

# Journal of Civil Law Studies

---

Volume 6 | Number 2

Article 2

---

12-31-2013

## A Legal System Based on Translation: The Turkish Experience

Esin Örüçü

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/jcls>



Part of the [Civil Law Commons](#)

---

### Repository Citation

Esin Örüçü, *A Legal System Based on Translation: The Turkish Experience*, 6 J. Civ. L. Stud. (2013)

Available at: <https://digitalcommons.law.lsu.edu/jcls/vol6/iss2/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Journal of Civil Law Studies by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# **A LEGAL SYSTEM BASED ON TRANSLATION: THE TURKISH EXPERIENCE**

Esin Örucü\*

I. Introductory Overview .....	445
II. General Problems and Pitfalls Relevant to the Turkish Experience.....	450
III. Some Specific Examples of Translation Hurdles as Seen in Turkish Codes and Cases .....	463
IV. Concluding Remarks .....	471

## I. INTRODUCTORY OVERVIEW

Following the collapse of the Ottoman Empire, the Turkish Republic was founded in 1923, and went through a process of total modernization, westernization, secularization and democratization, with the reform efforts resting solely on import from major continental jurisdictions both as to form and content: the Civil Code of Switzerland, the Commercial Code of Germany, and the Criminal Code of Italy. The French administrative law was already put in place during the time of the Ottoman Empire. This meant that the legal framework was synthetically constructed through voluntary and imposed receptions, imitations, adaptations and adjustments. The outcome, therefore, was “an eclectic” and

---

\* Professor Emerita of Comparative Law and Honorary Senior Research Fellow University of Glasgow; Professor Emerita of Comparative Law Erasmus University, Rotterdam; Dr.h.c. (Uppsala).  
esin.orucu@glasgow.ac.uk. An earlier version of this work was presented as a paper at the Annual Conference of Irish Society of Comparative Law in Cork on March 3, 2012. A portion of this paper related to several of the court cases discussed was previously used in part 6.3.2.1.b of ESIN ÖRÜCÜ, CRITICAL COMPARATIVE LAW CONSIDERING PARADOXES FOR LEGAL SYSTEMS IN TRANSITION (Nederlandse Vereniging voor Rechtsvergelijking, no: 59, Kluwer 1999), and other publications of mine.

“synthetic” legal system, directly borrowed and translated from, and significantly replicating, foreign models.<sup>1</sup>

Reception—and translation as its vehicle—was used as the sole method of law reform when the ideological and technological decision was made in 1924 to move outside the framework of the endogenous system of laws rather than to integrate and modernize the existing systems; that is, to receive foreign codes. To achieve this end and for the modernization of the civil law, the Swiss Civil Code was chosen. This Code was preferred over the French or the German codes because it was regarded as adapted to the multitude of cantonal customs; it did not use a technical language and therefore would be more easily translatable; it was set out as briefly as possible; it avoided judicial conceptualism; and it favored democratic equality by allowing freedom of contract, freedom of testation, equal rights in intestacy and equality of the sexes. This Code was deemed to be less ambiguous and more practical than the others. In addition, certain leading personalities in the Turkish legal world, such as the then Minister of Justice, were educated in Switzerland.<sup>2</sup>

A commission of twenty-six members was set the task of translating the trilingual Swiss Civil Code from its French version. Subsequently, a number of special commissions translated most of the important commentaries on various branches of law into Turkish. Within the year 1926, Turkish legal experts translated and produced three entirely new codes (civil, criminal and commercial), and there were more to follow.<sup>3</sup>

The main aim of this “purposive use of law” was to demolish the foundations of the old legal system by creating completely new laws. Not only that, but the intention was to regulate, by means of

---

1. Esin Örüci, *A Synthetic and Hyphenated Legal System: The Turkish Experience*, 1:2 J. COMP. L. 261-81 (2006).

2. See ERHAN ADAL, *FUNDAMENTALS OF TURKISH PRIVATE LAW* 44, 48 (5th ed., Beta 1998).

3. Code of Civil Procedure (1927), Code of Criminal Procedure (1929), Bankruptcy Code (1929) and Maritime Code (1930).

legislation, the relationships of the people, not according to existing customs, usages, and religious mores, but to what it was thought these relationships ought to be. To this end, the received codes were accompanied by radical social reform: eight reform laws (*İnkilap Kanunları*) established secular education and civil marriage, adopted the Latin alphabet and international numerals, introduced the hat, closed the Dervish convents, abolished certain titles and prohibited the wearing of certain garments.<sup>4</sup> These radical reforms were aimed at the basics: a language reform, a new western system of law, a new sense of national identity based on a newly created culture and an exclusion of the unwanted Islamic and Arabic elements of the Ottoman heritage. This whole episode was revolutionary and radically reformist, fulfilling the vision of the founding fathers.

The present reconstituted legal framework of Turkey is the product of law being moved across frontiers from societies and laws that are socially and culturally diverse from its own. Legal evolution, through a succession of imports, has relied solely on major translation work.<sup>5</sup> So, it can easily be said that the initial Turkish legal system is one based on large-scale translations alone.

It is not surprising then that there were problems created as a result of the translations, considering that the Turkish translators were not all professional translators but relied instead upon their knowledge of the specific foreign language necessary for translating a code; for instance, knowledge of the French language when translating the Swiss Civil Code from its French version. One feature the translators had in common was proficiency in

---

4. The constitutionality of these laws cannot be challenged even today (Art. 174 of the 1982 Constitution), nor can their amendment be proposed. However, change is in the air as a new Constitution is being prepared.

5. The Turkish Constitutions, though not translations, have also been influenced by foreign models. For instance, the 1924 Constitution of the young Republic was inspired by the 1875 Constitution of the Third French Republic and the 1921 Constitution of Poland; the 1961 Constitution made wide use of the Italian and West German Constitutions, with the provisions on economic development being inspired by the Indian Constitution of 1949; the present 1982 Constitution was inspired by the 1958 French and the American Constitutions.

French, though their knowledge of legal French differed. It is possible that none had any training in legal translation, but only in the law.

First, by considering the French version as “the source-law,” the translators failed to follow the rules applicable to the interpretation of the Swiss Civil Code as a trilingual text. If they were to provide a faithful translation of it as a legal text, the translators of such multilingual texts should not have ignored the legal authority of each of the languages. Translating a trilingual code into a fourth language as such creates a serious problem in itself, let alone when only one version is used. As Jimena Andino Dorato points out, it is a requirement to use all of the texts.<sup>6</sup> Translation cannot come exclusively from one official version; all texts (three, in our case) should have been taken into account.<sup>7</sup> In Switzerland all the versions have equal value and the judges, in case of doubt, have to resort to all versions. We know that the French, German and Italian versions of the Swiss Civil Code do not always agree. As an example we can cite article 1, section 1, of that Code, which in its German version states that the law applies to all questions for which it contains provisions “*nach Wortlaut oder Auslegung*.”<sup>8</sup> The French text says, “*la lettre ou l’esprit*,”<sup>9</sup> and the Italian one, “*la lettera od il senso*.”<sup>10</sup> The Turkish Code adopted the French version, “which itself may be, an inadequate expression of the correct meaning.”<sup>11</sup> Again, later on in the same article, section 3, we read that the judge should follow “established doctrine and case law.”<sup>12</sup> However, the German version refers to

---

6. For problems encountered when the bilingual Quebec Civil Code was translated into a third language (Spanish), see Jimena Andina Dorato, *A Jurilinguistic Study of the Trilingual Civil Code of Quebec*, 4 J. CIV. L. STUD. 591-630 (2011).

