

Esin Örüü

Infusion of the Diffused

The example of the Turkish legal System
– Too much too early, too little too late?

1 Introduction

Comparative law has been widely criticised for lacking in theory and for being Euro-centric, black-letter-law and private law oriented. The criticism comes mainly from legal theorists of various shades, international lawyers, sociologists of law, anthropologists of law and some comparatists who are interested in law and society and do not regard comparative law solely as a tool for the practice of law. There are also still those who see merit in the study of normative rules alone, alongside those who believe that law can only be studied in context to be meaningful. Research into culture, tradition, identity, distinctiveness, difference and legal pluralism compete with mainstream comparative black-letter-law research. Comparative law has indeed been at a crossroads for some time.

During this past two decades we have witnessed increasing interest in all forms of comparative law, international law and transnational law. The character, quality and quantity of work have increased and changed, but the basic problems have remained the same.

The continuing controversies of comparative law start with the name (comparative law / comparative legal studies) and continue with the subject (it does not exist / it is the most sophisticated branch of social science), the content (merely a method / the only approach to law), the methods (there is only one: either functionalism or contextualism / there are many on a sliding scale), and end in the issues discussed, theoretical and otherwise: legal families ('civil law + common law = the world' / mixed systems / extra-ordinary places); convergence / divergence (stress-

ing either similarities or differences); translate / do not translate; transplant (transposition / transplants are impossible); normative inquiries / cultural immersion; common core / better law; private law / public law; and finally, the place of metaphors (they are useful / they are misleading and an apology for lack of theory).

A critical overview moves us on to contemporary and burgeoning areas of, and new directions and new territories for, comparative law – such as the convergence/non-convergence debate, law in context (culture and economics), cultural distinctiveness and diversity, globalism versus localism, legal families and mixed systems, competition between legal systems, looking beyond the western world, the use of comparative law by judges, the role of comparative law in law reform activities and harmonisation, public law comparisons in both constitutional law and administrative law, a new common law in human rights, the ‘common core’ and the ‘better law’ approaches, and comparative law for international criminal justice. A number of other topics, some theoretical such as the post-modern critique of comparative law; theories about peoples’ practices and of different groups of actors of the law; and beyond legal rules, and some substantive topics such as alternative dispute resolution, e-commerce, environmental law, bio-ethics or food safety are also becoming prominent in comparative law research today.

Let us start by stating the obvious, comparative law or comparative legal studies, involve comparisons, that is: juxtaposing the unknown to the known. Comparisons in turn, confront us with four vital questions: How is comparison to be done? What is to be compared? Why do we carry out comparisons? And finally who compares?

Although we know that there is no consensus on methodologies to be used, the answer to the first question leads us into methodologies of comparative law.

The answer to the second question involved three levels of comparisons: macro-comparison, that is, comparing entire legal systems, mezzo-comparison, comparing areas of law, and micro-comparison, comparing specific rules of law. In this context comparative legal studies must resolve first the problems of classification of legal systems which is one of the important, but another controversial area of this subject.

The third question has a number of answers: as an academic, one generally undertakes comparisons to further knowledge, as a legal historian comparatist, to trace relationships between legal systems. Comparisons are also undertaken for pragmatic reasons, as a precursor to introduce

law reform, to undertake harmonisation and/or unification activities. It is in this context that we start considering comparative law as providing a pool of models and it is here that we talk of, what I call, trans-frontier mobility of law used as a generic term to cover a wide variety of instances, concepts and metaphors.

The answer to the final question will yield us academics – usually called comparatists – or by some, comparativists; legal experts dealing with development studies; the so-called regionalists, judges and finally legislators.

In the context of the third question, which on the whole looks at trans-frontier movements of the law, what comes to the fore is law being moved between legal systems either for purposes of domination, law reform or harmonisation activities. We could be facing modernization desires, harmonisation projects, circulation and penetration of global concepts. My preferred terminology for all such activities is the umbrella concept, trans-frontier mobility of law. However, more often, ‘trans-plants’ has been used as a generic term, as the umbrella concept. Alan Watson is the guru we should refer to for this metaphor and some others too.¹

2 Trans-frontier movements of law

It is a given that laws are moved from system to system, from legal culture to legal culture. Another important fact is that there is no need for comparisons to take place to achieve this movement, that is, in order to move a law one need not carry out an extensive comparative search: one model will do. Thus, comparison is not a *sine qua non* of legal transfers. Especially historically, this has been the case in colonial relationships. Again, although geographical proximity and shared language and culture are often presented as factors that impact transplants, these factors too are not a *sine qua non* of such, since laws have traveled long distances across regions and languages, although physical proximity and economic ties obviously aid the process.

