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THE DARK SIDE OF LEGAL TECHNICAL ASSISTANCE: LESSONS FROM FIELDWORK IN KOSOVO

Cristina Poncibò*

Abstract

International organisations and/or the EU or individual states have frequently sponsored and funded projects of legal technical assistance in third countries, including post-conflict areas. They have done so with the intention of promoting and guiding legislative reforms, judicial training, and more generally reforms in the domain of legal systems. These projects would – at least in the intentions of their promoters – have substantially contributed to the social, economic, and political development of these countries in economic, social and political transition. This chapter, which also draws on the author’s fieldwork in Kosovo, emphasises that only the proper practice of comparative law can significantly contribute to limiting the serious shortcomings that characterises these internationally-funded projects.

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Keywords

Law And Development, Legal Technical Assistance, Civil Law, International Organisations, Comparative Law, South-Eastern Europe, Kosovo

1. Introduction

Legal technical assistance is a specific area of work within the more general international assistance projects funded by international organisations, the EU or individual states, with the intention of promoting and guiding legislative reforms, judicial training, administrative and land registry reforms. The chapter points out the shortcomings of such projects in light of the author's field experience in Kosovo.¹

In its first part, the chapter considers the legal traditions of Kosovo and the impact of legal technical assistance projects on those traditions. In the second part, it

¹ The author has been a legal expert in Kosovo within the Project: Support to Civil Code and Property Rights (Phase 1). The draft text of the Civil Code of the Republic of Kosovo (Phase II) (in Albanian and English) can be found at <http://civilcode-kosovo.org/documents/?lang=en> (accessed 17 October 2022). The project was obviously affected by the pandemic, which slowed down adoption of the text by local institutions.

discusses the limitations of such projects and possible ways to reconsider them in light of the practice of comparative law and the lessons learnt in the field. Specifically, the conclusion stresses that comparative lawyers play a fundamental role in the analysis of historical sources and legal traditions, debiasing experts and, above all, protecting local legal cultures against the dark side of legal colonialism.

2. Legal Traditions of Kosovo

The reconstruction of the legal traditions of Kosovo reveals a complex and very interesting historical stratification of those traditions.² The state of the law is strongly influenced by historical events.³ For this reason, it can legitimately be said that Kosovo today is a rich case-study for a comparative lawyer: that is to say, a legal system where it is nevertheless possible to find a surprisingly wide array of legal experiences. After all, the area has always been a geographical borderland between Serbia and Albania and a cultural borderland between Europe and the Ottoman Empire. This juxtaposition is symbolised by the battle of Kosovo Polje (in English: the 'Plain of Blackbirds') which, in June 1389, saw the epic and bloody clash between the Christian armies of Prince Lazar Hrebeljanovic and the Muslim armies of Sultan Murad I.⁴ For more than five centuries, the region was under the rule of the Ottoman Empire, when certain principles of the *Mejelle* (the civil code of 1876), as well as the Shari'a, were superimposed (mainly in urban areas) on the customs of the local populations.⁵

² For a fundamental study on the history and cultures of the Western Balkans, see Ivo Andrić's book, *The Bridge on the Drina*, translated by Dunja Badnjević, Arnoldo Mondadori Editore, 2016.

³ The region was under the rule of the Roman Empire and then the Byzantine Empire. In particular, the Byzantine feudal property right known as 'pronoia', which consisted of the granting of land to distinguished citizens to administer (εἰς πρόνοιαν) in return for services rendered to the state, found application in the region. This form of ownership existed in Kosovo until the Middle Ages. Some scholars believe that the Albanian term for feudal property "Pronësia" is derived from the Byzantine 'pronoia'.

⁴ The Battle of Kosovo marked the end of the independence of the Slavic kingdoms in the Balkans: the new king of Serbia, Stephen Lazarević, became tributary to the sultan.

⁵ The legacy of Ottoman law concerns, for instance, the law of real estate, specifically the institutes of pledge and pre-emption.

2.1 Legacy of Kanun

Ottoman institutions allowed local populations to practise their customs, especially in the countryside: the Albanian cultural community was, for example, able to continue applying the principles of the well-known text *Kanun*, or *Kanuni* (Canon, etym. gr. κανών), by Leke Dukagjini: the most important code of Albanian customary law. The origin of the Kanun is lost in time, although tradition dates it back to 1444, the year in which Lekë Dukagjini, an Albanian leader famous for his tenacious resistance to the Ottoman Empire, is said to have drafted the contents of the aforementioned code.

Until the early 20th century, the Kanun was handed down only in oral form and, for centuries, it was the main reference point for regulating all aspects of social life in the local communities of Albania. The currently available written text is the result of the philological reconstruction work carried out by a Franciscan friar from Kosovo, Shtjefën Kostantin Gjeçov, who, after Albania's independence from the Ottoman Empire in 1912, attempted to transcribe the provisions of the Kanun, organising them systematically. However, Father Gjeçov's version does not concern the Kanun in the broadest sense of the term, because the provisions of the code, passed down orally for centuries, varied from fiefdom to fiefdom, so that it is impossible to reconstruct these customs in their entirety.

That said, the Kanun is the ultimate expression of tribal reciprocity among members of the Fis, the Albanian counterpart of clans, who were bound together by blood ties. Thus, for example, in the Kanun, there is no distinction between public and private law, because certain fundamental concepts, such as trust ("Besa"), honour and blood ties, infuse all the provisions of the code.⁶

The aforementioned text regulated all aspects of the social order and everyday practices of the community. It dealt with institutions ranging from property

⁶ Besa is an Albanian cultural concept that is usually translated as "faith", which means "keeping a promise" and "word of honour".

