

## Comparative Legal Metrics - Symposium

### Comparative Legal Metrics: An Introduction

Giulio Napolitano\*

The aim of this symposium is to discuss the significance of the themes raised by the volume ‘Comparative Legal Metrics. Quantification of performance as a regulatory technique’ edited by Mauro Bussani, Sabino Cassese and Marta Infantino.<sup>1</sup> The book collects fourteen essays (preceded by an introduction and closed by a concluding chapter, both authored by the editors), that were presented in a workshop organized within the framework of the 21<sup>st</sup> General Congress of the International Academy of Comparative Law (IACL), held Asunción, Paraguay, on October 2022.

According to the editors’ view, the research underlying the volume originated from an empirical observation.<sup>2</sup> Over the last decades, the trend of measuring performances has become global and pervasive – and increasingly more so since the so-called digital revolution. As a matter of fact, many jurisdictions around the world have aspired to ground public policies and regulation on rational basis, through the collection and elaboration of a set of quantitative information and data. In this way, the quality of regulation and the level of accountability of public decision-makers can be greatly enhanced, reducing the risk of bureaucratic drifts and administrative inefficiency.

The effects of the proliferation of performance measurements across a growing number of fields – from education to health, from work to credit, from justice to consumer sector – have been widely studied by social scientists, but legal research on this phenomenon has remained minimal. One of the aims of the book is actually to prove that the quantification turn has produced fundamental changes in the ways in which the law is seen and used. In particular, the spread of social quantification has implied substantial turns in governance and regulatory techniques, whereby performance-based measures are relied on to steer behavior towards desired goals, predominantly with a carrot and stick approaches, reporting

\* Full Professor of Administrative Law, Roma Tre University.

<sup>1</sup> M. Bussani, S. Cassese and M. Infantino eds, *Comparative Legal Metrics. Quantification of Performance as a Regulatory Technique* (Leiden: Brill, 2023).

<sup>2</sup> M. Bussani, S. Cassese and M. Infantino, ‘Quantification of Performance as a Regulatory Technique: An Introduction’, in Ead eds, n 1 above, 1.

obligations, quantity (rather than quality) and form (rather than substance). In this perspective, performance-based quantification qualifies as a form of regulatory intervention, that also profoundly affects how regulation is understood and applied.<sup>3</sup> Further – as the editors argue –, the ways in which this happens are multifarious. Performance-based measures are always adopted and applied in legal contexts and sectors that react differently to the quantification turn. The volume thus aims to provide a better understanding about which forms of quantitative measures are widespread, in which sectors and regions, have been implemented, and finally by whom and with what regulatory effects.<sup>4</sup>

The editors gathered high-profile scholars from Brazil, China, the European Union, Mexico, India, Japan, Poland, South Africa, Switzerland, and the United Kingdom, and asked them to reflect on the regulatory impact of performance-based quantitative tools in one of the following fields: domestic justice and education, national policy-making, trans/inter-national measurements of market-related activities. The volume is correspondingly divided into three parts. The first two parts deal with the spread of legal metrics in the management of core functions and services at the domestic level, focusing respectively on justice and education (Part I) and policy-making (Part II), while Part III analyzes how legal metric is used within and across state boundaries for the (self-)regulation of market-related activities.

More in particular, the seven contributions in Part I investigate performance-based quantitative assessments of justice and courts in Brazil,<sup>5</sup> Mexico,<sup>6</sup> India<sup>7</sup> and Switzerland<sup>8</sup> (Chapter 1-5), as well as the actual or prospective uses of legal metrics in the education systems in South Africa<sup>9</sup> and Poland<sup>10</sup> (Chapter 6-7). The four chapters in Part II address the use of performance-based tools in policy making from a variety of perspectives: Chapter 8 concerns Africa in general – and South Africa more specifically –, it examines how the digitalization of the public administration is

<sup>3</sup> M. Bussani, S. Cassese and M. Infantino, n 2 above, 1-18; Ead, 'Quantification of Performance as a Regulatory Technique: A Comparative Appraisal', in Ead eds, n 1 above, 323-364.

