

SYSTEMS MIXING AND IN TRANSITION: IMPORT AND EXPORT OF LEGAL MODELS: THE DUTCH EXPERIENCE

Jan M. Smits*

I.C.2

Associate Professor of Private Law, Maastricht University, the Netherlands

1 Introduction

The phenomenon of ‘legal transplants’ may be considered to be 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 terms of import and export of law, as Agostini does,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 the legal system or its rules, have both served as a motive for migration of Dutch law.³

In this report, 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 nowadays smaller countries, such as the Netherlands, are in a much better position to export their law than countries whose interest it is to play the ‘politics of power’. In the former Communist countries of Central and Eastern Europe, Dutch legal advice has indeed played an important role in shaping the legal framework of market economies. Moreover, I will try to make clear that Dutch law has only been 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 myself am most

* With many thanks to Wies Rayar for correcting my English.

1. Legal Transplants; An Approach to Comparative Law, Edinburgh 1974; 2nd. ed. London 1993.
2. Eric Agostini, *Droit comparé*, Paris 1988, 243.
3. A note on terminology: in this paper, transplantation, migration, importation and reception all refer to the same phenomenon. Cf. Wolfgang Wiegand, *The Reception of American Law in Europe*, *AJCL* 39 (1991) 236 and Max Rheinstein, *Types of Reception*, *Gesammelte Schriften Band 1*, Tübingen 1979, 261.

familiar, but also because most transplants have so far taken place in this area. The command system of the former Soviet Union to a large extent suppressed traditional private law. Consequently, a new civil code is seen by the Commonwealth of Independent States (CIS) as the keystone of law reform.⁴

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 still 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. In the heyday of the economic and political power of the United Provinces, the seventeenth century, when the torch of great legal science was passed to Holland,⁵ the Dutch were able to export their Roman-Dutch law – itself a mixture of Roman law and Dutch, mainly customary, law – to the territories to which they set sail. It is interesting to note that in the majority of the countries with what is now called a ‘mixed legal system’ – a term traditionally reserved for systems mixing civil law and common law – the civil law component is made up of Dutch law.⁶ The *concordantiebeginsel* (concordance principle) which the Dutch have observed since 1629, ensured uniformity: it implied 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 Netherlands Antilles.⁷

In the archetypical mixed legal system of South Africa, we therefore find substantive private law that is mainly based on Roman-Dutch law. It was introduced to the Cape of Good Hope by the Dutch East India Company

4. As submitted by the EC IS Joint Task Force in its ‘Report Shaping a market-economy legal system’, Brussels 1993 [European Economy no. 2], 29. See for a general overview Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, *AJCL* 43 (1995) 93.
5. After the famous phrasing of Franz Wieacker, *A History of Private Law in Europe*, Oxford 1995, 126.
6. Apart from the countries mentioned below, these ‘historical mixtures’ exist in Scotland (partly also because of Dutch influence exercised by Scottish jurists who studied at the Dutch Law Faculties in the 17th and 18th century), Quebec and Louisiana.
7. Art. 39 Statuut voor het Koninkrijk der Nederlanden, these days as a recommendation rather than as an obligation.

(VOC) in the years following 1652. From the Cape, it was introduced to other parts of what is now South Africa by the *Boers*, and to Lesotho (1884), Rhodesia (1898), Botswana (1909), Swaziland (1907) and Namibia (1920) by the English.⁸ 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 truly mixed character can be illustrated by looking at the trust, a concept imported from English law, which, in an ingenious way, has been incorporated into Roman-Dutch law. As a result, present-day South African trust law is very different from the English law of trust.⁹

A similar development took place in Sri Lanka (formerly Ceylon). There too, it was the VOC which occupied coastal territories from 1656 onwards and imported Dutch law. In 1796, England took over and the 1801 Charter of Justice declared that Dutch law was to remain applicable. Its field of application was even extended to the inland parts of the country (1852). In Guyana (former British Guyana) the situation was similar, although in 1917 Roman-Dutch law had been almost entirely abolished.

In the Dutch East Indies, which roughly speaking corresponded to the present Republic of Indonesia, where the Dutch ruled until 1949, the situation was entirely different. They were able to export not only their uncodified law dating from before the 19th century, but their 1838 Civil Code and other Codes as well. Although under Dutch rule the Dutch Civil Code was only applicable 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 Penal Code, as introduced 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 Netherlands Antilles and Aruba, both separate countries within the Kingdom of the Netherlands and thus bound by the concordance principle, the private law in force is in principle the same as Dutch law as it stood on 31 December 1991, the day before the new Dutch Civil Code (*BW*) came into effect in the mother

8. See Reinhard Zimmermann and Daniel Visser, *South African Law as a Mixed Legal System*, in: Zimmermann/Visser (eds.), *Southern Cross*, Oxford 1996, 1 and Eduard Fagan, *Roman-Dutch Law in its South African Historical Context*, o.c., 33.

