Forum

Brindisi to the Brindisians, graffiti in Brindisi, Italy. Photo by A. M. Pusceddu.

In/formalization

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Expertise and adventure: In/formalization processes within EU rule of law capacity building programs
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Expertise and adventure

In/formalization processes within EU rule of law capacity building programs

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Abstract: This paper explores dynamics of formalization and informalization as interlinked social processes as a contribution to a critical understanding of rule of law capacity building programs in the framework of EU enlargement policy. It also challenges the assumption according to which informality would be a modality characteristic of countries of the "Global South".

The concept of "informal economy" was forged in the framework of development studies (Hart 1973). While it has been – and is often still – uncritically employed to refer to a distinct, separate "sector" from the formal economy, it is widely recognized today that informal practices permeate the formal economy (Guha-Khasnobis, Kanbur, Ostrom 2007). A significant contribution to a critical assessment of informality as a process linked to formal practices came from the anthropological scrutiny of the legal/illegal divide (e.g. Heyman 2013), a pervasive dichotomization recently complicated by "extralegality", a broader conceptual framework referring to diverse kind of social processes in which collective and individual agents and institutions interact, favour and/or contrast the production of both, formality and informality in given social contexts (Smart, Zerilli 2014).

Drawing on ideas and ethnographic material developed while doing fieldwork within EU-funded legal cooperation projects – formerly in Romania, and more recently in Kosovo – in this commentary we focus on dialectics and tensions between formalization and informalization as inter-

linked social processes. We notably explore how dynamics of in/formalization may serve to penetrate logics and mechanisms of programs and projects of justice development, and particularly the diffusion of a certain legal culture under the "rule of law" umbrella concept.

While a number of authors have began to unpack the concept of rule of law itself, seeing it as a historical, cultural artefact *of* and *for* governmental, domination, and other exploitative practices captured by the idea of "plunder" (Mattei, Nader 2008), we suggest to look at rule of law as a commodity exchanged across the global legal marketplace. A market where legal knowledge, expertise and consultancy are exported and imported, offered, and in fact traded from countries of the "Global North" – aka the donors, each in competition with each other – towards countries of the "Global South" – the beneficiaries of international aid, struggling for recognition – in the form of projects and programs of legal development. The challenge we take, hence, is to bring current reflections on in/formality as social process back to (legal) development studies, notably in the framework of rule of law capacity building programs.

Prishtina, capital and largest city of Kosovo, Europe's youngest state. Especially the summer from early in the morning till late evening a plethora of bars and cafes around the city centre are plenty of people having their *macchiato*, a very tasty coffee. Stereotypes about Kosovar Albanians insist on their laziness. Their ability "to work" in cafes is often object of jokes and self-ironies. Actually, the tremendous number of meetings held in cafes is an important aspect of the projects' social life and indeed an opportunity to develop the projects in which "locals" and "internationals" cooperate. From apparently innocent, ironic comments the tone of the conversation may suddenly shift to serious observations. While discussing about the organization of a seminar for a project, a young official of the Kosovo Ministry of justice says: «Do they [the internationals] really think they can just come here in their imperialistic way? *They don't respect my country*. They don't know anything about us – and they want to tell us, how to make our country better? No, you cannot bring rule of law like this!» (emphasis added).

Since the end of the Cold War the world-hegemonic legal regime known as the rule of law has increasingly driven privatization, marketization and democratization programs, notably across the region interested by the EU enlargement policy. According to the EU, «the rule of law is the backbone of any modern constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member

States of the EU and, as such, one of the main values upon which the Union is based. *Respect for the rule of law* is a precondition for EU membership» (emphasis added)[1]. But how such precondition is achieved in actual practice, if ever? And how respect for the rule of law as a precondition for EU membership intersects with the "respect for my country" from the vantage point of people belonging to beneficiary administrations?

Among several other instruments, the EU adopted the Twinning, an institutional building tool designed to develop cooperation between public administrations of EU member states and of beneficiary (candidate or potentially candidate) countries[2]. A considerable part of the EU budget for enlargement is allocated for developing rule of law capacity building programs across the Instrument for Pre-accession Assistance region (IPA)[3]. Drafting a Twinning call for proposal and the application itself are rigidly formalized procedures. The competition among applicant countries, however, is often influenced by extralegal practices, notably the unique political and economic relationships certain member states have established with IPA region countries. For a member state, "to win" a project means to get financial resources and the opportunity to exercise a considerable power influence on the ground, notably on the way the legal system of a beneficiary country could be shaped, with significant economic consequences including financial investments, joint ventures and commercial partnerships.

The backbone of Twinning are usually two project leaders – one on behalf of the EU member state leading the project, the other of the beneficiary administration – a "Resident Twinning Adviser" (RTA) from a EU member state and his local counterpart. The RTA is usually assisted by two salaried "locals": an assistant and a translator. The general aim of a Twinning is to provide support for the transposition, implementation and enforcement of the EU legislation (the EU acquis). Hundred pages of EU-law have to be translated in another language and transposed into a national legal framework, finding the best solution in structure and wording. In this process of legal harmonization «law is not mathematics», as one RTA observes. In order to transpose and translate a legal provision different

1. See *Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law*, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0158R(01) (accessed on 12/11/2017).