7. *Id.* at 602.

8. <http://www.admin.ch/opc/fr/classified-compilation/19070042/191201010000/comparison.html>

9. *Id.*

10. *Id.*

11. ADAL, *supra* note 2, at 44.

12. <http://www.scribd.com/doc/59331459/Swiss-Civil-Code>.

“*bewährter Lehre und Überlieferung*,”<sup>13</sup> but the French version to “*des solutions consacrées par la doctrine et la jurisprudence*,”<sup>14</sup> thereby giving undue emphasis to case law to the detriment of customary law, and this is the version that entered the Turkish Code. This, nevertheless, may have turned out to be suitable since it was decided that ancient customary law cannot be resorted to in the Turkish case.

Second, the translators did not have a basic knowledge of the legal system of the language that they were translating from, which is a prerequisite “to properly translate at a scholarly level.”<sup>15</sup> Many Turkish academics thereafter had most of their training at universities in the countries from whence the receptions came. Being so trained, they undertook the “fitting” of the models to the Turkish situation and the “tuning” of them. Language training and translations were extensive. Fortunately, as a consequence of a historical accident, in the early years of the Republic, Swiss, Austrian and German academics also contributed to the new legal system, thus greatly helping the imported system to take root.<sup>16</sup> Professors such as Schwartz, König, Neumark and Hirsch were given sanctuary in Turkey before the Second World War, and held posts at the Turkish universities of İstanbul and Ankara. The presence of such professors in Turkey at the time of reception fuelled the spread of legal ideas in support of the concepts received. With time, many of their Turkish assistant lecturers

---

13. *Supra* note 8.

14. *Id.*

15. UGO A. MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, SCHLESINGER'S COMPARATIVE LAW: CASES, TEXT, MATERIALS 159 (7th ed., Foundation Press 2009).

16. On an extensive history and the importance of this event, see HORST WIDMANN, EXIL UND BILDUNGSHILFE: DIE DEUTSCHSPRACHIGE AKADEMISCHE EMIGRATION IN DIE TURKEI NACH 1933. MIT EINER BIO-BIBLIOGRAPHIE DER EMIGRIERTEN HOCHSCHULLEHRER IM ANHANG (Peter Lang Int'l Academic Pubs. 1973).

themselves became professors and so helped the “internal diffusion” and subsequent “infusion” of the law.<sup>17</sup>

Courts and academics still refer to “the source-laws” from time to time, and Turkish civil law is referred to as “*İsviçre-Türk Hukuku*” (Swiss-Turkish law). In the areas of criminal law and criminal procedure, there are also references to the source-law: the Italian (Criminal Code) and German (Code of Criminal Procedure) laws. We can thus speak of Italian-Turkish and German-Turkish laws as other “hyphenated” designations. As would be expected, over the years a Turkish civil law, a Turkish commercial law, a Turkish criminal law, a Turkish civil procedure and other laws have developed, slowly diverging from the source-laws. However, even today the higher courts, as the interpreters of the law, make use of the models when reaching decisions, though never basing a decision solely on the source-law. The models are still seen as aids to further modernization, as stimuli and correctors, aiding in the interpretation of the translated texts.

## II. GENERAL PROBLEMS AND PITFALLS RELEVANT TO THE TURKISH EXPERIENCE

To illustrate the vastness of the task involved in the Turkish endeavor, it is vital at the outset to note three factors. The first factor to be considered is the peculiarity of the Turkish language and its total difference to the source languages from whence the laws were borrowed and translated:

Turkish is a member of the south-western or Oghuz group of the Turkic languages, the other members being: the Turkic dialects of the Balkans; Azeri or Azerbaijani, spoken in north-west Persia and Soviet Azerbaijan; the Qashqai of south Persia; the Turkmen or Turcoman of Soviet Turkmenistan.<sup>18</sup>

---

17. Esin Öricü, *The Infusion of the Diffused: Four Circles of Diffusion Infusing the Turkish Legal System* in DIFFUSION: THE MOVEMENT OF LAWS AND NORMS (Sue Farran et al. eds.) (forthcoming).

18. GEOFFREY LEWIS, *TURKISH GRAMMAR* ix (Clarendon Press 1967).

From the 10th century onwards, the Turks were converted to Islam and adopted the Arabic alphabet; a vast number of Arabic terms related to theology, thought and civilization entered the language. In the 11th century, when the Seljuk dynasty was overrun by Persia, Persian became the language of Turkish administration and literary culture. Thus the “educated Turk’s vocabulary” was formed by “thousands of Persian words [which] joined the thousands of Arabic words.”<sup>19</sup> By the end of the 13th century, this hybrid language became the official language of the Ottoman dynasty. The speech of the majority of ordinary Turks, however, was Turkish.

Following the birth of the Republic, first, the Arabo-Persian alphabet was replaced by the Latin one in 1928; however, as a result of the nationalist element in the change, the new letters were not called Latin, but in contrast to the old Arabic script, “Turkish.” Since the codes had been translated and promulgated in 1926 into Ottoman Turkish and published in the old script, they had to be rewritten after the change to the new alphabet.<sup>20</sup> The new versions appeared in 1934. Then, a substantial language reform movement began to eliminate the Ottoman Turkish and to use Turkish words to replace Persian and Arabic words. Where no exact translations were to be found, they searched for words from other Turkic languages, and even sometimes invented new ones: new words were coined from Turkish roots, or from western words.<sup>21</sup> This movement also impacted the codes, but, although the script was

---

19. *Id.* at xx.

20. The script was changed in 1928, but the terminology remained, which meant that for students of law, to study these texts became more of a problem as years went by (one such student was myself, 1961-1965). The texts became in time virtually incomprehensible; however, there was later an edition of the Civil Code, where the 1934 text was on the left hand page and a translation into the Turkish of 1970s on the right. The new 2002 Code is more accessible to lawyers, though not necessarily to laymen.

21. Today the conservative section of society wants to revitalize the old words; the young do not know or understand these words; and first French, and recently English, words inundated Turkish and are being used even when there are Turkish equivalents.



changed and an effort was made to keep the language simple, the terminology remained mostly unchanged for a long time.

