

12-31-2015

## One into Three: Spreading the Word, Three into One: Creating a Civil Law System

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## ONE INTO THREE: SPREADING THE WORD

### THREE INTO ONE: CREATING A CIVIL LAW SYSTEM

Esin Öricü\*

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#### I. INTRODUCTION

*being many, seemingly one*

Shakespeare, Sonnet 8

It is a great honour and privilege for me to have been invited to deliver the 38<sup>th</sup> Tucker Lecture here in the elegant surroundings of the Paul Hebert Law Center. It is also a great pleasure. The pleasure is enhanced by the fact that the Lecture falls on St. Patrick's Day, and more importantly, that it marks the fiftieth anniversary of the Center of Civil Law Studies, now directed by my dear friend Professor Olivier Moréteau, whose hospitality I am enjoying. Thus I hope you will find it appropriate that my talk is on spreading the word and also creating a civil law system.

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Let me first clarify the title of this lecture: the first part of the title refers to the Louisiana experience, which I will consider later in this talk. I call this “one into three”, since the now-monolingual Louisiana Civil Code is being translated into French and Spanish, which I define as “spreading the word.” The Louisiana Civil Code Translation Project Conference in 2014 called this expansion “enhancing visibility.” Louisiana is not alone in this, however. A well-known instance of this kind of enhancement, though for a different purpose, is the monolingual Dutch Civil Code being converted, by translation, into a trilingual Code (Dutch, French and English)—that is, another “one into three.”<sup>1</sup> There is also the instance of the translation of the bilingual Quebec Civil Code (originally in French and English) into Spanish, thus creating yet another trilingual Code, rivalling the Louisiana one, however, this time “two into three.”<sup>2</sup> Then, though not recent, there is Fisher’s translation of the Civil Code of Philippines from Spanish into English, “one into two.”<sup>3</sup> Other instances might come to mind.

The second part of the title refers to the Turkish experience. Before considering the Louisiana case, I will deal with the translation into Turkish from the already trilingual Swiss Civil Code (in French, German and Italian), seemingly a “three into one” case. I define this as “creating a civil law system.” If all the three versions of the Swiss Code were looked into by the Turkish translators—as should have been the case—it could truly have been “three into one.” Unfortunately, the Turkish translators used only the French version of the Swiss Civil Code. Furthermore, had the Swiss themselves been involved in translating their Civil Code into Turkish, then the title of this lecture would have been “One

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1. For this 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 Gémard & Nicholas Kasirer eds., 2005).

2. See Jimena Andina Dorato, *A Jurilinguistic Study of the Trilingual Civil Code of Quebec*, 4 J. CIV. L. STUD. 591-630 (2011).

3. For this see Francisco Capistrano, *Mistakes and Inaccuracies in Fisher’s Translation of the Spanish Civil Code*, 9 PHILIPPINE L.J. 89-141 (1929).

into Three – Three into Four!” In fact, the Swiss did produce an official English version of their Code (three into four—a quatorlingual Code), though English is not regarded as the fourth official language. Its use is mainly in commercial law and international arbitration cases.

The crucial role of translation in multilingual law-making should alert us to problems to be encountered in developing not a single but a multilingual legal language through the example of European Union harmonization. This is also worth noting for more lessons to be learnt, although I will not be dealing with these issues in this lecture.<sup>4</sup> For me as a comparatist, however, the connection to comparative law becomes more than evident in all the works above.

Also, what I will not be doing here is looking at deeper and contentious questions such as, “if law lives in and through language, what happens to it when it is transferred into another language?”<sup>5</sup> 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? There are also other questions to be studied by jurilinguists, 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?”<sup>6</sup> I leave the discussion of these questions to others: linguists, sociologist and anthropologists, who would be in a better position than I am to tackle these issues.

Now, I would like to start this lecture by looking briefly at some general concerns related to code translations, such as language, culture, transpositions, neologisms, equivalence and mistranslations.

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4. THE ROLE OF LEGAL TRANSLATION IN LEGAL HARMONIZATION (C.J.W. Baaij ed., 2012).

5. BERNHARD GROSSFELD, THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW 101 (Tony Weir trans., 1990).

6. Dorato, *supra* note 2, at 618.

## II. GENERAL CONCERNS RELATED TO CODE TRANSLATIONS

Intra-linguistic translations deal with two languages: a source language and a target language, although, legal language may be regarded as having a system-specific nature. However, when culture-specific institutions, procedures or official bodies are involved one would obviously expect problems. Because no two languages are sufficiently similar as to be considered to represent precisely the same social reality, the untranslatable can be transcribed or explained in such cases. In legal systems that portray socio-cultural and legal-cultural affinity, the *legal register* may have become naturalized as a result of *sufficient similarity*.<sup>7</sup> When it is a case of impossibility of translation, translator's notes may be required. This method however, could not be considered with ease when translating codes, where there are mostly instances of word-for-word translation and, occasionally, of neologism. Code translations are particularly difficult, are full of hazards and create specific problems, and resorting to the original text might become necessary for accurate results. Different to the translation of the Quebec Civil Code into Spanish, the Turkish translators, for instance, did not indicate "with a dagger symbol and notes 'infelicities in language' with an asterisk,"<sup>8</sup> thus outlining difficult or controversial choices in translation. In fact, in the Turkish case, there are no translators' notes as is the case in the Quebec Code translation into Spanish; 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, if they so wish.

