

# Drafting a new Civil Code for Albania

Some personal experiences contrasted with the World Bank's 'Initial lessons'

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## 1. Introduction

Flying out to Albania, one finds oneself in the company of politicians, engineers, American lawyers, trade union leaders, salesmen, agriculturists, captains of industry, government representatives, bailiffs, human rights activists and teachers. Albania is inundated with consultants; it is almost to the breaking point. At first glance this flood does not seem to help much. Although the country is part of Europe, Albania is one of the poorest countries in the world. Public health care hardly exists and the infant mortality rate is high. Albania has all the characteristics of a third world country. That the Albanians do not starve probably has to do with the fact that the many Albanians who live abroad are financially supporting their relatives.

The roads and general infrastructure are very bad. There are frequent power cuts in Tirana and communication by telephone or fax is often extremely difficult. The only thing Albania is rich in are little two man army bunkers; former President Enver Hoxha built approximately 750.000 bunkers for a population of about 3.2 million. The landscape is scattered with them, concrete reminders of the time the country only thought to have enemies. An American (who else?) I met, suggested that the Albanian government should sell these useless bunkers for the price of 2000 dollars each: a bit of Albanian real estate for the person who really has got everything.

Let me start out by providing some background information. The first democratic general elections which were held in 1991, resulted in the majority of the vote going to the Socialist Party (the former Communist Party). This party, however, soon proved incapable of

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<sup>1</sup> Dr jur., Prof., Director of the E.M. Meijers Institute of Legal Studies, ad hoc judge in the District Court of Haarlem and ad hoc justice in the Court of Appeals of 's-Hertogenbosch. It was an honor for him to be invited by IJVO; this article is a rewrite of his speech. During the time this article was being prepared the future of Albania seemed very promising. As the article went to publication, there was a widespread outbreak of violence and human suffering. It is not clear at this time what the prospect will be for the people of Albania.

governing the country without the support of other parties. The Socialist Party and other parties formed tentative coalitions.

However in view of the increase of political chaos, new elections were called in March 1992 due to the pressure of active groups of the population. It turned out that the Albanian people had still to learn to accept some of the basic rules of parliamentary democracy, and particularly that its elected representatives can legitimately represent the people for the term of their mandate. Citizen pressure groups which played an active role in the struggle for democracy were having difficulty in accepting the limits of their role in a democracy.

## 2. *The economists came*

The country has a high unemployment rate. Whatever the country did possess under the communists, in the way of economic activity, disappeared. It seemed to be the general sentiment that to help Albania's economy on its feet, economists were required. Everyone in Albania mentions foreign investment and all political parties are in favor of free enterprise. What else can they do with a population that, to stay alive, is dependent on donations of the 400 000-600 000 Albanians who are living abroad? Indeed what else can they do? Yet by the Albanian leadership something else *was expected* of them.

'The Albanians will sooner eat grass than betray the principles of Marxism and Leninism.'

Few foreign investors came to Albania and the 'helping' West reached a conclusion: not economists, but lawyers had to come first. Large institutions such as the World Bank and the European Bank increasingly saw the importance of a decent legal infrastructure. What benefit are economists to a country where there is no adequate legal infrastructure, no reliable register of real estate or land, no contract law or discipline in fulfilling contractual obligations, no law of securities? Not only for Albania, quite the opposite, as it seemed to be Albania in last place, but also for the many Republics of the former Soviet Union.

Two years ago the World Bank presented a Policy Research Working Paper 'The World Bank and Legal Technical Assistance' (January 1995)<sup>2</sup>. The report is an effort to synthesize the experience acquired and address issues and dilemmas involved in the financing of technical assistance in legal reform efforts in its borrowing members.<sup>3</sup> The World Bank's report argues that only in a stable and predictable environment resources can be efficiently allocated, business risk rationally assessed and transactional costs kept at low levels.

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<sup>2</sup> The World Bank and Legal Technical Assistance, Initial Lessons, The World Bank Legal Department, Policy Research Working Paper 1414

<sup>3</sup> World Bank, *op cit* 1995, preface

Inability to enforce private contracts hinder the efficiency of economic discourse and thus have a negative impact on the economic development of a country. In that sense, reform of the judiciary and the establishment and strengthening of arbitral or other dispute settlement mechanisms which help achieve efficient and expedient enforcement of agreements between private parties, resolution of disputes and enforcement of laws and regulations is intrinsically tied to economic progress.<sup>4</sup> And although the Bank was, as far as I know, not involved in the area of civil law in Albania, the lessons that are being drawn in the Bank's report, fit amazingly well in my experience as a member of another sponsor of legal reform: the Council of Europe. This presentation is my personal experience as a member of one of the Council of Europe's drafting teams.

### 3. *Albania's legal tradition*

Albania has a troubled history. For centuries there was the threat posed by the Turks. Then Albania was a puppet of the Great Powers, tucked away in the Warsaw Pact. From there it flirted with the Chinese and became an odd outpost of Mao in Europe. The country made its foreign affairs and foreign trade the responsibility of a carpenter, as the great Albanian author Ismail Kadare wrote in his 'Albanian Spring'.<sup>5</sup> It appeared to be a very efficient way to reduce to nil the few relations with other countries. A country whose constitution declared atheism as its new religion. A country that has suffered under an improbable dictatorship. The top man was Enver Hoxha. He died in the nineteen eighties, but his regime outlasted him. In 1991 the dictatorship also collapsed in this country, the last remaining in Eastern- and Middle Europe.