We know that one should not translate from the legal language of the source language into the ordinary words of the target language; the translation must be made into the legal terminology of the target language. It is said that “the language of law is bound to the inner grammar of legal systems, cultures and mentalities, which in turn impede communication in words that are borrowed from another legal system, culture and mentality.”<sup>22</sup> However, the existing Ottoman legal language was totally different than the new source languages. French, German and Italian had no connection with Arabic, Persian and the legal target language, Turkish—be it Ottoman Turkish or modern Turkish.<sup>23</sup>

The second factor to be noted is that this difference was not only due to the fact that the languages were not related in any way, but also that “most” of the existing legal institutions and mentality from the Ottoman times originated from Islamic law—a different culture.<sup>24</sup> In addition, the potential users of the translations, judges and lawyers, were not familiar with the source languages or the source-laws either. “The fundamental difficulty in translation of

---

22. Vivian Grosswald Curran, *Comparative Law and Language* in THE OXFORD HANDBOOK OF COMPARATIVE LAW 675, 678 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

23. For example, the Dutch unilingual Code has been translated into two languages, French and English, and became a trilingual Code with considerable challenges. See Ejan Mackaay, *La traduction du nouveau Code civil néerlandais en anglais et en français* in JURILINGUISTIQUE: ENTRE LANGUES ET DROITS—JURILINGUISTICS: BETWEEN LAW AND LANGUAGE 537 (Jean-Claude Gemar & Nicholas Kasirer eds., Bruylant 2005).

24. I say “most” here advisedly, since following the Reformation movement (*Tanzimat*) in 1839, the Ottoman Empire moved from being an Islamic State to becoming a mixed legal system, by borrowing a number of Codes from France in order to appease the western powers: in 1850, the Commercial Code; in 1861, the Commercial Court Procedure; in 1863, the Maritime Code (also influenced by the Belgian and the Prussian Codes); and in 1879, the Code of Criminal Procedure. These were also translations. The first ever Ottoman Constitution of 1876 was inspired by the Belgian Constitution of 1831 and the Prussian one of 1850.

any kind is how to overcome conceptual difference.”<sup>25</sup> A concept or institution peculiar to the culture of the source language is said to be “more or less untranslatable,” all else being “more or less translatable.”<sup>26</sup> Then the translator can opt for equivalence looking for equivalents in the target language for terms of the source language legal systems.<sup>27</sup> This was not possible in all cases in the Turkish situation, as certain terms of art in the source legal traditions did not exist in the Turkish one.

When the legal systems concerned are nearly the same or very similar, equivalents work well since legal terminology has system-specificity. However, even then, “two or more languages cannot signify identically,” given the fact that “each national language continues to signify according to its own structures and continues to express its legal thought by means of a particular vocabulary . . . .”<sup>28</sup> In addition, there are “vast networks of associations of a word in one language that cannot all be transposed into the other, such that there must be a loss of connotative significance in the process.”<sup>29</sup> In the Turkish case, as indicated, since the source and target languages related to different legal systems, socio-cultures and different vocabulary, equivalents would have been rare, in any case. In addition, some of these equivalents already had other meanings and additional connotations. Although René de Groot seems to think that in cases of reception (and he does give the example of Turkey and Switzerland), there would not be such problems, since the concepts of one legal system have been adopted by the other and function in that system in the same way, he overlooks the factors discussed

---

25. MARTIN WESTON, AN ENGLISH READER’S GUIDE TO THE FRENCH LEGAL SYSTEM 9 (Berg Publishers 1991); Gerard-Rene de Groot, *Legal Translation* in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW (2d ed., Jan Smits ed., Edward Elgar Publ’g 2012).

26. Weston, *supra* note 25, at 9.

27. de Groot, *supra* note 25, at 539-40.

28. Simone Glanert, *Speaking Language to Law: The Case of Europe*, 1/2010 ROMANIAN J. COMP. L. 197, 202 (2010).

29. Curran, *supra* note 22, at 679.

above.<sup>30</sup> This conclusion is reached in spite of the fact that he accepts that “where the source language and the target language relate to different legal systems . . . virtual full equivalence proves to be a problem.”<sup>31</sup> This would be the case for the ensuing receptions from the same sources, such as the 2002 Turkish Civil Code, but does not apply to the initial receptions. If one were to go for “functional equivalence,” then, similarly, in the Turkish case, one would also come across problems arising from the above differences while looking for “the nearest situationally equivalent concept.”<sup>32</sup> So, “how should translations be elaborated when a legal phenomenon has no exact equivalent in two languages?”<sup>33</sup> This has been a significant problem in Turkey.

The third factor is that the Turkish language is phonetic in the sense that in the system of writing and pronunciation there is a direct correspondence between symbols and sounds.<sup>34</sup> Foreign words borrowed either in terms of loan-borrowing or calque must be converted into Turkish symbols to be pronounced correctly. Previously, the spellings were changed when words were borrowed from French, German, Italian and English to fit the phonetic Turkish language. For example, French “*station*” has become “*istasyon*,” Italian “*scala*,” “*iskele*,” German “*schlep*,” “*şilep*,”

---

30. de Groot, *supra* note 25, at 539.

31. *Id.*

32. WESTON, *supra* note 25, at 21.

33. Curran, *supra* note 22, at 678.

34. In this piece, all translations from Turkish are mine. For readers unfamiliar with the Turkish alphabet: it contains the letters *ç, ş, ğ, ö, ü* and *ı* (undotted *i*) both in the lower case and the upper case, in addition to twenty-three letters from the Latin alphabet (*i.e.* not *q, w* or *x*). Most Turkish consonants are pronounced as in English, most of the vowels as in Italian, but there are some variations. The Turkish *ö* and *ü* are like the German, or like the vowels in French *peu* and *tu*, dotted Turkish *i* like *i* in ‘sit’, the undotted *i* (*ı*) something between *i* as in ‘will’ and *u* as in ‘radium’. Among the consonants *ç* and *ş* are like *sh* and *ch*, as they are pronounced. *C* is pronounced like the *j* in ‘jet’. The *ğ*, after *e* and *i* – roughly as *y* in ‘saying’, after *o, ö, u, ü* – roughly as ‘sowing’, after *a* and *ı*, hardly sounded, but has the effect of lengthening the vowel. In this piece when I use Turkish words, I use official modern Turkish orthography and not transcription. On the new alphabet, see GEOFFREY LEWIS, THE TURKISH LANGUAGE REFORM: A CATASTROPHIC SUCCESS 27-39 (Oxford Univ. Press 1999).

English “steam,” “*istim*,” and so on.<sup>35</sup> Today, this does not seem to happen. Not only that, but English seems to enter the Turkish language at an enormous speed; Geoffrey Lewis calls this “the new yoke.”<sup>36</sup> In this context, I look later at a new entrant into the Turkish legal system—the word “mortgage”—and discuss arising problems, both those related to “loan-words” and to the phonetic nature of the Turkish language.