Terminology such as transplant, imposition and reception are used in classical statements of legal movements. These have been supplemented by a colourful vocabulary highlighting nuances in individual instances of this mobility such as grafting, implantation, re-potting, cross-fertil-

¹ A. Watson, *Legal Transplants: An Approach to Comparative Law* (1974).

isation, imposed reception, solicited imposition, crypto-reception and inoculation.² We also talk of cross-pollination, engulfment, emulation, infiltration, diffusion, infusion, digestion, salad bowl, melting pot and transposition.³ New notions and bases for analysis are being developed such as collective colonisation, contaminants, legal irritants, layered-law, hyphenated-law and competition of legal systems. Images such as contamination, inoculation, irritation, diffusion, infusion, seepage, migration, circulation and infiltration are all appropriate in describing present day encounters. The terms reception, imposed reception and concerted parallel development depict the activities.

We see that there is a plethora of metaphors used to indicate what is happening when trans-frontier mobility takes place and how this is happening. The list seems to be endless, every researcher adding yet another metaphor to the list for the specific analysis that is being offered. We can even talk of a 'charter of metaphors'.

Although there are those who refute the phenomenon of such movements, or at least their being meaningful and beyond creating a possible virtual reality, we have to admit the fact that this is a very fertile field of legal development and throughout history such movements have taken place very often and are taking place now in our day. The crucial question is not whether to borrow or not, but how to make the received fit the existing surroundings and work to achieve the desired result it was borrowed for: therefore implementation. One should obviously also differentiate between functionalist, universalist, technocratic, political or merely decorative borrowings in furthering one's analysis in individual case studies.

3 Diffusion and Infusion

Since in the title of this contribution I use diffusion and infusion, I will now move into these metaphors. In fact, the diffusion theory is a glorified transplant theory put into social science terminology indicating the spread of ideas – a special type of communication (autopoiesis). Seemingly, the theory as such suffers from 'an export bias' as it looks at the innovator-exporter (diffuser), and therefore may lead to virtual conver-

² See, Watson ff53 at 30.

³ See, Esin Örücü, 'Law as Transposition', (2002) 51 *International and Comparative Law Quarterly*, 205–236.

gence. It does not deal with 'infusion' that is, the importers' point of view, and therefore cannot measure genuine or actual convergence, which involves internalisation of the received and thus the 'fit'.

The word 'diffusion' comes from Latin '*diffundere*' meaning to spread out, and in science is a theory used in fluids and has been defined as the process in which small particles released, or produced, in one part of a fluid spread out to form an even distribution throughout the whole volume of the fluid, or to pour out a liquid with wide dispersion or spread. It is synonymous with spreading, propagation and dispersal. In scientific terms an example could be: a drop of ink added to a bucket of water will disperse and eventually colour all the water in the bucket, even if the water is not stirred. This need to be elaborated upon as it also corresponds to my understanding of 'infusion' to be further discussed below.

The theory, originally used in physics, chemistry and biology, has been translated into social sciences and used in anthropology, sociology, economics and finance. It has been given a relevant and rather broad meaning. William Twining for instance, believes that this theory rather than transplant theories should be taken up by comparatists to explain the phenomenon of how legal systems convergence.⁴ Twining advocates the use of social science sources.⁵ Though diffusionism seems to have gone out of fashion in anthropology, this is not the case in sociology. In this approach, the spread of ideas is pitched against the concept of innovation. Twining talks of cross-level diffusion, as diffusion also implies interaction or 'inter-legality' born out of a spreading in space.⁶ Diffusion can also be regarded as 'an informal spread', as a general and abstract term, embracing contagion, mimicry, social learning, organized dissemination' and other ways.

If diffusion is envisaged as circles or waves spreading, then I suggest it should be considered together with the 'wave theory'. The 'wave theory' or 'wave hypotheses', which shows how changes spread like waves and disperse over a wide area, was introduced in the 19th century by a Ger-

⁴ See William Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism* 1–45 and in (2006) 1:2 *The Journal of Comparative Law*, 237–260. Also William Twining, 'Social Science and Diffusion of Law' (2005) 32 *Journal of Law and Society*, 203–40. Twining refers to the 'diffusion of law' research carried out by Everett Rogers (See Everest M. Rogers, *Diffusion of Innovations* (Free Press, 1995 [1963])).