In one of his articles the bright Italian legal comparatist Ajani studied the sources of Albanian civil law.<sup>6</sup> During its existence as an independent State, Albania had two different Civil Codes. The first, adopted in 1928, was a draft prepared by a Commission of five members, which was strongly patterned on the French (1804 Code Civil) and Italian (1865 Codice Civile) models. The second Civil Code of Albania, adopted in 1981, was inspired by Marxist-Leninist doctrine. Technically, it contained elements of the Soviet model, but it also followed a German pattern which was also reflected in Soviet codifications. After World War II, and before 1981, Albanian civil legislation was enacted in the form of separate statutes ( ).

After 1945, as an indirect result of the transition towards a command economy, Albanian civil law moved away from the original French pattern towards a German oriented

<sup>4</sup> World Bank, *op cit* 1995, p. 15

<sup>5</sup> Ismail Kadare, *Nga një dhjetor në tjetrin/Printemps Albanais*, Fayard, Paris 1991

<sup>6</sup> Gianmaria F. Ajani, Codification of civil law in Albania, speech held in Leiden August 1993. See for a written version his article *Die Kodifikation des Zivilrechts in Albanien*, *Recht in Ost und West* 1993, pp. 257ff.

(pandectist) one. The 1981 Civil Code was unsatisfactory.<sup>7</sup> In certain important respects, it is inferior to other 'socialist codes' because it lacks even those fundamental rules on 'private' or individual activity that were found in most other socialist legislation. Those rules permitted in some cases the incorporation of new market-oriented solutions.

Under those circumstances, jurists working at the Codification Committee of the Ministry of Justice shared the opinion that a mere renovation of the 1981 Code was not sufficient. Such revision would have eliminated the prerogatives and privileges granted to the State and to State organizations, but would not have provided Albania with a complete and modern Civil Code. The problem, in other words, was not only what had to be repealed in the 1981 Civil Code, but also what had to be added to a currently legal structure.<sup>8</sup>

#### 4. *Task Force Albania*

In response to a request from President Berisha for specific aid to Albania in the form of a permanent presence of foreign legal experts at the side of the Albanian authorities, including the Presidency of the Republic, the Secretary General of the Council of Europe has set up a group of staff members mandated to respond to the request formulated by the Albanian president. This group, and more especially one of its coordinators, Markus Jaeger, initiated in 1993 a comprehensive program: the Task Force Albania. The projects were aimed at (i) establishing a basic legal framework, (ii) ensuring the proper application of the Rule of Law, and (iii) guaranteeing respect for basic human rights. In principle a Human Rights organization (the European Convention for the protection of Human Rights and fundamental freedoms) the Council now also targeted legislation, a revision of the judiciary, the elementary protection of Human Rights, a new Civil Code, Criminal Code and Code of Criminal Procedure and the strengthening of the Ministry of Justice.

I was involved in the project of the new Civil Code in conjunction with the aforementioned Italian lawyer, prof. Gianmaria Ajani and the French law professor Georges Wiederkehr (who was the head of the team and who was also participating in the drafting of a Code of Civil Procedure (1996)). A complete Civil Code had to be achieved within one year. And I still remember the bewilderment of the Albanians during the first meeting at the Ministry of Justice, when we happened to mention the 45 years it took to create a new Civil Code in the Netherlands. The Dutch have had a completely new Civil Code since 1992, work on it started just after World War II.

<sup>7</sup> For more details on the Code of 1981, see Christine Hocker-Weyand, *Grundzüge und Besonderheiten des Albanischen Zivilgesetzbuches von 1981*, WGO MfR 1986, pp. 101ff.

<sup>8</sup> Ajani, *op cit* 1993. For a much more elaborated study of the possible models for a new civil code, I must refer to the article of Ajani.

As far as I can see, the help of the Task Force Albania has provided a modest contribution towards the drafting of a new Albanian civil code<sup>9</sup> The Task Force itself has been dissolved in 1995

#### 5. *Why not copy a Code?*

Many countries in Eastern Europe are in need of a new Civil Code, if only to attract those elusive foreign investors So why not just copy the new Dutch Civil Code, the Italian one or the German BGB? When I was asked to offer my assistance, this was my first idea copy the part on Company Law, and then you immediately encompass Brussels law In Europe the Dutch Civil Code is regarded as the most recent codification of present ideas on Civil Law (This is no news for the Law Faculty of Osnabruck, since one of the distinguished scholars of your law school, Franz Nieper, has been writing a translation of a large part of it into German) In this way these countries would gain an enormous head start

Furthermore one has to bear in mind that in a country as Albania there are only a handful of legislators at the Ministry of Justice In Albania they are expected to make up for approximately 50 years of inactivity, as the Ministry of Justice was abolished under the communists As inexperienced as I was, I was quick to understand copy as much as you can and do not try to re-invent the wheel

