

Comparative law and ethics in Rule of Law assistance

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The structure of this skills oriented course integrated *comparative law experiences* with *professional ethics*. It aimed at inciting debate about legal cultures and cross system issues and bring students to reflect on their own practice or projects as *actors involved* in RoL advising work in multiple legal orders (domestic foreign, regional and international).

The first week introduced **central themes** (conceptual, methodological and substantive). The second week focused on **advanced issues**.

After a presentation and discussion of the topic, the daily **module** (or “class”) included as a springboard an exercise with comparative and ethical dimensions. The **exercises** offered a practical framework for a range of methods and tools to work with in other legal systems. Although comparative law as a scholarly discipline has now existed for more than a hundred years, practical applied exercises have been somewhat scarce. They help students from a legal tradition examine how to work in other legal traditions; for instance lawyers from a civil law tradition to advise in countries with common law, Islamic, or customary legal traditions. Likewise lawyers from any of these traditions will be able to better advice in countries of another legal tradition. Indeed comparative reasoning plays an ever larger role in legal reform, drafting statutes and deciding cases. Attention has also be given to lateral know-how and notions which are not particular to any given tradition but which run across a number of legal systems: general principles common to the laws of many states, casuistry, analogical reasoning (qiyas), “international opinion”, creativity, reciprocal influences and ethics of situations.

2- Course strategy. During the first session, I presented the course approach and its entry points: (1) The conceptual framework; (2) Methodological aspects in RoL comparative assistance (skills, know-how, processes, tools...); (3) Areas of comparative law to be covered during the course. Participants expressed their own wishes, including: justice (incl. post-conflict and transitional justice), human rights, family law, economy, labour law, migration, gender aspects....These dimensions (concepts, methodology and skills, substantive law) were not to be completed sequentially each at a single session. We continuously worked *with* them in technical assistance *comparative situations* using mixed scanning approaches at conceptual, strategic and operational levels, combining elements of comprehensive rationality and disjointed incrementalism (cf Public policy approaches)

3- Timing. To illustrate the importance and timing of the subject, slides related to the situation in the Arab world, in years before the on-going changes, were presented. Attention was in particular given in this slide to the column "voice and accountability"

Percentile Rank (0-100), 2002

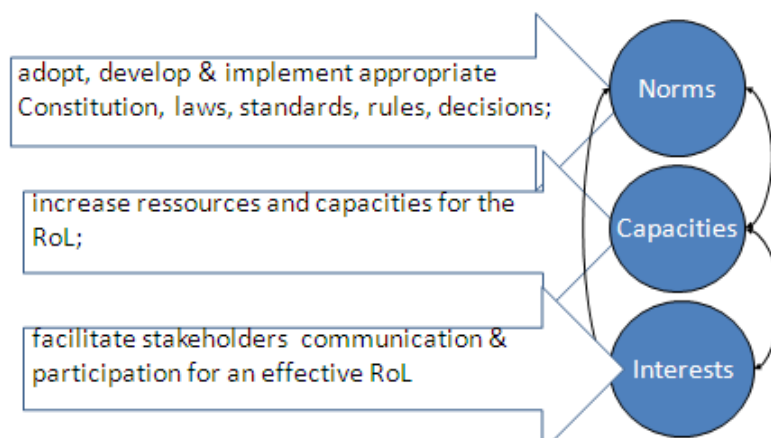
Country	Voice and Accountability	Political Stability	Government Effectiveness	Regulatory Quality	Rule of Law	Control of Corruption
Algeria	20.2	9.7	32.5	34	35.1	31.4
Cyprus	77.3	57.8	83	85.1	76.8	79.9
Egypt	22.2	34.1	46.9	38.1	57.7	47.9
France	88.4	70.8	90.7	85.6	87.6	89.2
Greece	81.3	78.9	76.3	82.5	74.2	73.2
Israel	67.2	14.1	83.5	79.9	81.4	83.5
Italy	83.8	73	80.4	83.5	75.8	76.3
Lebanon	31.8	27.6	43.3	37.1	51	45.9
Libya	4.5	31.9	18	4.6	18	24.7
Malta	88.9	97.8	85.6	81.4	83	76.8
Morocco	40.4	39.5	61.3	55.2	59.3	58.2
Spain	87.9	77.3	89.2	87.6	84.5	89.7
Syria	5.6	38.9	33	16.5	43.8	47.4
Tunisia	22.7	53	71.6	53.6	61.3	67
Turkey	36.4	27	50.5	56.7	55.2	43.8

Source: World Bank, "Governance Research: Indicator: Country Snapshot (GRICS): 1996-2002", 5

4- The conceptual approach: For a Cooperation Ethics

a) Reminder of the RoL adviser function & suggested methodology

RoL advisers assist counterparts...