(ownership of land by the clan) to the organisation of the family system (a system in which women played a subordinate role to men). It was a code that fully expressed the Albanian sentiment of independence from oppressing foreign peoples and reflected the proud harshness of the mountains and the character of the people inhabiting the region. In other words, the rules of the Kanun and the symbolic and social values that formed its foundation would ideally allow the integration of individual identity with the collective consciousness of a people resisting external pressures. The writer, Ismail Kadaré, describes this history in his outstanding books.⁷ Tito's communist regime, which attempted to impose coexistence between a centralised state and a social order based on tribal blood relations, made enormous efforts to contain the influence of the Kanun. However, although it achieved some results, it never managed to fully modernise the Albanian customary tradition. Indeed, after the local communist regime fell, the code continued – and to some extent continues – to implicitly influence the lives of Albanians, even in Kosovo.

2.2 The influence of Serbian Law

The territory of today's Kosovo was annexed to Serbia after the First Balkan War (1912-1913) and became part of Yugoslavia in 1918. Tito's victory in Yugoslavia marked the return of the Kosovan territory to Serbia, with the status of an autonomous region.

In truth, because Tito believed that he had to counter the risks of Serbian national primacy, he was not indifferent to demands for autonomy by the Kosovo Albanians. For example, in 1974, Tito granted Kosovo a constitution that recognised the province as a constituent part of the Yugoslav Federation, gave it the legitimacy of an autonomous local government. In particular, the Autonomous Socialist Province of Kosovo was recognised at the central level, while formally remaining a part of the Serbian Republic, became an integral part of the Federation (Art. 3).⁸ The 1974 Constitution, however, fuelled the discontent of the Serbian minority.

⁷ I. Kadaré, *Broken April*, New Amsterdam Books 1998.

⁸ The Kosovo Assembly elected its own member to the Yugoslav Presidential Council (Art. 321), which had to make decisions unanimously (Art. 330: Kosovo had in practice the right of veto at the federal level). Without

With particular reference to civil law, a civil code (namely, the *Srpski Gradjanski Zakonik*) had been in force in Serbia since 1844. It originated from elaboration of the Austrian General Civil Code (i.e. *Allgemeines bürgerliches Gesetzbuch*) of 1811, with some references to the French Code Civil of 1804, Serbian customary law and the aforementioned *Mejelle*. Therefore, the Serbian Civil Code was also officially applied in Kosovo for some time.

2.3 The Code of Zog

The union of the region with Albania in 1941 led to the adoption of the Albanian Civil Code of 1928 (the Zog Code, named after the King of Albania from 1928 to 1939). The Zog Code marked an important step in the history of Albanian and Kosovo law because, having been drafted by jurists with a western background, it was significantly influenced by the French Civil Code (1804), the Italian Civil Code of 1865, the Bürgerliches Gesetzbuch (BGB) (1900), the Swiss Civil Code (1912) and, finally, by the French-Italian project on the regulation of obligations (1927).⁹ It is interesting to note that Italian law made its entrance into the Kosovo region through the Zog Code.¹⁰ Subsequently, at the end of the Second World War, the Kosovan territory again became part of the former Yugoslavia: specifically, it became an autonomous region of Serbia. The Zog Code was no longer applied in the area because it was an expression of values that did not fit with the socialist vision of Yugoslavian societies.

the consent of the Kosovo Assembly, borders could not be changed (Art. 5). Federal acts would henceforth be published in both Serbo-Croatian and Albanian (Art. 269).

⁹ G. Chiodi, *Innovating without Destroying: The Italian-French Project for a Code of Obligations and Contracts*, in G. Alpa, & G. Chiodi (eds.), *Il progetto italo francese delle obbligazioni (1927). Un modello di armonizzazione nell'epoca della ricodificazione*, Giuffrè Editore, 2017, pp. 223-326.

¹⁰ G. Ajani, *Codification of civil law in Albania*, in G. Ginsburgs, D.D. Barry, W.B. Simons (eds.) *The Revival of Private Law in Central and Eastern Europe*, Martinus Nijhoff Publishers, 1996, p. 518 ff.

3. The Disintegration of The Socialist Federal Republic of Yugoslavia

The period of the Republic of Yugoslavia (1945-1981) was marked by the proliferation of socialist-inspired legislation aimed at filling the gaps created by the formal abrogation of the rules, including ones in civil law, enacted before the revolution (the aforementioned Zog Code). The law of the Socialist Federal Republic of Yugoslavia was characterised by the predominance of politics over the rule of law, the influence of public law in the private sphere of citizens, the superiority of the interests of the community with respect to the rights of the individual. During this period, private property was the subject of a socialist collectivisation process aimed at the creation of state and social property and a planned economy by the Yugoslav federal state. It is also true that Tito pursued an original interpretation of the socialist model which recognised local autonomy and the collective and autonomous management of state enterprises, to provide just two examples.¹¹

In such an institutional and political context, the system of civil law was based on four fundamental laws relating to obligations, property, succession, and the family.¹² After the end of the political unity of the former Yugoslavia, it was natural that some of the fundamental laws relating to civil law would continue to apply in states after a process of nationalisation (consider the experiences of certain countries, such as Slovenia, Croatia, Serbia, Bosnia-Herzegovina and Montenegro). In fact, Kosovo maintained the system of fundamental laws as the backbone of its civil law system and updated some of the fundamental norms in light of the experience of some Balkan countries and, in particular, Slovenia.

¹¹ A. Benacchio, *The New Yugoslavian Law on Obligations and Contracts*, in *Riv. Dir. Civ.*, 1983, I, 1, pp. 77-95.

¹² A. Benacchio, *Il diritto italiano nella Ex Jugoslavia (con particolare riferimento a Croazia, Montenegro, Serbia, Slovenia)*, in AA.VV., *Annuario di diritto comparato e studi legislativi*, ESI, 2014, pp. 507-537.