However, this is not what happened in Albania Even a new Civil Code specially tailored to suit Albania (and paid for by the IMF) was rejected Why? There are several reasons

#### 6. *Legal reform can not be imposed*

Many countries have several competent lawyers, and that's especially true for the Russian Federation<sup>10</sup> With respect to Albania some were even trained in the pre-communist style, but for them the (legal) world has stood still for fifty years A few young Albanians have already had the benefit of some study abroad, sometimes as a part of their university education (aided by programs of the European Community) and others have been sent later (see also par 16)

Another factor is that the Civil Code is 'the Queen of codes', one likes to keep control The question of 'authorship' plays also an important role, especially with the older lawyers Legal reform goes to the core of the social fabric of a society Legal reform *cannot be*

<sup>9</sup> See for more information about legal reform in Albania, e.g. Cristina Boglia, The new Albanian act on business associations ongoing legal reforms in commercial and private law, in Review of Central and East European Law, 1994, pp 657ff, Wim A Timmermans, The 1992 Albanian foreign investment law, in Review of Central and East European Law 1993, pp 553ff

<sup>10</sup> See Editorial, The New Civil Code of the Russian Federation, Review of Central and East European Law 1995, p 238

*imposed* in a country Unless the country is committed to reforming its legal regime, and either requests assistance for its reform process or agrees with assistance providers, legal technical assistance may be a waste of resources This was also one of the most important conclusions made by the World Bank.<sup>11</sup>

In the country itself you need a receptiveness, a willingness to receive advice Each society has to make fundamental choices about the structure and the direction of its legal system These should be guided by the legal as well as social, religious, customary, geographic, historical traditions and characteristics of the country<sup>12</sup> This was another lesson that could be drawn it is important for the success of legal reforms that each country prioritize its reform needs to reflect the particular circumstances of the country

These lessons correspond with the Russian experience. Prof. Sukhanov, Dean of the Law Faculty of Moscow State University and one of the members of the drafting team of that country concluded

'The Russian economy greatly needs skillfully drafted modern legislative acts that reflect both the peculiarities of the national legal system and the experience of commercial activity of developed foreign countries The new Civil Code will create precise and clear 'rules of the game' under the conditions of Russia's transformation to market organization'<sup>13</sup>

It is very difficult to transplant legal systems and impose ready-made solutions on countries However, in the World Bank report we also find the recommendation that it may be worth considering whether countries that need to build up their entire legal and regulatory frameworks would not be well advised to adopt suitable international conventions and model laws or follow closely examples that have proven functional in other societies There are famous examples Japan and China adopted the same code from Germany Turkey and Greece adopted the Swiss Code of Obligations and parts of the German Civil Code Nevertheless, ownership of reform is a key issue

Working on a draft for Albania, we came across the Albanian psychology Although one might expect this would play a more important role in the fields of Criminal Law or the Law of Persons and Family, it still is a factor not to be underestimated We are dealing with *Civil Law*

On top of that, it is important that assistance with legal reform in a country is really supported by the ministers and other high ranking persons Lawyers in the government usually recognize the need for legal reform and technical assistance to support it, but often

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<sup>11</sup> World Bank, *op cit* 1995, p 18

<sup>12</sup> World Bank, *op cit* 1995, p 9

<sup>13</sup> E A Sukhanov, Russia's New Civil Code, Parker Sch J E Eur L 1994, p 636

they are unable to convince the decisionmakers to allocate funds or to borrow for such purposes. One of the problems in Albania at that time was that ministers and high ranking decisionmakers easily could be replaced by others. That made the process of legal reform difficult. Therefore the conclusion by the World Bank is very true: in order for legal technical assistance to bring about the desired results, the recipient governments need to demonstrate a clear commitment to legal reform and take full ownership of the legal reform process.

### 7. *The difference in legal infrastructure*

The legal infrastructure in many countries in Eastern and Middle Europe is so different from the rest of Europe or the United States. First the judiciary, the quality and experience of the judges vary strongly — to put it mildly. That's especially true for Albania, where you also find the results of fifty years of self-inflicted isolation.<sup>14</sup> In addition, a number of experienced judges were also dismissed shortly after the revolution. I remember a visit to the District Court of Tirana where we were to meet with the vice-president of the Court. We were received by a young man, wearing a pair of jeans and sneakers and who would escort us to the vice-president's office. When we were shown into his room the young man took his place behind the desk. *he* was the vice-president of the Court of Tirana.

The position of judge is not very popular at present. It is badly paid and is not free of danger. To ease the shortage of judges there is now a six month course to become a judge. No previous legal training is required. So, the educational system is not able to deliver lawyers of a calibre we are used to in Western-Europe and the United States.

Here we come across a very important issue. What is crucial in many of the former communist countries is the strengthening of the judiciary and the establishment of extrajudicial bodies and various regulatory agencies. According to the World Bank's report, the issues that most frequently need to be addressed in these sectors are:

- a the removal of barriers in access to justice, such as inordinate delays in juridical proceedings, excessive costs associated with pursuing legal claims and the lack of alternative dispute resolution mechanisms,
- b improvement of court administration and case management,
- c reducing corruption and raising ethical standards in the judiciary and legal profession at large,

<sup>14</sup> See Winston P. Nagan, Artan Hoxha and Paul J. Dirks, *Strengthening the rule of law in Albania: impartiality, independence, and the transformation of the legal profession*, in *Review of Central and East European Law* 1994, pp. 677ff.