Triangulated methodology

1/ Contextual (the norms in context)

International recognized principles & standards;
Regional norms;

Interpret Constitution, legislation, customs...

External & internal coherence

Law in action and Cases

2/ Functional

Objectives, capacities,
sector approach, Budget
support; Programme cycle;
Logical framework approach;
other guidelines (RIA); Thematic
guidelines

3/ Societal (Interactive)

Stakeholders analysis
Participatory,
Counterparts, partners,
exchanges, workshops
Iterative, retrospective,

b) Exercise

UN Regulations

governing the Status, Basic [Rights and Duties](#) of Officials and
Experts on Mission; Regulation 1: Officials and experts on
mission shall make the following written declaration witnessed by
the SG or an authorized representative:

I solemnly declare and promise to exercise in all loyalty,
discretion and conscience the functions entrusted to
me by the UN, to discharge these functions and
regulate my conduct with the interests of the UN only in
view, and not to seek or accept instructions in regard to
the performance of my duties from any Government or
other source external to the Organization.

Regulation 2c: (...) Loyalty to the aims, principles and purposes of
the UN, as set forth in its Charter, is a fundamental obligation of
all individuals covered by the present Regulations.

(Read also Naturalisation test <http://eudo-citizenship.eu/comparative-analyses>)

c) Cooperation Ethics

The RoL adviser – foreign or national expert engaged in technical assistance-works in three
interrelated fields: normative, administrative and socio-economical¹.

¹ This empirical analysis presents (modest) analogies with Miguel Reale's *Tridimensional theory of Law* (first defined in *Filosofia do Direito* 1953, then in *Teoria Tridimensional do Direito* 1968) where he combines sociology of law, legal positivism and natural law. Reale's *Dialectics of complementarity* is developed in *Experiência e Cultura* (1977). " Law, fact, value and norm will always be present whether the law is studied by the philosopher, the sociologist, or the jurist " (in *A Brazilian Perspective on Jurisprudence: Miguel Reale's Tridimensional Theory of Law* Augusto Cesar Moreira Lima Oregon Review of Int'l Law Vol 10, 2008) On M. Reale also: *De la pyramide au réseau?: Pour une théorie dialectique du droit*, François Ost, Michel Van De Kerchove.

1- Norms. In the first field, the adviser's role is, roughly put (but more precisely defined in her/his Terms of References-ToR), to help ensure that norms², legislation, measures, rules, decisions and so on eventually reflect internationally recognised standards as adopted in declarations³, covenants, treaties, agreements incorporated in National strategies, public policies, actions plans and so on. But this normative top down legality (as often presented in the ToR) often reflects a bottom-up reality whereby universal values and RoL where in fact firstly claimed by citizens (e.g. Nelson Mandela; or writers e.g. Soljenitsine; or movements e.g. Solidarinosc, Kefaya...); not by "transplant" nor (realistic) diplomacies but by struggling people in search of justice. The adviser's **methodology** is thus necessarily comparative and contextual as the partner (or "beneficiary") expects knowledge, advice and know-how adapted to the local system, strategy and conditions⁴. **Questions** in this field relate to the nature and content of law; how it should define rights and duties; lessons to be drawn from other constitutions and legislative reforms; the consistency, validity and clarity of rules; their sources and function, their making and impact; the authority of written and unwritten norms, different reasonings⁵...

In this field the adviser's **ethics** is **principled**, deontological, an ethic of professional and personnel principles and values. This view "describes a form of justification in which first principles are derived in a way that does not presuppose any final human purposes of ends, nor any determinate conception of the human good"⁶. In other words there should be certain principles from which all others are derived but which themselves are self-existent. A lawyer will abide, among others to the oath of admission to the Bar (if she or he is a "Barrister" lawyer), to international commitments, to the service contract but also to her/his own value judgment⁷ as an expert working in a project or programme funded by an international, regional or bilateral cooperation institution. Moreover ethical and comparative law issues are not only international: "The most urgent problem in the design of democratic institutions today is how best to design such institutions in the midst of seemingly profound internal heterogeneity, conflict, and group differences"⁸.

