Import and Export of Legal Models: The Dutch Experience

Jan M. Smits*

1. Introduction

The phenomenon of “legal transplants” may be considered one of the major subjects of modern comparative law. Ever since Alan Watson published his famous book on the topic,¹ academics have been intrigued by exchanges of law whether between civil law countries or between civil law and common law countries. If put in Agostini’s terms of import and export of law,² over the past four centuries the Netherlands has been both an exporting and an importing country. The position of Dutch law is interesting, since the two reasons for the export and import of law, namely imposition, that is mere force exercised by the exporting country, and the persuasive authority of a legal system or its rules, have both served as a means for migration of Dutch law.³

In this contribution, I will present a brief general overview of the import and export of Dutch law during the past four centuries. My main interest, however, lies in the recent efforts by Dutch organisations, governmental and non-governmental, to establish the “rule of law” or, for that matter, a market economy, in the countries of Central and Eastern Europe. I will defend the thesis that smaller countries, such as the Netherlands, are in a much better position to export their law than those countries who play the “politics of power.” This is to some extent confirmed by the experience of the former Communist countries of Central and Eastern Europe, where Dutch legal advice has played an important role in shaping a more market economy-oriented legal system. Moreover, I will try to make clear that Dutch law was only able to fulfil its exporting task because of its past role as an importing country. I will concentrate on private law, not only because this is the area of law with which I am most familiar, but also because most transplants have so far taken place in this area. The command system of the former Soviet Union suppressed traditional private law to a large extent. Consequently, a new civil code is seen by the Commonwealth of Independent States (CIS) as “the keystone of law reform.”⁴


⁴ As submitted by the Commission of the European Communities Directorate-General for Economic and Financial

---

* Jan Smits is Professor of European Private Law, Maastricht University. This is an updated version of an article that was published as Jan Smits, Systems Mixing and in Transition: Import and Export of Legal Models: the Dutch Experience, in NETHERLANDS REPORTS TO THE FIFTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 46 (E.H. Hondius ed., 1998).
2. Dutch Law around the World? Export of Dutch Private Law by Imposition

All that is needed to present a modest historical survey of the influence of Dutch law remaining in other countries is an overview of Dutch colonialism. The export of law by imposition, *ratione imperii*, and not *imperio rationis*, has shaped the legal systems of several countries.

The Seventeenth Century marked the heyday of the Dutch Republic’s economic and political power. It was then that the “torch of great legal science” was passed to Holland and the Dutch were able to export their Roman-Dutch law — a mixture of Roman law and mainly customary Dutch law — to the territories to which they set sail. It is interesting to note that in the majority of the countries with “mixed legal systems” — a term identifying systems mixing civil law and common law — the civil law component is made up of Dutch law. The *concordantiebeginsel* (principle of concordance) observed by the Dutch since 1629, ensured uniformity by implying that the law in the colonies would, as much as possible, be the same as that of the mother country. In some areas of law, this principle still governs the relationship between the Netherlands and its overseas territories Aruba and the Dutch Antilles.

In the archetypical mixed legal system of South Africa, we therefore find substantive private law that is mainly based on Roman-Dutch law. The Dutch East India Company (VOC) introduced it to the Cape of Good Hope in the years following 1652. From the Cape, the Boers introduced it to other parts of what is now South Africa, and the English similarly brought this form of law to Lesotho (1884), Rhodesia (1898), Botswana (1909), Swaziland (1907), and Namibia (1920). The English policy of preserving Dutch law after taking Dutch territories in the Cape (in the period between 1795 and 1803 and after 1806) and the introduction of English procedural law from 1827 onwards, are the reasons why South-African law could develop as a mixed legal system. Its mixed character can be illustrated by looking at the trust, a concept imported from English law, which, in an ingenious way, was incorporated into Roman-Dutch law. As a result, present-day South African trust law is very different from the English law of trust: it stands somewhat in between the English trust and comparable civil law institutions.
A similar development took place in Sri Lanka (the former Ceylon). There too, it was the VOC that occupied coastal territories from 1656 onwards and imported Dutch law. In 1796, England took over and the English 1801 Charter of Justice declared that Dutch law was to remain applicable. In 1852, Dutch law’s field of application was further extended to the inland parts of the country. Guyana (formerly British Guyana) faced a similar situation, although in 1917 Roman-Dutch law was almost entirely abolished.  

In the Dutch East Indies, which roughly corresponds to the present Republic of Indonesia, where the Dutch ruled until 1949, the situation was entirely different. The Dutch were able to export not only their pre-Nineteenth Century uncodified law, but their 1838 Civil Code and other codes as well. Although under Dutch rule, the Dutch Civil Code only applied to Europeans and those placed on the same footing, nowadays its field of application, as the *Kitab Undang-undang Hukum Perdata*, has been extended to all Indonesians in so far as its rules are not contrary to other Indonesian laws. The Dutch Penal Code, introduced in Indonesia in 1918, is still in force as the KUHP(*Kitab Undang-undang Hukum Pidana)*.  

In Surinam (Dutch Guyana), which gained independence in 1975, the 1838 Dutch Civil Code is still in force. In the Dutch Antilles and Aruba, both separate countries within the Kingdom of the Netherlands, a slightly amended version of the new Dutch Civil Code of 1992 was introduced. In the Antilles, this happened in 2001, and in Aruba in 2002. The reason for the introduction of the new Code in these countries was not so much the principle of concordance itself, but rather the appeal of a tradition of several centuries of uniformity, and the intensive trade and passenger travel between the Netherlands and these two countries. In addition, the two governments overseas felt that the quality of the solutions provided for by the Dutch Code was better than that of the old Dutch Civil Code.

This is a particularly interesting reason, since it is part of a more general tendency leading away from importing law by imposition. Aruba and the Dutch Antilles voluntarily imported law. This enabled them to decide for themselves which legal rules they thought useful, and to leave out those parts of the Dutch Civil Code they thought less suitable for their national legal culture. Thus, they left out the provision (article 3:84 s. 3 Dutch Civil Code) that bans a transfer of ownership for security purposes, as they were afraid that importing this *fiducia* ban would jeopardise business, in particular with American companies. Other differences deal with the level of protection for consumers against unfair general conditions and with family law. In this connection, it is worth noting that the principle of concordance is no longer interpreted as obliging other countries to bring their laws into line with Dutch law. The principle is now rather seen as a bilateral declaration that the countries within the Kingdom of the Netherlands will strive for as much legal unity as possible.