- d depoliticization of the judicial branch , especially with respect to selection and promotion of judges,
- e modernization of procedural codes,
- f to establish a professional bar, licensing, etc <sup>15</sup>

Therefore, legal assistance is much more than only assisting in the drafting of a new law It is furthermore of the utmost importance that the law and, more particularly the Civil law, is in line with the tradition of the country in question

#### 8. *Conclusions so far*

So, the conclusion so far is, that it is not feasible under these circumstances, as the lack of quality and experience of many judges, to produce a Western European Code such as the Dutch Code The Dutch Code has many so called open rules (or norms), such as requirements of 'reasonableness and equity' With this the judge can even put crystal-clear contractual clauses aside It goes without saying that to do this, years of experience or maybe even a lifetime of experience is necessary

So, for us in the Task Force Albania, but also for the experts in the Russian drafting team, to copy the Dutch Civil Code, as it stood, was just not possible The same applies to the Italian Civil Code Even, though, if it is true that the Albanian government does not wish to copy someone else's Code, a foreign Code can be very valuable as reference material And this is their function Ideas can be taken from everywhere

Quite often the three of us were astonished by certain concepts that were drafted by the Albanians For example, the Albanians provided that the Frenchman did not recognize his Code Civil The Italian not his Codice Civile, and I was unable to recognize either the Dutch or German Civil Code It emerged to be a rule taken from the Swiss Civil Code of 1912, in an Italian translation This was explainable as the Albanians have little problem reading Italian Furthermore it was a rather recent Code and had nothing from the fascist tradition of the Italian Civil Code (of 1942) But on the table the Albanian legislators had the Italian Civil Code, the Swiss Civil Code in an Italian translation, the French Civil Code, the new Dutch Civil Code in a French and English translation, the old Communist code and the IMF draft prepared by professor Ajani<sup>16</sup>

Using all these sources, finally a draft was composed which we then discussed in several sessions during the year 1994 One example was a discussion about the way in which the articles of an association should be altered The draft provided that for such an alteration a minimum of 60% of the members should vote in favor For a very small association this

<sup>15</sup> World Bank, *op cit* 1995, p 12

<sup>16</sup> See before, par 5



might not be a problem, however, modern Codes prefer a system where a certain number of members attending the meeting is required. It took some time to convince our respected Albanian colleagues that it would be very difficult to get all the members to attend the meeting, and that in case of a large football club or Unionit might be even impossible to find a meeting room large enough.

Assisting in the drafting of a new civil code, with such speed, is an unusual experience for someone who is accustomed to confer with dozens of other scholars for months on end about a word and a half in a text, or studies for weeks to find the right interpretation of the observations made by the Supreme Court in a piece of case law. This is why offering technical assistance to another country is such a valuable experience. It puts one's own legal certainties in perspective, no doubt one of the most important aspects of comparing legal systems. These new statutes are also exciting from a legal theoretical view. Ajani argues in a study of legal transplants in Russia:

The study of foreign and uniform influences in post-socialist law adds a new reason for changing the static approach of Comparative law, based on a conventional division in Legal Families, into a dynamic examination of the converging flows between the two major systems, such dynamic examination is called not only to give order to the outcome of legal transplants at the level of positive law,<sup>17</sup> but also to analyse the influence of the new factors of circulation, both normative or scholarly, on the legal process, and on the implementation of the new solutions.<sup>17</sup>

That brings us to the Russian Federation, for a small excursion.

#### 9 *How did they go about it in Russia?*

With respect to the Russian civil code, early on, a bilateral legislation team was formed, composed of Russians and Dutchmen. The head of the Dutch delegation is Dr W. Snijders, vice-president of the Supreme Court and Royal Commissioner. For many years he was responsible for the realization of the new Dutch Civil Code. Snijders was assisted by a small team of professional legislators, but in the meantime he on his own, being one of the foremost civil law authorities in the Netherlands, is capable of perceiving the totality of civil legislation. On top of that, the team was assisted by several experts on Russian law, the substantive contribution of the Leiden Institute for Eastern European law and Russian

<sup>17</sup> Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, *The American Journal of Comparative Law* 1995, p. 116. The same, with Ugo Mattei, raises the question whether Eastern and Central European Countries are still a family of legal systems, *Codifying Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economics*, *Hastings Int'l & Comp. L. Rev.* 1995, p. 1117ff.