9. Reinhard Zimmermann, *Das römisch-kanonische Ius Commune als Grundlage europäischer Rechtseinheit*, JZ 1992, 14.

country.¹⁰ It is envisaged, however, that the new Dutch Civil Code will be introduced here too on 1 January 1998.¹¹ The reason for the introduction of the new Code in these countries is not so much the concordance principle itself, but rather the appeal of a tradition of several centuries of uniformity, the inherent quality of the Code and the intensive trade and passenger travel between the Netherlands and these countries.

This is a particularly interesting reason, since it is part of a more general development. Regardless of the many differences in the way Dutch law nowadays applies in the above countries, they all have one thing in common: Dutch law was imported *by imposition*. Nowadays, a different approach is more appropriate, since it is more in accordance with the modern, less positivistic, view of the law. *Voluntary* import enables the importing country to decide for itself which legal rules are useful. In this connection, it is worth noting that the concordance principle 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 is concerned with substantive law, the second with methodology. If 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 have been established in and form the basis of case-by-case adjudication. Moreover, it 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 the common law system; from a methodological point of view, they are not based on ideology, but are an *ad hoc* method for obtaining just results.

10. M. Tratnik, *De jurist in Aruba en in de Nederlandse Antillen en het NBW*, TAR Justicia 1992, 141. The 1838 Dutch Civil Code was introduced in these countries in 1869.

11. Some provisions will probably be different. J. de Boer, *De invoering van een nieuw Burgerlijk Wetboek van de Nederlandse Antillen en van Aruba*, TAR Justicia 1997, 1.

Contemporary Dutch law cannot be readily characterised in terms of these legal systems. 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* ('juridical act') – one of the more prominent concepts of the Dutch Civil Code – have been borrowed in part from the German law on *Rechtsgeschäft*. The same holds true for the rules governing 'full powers of attorney' (*volmacht*) and general contract terms (*algemene voorwaarden*). 'Undue influence' (*misbruik van omstandigheden*) as a ground for annulment and 'anticipatory breach', as introduced into Dutch law, are highly influenced by English law. The way in which 'dwaling' (mistake) is regulated – with the exception of *wederzijdse dwaling* (common mistake), where the mistake is not caused by the other party – is based on Dutch case law, but it has also been influenced by the English concept of 'misrepresentation'.¹²

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 – have led some authors¹³ 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 view¹⁴ and have asserted that Dutch law is still mainly based on French law, with a hint of German legal *mentalité*.¹⁵ This debate does not seem very

12. D.C. Fokkema, De invloed van de rechtsvergelijking op de ontwikkeling van het nieuwe BW, NJB 1983, 1223, 1227; B. Wessels, Civil Code Revision in the Netherlands: System, Contents and Future, NILR XLI (1994) 196.

13. See, in particular, Arthur S. Hartkamp, Judicial Discretion Under the New Civil Code of the Netherlands, AJCL 40 (1992) 551, 570: 'there is a widespread belief that Dutch law has floated away from its French origin into the direction of the German law family'.

14. U. Drobnig, Das neue niederländische bürgerliche Gesetzbuch aus vergleichender und deutscher Sicht, ERPL 1993, 171, 187: 'einige Strukturelemente und einige materielle Prinzipien aus dem Deutschen Recht'.

15. Cf. Denis Tallon, The new Dutch Civil Code in a comparative perspective – a French view-point, ERPL 1 (1993) 189, 197.

useful, if no practical or theoretical consequences ensue from the characterization of Dutch law as belonging to one legal family or another. Dutch law remains part of the Romanistic systems of law, because the Dutch Civil Code distinguishes between the law of persons, the law of property and the law of obligations. It must be emphasized, however, that *within* the Romanistic tradition, the Dutch Civil Code is an attempt at combining the best of Dutch, German and French law. This is highly interesting, because the Dutch Civil Code is thus truly based on the *jus commune* of continental Europe,¹⁶ and even *creates* a *jus commune*. In trying to find the best possible solutions for the dilemmas they were faced with, the framers of the Dutch Civil Code made frequent use of comparative law.¹⁷

Where English law has influenced the Dutch Civil Code, it is entirely embedded in the Romanistic tradition. ‘Anticipatory breach’ and ‘misrepresentation’ are hidden within the sets of provisions on *tekortkoming in de nakoming* (non-performance) and *dwaling* (mistake), respectively. It can be concluded, however, that the Dutch Civil Code is firmly rooted in continental law. 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 leadership¹⁸ in Western law from Europe to the United States, which has taken place since 1945. In particular in trade law, it is customary to refer to such newly created concepts of Anglo-American origin as ‘leasing’, ‘factoring’, ‘franchising’ and ‘sale and leaseback’. In the case of trusteeships, now recognised to a limited extent in the 1985 Hague Convention on the law applicable to trusts and on their recognition, the reception tends to influence the very structure of the private law system, although the full effect is yet to be acknowledged.¹⁹ Dual ownership by distinguishing legal from economic control of property is not typical of Dutch private law. It can be safely concluded, however, that for the most part Dutch substantive law is of a Romanistic nature.