3. The Netherlands as an Importing Country: Towards a Mixed Legal System?  
When a legal system needs to be characterized in terms of legal families, at least two questions should be taken into account. The first concerns substantive law, while the second addresses methodology. If

---


For more details, see *Jan Smits, The Making of European Private Law: Toward a Ius Commune Europaeum as a Mixed Legal System* 139 (2002).

Although there is now a draft for a new Indonesian Criminal Code.

the substantive rules find their origin mainly in the gradual reception of Roman Law, are laid down in national codifications, and the mere application of statutory rules should, in principle, lead to a just result, we are dealing with a civil law system. The English common law system, on the other hand, is characterised by legal rules, which did not develop on the basis of Roman Law, but were established in and from case-by-case adjudication. Moreover, the common law lacks the more systematic approach of continental law. The traditional mixed legal systems are truly on the borderline of these two systems since their substantive law is made up of rules from both the civil and common decree systems. From a methodological point of view, they are often not based on a clear-cut ideology, but have an ad hoc method for obtaining just results.

Contemporary Dutch law cannot be readily characterised in terms of these two legal traditions. It is true that where substantive law is concerned, such characterization is not too complicated: Dutch law is undoubtedly still part of the civil law tradition. It is far more difficult, however, to answer the question as to which particular part of the civil law tradition Dutch law belongs.

The new Dutch Civil Code, which came into force in 1992, is most firmly based on the French tradition; the case law codified by it was based on the Dutch Civil Code of 1838, a slightly modified version of the French Code Civil of 1804. However, some concepts have been taken from the German and English tradition. For example, the provisions governing rechtshandeling (“legal act”) — one of the more prominent concepts of the Dutch code — were borrowed in part from the German law on Rechtsgeschäft. The same holds true for the rules governing power of attorney (volmacht) and general contract terms (algemene voorwaarden). On the other hand, English law highly influenced the rules regarding undue influence (misbruik van omstandigheden) as a ground for avoidance of a contract, and rules dealing with anticipatory breach. While the way in which mistake (dwaling) is codified may remind a Dutch lawyer of Dutch case law, the provision was also influenced by the English doctrine of misrepresentation.

The highly systematic organization of the 1992 Dutch Civil Code, and in particular the existence of a “General Part” — though not as general as the one in the German Civil Code (BGB) since it only applies to the law of obligations and to property law and not to family and company law — has led some authors to argue that Dutch private law no longer belongs to the group of French-inspired systems of law, but rather to the Germanic group. This is alleged to be apparent from its more learned character — the Dutch Civil Code is said to contain Professorenrecht — law developed by academics. Others have questioned this view and have asserted that Dutch law is still mainly based on French law, with a hint of the German legal mentalité. This debate does not seem very useful if no practical or theoretical consequences ensue from the characterization of Dutch law as belonging to one legal family or another.

---


14 “There is a widespread belief that Dutch law has floated away from its French origin into the direction of the German law family.” Arthur S. Hartkamp, Judicial Discretion Under the New Civil Code of the Netherlands, 40 AM. J. COMP. L. 551, 570 n.23 (1992).


Dutch law, in any event, remains part of the Romanistic systems of law as it systematically distinguishes between the law of persons (family law), the law of property, and the law of obligations. It must be emphasized, however, that within the Romanistic tradition, the Dutch Civil Code attempts to combine the best of Dutch, German, and French law. This is highly interesting, because the Dutch Civil Code is thus truly based on the *ius commune* of continental Europe.\(^17\) In trying to find the best possible solutions for the dilemmas that they faced, the drafters of the Dutch code frequently used comparative law.\(^18\)

Where English law influenced the Dutch Civil Code, it is entirely embedded in the Romanistic tradition. Anticipatory breach and misrepresentation are hidden within provisions containing the typical civil law concepts of non-performance and mistake. A different question, however, is whether Dutch *case law* is increasingly influenced by American and, to a lesser extent, English law. This would be in line with the shift in intellectual leadership\(^19\) in Western law from Europe to the United States, which started in 1945. In particular, in commercial law it is customary to refer to such newly created Anglo-American concepts as leasing, factoring, franchising and sale and leaseback. In the case of trusts, now recognised to a limited extent in civil law countries through the 1985 Hague Convention on the Law Applicable to Trusts and on Their Recognition, its reception tends to influence the very structure of the private law system, although the full effect of the Convention is yet to be acknowledged.\(^20\) Dual ownership, by distinguishing legal from economic control of property, is not typical of Dutch private law. It is safe to conclude, however, that for the most part Dutch substantive law is of a Romanistic nature.

When we turn from substantive law to methodology, it is far more difficult to determine whether Dutch law, or any modern continental legal system for that matter, is still part of the civil law tradition. In a codified civil law system, merely applying statutory rules to obtain justice is traditionally the prevailing ideology. This accords with the academic, rational type of law-making as practised in continental legal systems. In these systems, codification ensures predictability and legal certainty, whereas the common law, traditionally, lacks a systematic and logical method of dispensing justice in individual cases. Moreover, in a common law setting, law was never seen as an academic discipline. “Unfortunately or fortunately, I am not sure which, our law is not a science,” Bailache remarked in 1919.\(^21\) This traditional absence of conceptualism, and an emphasis on common sense, renders the facts of the case much more important than in continental law. In the words of Max Rheinstein, “[t]he ways of the common-law mind are different from those of the civil-law mind.”\(^22\)


\(^20\) Wiegand, *supra* note 3, at 238.

\(^21\) *See* Michael G. Martinek, Der Rechtskulturschock, 24 Juristische Schulung 92, 95 (1984) (*quoting* Belfast Ropewalk Co. v. Bushell, 1 K.B. 210, 213 (1919)).