Studies<sup>18</sup>, and a very capable interpreter<sup>19</sup> They were taking their time Work started over four or five years ago, alternating between Moscow and the Netherlands

It is considered to be a completely Russian product and none of it has been written by foreign advisors<sup>20</sup> Although in the framework of this continuous collaboration between Russian and Dutch lawyers, the new Dutch Civil Code has been translated into Russian as a reference tool for the Russian drafting team, the Dutch themselves have not drafted any part of the new Russian Civil Code Rather, the numerous meetings that have been held in Russia as well as in the Netherlands have been prepared by circulating in advance to the Dutch experts the most recent Russian drafts in English and/or in Dutch with specific written questions on these draft texts posed by the Russian drafting team members, and intensive full-day sessions at which Dutch lawyers provide answers to these written questions orally (rather than in writing) to maximize the exchange of information and ideas in as effective and efficient a manner as possible<sup>21</sup>

The standard question in the consultation process was therefore how have you solved this problem? and what do you think of our solution?<sup>22</sup> Here also allowances had to be made for the relative inexperience of judges and lawyers, and the limitations of the training facilities Therefore the *experience* of the Dutch is of more importance to the Russians than the *contents* of the new Dutch Civil Code

#### 10 *A model code for the CIS countries*

What makes working on the Russian Civil Code even more interesting is the fact that it will more than likely be copied by other CIS countries<sup>23</sup> In the Soviet past, major laws would be drafted as principles or fundamentals of legislation in Moscow The union republics would usually adopt such legislation with only modest amendments Nowadays, the

<sup>18</sup> I want to mention the head of the institute, prof. Feldbrugge, furthermore dr. Van den Berg and mr. Simons They played, together with other people of the institute, a role that can not easily be overestimated

<sup>19</sup> The funding for the first Russian-Dutch session on the draft of the Civil Code was provided by the Dutch Ministry of Justice Subsequent larger-scale funding was obtained through Dutch technical assistance programs coordinated by the Dutch Ministry of Foreign Affairs and the Ministry of Development and Cooperation, respectively A Dutch-German program in The Ukraine has been funded by the European Commission's TACIS facility

<sup>20</sup> See for a short outline Russia promulgates a New Civil Code, Parker Sch. J.E. Eur. L. 1994, pp. 706ff and Land Ownership in the Russian Civil Code, *ibid.* 1995, pp. 127ff See also Christine Huper, Das Einföhrungsgesetz zum neuen Russischen Zivilgesetzbuch, *Wirtschaft und Recht in Osteuropa* 1995, pp. 161ff

<sup>21</sup> Speech held by William B. Simons of the Institute for East European Law and Russian Studies of Leiden University, New Civil Legislation for the Newly-Independent States of the Former Soviet Union, April 12, 1996 For more information about the members of the Russian team, the Editorial *op cit.* p. 238

<sup>22</sup> Editorial, The New Civil Code of the Russian Federation, *Review of Central and East European Law* 1995, No. 3/4, pp. 239

<sup>23</sup> See Simons, *op cit.* (speech New Civil Legislation), see also the Editorial, *op cit.* 1995, p. 239-240

members of the CIS are more free to go their own way. Their desire of independence is quite understandable. But if the adoption of the model could succeed in spite of nationalistic feelings, these countries will have an instant advantage over Western Europe with its diversity of Civil Codes. The Interparliamentary Assembly of the CIS had therefore decided, already in 1994, that a Model Civil Code for the CIS member states would be prepared. In October 1994 such a Model Civil Code was adopted by the Interparliamentary Assembly. It is not so that the Model Civil Code of the CIS is a copy of the Russian Civil Code, but in practice they end up to come very close to one another.

The Model Civil Code has been put together by working groups consisting of members of the Civil Code drafting teams of most of the CIS members. In the non-Russian republics, the Russian draft has always been the principal source for domestic drafting. But sometimes other legislative solutions are preferred, other words are used, or matters have been covered which had been left unregulated in the Russian Code. The CIS Model Civil Code is therefore truly the product of joint efforts, while at the same time its direct and indirect links with the Russian Code are very strong.<sup>24</sup>

This Model is not the end of the drafting activities of the CIS countries. They understand very well the need to view the new codes as the start, and not the end, of serious legal reform in their respective countries, the subject at some time in the not-so-distant future to possible further change and amendment, and the keystone of the civil law system which, nevertheless, will need to be complemented by other pieces of key economic legislation.<sup>25</sup> This last consideration has resulted in a consensus to begin work in 1996, along with finalizing the Model Civil Code, on three important model laws, i.e. laws on companies, bankruptcy, and mortgage.

And there are other projects that have been begun, both in the context of model legislation as well as on bilateral basis, e.g. in the field of criminal law and criminal procedure. These convocations generally follow the pattern that has been set in the civil law field: texts of draft laws and questions, oral responses by the Dutch as well as US experts and then the work to refine and complete the texts is carried on after the national representatives returned to their home countries. Further areas that could lend themselves to the model legislation approach are labor law, environmental protection, economic (and organized) crime, and administrative procedure.<sup>26</sup>

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<sup>24</sup> See the Editorial, *op cit* 1995, p. 239.

<sup>25</sup> Simons, *op cit* (speech New Civil Legislation).

<sup>26</sup> Simons, *op cit* (speech New Civil Legislation).

