ORGANIZING DISORDER: INDEXING MIGRANTS’ RIGHTS AND INTERNATIONAL MIGRATION POLICY

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I. THE HUMAN RIGHTS OF MIGRANTS

In 1999, the United Nations Human Rights Commission mandated a Special Rapporteur with the responsibility of promoting and ensuring the protection of the human rights of all migrants. The resolution articulating the Special Rapporteur’s mandate draws attention to the “racism, xenophobia and other forms of discrimination and inhuman and degrading treatment against migrants,” and reminds us of the importance of efforts to overcome the obstacles that exist to the full and effective protection of their human rights and fundamental freedoms.1 However, over a decade has now passed and progress has been, at best, incremental. In his final report in 2011 as the outgoing Special Rapporteur, Jorge Bustamante stated clearly, “insufficient progress had been made in mainstreaming human rights into migration governance.”2 Perhaps one of the best illustrations of this is the poor ratification record of international treaties that articulate the rights of migrants.

At the time of this writing, only 47 of the 192 Member States of the UN have ratified the 1990 International Convention on the Protection of the Human Rights of All Migrant Workers and Members of Their Families (ICRMW).3 Among these countries, 91%, meaning all but four, are immigrant-sending countries.4 Moreover, none of the advanced industrialized immigrant-receiving countries, where the drums of immigration control arguably beat

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Several International Labor Organization (ILO) treaties also articulate the rights of migrant workers, but these too have poor ratification records. For example, only 23 countries have ratified ILO Convention 143 (C. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers. The low number of ratifications is certainly not due to lack of time, as C. 143 has been open for signature since 1975.

It is here where the importance of efforts such as the International Migrants Bill of Rights (IMBR) project becomes especially pertinent. Ongoing and persistent calls to infuse human rights norms into global migration governance and domestic policies have gone largely unheeded. As François Crépeau, the current Special Rapporteur on the human rights of migrants notes, “states continue to attempt to govern migration largely on a unilateral basis,” which has led to a “retreat from binding United Nations-based frameworks.” As a matter of realpolitik, such a dynamic is to be expected in a post-Westphalian system of nation-states, wherein non-interference in domestic affairs and the integrity of territorial borders are among the main components of national sovereignty. This would not be entirely problematic if (1) the rights of migrants were fully recognized, respected, and did not need protecting, and (2) if rights abuses were to occur, that domestic legal frameworks could offer remedies and redress in a manner consistent with international standards. Unsurprisingly, among the reasons cited for the general lack of support for international treaties designed to strengthen rights protections for migrants, particularly among Western countries, are that migrants are already treated in accordance with international standards and that existing legal frameworks are in fact sufficient.

Both of these reasons, however, do not hold up well under empirical scrutiny. For example, the work of the Special Rapporteur has shown that the hands of Western immigrant-receiving countries, including countries that are regarded as leaders in human rights, are not clean when it comes to the abuse
of the rights of migrants. The Special Rapporteur has conducted twenty-eight country visits; European Union Member States have been the subject of seven of these visits and the United States has been the subject of two. In nearly every visit, either blatant rights violations, policies that severely restrict or curtail rights in the interest of immigration control, or inadequate legal protections were documented. This is illustrative of the core political dynamic that raises the importance of the IMBR: The rights of migrants remain at risk, and states seldom confess openly and publicly to the rights abuses they commit.

Given this complicated disorder, a database with objective, measurable, and verifiable indicators such as the one being created by the IMBR consortium will have no shortage of uses. It may serve as an international legal reference for immigrants, attorneys, and policy makers concerned with the rights, protections, and entitlements of international migrants. It may serve as an advocacy tool to benchmark the extent of policy protections and provisions rendered by different governments. It may serve as a means of evaluating the extent of different states’ compliance with the international and domestic commitments they make. It may also serve as a basis for the comparative analysis of immigration regimes, such that scholars can analyze the impact that migrants’ rights regimes have on other phenomena, or how other phenomena affect such regimes. In so doing, it can further expose the distance between rhetoric and state practice when it comes to respect for the human rights of migrants.