Now, turning to other issues, it is true that legal language (legal register) may be regarded as having a system-specific nature, and yet intra-linguistic translations deal with a source language and a target language. In addition, problems that may exist when translating, for instance, frozen metaphors and idioms of one language to another, do not exist in legal language, since such terminology is not used. Obviously one would expect problems when culture-specific institutions, procedures or official bodies are involved. In such cases, the untranslatable can be transcribed or explained, as no two languages are sufficiently similar to be considered as representing precisely the same social reality. In many legal systems, especially those that portray socio-cultural and legal-cultural affinity, the “legal register” may have become naturalized as a result of sufficient similarity. Yet, to translate technical words used by lawyers in France, Germany, or elsewhere on the European continent into Turkish would have been in many cases a nearly impossible task. The best approach may have been to keep the original word and provide an explanation as suggested by Martin Weston, a former translator at the Secretariat of the Council of Europe in Strasbourg and Senior Translator at the Registry of the European Court of Human Rights.<sup>37</sup> In a case of impossibility of translation, it can be said that a translator’s note may be required. This method, however, could not be considered with ease when translating codes, where there are mostly instances

---

35. For more examples, see LEWIS, *supra* note 18, at 9.

36. LEWIS, *supra* note 34, at 133-39.

37. WESTON, *supra* note 25, at 17.

of word-for-word translation and, occasionally, of neologism. We know that code translations are particularly difficult, are full of hazards and create specific problems,<sup>38</sup> and that to obtain accurate results, resorting to the original text might become necessary.<sup>39</sup>

Transcription or borrowing is not translation, but “an alternative way of dealing with culture-specific terms when translation in the narrower sense is not possible.”<sup>40</sup> It may be assumed that between European languages the difficulties may be less pronounced than between European languages and a non-European language such as Turkish, based on the presence or absence of common cultural denominators.<sup>41</sup>

Although it is true that words are an essential vehicle of cultural influence, cultures are not necessarily co-terminous with

---

38. Here four instances could be noted: The first consists of the three authentic versions of the trilingual Swiss Civil Code. The German, French (remember this is the version used by Turkish translators) and Italian texts, prepared with great care, are all equally authoritative. However, there are various discrepancies between the three texts and the courts in practice have to make a choice between versions. For the second instance, the Spanish Civil Code, see Franklin R. Capistrano, *Mistakes and Inaccuracies in Fisher's Translation of the Spanish Civil Code*, 9 PHILIPPINE L. J. 89-141 (1929). The third instance is the case of the translation of the bilingual Quebec Code into Spanish and its accompanying problems. For this, see Dorato, *supra* note 6. The fourth instance, which has already been mentioned, is the monolingual Dutch Code being converted into a trilingual Code (Dutch, French, and English). For this, see MacKaay, *supra* note 23. Further, the nine contributions that appear in THE ROLE OF LEGAL TRANSLATION IN LEGAL HARMONIZATION (C. J. W. Baaij ed., Kluwer Law Int'l 2012) indicate the crucial role of translation in multilingual law-making and alert us to problems to be encountered in developing not a single but a multilingual legal language through the example of EU harmonization. The connection to comparative law becomes more than evident in all the works above.

39. As opposed to the translation of the Quebec Civil Code into Spanish, the Turkish translators did not indicate “with a dagger symbol and notes ‘infelicities in language’ with an asterisk,” in this way outlining difficult or controversial choices in translation. See Dorato, *supra* note 6, at 595. In fact, in our case, there are no translators’ notes, but following each article in the Turkish Civil Code, the number of the corresponding Swiss article appears, with the aim that scholars and judges may like to consult the original text.

40. WESTON, *supra* note 25, at 30.

41. However, for the problem of seemingly similar words with different connotations between French and English, see Curran, *supra* note 22, at 678 and MATTEI ET AL., *supra* note 15, at 154-62. The same problem exists between Dutch and German, and Austrian and German.

languages, though the language of a particular society is an integral part of its culture. The lexical distinctions drawn by each language reflect the culturally important institutions and activities of that society. In the process of legal translation, therefore, what is sought is functional equivalents. It can also be assumed that there is much “cultural overlap.” There may be no synonymy between words of different languages, but a greater or lesser degree of equivalence can be found in the “application” of the word. However, these can only be intuitive judgments of equivalence in the areas of cultural overlap. The general assumption is that exact equivalence cannot be obtained and that validity can be achieved only through control of factors that affect equivalence. Weston, however, suggests five possible options open to translators facing a culture-bound source language: use of a target language expression denoting the nearest equivalent concept (functional equivalence); word-for-word translation, making adjustments of syntax and function words if necessary; borrowing of the foreign expression and adding a target language explanation if the concept is unlikely to be familiar to the target language readership; creation of a neologism, in the form of a literal translation, a naturalization or a wholly non-formal translation; or, lastly, use of an existing naturalization.<sup>42</sup> In order of precedence, the rules to be followed then are: a word-for-word translation if “this yields a functional equivalent;” “a non-literal translation representing a functional equivalent in the target language;” “a word-for-word or non-literal translation that represents a semantic equivalent, but is not the label of a functionally equivalent referent in the target language culture (because there is none);” “transcription;” and, finally, “neologism.”<sup>43</sup>

Neologism is a subsidiary solution and the last resort in any translation activity in law, and translators generally refrain from creating neologisms. The mandatory test would be that of

---

42. WESTON, *supra* note 25, at 19-21.

43. *Id.* at 31.

necessity. However, a translator choosing his or her own neologism must be aware that this could lead to confusion. As Weston says, “it is no business of the translator’s to create a new word or expression if the source language expression can be adequately and conveniently translated by one of the methods already described.”<sup>44</sup> Old words may be combined to form new compounds or phrases. Neologisms, if any, are naturalized, and foreign words are either given a word-for-word translation or borrowed and naturalized. Any neologism created must satisfy the requirements of conformity with standard target language grammatical, morphological and phonological patterns; that is, naturalness as well as economy and succinctness.

Now, it could be said that loan-words, borrowed from other languages and being recognizable from their language of origin, may be regarded in Turkey as indications of cultural transformation and therefore less desirable. Although preserving the source term can be an option when languages are related, as underlined by de Groot, “using an untranslated term from the source language in the target language must be avoided in particular where there is little or no etymological correspondence between the two languages.”<sup>45</sup> Nonetheless, if we look at the example of the word “mortgage,” already mentioned above, this is exactly what happened. In 2007, Law No: 5582,<sup>46</sup> called the “Mortgage *Yasası*” (Mortgage Statute), was passed by the Turkish legislator introducing a new possibility for home-buyers. In the body of the statute the word “mortgage” (kept in English) is then explained as “*ipotekli konut kredisi*”<sup>47</sup> and a neologism—used here in a very broad sense—also appears: “*tutulu satış kredisi*.”<sup>48</sup> None

---

44. *Id.* at 28.

45. de Groot, *supra* note 25, at 541.

46. *Resmi Gazete* no 26454; 21/02/2007.

47. “Housing loan with mortgage.” Mortgage has also been translated at times as “*Tutsat*” (in English “hold and sell”), again meaningless to a Turkish home-buyer.

48. “Enslaved or apprehended sales loan.”

of these concepts mean anything to a Turkish home-buyer. In addition, Turkish being a phonetic language, the word “mortgage” is pronounced by Turks as it is written, in a very amusing fashion!