### 11 *The differences with Albania*

First, there was the language problem. The differences with the realization of the Albanian Code (and this equally applies to all other legislation projects there) are considerable. In this case there was a multilateral team rather than a bilateral one. Four Albanians, amongst which was the aged vice-president of the Constitutional Court, professor Ghilani, and the Head of legislation at the Ministry of Justice, dr. Vasil. As I said before, the team of foreign experts consisted of an Italian, professor Ajani, a Frenchman, professor Wiederkehr and myself. Besides the instant language problem — deliberations were held in Albanian and French — the team consisted of people from various legal traditions. Although in a broader perspective the Netherlands, Italy and French all belong to the Roman legal tradition, it is questionable whether this still applies to the new Dutch Civil Code. The Italian Codice Civile of 1942 and the French Civil Code of 1804 are also quite different. All this required some harmonization between the foreign experts before work could start.

The lesson drawn by the World Bank, however, was that for quality legal technical assistance at affordable rates, it is important to diversify the selection of advisers to include local lawyers as well as consultants from different legal systems. But they add that the selection of consultants should, however, be consistent with the chosen direction of the country's legal reforms.

### 12 *The coordination problem*

I would like to underline the problems one encounters in working together in teams that consist of people from different traditions. Many times, the receiving countries are not accustomed to foreign assistance. Many Eastern European countries and the republics of the former Soviet Union do not have institutional structures set up to receive legal technical assistance. That can lead to unnecessary waste of resources. A lesson was that was drawn by the World Bank.

It is crucial for the success of legal technical assistance to have proper counterparts in the government implementing such assistance. Some countries may benefit from the establishment of legal reform units within the partner governments that coordinate between economic and legal reforms in order to ensure continuity and avoid duplication of legal reform activities.<sup>27</sup>

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<sup>27</sup> World Bank, *op cit* 1995, p. iii

So coordination on the part of the receiving country is important. But the same is true for the assisting country. This is a good opportunity to mention the Dutch *Centre for International Legal Co-operation*. The Centre has its office in Leiden, The Netherlands. It is a non-profit organization, providing means of communication between countries wishing to involve foreign legal expertise in re-structuring their legal systems, on the one hand, and Dutch expertise relevant to this process, on the other hand. The members on the Centre's Board represent delegates from nearly all the Law Faculties in the Netherlands, the Ministry of Justice, the Bar Association, the Association of Judges, and various institutes specializing in foreign law. The staff of the Centre provides a diversity of experience in project management, fund-raising and budgeting. It draws heavily on the various Law Faculties, ministries and professional organizations. The largest undertakings in the past few years were undoubtedly the projects aimed at a new Civil Code for Russia and a Model (Recommended) Civil Code for the US states. This project came into being through contacts established through the Institute for East European Law and Russian Studies. Additional programs were instituted in 1994/5 between The Netherlands and, e.g., The Ukraine, Kazakhstan, Belarus, Kirghistan, and a Leiden-Beijing project for Legal Transformation.<sup>28</sup> A relatively new development of international legal cooperation is the growing willingness of parties involved to combine their efforts in order to reach a higher level of effect and to prevent duplications of programmes or even clashes between programs. The Centre has good relations with the Legal Department of the World Bank in Washington D.C., I could also mention the cooperation in some projects between the Dutch Centre and the German *Stiftung für rechtliche Zusammenarbeit*.

The *Council of Europe*, on the other hand, hardly ever works on a bilateral basis. Often a prerequisite is that lawyers of various European countries are involved. Of course, a bilateral team has certain advantages. One can not, however, underestimate the international competition and the need of many Middle- and Eastern European countries to ask for 'second opinions'.

Various examples can be given of countries who have shopped at numerous universities and Ministries of many countries to get just that bit of additional advice. Often it stems from genuine doubt about a certain concept. Co-operation, both nationally and internationally, with other countries and teams is then inevitable and constructive.

### 13 *The differences between the drafting teams*

Another difference between the experiences in Albania and in the Russian Federation lies in the difference between the Russian legislation team, affiliated *inter alia* with the prestigious

<sup>28</sup> See Centre for International Legal Cooperation, Annual Report 1995 — Approach and projects. Directors of the Centre are Jan van Olden and ms Hester Minnema.

University of Lomonosov on the one hand, and the Albanians on the other. This is hardly surprising since the small legislation department in Tirana not only carried the responsibility for the Civil Code, but also had to cover such widely differing subjects as Criminal Law, Criminal Procedure, Family Law, Intellectual Property, etc., etc. At the same time the project was put under considerable pressure by the Albanian Minister of Justice Cela (who has now been promoted to dean of the law school in Tirana). He thought in weeks and months rather than years.

The Russian Code, however, was prepared by a distinguished group of Russian lawyers and administrators whose political and economic outlook as reflected in the Code is consistently democratic and market oriented.