This database evolves amidst a flurry of scholarly attempts to code the universe of immigration policy across countries. In this short article, we discuss this previous work and reflect on best practices in developing indicators. We critique the IMBR indicators and consider available methods for social science and legal analysis.

II. AN EMERGING FIELD

Within the field of migration studies, existing indices have made significant progress in the compilation, coding, and measurement of policy and law. Given the enormous scope of country-level regulation related to migration, studies have been necessarily limited to particular topics such as those


covering asylum policy, labor migration, and the integration and entitlements of migrant workers and their families. Even fewer studies are significantly cross-national in nature. Here, scholarship about citizenship and integration policy have made the most progress.

Forthcoming work by the International Migration Policy and Law Analysis (IMPALA) Consortium reviews this work and seeks to improve it by measuring the restrictiveness of both admissions and naturalization policy according to the direct coding of legal statutes across twenty countries and thirty years. As this work has shown, immigration policy outputs in Western Europe and North America have become increasingly complex over time, featuring more categories of regulation and denser networks of policies. Though they have only completed this coding for nine countries in a span of ten years, this approach and its methods set the bar for both a standard of rigor and for the application of legal research for the purposes of social scientific research.

However, little such work examines countries’ variable protections of migrants’ rights. A pair of indices created by Martin Ruhs includes thirty-five indicators that measure the openness of labor immigration programs in forty-six upper and middle-income countries, and the legal rights (civil and

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political, economic, social, residency and family reunification) granted to the
migrant workers they admit. In this work, he argues that labor immigration
policies in his case countries are characterized by a trade-off between
openness and rights. That is, countries with less restrictive admission policies
are characterized by a more restrictive set of rights, particularly economic,
social, residency, and family reunification rights.

Despite a general focus on high-income and Western industrialized coun-
tries, people are migrating to an increasing number of new destination
countries, including states in the Global South that do not have such estab-
lished policy infrastructures. New work is considering the demographics of
these countries as outcomes of policy regimes. Alas, actual laws and
policies are frequently nascent, vague or difficult to research in such venues.
One of the main challenges for scholars is thus to create indicators that not
only reflect the complexity of statutes as parsimoniously as possible, but also
capture the full extent of migrants' rights in a manner outlined by the IMBR's
principles.

III. METHODOLOGICAL CONCERNS

The IMBR captures an extensive array of rights in twenty-three separate
articles. As an integrative legal framework, it reflects core principles related
to physical integrity rights, civil and political rights, and economic, social,
and cultural rights. While its comprehensiveness is one of its greatest
strengths, the IMBR also presents a series of methodological challenges for
social science and legal researchers.

A. From Concept to Reality

One of these challenges is to identify empirical indicators for the rights
articulated in the IMBR. In other words, how do we know the rights of
migrants when we see them? Anticipating a chorus of, "if rights are ar-
ticulated in laws," or other similar answers, a useful thought exercise is to
imagine an analogous question in a different context. For example, how do
we know democracy when we see it? Just as our ideas about what it means to
be a democracy can manifest not only in constitutions that guarantee
fundamental civil and political rights, but also in what these rights mean for

19. MARTIN RUHS, THE PRICE OF RIGHTS: REGULATING INTERNATIONAL LABOR MIGRATION 6,
20. Id. at 6.
21. Çağlar Özden et. al., WHERE ON EARTH IS EVERYBODY? THE EVOLUTION OF GLOBAL BILATERAL
22. See ANNA BOUCHER & JUSTIN GEIST, CROSSROADS OF MIGRATION: A GLOBAL APPROACH TO
NATIONAL DIFFERENCES (forthcoming 2014).
http://w0.World.georgetown.edu/academics/centers-institutes/isim/imbr/IMBR-Info.cfm, 28 GEO.
IMMIGR. L.J. 9.
the lived experiences of people in a society (e.g., meaningful political participation, freedom of religion, etc.), among number of other ways, the rights of migrants can find expression in law, but other indicators also exist. What then governs the selection of indicators?