<sup>4</sup> *ibid*

<sup>5</sup> P.R. Borges Fortes, 'Revisiting 'Justice in Numbers' in Brazil: Quantified Justice, Managerial Judges, and Numeroids as a Regulatory Technique', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 21-38.

<sup>6</sup> L. José Béjar, J.A. Casanovas, C.A. Villanueva, 'Performance- Based Evaluation in Mexico's Federal Administrative Justice Tribunal and the Federal Judiciary Power: A Comparison', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 39-60.

<sup>7</sup> M. Subin Sunder Raj and C. Basak, 'Judicial Performance Index in India: Charting a New Course', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 61-73.

<sup>8</sup> A. Lienhard, 'Performance Assessment in Courts – the Swiss Case', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 74-95.

<sup>9</sup> V. Farysheuskaya and P. Piraino, 'Admission Algorithms for Affirmative Action in Higher Education: The South African Experience', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 96-117.

<sup>10</sup> A. Jakubowski, 'Quantification and Parameterization of Legal Research: The Case of Poland', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 118-136.

providing for new quantitative tools of governance;<sup>11</sup> Chapters 9 on China<sup>12</sup> and 10 on Japan<sup>13</sup> navigate through the many local uses of performance-based instruments for the management and supervision of public and private conduct; Chapter 12 on the United Kingdom reports how performance-based assessments lie at the core of the human rights review carried out by the UK's Equality and Human Rights Commission.<sup>14</sup> Part III analyzes how legal metric is used within and across state boundaries. Chapter 12 on Africa<sup>15</sup> and Chapter 13 on Europe<sup>16</sup> explores the potential benefits and perils of mass algorithmic profiling and of reputational feedback systems in the digital economy. Chapter 14 examines the development of hard and soft-law quantitative tools of self-measurement for channeling corporate activity within and outside national boundaries,<sup>17</sup> while Chapter 15 focuses on the ways in which the measurement of countries' legal institutions by international organizations have influenced policy-making and regulation in national legal systems.<sup>18</sup>

Cutting across boundaries of national/supra-national/transnational law and of public/private domains, the volume empirically demonstrates that performance-based measures may work as a form of regulatory intervention, and its style and effects are dependent on the sector and the context in which the turn to quantification takes place. At the same time, the volume abstains from any naive enthusiasm, openly analyzing the limits and the errors that can occur (and historically happened) in the elaboration of standards.

<sup>11</sup> R. Gottardo, 'Algorithmic Decision-Making and Public Sector Accountability in Africa – New Challenges for Law and Policy', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 139-179.

<sup>12</sup> I. Cardillo, 'Governance and Quantification of Performance in China', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 180-202.

<sup>13</sup> T. Inatani and M. Kinoshita, 'Use and Abuse of Quantitative Methodology for Policymaking in Japan', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 203-215.

<sup>14</sup> D. McGrogan, 'Measuring Human Rights Performance in the UK: Liberalism, Communitarianism, and the Equality and Human Rights Commission's 'Drunkard's Search'', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 216-242.

<sup>15</sup> S. Mancuso and L. Corselli, 'Profiling in Algorithm-Based Decisions: An African Perspective', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 245-265.

<sup>16</sup> T. Rodríguez de las Heras Ballell, 'Trust in an 'Omnimetric Society'? Reputational Systems in Platforms as Tools for Assessing Contractual Performance and Applying Remedies', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 266-283.

<sup>17</sup> L. Heckendorn Urscheler, 'Performance Measurements in Compliance with Corporate Social Responsibility Obligations', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 284-304.

<sup>18</sup> K.E. Davis, 'The Role of International Organizations in the Production of Legal Metrics', in M. Bussani, S. Cassese and M. Infantino eds, n 1 above, 305-322.