The difference was also caused by the fact that for many years Albania did not possess a Ministry of Justice, and because the existing Civil Code of 1981 was so alien to Western tradition. More so than the Soviet-Russian Civil Code, which had some adaptations that would make the transition easier.<sup>29</sup> The old Albanian Civil Code of 1921 never functioned in an industrial society. It had been copied more or less directly from the French Code Civil. Already upon its adoption in 1928 the Albanian civil code was in large part some hundred and twenty years old. It should be emphasized that the 1928 code was not itself an 'old' one because it was adopted 65 years ago, but because it was based on an old model. In France, since the initial adoption of the Code Civil in 1804, there had been continuous legislative and judicial efforts to keep it up-to-date.<sup>30</sup>

Although unsystematic, such efforts had helped the 1804 code keep abreast with the evolution of France into an industrial country. In contrast, in Albania, the 1804 model had not been updated either through legislative or intense judicial activity since its introduction.<sup>31</sup> As I quoted Ajani earlier in this presentation, the 1981 Civil Code was unsatisfactory. In certain important respects, it is inferior to other 'socialist codes' because it lacks even those fundamental rules on 'private' or 'individual' activity that were found in most other socialist legislation. Those rules permitted in some cases the incorporation of new market-oriented solutions.<sup>32</sup>

Moreover, the self-sufficient Albanian regime run by Party leaders for many decades isolated the country from international trade and world markets. It did not permit the survival of a legal culture concerning international transactions, as was the case in all other European socialist countries. The unique isolation of Albania from the world economy, in sum, did not permit the 1981 Civil Code to adapt to changing circumstances and, therefore,

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<sup>29</sup> Ajani, *op cit* 1993

<sup>30</sup> See Hocker-Weyand *op cit* 1986

<sup>31</sup> See Ajani, *op cit* 1993

<sup>32</sup> Ajani, *op cit* 1993

the Code has, in fact, outlived the legal culture that created it. For all these reasons a mere renovation of the 1981 Code was not sufficient.

A difference also existed on the side of the *experts*. During its drafting numerous agencies and institutions of the Russian Federation, as well as specialists from the Netherlands, Germany, the United States, Italy and France, were consulted. Besides that, dr. Snijders and his team are experienced legislators plus the added advantage of Snijders' overall knowledge of the whole Civil Code. Nevertheless, the result is definitely not a copy of the new Dutch Civil Code.

#### 14. *How to proceed — legal education*

The few universities in Albania are hardly popular and yet it is from there that a lot will have to be done to ease the acceptance of the Civil Code. How? It is difficult to say. It even remains to be seen if the country will be able to *publish* its new legislation in a proper and accessible way. The most important users are of course the judiciary and the Universities. The judges I spoke with told me that they will, every now and then, step on their bicycle to go to the Ministry of Justice to consult a certain piece of legislation in the statute-books, but that on the whole they would just apply a kind of customary law.

This also turns out to be one of the warnings of the World Bank because in many other countries in the world it is very cumbersome to gather legal information and even obtain copies of published laws and regulations. Apart from making it difficult for people to comply with laws and regulations they can not obtain, the lack of access to relevant legislation can be a major hindrance to private foreign investment in the country, as well as a source of corruption by government officials who control access to unpublished laws.<sup>33</sup>

Let alone that commentaries have been written on this new law. The academics can not be expected to do so, they are too busy surviving. Our Albanian colleagues at the law school earn a maximum of \$75 per month and are forced to have odd-jobs on the side. Proper training for judges is not to be expected. Additionally, the Code has been written in a great rush, however knowledgeable the Albanian lawyers may be, it can not be avoided that the Code contains contradictions or is in discord with other laws. So, it seems absolutely crucial for a successful transition into a democratic society that all sorts of training is provided for judges. They will have to get acquainted with the new laws (civil law, criminal law etc.) and, on top of that, they will have to be trained in being a judge in a democratic society. That brings us to the importance of legal education. In many Eastern European countries legal education is not adapted to the new situation.

<sup>33</sup> World Bank, *op cit* 1995, p. 13

This problem applies even more to Albania. There is something that can be done, though. Two Dutch universities, Leiden being one of them, have already established a smooth running exchange program. Here, international co-operation is vital. One of the many projects that were started in the early nineties, was our university-cooperation program. The project was set up by the law faculties of Tirana, Trento (Italy) and Leiden. It was one of the first, so called, 'TEMPUS' projects, a project financed by the European Communities. (As far as I know there are not many *legal* projects under TEMPUS<sup>34</sup>). In fact it started with my Italian colleague Gianmaria Ajani<sup>35</sup>, who somewhere in 1991 was asked by the IMF and the Albanian government to draft a new civil code for Albania. He worked in close cooperation with some bright Albanian lawyers at the Ministry of Justice.

The relationship between Albania and (Italy) Trento was quite natural. There have always been good relations between the Italian legal and judicial culture and the Albanian one. E.g. most Albanian law professors speak Italian. Also, the only foreign television the Albanian people was able to get, for so many years was the Italian one. The aim of the TEMPUS-project was and is to assist the Law Faculty of Tirana in its efforts to reform the teaching programs, of course in view of the change of Albania into a democratic, market-oriented society. The Tirana law faculty receives about 300 students every year. But by now the number of students is increasing, because the demand is increasing, in order to set up and implement legal reforms which are so urgently needed in almost all areas of life.

The project stressed as particularly important the adoption of new legislation in the field of civil and commercial law for three main reasons. It is hoped that (i) it will provide the legal framework for developing a market-oriented economy, (ii) it will be a guarantee of social order, and (iii) that it will encourage economic cooperation with other countries and international organizations. The general purpose of the project is to realize a reform of the teaching program offered to Albanian students. An important activity is the retraining of staff, supported and related to an update of the library and of the teaching materials. Student exchange contributes to speeding up the university studies reform.