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7. To translate technical words used by lawyers in France, Germany or elsewhere on the European continent into Turkish, which I will address later in this article, 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—though in the context of a code translation this may not be appropriate. See Martin Weston, *Technical and Practical Approaches to Translation* in AN ENGLISH READER'S GUIDE TO THE FRENCH LEGAL SYSTEM 9-42 (Berg, Oxford 1991).

8. See Dorato, *supra* note 2, at 595.

“An alternative way of dealing with culture-specific terms, when translation in the narrower sense is not possible,”<sup>9</sup> is transcription or borrowing, which is not translation. It may be assumed that between European languages, such as English, French and Spanish, the difficulties may be less pronounced than between European languages and a non-European language, such as Turkish, which I will deal with below. This is related to the presence or absence of common cultural denominators.<sup>10</sup>

It is true that the word is an essential vehicle of cultural influence and the language of a particular society is an integral part of its culture, yet cultures are not necessarily coterminous with languages. Because the lexical distinctions drawn by each language reflect the culturally important institutions and activities of that society, in the process of legal translation what is generally sought is functional equivalents. It can also be assumed that there is much *cultural overlap*. A greater or lesser degree of equivalence can be found in the *application* of the word, though there may be no synonymy between words of different languages. The general assumption is that exact equivalence cannot be obtained and that validity can be achieved only through control of factors that affect equivalence. Martin Weston—a onetime translator in the Secretariat of the Council of Europe in Strasbourg and Senior Translator in the Registry of the European Court of Human Rights—suggests five possible options open to translators facing 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,

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9. Weston, *supra* note 7, at 30.

10. For the problem of seemingly similar words with different connotations between French and English, see Vivian Grosswald Curran, *Comparative Law and Language* in THE OXFORD HANDBOOK OF COMPARATIVE LAW 675-707, at 678 (Mathias Reimann & Reinhard Zimmermann eds., 2006) and UGO MATTEI, TEEMU RUSKOLA, & ANTONIO GIDI, SCHLESINGER'S COMPARATIVE LAW: CASES-TEXTS-MATERIALS 154-62 (7th ed., 2009). The same problem exists between Dutch and German, and even Austrian and German.

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>11</sup>

Creating neologisms is a subsidiary solution and a last resort in any translation activity in law. Necessity must be the mandatory test. 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>12</sup> It is possible to combine old words to form new compounds or phrases. It must also be kept in mind that all neologisms created must satisfy the requirements of conformity with regular target language grammatical, morphological and phonological patterns. What is needed is naturalness, as well as economy and succinctness.

*Loanwords*, recognizable from the language of origin, borrowed from other languages, may be regarded in the receiving system as indications of cultural transformation and therefore less desirable. Preserving the source term can be an option when languages are related. Yet, as underlined by Rene 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>13</sup>

In his work, de Groot gives the example of *mortgage*, illustrating the translation of the Spanish word *hipoteca* into English as *hypothec*, rather than *mortgage*. He asks the question: “Would this term not look very odd to an English reader of the target text if no explanation is provided?”<sup>14</sup> Obviously, the word *hypothec* would work well with Scottish or Louisiana audiences!

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11. Weston, *supra* note 7, at 19-21, 31.

12. *Id.* at 28.

13. Gerard-René de Groot, *Legal Translation* in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 538-54, at 541 (2nd ed., Jan Smits ed., 2012).

14. *Id.* at 544.

Reading is related to *conceptual content*, and it is often impossible to give the meaning of a word without *putting it in context*. A word-for-word translation, that is *literal translation* (formal lexical equivalence), can be criticized in this regard. If there are source language expressions that defy translation in the narrow sense, then literal translation makes no sense. In such a case, transcribing or paraphrasing (*glossing*) can be recommended. The source language term will be given in italics or between inverted commas and followed in brackets by the target language gloss. Although this may be a workable method in general, one cannot clarify the original term in a code by adding a literal translation in parentheses. Although, Jimena Andino Dorato suggests that “where translation is found to be impossible, a note is evidently necessary” and in fact, there are seventy-eight translator’s notes in the Spanish version of the Quebec Civil Code.<sup>15</sup>

Because “sentences are unlimited in their variety of the arrangement of words,”<sup>16</sup> and because language is connected to context, and because in the context of statutory interpretation, the instrument is considered “an always speaking statute”<sup>17</sup> and the words are given their “natural and ordinary meanings” that reflect the “common sense” proposition, it seems difficult “to accept easily that people have made linguistic mistakes in formal documents.”<sup>18</sup> This, however, may not always be true, as, for example, seen in the Turkish translations.

Roman law terms may also be attractive as neologisms, since one can assume that lawyers have knowledge of Latin. Latin

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15. See Dorato, *supra* note 2, 613.

16. 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 79-90, at 81 (Basil S. Markesinis ed., 2000); Esin Örucü, *Interpretation of Multilingual Texts in the UK*, vol. 10.3 ELECTRONIC J. COMP. L. (December 2006), <http://www.ejcl.org/103/art103-9.pdf>.

17. Steyn, *supra* note 16, at 90.

18. *Id.*



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* can be retained in Latin. However, the target audience is not necessarily only lawyers, so care has to be taken.