16. Thus forming a style of its own. Zweigert/Kötz/Weir, *Introduction to Comparative Law*, 2nd. ed., Oxford 1992, 105.

17. See for foreign influences on the new code Frans J.A. van der Velden and Nico A. Florijn, *Harmonization of Private Law Rules between Civil and Common Law Jurisdictions – Dutch experiences*, in: Hondius/Steenhoff (eds.), *Netherlands Reports to the Thirteenth International Congress of Comparative Law Montreal 1990*, The Hague 1990, 43.

18. Cf. Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law* (review essay), *AJCL* 42 (1994) 195. See for an overview of common law rules in the new Civil Code: Van der Velden/Florijn, *Harmonization*, o.c., 43.

19. Wolfgang Wiegand, *The Reception of American Law in Europe*, *AJCL* 39 (1991) 229, 238.

Methodologically, however, it is far more difficult to determine whether Dutch law, or even modern continental law for that matter, is still part of the Civilian tradition. In a codified civil law system, merely applying statutory rules to obtain justice is 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, in principle, lacks a systematic and logical method of dispensing justice in individual cases. Moreover, in a common law setting, law is not an academic discipline: 'Unfortunately or fortunately, I am not sure which, our law is not a science', Bailache remarked in 1919.²⁰ The absence of conceptualism and an emphasis on common sense render the facts of the case and the reasoning much more important than in continental law. In the words of Max Rheinstein: 'the ways of the common law mind are different from those of the civil law mind'.²¹

This archetypical image is outdated, however. In many continental systems, the judiciary have been granted 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* (reasonableness and fairness/'good faith' test). The courts are thus able to further develop the law where the Code remains silent, for example, in the case of extra-contractual liability. 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.²² 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 the 'decivilianization'²³ of Dutch private law.

It is important for my line of reasoning 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 faced, makes the Dutch Civil

20. Cited by Michael G. Martinek, *Der Rechtskulturschock*, JuS 1984, 92, 95.

21. *Comparative Law – its Functions, Methods and Usages*, Gesammelte Schriften Band 1, Tübingen 1979, 256.

22. Hartkamp, *Judicial Discretion*, o.c., 568.

23. For this terminology: Pierre Legrand, *Civil Law Codification in Quebec: A Case of Decivilianization*, ZEuP 1 (1993) 574.

Code a rich source of inspiration for legislators in other countries.²⁴ Indeed, this is what Meijers (1880-1954), the father of the 1992 Dutch private law codification, had hoped for when he wrote that in drafting a Civil Code, a small country could show the world its greatness.²⁵ He felt that the 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 had emerged in the countries of Central and Eastern Europe. The role of Dutch law in this process is the main subject of this report. It is no exaggeration to state that, as the export of Dutch law in the past took place *ratione imperii*, it is the inherent quality of the solutions elected that may now inspire other countries to voluntarily import provisions of the 1992 Dutch Civil Code.

4 Efforts to export private law to the Commonwealth of Independent States

It would be ethnocentric these days to view exporting law as a unilateral process in which no account is taken of the recipient. In fact, export and import are very related phenomena: after all, successful export of law can only take place if the importing country is prepared not only to perceive of the exporter's rules as useful, but also to implement them. As legal *mentalités* may differ substantially, according to the importing country in question, 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. Problematic, however, is that in some countries the authorities are inclined to over-emphasize the impact of legal rules. Using law consciously and deliberately as a vehicle of economic and social change,²⁶ 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

24. U. Drobnič, Das neue niederländische bürgerliche Gesetzbuch aus vergleichender und deutscher Sicht, ERPL 1 (1993) 171, 175: 'Es verdient die höchste Aufmerksamkeit der Rechtsvergleicher'.

25. Wijzigingen en aanvullingen van het Burgerlijk Wetboek na 1838, VPO I, Leiden 1954, 136.

26. Joint Task Force Report, 13.

importing Western legal models,²⁷ but this argument should not be overstretched. 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 economic activity.

Below I will give a more detailed overview of the efforts by Dutch organisations to promote the export of Dutch law over the past five years. It should be emphasized that I am able to present this overview through the kind assistance of the Centre for International Legal Cooperation in Leiden, the 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 Centre, 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, in particular relevant Dutch legal expertise, in restructuring their legal systems. The members on the Centre's Board represent nearly all the 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 Centre's activities.²⁸ The bulk of these activities consists of cooperation with the countries of the former Soviet Union.

