of institutions, which are essential for governance and rule of law.

The WGIs measure the rule of law as a perception and aim for the best possible reflection of the quality of governance, not for its interpretation.¹⁵⁶ The authors of the WGI methodology, Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, call users to avoid over interpreting the small differences in performance across countries or over time mostly due to their margins of error.¹⁵⁷ So, a careful interpretation of data, provided by the WGI, could indeed make this tool more helpful to policymakers, analysts, journalists, donors, and international organizations. However, the WGI project has three main shortcomings. First, the WGI narrowly defines the rule of law, specifically focusing on the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.¹⁵⁸ The law-making process, public participation, and human rights are not mentioned in this definition.¹⁵⁹ Second, the measured six dimensions of governance are strongly correlated and the individual variables assigned to six broad categories of governance are not clear-cut.¹⁶⁰ Moreover, the rule of law and human rights should have a special place in the measurement of governance and should not have the same weight as, for example, control of corruption. Finally, the major critique of the WGI is that the aggregated indicators do not

Measurement 4, (Sciences Po, LIEPP Working Paper No. 137, Oct. 28, 2022) (explaining that some rule of law indices, as they take time to process data, often end up publishing based on outdated information); Jakab & Kirchmair, *supra* note 154, at 938 (explaining how, for example, the Freedom House “Freedom in the World” rule of law index uses old data).

156. Kaufmann et al., *supra* note 25, at 223.

157. See Kaufmann et al., *supra* note 25, at 2 (“Moreover, by constructing and reporting explicit margins of error for the aggregate indicators, we enable users to avoid over-interpreting small differences between countries and over time in the indicators that are unlikely to be statistically – or practically – significant.”).

158. *Id.* at 223 (explaining which factors the WGI utilizes for its rule of law score).

159. *Id.*

160. See *id.* at 5 (arguing that while the six dimensions should be considered in conjunction with one another, it adds difficulty when assigning individual variables to each category).

reflect the quality of institutions, while the applied definition of governance includes the traditions and institutions by which the authority is exercised.¹⁶¹

Unfortunately, in absence of the human rights foundation and with no tools to assess the institutions, quality of governance might not be measured properly. While the trend of the rule of law development in Belarus over the last twenty years is properly reflected, the policymakers and foreign aid donors in 2016 could have interpreted the spike as a significant improvement.¹⁶² However, it was hardly so because the institution of public participation was still at its least developed stage and the measurement of governance should have reflected this.

The Rule of Law Index has a reputation as an independent source of original data, produced by the World Justice Project.¹⁶³ The main shortcoming of the Index is evident in that it defines the rule of law as the system of laws, institutions, and norms, but it does not measure the laws on the books and does not have a solid conceptual framework for an assessment of institutions.¹⁶⁴

What is measured by the Index is only a perception of the rule of law,¹⁶⁵ which is still important and might be the only possible

161. See Tobin Im & Youngmi Choi, *Rethinking National Competitiveness: A Critical Assessment of Governmental Capacity Measures*, 135 SOC. INDICATORS RSCH. 515, 525 (2018) (explaining how the WGI does not critically evaluate the quality of institutions).

162. *World Governance Indicators*, WORLD BANK GROUP, <https://www.worldbank.org/en/publication/worldwide-governance-indicators/interactive-data-access> (showing how Belarus's score for rule of law in the WGI increased significantly in 2016); see also Andrei Kazakevich, *Nations in Transit 2017: Belarus*, FREEDOM HOUSE, <https://freedomhouse.org/country/belarus/nations-transit/201> (suggesting that the rule of law improved in Belarus in 2016).

163. Marina Matic Bošković, *The Perception of Justice in Western Balkans Countries*, 2021 REG'L L. REV. 25, 29–30 n. 40 (2021) (describing the Rule of Law Index as the leading source for data on the rule of law).

164. See Jessica Scott, *From Environmental Rights to Environmental Rule of Law: A Proposal for Better Environmental Outcomes*, 6 MICH. J. ENV'T & ADMIN. L. 203, 235 (2016) (explaining how the Rule of Law Index does not measure laws on the books).