As to ambiguity, that is the double meaning with doubt and uncertainty: *patent ambiguity* is obvious on the face of the instrument; *latent ambiguity* becomes apparent only when the surrounding circumstances are known. To resolve ambiguity, extrinsic evidence is admissible to enable the court to ascertain the meaning. Ambiguities in the meaning of the translated codes or other legislation are resolved by recourse to rules of construction and interpretation and, more important, resort to the original texts.

Finally, although inadequate for dealing with linguistic comparability, using *back translation*, a simple technique, may help in writing multilingual texts. Rather than offering solutions, however, it would serve as a detector of problems. A comparison of the two or more 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.

### III. THREE INTO ONE: THE TURKISH CASE

I would now like to move onto illustrating some of the above issues through the experience of Turkey with her process of total and global modernization, westernization, secularization, democratization and constitutionalism.

Let me tell you about the Turkish experience of creating a civil law system, and thereby a new identity for the populace.<sup>19</sup>

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19. The birth of this identity was also supported by the social reforms introduced by the eight reform laws (*Inkılâp Kanunları*), establishing secular education and civil marriage, adopting the Latin alphabet and the international numerals, introducing the hat, closing the dervish convents, abolishing certain titles, and prohibiting the wearing of certain garments. These reform laws are still protected by Art. 174 of the 1982 Constitution.

The Turkish Republic was founded in 1923, following the collapse of the Ottoman Empire. The Ottoman state already had a mixed legal system from 1839 onwards, with Islamic law and French law constituting the legal framework. Personal laws applied on the basis of religions of the various communities, forming a kind of legal pluralism. However, the Republic's vision of total modernization, westernization and secularization led to reform efforts that rested solely on import from major continental jurisdictions, both as to form and content. French administrative law was already put in place during the time of the Ottoman Empire. The borrowed codes now were the 1926 Civil Code and Code of Obligations from Switzerland, the 1926 Commercial Code from Germany, the 1926 Criminal Code from Italy, the 1927 Code of Civil Procedure from Switzerland and the 1929 Code of Criminal Procedure from Germany. Thus, from 1926 to 1930, within a span of five years, a civilian legal system was created. This meant that the legal framework was synthetically constructed through voluntary and imposed receptions, imitations, adaptations and adjustments. As a result, an *eclectic* and *synthetic* legal system was born, directly borrowed and translated from, and significantly replicating, foreign civilian models.<sup>20</sup> Such large-scale borrowings transformed the mixed legal system into a civilian system, thus promoting the civil law in Turkish. However, law was being infused from societies and laws that were socio- and legal-culturally diverse from her own.

At times the choice of system to borrow from was driven by the perceived *prestige* of the model, and at other times by *efficiency*. Sometimes *chance* or *historical accident* played a role. The fact that a number of different models were chosen, except on

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

the whole the civilian tradition might have given the borrowings *cultural legitimacy*.<sup>21</sup>

For my purposes here, I will only deal with the Civil Code. To achieve the aim of the vision and for the modernization of the civil law, the Swiss Civil Code was chosen. This Code was preferred over the French or the German ones 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; it favoured democratic equality by allowing freedom of contract, freedom of testation, equal rights in intestacy and equality of the sexes. Added to these reasons was also the fact that certain leading personalities in the Turkish legal world, such as the then Minister of Justice, were educated in Switzerland.<sup>22</sup>

The task of translating the trilingual Swiss Civil Code from its French version was given to a commission of twenty-six members. A number of special commissions later translated most of the important commentaries on various branches of law into Turkish. In fact, within the year of 1926, Turkish legal experts translated and produced three entirely new codes (Civil, Criminal and Commercial), and more were to follow.<sup>23</sup>

As a result of such far reaching translations, there were a number of problems created, the least being that the Turkish translators were not all professional translators but relied upon their knowledge of the specific foreign language necessary for translating a Code: in the case of the Swiss Civil Code, for instance, this was French. One feature these translators had in common was skill in French, though their knowledge of legal

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21. 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 65-82, at 68-69, 80 (1998).

22. See ERHAN ADAL, FUNDAMENTALS OF TURKISH PRIVATE LAW 44, 48 (rev. 5th ed., 1998).

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

French differed. Possibly none had any training in legal translation, though they were trained in law. There was a comparable problem in the case of the Quebec Code translation into Spanish. Dorato tells us that “one feature they [translators] all had in common was skill in Spanish, though their knowledge of Latin Spanish differed: only a few of them had studied or practiced law in Spanish speaking countries.” The “translators did not have much experience with respect to Quebec law and its context” either.<sup>24</sup>

We know that the three authentic versions of the trilingual Swiss Civil Code—German, French and Italian texts, prepared with great care—are all equally authoritative. And yet, there are various discrepancies between the three texts. The French, German and Italian versions of the Swiss Civil Code do not always agree. Since in Switzerland all the versions have equal value, in case of doubt, the judges have to resort to all versions and may have to make a choice between versions while interpreting the law, but not in Turkey. It is not difficult to expect that there were and still are problems created as a result of translations and building a system based on translation. If a faithful translation of the Swiss Civil Code were to be provided, the translators of such a multilingual text 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 Dorato points out, it is a requirement to get to all the texts (three in our case) and to take them all into account.<sup>25</sup> However, she tells us that in the Quebec translation of the code into Spanish, “even if the English version had an important role, the French version seems to have been considered the source text and the English version mostly as a translation of it,” though the translators knew that this was an officially bilingual code.<sup>26</sup>

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24. See Dorato, *supra* note 2, at 606, 609.