⁵ Twining (2006), *ibid* 238–239.

⁶ *Ibid* 249.

man linguist, Johannes Schmidt in 1872.⁷ According to this hypothesis, different linguistic changes may spread like waves over a speech area and thus lead to convergence. A subsequent wave may also move to areas not covered by the earlier wave. Schmidt drew lines (isoglosses) on a map to separate places where there were language differences – one isogloss enclosing one area with a particular linguistic form (divergence). Successive waves create a network of isoglosses.⁸ Following various local divergences, the subsequent groupings would then have come about by the operation of the wave model. In this hypothesis, two or more closely related languages may each have features in common with their own neighbours that they do not share with each other.

It must be remembered however, that similarities do not always arise from genetic relationships, neither does resemblance necessarily indicate common origin. There can be ‘horizontal transfers’ between adjacent systems. ‘Horizontal transfer’ can also explain why a borrowed concept or institution does not always retain exactly its original meaning. Areas nearest or adjacent to the initial change will change first and may even give up their own peculiarities. Subsequent re-groupings may come about on the ‘wave model’. Thus convergence can occur between concepts or systems originally very different. The ‘knock-on-effect’, which can be regarded as the ‘ripples’ of the wave, can also be used to explain developments.⁹

It is important to note that contact leads to convergence and convergence to uniformity. Thus, similarities can develop through time, by the process of convergence through contact. Therefore, common parentage is not in issue, since the ancestors could have been quite dissimilar, but through continuing contact, mutual influence and borrowing, the languages become significantly closer to each other, though never becoming identical. Thus waves cause diffusion and dispersals, occurring spontaneously through contact.

If the term ‘language’ is replaced by ‘law’, one can see that this combined approach could also indicate a way forward for an understanding of how legal systems function, change and develop; converge or diverge, catering for our understanding of both.

⁷ Johannes Schmidt, *Die Verwandtschaftsverhältnisse der indogermanischen Sprachen* (Weimar, Böhlau, 1872).

⁸ Renfrew Colin Renfrew and KL Cooke (eds) *Transformations, Mathematical Approaches to Cultural Change* (New York, Academic Press, 1979) 105.

⁹ Ibid 111.

Contamination,¹⁰ derivation and diffusion are all variations on the theme of 'trans-frontier mobility of law', which shows that legal systems live in contact and interaction, and are interrelated. Systems may have common roots or may have heavily borrowed from each other or, through some historical accident, be derivatives from a parent system. However, when laws are moved and then 'transposed', that is, 'tuned' to create the 'fit', variations occur.¹¹

As diffusion should be considered in combination with the wave theory to show the spread, so should infusion be considered together with transposition to indicate the internalisation of the diffused.

As a scientific terminology, infusion is a steeping process, extracting chemical compounds or flavours from plant material in a solvent such as water, oil or alcohol by allowing the material to remain suspended in the solvent over time. More specifically, it is the process of pouring water over a substance, or steeping the substance in water, in order to impregnate the liquid with its properties or virtues. A herbal infusion is what comes to mind in ordinary life.

Diffusion in law then would be the spread of laws from points of dispersal in waves and when the waves reach the shores of other legal systems then infusion must take place to impregnate the recipient legal system or systems, become internalised and fit the new environment.

In law then, each legal institution or rule introduced from one legal system (diffuser) to another (the recipient), is diffused into the system of the recipient, the transposition occurring to suit the particular socio-legal culture and needs of the recipient upon infusion. If there is positive receptivity, significant adaptations can be made to fit the diffused into the pre-existing formal or informal legal order. The diffusion can, in addition, create new developments through infusion and the knock-on effect. Mathias Siems has suggested that sometimes the transplant may work

¹⁰ Olivier Moreteau has added to this concept further meanings, as he says that reception, migration, circulation and the like describe the visible, contamination refers to the less visible. See Olivier Moreteau, 'The Intruction to Contamination' (2010) 3 *Journal of Civil Law Studies*, 9–15.