165. Sven Horak, *Join In or Opt Out? A Normative–Ethical Analysis of Affective Ties and Networks in South Korea*, 149 J. BUS. ETHICS 207, 210 n. 2 (2018) (explaining how the Rule of Law Index measures perceptions of the rule of law).

evaluation of this complex phenomenon. The Index methodology, however, claims that it measures the policy outcomes, such as whether people have access to courts or whether crime is effectively controlled.¹⁶⁶ However, these outcomes could only be evaluated by the quality of functioning institutions, which the Index does not assess.¹⁶⁷ Moreover, the Index methodology has been applied only in three major urban areas in each of the countries and while the nationally representative polls are planned to be completed, some of the inconsistencies could be attributed to the use of old data—like using polls from 2014 and 2017 for the ranking of Belarus 2022—despite the perception of the rule of law in the country changing significantly since then.¹⁶⁸ The old data from households is partially adjusted by annual reviews from the experts, but it does not allow for the tracking of minor changes in perceptions.¹⁶⁹

The World Justice Project explains that the Index is not specific enough to establish causation between the rule of law factors.¹⁷⁰ Thus, the authors of the methodology call for applying more analytical tools to analyze the causes and providing possible solutions.¹⁷¹ However, the Index produces an overall ranking and puts a country in a certain place in the global assessment.¹⁷² The main critique of this assessment is that the eight factors of the rule of law are treated as equal with the overall rank calculated as an average. Fundamental rights should be a foundational principle of the rule of law and the remaining seven factors should be weighed differently, considering some common

166. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2023 14 (2023).

167. See Juan C. Botero & Alejandro Ponce, *Measuring the Rule of Law* 16 (World Justice Project, Working Paper No. 001, Nov. 2011) (explaining that the Rule of Law Index does not focus on institutional quality).

168. See RULE OF LAW INDEX 2023, *supra* note 166, at 183, 187 (2023) (describing that the WJP index was previously conducted in the three largest cities of each country) (noting that in Belarus the three cities polled were Minsk, Gomel, and Mogilev in the years 2014 and 2017).

169. See *id.* at 183 (explaining that household data is complemented by assessments from local practitioners and academics with expertise in various legal fields).

170. *Id.* at 185.

171. *Id.*

172. See *id.* at 182–83 (explaining that the index team organized the data collected so that it would be globally comparable via a ranking system in which each country is assigned a score based on over 500 variables).

features of the rule of law development in different political regimes.

There is an international consensus that the rule of law serves as an enabler of peace and security in the society, confirmed by the U.N., World Bank, and International Development Law Organization as well as other entities.¹⁷³ Agenda 2030, as the main global strategy for international development, highlights the role of SDG 16 on peace, justice, and strong institutions, and is an enabler of all Sustainable Development Goals.¹⁷⁴ Although the rule of law is not explicitly mentioned in any goal, but Agenda 2030 “recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.”¹⁷⁵

The SDG Index and Dashboard follow the logic of Agenda 2030, and their critique is equally attributable to the shortcomings of this strategic U.N. framework. Although all SDGs are treated as equal, the so-called “enablers” should shape the reform strategies to prioritize foreign aid for development.¹⁷⁶ SDG 16 on peace, justice, and strong institutions, therefore, should be a foundation for improvements in all

173. See G.A. Res. 70/1, ¶ 35 (Oct. 21, 2015) (asserting that effective rule of law and good governance is essential for peace, justice, and sustainable development); *Global Program on Justice and the Rule of Law*, WORLD BANK, <https://www.worldbank.org/en/programs/global-program-on-justice-and-rule-of-law/priority-themes/1/7> (recognizing rule of law as a crucial factor for peace and successful post-conflict reconstruction); *IDLO and the United Nations’ 2030 Agenda for Sustainable Development*, INT’L DEV. L. ORG. (IDLO), <https://www.idlo.int/what-we-do/rule-of-law/2030-agenda> [hereinafter *2030 Agenda*] (arguing that the principles underpinning the rule of law are important in promoting peaceful societies); Press Release, Secretary-General, Rule of Law Essential for Maintaining International Peace, Secretary-General Says at Open Debate, Stressing Security Council’s Critical Role in Upholding Principle, U.N. Press Release SG/SM/21653 (Jan. 12, 2023) (expressing the importance of the rule of law in promoting peace and stability while also preventing abuses of power).

174. See G.A. Res. 70/1, *supra* note 173, at 14 (“Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective accountable and inclusive institutions at all levels.”).