25. *Id.* at 602.

26. *Id.* at 611.

Neither did the Turkish translators have a basic knowledge of the legal system of the language they were translating from, which is a prerequisite “to properly translate at a scholarly level.”<sup>27</sup> A number of Turkish academics thereafter had most of their training in universities in the countries from whence the receptions came. They then undertook the *fitting* of the models to the Turkish situation and the *tuning* of them. In the early years of the Republic, language training and translations were extensive. Fortunately for the Turkish legal system, again in the early years of the Republic, as a consequence of a historical accident, Swiss, Austrian and German immigrant academics also contributed to the new legal system. This greatly helped the imported system to take root.<sup>28</sup> Professors such as Schwartz, König, Neumark and Hirsch were given sanctuary in Turkey before the Second World War, and held posts in the Turkish universities of İstanbul and Ankara. The presence of such Professors in Turkey at the time of reception fuelled the spread of civilian legal ideas. Many of their Turkish assistant lecturers later themselves became professors and so helped the *internal diffusion* and subsequent *infusion* of the law.<sup>29</sup>

A Turkish Civil law, a Turkish Commercial law, a Turkish Criminal law, a Turkish Criminal Procedure, a Turkish Civil Procedure and other laws have developed over the years, slowly diverging from the source laws. Nonetheless, even today, the higher courts, as the interpreters of the law, at times make use of the models when reaching decisions. They never base a decision

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27. Mattei et al., *supra* note 10, at 159. In fact, again Dorato points out that in the Quebec experience, the translators did not know of “the Quebecer’s perspective”, not having had contact with “the Quebec reality.” See Dorato, *supra* note 2, at 605. They “did not have much experience with respect to Québec law and its context” either. *Id.* at 609.

28. 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 IN ANHANG (1973).

29. See Esin Öricü, *The Infusion of the Diffused: Four Circles of Diffusion Infusing the Turkish Legal System* in DIFFUSION OF LAW: THE MOVEMENT OF LAW AND NORMS AROUND THE WORLD (Sue Farran et al. eds., Juris Diversitas Series, Ashgate Pubs. 2015).

solely on the source law, but the foreign models are still seen as aids to further modernization, as stimulus and corrector, aiding interpretation of the translated texts.

I must now mention three specific factors to illustrate the vastness of the task. The first factor is the peculiarity of the Turkish language and its total difference to the source languages: Turkish is a member of the south-western or Oghuz group of the Turkic languages. Other members of the group are the Turkic dialects of the Balkans; Azeri or Azerbaijani, spoken in north-west Iran and Azerbaijan; the Qashqai of south Iran; and the Turkmen or Turcoman of Turkmenistan.<sup>30</sup>

Turks were converted to Islam from the tenth century onwards and adopted the Arabic alphabet. A vast number of Arabic terms related to theology, thought and civilization entered the language. When the Seljuk dynasty was overrun by Persia in the eleventh century, Persian became the language of Turkish administration and literary culture. As a result, the “educated Turk’s vocabulary” was formed by “thousands of Persian words [which] joined the thousands of Arabic words.”<sup>31</sup> By the end of the thirteenth century, this hybrid language became the official language of the Ottoman dynasty. The speech of the majority of ordinary Turks, however, was always Turkish.

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30. See GEOFFREY LEWIS, *TURKISH GRAMMAR* at ix (1967). For those 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 “it”, and the undotted *i* (*ı*) is 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. On the new alphabet, see GEOFFREY LEWIS, *THE TURKISH LANGUAGE REFORM: A CATASTROPHIC SUCCESS* at 27-39 (1999) [hereinafter *TURKISH LANGUAGE REFORM*].

31. LEWIS, *TURKISH GRAMMAR*, *supra* note 30, at xx.

In 1928, the Arabo-Persian alphabet was replaced by the Latin one, but as a result of the nationalist element in the change, the new letters were not called Latin, but “Turkish”, in contrast to the old Arabic script. Because the Codes had been translated into Ottoman Turkish and promulgated in 1926, and published in the old script, after the change to the new alphabet, they had to be rewritten—that is, transcribed from the Arabic alphabet to the Latin one. The new versions appeared in 1934.<sup>32</sup> Thereafter a substantial language reform movement began. Ottoman Turkish was eliminated and Turkish words replaced Persian and Arabic words. Where none 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. Inevitably, this movement also impacted the Codes. Although the script was changed and an effort was made to keep the language simple, for a long time, the terminology remained mostly unchanged.

It must be remembered that the existing Ottoman legal language was totally different to 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.

The second factor 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 hailed from Islamic law: a different culture. I say “most” here advisedly, since following the Reformation movement (*Tanzimat*) in 1839, the Ottoman Empire moved, as noted, from being an Islamic State to becoming a mixed legal system, by borrowing a number of Codes from France in order to appease the

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32. 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 the 1970s on the right. The new 2002 Code is more accessible to lawyers, though not necessarily to laymen.

western powers: the Commercial Code in 1850, the Commercial Court Procedure in 1861, the Maritime Code in 1863 (also influenced by the Belgian and the Prussian Codes), and the Code of Criminal Procedure in 1879. These were also translations.