2- Capacities. The second field is more institutional and administrative. In order to effectively and efficiently reach its goals, the direct partner (or "beneficiary"), requests operational assistance, advice and support to enhance (build, increase, strengthen...) **capacities** (human, material, resources, infrastructures...) and **procedures**. Here, the expert's **methodology** is functional and based on public policy analysis; costs-benefit analysis, policy-making processes; management and best practices in training and technical

² « a norm is defined as "a rulelike prescription which is clearly perceptible to a community of actors which makes behavioural claims upon these actors" Martha Finnemore & Kathryn Sikkink (*International norm dynamics and political change* International organization vol 52 n°4); they add "agreement among a critical mass of actors on some emergent norm can create a tipping point after which agreement becomes widespread in many empirical cases" e.g. given during the course: women's suffrage"

³ « To be sure, soft law is sometimes designed as a way station to harder legalization, but often it is preferable on its own terms. Soft law offers many advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own " Abbot & Snidal 2000 International Organisation vol.54

⁴ cf bibliography on comparative law in Prolaw website. In French among others: *Comparer les droits, résolument* PUF 2009)

⁵ *The rule of law in international and comparative context* Edited by Robert McCorquodale British Institute of International and Comparative Law 2010

⁶ M.J. Sandel, *Liberalism and the limits of Justice*, Cambridge University Press. 1995 p. 3

⁷ According to Dworkin we are justified in thinking a "value judgment" true when we are justified in thinking that our arguments for holding it true are adequate arguments. The Kantian justification of an ethical principle requires to go beyond "I" to a universalisable judgment, the standpoint of an impartial observer.

⁸ Pildes R.H. *Ethnic identity and democratic institutions* Ed. by Choudhry Oxford University Press 2008

assistance (the logical framework approach; objective mapping, functional analysis; sector and budget approaches; risk appraisal, Training of trainers...). In addition the adviser is aware that public institutions are sensitive to both norms and citizens' expectations, but not fully determined by either. Institutions have also their own "life". **Questions** appear in structuring problems; forecasting expected outcomes; facilitating decision-making; recommending preferred options and developing arguments; monitoring bidding procedures, evaluating performance... They raise the questions of capabilities (Amartya Sen), resources (Ronald Dworkin), human capital (Gosta Esping-Andersen).

In this field the expert's **ethic** is primarily **consequentialist**. As the "client" will be responsible for the consequences of advices, a teleological contextualization of the RoL assistance is needed. And according to rule-utilitarianism, the right action is that action which is performed in accordance with a rule, or set of rules, the following of which maximizes utility⁹. For J. Rawls however even teleology is not the ends we choose but our *capacity* to choose them. And this capacity is located in a self which must be prior to ends it chooses. "The self is prior to the ends which are affirmed by it"¹⁰.

3- Interests. These two fields are embedded in a socioeconomic specific *context* (usually difficult: in transition, developing, instable, fragile, failing, failed, in conflict, in war, post-conflict, in disaster recovery...). The adviser needs to interact with stakeholders, people and understand their actual interests. The **methodology** is not only based on social research and technical tools (such as stakeholders' analysis, regulatory impact assessment), it is highly interactive and societal and has to do with democracy and occasionally political practices. **Questions** arise as the RoL adviser is confronted with relations¹¹ in the real world, interests, struggles, lack of exchanges, inequalities in the access to knowledge or justice; power relations and discourses; wrong interpretations; conflicting strategies...The challenge is democracy, "Building a society"¹²; the Theory and Practice of Equality¹³, "Equality of fair opportunity" (J.Rawls).

As reason is "imbedded in complexes of communicative action and in structures of the lived-in world" (Habermas), the RoL adviser's ethics is also to be found in **communication ethics** when partners mutually recognize each other by accepting the common structures and processes that make *cooperative communication* possible. Otherwise, for instance when representatives of different cultures do not recognize each other as persons each having his/her own dignity, claims to power will distort the situation and prevent a reasonable conversation and practical reason. The challenge exists within the same culture too as it is often about "*Moral sentiments and material interests: The foundation of cooperation in economic life*"¹⁴.