In keeping with our example, the Polity IV Project, which produces one of the most widely used measures of democratic governance in the social sciences, collects data on indicators that reflect the procedural rather than substantive aspects of democracy. This is purposive and reflects an interest in the social sciences to empirically examine whether democracy in law and institutions leads to the range of substantive outcomes we generally hope for and expect from democratic governance. The IMBR’s selection of indicators seems similarly purposive. By specifying indicators of rights as they appear “on the books” of states, researchers can use these data to engage with a number of important questions, including whether the articulation of rights in domestic laws translates into substantive outcomes for migrants.

Rights are a multidimensional concept. Thus, even after settling on empirical indicators, we must then ask ourselves whether these indicators represent the pillars on which our concept stands. Otherwise put, if our answer to the question of “how do we know the rights of migrants when we see them?” is something to the effect of, “by looking to the domestic laws of states,” the question then becomes, which of these laws “matter.”

Ways of determining intellect and aptitude, particularly among young people preparing for college, provides another analogy. Standardized tests like the Scholastic Assessment Test (SAT) form one of the pillars that admissions boards use to evaluate college readiness. However, standardized tests can be criticized for being indicative of test-taking ability, which is a part of, but not the whole of what students encounter in college. Being attune (more or less) to this point, admissions boards also consider grades, extracurricular activities, and personal statements as part of the overall assessment of college readiness. Shifting our attention back to the IMBR, the twenty-three articles it lays out provide us with a framework for conceptualizing the rights of migrants. These rights ought to be more than simply footnotes in national laws to citizenship rights. Rather, more than just physical integrity rights, they should permeate all aspects of civic, political, economic, social, and cultural life. The articulation of rights in each of these areas forms the discrete pillars on which the rights of all migrants stand. If the IMBR simply articulated a set of political rights, for example, one could easily imagine critiques along the lines of, “the rights of migrants are more than just political rights.” We are hard pressed to make such critiques, however, given the encompassing way in which the IMBR conceptualizes rights.

B. Measurement Error

This leads us to a more technical point. While the IMBR provides a compelling framework for conceptualizing the rights of migrants, like democracy and intellect, the rights of migrants cannot be measured directly. What can be observed (i.e., the articulation of rights in law) thus provides measures for the unobserved (i.e., respect or disregard for the rights of migrants).

In the language of structural equations modeling, the rights of migrants can be thought of as a latent variable, which we can denote using \( \eta \) (eta). While we do not observe \( \eta \) directly, we can say that states with laws "on the books" that articulate protections for migrants are more likely to respect the rights of migrants than those that do not. The IMBR's empirical indicators thus share a relationship with \( \eta \). These relationships can be represented by \( \lambda_i \), wherein \( \lambda \) (lambda) represents how much each particular indicator "loads" onto \( \eta \) and the subscript \( i \) represents each indicator. The larger the value of \( \lambda \), the more a particular variable "loads" onto \( \eta \). In other words, higher correlations between \( \lambda \) and \( \eta \) mean that the indicators are in fact tapping into the concept that we are interested in. This discussion is not complete, however, without the introduction of \( \theta_i \) (theta), which is the measurement error between each of our observed indicators and our unobserved construct. In other words, do indicators measure what they are intended to measure?

Altogether, we can think of measurement error as such:

\[
\theta_i = y_i - \lambda_i \eta
\]

This equation acknowledges the possibility that each IMBR indicator, no matter how rigorously conceptualized and carefully coded, may not perfectly tap into the core of what we are interested in. The term \( y \) in the equation is a country's score on a particular indicator and each indicator is denoted by the subscript \( i \). Theta therefore represents the difference between a country's score on a particular indicator and its structural legal protections of rights. For example, misinterpreting "laws on the books" provides one source of possible measurement error. Forcing complex laws into intentionally parsimonious categorization schemes provides another example of error that can arise in the coding process (while filling out the indicator questionnaires). Finally, the indicators only focus on national-level law, but some countries may more comprehensively protect migrants' rights at a different lawmaking level; such as state law instead of federal law.