To be mentioned in this regard are the Basic Law on Obligations (2012)¹³ and the Basic Law on Property and Other Real Rights (Law No. 03/L-154).¹⁴ These were supplemented by the Basic Law on Succession (Act No. 2004/26) and the Basic Law on Family Matters (Act No. 2004/32).¹⁵ Specifically, the Basic Law on Obligations adopted the Slovenian model (itself close to the traditional Yugoslav model, with some modifications and additions dictated by political change), while the Basic Law on Private Property was influenced by German law.¹⁶

The aforementioned legal text comprised a general part regulating the general principles common to all obligations (Articles 1-437) and a special part concerning certain types of contracts (Articles 438-1056). The general part regulated obligations arising not only from contracts, but also from other sources of the law of obligations, such as civil liability, unjust enrichment and unilateral legal acts. Moreover, the 2012 Law of Obligations definitively abandoned the concepts of socialist private law and embraced some of the concepts distinctive of liberal contract law – that is, ones proper to western contract laws, such as party autonomy and the prohibition of abuse of rights.

4. International Organisations as Law-Makers in Kosovo

It is well known that the conflicts between the Albanian and Serbian ethnic groups in the area and the development of Serbian nationalism grew during the 1980s. At the

¹³ Basic Law on Obligations ('*Obligacijski zakonik*'), in Official Gazette of the Republic of Slovenia, RS 83/2001. Laws are not indicated by number and date as in Italy, but by abbreviations of their names, indicating only the G.U. of publication.

¹⁴ The property law was passed in 2009 during the UNIMIK period. This legislation is heavily influenced by German property law (being the result of German technical assistance), except for the provisions on pledge and mortgage, which appear to have been influenced by common law principles. The institution of *leasehold* also appears, confirming the presence of such influence.

¹⁵ The weight of local customary law is most evident in family law. For instance, Articles 271-277 provide for the personal and economic responsibility of family members towards each other. These rules reflect the traditionally communal character of the Kosovar family.

¹⁶ An initial attempt to prepare a new text was the subject of an international technical assistance project (GIZ, when the region was still under the control of UNIMIK) that ended in 2004. The draft was not approved on the grounds that it was too abstract and complex because it was subject to the influence of German law and, thus, difficult to understand by local jurists.

end of 1987, with the seizure of power in Serbia by General Milošević, tensions increased further. The Constitution adopted by Serbia in 1989 drastically curtailed Kosovo's autonomy and began a strong campaign of Serbian influence on Kosovo's institutions.¹⁷ In response, a parallel Albanian state was formed in 1991. It was headed by Rugova, president of the Democratic League of Kosovo (LDK), and after a referendum, the Republic of Kosovo was proclaimed, although it was recognised only by Tirana.

In 1995, while the international community seemed to ignore the risks associated with the difficult coexistence of the various ethnic groups in the area, the Kosovan forces disunited and, in open defiance of Rugova's non-violent resistance, a fighting movement was born, from which the Kosovo Liberation Army (UÇK) was formed. By the end of 1997, some rural areas of Kosovo were under the control of the UÇK separatists, and Serbian General Milošević authorised a ferocious repressive campaign, with massacres and deportations carried out by Serbian militias and paramilitary troops. Then, in 1999, the failure of the Rambouillet peace accords and the dramatic air attack on Serbia by NATO forces (March 1999) led the UN Security Council to adopt Resolution No. 1244 on Kosovo.

This resolution provided for the deployment of two military forces, KFOR and UNMIK¹⁸, under the leadership of the United Nations, and it established an interim international administration of Kosovo. This measure, although it called for autonomy in the area, reaffirmed the sovereignty of Serbia. In fact, the subsequent negotiations under the auspices of the United Nations to define the status of Kosovo

¹⁷ In order to debase the reborn Kosovan sense of belonging and to enshrine the idea of Greater Serbia, Slobodan Milosevic, with the Constitution of the Serbian Republic adopted on 28 September 1990, renamed the Socialist Autonomous Province of Kosovo as the Autonomous Province of Kosovo-Metohijan, limiting its autonomy (Art. 3), elevating Serbo-Croatian to the sole official language (Art. 8), and declaring the Serbian territory "one and indivisible" (Art. 4), which could only be changed by a referendum organised at the national and not local level. All main powers were transferred to Belgrade.

¹⁸ Since the end of the 1990s, a multinational mission under the aegis of NATO has been active in Kosovo. It is known as the Kosovo Force (KFOR), and its priority objectives are to maintain the security and stability of the small but complex Balkan country. The acronym UNMIK stands for the United Nations Mission in Kosovo.

immediately appeared to be very complex because the ethnic Albanians' demand for independence was not accepted by the Serbs, who were only prepared to grant an autonomous status. Peacekeeping and security tasks were allocated to the aforementioned KFOR mission. The civilian component of the international intervention was entrusted to one of the most ambitious and demanding missions in the history of the United Nations (the aforementioned UNMIK), which was conceived as a mission to manage the entire administrative sphere of Kosovo.¹⁹

It is important to note that, within the framework of the provisions of Resolution 1244, UNMIK set up an *interim* administration that was neutral with regard to the international legal status of Kosovo: on the one hand, it was conceived as a transitional solution in view of the handover of competencies to local interim institutions; on the other hand, the UN undertook to facilitate negotiations between Serbia and Kosovo.²⁰

However, over the years, UNMIK ended up by being neither transitory nor neutral. Several factors contributed to making the international presence indispensable and prolonged over time: the almost total absence of local institutions able to administer the territory autonomously; the withdrawal of Serbian personnel and officials; the persistence of strong ethnic tensions; and uncertainty over the future *status* of the area. For the same reasons, the more the international presence tended to become permanent and managed the administration of Kosovo, the more it created autonomous government structures from Serbia, ones very close to *de facto* independence.

