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The rule of law: Measurement and deep roots☆

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ABSTRACT

We propose a new *de facto* indicator for the rule of law. It is the first such indicator to take the quality of legal norms explicitly into account and not only their enforcement. Using this indicator, we investigate the deep roots of the rule of law. Our findings suggest that, in line with the theoretical literature on long-run economic development, specific determinants of long-run development (such as colonization events and strategies) operate via the rule of law, whereas others (such as the timing of early state formation and the transition from hunter-gatherer to agrarian societies) are not related to the rule of law. We interpret this evidence as supportive of the established notion in the literature that institutions matter for development.

1. Introduction

Most people, at least in the West, agree that the rule of law, which can be defined as the subordination of all citizens and all representatives of the state to well-defined and established laws, is a desirable trait for a country's legal system. It is often argued to be the basis for predictable and fair state action, which in turn is conducive to economic development. Not surprisingly, many development organizations have tried to promote the establishment and preservation of the rule of law in various parts of the world – thus far with mixed results at best.

Given this enthusiasm for the rule of law, it is remarkable how little we know about it. This pertains not only to its effects, but also to its root causes. Improving our knowledge of the rule of law presupposes the ability to measure it. To date, the existing rule of law indicators suffer from a number of conceptual flaws. Therefore, a new indicator is developed here. We follow a proposal for such an indicator that was spelled out in Voigt (2012). This proposed indicator is based on a rather minimal conception of the rule of law that implies a limited number of theoretically derived and individually measureable dimensions of the rule of law. In debates about the rule

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of law, such an approach is usually referred to as the "thin" conception of the rule of law, which is distinguished from "thick" conceptions in which other dimensions, such as democracy or fundamental rights are added to the thin core. Data produced by the World Justice Project (WJP, see Botero and Ponce, 2011) is used here to analyze the association between the few dimensions taken into account and to measure the rule of law in aggregate. This data describes the *de facto* situation in a country with respect to multiple elements of the rule of law and based on the perceptions and experiences of both citizens and country experts.

Drawing on our newly developed rule of law indicator, we investigate the fundamental determinants of the rule of law. The development community seems to agree that attempts to export democracy have been, by and large, a failure (Andrews, 2013 and Coyne, 2007 are just two scholars making that point). Nevertheless, there is still much money spent on trying to implement the rule of law in many regions of the world. The World Bank alone spends hundreds of millions of dollars annually on such projects. Also the European Union uses an instrument for pre-accession assistance to financially support rule of law promotion in countries that are official candidates for membership. To better evaluate the prospects of being successful in such an endeavor, it is essential to understand why some countries were able to implement and safeguard the rule of law, while others are merely ruled by law. This is closely linked to questions about the fundamental causes of long-run growth. Both democracy and various aspects of the rule of law are considered by some scholars to be determinants of differences in income (see Acemoglu et al., 2018 for the effect of democracy on income, and Rigobon and Rodrik, 2005 for the causal relationships between income, democracy, and rule of law). Instead of directly addressing the complex identification problems arising in the analysis of the interrelationship between income levels and the rule of law, we focus on a more basic question: Given the strong association between income and the rule of law, which of the fundamental determinants of income can also be linked to modern-day rule of law levels?

Our findings suggest that only those determinants of long-run economic development for which theory claims a transmission channel via improving the rule of law are actually linked to higher rule of law levels. Other established deep determinants of income differences are not statistically related to the rule of law at all. Hence, our results indicate that the rule of law does significantly contribute to economic development and it does not simply arise as a consequence of high income levels.

The rest of the paper is organized as follows. In Section 2, we introduce our new rule of law indicator. Sections 3 and 4, respectively, deal with potential proximate causes and the deep roots of the rule of law. Section 5 concludes.

2. A new rule of law indicator

The renewed interest in the rule of law in recent years has been accompanied by a supply of indicators purporting to measure the rule of law. So, why would anyone produce yet another one? It has been convincingly argued that some of the most frequently used indicators in cross-country studies suffer from serious flaws (see Voigt, 2012 for a summary of this literature). As an example, consider the dimension "rule of law" produced as part of the Worldwide Governance Indicators by a team originating from the World Bank (Kaufmann et al., 2011).[1] It is not only among the most frequently used indicators for the rule of law, but probably also the most criticized. The main critique is that the indicator is not based on a thoughtfully systematized concept, but that its (implicit) definition is based on surveys that happen to be available when the indicator is produced.[2] Consequently, it is unclear if this indicator really captures the quintessence of the rule of law or whether it is driven by some non-essential components. Producing a new rule of law indicator with a sound theoretical basis promises not only an alternative to the World Bank's indicator, but allows also an evaluation of whether there is cause for concern regarding its validity.

2.1. Conceptualizing and measuring the rule of law

It is not surprising that a concept like the rule of law has been delineated in a myriad of ways. Here we propose to rely on a rather thin (narrow, formal) instead of a thick (broad, substantive) conception.[3] Whereas the thin version contains only the bare necessities, a thick version may contain other desirable traits. We choose to delineate the rule of law rather thinly here because an all-encompassing definition of the rule of law would be unworkable for both empirical research and policy advice. To be as clear as possible about our conceptualization of the rule of law, we name some concepts that are better kept apart from it: (1) democracy, (2) market economy, (3) broadly defined human rights, (4) law and order, and (5) the degree to which citizens comply with the law.[4]

To give the various dimensions of the rule of law some structure, we propose to distinguish formal traits that legislation should have from instruments that are used to ensure the proper implementation of legislation. These instruments include, among other things, the separation of powers, judicial independence, and a narrowly defined set of basic human rights (including the absence of extrajudicial killings, torture, and the like).

Focusing on the formal traits of legislation, Hayek (1960:164) points out that the rule of law is typically contrasted with the rule of man. It is sometimes referred to as "government under the law" because the law is to be applied equally to everyone, political leaders included. Under the rule of law, no power employed by government may be arbitrary, but all power has to be limited. According to

[1] Other popular rule of law indicators are, e.g., provided by Freedom House or as part of the Bertelsmann Transformation Index and the International Country Risk Guide.

[2] We are deliberately brief here because there is an extensive debate of the indicator's weaknesses. Among the critics are Arndt and Oman (2006), Knack (2006), Langbein and Knack (2010), Thomas (2010), as well as Kurtz and Schrank (2007). Kaufmann et al. (2007) is a reply to some of the critics.

[3] The distinction between thin and thick concepts is commonly used in the literature on the rule of law (see, e.g., HiiL, 2007).

[4] Voigt (2012) discusses reasons for separating these concepts from the rule of law. Raz (1977) argues that they better be kept apart from the rule of law as a matter of analytical clarity.