\(^22\) Max Rheinstein, *Comparative Law — Its Functions, Methods and Usages*, in Gesammelte Schriften, Vol. 1, 251,
This archetypical image is outdated, however. Many continental systems, grant the judiciary wide discretionary powers. Consequently, the present continental courts are inclined to reason on a case-by-case basis in basically the same manner as their Anglo-American counterparts. Judicial discretion is especially broad under the Dutch Civil Code because of its many general provisions, such as the requirement of testing against the criterion of redelijkheid en billijkheid (good faith). The courts are thus able to further develop the law where the Code remains silent. The courts are also able to derogate from specific provisions in the Dutch Civil Code or from a contractual clause in order to prevent unjust results in view of the circumstances of the case. This flexibility of the law, allowing the judiciary discretionary freedom, obliges judges to reason each case. It is open to discussion whether this freedom goes so far as to eventually lead to a “decivilianization” of Dutch private law.

For my line of reasoning, it is important to note that a comparative survey of possible solutions, available in a variety of countries for the functional problems the drafters of the Dutch Civil Code had to face, makes the Dutch Civil Code a rich source of inspiration for legislators in other countries. Indeed, this is what E.M. Meijers (1880-1954), the father of the 1992 Dutch private law codification, hoped for when he wrote that in drafting a civil code, a small country could show the world its greatness. He felt that the new Dutch Civil Code could serve as a model for other civil codes and international treaties in the area of private law. Meijers could not foresee that by the time “his” Code came into effect, a great need for law reform would emerge in the countries of Central and Eastern Europe.

The role of Dutch law in this process is the main subject of this report. As the export of Dutch law in the past took place ratione imperii, there are now other factors that account for countries voluntarily taking over provisions of the 1992 Dutch Civil Code. The remainder of this contribution shows how this process of importing law took place in practice.

4. Efforts to Export Dutch Private Law to the Commonwealth of Independent States (CIS)

It would be ethnocentric to view exporting law as a unilateral process that takes no account of the recipient. In fact, export and import are very related phenomena. Successful export of law can only take place if the importing country is prepared not only to perceive the exporter's rules as useful, but is also willing to implement them. As legal mentalités may differ substantially from one importing country to another, the question arises as to whether it is at all possible for the exporting country to assess the chances of successful reception of the proposed rules. This calls for a very considerate exporting process through the provision of information on the exporter's legal system and the setting up of consultation protocols. In the end, it is for the importer to decide which of the proposed rules it will adopt.

This may be problematic, however, as some countries’ authorities are inclined to over-emphasize the

256 (1979).

23 Hartkamp, supra note 14, at 568.

24 Pierre Legrand, Jr., Civil Law Codification in Quebec: A Case of Decivilianization, 1 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 574 (1993) (providing explanation of this terminology).

25 U. Drobnig, supra note 15, at 175 (“Es verdient die höchste Aufmerksamkeit der Rechtsvergleicher.”).

impact of legal rules. Using law consciously and deliberately as a vehicle of economic and social change, as advocated by the EC Independent States Joint Task Force on Law Reform, appointed in March 1992, has its limits. It cannot be denied that the development of market economies in the CIS countries is one of the predominant reasons for importing Western legal models, but this argument should not be overextended. If it is, law reform is doomed to fail, since a transplanted legal system that is not compatible with the (legal) culture in the receiving country only creates a virtual reality. In other words, importing a Western legal model does not automatically lead to increased economic activity. Below I will give a more detailed overview of the efforts of Dutch organisations to promote the export of Dutch law over the last decade. It should be emphasized that I am able to present this overview through the kind assistance of the Centre for International Legal Cooperation (CILC) in Leiden, a central body coordinating law-reform assistance in the Netherlands. In the years following 1989, law-reform assistance was rather uncoordinated as it was rendered by separate institutions and individuals. In 1993, the CILC, a non-profit organisation, was founded to avoid problems in the future and to serve as a liaison between countries wishing to involve foreign legal expertise, particularly Dutch legal expertise, in restructuring their legal systems. The members on the CILC’s Board represent nearly all law faculties in the Netherlands, the Dutch Ministry of Justice, the Dutch Bar Association, the Dutch Association of Judges, and various institutes specializing in foreign law. A small staff of approximately 12 persons is responsible for the organisation of the CILC’s activities. The bulk of these activities consists of cooperation with the countries of the former Soviet Union.

Coordinated by the CILC, Dutch organisations have made an effort to promote the export of, mainly Dutch, private law in at least three different ways: by providing assistance in preparing legislation, in assisting in its implementation and training the judiciary, and through university cooperation.

As regards legislative activities, the Dutch offered their support to many countries, but I will concentrate on the efforts in Russia. Dutch involvement in the preparation of a new Civil Code for the Russian Federation began in May 1993. At that time, a small committee, consisting of law professors, J. de Boer and F.J.M. Feldbrugge, and the Vice-President of the Netherlands Supreme Court and Government Commissioner for the New Dutch Civil Code, W. Snijders, went to Moscow to discuss possible Dutch involvement. They met with the Presidential Committee entrusted with the drafting of a new civil code. From October 1993 onwards, consultations took place concerning Part 1 of the code, which was signed by President Yeltsin in November 1994. It came into effect in January 1995. As the Russian Minister of Justice described the cooperation with Dutch experts as “extremely useful,” CIS legal experts discussed further cooperation during a March 1994 meeting organised by the CIS Interparliamentary Assembly and held in St. Petersburg. Various consultations were held, for instance in November 1994 and March 1995. Legal experts from other CIS countries were also invited to attend the latter consultation meetings. In December 1995,
when the Russian Parliament adopted Part 2, further support was given until the end of 1996 to prepare the smaller Part 3 on private international law and inheritance law (entered into force in 2002). Leiden University initially funded Parts 1 and 2, but as of October 1993, MATRA and the American Rule of Law Programme USAID began financially supporting Parts 1 and 2. Part 3 was entirely funded by MATRA.