175. G.A. Res. 70/1, *supra* note 173, ¶ 35.

176. See Jeffrey D. Sachs et al., SUSTAINABLE DEVELOPMENT REPORT 2023 vi (2023) (explaining that the importance of SDGs is to promote investment and help reform global financial architecture).

sectors of state policy, from the environment to the economy. The SDG Index and Dashboard do not apply weight to the SDGs and do not have a methodology to assess the strength of the institutions, similar to Agenda 2030.¹⁷⁷ These shortcomings might lead to an erroneous prioritization of reforms for sustainable development and a misuse of the overall SDG ranks by the countries with high results in health, education, environment, and little progress on the rule of law and governance, which is mostly reflected by only one SDG 16.

The presented critique of the rule of law measurements demonstrates that the rankings miss an assessment of the quality of institutions.¹⁷⁸ In the next chapter, this article will suggest an alternative measurement of the rule of law and governance in a broader context. Without attempting to create only one indicator, this article aims to conceptualize an assessment which might be useful in a framework of the official development assistance, including drafting of development programs, monitoring of their effectiveness and impact, and evaluation of transformative outcomes.

III. ASSESSING THE QUALITY OF INSTITUTIONS: ALTERNATIVE EVALUATION OF GOVERNANCE

The history of promoting legal reforms as a development strategy dates back to the 1950s and 1960s, when many former colonies became independent and the donors of foreign aid to these countries were committed to a modernization of their laws and institutions.¹⁷⁹ The recent empirical studies on the impact of governance on development found a dramatic influence of the rule of law on development outcomes.¹⁸⁰ Hence, since the 1990s a significant part of

177. See G.A. Res. 70/1 *supra* note 173, ¶ 40 (stating that each of the SDG are of equal importance); see also Sachs et al., *supra* note 176, at 23 (explaining that the SDG Index is an assessment of a country's performance on each of the 17 SDGs and that the Index gives equal weight to each SDG).

178. See Tom Ginsburg, *Pitfalls of Measuring the Rule of Law*, 3 HAGUE J. RULE L. 269, 270–72, 279 (explaining that rule of law measurements have been highly criticized for their difficulty to conceptualize).

179. See TREBILCOCK & MOTA PRADO, *supra* note 1, at 45 (describing why the 1950s and 1960s are often referred to as the first law and development movement).

180. See *id.* (noting the emergence of institutional theories of development in

the official development assistance has been channeled to governance reforms, while the rule of law has become a mandatory component of most foreign aid development programs.¹⁸¹ The link between the rule of law and sustainability was first endorsed by the heads of states at the U.N. World Summit in 2005.¹⁸² This international consensus was confirmed by a statement that good governance and the rule of law were essential for sustained economic growth, sustainable development, and the eradication of poverty and hunger.¹⁸³

The international indexes and rankings, which are reviewed above, have been instrumental for donors in assessing the outcomes of their foreign aid.¹⁸⁴ The New York University project on global indicators provided comprehensive research of how the policy actors are deduced by quantification and the indicators *de facto* govern global development, led by a theory of an ideal society, which was used when the indicator's methodology was framed.¹⁸⁵ This underlying idea of good governance should be built on the principles of rule of law and human rights, not promoted through legal transplants. Alternatively, this article suggests a new approach to measuring governance by the quality of institutions.

These institutions represent a structural context of society, and any policy reform promoted by the foreign aid programs should be aimed at strengthening these institutions by making them resilient and able to sustain the checks and balances. The governance for the purposes

academic and political settings).

181. See *id.*, at 32 (“Beginning in the early 1990s, an institutional perspective on development has become increasingly prominent in development thinking, captured in the mantra “institutions matter,” or “governance matters”. This perspective views the quality of a country’s domestic institutions as a major determinant of its development.”).

182. Wakelin, *supra* note 13, at 823.

183. See World Summit Outcome, *supra* note 14, ¶ 11 (“We acknowledge that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.”).

184. See Kevin E. Davis et al., *Indicators as a Technology of Global Governance 1* (Inst. Int’l L. and Just., Working Paper 2010/2, 2011) (explaining that indicators are produced by a variety of organizations and used to compare and rank states for the purpose of allocating foreign aid and investments, among other things).

185. See *id.* at 11 (describing how indicators express ideologies about the ideal society and the process for achieving an ideal society).

of this assessment consists of the rules and traditions by which authority in a country is exercised through its institutions.¹⁸⁶ The rule of law and human rights should be the inseparable founding principles of governance. The rule of law principle in its broader sense usually includes human rights, but for the purposes of this assessment it is better to emphasize human rights as a separate founding pillar of governance alongside the rule of law.