Coordinated by the Centre, 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, Dutch support has been given to many countries, but I will concentrate on the efforts in Russia. Dutch involvement in the preparation of a new Civil Code for the Republic of Russia began in May 1993. At that time, a small committee consisting of law professors de Boer and Feldbrugge and the Vice-President of the Netherlands Supreme Court and Government Commissioner for the New Dutch Civil Code, Snijders, went to Moscow to discuss possible Dutch involvement. They met with the Presidential Committee entrusted with the drafting of a new Civil Code.²⁹ From October 1993 onwards, consultations took place concerning Part 1, which was signed by President Yeltsin in November 1994. It came into effect in January 1995. Since the Russian Minister of Justice described

27. See, e.g., Joint Task Force Report, 13.

28. Annual Report of the Centre for International Legal Cooperation 1995, 2.

29. F.J.M. Feldbrugge, *Het nieuwe Russische Burgerlijk Wetboek en Nederland*, *Nederlands Juristenblad* 1993, 1073.

the cooperation with Dutch experts as 'extremely useful', further cooperation was discussed in March 1994 in St. Petersburg during a meeting of CIS legal experts organised by the CIS Interparliamentary Assembly. 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 Part 2 was adopted by Parliament,³⁰ support was given until the end of 1996 to prepare the smaller Part 3 on intellectual property law, private international law and inheritance law. This time, bilateral consultations with Dutch experts took place. Initially, the project was funded by Leiden University. Since October 1993 it has been receiving financial support from MATRA³¹ and the American Rule of Law Programme USAID. Part 3 was entirely funded by MATRA.

Since March 1994, Dutch experts have 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 is one of the largest undertakings so far in the field of legal reform in Central and Eastern Europe. The assumption is that it is 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.³² Although the Model Code is only a recommendation, it is of great importance: if adopted, it enables the Independent States to acquire a high standard of codification, while at the same time preserving their traditional uniformity of legislation.³³ The countries involved in this project are Russia, Belarus, Kazakhstan, Kirghizia, the Ukraine, Mongolia, Georgia, Armenia, Moldova, Azerbaidjan and Uzbekistan. Mongolia, although not a CIS member, is able to participate in the process through the financial support of the Dutch Ministry of Foreign Affairs.³⁴ The Interparliamentary Assembly of the CIS States, formally entrusted with the drafting, was assisted by a Dutch team headed by Snijders. The consultation procedure was set up in

30. It came into effect in March 1996. Annual Report of the Centre for International Legal Cooperation 1994, 4-5; AR 1995, 5-6

31. AR 1994, 4; AR 1995, 5. MATRA is a Dutch Government scheme aimed at supporting social transformation in Central and Eastern Europe.

32. Set up in 1994 in some of the CIS countries, namely Kazakhstan (jointly financed by the Dutch Ministry of Justice and ABN/AMRO commercial bank), Belarus (financed by the DGIS programme of the Ministry of Foreign Affairs) and Kyrghizia (financed by DGIS as well; the consultation meeting was also attended by Russian, Kazakh and Uzbek drafting teams and by American expert Peter Maggs). AR 1995, 6, 8; AR 1994, 6-7; Jaarverslag Centre for International Legal Cooperation 1996, 5.

33. Feldbrugge, o.c., 53; Report Joint Task Force 29.

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

close cooperation with the American Rule of Law Consortium.³⁵ In 1995, for example, consultations were held on an almost monthly basis to work out the second and third part of the Model Civil Code for the CIS countries. In the area of criminal law, meetings were held involving a total of 45 participants from the CIS countries, who worked out drafts for the model codes on substantive criminal law and on criminal procedure.³⁶ Most of the costs were originally borne by USAID, a smaller part (15%) was funded by other donors. In 1996, however, at a time when the model codes were nearly complete, US funding ceased. Recently, the Dutch Ministry of Foreign Affairs has funded a follow-up project providing technical assistance to the drafting process of the model codes: 'Completing the Model Code of the CIS States',³⁷ and of some closely related laws related to bankruptcy and companies. These laws include draft legislation on the registration of foreign legal persons.

This does not mean that individual assistance is not available to these countries. In Armenia, at the request of the Armenian team drafting the new Civil Code, a consultation procedure has been set up for the period 1995-1998. Armenian, American and Dutch experts have met several times to discuss drafts. Experts from these countries are involved in the drafting of a new penal code and a code on criminal procedure in cooperation with the Council of Europe. Both projects are funded by the American Rule of Law Consortium.³⁸ The legislative committee of the Georgian Parliament requested the assistance of Dutch and American experts to finalize the draft of a new Civil Code, which was originally made with the assistance of German experts, and to start work on the reform of the criminal law. In the Ukraine, the Dutch Centre participates 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.³⁹ In 1994-1995, in cooperation with the *Stiftung*, support was given to the team drafting a new Ukrainian Civil Code.⁴⁰ Both projects were

35. Established by two major American commercial consultancy firms and involved in many USAID-sponsored law reform projects; AR 1994, 4.