Furthermore, the potential users of the translations, judges and lawyers, were not familiar with the source languages, source culture or the source laws. Martin Weston observes that, “the fundamental difficulty in translation of any kind is how to overcome conceptual difference.”<sup>33</sup> A concept or institution peculiar to the source-language-culture is said to be “more or less untranslatable,” all else being “more or less translatable.”<sup>34</sup> Then the translator can opt for equivalence, looking for equivalents in the target language for terms of the source language legal systems.<sup>35</sup> As certain terms of art in the source legal traditions did not exist in the Turkish one, this was not possible in all cases in the Turkish situation.

Because legal terminology has system-specificity, equivalents work well when the legal systems concerned are nearly the same or very similar. There are also “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>36</sup> 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>37</sup> So, “how should translations be elaborated when a legal phenomenon has no exact equivalent in two languages?”<sup>38</sup> This has been a significant problem in Turkey.

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33. Weston, *supra* note 7, at 9. Also see de Groot, *supra* note 13, at 538.

34. Weston, *id.*

35. de Groot, *supra* note 13, at 539-40.

36. Curran, *supra* note 10, at 679.

37. Weston, *supra* note 7, at 21.

38. Curran, *supra* note 10, at 678.



The third factor to be noted 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. If foreign words are borrowed either in terms of loan-borrowing or *calque*, they must be converted into Turkish symbols to be pronounced correctly. Previously, the spellings were changed when words were generally borrowed from French, German, Italian and English to fit the phonetic Turkish language. For example, French “station” became “istasyon”, Italian “scala”, “iskele”, German “schlep”, “şilep”, English “steam”, “istim” and so on.<sup>39</sup> Today, this does not seem to happen. Not only that, but English seems to have entered the Turkish language at an enormous speed. Geoffrey Lewis calls this “the new yoke.”<sup>40</sup>

In spite of the fact that Roman law was taught in Law Faculties in Turkey, jurists in Turkey know no Latin. Therefore, Roman law terms and Latin phrases, which may be attractive as neologisms, could not have been retained in Latin, as the basis of the Turkish language is not Latin.

While reminiscing of his years of teaching commercial law in Turkey, Professor Ernest Hirsch, one of the foreign professors working in Turkey during the formative years of Turkish law,<sup>41</sup> writes that he was not using the Turkish Commercial Code since he knew no Turkish. Rather, he used 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 one. The Code was therefore eclectic and in its translation a variety of terminology was used, depending on the translator. He reports that

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39. For more examples, see LEWIS, *TURKISH GRAMMAR*, *supra* note 30, at 9.

40. LEWIS, *TURKISH LANGUAGE REFORM*, *supra* note 30, at 133-39.

41. 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 173, İstanbul Üniversitesi Hukuk Fakültesi No: 1888/421, 173-89 (1973).

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>42</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 the lectures were partially ambiguous and partially incomprehensible!

Most of the codes have been updated in our day: the Civil Code in 2002, the Criminal Code in 2005 and the Commercial Code in 2011, but the bases have not changed and they still carry the stamps of the translated laws of the 1920s, though these new codes are not direct translations any more.

#### IV. ONE INTO THREE: THE LOUISIANA CODE

I am aware that I will be partially “taking coal to Newcastle” or more colloquially here, “sand to the beach,” when I talk of the Louisiana experience at Louisiana State University. Be that as it may, let us now turn our gaze to the Louisiana experience. When we look into the history of codification in Louisiana, if the 1769 O’Reilly’s Code,<sup>43</sup> based on Spanish law transforming Louisiana into a Spanish ultramarine province, is left to one side, we see as the first important enactment the 1808 Digest: “A Digest of the Civil Laws now in Force in the Territory of Orleans, with Alterations and Amendments Adapted to its Present Form of Government.” This Digest, known as the Louisiana Civil Code of 1808,<sup>44</sup> was bilingual, published both in French and English, the English version being a translation from the French original. This is the Code which was revised in 1825, again as a bilingual code, and finally in 1870. As revised and amended, the 1870 Code, now

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42. *Id.* at 176.

43. There are lively discussions on whether the O’Reilly Code repealed the French law that prevailed in Louisiana then, as French law was still in force at the time of the Purchase (especially between Tucker, Batiza and Pascal). However, there is no published project acknowledging the debt to either of the sources.

44. Here, too, we must say that the discussion as to whether the Code was a Code or a Digest, even for the present code, never went away.

monolingual and only in English, but bilingual in spirit, remained the foundation of Louisiana private law until very recently. Even today, parts of the 1870 Code are deemed applicable.

The 1808 Civil Code or Digest was based on a variety of sources, its model being the preparatory works and the final text of the French Civil Code of 1804, together with Roman law, Spanish law and Common law. One might say that Spanish law remained in the blood, though the French model dominated: when there was an obvious difference between Spanish and French laws, the redactors were careful to adopt Spanish solutions.<sup>45</sup>

The 1808 and the 1825 Civil Codes were mainly a blend of two specific sources (French and Spanish) and both Codes appeared in French and English, first drawn up in French and then translated into English. Although both versions had equal status officially, there were a number of errors in the English text. In the event of obscurity, ambiguity, fault or omission, both texts were to be consulted and mutually serve the interpretation of one or the other. This was the case for the 1808 enactment. For the 1825 one, the two texts were printed on facing pages and there were no provisions for the resolution of conflicts between the two texts. Because of the poor quality of the translation, the courts came to the conclusion that the French text was to be controlling. This strengthened the place of French culture in the Louisiana civilian tradition since the legal profession had to be familiar with French legislation, jurisprudence and doctrine.