¹¹ See Öricü, above note 3, 205. "The term "transposition" is more apt in instances of massive change based on competing models, in that here the pitch is changed. In musical transposition, each note takes the same relative place in the scale of the new key as in the old, the "transposition" being made to suit the particular instrument or the voice-range of the singer. So in law.' Ibid, 207.

better here than in the original country. This he calls 'overfitting legal transplants'.¹²

Although originally the term 'legal transplant'¹³ has been the usual one applied to all these import and export activities, I believe that the term 'transposition', is more appropriate as it also involves 'tuning', that is the process of 'fit', the most important element for the workings of a legal system. Legal developments of our day are best seen as instances of transposition, successful infusions. The 'tuning' to take place after transposition by appropriate actors of the recipient is the key to success: the diffused must be infused. In fact, there may be a number of transpositions, since no single model has to be used by any one recipient. Old models may be abandoned with 'optimistic normativism' while new legal models are looked for.¹⁴ In such a case, a transplanted legal system not compatible with the culture in the receiving country, without the appropriate transposition and tuning, will create only a virtual reality.¹⁵ In answer to the question, 'how do legal ideas, institutions and structures find their way from one location to another?' it has been said that 'laws do not have wings'.¹⁶ This alone highlights the importance of those who move the law and help in its diffusion and infusion, and internalisation, that is, 'tuning'. Countries that adapt transplanted law can have more effective legality by further developing their formal sources and building effective legal systems with effective economic development. This receptivity

¹² MM Siems, 'The Curious Case of Overfitting Transplantations' in M Adams & D Heirbaut (eds) *The Method and Culture of Comparative Law*, 2014) 133–146.

¹³ Monateri claims that the term 'legal transplant' utilised by Watson for 'scholarly purposes' is today taken over by 'purposive practical lawyers' involved in projects of 'exporting their own legal systems'. See, PG Monateri 'The "Weak" Law: Contamination and Legal Cultures' in *Italian National Reports to the XVth International Congress of Comparative Law*, Bristol, 1988 (Milano, Guiffre editore, 1988) 83. Transplants have also been classified into four groups: direct-receptive, direct-unreceptive, indirect-receptive, indirect-unreceptive, the indication being that even 'transplant' from 'transplant', that is indirect transplant, rather than from 'origin', that is direct transplant, are possible.

¹⁴ See Gianmaria Ajani, 'La Circulation de Modèles Juridiques Dans le Droit Post-Socialiste', (1994) *R.I.D.C.* – 4, 1087–1105.

¹⁵ Jan M Smits 'Systems Mixing and in Transition: Import and Export of Legal Models: The Dutch Experience', in Eward H Hondius (ed) *Netherlands Reports to the Fifteenth International Congress of Comparative Law*, (Intersentia Rechtswetenschappen, 1998) at 55.

¹⁶ F. Schauer, 'The Politics and Incentives of Legal Transplantations', Law and Development Paper No. 2, CID Working Paper No. 44, April 2000, Center for International Development at Harvard University (2000), available at: <http://www.cid.harvard.edu/cidwp/044.htm>.

can enhance the process by making significant adaptation in the foreign formal legal order to fit the pre-existing formal or informal legal orders. Additionally, the diffusion of innovation will create new developments through infusion and the knock-on-effect.

4 The Turkish case

I want to present as a supreme example of circles of diffusion, reaching the shores of legal system, and being infused into it: the Turkish case.¹⁷ This case is not the result of a people migrating from one land to another and taking their laws with them thus leading to a diffusion of laws. Neither is it a case of diffusion consequent to a colonial imposition, or a transfer of sovereignties between two colonial powers, since the Ottoman Empire and its heir, the Turkish Republic, were never colonies. This diffusion is the result of the will and efforts of domestic renovators, in the case of the French administrative law, starting with the elite of the Ottoman Empire, though under pressure, and the others, the elite of the Turkish Republic: the Civil Code, the Commercial Code and the Criminal Code were received between 1926–1930 into the legal system from Switzerland, Germany and Italy respectively, with more borrowings to follow, displacing all that was there before, Islamic law among others. The formation of the legal system relied entirely on reception and translation. Here we see four circles of diffusion, emanating from France, Switzerland, Germany and Italy, arriving in Turkey mainly in the form of Codes and infusing the Turkish legal system and society.¹⁸ The circles of diffusion did not reach Turkey in ripples or gradually, but flooded the legal system as major waves, foreign laws and doctrine being translated to allow the diffusion and ensuing infusion to take place. When discussing ‘legal transplants’, the Turkish experience was referred to as the most extreme example by Alan Watson and other comparative law scholars

¹⁷ See, Örücü, Esin, ‘Infusion of the Diffused: Four Circles of Diffusion Infusing the Legal System of Turkey’ in Sue Farran, James Gallen, Jennifer Hendry & Christa Rautenbach (eds) *The Diffusion of Law: The Movement of Law and Norms Around the World* (Juris Diversitas Series, Ashgate Publishers, 2015) Ch. 2 7–24.