Since March 1994, Dutch experts also participated in the process of drafting a Model Civil Code (and model codes on substantive criminal law and criminal procedure) for the CIS countries. This Model Code Project was one of the largest undertakings thus far in the field of legal reform in Central and Eastern Europe. The drafters assumed that it would be more efficient to set up a system of joint consultations for drafting model legislation to be used by all the CIS countries than to have a great number of separate bilateral projects. Although the Model Code only provides recommendations, it is of great importance. If adopted, the Model Code enables the Independent States to acquire a high standard of codification, while at the same time preserving their traditional uniformity of legislation. The countries involved in this project were Russia, Belarus, Kazakhstan, Kyrgyzstan, Ukraine, Mongolia, Georgia, Armenia, Moldova, Turkmenistan, Azerbaijan, and Uzbekistan. Mongolia, although not a CIS member, also participated in the process through the financial support of the Dutch Ministry of Foreign Affairs. A Dutch team headed by W. Snijders assisted the Interparliamentary Assembly of the CIS States, who were formally entrusted with the drafting. The consultation procedure was set up in close cooperation with the American Rule of Law Consortium. In 1995, consultations were held on an almost monthly basis to work out the second and third part of the Model Civil Code for the CIS. In the area of criminal law, a total of 45 participants from the CIS countries held meetings to work out drafts for the model codes on substantive criminal law and on criminal procedure. Most of the costs were originally borne by USAID, while other donors funded a smaller part


34 CILC 1994 ANNUAL REPORT, supra note 32, at 4; CILC 1995 ANNUAL REPORT, supra note 30, at 5. MATRA is a Dutch Government scheme aimed at supporting social transformation in Central and Eastern Europe. An overview of MATRA’s activities can be found at http://www.netherlands-embassy.ru/matra_fund.html.

35 Some bilateral projects were set up in 1994 in some of the CIS countries, namely Kazakhstan (jointly financed by the Dutch Ministry of Justice and ABN/AMRO bank), Belarus (financed by the DGIS programme of the Dutch Ministry of Foreign Affairs) and Kyrgyzstan (financed by DGIS as well; Russian, Kazakh, and Uzbek drafting teams and, the American expert, Peter Maggs, also attended the consultation). See CILC 1995 ANNUAL REPORT, supra note 30, at 6, 8; CILC 1994 ANNUAL REPORT, supra note 32, at 6-7; CENTRE FOR INTERNATIONAL LEGAL COOPERATION (CILC), 1996 ANNUAL REPORT 5 (1996) [hereinafter CILC 1996 ANNUAL REPORT].

36 Feldbrugge, supra note 31, at 53; Joint Task Force Report, supra note 4, at 29.

37 Mongolia enacted a new Civil Code in 1995, but still wants to elaborate and improve the Code.

38 Established by two major American commercial consultancy firms and involved in many USAID-sponsored law reform projects; CILC 1994 ANNUAL REPORT, supra note 32, at 4.

In 1996, however, at a time when the Model Codes were nearly complete, US funding ceased. Several governments funded follow-up projects providing technical assistance to the drafting process of the model codes. Thus, the Dutch funded a project on “Completing the Model Code of the CIS States,” and drafting projects of some closely related laws dealing with bankruptcy and companies. These laws included draft legislation on the registration of foreign legal persons.

The Interparliamentary Assembly of the CIS finally ratified the Model Civil Code in 1994-1996. It served as a basis for the national codes of most of the countries mentioned above. I should add that several other model laws for the CIS were drafted as well. Among these are model legislation in the field of securities (a project co-financed by the Dutch Ministry of Foreign Affairs, the German Gesellschaft für Technische Zusammenarbeit (GTZ) (Agency for Technical Cooperation) and the European Bank for Reconstruction and Development) and model labor law.

This focus on the Russian Civil Code and model laws for the CIS did not mean that individual assistance in making civil legislation was not available. In Armenia, for example, at the request of the Armenian team drafting the new Civil Code, a consultation procedure was set up in the period 1995-1998. Armenian, American, and Dutch experts met several times to discuss drafts. Experts from these countries also helped to draft a new penal code and a code on criminal procedure in cooperation with the Council of Europe. The American Rule of Law Consortium funded both projects. The legislative committee of the Georgian Parliament also requested the assistance of Dutch and American experts to finalize the draft of their new Civil Code, which was originally made with the assistance of German experts, and to start work on the reform of criminal law.

In Ukraine, the CILC participated in a Consortium led by the German Stiftung für Internationale Rechtliche Zusammenarbeit (Foundation for International Legal Cooperation) to assist in the establishment (in 1997) of a Legal Policy and Advice Centre for the benefit of the Ukrainian government. In 1994-1995, in cooperation with the German foundation, support was given to the team drafting a new Ukrainian Civil Code. Both projects were funded under the EC TACIS programme.


41 The texts of some of these codes can be found at http://www.lexinfosys.de/codes/codes1.html. See also Marina S. Korableva, A Comparative Study of the Protection of Civil Rights: the Civil Codes of CIS Countries, 28 REV. CENTRAL & EAST EURO. L. 167 (2002-03).

42 The Model Securities Law was worked on between 1998 and 2002. See CENTRE FOR INTERNATIONAL LEGAL COOPERATION (CILC), 2000 ANNUAL REPORT 17 (2000); CENTRE FOR INTERNATIONAL LEGAL COOPERATION (CILC), 2002 ANNUAL REPORT 12, 12-13 (2002).

43 CILC 1995 ANNUAL REPORT, supra note 30, at 9; CILC 1996 ANNUAL REPORT, supra note 35, at 4-5.


45 CILC 1995 ANNUAL REPORT, supra note 30, at 8.

46 Technical Assistance Programme to the Independent States (TACIS) was created in 1991 as the world’s largest technical assistance programme, and was intended to help create a market economy in the CIS. See also EUROPEAN COMMISSION, THE EU’S RELATIONS WITH EASTERN EUROPE AND CENTRAL ASIA, at http://europa.eu.int/comm/
In Belarus, MATRA-sponsored support was given in 1994-1995 for the preparation of a new Civil Code. The main issue here was that the drafters needed advice from an “impartial outsider” on the policy choices they had to make in respect of the differences between their own draft, the Russian Civil Code, and the CIS Model Civil Code. Other projects have included legislative support to the Polish Ministry of Justice in the form of consultation procedures on modernizing Polish legislation. In the area of private international law, the Dutch Ministry of Justice, as well as drafting consultancies in countries such as Latvia, Lithuania, Hungary, the Czech Republic, and Albania have funded projects.