¹⁹ United Nations Security Council, Resolution No. 1244. The mission has four pillars, each of which falls under the authority of the Special Representative of the UN Secretary-General: the first pillar, managed by the United Nations High Commissioner for Refugees, concerns humanitarian affairs (Human Affairs) and justice (Law Enforcement and Justice); the second pillar, managed by the United Nations, concerns civil administration; the third pillar, led by the Organisation for Security and Cooperation in Europe (OSCE), is responsible for democratisation and institution-building (Democratization and Institution Building); the fourth pillar (EU) concerns economic reconstruction.

²⁰ R. Blerim, *UNMIK as an International Governance with Post-War Kosova; Nato's Intervention; UN Administration and Kosovar Aspirations*, Shkup, 2003.

For our purposes, it is particularly interesting to note that UNMIK assumed (from June 1999 onwards), a (questionable) legislative competence in many areas of local laws.²¹ According to the official reconstruction, Kosovo turned to the international community for technical assistance to promote a legal framework, also by means of legal transplantation, that would favour transition to the construction of an independent state in a market economy framework.²² The rules (referred to as *regulations*) of UNMIK were such that they covered, for example, the sale of goods, pledging, and commercial law.²³ In other words, these international subjects actually performed a (emergency) legislative function with effects on civil law until 2008.²⁴ That was a crucial year. As said, Kosovo declared independence. In this stalemate, the Kosovo Parliament unilaterally declared the country's independence on 17 February 2008; and in June of the same year, the Constitution, inspired by the proposal of the mediator, M. Ahtisaari, came into force.²⁵ Secondly, the United Nations granted authority and control over the territory to the European Union (EU). Thirdly, Kosovo

²¹ UN Security Council Resolution No. 1244, UNMIK Regulation No. 1999/01, according to which all legislative, executive and judicial powers would be vested in UNMIK and exercised by the Special Representative of the UN Secretary-General.

²² D. Berkowitz, K. Pistor, J.F. Richard, *Economic development, legality, and the transplant effect*, in *European Economic Review*, 2003, 47, pp. 165-195.

²³ Regulations are accessible

at <https://unmik.unmissions.org/sites/default/files/regulations/02english/Econtents.htm>

(consulted 17 October 2022).

²⁴ The reference is to the UNMIK regulations on civil law. For obvious reasons of space, this article does not cover the countless Regulations on public and administrative law. The Regulations concern, in particular, the period from 1999 to 2008.

²⁵ Despite the fact that Kosovo has been recognised by around 74 states in the world, including 86% of NATO members and 81% of EU members, the opposition of some major powers (Russia, China, India, Brazil) and the hesitancy of some European states (Spain, Cyprus, Greece, Slovakia and Romania) persist. The region's tribulations seem never-ending.

signed an agreement with the EU to establish the European Union Rule of Law Mission in Kosovo (EULEX).²⁶

In this context, the international community assured the region a kind of 'supervised' independence, i.e. one expressly guided by the international institutions present in the country. On the other hand, the unilateral nature of the declaration of independence exacerbated ethnic tensions, so that a greater effort by the international administration was required to prevent conflict. However, after independence, UNMIK and EULEX²⁷ continued to play a leading role in providing legal assistance to the young parliament in the performance of its legislative functions.²⁸ The two organisations were sometimes joined in their mission by individual states (Germany, Norway) through bilateral technical assistance projects focused on substantive and procedural aspects of the law.

As a consequence of the above, the regulations adopted under the auspices of the international community were imposed on the above-mentioned legal traditions that were historically present in the area (namely, customary law (e.g. Kanun), Serbian and Albanian influences, Yugoslavian socialist and post-socialist laws). The result was a lacunose, fragmentary and conflicting regulatory landscape. In this regard, suffice it to mention, by way of example, the introduction of a regulation about the legal concept of the *leasehold* (specifically: a form of land tenure or property tenure where a party buys the right to occupy land or a building for a given length of time) by a legal

²⁶ A. L. Capussela, "Kosovo: EULEX disaster", published on 28 November 2012 in the online journal *Balkans and Caucasus Observatory* at <http://www.balcanicaucaso.org/aree/Kosovo/Kosovo-disastro-EULEX-126993> (accessed 17 October 2022).

²⁷ In February 2008, the EU decided to launch the EULEX mission, which aimed to assist Kosovo's institutions in achieving and consolidating European and international standards of law enforcement. To this end, the mission performed leadership, monitoring, advisory and, where necessary, executive functions in the three key areas of police, customs, and justice.

²⁸ According to the 2008 Constitution, Kosovo's Parliament is unicameral and consists of 120 members, of whom 100 are directly elected and 20 are distributed among the country's ethnic minorities (10 for Serbs and 10 for other minorities). Still today, Belgrade refuses to recognise the independence of what it considers an autonomous region of Serbia.

technical assistance project sponsored by the US government. Precisely, a leasehold estate is an ownership of a temporary right to hold land or property in which a lessee or a tenant holds rights of real property by some form of title from a lessor or landlord. Although a tenant does hold rights to real property, a leasehold estate is typically considered personal property. As a result, the said regulation was disapplied by local jurists, because leasehold is alien (or rather, unknown) to local legal traditions and also devoid of usefulness in the economic context of Kosovo.²⁹

5. The failure of legal technical assistance projects

The introduction of this and other ‘alien’ legal concepts into the local legal environment was primarily the result of international projects of ‘legal technical assistance’. This is a practice that may concern various legal issues (e.g. constitutional reforms, criminal law and private law reforms) and that, in concrete terms, results in the planning and delivery of diverse assistance activities, such as the drafting of new laws and regulations, judicial training programmes. The field has been subject to extensive research and criticism, especially in *law & development* scholarship.³⁰ The movement has for decades been the subject of doctrinal disputes that have made this interdisciplinary field of study somewhat elusive in its principles and methods.