We must remember that Vivian Grosswald Curran notes: “the appearance of a word or phrase in a foreign language and in italics will alert the reader to the irremediable foreign nature of the underlying concept.”<sup>49</sup> The fact that an untranslated word is not accessible to the reader without explanatory references is the obvious disadvantage of this technique. As de Groot explains:

If the translator suspects [in our case knows] that the substance of the legal system from which he or she wishes to borrow a term to serve as a neologism—and consequently also its legal terminology—is unknown to the users of the target text, a reassessment is in order or an explanatory footnote must be added to the neologism.<sup>50</sup>

In our case, the English word “mortgage” is in the name of the statute, it is not in italics, and the explanation is by way of creating new neologisms, meaningless to the reader. As Simone Glanert states, “the recourse to the descriptive method does not offer a way out of the problem of untranslatability, because a legal language is not only the medium of a legal culture but also part of a standard language” and “the concocted sequence of . . . words becomes a vicious circle . . . .”<sup>51</sup>

Coincidentally, the example de Groot gives in his work is also that of the word “mortgage,” illustrating the translation of the Spanish word “*hipoteca*” into English as “hypothec” rather than “mortgage,” and he asks the question: “[w]ould this term not look very odd to an English reader of the target text if no explanation is provided?”<sup>52</sup> In the Turkish case, though some kind of an explanation is provided in the text, the institution still does not

---

49. Curran, *supra* note 22, at 678.

50. de Groot, *supra* note 25, at 542.

51. Glanert, *supra* note 28, at 203.

52. de Groot, *supra* note 25, at 544. Obviously the word “hypothec” would work well with a Scottish audience!



seem to have taken root and the “fit” did not materialize, since the 1926 Civil Code, based on civilian institutions and terminology translated from the French (and the 2002 Civil Code is no more different), is totally alien to the English language (the new source language in the case of this statute) and contains other concepts. Would this new law also mean that, given time, the English source would affect the style, form and tone of Turkish law? Here a calque—loan translation—using an original word (“*konut kredisi*,” in our case, though the word “*kredi*” is also from French, but at least well-established), but giving it a new meaning, may have been more acceptable, as this would only reflect a similar parallel pattern of semantic evolution.

It must be remembered that the reading is related to “conceptual content,” and it is often impossible to give the meaning of a word without “putting it in context.” Therefore, a word-for-word translation—that is, a “literal translation” (formal lexical equivalence)—can be criticized. It is true that if there are source language expressions that defy translation in the narrow sense, literal translation makes no sense, in which case, transcribing or paraphrasing (glossing) can be recommended. Here, the source language term will be given in italics or between inverted commas, and followed in brackets by the target language gloss. This may be a workable method in general, but one cannot clarify the original term by adding a literal translation in parentheses in a code, either.

In a legal text, a word forms part of a sentence and, “sentences are unlimited in their variety of the arrangement of words.”<sup>53</sup> Language is connected to context and dictionaries cannot be regarded as solving problems of interpretation. “Dictionaries, a grammar book, and precepts of syntax, will not by themselves

---

53. Johan Steyn, *Interpretation: Legal Texts and Their Landscape* in THE CLIFFORD CHANCE MILLENNIUM LECTURES: THE COMING TOGETHER OF THE COMMON LAW AND THE CIVIL LAW 79, 81 (Basil S. Markesinis ed., Hart Publ'g 2000); and Esin Öricü, *Interpretation of Multilingual Texts in the UK*, 10.3 ELECTRONIC J. COMP. L. (2006), <http://www.ejcl.org/103/art103-9.pdf>.

yield the contextual meaning of words and sentences.”<sup>54</sup> In the translation of the various codes into Turkish, though, dictionaries were used and some mistranslations occurred, as will be seen below. However, it is said that, since in the context of statutory interpretation, the instrument is considered “an always speaking statute,”<sup>55</sup> and the words are given their “natural and ordinary meaning” that reflects the “common sense” proposition, it is difficult “to accept easily that people have made linguistic mistakes in formal documents.”<sup>56</sup> As will be seen, however, this cannot be always assumed in the Turkish situation.

Many Latin phrases such as *lis alibi pendens*, *forum non conveniens*, *ejusdem generis*, *negotiorum gestio*, *status de manerio*, *sine die*, *sic utere tuo ut alienum non laedas* that could have been retained in Latin, had the basis of the Turkish language been Latin, were not, in spite of the fact that Roman law was taught in law schools in Turkey. Nevertheless, many jurists in Turkey know no Latin, so although Roman law terms may be attractive as neologisms, one cannot assume that lawyers have any such knowledge.

Now to another concept: ambiguity, or double meaning. It is known that there can be two types of double meaning, doubt or uncertainty: “patent ambiguity,” which is obvious on the face of the instrument, and “latent ambiguity,” which becomes apparent only when the surrounding circumstances are known. The general rule is that, to resolve patent ambiguity, extrinsic evidence is admissible to enable the court to ascertain the meaning, but not to give a meaning to a word or phrase capable of being given an ordinary interpretation. Extrinsic evidence is admissible to explain a latent ambiguity. Ambiguities in the meaning of a statute or other legislation are resolved by recourse to rules of construction and interpretation and resort to source-laws by academics or the high

---

54. Steyn, *supra* note 53, at 81.

55. *Id.* at 90.

56. *Id.*

courts, which in Turkey is mostly the *Yargıtay* (the Turkish Court of Cassation).

Related to ambiguity, again there is one interesting example worth looking into. The Convention on the Elimination of All Forms of Discrimination Against Women<sup>57</sup> was ratified by Turkey in 1985.<sup>58</sup> It is also now the case that the Turkish Constitution is to be read in the light of International Conventions.<sup>59</sup> The translation of the Convention uses the word “*önlenme*”<sup>60</sup> meaning “prevention” to correspond to “elimination” rather than “*tasfiye*”<sup>61</sup> or “*ortadan kaldırılma*”<sup>62</sup> both of which do correspond to “elimination” or “removal.” These Turkish words have their own connotations. In addition, “*her türlü*” in the official title means “all kinds,” whereas “*her biçimiyle*” used in Professor Semih Gemalmaz’s translation means “in all its forms.”<sup>63</sup> Some feminist lawyers are claiming that the title creates an ambiguity on purpose, especially in view of the number of reservations Turkey attached to the Convention. In their opinion, “prevention” implies “from now on,” whereas “elimination” implies looking through existing legislation and cleansing them from such discrimination, and that

---

57. G.A. Res 34/180, 34 U.N. GAOR Supp. No. 46, U.N. Doc. A/34/46, at 193 (18 Dec 1979).

58. Kadınlara Karşı **Her Türlü** Ayrımcılığın **Önlenmesi** Sözleşmesi (*Resmi Gazete* 187.92; 25/06/1985). This is the title of the official translation. A translation by Professor Gemalmaz is different: Kadınlara Karşı **Her Biçimiyle** Ayrımcılığın **Ortadan Kaldırılması** Sözleşmesi. Gemalmaz also states that in the official Turkish translation of the Convention, there are serious mistakes both in the title and in many of its articles. Mehmet Semih Gemalmaz, *Kadınlara Karşı Her Biçimiyle Ayrımcılığın Ortadan Kaldırılması Sözleşmesi: Çekinceler Sorunu Işığında Haklar Analizi (The Convention on the Elimination of Discrimination Against Women in all its Forms: An Analysis of Rights in the Light of Reservations)* in PROF. DR. İL HAN ÖZAY’A ARMAĞAN, LXIX İSTANBUL ÜNİVERSİTESİ HUKUK FAKÜLTESİ MECMUASI 139-238, 141 (2011).