36. AR 1995, 6.

37. The three different parts of the Model Civil Code have now been ratified by the Interparliamentary Assembly of the CIS.

38. AR 1995, 9; Jaarverslag 1996, 4-5.

39. AR 1994, 5-6; Jaarverslag 1996, 6.

40. AR 1995, 8.

funded under the EC TACIS programme.⁴¹ 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’⁴² 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.⁴³ Other projects have included legislative support to the Polish Ministry of Justice in the form of consultation procedures on modernizing Polish legislation, for instance, in the area of private international law, funded by the Dutch Ministry of Justice,⁴⁴ and drafting consultancies with Albania, the Czech Republic and Eritrea.

The Dutch organisations involved in legal reform abroad are aware that enacting new legislation is virtually useless if the process of implementation fails. The practice of ignoring new legislation⁴⁵ leads to failed law reform and makes the legal system lose credibility and certainty. Now that Civil Codes have been drafted in most CIS countries, legal reform activities – and Western support for these – have to some extent shifted to the process of implementation. 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 US government and the Dutch MATRA scheme, aims at the renewal of the curriculum. In a first stage, Western study materials in the area of substantive criminal law and criminal procedure are collected to facilitate the study of the Russian Penal Code of 1996, which contains many Western concepts. The material is translated and studied by Russian lecturers, who subsequently come to the Netherlands to prepare new textbooks.⁴⁶

The second example is Mongolia, with which long-term collaboration is envisaged. The Dutch Ministry of Foreign Affairs is considering whether to fund the training of Mongolian judges.⁴⁷ Representatives of the Dutch Association of Judges, the Netherlands Helsinki Committee, the Leiden Institute for East European Law and Russian Studies and the Centre have already been to Ulan-Bator for a seminar on the modernisation of Mongolian private law. The current Mongolian Civil Code is rather concise. A similar,

41. Technical Assistance Programme to the Independent States, created in 1991 as the world’s largest technical assistance programme, intended to help to create a market economy in the CIS.

42. AR 1995, 8.

43. AR 1994, 6; AR 1995, 8.

44. AR 1995, 9.

45. As was done on a large scale during *Perestroika*.

46. Jaarverslag 1996, 8-9.

47. AR 1995, 11; Jaarverslag 1996, 8.

MATRA-funded, project for the training of judges in the Ukraine, in anticipation of the introduction of the Civil Code, was planned for 1995-1997.

In the field of university cooperation, many activities have been initiated over the past few years. 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 in Moscow have cooperated under a EC TEMPUS project with the administrative support of the Centre. This project was coordinated by the Dutch Institute for East European Law and Russian Studies. Its primary goal was the updating and upgrading of the curriculum in Moscow. The activities included the exchange of teaching staff and students. Dutch professors of law taught courses in Moscow on European law and on the Dutch Civil Code.⁴⁸ 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.

A more modest project in the field of university cooperation is the CROSS programme,⁴⁹ carried out between 1995 and 1997. The programme was aimed at supporting the Moscow State Institute of Law. Five different universities acted as hosts to promising young lecturers of the Institute who came to collect material for a new textbook on European law. Two of these lecturers attended courses on legal documentation in The Hague and will set up a Documentation Centre on European law in Moscow. It is hoped that a Chair in European law will be established at the Institute. Special attention has been paid to 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.⁵⁰

Related to the mission of the CROSS programme is the Dutch participation (through the Centre) in a large consortium, which include the Goethe University in Frankfurt, the T.M.C. Asser Institute at The Hague and Italian and Greek organisations. The programme aims at supporting the creation of an Institute of European Law (IEL) at the Moscow Institute of International Relations. The consortium won a tender put out by the EC, which provides funding through the TACIS programme. The project facilitates a multitude

48. AR 1994, 5; AR 1995, 7; Jaarverslag 1996, 6-7.

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

50. AR 1994, 5; AR 1995, 7; Jaarverslag 1996, 7.

of exchanges of lecturers and the shipping of materials over the period 1997-2000.⁵¹

In Belarus, support in the field of international trade law was requested by the Law Faculty of Minsk State University. MATRA-funded activities over the period 1995-1997 included the shipment of books and legal materials, visits by Belarusian researchers to the Netherlands and guest lectures, for instance, three courses taught in 1996 by Dutch experts in Minsk.⁵²

Special attention should be paid to a broad-scope project in Moldova, the implementation of which is the responsibility of the Dutch Ministry of Foreign Affairs. It is also partly sponsored by the Ministry. This project is part of a larger UNDP programme on 'Governance and Democracy in Moldova', coordinated by the Centre. The project consists 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 is carried out by the Law Faculty of Maastricht University and provides for an exchange of lecturers and students. Each year, a promising young Moldovan lecturer participates in the Maastricht LLM programme.⁵³ The project was implemented in 1996 and will end in 1999. Because of its large-scale activities, a staff member of the Centre acts as local coordinator in Chisinau.⁵⁴

This overview would not be complete without discussing activities undertaken in other parts of the world. These are rather modest. In 1995-1996, as part of a larger project of cooperation between China and the Netherlands within various agreed fields of science, the Leiden-Beijing Legal Transformation project was implemented. Its main objective was the exchange of researchers and lecturers. Courses on tax law and company law were given by Dutch lecturers.⁵⁵ The export of the New Dutch Civil Code was felt to be inappropriate at that time, although also in China a review of the General Principles of the private law of the People's Republic of China (156 provisions only) is forthcoming.