One should go further. Carol Gilligan¹⁵ and Virginia Held¹⁶ find higher tendencies in women to affiliate with others and to interpret their moral responsibilities in terms of their

⁹ Brad Hooker, *Ideal code, real world: a rule-consequentialist theory of morality*. Oxford University Press 2000

¹⁰ J. Rawls, *A Theory of Justice* OUP 1980 p.560

¹¹ Pierpaolo Donati, *Relational Sociology: A New Paradigm for the Social Sciences*, London, Routledge 2010

¹² Pierre Rosanvallon *La société des égaux* Seuil Paris 2011; Alain Renaut *Quelle éthique pour nos démocraties* Buchet Chastel 2011, Dominique Terré *Les questions morales du droit* PUF 2007

¹³ Ronald Dworkin *The Theory and Practice of Equality*, Cambridge (Mass.), Harvard University Press, 2000

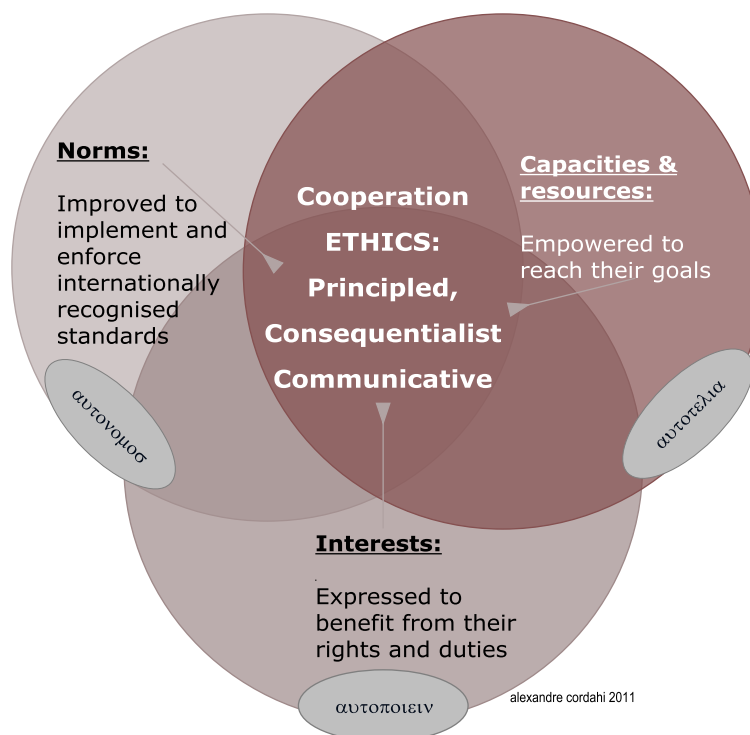
¹⁴ Herbert Gintis, Samuel Bowles, Robert Boyd & Ernst Fehr, Cambridge (Mass.) MIT Press 2006

¹⁵ *In a different voice: Psychological theory and women's development* Cambridge (Mass): Harvard University Press, 1982

relationships with others. For Gilligan and Held valuing autonomy and individual independence over ***care and concern for relationships*** is seen as an expression of male bias.

With the conditions of cooperative communication, democracy, Human rights based approaches and the Rule of law, arguments can and should convince, without violence. As illustrated hereunder the three spheres offer a complex interplay of norms, institutions and interests¹⁷. The adviser seeks to facilitate fluidity within and between these spheres. With his or her assistance, local partners and “persons of vocation” (*Berufsmenschen* Max Weber) promote norms compatible with their national strategy and principles of universal significance.

“The ethic of conviction and the ethic of responsibility are not absolute opposites. They are complementary to one another, and only in combination do they produce the true human being who is capable of having ‘vocation for politics” (Max Weber). That also applies in our framework to which we add however *cooperative communicative ethics*. There is a tension between the *principled* ethics of the lawyer, the *consequentialist* ethics of the public servant and the *cooperative communicative* ethics of the international cooperation actor. Seeking to bridge the gap (and assist others doing so) is a duty for the RoL adviser, and, whenever done, a professional pleasure and (occasional) achievement.



¹⁶ *Feminist Morality : transforming culture, society, and politics* Chicago: University of Chicago Press, 1993

¹⁷ M. Reale and J. Derrida were influenced by the Husserl and Natorp dialogue on the method of reconstruction vs. reduction. The Neo-kantian Marburg school (H.Cohen, P. Natorp, E. Cassirer) developed principles of legal humanism. Paul Natorp considered that the Weimar Constitution had to be founded on three ideal pillars: , legal universality, economic regulation and the education of its citizens. He argued that any legitimate legal order (*Rechtsstaat, the Rule of law*) is underpinned by the *autonomous* human person as a legal subject and self-creation (*autopoiesis*) linked to the ethical doctrine of freedom as an *autotelic* form, dynamically and continually defining goals. Reale favoured such cooperative personalism which can still inspire us.