The Dutch organisations involved in law reform abroad are of course aware that enacting new legislation is virtually useless if the process of implementation fails. The practice of ignoring new legislation leads to failed law reform and makes the legal system lose credibility and certainty. Thus, by the time most former Soviet republics had enacted new civil codes, Dutch legal assistance had shifted its focus to the process of implementation. In particular since 1999, many projects on implementing new legislation were set up. These projects focused on the training of judges, strengthening the capacity of the judicial system, preparing commentaries on the new codes, or legal training in general. I will give two examples of these activities.

The first is concerned with the training of the Russian Procuratura, the training institute of the Public Prosecutor in St. Petersburg. The project, jointly funded by the U.S. government and the Dutch MATRA scheme, aimed at renewing the curriculum of the institute. In a first stage, Western study materials in the area of substantive criminal law and criminal procedure were collected to facilitate the study of the new Russian Penal Code of 1996, which contains many Western concepts. The material was translated and studied by Russian lecturers, who subsequently came to the Netherlands to prepare new textbooks.

The second example concerns the implementation of the Civil Code in Georgia. Dutch experts assisted in the preparation of a new Civil Code (adopted in 1997). The Georgian government asked CILC, the German GTZ, and USAID to help implement the code. Between 1998 and 2001, a project was executed to support the making of a commentary on the code, legal training, and a public awareness campaign. On the Georgian side, participants included the Ministry of Justice, the Judicial Training Center in Tbilisi, the team that drafted the code, and the Georgian Young Lawyers’ Association. A commentary was written, several seminars for legal professionals were organised, and information about the code was provided to the general public. A similar project was set up in Russia to support the implementation of the Russian Civil Code.

In the field of university cooperation, many activities were initiated over the last decade. Between January 1994 and September 1997, for example, the Dutch Law Faculties of the Universities of Leiden and Nijmegen, the Louvain University Law Faculty in Belgium, and the Law Faculty of Lomonosov University

external_relations/ceecatacis/index.htm.

47 CILC 1995 ANNUAL REPORT, supra note 30, at 8.

48 CILC 1994 ANNUAL REPORT, supra note 32, at 6; CILC 1995 ANNUAL REPORT, supra note 30, at 8.


50 This was done on a large scale during Perestroika.


52 CILC 2000 ANNUAL REPORT, supra note 42, at 18.

53 Id. at 19.
in Moscow cooperated under an EC TEMPUS project. The Dutch Institute for East European Law and Russian Studies coordinated this project. The project’s primary goal was to update and upgrade the curriculum in Moscow, which included the exchange of teaching staff and students. Dutch law professors taught courses in Moscow on European law and on the Dutch Civil Code. Dutch students visited Moscow on a study trip. Part of the activities were of a practical nature — in 1996, books and even a copier were shipped to Moscow to ensure distribution of materials for teaching purposes.

Another project in the field of university cooperation was the CROSS programme, carried out between 1995 and 2000. The programme aimed at supporting the Moscow State Academy of Law and, in particular, promoting the teaching of European law in Russia. Five different universities hosted promising young lecturers of the Institute who came to collect material for a new textbook on European law. Several of these lecturers attended courses on legal documentation in The Hague. Special attention was paid to ensure the dissemination of the new textbook to other law faculties in Russia. More practically, books and computer hardware and software were sent. Also, in this case, the Leiden-based Institute for East European Law and Russian Studies had a coordinating role.

Related to the mission of the CROSS programme was the Dutch participation in a large consortium, which included the Johann Wolfgang Goethe University in Frankfurt, the T.M.C. Asser Institute at The Hague and Italian, English, French, and Greek organisations. The programme aimed at supporting the creation of an Institute of European Law (IEL) at the Moscow Institute of International Relations. Many guest lectures by law professors from the EU and visits by IEL students and professors to European universities were carried out. Another important part of the project was to set up a library on European law for the new institute.

Special attention should be paid to a broad-scope project in Moldova, the implementation of which was the responsibility of the Dutch Ministry of Foreign Affairs. It was also partly sponsored by the Ministry. This project, carried out between 1996 and 1999, was part of a larger UNDP programme on “Governance and Democracy in Moldova.” The project consisted of three interrelated components: legislation and legislative training, training of the judiciary, and university cooperation with the State University Law Faculty in Chisinau. The third component was carried out by the Law Faculty of Maastricht University and provided for an exchange of lecturers and students. Each year, a promising young Moldovan lecturer participated in the Maastricht LLM programme.

This overview would not be complete without discussing Dutch activities undertaken in other parts of the world. These included assistance in drafting a new civil code and code of civil procedure in Eritrea.


55 CROSS is the Bureau of the Netherlands Ministry of Education for Cooperation, Culture, and Science with Russia in the field of Higher Education.


58 Joint Task Force Report, supra note 4, at 36 (see the suggestion made in the report).

59 CILC 2000 ANNUAL REPORT, supra note 42, at 14 (explaining that 1997-2001 was funded by the UNDP).
project aimed at supporting a law faculty in Mali and a judicial support program in Yemen. In 1995-1996, as part of a larger cooperative project between China and the Netherlands within various fields of science, the Dutch implemented the Leiden-Beijing Legal Transformation project. The project’s main objective was the exchange of researchers and lecturers. Dutch lecturers gave courses on tax law and company law. In the drafting process of the new Chinese Civil Code, of which the part on contract law was already implemented, Dutch experts were involved as well.

Since 1992, the relationship between the Netherlands and its former colony of Indonesia has not been optimal due to a number of incidents concerning human rights and an allegedly paternalistic development programme developed by the Dutch. Since that time, any link between legal assistance and development cooperation was unacceptable to the Indonesian government. However, a long-term project to compile a dictionary of legal terms, translated from Indonesian into Dutch, was carried out from 1994 to 1999. The project was financed by the Dutch Ministry of Justice and the Royal Netherlands Academy of Sciences. This was not just a theoretical exercise; it is widely accepted that in order to ensure a universal and correct implementation of legal norms, homogeneous language must be used. This law dictionary facilitated such unification of legal language. In 1995, the Netherlands and Indonesia signed a Memorandum of Understanding, which addressed future cooperation between the two countries in the field of law reform and legal studies. This led to some projects in the field of criminal law, including the making of an annotated translation of the major Dutch textbook on criminal law.