²⁹Other relevant regulations are: The Leasing Contract Act (Law No. 03/L-103), which is governed according to common law principles; the Slovenian Land Ownership Act (Law No. 02/L-26); the Information Society Act, which regulates e.g. electronic commerce (Law No. 04/L-094).

³⁰ Y. S. Lee, *Law and Development, Theory and Practice*, Routledge, 2020. ID., *Call for a New Analytical Model for Law and Development*, *Law and Dev. Rev.*, 2015, 8, p. 1. W. Vandenhole, *Towards a Fourth Moment in Law and Development?* *Law and Development Review* 2019, 12, 2, pp. 265-283. M. J. Trebilcock, M. Mota Prado, *Advanced Introduction to Law and Development*, Edward Elgar, 2014. D. M. Trubek, *Law and Development 50 Years On*, Univ. of Wisconsin Legal Studies Research Paper No. 1212/2012. K. Davis & M. Trebilcock, *The Relationship between Law and Development: Optimists vs. Skeptics*, *Amer. J. Comp. L.*, 2008, 56, p. 895 ss. G. Ajani, *Poverty and Development*, in AAVV, *Human Rights. Cultura dei diritti e dignità della persona nell'epoca della globalizzazione*, Altante I, Soggetti e i Temi, Utet, 2007, pp. 77-112. D. Trubek, A. Santos (eds), *The New Law and Economic Development, A Critical Appraisal*, 2006. D. Trubek, M. Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, *Wisconsin Law Review*, 1974, pp. 1062-1101. J. H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, *Amer. J. Comp. L.*, 1977, 25, pp. 457-491.

Some authors (Trubek and Santos) have produced a useful reconstruction of the evolution of this doctrine,³¹ which initially held that law should be conceived as an instrument of state intervention in the economy. Subsequently, law came to be seen primarily as an instrument of the market. In both perspectives, law was understood as a social engineering mechanism at the service now of the state, now of the market. Finally, law was conceived by the doctrine as regulatory and/or complementary to the market and aimed at protecting and promoting the social element. Clearly, the latter perspective tends to focus on respect for the local context and diversity. Thus, this doctrinal reconstruction evidences an evolution from the instrumental conception of law with respect to the state and the market to the affirmation of the role of law as a regulator attentive to the social dimension.

More recent scholarship has noted that this description of the doctrine of *law & development* always ends up by placing the paradigm of economic development at the centre of its interest, whilst it side-lines certain fundamental reflections related to rights and social needs. Such critical (sometimes even self-destructive) thinking offers a rationalisation of this strand of interdisciplinary studies in terms of content and methodology and provides – perhaps – a glimpse of some new perspectives.³²

The new period (now underway) would consist of a phase in which the doctrine under consideration could focus its attention – despite the diversity of conceptions and approaches (ending in pluralism) – on the objectives of social change and social justice; and in which it could do so without letting the question of economic development end up, as in the past, by absorbing most of the conceptual effort of the authors belonging to this school.

Undoubtedly, we are witnessing some signs of a renewed interest in the field of law and development, which has resulted in the creation of a new international network

³¹ D.M. Trubek and A. Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in D.M. Trubek and A. Santos (eds.), *The New Law and Economic Development A Critical Appraisal*, Cambridge University Press, 2006, p. 2.

³² W. Vandenhoele, 2019, pp. 265-283. K. De Feyter, G. E. Türkelli, S. de Moerloose (eds), *Encyclopedia of Law and Development*, Edward Elgar, 2021, Ch. 1 and Ch 12.

of scholars belonging to different disciplinary fields.³³ Therefore, it must be emphasised that some interesting matters for reflection are emerging, and that they concern both the scope of the doctrine itself – with a renewed vitality that reduces the weight of the paradigm of economic development as the sole and primary objective – and the object of study, which is more attentive to the pluralism of perspectives (e.g. sustainability, gender studies, to name but a few). These scholars often conduct a critical reading of the fundamental issues of inequality and poverty that will certainly occupy the doctrine in the years that will follow the current pandemic. Equally promising appears to be the effort to achieve methodological clarity with respect to a doctrine that requires a multidisciplinary, interdisciplinary, empirical approach closely bound up with political, social, and cultural analysis.

To return to the specific domain of international and European projects of legal technical assistance, many authors belonging to the above-mentioned law & development school of thought believe that these kinds of projects are ideologically-driven and therefore consist of attempts by the Western countries and economies to advance some sort of legal colonisation with respect to legal systems and economies in transition.³⁴ There is a long distance between the everyday practice of international organisations and the theories falling under the umbrella of the law & development school. This causes total distrust of those organisations' capacity in this field and of their experts' ideologies and biases.³⁵ Moreover, the large majority of international legal technical assistance projects still resemble social experiments: it remains very difficult to understand their practical and stable results.³⁶

The reasons for this situation are manifold and difficult to analyse in depth. Management difficulties may be a first cause. International organisations manage such

³³ See the proposals of the *Law and Development Research Network* at <https://lawdev.org> (accessed 17 October 2022).

³⁴ L. Martino Levi, *Law and Development, Mission and Instruments of International Economic Organisations*, Aracne, 2011.

³⁵ R. Z. Sannerholm, 'Cut-and-paste'? Rule of law promotion and legal transplants in war to peace transitions, in A. Bakardijeva Engelbrekt, J. Nergelius (eds.), *New Directions in Comparative Law*, Edward Elgar, 2010, pp. 56-77.