Since 1992, the relationship between the Netherlands and its former colony of Indonesia has not been optimal due to a number of incidents concerning the human rights situation and an allegedly paternalistic development programme. Since that time, any link between legal assistance

51. Jaarverslag 1996, 5-6.

52. AR 1995, 8-9; Jaarverslag 1996, 8.

53. See the suggestion made in the Report of the Joint Task Force, 36.

54. AR 1995, 9; Jaarverslag 1996, 10-11.

55. AR 1994, 9; AR 1995, 11.

and development cooperation has been unacceptable to the Indonesian government. A long-term project (1994-1999) aims at the compilation of a dictionary of legal terms, translated from Indonesian into Dutch. The project is being financed by the Dutch Ministry of Justice and the Royal Netherlands Academy of Sciences. It is 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. Such unification of legal language is facilitated by a law dictionary.⁵⁶ In 1995, a Memorandum of Understanding was signed on cooperation between the two Ministries of Justice, which described four different projects in the field of law reform and legal studies. It is not sure, however, whether Indonesian funds will become available to implement these projects.⁵⁷

The above overview shows that nearly all Dutch efforts in the field of law reform have been coordinated by the Centre. Coordination by this central body has served as a safeguard against abuse. It was the Centre's policy where possible to have 'impartial outsiders' as advisors in the firm belief that efforts to export Dutch law should not result in 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

Some attention must be paid to the working methods as practised in law reform assistance to the CIS countries. In many cases, the initiative to involve Dutch experts in law reform projects was taken by the foreign governments and drafting committees in need of assistance, or by a foreign organisation in charge of legal reform. The following serves as an illustration: one of the American consultancy firms taking part 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.⁵⁸ To a lesser extent initiatives were taken by Dutch organisations. Dutch assistance in preparing the Russian Civil Code, for example, was initiated by the Institute for East European Law and Russian Studies, which already had many contacts within the former Soviet Union. Likewise, it was this Institute that helped to develop the large Model Civil Code Project. To develop the projects, the members of staff of the Centre in Leiden meet with their

56. Cf. Report of the Joint Task Force, 25-26, where it is stated that a legal dictionary could also be useful in promoting cross-fertilization between the Independent States and the Western legal society.

57. AR 1994, 7-9; AR 1995, 10; Jaarverslag 1996, 9-10.

58. AR 1994, 4.

counterparts from the various countries to identify and analyze their wishes and requirements. After consultation with experts, the staff formulate an action plan and look for funding. When a proposal has been approved, the Centre assumes responsibility for its implementation, monitors its progress and reports to the donor agencies.⁵⁹

Although aiming at self-sufficiency, over the past five years the Centre has received support from various organisations. The Dutch Ministry of Justice is the main sponsor, but financial support has also been received from the Ministry of Education and the Dutch Law Faculties. Contacts are maintained with the Council of Europe, the World Bank in Washington DC, the German *Stiftung für Internationale Rechtliche Zusammenarbeit*, the American Rule of Law Consortium and several Dutch institutes specialising in foreign and comparative law. Funding takes place on a project basis through sponsoring by a multitude of organisations. Several Netherlands Supreme Court Judges take part in the projects, with an even more crucial role for Snijders.

The actual support to 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 had emerged alongside the old RSFSR Civil Code of 1964.⁶⁰ 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.⁶¹ The Commission prepared a draft for Part 1; subsequently, a consultation procedure with Dutch experts was developed that proved to be 'very productive'⁶² in the eyes of the drafters in question. The Russian drafting team prepared draft texts and questionnaires, which were translated by the Centre for East European Law and Russian Studies into Dutch, where consultancy was limited to Dutch experts, or into English,

59. AR 1995, 3.

60. Corinna M. Wissels, *The Russian Civil Code: Will it Boost or Bust Franchising in Russia?*, *Review of Central and East European Law* 22 (1996) 495, 497.