¹⁸ As an aside, note that diffusion from these four legal systems have reached and are still reaching the shores of many other legal systems world-wide though impositions, imposed receptions and voluntary receptions.

such as Zweigert and Kotz, and Twining.¹⁹ Since the Turkish experience represents the passage of a legal system from one legal culture to another, historians and comparatists alike have hailed it as unique. Here, history was shifted. The switch in Turkey was to Roman law based legal systems and its legal system can be classified as belonging to the Germanic subgroup of civil law countries.²⁰

Viewed from the vantage point of the models, the Turkish experience is an excellent example of diffusion. Viewed from the internal point of view, it is an excellent example of voluntary receptions. In either case, it is an example of diffusion and infusion of the Turkish legal system and society by four foreign laws and the accompanying doctrine. We can also regard this experience as the confluence or meeting and overlapping of four circles or waves of diffusion in one locale: Turkey. Yet, the question in our title needs to be addressed: Too much too early, too little too late?

The Ottoman Empire was an Islamic state between 1299 and 1839, and a mixed legal system with considerable French influence from 1839 to the fall of the Empire in 1920. Following the collapse of the Ottoman Empire and the founding of the Republic in 1923, Turkey went through a process of total and global modernisation, westernisation, secularisation, democratisation and constitutionalism with efforts of reform resting solely on import from the major continental jurisdictions both as to form and content.

In the hope of joining the European Union and in order to fulfil the requirements of the European Union *acquis communautaire*, law reform is carried out in the same manner even today. In fact, the inroads made by *acquis communautaire* into the Turkish legal system can also be regarded, though at a stretch, as the fifth circle of diffusion. These current 'receptions' in Turkey vis-a-vis European Union law are examples of weak

¹⁹ See for example, Konrad Zweigert, and Heinrich Kötz, *An Introduction to Comparative Law* (3rd ed, trans. Tony Weir, Clarendon Press, 1998). As recently as 2000, Alan Watson cited the Turkish example to support his views. See Alan Watson *Legal Transplants and European Private Law*, Ius Commune Lectures on European Private Law: 2 (2000). So does William Twining consider this example in Twining (above note 4, 2005) at 223–228.

²⁰ Z. Derya Tarman, 'Turkey' in Jan.M Smits (ed) *Elgar Encyclopedia of Comparative Law*, 2nd ed (Edward Elgar: Cheltenham, 2012), 940–946 at 940. I have also analysed elsewhere the present legal system as a 'covert mix'. See, Esin Örüçü, 'Turkey's Synthetic Legal System and Her Indigenous Socio-culture(s) in a "Covert" Mix', in Esin Örüçü (ed) *Mixed Legal Systems at New Frontiers*, (Wildy, Simmonds and Hill Publishing, 2010), 150–203.

‘imposed receptions’, the qualifier ‘weak’ being attached to this analysis since the element of choice is still there.²¹ Some other new waves, the result of globalisation, should also be mentioned here. A number of the new Turkish legislation have been modelled on the international treaties, UNCITRAL model laws or EU legislation, such as those on intellectual property, intellectual and artistic works, law for the protection of patent rights, law for the protection of trade marks, law on international arbitration, law on protection of competition, law on protection of consumers, law on access to information and the law on electronic communications.

A most important point is that, from its very inception, the Turkish legal system tried to transform the social, political, ideological, religious and economic systems it encountered. What instigated the legal evolution was a strong aspiration to become western and contemporary. Thus, Turkey became ‘European by law’²² and the locale where different circles of diffusion met. By receiving, adapting and mixing laws from various foreign western sources with very different historical antecedents and melting them down in the Turkish legal pot, through ‘imposed receptions’, voluntary ‘receptions’, ‘imitations’, ‘adaptations’ and ‘adjustments’, an ‘eclectic’, ‘synthetic’ and ‘hyphenated’ legal system was created.²³ The extremely important factor to mention here is obviously the problem of successful infusion of the diffused laws, although the term ‘successful’ is ambiguous.