Although the 1825 Code followed the French Civil Code closely and the redactors relied heavily on French doctrine and

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45. See Vicenç Feliu, Dennis Kim-Prieto & Teresa M. Miguel, *A Closer Look: A Symposium Among Legal Historians and Law Librarians to Uncover the Spanish Roots of the Louisiana Civil Law*, Librarian Scholarship Series Paper 23 (2010), <http://digitalcommons.law.yale.edu/ylss/23>. The authors consider the debate regarding whether the origin of Louisiana civil law is based in the Spanish or in the French legal tradition, which has been ongoing since its incorporation into the United States. They propose and demonstrate that the Spanish, not French, civil law had an enormous influence on the creation and evolution of Louisiana civil law and that this legacy resonates today.

jurisprudence, the Roman and Spanish sources were still there, their basic assumptions and character being retained unless better rules could be found or devised. The redactors also identified their sources for the amendments, deletions and additions. The still-bilingual 1825 Code, as an all-inclusive piece of legislation, intended to break with the past. It was not just an amendment of the 1808 Digest. Its article 3521 stated that:

The Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the legislature of the territory of Orleans and of the Legislature of the State of Louisiana, are hereby repealed in every case, for which it has especially provided in this code, and that they shall not be invoked as laws, even under the pretence that their provisions are not contrary or repugnant to those of this Code.

Not seeing this to be sufficient in view of the attitude of the Louisiana Supreme Court, in 1828 the Great Repealing Act was passed.

We see that this blend survived in the 1870 Code, though now only in English. This Code was published under the title “The Revised Civil Code of the State of Louisiana.” Actually, it was substantially the Code of 1825. The revision related to the elimination of certain provisions such as those concerning slavery and incorporation of amendments made with integration of acts passed since 1825. The articles were thus re-numbered. The question then became whether the French text was still to be regarded as the controlling text as and when a conflict occurred between the English and the French versions in the untouched articles of the 1825 Code, now in the 1870 Code. Because the French and Spanish speakers in Louisiana had vastly dwindled, this approach became untenable, however. Nevertheless, the 1870 Louisiana Civil Code was both functional and durable.

In the last decades of the twentieth century, countries such as Quebec, the Netherlands, Belgium and France all felt the need to

update their codes, as these codes did not reflect or respond anymore to the social needs of the populace. The Louisiana legislature also decided to produce a new code and, similar to the Dutch, chose the method of selective revision of individual titles and chapters. The revision started in 1987 and within ten years most of the Code was completely revised. The present Code (or as some have it, the new Digest<sup>46</sup>) has other sources than the classical French and Spanish, though all in the civilian legal tradition. There are, for instance, references to German, Greek, Italian, Quebec, Swiss and even Ethiopian Codes, as pointed out in the comments following the articles of the Code. Thus it does indeed enhance the visibility of the civil law tradition and as such it can be expected to contribute further to the American common law culture in the other American states and the federal law. This can be assessed as promoting the civil law in English.<sup>47</sup>

By translating the Code into French and Spanish, the visibility will be further enhanced.<sup>48</sup> We already know that the 1825 Louisiana Code has had its impact on a number of Latin American civil codes, such as the Chilean (1855), which influenced later Latin American codifications, such as the Ecuador of 1857, Colombia of 1873-1887, El Salvador of 1859, the Brazilian of 1864, and the Puerto Rican and Argentinean ones of 1871.<sup>49</sup> The Argentinean Code then became a model for others and also

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46. See Vernon Palmer, *The Death of a Code—The Birth of a Digest*, 63 TUL. L. REV. 221-64 (1988); Vernon Palmer, *Revision of the Code or Regression to a Digest? A Rejoinder to Professor Cueto-Rua*, 64 TUL. L. REV. 177-86 (1989), among others.

47. However, see, Alain Levasseur & Vincenç Feliu, *The English Fox in the Louisiana Civil law Chausse-Trappe: Civil Law Concepts in the English Language; Comparativists Beware*, 69 LA. L. REV 715 (2009).

48. The French translation is well under way. We must remember here that while, obviously, the translation is into standard French, the position of Cajun French, spoken by some in Louisiana, is neglected. See the emphasis in the 1968 CODOFIL (Council for the Development of French in Louisiana) report, as discussed in 2014 by James Etienne Viator, *Kreyol-Ye, Kadjen-Ye, E Lalwa a Langaj Dan Lalwizyann (Creoles, Cajuns, and Language Law in Louisiana)*, 60 LOY. L. REV. 273 (2014).

49. See Rolf Knutel, *Influence of the Louisiana Civil Code in Latin America*, 70 TUL. L. REV. 1445-77 (1996).

influenced the revisions in 1984 of the 1870 Louisiana Code in the area of conventional obligations. The 1825 Louisiana Civil Code served as a natural model for the drafting, style and substance of these Codes in Latin America. According to Knutel, the Louisiana Civil Code, animated by the spirit of Roman Law and of civil law, has been “the means of transportation through which, the fruits and results of this legal thinking arrived in the then–modern and young South American states.”<sup>50</sup> In addition, in the Caribbean Basin, the Civil Code of St Lucia was also impacted by the Louisiana Civil Code.