³⁶ R. Peerenboom, *Toward a Methodology for Successful Legal Transplants*, *The Chinese Journal of Comparative Law*, (2013) Vol. 1 No. 1 pp. 4-20, p. 12.

projects, and they often do so without the input of local lawyers (judges, for example). Often, certain projects are the result of contingent political necessity, as in the case considered here. Moreover, the evaluation of project results is often difficult: in such areas, the analysis stops at the reports and similar documents attesting to the project's goals and main results. Consequently, the effects of such initiatives are either difficult to measure or they are modest – and temporary – because the projects are not able to profoundly affect the country's institutions and legal culture.

As a result, it is possible to detect a case of total detachment between the highly critical academics in law & development and the organisations, including the EU, and states involved in legal technical assistance projects. Clearly, one option consists in leaving the practice of legal reforms in the hands of international organisations and their experts. Admittedly, there are sound ethical reasons and political and personal convictions that may justify scholars' reluctance and criticism in this context. However, the result of this attitude of reasonable reluctance is to watch from afar and criticise the project that states and international organisations are developing in the field.

5.1 Kosovo as a Case of Legal Colonialism

The above-described experience of Kosovo has similarities with other cases from the post-socialist area: with the collapse of socialism, a mechanism of (re)westernisation of the legal system emerged so that it could re-join the international community. The point is that, in the case of Kosovo, many (perhaps too many) answered the call. And it is true that some economic powers, including the EU, felt that exporting their law was necessary to gain attention and political visibility.³⁷

³⁷ M. Bussani, L. Heckendorn Urscheler (eds), *Comparisons in Legal Development. The Impact of Foreign and International Law on National Legal Systems*, Schulthess, 2016. R. Michaels, *One Size Can Fit All - Some Heretical Thoughts on the Mass Production of Legal Transplants* in G. Frankenberg (ed), *Order from Transfer: Comparative Constitutional Design and Legal Culture Law*, Edward Elgar, 2013. S. Newton, *Law and development, law and economics and the fate of legal technical assistance*, in J. Arnscheid, B. Van Rooij, J.M. Otto, *Lawmaking for Development. Explorations into the Theory and Practice of International Legislative Projects (Series on Law, Governance, and Development)*, Leiden University Press, 2008, pp. 23-50. The authors note: "Legal technical assistance ('Legal TA') over the past ten years or so has become an integral part of economic development and transition programmes" (p. 23).

In our case, the absence of a coherent strategy among the different projects in Kosovo emerged also due to the lack of functioning coordination structures at the Ministry of Justice. This was in contrast to other Balkan countries where legal reform projects had been more successful and had visibly affected the EU accession process. And it is quite obvious (except to the initiators of such initiatives) that a legal system has its own internal coherence, or at least it should have. Therefore, reform projects should be coordinated among the promoters in such a way that the aim of promoting and safeguarding the coherence of a country's law is respected. In the case considered here, however, this intention was disregarded because of the different political agendas of the states that financed the projects.

The present case is, in our view, emblematic: in the aftermath of the armed conflict, a number of international actors (the United Nations, the EU, the United States, individual states) undertook to financially and technically support a multiplicity of legal reform projects. In particular, the manifold programmes financed by international bodies, as well as by individual states, had the aim of promoting the reform of substantive civil and criminal law, as well as civil and criminal procedural law.³⁸

However, because these projects were previously coordinated, they produced a fragmentary and sometimes contradictory regulatory framework. Moreover, some projects did not take due account of the local reality: some norms resulting from such initiatives proved to be unreasonable when related to the economy of a country in transition (consider the aforementioned case of the introduction of the *leasehold* institution that Kosovar jurists ignore).

Some norms are, in fact, alien to the experience of Kosovan jurists and contribute to the complexity and fragmentation of, among other things, the Kosovan law system. Consequently, for instance, the country's property law is a chaotic set of norms referring to socialist law, as well as some more recent transplants of norms from

³⁸ J. Arnscheidt, B. Van Rooij, J.M. Otto, *Law-making for Development, Explorations into the Theory and Practice of International Legislative Projects*, Leiden University Press, 2008.

German property law, with some references to Slovenian and/or Croatian law. The reason for this lies, as mentioned, in the total lack of coordination among the reform programmes promoted by international bodies, as well as by individual states in bilateral projects. The result is discouraging, because these programmes should have contributed to simplifying and modernising Kosovo's civil law system.³⁹ For the sake of intellectual honesty, it must also be said that the approach criticised here was also due to the urgent need to rebuild the institutional and regulatory fabric of a country immediately after an armed conflict.

In truth, the same considerations could also apply in the case of Bosnia and Herzegovina. In essence, this article emphasises that international projects have developed a kind of 'legal colonialism'⁴⁰, which, without taking the consequences into account, has introduced *civil law*, *common law*, US Law, Nordic legal traditions, into the Kosovan legal system, creating, without any coordination, a situation of unsustainable regulatory fragmentation and confusion.⁴¹ Consequently, the Kosovan legal system is a mixed but artificial legal system resulting from a series of fragmented, overlapping and uncoordinated transplants of common law and civil law, Nordic law, US Law, legal concepts, institutions and procedures.⁴²

³⁹ The main entities are the Federation of Bosnia and Herzegovina, Republika Srpska and the Brcko district. See also P. Cserne, *Drafting Civil Codes in Central and Eastern Europe: A Case Study on the Role of Legal Scholarship in Law-Making Pro Publico Bono*, 2011, pp. 9-10, at <https://www.semanticscholar.org/paper/Drafting-Civil-Codes-in-Central-and-Eastern-Europe%3A-Cserne/502e2033118ebcaa672c2cde67ffb785f149d287> (22 November 2022).