The various source-codes were selected from what were seen to be ‘the best’ in their field for various reasons. The choice was driven at times by the perceived ‘prestige’ of the model, and at other times by ‘efficiency’, sometimes by ‘chance’, or ‘historical accident’. 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 interlock and solve the social and legal problems of Turkey. In the process, the reforms in the legal framework were accompanied and complemented by a series of social reform laws aimed at changing people; a most important feature of these far reaching radical

²¹ See Esin Örüçü ‘Turkey Facing the European Union – Old and New Harmonies’ (2000) 25 *European Law Review* 57.

²² The clause is borrowed from the title of Hernnfeld’s book. See, Hans Hernnfeld, *European by Law* (Gütersloh, Bertelsmann Foundation, 1992).

²³ See for further analysis Esin Örüçü, ‘A Synthetic and Hyphenated Legal Systems: The Turkish Experience’ (2006) 1:2 *The Journal of Comparative Law*, 27–47.

reforms was that their intended impact was to be not just on the legal system, but also on the social system.²⁴

In the past century, laws of European origin, themselves the product of centuries long inter-receptions, diffusions, displacements and translocations, had their full impact on Turkey; not in ripples but in waves creating a tsunami both in legal and social terms. The four circles of diffusion blended when they reached Turkey and this blend gave Turkish law its civilian laic character: the Turkish legal system, this locale, became a delta. Diffusion was realised through translation; the Turkish elite and the translators enabled the spreading of the waves into the Turkish legal and social soil. Infusion was to follow with the work of German, Austrian and French émigré professors, their academic translators and, later on, the courts. Law developed after 1930 in Turkey is the continuation of the trend that started between 1926–1930.

In early 21st century, law in Turkey has been in transition. Developments such as the new 2002 Civil Code, the 2005 Criminal Code, 2005 Code of Criminal Procedure, 2007 Law on Private International Law and International Civil Procedure, 2011 Code of Civil Procedure, 2011 Code of Obligations and the 2011 Commercial Code, with the aim of further integration with Western Europe and the European Union, can be regarded as related to this steady line of development with further new waves of diffusion from western Europe spreading even further, enlarging the delta.

However, things are not always what they seem. Now looking at ‘too much too early, too little too late’ what can we say? The initial official programme was geared to eliminate any kind of personal choice regarded as undesirable by the formal legal system and a strong effort was made to achieve infusion. The major receptions took place while the legal system was in the process of evolving and incomplete. Thus no significant obstacles or barriers existed in the way of the incoming waves. The legal tradition was certainly ‘weak’ and open to foreign legal and cultural intrusion. The dissolved substances (law in this case) continue passing through the porous membranes (of the Turkish legal system) by osmosis. In fact, some

²⁴ The social reforms were introduced by the eight reform laws (*İnkılap 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 laws are still protected by the 1982 Constitution; their constitutionality cannot be challenged even today, nor can they be amended.

of the existing institutions of the Republic were themselves objects of earlier diffusion and infusion, such as French laws during the time of the Ottoman Empire. Nevertheless, as there was no direct social contact between the models and the recipient, the culture of the masses, though partially changed, remained on the whole unrelated to the models in spite of domestic efforts to change the people. Because of this factor, though there was no 'limited diffusion', the most important aspect of this extreme case of diffusion is the problem of infusion of the diffused and transposition. This is where the present problems lie.

We know that, 'borrowing and imitation is [...] of central importance to understanding the course of legal change', and 'the birth of a rule or institution is a rarer phenomenon than its imitation'.²⁵ Monateri goes even further and says that practically every system has grown from 'contaminations'.²⁶ Moreover the Turkish case does provide additional evidence that there is not much that is original in law. Yet, when viewed from a sociological and anthropological perspective, can we be so sure that the infusing of the diffused has taken place and that the diffusion was not 'too much too early' and therefore the societal result 'too little too late'? Recent developments in Turkey seem to point to both of these phenomena. Hence the necessity to re-assess the legal system in the spectrum of legal systems. The synthetic and eclectic civilian tradition has not only become a 'covert mix' but also a new hybrid, with Islam entering the scene even though mainly in the form of tradition as yet.