The assessment of governance should at least examine the following institutions, though the list might be expanded: public participation in decision-making, independent oversight, media, private sector, public services, representative power, and the judiciary. The measurement should focus on the quality of institutions, meaning to what degree they are governed by the rule of law, human rights, and are inclusive, transparent, accountable as well as resilient. The hardest part of the assessment is to define the criteria of the quality of institution, but the standard should be the level of maturity of the institution and its ability to remain in governance when the powers of other institutions are changing. José Antonio Alonso and Carlos Garcimartín defined the following qualities of institutions needed for good governance: capacity, predictability, adaptability, and credibility.¹⁸⁷ However this assumption is based on institutions' economic functions. In the proposed assessment of governance, all institutions should serve as checks and balances for one another.

The institutions should be measured both by looking at the formal characteristics of their design and by exploring the people's perception of their functioning. Most statutory legislation will be reviewed as part of the formal side of institutions, while the people's perceptions and expert reviews should provide insights into the resilience and maturity of them.

The measurement of institutions is suggested as an alternative to measurements of the rule of law, in which a strong focus on statutory

186. See *id.* at 4, 22, 26 (advocating for caution in the process of choosing indicators because adopting indicators means that governments must accept certain global governance standards which thereby affect governance decision-making).

187. Jose Antonio Alonso & Carlos Garcimartín, *Measuring Governance As If Institutions Matter: A Proposal*, in THE PALGRAVE HANDBOOK OF INDICATORS IN GLOBAL GOVERNANCE 69, 91 (Debora Valentina Malito et al., eds. 2018).

legislation might lead to incorrect conclusions on the quality of governance. The foreign aid programs often plan adoption of certain laws as their main outcome, framed as a legislative reform.¹⁸⁸ Thus, the index which investigates specific legislation will provide a high rank to the country where the good laws are in place.¹⁸⁹ To the contrary, thirty years after its implementation of the International Covenant on Civil and Political Rights, Belarus, for example, recently denounced the treaty's First Optional, which allowed individual complaints to the Human Rights Committee.¹⁹⁰ Belarus is only country in the twenty-first century to withdraw from the treaty, which is ratified by 117 other countries.¹⁹¹ This legislative rollback might not be possible with a better developed culture of public participation in decision-making.¹⁹²

Therefore, a suggested evaluation of governance based on the quality of institutions might be an efficient alternative to quantitative measurements of the rule of law with their inherent limitations. Moreover, the institutions are treated as context-specific structures, so the conceptual framework of the proposed measurement is based on an assessment of the local conditions instead of imposing the transplants.¹⁹³ The rule of law and human rights serve as the basis for

188. See Dawson & Swiss, *supra* note 1, at 765 (suggesting that aid appears more helpful to rule of law outcomes than previously believed and noting that aid can influence the diffusion and adoption of model laws).

189. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2022 52 (2022), <https://www.state.gov/wp-content/uploads/2022/10/20221020-2022-TIP-Report.pdf> (ranking countries based on effort of governments to meet the Trafficking Victim Protection Act's minimum standards, including enacting laws punishing human trafficking).

190. See Press Release, U.N. Office of the High Commissioner for Human Rights (OHCHR), Belarus' Withdrawal from Individuals Complaints Procedure a Serious Setback for Human Rights Protection, UN Human Rights Committee Says, U.N. Press Release (Nov. 25, 2022) (expressing regret over Belarus' withdrawal from the First Optional Protocol and suggesting that the withdrawal will deny justice to victims of human rights violations).

191. See *id.* (condemning Belarus' decision to withdraw from the Optional Protocol).

192. See *id.* (noting that the decision to withdraw from the First Optional Protocol was made without consulting civil society and non-governmental entities).

193. See Kaufmann et al., *supra* note 25, at 3–4 (explaining that governance, and the institutions and traditions used to measure governance, are evaluated on a country-specific level).

any institution in a country, so their absence would immediately lead to a conclusion that the institution is not functional.¹⁹⁴ A visualization of the suggested measurement should be a narrative description instead of the country rank or a traffic light. A description of the quality of institutions formulated by the experts as an outcome of the assessment will help minimize its misinterpretation and misuse.