2. See https://ec.europa.eu/neighbourhood-enlargement/tenders/twinning_en (accessed on 12/11/2017).

3. The IPA region includes Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey.

solutions are possible: «You cannot imagine the fights behind the façade! Even within the EU, member state countries are fighting for *their own* solution!», the same informant suggests. Interestingly, while disagreements and controversies are relevant for understanding the actual implementation of projects and their final outcome, the conflictual dimension does not appear in official documents. Divergent opinions regarding how to face an accident or to address a technical issue are average during unofficial meetings, email exchanges, and cell phone conversations. Those informal negotiations, however, perceived as ubiquitous and «quite exhausting!», in the words of one expert, are carefully removed from the project reports. «It is a long way to negotiate a report. A considerable amount of time is spent writing reports in order to find the correct wording», the same expert adds. Not infrequently, the project leaders in charge of the report are asked by EU representatives to rewrite this or that section in order to make it consistent with the original blueprint, its structure and wording such as "terms of reference", "assumptions", "local ownership", and so on. Similarly, under the current EU audit regime, a work plan has to be implemented, benchmarks have to be fulfilled, reports to be written, documents to be produced, visibility guarantee, sustainability assured. As Riles (1998) has observed for similar cases of negotiations of international agreements, matters of "form" (i.e. aesthetics) appear more important than questions of "meaning".

Frequently glossed as "internationals", experts working for Twinning programs are experienced legal practitioners from EU member states. Typically they are legal professionals, judges, prosecutors or academics with a permanent position in their home country public administration. In our experience they are often male close to retirement age, who feel flattered by the opportunity to provide their job with an international dimension: «working as an expert here [in Kosovo] is a chance to give an international turn to my career», said one expert. In addition to several benefits, internationals often show themselves enthusiastic and proud to turn their knowledge and longstanding legal experience at the service of "developing democracies". Beyond such moral implications, many of them consider working as a consultant in a country like Kosovo an adventurous, exotic experience: «Isn't our life more interesting and exciting here?», an expert observes and immediately responds: «Oh, how boring it will be, when back in my country office!». Obviously, money is another important factor: the payment due for a mission abroad is usually very convenient comparing to the salary the same expert would earn in the home country.

International experts cooperate with "locals", namely officials and civil servants of beneficiary public administrations, usually professionals with a university background in law. While at least in principle experts from EU member states and officials from candidate countries share the same commitment (as prescribed by the Twinning manual itself), their actual collaboration is challenged by their structurally unequal position in the project in terms of roles, access to the project's budget and capacity to influence the project's implementation. In fact, the Twinning does not allow recruitment of local officials in the role of paid experts. Logics and rhetoric of cooperation and learning by doing on which the Twinning is based reserves to the locals (and only to some of them) the opportunity to take part to seminars and "study visits", the latter being educational initiatives organized by representatives of the EU member state in their home country and institutions. These are often also occasions for tourism and leisure, and are perceived by locals as a source of revenue in addition to the modest salary of the beneficiary public administration. As anticipated, major discrepancies between locals and internationals concern their different retribution and what they actually "get" from participating in a project. If we look at the average budget of a Twinning project (typically from € 1.2 to 2.0 million) from an accounting perspective, roughly 80% of the total amount of the expenses goes for the RTA salary, the short- and long-term experts' fees. In other words, as one RTA observes, «the money goes back to EU member state representatives, instead of reaching the beneficiary country», as one might expect.

Interestingly, although these structural inequalities affect the actual collaboration and the everyday project's social life, there seems to be a non-spoken mutual agreement between "locals" and "internationals". Beyond the effectiveness of the projects and irrespective of their actual outcomes all actors involved share the idea that new projects have to be launched and ongoing missions extended. This is cynically summarised by a local informant as the common interest «to keep the sick person sick». A full recovery of the patient would not justify any further aid intervention of assistance reducing a number of opportunities (including salaries for local staff, benefits for the local economy and infrastructure like hotels, taxis and restaurants etc.) for many of the actors actively involved in making the rule of law a commodity to be exchanged and traded across the legal marketplace, at both local and global level.

To conclude, ethnography among "internationals" and "locals" actively involved in the legal marketplace also shows that assigning to countries of the "Global North" the role of providers of legal rationality and formal procedures for countries in the "Global South", the latter being presumably "affected" by informal, traditional, and often corrupt practices is a misleading ideological assumption, albeit persistent in both popular and academic discourse. An insider view of the legal marketplace rather suggests that formal and informal practices and processes, their intricacies and uneven configurations permeate the actual implementation of the cooperation projects, beyond the local/international divide.

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