The preceding overview shows that the CILC coordinated most of the Dutch efforts in the field of law reform. This coordination also served, to some extent, as a safeguard against abuse. It was the CILC’s policy to hire, as much as possible, “impartial outsiders” as advisors due to their firm belief that efforts to export Dutch law should not raise concerns about legal or cultural imperialism or chauvinism on the part of the exporting country.

5. Working Methods of Law Reform in the CIS Countries

It seems appropriate to pay some attention to the working methods as practised in law reform assistance to the CIS countries. In many cases, foreign governments and drafting committees in need of assistance, or foreign organisations in charge of legal reform, took the initiative of involving Dutch experts

---

60 CILC 2000 ANNUAL REPORT, supra note 42, at 28; CILC 2002 ANNUAL REPORT, supra note 42, at 19 (concerning the years 1999-2002).

61 CILC 2002 ANNUAL REPORT, supra note 42, at 18.


63 CHINESE CIVIL LAW FORUM, at http://www.eclaw.net (making the text available).

64 The six volumes of the dictionary were published in 1999-2000.

65 Cf. Joint Task Force Report, supra note 4, at 25-26 (stating that a legal dictionary could also be useful in promoting cross-fertilization between the Independent States and the Western legal society).


67 CILC 2000 ANNUAL REPORT, supra note 42, at 22-23.
in law reform projects. One of the American consulting firms participating in the Rule of Law Consortium approached the Leiden Centre with a request for Dutch consulting services in relation to the Model Code for the CIS countries.\footnote{CILC 1994 ANNUAL REPORT, \textit{supra} note 32, at 4.} To a lesser extent, initiatives were taken by Dutch organisations themselves. For example, the Institute for East European Law and Russian Studies, which already had many contacts within the former Soviet Union, requested Dutch assistance in preparing the Russian Civil Code. Likewise, it was this Institute that helped develop the large Model Civil Code project. To carry out the projects, the members of staff of the CILC in Leiden usually met with their counterparts from the various countries to identify and analyse their wishes. After consulting with experts, the staff formulated an action plan and looked for funding. When a proposal was approved, the CILC assumed responsibility for its implementation, monitored its progress, and reported to the donor agencies.\footnote{CILC 1995 ANNUAL REPORT, \textit{supra} note 30, at 3.}

Although aiming at self-sufficiency, over the past decade the CILC received support from various organisations. The Dutch Ministry of Justice seems to have been the main sponsor, but financial support was also received from the Ministry of Education and the Dutch Law Faculties. The CILC maintained contacts with the Council of Europe, the World Bank in Washington, D.C., the German \textit{Stiftung für Internationale Rechtliche Zusammenarbeit}, the American Rule of Law Consortium, and several Dutch institutes specialising in foreign and comparative law. A multitude of organisations sponsored funding on a project basis. Several Netherlands Supreme Court Judges took part in the projects, with an even more crucial role for Vice-President Snijders.

The actual support for drafting activities and other forms of legal assistance can be characterised as practical. In the case of the Russian Civil Code, it must be borne in mind that, in the period between the beginning of economic reform in the late 1980s and 1995, a chaotic compilation of presidential decrees and parliamentary laws emerged alongside the old RSFSR Civil Code of 1964.\footnote{Corinna M. Wissels, \textit{The Russian Civil Code: Will it Boost or Bust Franchising in Russia?}, \textit{22 REV. CENT. & EAST EUR. L.} 495, 497 (1996).} As a result, people lost faith in the legal system and it was recognised that further economic reform could only be successful if a stable and predictable legal system could be developed. For this reason, in 1992 a Civil Code Drafting Commission composed of Russia’s foremost private law specialists started work under the auspices of the Research Centre for Private Law, headed by Alekseev.\footnote{The Research Centre for Private Law is a State institution, created in 1991 and attached to the President of the Russian Federation.}

The Commission prepared a draft for Part 1; subsequently, a consultation procedure with Dutch experts was developed that proved to be “very productive”\footnote{See Feldbrugge, \textit{supra} note 31, at 50.} in the eyes of the drafters. The Russian drafting team prepared draft texts and questionnaires, which were then translated by the Centre for East European Law and Russian Studies into Dutch, where consulting was limited to Dutch experts, or into English, when foreign experts were also involved.\footnote{Many translations of the Dutch Civil Code are available in other languages. \textit{See generally NEW NETHERLANDS CIVIL CODE/NOUVEAU CODE CIVIL NÉERLANDAIS} (P.P.C. Haanappel & Ejan Mackaay eds., 1990) (translating the Dutch Civil Code into English and French); \textit{NIEDERLÄNDISCHES BÜRGERLICHES GESETZBUCH} (F. Nieper & A.S. Westerdijk...
possible for the experts to prepare themselves for the plenary sessions. The Russian drafting team needed a Russian translation of the Dutch Civil Code, which was prepared with the financial assistance of sponsors.\textsuperscript{74}

The objective of the questionnaires was to obtain opinions on the proposed Russian text, or to receive information on Dutch or other foreign provisions on a specific subject. The questions were discussed orally in working sessions which lasted from several days to two weeks. These sessions were mainly held in the Netherlands, but some took place in Russia as well.\textsuperscript{75} This type of consultation enabled the Russian drafters to decide on the subjects they thought could be inspired by foreign law, while the foreign experts were able to give detailed surveys of their own legal systems.\textsuperscript{76}

Compared to the advice given by American, German, and Italian experts, the Dutch influence was considerable, although it is very difficult to trace it back to specific provisions in the Russian Civil Code. A member of the Dutch team, Feldbrugge, pointed out that the Russians had some reservations about the American and German advice, since these countries are among Russia's foremost business partners. Moreover, the American and German advisors were closely connected to their respective Ministries of Foreign Affairs, whereas Dutch legal assistance, although funded by the MATRA programme, was entirely separate from the Dutch government. The Russian drafting team implicitly understood that the Dutch experts had no goal but to improve the quality of the legal reform.\textsuperscript{77} To my knowledge, this is true for all Dutch organisations that fund or coordinate legal reform, in that they have not attempted to exercise any control over the nature of the legal advice given. In this respect, smaller countries, such as the Netherlands, may be in a better position to export their law than larger countries; no matter how noble their motives, larger countries will be more readily accused of legal chauvinism.