61. A State institution, created in 1991 and attached to the President of the Russian Federation.

62. According to Feldbrugge, o.c., 50.

where foreign experts were also involved.⁶³ The translations were made in advance in order to make it 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.⁶⁴ The objective of the questionnaires was to obtain opinions on the proposed Russian text or to receive information on Dutch or other Western 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.⁶⁵ 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.⁶⁶

Compared to the advice given by American, German and Italian experts, the Dutch influence was considerable, although it is not possible to trace it back to specific provisions in the Russian Civil Code. A member of the Dutch team, Feldbrugge, has 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 Ministry of Foreign Affairs. The Russian drafting team well understood that the Dutch experts had no goal but to improve the quality of legal reform.⁶⁷ To my knowledge, this is true for all Dutch organisations which 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, are in a much better position to export their law than super-powers: no matter how noble the motives of the latter, they will be more readily accused of legal chauvinism.

63. Translations of the Dutch Civil Code into English and French include P.P.C. Haanappel and Ejan Mackaay, *New Netherlands Civil Code/Nouveau Code Civil Néerlandais*, The Hague 1990; into German by F. Nieper and A.S. Westerdijk (eds.), *Niederländisches Bürgerliches Gesetzbuch*, München 1995; into Spanish by Juan Guillermo van Reigersberg Versluys, *Derecho patrimonial neerlandés*, Malaga 1996. For an overview of literature on the Civil Code: O. Remien, *ZEuP* 1994, 187.

64. Feldbrugge o.c., 51.

65. Feldbrugge o.c., 50. The Dutch team was headed by W. Snijders (AR 1994, 4).

66. Feldbrugge, o.c., 50.

67. Feldbrugge, o.c., 51.

The EC Independent States Joint Task Force on Law Reform was of the opinion that the highly practical approach of cooperating directly with the drafting team was to be the best method of legislative reform. In its Report⁶⁸ it proposed 'active' law reform assistance: joint drafting groups of experts, who are proficient in Russian should be created, backed up by specialists from the continental and the Anglo-American tradition. These specialists should work with drafts translated into English.⁶⁹ The form that has proven to be the most effective has been the provision of concrete rather than abstract information.

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 parties set up to draft new texts. These were duly discussed with Dutch and American experts⁷⁰ 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.⁷¹

The other projects discussed also tended to be as practical as possible. As far as the training of judges was concerned, usually short 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 copier were sent to Law Faculties.

6 Why export dutch private law?

68. Report Joint Task Force, 33.

69. Cf. W.E. Butler, *Foreign Legal Assistance in the CIS: Lessons from the early years*, in: George Ginsburgs et al. (eds.), *The Revival of Private Law in Central and Eastern Europe (Essays in Honor of F.J.M. Feldbrugge)*, The Hague 1996, 510.

70. AR 1995, 6.

71. AR 1995, 8.

Dutch involvement in law reform predominantly in Central and Eastern Europe has expanded greatly over the past five years. The Dutch Civil Code in particular seems to have an attraction for countries in need of a new legal infrastructure for a market economy. Two questions need to be answered. In the first place, the more general question as to the reason for embracing the codification idea and consequently the civil law family, rather than choosing the Anglo-American common law family with its recently developed rules based on new commercial law concepts. This question concerns the reason why the export of Dutch law was possible in the first place. The second question is why precisely Dutch law has 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* has been 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'⁷² and in the Report of the EC IS Joint Task Force, we read 'that a stable market economy, so essential for the Independent States, cannot function normally without a stable body of civil legislation in the form of civil codes or fundamental principles of civil legislation of the type enacted in the former Union.'⁷³ As a result, the entire legal system of the Independent States was to be rebuilt starting from the premise of entrepreneurial freedom.⁷⁴ This is particularly interesting since private law is used 'as a conscious and deliberate vehicle of social change' in transforming the economic system.⁷⁵

The first question refers to the way market-oriented private law has been organized, namely through civil 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 enacted civil law codifications in 1922 and 1964. The new Russian Civil Code has a Pandectic structure and is characterised by an abstract style. As in the German and Dutch Civil Codes, different degrees of generalization exist, which requires frequent cross-referencing as these Codes proceed from

72. Wissels, o.c., 498.

73. Report Joint Task Force 91-92. Cf. 29: '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'.

74. Report Joint Task Force 13.

75. Report Joint Task Force 13.

the general to the specific.⁷⁶ 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.'⁷⁷

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',⁷⁸ codification is a far better way to achieve this than through 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 Russian (and other CIS states) entrepreneurs possess little legal knowledge. They usually lack the elementary skills for working with contractual partners. As a result, contracts are often concluded in a haphazard way.⁷⁹

A Civil Code may contain solutions for 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 by contract. The provisions of the Code are therefore 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.⁸⁰ This calls for an intensive programme of implementation.

76. Wissels, o.c., 501. Cf. Bernard Rudden, *Soviet Civil Law*, *Review of Socialist Law* 15 (1989) 31.

77. Bernard Rudden, *Civil Law, Civil Society, and the Russian Constitution*, *LQR* 110 (1994) 56, 61.

78. Report Joint Task Force, 13.

79. V.V. Vitrianskii, *Contract as a Means for Regulating Market Relations: The Draft Civil Code (First Part) of the Russian Federation*, *Review of Central and East European Law* 20 (1994) 649, 652.