59. Amended art. 90, 1982 Constitution.

60. Turkish word.

61. Arabic word.

62. Turkish word.

63. Gemalmaz, *supra* note 58.

“all kinds” is less effective than “in all its forms.”<sup>64</sup> The claim that this was done on purpose, so that an ambiguity would be created and no clear-cut path could be followed,<sup>65</sup> may be well founded and convincing. Nevertheless, one cannot be sure unless one is privy to the policy behind this choice of words, so I have some doubts about this claim.

Using “back translation,” which is a simple technique, though inadequate for dealing with linguistic comparability, may help in writing multilingual texts. It would serve as a detector of problems, however, rather than offering solutions. Comparison of the two texts can show the sources of difficulty and inconsistency. Yet, an item in the source language may give rise to more than one version in a target language and re-translation may create multiple source language versions. In this context, it might be an interesting exercise to compare the earlier version and the later version of the same Turkish Civil Code to detect any changes in meaning in this “inner” translation between the 1934 and the 1970 texts appearing side by side.<sup>66</sup> This approach, valuable in the writing of the texts, may not be so useful in their interpretation.

### III. SOME SPECIFIC EXAMPLES OF TRANSLATION HURDLES AS SEEN IN TURKISH CODES AND CASES

Cevdet Menteş, the then President of the *Yargıtay* (the Turkish Court of Cassation), in his speech to commemorate the 50th anniversary of the Civil Code published in a volume by the University of Ankara, points out that in the preparation of the Civil Code there were obvious translation errors in articles 65, 85, 187/2, 244/2, 507/3, 552 and 923, and that the mistakes in translation

---

64. Conversation with Ms. Canan Arın, a well-known and assertive practicing lawyer in Istanbul, May 2013. In addition, see Feride Acar, CEDAW ve Türkiye’de Durum, GÜNCEL HUKUK DERGİSİ 12 (2005).

65. *Id.*

66. Referenced in *supra* note 20. For some examples from the Code articles, see LEWIS, *supra* note 34, at 128-29.

were not limited to these only.<sup>67</sup> There were more “mistakes, inaccuracies and weaknesses of expression.”<sup>68</sup> He also argues that, although in a decision of 1950 unifying precedents, the *Yargıtay* held that, in cases of mistakes in translation, the source-law Swiss Civil Code would be taken as the basis and the articles interpreted according to their purpose in the source-law; nevertheless, it would be more desirable for the legislator to correct these errors.<sup>69</sup>

On the same occasion, Professor Necip Kocayusufpaşaoğlu concentrated on a concept unknown in the old law in the area of succession: “*mirasta iade*” (“*rapport successoral*” or “*rapport a succession*” in the French version and “*ausgleichung*” in the German version of the Swiss Civil Code). Not being in use before 1926, this institution, which hailed both from Roman and Germanic laws, was ignored by Turkish lawyers for a long time. In fact, it was already a problematic one in theory and practice in Switzerland, Germany and Italy, in spite of its pedigree. Kocayusufpaşaoğlu also criticizes the choice of terminology, indicating that the word “*iade*” (return) does not cover all instances subsumed under this institution, which he calls “*denkleştirme*” (equalization).<sup>70</sup> He then goes on to look at other concepts used in article 603 which he believes contain wrong word choices, usually words with established prior meanings and connotations. He is of the opinion that instead of correcting the mistakes in translation, this article, which, according to him, has been very badly translated in the first place, should be rewritten.<sup>71</sup>

Another publication, this time from İstanbul University, commemorating the 50th anniversary of the Civil Code, also

---

67. Cevdet Menteş, *Konuşma (Speech)* in MEDENİ KANUN’UN 50. YILI, BİLİMSEL HAFTA: 15-17 NİSAN 1976, Ankara Üniversitesi Hukuk Fakültesi Yayınları No: 408, 2-6, 2 (1977).

68. *Id.*

69. *Id.*

70. Necip Kocayusufpaşaoğlu, *Mirasta İade (= Denkleştirme) ile İlgili Meseleler’ (Matters related to Equalization in Succession)* in MEDENİ KANUN’UN 50. YILI, BİLİMSEL HAFTA: 15-17 NİSAN 1976, Ankara Üniversitesi Hukuk Fakültesi Yayınları No: 408, 117-38, 117-19 (1977).

71. *Id.* at 133-35.

contains a number of contributions assessing the code and the developments in the law in the Republican period in Turkey. Among these, there is one by Professor Ernest Hirsch, who was one of the foreign professors working in Turkey during the formative years of Turkish law.<sup>72</sup> He talks of his years of teaching commercial law, not using the Turkish Commercial Code since he did not know Turkish, but two unofficial French translations of it, which were not identical. He points out that in the preparation of the Commercial Code (1926-1929) a number of translators used different foreign codes, not just the German.<sup>73</sup> The Code was eclectic and in its translation a variety of terminology was used, depending on the translator. His Turkish colleagues told him jokingly that “the Code is a Russian salad in need of mayonnaise to be put on top by you.”<sup>74</sup> He further admits that since he studied the Code from those inadequate French translations and lectured in German, the lectures then being translated into Turkish, all were partially ambiguous and partially incomprehensible!<sup>75</sup> In fact, according to Hirsch, it was rumored that since most professors, judges and lawyers knew no foreign languages, they were mostly relying on the literal translations of the codes as texts rather than inquiring into the spirit embodied in them.<sup>76</sup>

Let us now turn to some specific examples. One problem surfaced while the *Yargıtay* was dealing with “arbitration agreements” in a unification of precedents.<sup>77</sup> The Court first determined that a number of different systems of arbitration

---

72. Ernest Hirsch, *Yasama ile Öğreti ve Yargı Arasındaki Karşılıklı Bağlılık* (Reciprocal Ties between Legislation, Education and the Judiciary) in 50. YIL ARMAĞANI: CUMHURİYET DÖNEMİNDE HUKUK, İstanbul Üniversitesi Hukuk Fakültesi No: 1888/421, 173-189, at 173 (1973).

73. *Id.* at 175.

74. *Id.* at 176.

75. *Id.*

76. *Id.*

77. 93/4; 94/1; 28.1.1994; 20 *Yargıtay Kararları Dergisi* 1994, 519. “Unification of precedents” is the one type of decision of the *Yargıtay* that is binding on all courts.

agreements were accepted by the laws of Switzerland, Germany, Austria and France, and then said:

Article 533 of the Turkish Code of Civil Procedure is differently arranged to the source-law, the Neuchatel Code of Civil Procedure article 488. Somehow, the words “unless otherwise contracted” in article 488/1 have not been incorporated into article 533. The translation leaves a gap. Neither does article 533 have any indication as to what would lead to an appeal. We therefore think that article 533 should be interpreted anew, as the existing interpretations and practices do not give satisfactory results.<sup>78</sup>

Then the *Yargıtay* unified various decisions emanating from its chambers stating: “[d]uring the discussions some judges have said that we cannot follow the source-law. The majority however, is of the view that we can. Thus, an arbitration award not in accordance with the law can be appealed against.”<sup>79</sup> One must ask whether this omission was on purpose or by mistake.