The EC Independent States Joint Task Force on Law Reform determined that the highly practical approach of cooperating directly with the drafting team was the best method of legislative reform. In its 1993 Joint Task Force Report,\textsuperscript{78} the task force proposed “active” law reform assistance by forming joint drafting groups of experts proficient in Russian, who would then be supported by specialists from the continental and the Anglo-American tradition. These specialists would work with drafts translated into English.\textsuperscript{79} Providing concrete rather than abstract information proved to be the most effective method.

This course of offering legal advice, not in the abstract but during the actual process of drafting a legislative text, was also followed when drafting the model code for the CIS countries. Here, experts from the various CIS countries worked together on the model codes in working sessions set up to draft new texts.

\textsuperscript{74} Feldbrugge, supra note 31, at 51.

\textsuperscript{75} Id. at 50. W. Snijders headed the Dutch team. CILC 1994 ANNUAL REPORT, supra note 32, at 4.

\textsuperscript{76} Feldbrugge, supra note 31, at 50.

\textsuperscript{77} Id. at 51.

\textsuperscript{78} Joint Task Force Report, supra note 4, at 33.

These were duly discussed with Dutch and American experts\textsuperscript{80} in meetings that took place in Leiden and St. Petersburg. The actual drafting was done by an institute, which was virtually made up of the same persons as the Research Centre for Private Law in Moscow. Moreover, the Model Civil Code is to a large extent based on drafts for the Russian Civil Code. A similar approach was practised in drafting the Ukrainian Civil Code: parts of the code were discussed during three plenary sessions held in Leiden, Kiev, and Weimar on the basis of draft texts and questionnaires prepared by the drafting team and translated for the convenience of the experts. A number of German and Dutch experts offered their oral and written comments on various questions. In addition to the plenary sessions, some small-scale expert meetings were arranged to discuss specific topics.\textsuperscript{81}

The other projects discussed also tended to be as practical as possible. As far as the training of judges was concerned, intensive courses were organized for mainly lower-court judges, on the role of judges in a democratic society and on issues of modern, private, and commercial law. University cooperation did not only consist of giving lectures and conducting research, but also books and even a copymachine were sent to the foreign law faculties.

6. Why Export Dutch Private Law?

The Dutch involvement in law reform, that predominantly took place in Central and Eastern Europe, expanded greatly over the last decade. The Dutch Civil Code in particular seems to have had an attraction for countries in need of a new legal infrastructure for a market economy. This provokes two questions. In the first place, there is the more general question why the Central and Eastern European countries embraced the idea of codification, rather than choosing an Anglo-American common law tradition, with its high quality commercial law. This question concerns the reason why it was export of civil law that took place. The second question is why precisely Dutch law seems to have played such an important role in the law reform process.

Before these two questions can be answered, we need to ask ourselves why, in particular, private law was exported to Central and Eastern Europe. It is not difficult to find the answer. In the Independent States, a new Civil Code is usually seen as the keystone of law reform. The new Russian Civil Code, for example, has also been termed “the Economic Constitution of the Russian Federation,”\textsuperscript{82} and in the Report of the EC IS Joint Task Force of 1993, we read “that a stable market economy, so essential for the Independent States, cannot function normally without a stable body of foundation civil legislation in the form of civil codes or fundamental principles of civil legislation of the type enacted in the former Union.”\textsuperscript{83} As a result, the entire legal system of the Independent States was to be rebuilt starting from the premise of entrepreneurial freedom.\textsuperscript{84} This is particularly interesting since private law is used “as a conscious and deliberate vehicle of social change” in transforming the economic system.\textsuperscript{85}

The first question refers to the way market-oriented private law is organized, namely through civil

\textsuperscript{80} CILC 1995 ANNUAL REPORT, supra note 30, at 6.
\textsuperscript{81} Id. at 8.
\textsuperscript{82} Wissels, supra note 70, at 498 n.8.

\textsuperscript{83} Joint Task Force Report, supra note 4, at 92. “The values and principles of a market economy can never be secure unless and until civil legislation is systematized and codified in the form of a civil code.” Id. at 29.

\textsuperscript{84} Id. at 13.
\textsuperscript{85} Id.
law codification. I believe the reason for this choice is twofold. In the first place, the majority of the Independent States, Russia in particular, used to have a continental legal tradition; they have Roman Law roots and are familiar with the phenomenon of codification. Russia for example enacted civil law codifications in 1922 and 1964. The new Russian Civil Code indeed has a Pandectist structure and is characterised by its abstract style of drafting. As in the German and Dutch Civil Codes, different degrees of generalization exist, which requires frequent cross-referencing as these Codes proceed from the general to the specific. As Rudden has aptly remarked, “a ‘pandectist’ system fashioned to deal with non-socialist societies is fundamentally quite capable of handling post-socialism. Banality can be a blessing.”

In the second place, and more importantly, as a new Civil Code is considered to be an integrative part of the policy of economic development, because of the need for a legal system that is “stable, cohesive, and comprehensible, ensuring predictability of result in individual cases,” codification is a much better way to achieve this than common law. This is particularly true, if results must be achieved within a short period of time; a common law system is a “seamless web” and cannot be created at once. Certainty and predictability of law benefit from as many detailed provisions as possible and greater detail is automatically achieved by the systematic organization of a Code. It is all the more necessary since most of the Russian (and other CIS state) entrepreneurs possess little legal knowledge. They usually lack (or at least lacked shortly after the fall of the Soviet regime) the elementary skills for working with contractual partners. As a result, contracts were often concluded in a haphazard way.

A Civil Code may contain solutions for such carelessly drafted contracts. In the Civil Codes of the CIS states, no preference is therefore given to dispositive norms, i.e. rules established by the legislator which take effect only if the parties have not provided otherwise in their contract. The provisions of the Code are therefore in principle mandatory, unless they provide that parties may arrange otherwise in the contract. In this way, parties are able to enter into a contract without much knowledge of contract law. In a common law system, such rules will have to emanate from practice, which can take a very long time. Of course, the rapid introduction of so many detailed provisions through state intervention, as with these codifications, may cause a problem that is non-existent in a common law system: the acceptance of the Code can be problematic, especially since in the CIS states a “near perfect document” could not be provided in the short time available. This calls for an intensive programme of implementation.