Even the Spanish Civil Code was influenced by the Preliminary Title of the revised edition of the 1870 Louisiana Code, in the changes introduced into the text of the Spanish Code, which is younger than the 1870 Louisiana one. Thus Louisiana Civil Code provisions were exported into Latin America, and back to Spain and Europe in the “Old World.”<sup>51</sup> As Knutel notes:

The Roman legal institutions, maxims, and solutions to legal problems travel around the world, from Rome to France and Spain; from there to Louisiana; from Louisiana to Latin America; and from Latin America back to Louisiana and back again to Europe. They may change their appearance, but in their substance, they remain Roman.<sup>52</sup>

Hopefully, the Louisiana Civil Code will again be a model for Latin American code revision projects, competing with the Quebec Code. In this context, the Spanish version rather than the French should prove to be the more valuable of the two.

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50. *Id.* at 1467-68. Knutel also asks the question (1451-52), why would the lawmakers of a Code think it would be helpful or appropriate to borrow a foreign code (the LA. CIV. CODE) for their work? He gives as reasons: it was relatively easy to gain knowledge; the 1825 LA. CIV. CODE was the first civil code of the New World and therefore became a model; and the community played a role in legal development.

51. *Id.* at 1451, and Shael Herman, *Louisiana's Contribution to the 1852 Projet of the Spanish Civil Code*, 42 LA. L. REV 1509, 1512 (1982).

52. Knutel, *supra* note 50, at 1474.

In sum, viewed from a historical point of view, today's translation of the present Louisiana Civil Code into French and Spanish does not come as a surprise. The affinity to both French and Spanish laws has been there from the start. We also have to remember that although the 1808 and 1825 Codes were bilingual, the French text was the controlling text, as it was claimed that the English translation was done in a hurry and was not very accurate. Even after the 1870 Code this discussion did not die away. Again from a historical perspective, today's translation project signifies Louisiana's legal and cultural heritage and a return to an original identity that is based on French and Spanish cultures. Though not its overt aim, this "one into three" can therefore also be regarded as a rekindling of the past, a nostalgic move towards a past heritage that might be in the process of being lost.<sup>53</sup> Because common law influence expanded, and the 1870 Code faced the danger of becoming just another statute, the new Code and this translation project is also making a statement. Re-asserting the civilian past may be seen as a stamp of identity in a common law surrounding in the twenty-first century, a century that is today regarded as the century of the common law and of the American kind.<sup>54</sup>

Viewed from a comparatist's point of view, the comparators for Louisiana are the Quebec and the Dutch experiences. For instance, when the trilingual edition of the Civil Code of Quebec came out in 2008, the Spanish version was added to the French and English versions as the third column on the left. The format of three columns side by side was preferred and "the metamorphosis from translation to trilingual Code is also emphasized by the title: 'Código Civil de Quebec–Code Civil du Québec–Civil Code of

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53. For elements in mixed legal systems that are endangered, *see* contributions in *A STUDY OF MIXED LEGAL SYSTEMS: ENDANGERED, ENTRENCHED OR BLENDED* (Sue Farran, Esin Örürü & Seán Patrick Donlan eds., *Juris Diversitas Series*, Ashgate Pubs 2014).

54. *See*, for example, Pacifico Agabin, *Philippines: The Twentieth Century as the Common Law's Century* in *id.* at 61-87.

Québec’.”<sup>55</sup> This is a Code presented in three languages. Neither is there an indication that the Spanish version lacks authority. Different to the Louisiana and the Dutch Codes which are “one into three” cases, the Quebec Code was a bilingual text being translated into a third language: “two into three.” Last but not least, an important question is, “which Spanish or whose Spanish?” When there are regional variants of the language into which a code has to be translated, should one search for or create a neutralized language? In the Quebec experience, although mainly the Argentine version of Spanish was used, Dorato says that “the Spanish ‘neutralization’ that appeared in the second stage, seems to have been more a search for a neutral Latin-American Spanish than an international Spanish.”<sup>56</sup> Would looking at the Spanish as used in the EU legislative translations have helped?

#### V. ROUNDING UP

According to Eva Hoffman, unless “the entire language” around the word or its audience is transported, distortions occur in translation of even a single word in “transporting human meaning from one culture to another.”<sup>57</sup> Pierre Legrand claims that “legislation cannot make mores.”<sup>58</sup> As seen earlier, the entire Turkish legal system, which is 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, and therefore—we can infer—translations, as a way forward for legal systems, Alan Watson is of the view that even when misunderstood or even mistranslated, a borrowed institution or concept may solve the problems for the

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55. Dorato, *supra* note 2, at 609.

56. *Id.* at 617.

57. EVA HOFFMAN, *LOST IN TRANSLATION: A LIFE IN A NEW LANGUAGE* 272-73 (1991, 2008).

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



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>59</sup> Furthermore, “foreign law can be influential when it is totally misunderstood.”<sup>60</sup> When one looks at the Turkish experience again, it can be said that Watson’s views can be endorsed.

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>61</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 relationship indeed as profound as is purported?