⁴⁰ L. Salaymeh, R. Michaels, *Decolonial Comparative Law: A Conceptual Beginning*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2022, 86, pp. 166–188, where the authors claim that “Rather than organizing comparative law around the objective of unifying or “modernizing” law, we advocate using comparative law to decolonize legal thinking and to create conditions for legal pluriversality. A decolonial analysis reveals the coloniality within conventional comparative law and thereby helps move beyond it.”

⁴¹ V. Marmullakajal, *Legal Transplants and Their Impact on Kosovo's Legal System, Sociology and Anthropology*, 2017, 5, 4, pp. 373-377.

⁴² V. Marmullakajal, *cit.*, p. 375. He notes: “The US, for example, has had significant influence in drafting the Criminal Code and Criminal Procedure Code whereby it can be easily stated that these two codes resemble very much Anglo-Saxon (adversarial) system. Many concepts that have been introduced in the codes are new for legal practitioners in Kosovo”.

6. The Dark Sides of Legal Technical Assistance: The role of comparative lawyers

6.1 Debiasing the expert

Generally, when international organisations, and the EU itself, conduct technical assistance projects, they make use not only of their own officials, but also of ‘experts’ (officials of international organisations, jurists specialised in technical assistance projects, university lecturers). The doctrine regards these experts with suspicion: “Sometimes, the influence of foreign law is conveyed by the work of a person who wears (apparently) modest clothes: that of the consultant, or expert”.⁴³

In regard to the experience considered here, the legislative activity of international organisations has been criticised for the poor quality of legislative texts and the fragmentation of the legal sources: the aforementioned reforms were conceived by the international officer with the collaboration of experts (or consultants). Hence, a main question concerns the biases of, and the role played by, international experts. Indeed, the experience of Kosovo seems to confirm the bias of the experts, namely a certain preference for the solutions of the legal system of cultural reference (this observation also applies, for example, to the case of Bosnia-Herzegovina).⁴⁴

Hence, experts may not be able to point out the flaws and merits of foreign legal systems, also considering aspects of their application. On the contrary, they tend to show, consciously or unconsciously, an inclination towards certain solutions linked to their own cultural, ideological or national affiliation. This preference may be dictated by a better knowledge of the legal system of their own country, or it may also be ideologically or politically motivated by the affirmation of the domestic model. Apparent in reform projects, is a preference for certain solutions according to on the nationality of the experts, or the choice of compromise solutions. The legislative reform projects favoured the transplantation of *common law* and *civil law* concepts (and thus a kind of artificial creation of a mixed legal system based on the two systems)

⁴³ M. Graziadei, *L'influenza del diritto privato italiano in Europa*, in AA.VV., *Annuario di diritto comparato e di studi legislativi*, ESI, 2014, p. 310. The author reports on the legal technical assistance project to develop Albania's civil code that came into force in 1994.

⁴⁴ C. Picker, *An introduction to comparative legal cultural analysis of International Organizations*, in *Comparative Law and International Organizations. Cooperation, Competition and Connections*, Schulthess, Zurich, 2014, pp. 11-40.

into the legal system of Kosovo, thereby favouring the establishment of a mixed legal system.

In our opinion, the practice of comparative law should act as an antidote to the cognitive limitations of experts.⁴⁵ Those who practise comparative law have (or should have) an awareness of the limitations of the legal system to which they belong (and usually the one in which they have been trained), so that they are less subject to the cognitive limitations mentioned above. Thus, a jurist who has been trained in comparative law and is aware of his/her bias towards his/her own legal system is able – or should be – to examine possible solutions in a more rational and fruitful manner.

Moreover, a comparatist has – or should have – an exceptional ability to understand, also from a historical perspective, the stratification of local legal traditions, and will thus be able to contribute to the reconstruction of the system subject to the transposition of a new model. Such a scholar should also have a greater interest in dialogue with local jurists. It is thus the comparatist who should oppose the adoption of models that are incompatible with, and *foreign* to, the country's legal tradition.⁴⁶ Unfortunately, a significant number of experts working in international projects have not received specific training in the theory and practice of comparative law.⁴⁷

6.2 Understanding legal formants

In regard to the project described here, the focus on legislative formants has absorbed all the attention of the experts and institutions involved. This is a shortcoming that anyone who deals with comparative law will immediately note.⁴⁸ In fact, the success of a civil law codification project depends on the acceptance of the model proposed by the local courts and academics. These subjects – judges, notaries, lawyers,

⁴⁵ D. Kennedy, *The Methods and Politics of Comparative Law*, in M. Bussani and U. Mattei (eds.), *The Common Core of European Private Law: Essays on the Project*, Kluwer Law International, 2003, pp. 131-207.

⁴⁶ To cite just one example, the working group strongly supported the principle of gender equality in civil law.

⁴⁷ S. Cassese, *Beyond Legal Comparison*, in M. Bussani, L. Heckendorn Urscheler (eds.), *Comparisons in Legal Development. The Impact of Foreign and International Law on National Legal Systems*, Schulthess, 2016, p. 227.

⁴⁸ J. H. Merryman, *The Loneliness of the Comparative Lawyer*, Kluwer, 1999, pp. 31-32.

university lecturers/scholars – play a fundamental role in the understanding, sharing and, finally, application of the new rules in practice.

Hence, evident to the scholar of comparative law is the importance of certain good practices that too often do not receive the requisite attention in international programmes. These good practices concern, for instance, giving access to the preparatory work on the text, providing an explanatory commentary on the text of the code, and adopting/devising measures to implement the code. However, the need for a rapid and politically visible result, as well as the management shortcomings mentioned above, induce the international organisations supporting the projects to ignore such good practices.