Dealing with letters of guarantee, bills of lading and “clear on board,” and the resolution of the question as to whether the carrier is free of liability when the sender enters incorrect information into the bill of lading, the *Yargıtay* indicated that the topic had been widely discussed in international law, and then referred to letters of guarantee (clear on board) in the French and German Commercial Codes, showing that there is no agreement on the point.<sup>80</sup> A dissenting opinion referred to German, Italian and French doctrine, as well as English doctrine, and cases on misrepresentation. It then suggested that:

Since the applicable provision, section 1064/11 of the Turkish Commercial Code, does not exist in “the source German law” (HGB) and neither was it in the Turkish Government Draft Bill when it went to Parliament, then this must mean that the Judicial Committee added this in haste and it went through Parliament without discussion. It is obvious that the provision was badly written and

---

78. *Id.* at 526.

79. *Id.* at 528.

80. 93/565; 94/3295; 21.4.1994; 20 *Yargıtay Kararları Dergisi* 1994, 1782.

hurriedly. If regarded in this light, the rules of the Hamburg Convention on Carriage of Goods by Sea could apply and section 1064/11 should be thus interpreted. This is also in accordance with legal opinion given by Turkish Maritime law experts.<sup>81</sup>

An example from family law is also illuminating. In a case related to the inheritance rights of an adopted child,<sup>82</sup> the *Yargıtay* was critical of the translation of article 257/2 of the 1926 Civil Code. In the case under consideration, the inheritance rights of a child were postponed till after the death of both adoptive parents at the time of the adoption agreement. However, article 257/2 stated that an agreement depriving the adopted child of inheritance rights must be concluded before the adoption agreement. According to the *Yargıtay*, this is not in keeping with the source Swiss Civil Code, and that this view is also supported by Turkish and Swiss doctrine.<sup>83</sup> The Court went on to say: “[f]ollowing the unification of precedents 4/10 of 20.9.1950, errors in translation should be understood and interpreted in keeping with the source law.”<sup>84</sup> The authority of foreign doctrine has contributed to the correct interpretation of the Code, Turkish judges being free to resort to foreign documents and texts, where necessary.

Now looking at the area of criminal law, we can briefly consider some further problems. The references in criminal law and criminal procedure to Italian law are mostly in dissenting opinions rather than in the decisions themselves and are resorted to in order to challenge mistaken interpretation of the 1926 Turkish Criminal Code (now replaced by the 2005 Criminal Code) and the 1929 Code of Criminal Procedure, and to point to mistakes in translation at the time of reception. The *Yargıtay* is called upon to search for the true meanings in the original versions. For instance, in a case concerning “murder to facilitate the committing of

---

81. *Id.* at 1789.

82. 2000/0858; 2000/120077; 12.10.200; 26 *Yargıtay Kararları Dergisi*, 1819-1820.

83. *Id.*

84. *Id.* at 1820.



another crime,”<sup>85</sup> the dissenting opinion (Judge Selçuk, well-versed in Italian) claimed that the term “crime” in articles 135, 150 and 163 of the Code of Criminal Procedure was a mistaken translation of the term “act” in the source-law, whereas the term “action,” used in article 257, was the correct translation. It was indicated that when article 135 was amended in 1992, this mistake should have been corrected.<sup>86</sup> After pointing to some other discrepancies, the same dissenting judge said, “as can be seen, as a result of giving wrong meanings to terms and concepts, the Turkish practice has become divorced from the laws of the legal systems that inspired it.”<sup>87</sup>

In another case<sup>88</sup> related to causing bodily harm to, and the maltreatment of, members of the family, though there were no references to foreign sources in the decision, again the same dissenting judge referred to mistakes in translation and interpretation. He criticized the established view of the *Yargıtay* regarding the term “a number of persons” as more than three, and “a few persons” as three.<sup>89</sup> According to him these variations do not exist in the Italian source-law, where the term “*plu persone*” is used to indicate more than two persons. The Turkish Code and the “Majno” Annotations<sup>90</sup> use sometimes one, sometimes another word to translate this term, and there is, therefore, some ambiguity and confusion. When articles 480 and 482 were being amended, the legislature followed the mistaken decisions of the *Yargıtay* and

---

85. 97/1-76; 97/114; 13.5.1997; 23 *Yargıtay Kararları Dergisi* 1997, 1608 1616.

86. *Id.* at 1616.

87. *Id.*

88. 96/8022; 96/9095; 3.12.1996; 23 *Yargıtay Kararları Dergisi* 1997, 617.

89. *Id.* at 620.

90. These annotations (called in Turkish “*Manjo Şerhi*”) in four volumes were written by the Italian Criminal lawyer Luigi Manjo and published in the early years of the Republic, first in the Ottoman script by the then Minister of Justice Mahmut Esat Bozkurt, including his preface. It was later published in the Latin script. In 1977 it was re-published by the *Yargıtay (Yargıtay Yayını* no:3, Ankara). It is now out of print.

changed the term “a number of persons” to “three.” The dissenting judge said:

While the law was being interpreted, the source-law should have been consulted. It should not have been forgotten that the Turkish Criminal Code is the outcome of a reception and translation. Therefore, it is necessary to correct mistakes in translation by “corrective interpretation.” The only acceptable departure from the source-laws is where the legislature has shown reasons for this departure in debate in Parliament. Therefore, whenever necessary the Italian Code and reasoning must be used.<sup>91</sup>

Where the right to defense of the suspect was being determined, the *Yargıtay* was of the opinion that, reminding the suspect that he has the right to employ a lawyer and that he has the right to silence are essential elements of procedure, otherwise the right to defense is to be regarded as limited.<sup>92</sup> After stating that laws of all democratic states point in the same direction, two dissenting opinions referred to the source, the German Code of Criminal Procedure articles 243 and 130, which have the same text as the Turkish articles 236 and 135. Both opinions extensively discussed decisions of the German Federal Court (BGH) with further references to foreign doctrine on criminal procedure.<sup>93</sup> The *Yargıtay* was criticized for not applying the aforementioned articles in line with the German Federal Court practice and for not using its discretion in determining the value of such procedural niceties and, instead, taking them as absolutes.<sup>94</sup>

In a case dealing with “premeditated murder,”<sup>95</sup> a dissenting opinion compared the Turkish *Yargıtay* to its French, German and Italian counterparts. It then pointed out that the word “premeditated” was not defined in the Turkish Criminal Code and that, because in the early years of the Republic it was the practice

---

91. *Supra* note 88 at 620.

92. 95/7; 95/302; 24.10.1995; 22 *Yargıtay Kararları Dergisi* 1996, 103.

93. *Id.* at 104.

94. *Id.* at 105.