One crucial question to pose related to all translated codes must be: why translate a code? Aims and reasons vary.

By creating completely new laws, the aim of the Turkish experience was to demolish the foundations of the old legal system. Not only that, but the intention was to regulate, by means of legislation, the relationships of the people, not according to existing customs, usages, and religious mores, but according to what it was thought these relationships ought to be. In fact, to achieve this aim, the received Codes were accompanied by eight radical social reform laws (*İnkilap Kanunları*), establishing secular education and civil marriage, adopting the Latin alphabet and international numerals, introducing the hat, closing the dervish convents, abolishing certain titles and prohibiting the wearing of certain garments. The constitutionality of these laws cannot be

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59. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 52 (1974).

60. *Id.* at 99.

61. Discussed by Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions* in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 441, 469 (Mathias Reimann & Reinhard Zimmermann eds. 2006). *See also* Grossfeld, *supra* note 5, at 101; and Dorato, *supra* note 2, at 618.

challenged even today (Art. 174 of the 1982 Constitution), nor can their amendment be proposed.<sup>62</sup> The radical reforms in Turkey aimed at the basics: language reform, a new western system of law, a new sense of national identity based on a newly created culture, excluding the unwanted Islamic and Arabic elements of the Ottoman heritage, which created a civil law tradition.

Can it be suggested here that the Turkish Codes, originally all translations from civilian codes, might be vehicles to “spread the word further a-field” as models for the newly emerging Middle East, Turkic and North African countries?

The aims of other experiences are quite different and not as revolutionary or even radical as the Turkish one. The present aim of the Louisiana experience, for instance, is not that radical: enhance visibility and promote the Louisiana civil law, which is in English, mostly to countries in Latin America. Since this new code has its sources in a number of civilian codes, it is a fine example of a synthetic amalgam worth exporting. Time will show its destiny as a trilingual code. The wider impact of the more recent codification effort has already been felt, for instance in Estonia, through the help of Professor Yiannopoulos in the production of the Estonian Civil Code, although the direct influence of the Louisiana Civil Code was limited.<sup>63</sup>

The main aim of the Quebec experience can be compared to the Louisiana one. The Quebec Code is also the main competitor to the Louisiana Civil Code. Already in English and French, its Spanish version may prove useful if the aim is to spread the word and act as a model in Latin America. It is a vehicle for exporting

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62. However, change is in the air as a new Constitution is being prepared.

63. See Paul Varul & Heiki Pisuke, *Louisiana's Contribution to the Estonian Civil Code* 73 TUL. L. REV. 1027-31 (1998-1999). Since parts of the LA. CIV. CODE, specifically on Property law (arts 1994-1999), impacted the Estonian Civil Code, can we then say that the LA. CIV. CODE was partly translated into Estonian?

Quebec legal ideas into Spanish-speaking countries.<sup>64</sup> In the Preface of the Code, a number of aims are stated. The trilingual Code is presented as a tool for legal practice in Quebec as well as having a theoretical use as an asset in comparative law. Another aim, again stated there and more important for our purposes here, is to serve as an inspiration to a number of foreign legislatures.<sup>65</sup>

The aim of the Dutch translations, especially into English, is to enhance its position as a prospective model in the emerging democracies in Eastern Europe and also have an impact on the scholars and politicians in multilingual European Union law-making. Dutch not being an international language shared by a large number of nations, and English seemingly becoming the new *lingua franca*, this prospect has definitely been strengthened by this translation process. It is a true expansion of visibility of a civilian system into the English language and into the common law world, mainly within the context of the European Union

The aim of the Philippines translation was the preservation of the Spanish civilian heritage in a country where Spanish as an official language has been lost and the impact of American common law has grown exponentially

Obviously, the Turkish experience is not similar to the others such as Louisiana, Quebec or the Dutch also in another way, in that here it is the recipient that translated someone else's codes and not

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64. Dorato says, for this “the timing was excellent since this was a decade of re-codification efforts in Latin American countries.” Previous successful efforts include Paraguay (1985), Peru (1984) and Brazil (2009). Dorato, *supra* note 2, at 604. When Argentina wanted to reform its Civil Code, the bill that was passed was to “a significant extent inspired by the Civil Code of Québec,” “recently enacted, clearly written and [considered] an excellent infusion between civil law and common law.”: *Id* at 603-604. Argentina eventually adopted a new project presented in 2012, and passed into law on October 1, 2014, to take effect on January 1, 2016: Julieta Marotta & Agustín Parise, *Argentina - On Codes, Marriage, and Access to Justice: Recent Developments in the Law of Argentina*, 7 J. Civ. L. Stud. (2014).

65. *See id.* at 594.

the Swiss, Germans and Italians that translated their own codes into Turkish

The final words must be that the most important factor in all these projects is the human factor. Through creative interpretation, mistakes and inaccuracies in translation (unless they are there on purpose) can be either eliminated over time with minor corrections or give a different direction to the law compared to the source laws. For this, an active judiciary and creative academics are needed. Louisiana definitely has them in abundance. The hope is that they will continue to inspire those in other jurisdictions and also help in training multilingual jurists.

May the word be spread and visibility enhanced to the glory of the Louisiana mixed legal system.

As to the civil law, a quote from Shakespeare's Sonnet 8 sums it up: "being many, seemingly one."