On this basis, it is possible to envisage the disapplication by local jurists of rules imposed by international organisations or individual states in the international community. The local legal system consists of rules that local jurists often disapply because they are too complex and far removed from the experience of individuals such as students, lawyers, judges or academics. This calls for more attention to be paid to the 'reaction' of jurisprudence and doctrine, as well as a greater effort to ensure that the new text of the civil code is taught both professionally and in universities.

The above-described case of Kosovo also underscores the importance of legal transplantation as an ongoing process. On some occasions, technical assistance projects in the legal field must respond to international and local political pressure to adopt texts quickly.⁴⁹

By contrast, according to the case considered here, local legal culture should drive reform (not the other way around).⁵⁰ It thus emerges that it is necessary to shift attention to the capacity – and willingness – of local jurists (judges, lawyers, scholars) with respect to reception of the proposed model. By 'capacity' is meant the possibility for local jurists to know and apply the model in question. The idea expressed here

⁴⁹ P. Legrand, *The impossibility of legal transplants*, in *Maastricht Journal of European & Comparative Law*, 2007, 4, pp. 111-124.

⁵⁰ E. Örüçü, *The Enigma of Comparative Law. Variations on a Theme for the Twenty-first Century*, Martinus Nijhoff Publishers, 2004, pp. 93-105. In particular, see the chapter entitled “Comparative Law and Law Reform by Transposition”.

can be made clearer by referring to a concrete example: in the year 2004, the Kosovar authorities had already promoted a first project of private law reform. The text resulting from that project eventually proved to be too close to the approach of the above mentioned BGB. Actually, this is not surprising given the leading role of German bilateral cooperation in the operation. This draft code was not, however, accepted and approved by the local institutions: it appeared to be too hostile to, and remote from, the experience of local jurists and, therefore, difficult for them to understand and apply.⁵¹ There was consequently a shared conservative determination not to replace the four fundamental laws of Kosovan law with an unfamiliar and highly sophisticated text in the light of German jurisprudence and doctrine.

It should also be once again emphasised that Kosovo's public and civil law systems have historically been founded on a set of fundamental laws of private law. This is the choice pursued in Slovenia, and, on closer inspection, there are few examples of codification in the region. This demonstrates, in the writer's opinion, the endurance and quality of the Yugoslav model of fundamental laws, a system that has not, as said, undergone a codification process. Still today, the judges of the countries of the former Yugoslavia, especially the Kosovo judges, find themselves applying more recent legal texts in the same way as the jurisprudence of the Yugoslav courts or the national courts of the states of the former Yugoslavia. In this way, a process of fruitful interaction has been created among the courts of the region, even though they now belong to independent states. In the present case, it is therefore questionable whether codification is desirable. First of all, the codification or restatement projects of local legal sources are so complex that they would require years of study and preparation, preferably by local jurists, possibly with the technical support of international and EU ones.

It is doubtful whether an international project, lasting four years, could achieve such a goal: the risk is that of ending up with a text lacking the necessary and desired qualities. Needless to say, the success of national codifications has historically been

⁵¹ This was a draft civil code from 2004, which was based on the BGB. The text appeared excessively complex and far removed from the mentality of local jurists and was never approved. Curiously enough, the local jurists were quite favourable to this text because they were often trained in Germany and were therefore familiar with German civil law.

linked to long and fruitful preparation, and facilitated by the existence of a well-established legal doctrine.

6.3 Localising legal transplants

Finally, the constant involvement of local lawyers in the preparatory work on the text should be a prerequisite for any reform project.⁵² However, in the case of Kosovo, international reform processes could only partly rely on local experience.⁵³

Indeed, the comparison with local jurists allows one to grasp their reaction of agreement, surprise or irritation with respect to the solutions proposed in the course of the preparatory work. Suffice it to recall that, in the case of the Albanian civil code, the choice of the Italian model had been guided not only by considerations of historical continuity, linked to the Albanian legislator's traditional reliance on the Italian model, but also by the characteristics of the Italian civil code – that is, by its mixed nature, comprising both French and German influences, which made it, at that historical moment, a synthesis of the European law to which Albania intended to move closer. One does not discern here an equal collaboration between local jurists and international experts: it is the local jurists who must guide the reform process and show a willingness with respect to the process of transposition of the model and training with respect to its concrete application. In short, it must be the local legal system and culture – with the support of foreign scholars – that evolves by itself thanks to external stimulus and pressure. To put it differently, evolution is something that emanates from within in order to be real and lasting.⁵⁴

The term local jurists denotes judges, lawyers and academics, so as to have theoretical, historical but also application-related perspectives. Indeed, such a suggestion would be a Copernican revolution in the field of international law reform projects: in most of such projects, it is the experts who direct the process, with the advice of local

⁵² E. Öricü, before, p. 102.

⁵³ V. Marmullakajal, before, p. 375.

⁵⁴ E. Öricü, before, p. 97

jurists. In the case of Kosovo, local jurists were called upon to play a merely advisory role, and the judges surprisingly played an wholly minor role compared to the academics. This is because the European Commission, as the initiator of the project, excluded in principle the possibility of involving local judges as consultants for reasons related to the risk of a conflict of interest.⁵⁵

7. Conclusion

The chapter has examined the case of a legal technical assistance project in Kosovo. Our conclusion is that a response to the dark side of legal technical assistance may come from the background of comparative law scholars who are used to consider the historical roots and the formants of the law, explicit and implicit in their becoming and influencing each other. Only a proper practice of comparative law can offer an opportunity to de-bias the experts and, more important, defend local legal culture against the risks of contemporary attempts of legal colonialism. Indeed, comparative law still teaches, as in the case considered in this chapter, the fundamental role to be played by histories, places, and legal traditions.

⁵⁵ S. J. Toope, *Legal and Judicial Reform through Development Assistance: Some Lessons*, in *McGill Law Journal*, 2003, 48, 3, pp. 357-412.