95. 94/1-167; 94/188; 27.6.1994, 20 *Yargıtay Kararları Dergisi* 1994, 1829.

to interpret this code according to the French Criminal Code rather than the Italian source-law, a number of problems were created.<sup>96</sup> This was indeed a linguistically easy but mistaken option; it was not possible to transfer the interpretation of one to the other. The 1810 French Criminal Code was no longer in effect and the new Code had yet a different system and defined cases of premeditation as “assassination.” The Italian criminal system left this determination to the judge.<sup>97</sup> According to this dissenting judge, the Turkish system seemed to sway between the French and the Italian systems by sometimes using the French conceptual structure “calmness” (cool-headedness), and thus had internal inconsistencies.<sup>98</sup> The *Yargıtay* should give a final definition of “premeditation” and then use this definition as a criterion when viewing the decisions of the lower courts. The dissenting judge then referred to Spanish teaching and practice, which had also been influenced by the Italian, German and French laws, to show that they did follow this path.<sup>99</sup>

In another case, it was pointed out by the *Yargıtay*<sup>100</sup> that the Turkish Criminal Code does not define “grafts, tricks and dishonesty,” which are the formal conditions for the proof of “swindling.” Considering comparative law, the Court discerned two trends. However, it then decided the case according to the system of the Turkish Criminal Code. The aforementioned judge in his dissenting opinion again looked at a number of legal systems and specifically at the source-law. He said that the Italian Criminal Code gives weight to the subjective element, “the decision to commit an offence.”<sup>101</sup> He claimed that by adding a condition not foreseen by the Code, the *Yargıtay* was narrowing the scope of article 80, which can only be done by the legislature. This is

---

96. *Id.* at 1832.

97. *Id.* at 1833.

98. *Id.* at 1834.

99. *Id.* at 1834.

100. 98/6-280; 98/359; 24.11.1998; 25 *Yargıtay Kararları Dergisi* 1999, 238.

101. *Id.* at 240.

accepted not only in Italian but also in Swiss, Belgian and French laws.<sup>102</sup> He then summarized the position in the Italian source-law by reference to legal writers such as Battaglini, Pannain, Ranieri, Antolesei, Nuvo Lone, Fiandaca, Mantovani, Musco, Padovani and Cavallo. He pointed to a translation error in article 80, and said that a Turkish unification of precedents in 1929 had unfortunately further reinforced this error.<sup>103</sup> In 1941 the section was amended. As before, the judge blamed this unhappy development on the interpretation of the Italian-Turkish Criminal Code in the light of the French Criminal Code, which is incompatible with the Italian one. According to him, “decision to act” and “criminal intention” are not equivalent.<sup>104</sup> In an earlier decision, the General Council of Criminal Law of the *Yargıtay*<sup>105</sup> compared the Turkish Code with the source-law and pointed to the fact that article 80 had been amended and that “the same intention to commit an offence” was now replaced by “the same decision to commit an offence.”<sup>106</sup>

#### IV. CONCLUDING REMARKS

Modernization and westernization of Turkey’s legal system were not based on any one dominant culture, and the fact that a number of different models were chosen might have given the borrowings “cultural legitimacy.”<sup>107</sup> As stated, the civil law, the law of obligations and civil procedure were borrowed from Switzerland, commercial law, maritime law and criminal procedure from Germany, criminal law from Italy and administrative law from France; all translated, adapted and adjusted to solve the social and legal problems of Turkey and to

---

102. *Id.* at 241.

103. *Id.*

104. *Id.*

105. 98/11-205; 98/304; 13.10.1998; 24 *Yargıtay Kararları Dergisi* 1998 at 1809.

106. *Id.* at 1811.

107. Gianmaria Ajani, *The Role of Comparative Law in the Adoption of New Codifications* in ITALIAN NATIONAL REPORTS TO THE XVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 68-69, 80 (1998).

interlock. The choice was driven at times by the perceived “prestige” of the model, at other times by “efficiency,” and sometimes by “chance,” or “historical accident.” In recent years the codes have been updated—the Civil Code in 2002, the Criminal Code in 2005 and the Commercial Code in 2011—but the bases have not changed and, though not translated now, they still carry the stamps of the translated laws of the 1920s.

Although Eva Hoffman claims that distortions occur in translation of even a single word in “transporting human meaning from one culture to another” unless “the entire language” around the word or its audience are transported,<sup>108</sup> and Pierre Legrand that “legislation cannot make mores,”<sup>109</sup> the entire Turkish legal system, still fully functioning, is built on such institutional transfers and translations, with a different and brand new audience, and has been keeping lawyers, judges and academics active since 1926.

A great believer in receptions as a way forward for legal systems, Alan Watson is of the view that even when misunderstood or mistranslated, a borrowed institution or concept may solve the problems for the solution of which it was borrowed. He says: “. . . a total mistake as to the meaning of the rules which it is thought are being borrowed need not stop the creation of a new doctrine nor prevent it becoming authoritative and important.”<sup>110</sup> In addition, “. . . foreign law can be influential when it is totally misunderstood.”<sup>111</sup> When one looks at the Turkish experience, it can be said that Watson’s views can be endorsed. It is of course true that, as observed by Glanert, “the inevitably violent introduction of a newly created legal terminology causes in every

---

108. EVA HOFFMAN, *LOST IN TRANSLATION: A LIFE IN A NEW LANGUAGE* 272-73 (Vintage 2008).

109. Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 119 (1997).

110. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 52 (Scottish Academic Press 1974).

111. *Id.* at 99.

national legal language a semantic earthquake.”<sup>112</sup> Would all this translation and earthquake have an added meaning today, now that the Turkish language is also being Europeanized? Can the national language be reduced to an instrumental dimension? Can we observe “the adoption of a transnational legal neo-language?”<sup>113</sup>

One thing is certain, and that is that the Turkish experience defies the romantic view that there is an indissoluble bond between law, language and culture.<sup>114</sup> This experience, therefore, can also be studied as a useful empirical work on the relations between language, culture, translation and comparison, and the value of a code in more than one language. Is this relation indeed as profound as is purported? Suffice it to say that the Turkish experience, in my opinion, rightly leads one to ask, “whose law, whose culture, whose language?”

Through creative interpretation, mistakes and inaccuracies in translation (unless they are deliberate) can be either eliminated over time or give a different direction to the law compared to the source-laws. For this, an active judiciary and creative academics are needed, which is what has been happening in the Turkish legal system over the past ninety years.

---

112. Glanert, *supra* note 28, at 201.

113. *Id.*

114. Discussed by Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions* in THE OXFORD HANDBOOK OF COMPARATIVE LAW 469 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2006). In this paper I am not looking at deeper and contentious questions such as:

[I]f law lives in and through language, what happens to it when it is transferred into another language? If the structure of a language influences, or even determines, the mode and content of thought, might it not be that any language can only express certain thoughts, and that these thoughts differ from culture to culture?

*See* BERNHARD GROSSFELD, THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW 101 (Tony Weir trans., Oxford Univ. Press 1990). Other questions can also be raised which jurilinguists will study, such as “how strong is the link between the law or a legal system and the language of its statutes?” and “is a ‘neutral legal language’ possible or even necessary?” *See* Dorato, *supra* note 6, at 618.