25. See INT'L. IMMIGRANTS BILL OF RIGHTS INITIATIVE, 2013–2014 PILOT STUDY: CODING PROCEDURES AND RECORDING GUIDELINES FOR IMBR DRAFT INDICATORS (2014), 28 GEO. IMMIGR. L.J. 143, 144 ("Although federal systems can produce contradictory national- and state-level policies, the pilot study questions focus exclusively on national-level policies.")
C. Systematic Error

Perhaps more importantly, respect for the rights of migrants requires more than the articulation of certain rights in law, which is a kind of error not captured in the equation above. How laws are interpreted, what they mean as a matter of practice, and what they mean in migrants' lived experiences are all important factors to consider. What laws "on the books" do not capture when it comes to what states do "on the ground" is thus another major source of measurement error that must be considered in relation to the IMBR. For example, a country such as North Korea may get a perfect score on the indicators because it has written flawless laws protecting human rights, but in practice many of those laws are not actually followed.26

The IMBR Initiative has made the decision to measure the rights of migrants as an expression of law, rather than practice.27 This distinction, which reflects the difference between outputs and outcomes, respectively, is well-trodden territory in policy studies, and particularly immigration policy studies. James F. Hollifield, drawing on David Easton, explained outputs as the level of policy formulation, while outcomes are at least in part the result of policy implementation.28 While policy outcomes originate to some degree in legislative outputs, they also frequently defy international and domestic commitments in order to serve political interests or due to the incapacity of state enforcement mechanisms.

The collection of output and outcome data each carry benefits and disadvantages. An exclusive focus on outputs "leaves out important aspects such as the control, interpretation and implementation of laws as well as the consequences of formal regulations."29 This is especially true in circum-
stances where adherence to de jure laws is replaced by de facto realities.\textsuperscript{30} The desirability of focusing on outputs is a central question for the IMBR because states' rhetorical and legislative commitment to international law and norms is frequently not reflected in their practice. Moreover, some states may not acknowledge or ratify international law and norms out of concern for their sovereignty, but nevertheless meet relevant standards independently. On the other hand, outcomes sometime fail to account for unauthorized activity, casual exemptions and other informalities. Migration outcomes are also influenced by many other factors beyond policy decisions, and can therefore be an uncertain proxy for policy regimes. To address this difficulty, many databases have simply opted to consider both outputs and outcomes. For example, Koopmans' studies of settlement policy featured forty indicators that involved not only policies in law, but also the cultural aspects of policies, related administrative decrees, and local implementation practices.\textsuperscript{31} Similarly, the MIPEX project combined a large range of more than 140 indicators, which were coded by experts who are assumed to have sufficient knowledge of implementation practices.\textsuperscript{32} This is also the method of the Economist Intelligence Unit's (EIU) \textit{Global Migration Barometer}, which evaluates naturalization and admissions policies.\textsuperscript{33}

D. \textit{Coding Error}

Another concern related to measurement is the extent of coder subjectivity and inter-coder reliability. IMBR questions ask coders questions such as: "Does the government prohibit?"\textsuperscript{34} "Does the government criminalize?"\textsuperscript{35} "Does the government allow?"\textsuperscript{36} "Does the government provide?"\textsuperscript{37} "Are migrants included?"\textsuperscript{38} Such questions frequently require coders to make determinations about the implicitness or explicitness of statutes, regulations,
and constitutions—all of which are highly subject to judicial interpretation in the first place. While the IMBR’s inclusion of legal references for each coding decision will be tedious to execute, it will prove imperative when future users seek to corroborate coding decisions.39

To address this, earlier work has replaced simple, dyadic indicators (which facilitate aggregation) with continuous variables, which account for more nuance.40 In particular, Zachary Elkins shows that graded measures have superior validity and reliability.41 The IMBR Indicators account for this by allowing coders to respond “Conflict: A conflicted response reflecting competing and contradictory laws” or “NA: A ‘not applicable’ response reflecting a lack of relevant laws,” along with the conventional “Yes/No” dichotomy.42 While “Conflict” is a clear term, there is a propensity for careful coders to error on the side of “NA” unless absolutely explicit evidence is present in documentation. This may lead to the underestimation of a state’s adherence and variation in coder determinations across states.