80. Wissels, o.c., 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'.

The second question, far more important from the perspective of legal export, is why in particular the *Dutch* Civil Code has played such 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 legal system, or a specific rule of that system, and economic efficiency.⁸¹ 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'. This cannot really account for its success. On the contrary: importing the most 'up-to-date model' may even hamper the transition to a market economy, because it implies importing 'costly' provisions, for instance, on consumer rights and environmental protection.⁸²

This leaves us with two other possible reasons: the comparative character of the Civil Code and its mixture of 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 best known. As has been pointed out before in this report, the Dutch Civil Code took guidance from excellent modern civil codes and from common law systems as well. The *jus 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 has made the export of private law possible. However, this factor should not be overrated: the new Quebec Civil Code, American, Italian, French and German law and such international treaties as, for instance, CISG also exerted influence. 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 has been incorporated into the Russian Civil Code.

The latter argument is just as important to explain 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 the former Minister of Justice, Fyodorov, on the principles of the social *Rechtsstaat*.⁸³ In a social market economy, the law should take care of the

81. Cf. Ugo Mattei, Efficiency in Legal Transplants: An Essay in Comparative Law and Economics, *International Review of Law and Economics* 14 (1994) 3.

82. Gianmaria F. Ajani, Codification of Civil Law in Albania, in: George Ginsburgs et al (eds.), *The Revival of Private Law in Central and Eastern Europe* (Essays in Honor of F.J.M. Feldbrugge), The Hague 1996, 524.

83. 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*, o.c., 122.

economically weaker parties, for example, by setting limits for company conduct.⁸⁴ In this area too, it is possible to profit from the Dutch Civil Code, which is a mixture of hard and fast rules and equitable provisions. The role, awarded to ‘good faith’, through the criterion of *redelijkheid en billijkheid* (reasonableness and fairness), extends to all obligatory relationships and enables the court to derogate from contracts validly entered into by the parties, even from statutory provisions, if necessary. The Dutch Civil Code can be used as a source of inspiration where equitable results are sought, as with the aid of ‘one astonishing equitable provision’⁸⁵ in the Unidroit Principles of International Commercial Contracts 1994, which ensures that the Principles are also acceptable to the countries of Central and Eastern Europe.⁸⁶ 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 legally protected interests of others. Thus, a relationship has been created based on good faith,⁸⁷ although the role of ‘good faith’ is not as important as in Dutch law.

7 National sovereignty and reception of law

Örücü writes that a ‘new *genre* of *mixité*’⁸⁸ 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 other mixed legal systems. The question still remains as to whether the export of Dutch law has been ‘successful’, but an answer cannot be given so long as there is no criterion for the successfulness of legal transplants. Some have sought this criterion in the contribution legal exports have made to the establishment or strengthening of the rule of law or a free market economy in the countries under discussion.

It is extremely difficult, however, to come up with an answer to this question. The establishment of the rule of law is a long process, the success of which depends on the general political and cultural climate in a particular

84. See Van den Berg, o.c., 122.

85. Richard Hyland, On Setting Forth the Law of Contract, *AJCL* 40 (1992) 546. This art. 3.10 concerns ‘gross disparity’.

86. Alejandro M. Garro, The Gap-Filling Role of the Unidroit Principles in International Sales Law, *Tulane LR* 69 (1995) 1161-1162.

87. Cf. Van den Berg, o.c., 121. An English translation of the Russian Civil Code was published in *Review of Central and East European Law* 21 (1995) 237.

88. Esin Örücü, Mixed and Mixing Systems: A Conceptual Search, in: Örücü et al., *Studies in Legal Systems: Mixed and Mixing*, The Hague/London/Boston 1996, 351.

country and not on legal infrastructure alone. All an exporting country can do is to 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 has happened in Russia, where the drafters have had the benefit of foreign-law suggestions, but have made their own choices; consequently, it is not possible to establish which foreign model has most influenced the actual legal reforms adopted by the importing country. The influence was of a rather diffuse nature.

As regards strengthening market economies, it should be reiterated that at the time Western countries became involved in the reform process, almost all necessary market economy issues had been addressed by legislation. For the reasons discussed above, Western countries, the Netherlands in particular, 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’,⁸⁹ more or less obliging the importing countries to profit from Western experience. The establishment of the rule of law is inspired by a rather political motive. In this respect, it is understandable that the new Constitutions of the Independent States have been much less influenced by foreign law than 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.⁹⁰

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 no 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 come into it. Could this possibly account for the success of Dutch private law in the law reform process?

89. Report Joint Task Force, 19.

90. Report Joint Task Force, 17.