With respect to *staff mobility*, two different activities lead to retraining of the Albanian staff: (i) first, self-study abroad under consultancy of EC-colleagues, (ii) and second, the involvement of seminars on Eastern Europe reforms with the participation of Western and Eastern staff. Since the process of legal reforms requires continuous updating and an interdisciplinary approach, the organization of seminars is an efficient way to face these challenges. Both activities are directed to the production of new teaching materials. Under the program, the library has been equipped with foreign legal documentation, periodicals

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<sup>34</sup> Another TEMPUS project is in its last year now: is a joint project of the Moscow Lomonosov University, Leuven, Nijmegen en Leiden.

<sup>35</sup> The program was set up by the Universities of Trento (Gianmaria Ajani) and Leiden (Paul Dirks and dr. Wim Timmermans).



and books Furthermore the library service has been provided with a copy center and the organization of a professional training seminar for the library employees

So far I focused on staff mobility But another important objective of the project is *student mobility* Studying abroad is an important moment in a student's curriculum and, at the same time, stimulates the implementation of teaching reforms We should not forget that many Albanian students had never been abroad, although their ability to speak foreign languages was often remarkably good What they needed was a breath of fresh air and to open their windows to Western societies Of course that is true for all former socialist states, but it is especially true for Albanians who have lived in 'splendid isolation' or should I call it 'tragic isolation', for such a long time

The largest number of students was hosted by Trento (ten each year), while the others (five each year) followed courses taught in English in the Leiden Law Courses The classes they took very often provide internationally oriented subjects such as international law, EC-law, human rights, etc

The students all had their far-reaching aspirations and expectations They all want to change Albania into a free, market-oriented, state, they wanted to get rid of the tragic isolation of so many years, they wanted to promote human rights After arriving in Holland, the Leiden law faculty tried to keep the Albanian students together There was not only a profound legal shock, the main shock is a cultural one We should not forget that the regime, up until a few years ago, had been very oppressive In a physical way (students from universities and colleges easily faced eight years in prison for just an unfortunate remark), and in a psychological way I quote from of a speech by Enver Hoxha from May 13, 1970

I am fully confident that the Party and youth organizations in the schools and universities will throw themselves more vigorously into this struggle to carry out all-round communist education of the school and student youth, especially for their ideological and political education, will become still more vigorous and militant and will further revolutionize their entire life and activity '

But in spite of the cultural shock the students had to cope with, it was remarkable to see that their results were usually good Two of the students we have had in Leiden last year have become assistant-professors at the Law Faculty in Tirana Two others have become judges in a district court We should not forget, though, that there are so few good lawyers in Albania, that a judicial career is easily made One other interesting example since my first visit to Tirana in September last year, two very young and bright colleagues from the Ministry of Justice have been appointed justices in the Albanian Court of Cassation One of them was a participant in the civil code drafting committee

So what we see here is that the effect of the students foreign training is a very direct, and hopefully a lasting one! And that makes the cooperation with Albania so exciting

### 15 *Will the people abide?*

And then the maybe most important factor one can only speculate in how far the people will actually abide by the new Code Vladimir Fedorov, of the EBRD, discusses this in the magazine *Law in Transition* that gave a brief outline of the new Russian legislation

The most serious problem that Russia will face after the Civil Code is enacted by the parliament, is how to make business operators and any other subjects of civil law relations respect and abide by the norms and principles it contains This may not be an easy task and it may take some time '

Is that already the case for Russia, it applies even more for Albania

### 16 *Main conclusions*

The main conclusion is that financing and assisting in legal reform is not just the drafting of a new code In fact it is much more than that it is providing technical assistance, training activities, the provision of goods like computers, fax-machines, e-mail, etc , providing textbooks for law libraries, and also things as the building of a court room Besides, legal reform is too important for lawyers only It is, e g , very much related to economic reforms The implementation is important Legal reform is not only passing laws, it is also implementing them And so, legal reform is a long term process

It was a curious experience, this Task Force Albania Ybo Buruma (my Leiden colleague of the Criminal Law team) and I often had strange conversations at the end of the day His stories were often a lot more spectacular than mine, because he, for example, had advised in a particular case to convert a death penalty into a life long sentence In contrast, I had concluded the day with the decision that cancellation of a judicial act would not be retro-active

In 1994 the *Kodm Civil te Repuklikes se Shqiperise* was signed into law <sup>36</sup>

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<sup>36</sup> It has been published in the issues 11-14 of the *Fletorja Zyrtare* It replaces the Communist Civil Code of 1981 (with a few exceptions) and is – in a way – the successor of the first Albanian Civil Code of 1928, that was based upon the French *Code Civil* of 1804 and the Italian *Codice Civile* of 1865 The new Civil Code is subdivided into five books General Part, Ownership and Property, Law of Inheritance, Obligations, Agreements An unofficial English translation is available at the Library of the Leiden Institute of East European Law and Russian Studies An English translation of the 1992

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*Law on foreign Investments* (made public by Decree Nr 280 of 11 August 1992) can be found in the *RCEEL*, 1993, pp 561-567 The Penal Code and the Code of Penal Procedure have been adopted in 1995-1996 A Code of Civil Procedure was adopted on March 31, 1996