E. From Indicators to an Index

One of the goals of the IMBR project is to use the data collected on the empirical indicators of rights to create an index that scores states along a continuum of respect or disregard for the rights of migrants. The extent to which this index will be used by researchers, however, may largely hinge on the answer to the question of how the indicators combine to form a meaningful measure of rights? To aggregate the indicators to form an index, researchers may (1) rescale the indicators so that their ranges are equal, (2) ensure consistency in the valence of the indicators, (3) add up the values for all of the indicators, and then (4) rescale the total scores using a common range. For example, assuming each indicator involved a “no” or “yes” answer, wherein “no” represents the absence of rights (negative valence) and is assigned a value of 0 and “yes” represents the presence of rights (positive valence) and is assigned a value of 1, one could simply combine the indicators to form an additive index.

This approach, however, makes a number of problematic assumptions. One of these involves how the indicators are weighted. In the aforementioned example, all indicators are weighed equally. This would mean that the right of non-refoulement was weighed the same as the right to hold opinions

39. See Coding Procedures, supra note 25, 28 GEO. IMMIGR. L.J. 145 ("[D]ata collectors should check only those sources of law that support the given response. Alternatively, in cases where there is a "Conflict" response, data collectors should check all sources of law that generate the resulting contradiction.").


42. Coding Procedures, supra note 25, 28 GEO. IMMIGR. L.J. 144.
without interference, and so on for all of the indicators. This would not be problematic if we did not have \textit{a priori} assumptions about hierarchies of rights and the importance of particular rights relative to others. Another assumption made in the example is that there are constant and equal distances between values. Imagine a scenario wherein three indicators—the right to life in Article 5,\textsuperscript{43} the right to liberty and security of person in Article 6,\textsuperscript{44} and the right to education in Article 22\textsuperscript{45}—combined to form an index of the rights of migrants. A value of 1 is assigned to an indicator if the right is articulated in law and 0 otherwise. Our hypothetical index would thus have a maximum value of 3. In comparing two countries, A and B, suppose A articulated the right to life and the right to liberty and security of person, but not the right to education, and B articulated the right to liberty and security of person and the right to education, but not the right to life. Both countries would receive a score of 2, however, the distance between a score of 2 and a score of 3 for A would reflect the absence of the right to education whereas for B it would reflect the absence of the right to life. The underlying point of discussing these examples is that for researchers to have confidence when referring to or using the index, a clear answer must be given to the question of how the indicators combine to form a meaningful measure of the rights of migrants.

\section*{IV. ORGANIZING DISORDER}

The world of migration policy regimes resembles a large collection of children's handball courts. In each court, the interests of the participants remain largely constant and the fundamentals of the game remain the same. However, each court's players improvise a variety of ever-changing rules, unspoken leniencies, and unmarked boundaries, such that a newcomer would have trouble navigating from one court to the next. Without a centralized list of referable rules that systematically organizes these differences, onlookers have trouble understanding—let alone participating in or joining—the various venues. This is the dilemma facing immigrants, advocates, attorneys, and scholars concerned with the nature and extent of migrants' rights across countries. The IMBR and its database of indicators will go a long way towards mapping out these differences.

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\begin{itemize}
\item \textsuperscript{43} \textit{Int'l. Migrants Bill of Rights} art. 5, \textit{28 Geo. Immigr. L.J.} 16.
\item \textsuperscript{44} \textit{Int'l. Migrants Bill of Rights} art. 6, \textit{28 Geo. Immigr. L.J.} 16.
\item \textsuperscript{45} \textit{Int'l. Migrants Bill of Rights} art. 22, \textit{28 Geo. Immigr. L.J.} 21.
\end{itemize}