In general, Engle Merry, who advocated for a narrative ethnographic account as a complement to quantification,¹⁹⁵ is correct. She gave an example of an assumption that the number of police forces is treated as a solution to violence, which is not fully true, because violence is often linked to gender stereotypes in society and cannot be counteracted if the gender issues are neglected.¹⁹⁶ Engle Merry called for creation of micro-ethnographic studies and qualitative knowledge of people, social situations, and larger structural contexts to counter the global indexes and rankings, which led to homogenization by quantification.¹⁹⁷

IV. CONCLUSION

Measurement of the efficiency and impact of foreign aid programs and assessment of the rule of law in a recipient country both include the gray areas, despite many global efforts of monitoring and evaluation.¹⁹⁸ Hence, a measurement of the official development assistance channeled for improvement of governance is a double effort. Throughout the process of drafting the development programs, planning the policy reforms, as well as assessing their transformative

194. *See id.* at 2, 4 (explaining that rule of law and various other human rights concerns, like absence of violence, are used to measure governance in each country evaluated).

195. *See* ENGLE MERRY, *supra* note 1, at 1–2 (explaining that while numerical knowledge is essential, if it is not connected to qualitative data then it can lead to oversimplification).

196. *See id.* at 2 (detailing an indicator in New York City that measured the proportion of investigations of law enforcement officials for certain cases).

197. *See id.* at 221 (arguing that quantitative models should not be relied on because it detracts from the complexity of the social world and suggests a more qualitative approach).

198. *See* Davis et al, *supra* note 184, at 1, 20, 33, 48 (explaining that while many indicators are currently used for the purpose of allocating aid and influencing global governance, future research should be conducted to better understand the impacts of indicators).

outcomes, donors, authorities, civil societies, and academia rely on the international rankings and indicators, which measure governance and the rule of law as its integral part.¹⁹⁹

Creation of any measurement starts with a theory of an ideal society towards which the current situation is assessed.²⁰⁰ However, in absence of a clear definition of governance and the rule of law, a conceptualization of the indicators lacks coherence and theoretical depth. At the same time, most rule of law indexes and rankings were able to demonstrate trends and patterns for countries over a long time, as proven by a case study of Belarus.²⁰¹ However, any quantitative measurement might be misleading without a substantive interpretation, which requires a multi-dimensional approach and acknowledgement of methodology limitations.²⁰²

All reviewed indexes and rankings lacked a measurement of both the statutory legislation and its implementation. The global nature of the rankings and limited resources for data collection explained some compromises in the methodology, which are not outlined upfront to an ordinary reader.²⁰³ For example, the authors of the indicators relied on the old surveys to have more countries in the report and limited the researched population groups to ensure a cross-country comparability of data.²⁰⁴ Unfortunately, the unmeasured vulnerabilities might become even more apparent. Finally, the methodology of indicators

199. *See id.* at 20 (noting that the World Bank and other organizations that track indicators claim to influence global governance via their impact on governing entities, local constituencies, and investors, as well as public, professional, and political opinion).

200. *See id.* at 11 (suggesting that indicators often express ideologies about the ideal society and that these ideologies may be shaped by users and other actors interpreting the indicators).

201. *See* RULE OF LAW INDEX 2022, *supra* note 44, at 50 (displaying the results of the Belarus case study and assigning Belarus a global ranking based on the indicators measured).

202. *See* ENGLE MERRY, *supra* note 1, at 25 (explaining that the statisticians and experts who create indicators face challenges like missing data and unmeasurable phenomena and arguing that these limitations should be acknowledged).

203. *See id.* at 25 (arguing that the limitations of quantitative data collection for indicators, such as missing data and unmeasurable phenomena, should be acknowledged and even challenged given that these indicators have the power to shape public perception).

204. *See* RULE OF LAW INDEX 2023, *supra* note 168, at 183 (noting that the polling data used for the index was collected in different years depending on the country).

provided equal weight to components of the rule of law without underlining, or even omitting, the role of human rights.²⁰⁵

A suggested alternative evaluation of governance should assess the quality of institutions, which are defined as country-specific structures and meant to exercise authority, both of which are subordinate to the principles of rule of law and human rights. The narrative, presented as an outcome of this assessment, could be used by policymakers and donors as they plan the governance reforms and foreign aid programs. Ideally, this approach should help avoid dysfunctional transplants and make the institutions resilient so that they constitute checks and balances for good governance, which is essential for development.²⁰⁶

205. See RULE OF LAW INDEX 2022, *supra* note 44, at 183–184 (explaining that data was equally weighted for easier comparison).

206. See Faundez, *supra* note 16, at 400, 411 (explaining that transplanted institutions will likely fail and bring about social disorder).