The second question, far more important from the perspective of legal export, is why in particular the Dutch Civil Code played an important role in law reform in Central and Eastern Europe. What factors seem to account for the “success” of the influence of Dutch law? In the scholarly discussion on legal transplants, two main reasons are given for legal imports: the prestige of (a specific rule of) a legal system


90 Wissels, supra note 70, at 502 (“The drafters rightly felt they could not afford to spend over forty years on a Civil Code that might be awarded general approval. That is a luxury only code drafters in a developed market economy such as the Netherlands can permit themselves.”).
and economic efficiency. The former factor seems to be paramount in the case of the Dutch Civil Code. Until the enactment of the Russian Civil Code, the Dutch Civil Code was arguably the most modern Civil Code in the world, or even, as Alekseev put it on Russian television in 1993, “the best Civil Code in the world.” Ever this cannot really account for its success. On the contrary: importing the most “up-to-date model” even hamper the transition to a market economy, because it implies importing “costly” provisions, for instance, on consumer rights and environmental protection.

This leaves us with two other possible reasons: the inspiration that the drafters of the Dutch Civil Code drew from foreign law’s proposed mixture of a market economy and the idea of a social Rechtsstaat — a state under the rule of law in which the economically vulnerable enjoy protection. The former argument is the one best known. As noted earlier, the Dutch Civil Code took guidance from both modern civil codes and common law systems. The ius commune thus created and incorporated in the Code may prove a veritable treasure trove for drafters in other countries. In other words, the previous import of private law from other countries to the Netherlands made the export of its private law possible. However, this factor should not be overemphasized. The new Civil Code of Quebec, and American, Italian, French, and German law, and international treaties such as the CISG, also exerted influence on the codes of the CIS countries. As to the influence of common law, the “trust” was considered to be a concept of Anglo-American law of considerable interest to the Independent States and was incorporated into, inter alia, the Russian Civil Code.

The latter argument is just as important in explaining the role of the Dutch Code in law reform. The new Russian Civil Code is not based on the American model of a highly liberal market economy, but, according to former Russian Minister of Justice Fyodorov, is based on the principles of the social Rechtsstaat. In a social market economy, the law should take care of the economically weaker parties, for example, by setting limits for company conduct. In this area too, it is possible to profit from the Dutch Civil Code, which mixes both hard and fast rules and equitable provisions. The role awarded to “good faith” extends to all obligatory relationships and enables the court to derogate from contracts validly entered into by the parties, and even from statutory provisions, if necessary. The Dutch Civil Code can be used as a source of inspiration where equitable results are sought. In this respect, the Code is very much like the UNIDROIT Principles of International Commercial Contracts of 1994 that contain “one astonishing equitable provision,” which ensures that the Principles are also acceptable to the countries of Central and Eastern Europe. Several provisions in the Russian Civil Code derive from this idea of a social Rechtsstaat. Article 9, for example, provides that “the exercise of civil rights must not violate the rights and legislatively

---


92 Gianmaria F. Ajani, Codification of Civil Law in Albania, in THE REVIVAL OF PRIVATE LAW IN CENTRAL AND EASTERN EUROPE (ESSAYS IN HONOR OF F.J.M. FELDBRUGGE) 524 (George Ginsburgs et al. eds., 1996).

93 Cf. Ger P. van den Berg, The Constitution, the Constitutional Court and the Development of Russian Civil Law in the Transition Period, in THE REVIVAL OF PRIVATE LAW IN CENTRAL AND EASTERN EUROPE (ESSAYS IN HONOR OF F.J.M. FELDBRUGGE) 122 (George Ginsburgs et al. eds., 1996).

94 See id.


protected interests of other persons."

7. National Sovereignty and Reception of Law

Örücü remarks that a “new genre of mixité” has emerged in the new states of Central and Eastern Europe. This makes it all the more difficult to compare the legal transplants which have taken place in these states with those in the legal systems that are traditionally characterised as “mixed.” The question still remains whether the export of Dutch law has been “successful,” but an answer cannot be given as long as there are no criteria for evaluating the success of legal transplants. Some have sought to evaluate success by measuring the contribution legal exports have made in establishing or strengthening the rule of law or a free market economy in the countries under discussion.

It is extremely difficult, however, to establish whether this has been the case. The establishment of the rule of law is a long process, the success of which depends upon the general political and cultural climate in a particular country and not on the legal infrastructure alone. An exporting country can only try to show the importer how to cope with the legal problems it faces. In the end, the importing country should decide for itself whether a specific transplant may be beneficial. This is exactly what happened in Russia, where the drafters had the benefit of foreign-law suggestions, but in the end made their own choices. Consequently, it is not possible to establish which foreign model most influenced the actual legal reforms adopted by the importing country. The influence was of a rather diffuse nature.

In regard to strengthening market economies, it should be reiterated that, at the time Western countries became involved in the reform process, legislation had addressed almost all of the necessary market economy issues. For the reasons discussed above, Western countries, especially the Netherlands, could be instrumental in improving the poor quality of such legislation, which had often been drafted by economists. In my opinion, legal support was more fruitful in this context, since one of the reasons for strengthening a market economy was the wish to increase the (low) level of foreign private investment. Bringing Independent State laws into line with international standards was seen as “a major precondition,” more or less obliging the importing countries to profit from Western experience. The establishment of the rule of law is thus inspired by a rather political motive. In this respect, it is understandable that foreign law has influenced the new Constitutions of the Independent States much less than it has affected the Civil Codes. Moreover, the non-systematic, diffuse approach practised by the importing countries accounts for the fact that legal models have not been exported wholesale. It is even argued that since implementation is often the bottleneck of law reform, new legislation should not be excessively sophisticated.

The success of legal transplants could perhaps be better measured by a less pretentious criterion: the extent to which the importing countries are satisfied with the support offered. This criterion refers to the all-important national sovereignty in law reform. In principle, legal transplants and national sovereignty are not enemies, but in this “new genre of mixité” they may very well end up as such if the legal exporter intends to impose its own legal rules on other countries. Where the rules have persuasive authority, imposition does not

---


99 Joint Task Force Report, supra note 4, at 19.

100 Id. at 17.
come into play. Could this possibly account for the success of Dutch private law in the law reform process?