I have addressed the Turkish legal system as a 'covert mix' on many occasions. I would like to say a few words on the reason for this designation. Turkey's legal system definitely is not a mix of civil law and common law. Neither is Turkey a mixed jurisdiction in the classical sense, nor does she have an overt mixed legal system. After the collapse of the Ottoman Empire in 1920, we know that legal evolution in the Turkish Republic was instigated through a strong desire on the part of the ruling elite to become western and contemporary, and still today, law reforms are undertaken in order to fulfil the requirements of the European Union *acquis communautaire*, in the hope of joining it. Legal evolution has been

²⁵ Sacco says that 'between two totally different systems, an overall reception is easier than wide-ranging imitation of particular rules and institutions.' The Turkish case vindicates this view. See Roberto Sacco 'Legal Formants: A Dynamic Approach to Comparative Law (Installment ii of ii), (1991) 39 *American Journal of Comparative Law* 343 at 400, and 394, 397.

²⁶ Monateri, above note 13 at 107.

through a succession of imports from the civilian world rather than being home-grown, and has relied on major translation work. In fact, the legal system of the Turkish Republic has the appearance of belonging to the civilian tradition in toto, with the ingredients borrowed from Switzerland, Germany, Italy and France. Yet, although the Turkish legal system is not a mixed one in the orthodox sense, it is mixed in two other significant and different senses.

First, it is a synthetic and eclectic legal system, legislatively reconstructed, initially between 1926 and 1930, by receiving, adapting and mixing laws from various foreign western sources and melting them down in the Turkish pot to form the overlay, the civilian legal system. It is interesting to observe how this amalgam, with most of its parts hailed from Roman law – a source alien to the endogenous traditions – works.

Second, the legal system is a mix of these diverse laws with the lives of a people, the majority of whose values and demands reflect a different socio-culture related to one past element of the legal system, that of the Ottoman Empire – all its laws erased by the Turkish Republic – significantly different to the socio-cultures represented by the incoming laws. The Ottoman legal system was legally pluralistic, enveloped in Islamic law until 1839, thereafter, until its collapse, a legally pluralist mixed legal system with the added ingredient being borrowed from the French one. In its hay-day, the Ottoman Empire was an Islamic state with a minority Muslim population ruling a majority of non-Muslims.

It is this unique composite that makes it possible to consider the Turkish legal system ‘a covert mix’. It is also the mix in this sense that makes it worthwhile to look for the place of Islam and tradition in this laic civilian legal system. The seepage of Islam into the fabric of the legal system is in the process of creating this ‘novel hybrid’ today.²⁷ To trace the subtle developments here becomes worthwhile if one wants to understand the full picture.

²⁷ See Örücü, E, ‘How far can religion be accommodated in laic Turkish family law’ in Mair, J. & Örücü, E (eds) *The Place of Religion in Family Law: A Comparative Search* (CEFL/Intersentia, Antwerp, 2011). Also see for areas of interest to show this seepage, Örücü, ‘Turkey’s Synthetic Civilian Tradition in a “Covert” Mix with Islam as Tradition: A Novel Hybrid’ Ch 12 in Vernon Palmer, Mohamed Y Matter & Anna Koppel (eds) *Mixed Legal Systems: East and West*, (Juris Diversitas Series, Ashgate Publishers, 2015) 185–202.

5 A Closing Remark

I would like to make a wider point here. For me, contamination, diffusion and derivation are all variations on the theme of 'trans-frontier mobility of law',²⁸ which shows that legal systems live in contact and interaction, and are interrelated. Systems may have common roots or may have heavily borrowed from each other or, through some historical accident, be derivatives from a parent system. However, when laws are moved and then 'transposed', that is, 'tuned' to create the 'fit', variations occur. The diffused should be infused in order to have the desired impact.

In Europe today, in many areas of law, similar laws are being produced by legislatures, mostly fulfilling the requirements of the European Directives. Little new legislation is enacted that does not involve some comparative research, as there are very few, if any, unique areas left to the creative forces of a single state. For instance, we see similar developments in the areas of social security law, environmental law and environmental liability, anti-terrorist legislation, same-sex relationships, adoption and euthanasia. It must be remembered that supranational institutions play a significant role in encouraging the systematic migration of legal ideas (see for instance, the EU conditionality mechanism).

The warning is always the enabling of the infusion of the diffused and making sure that no diffusion is 'too much too early' or 'too little too late' for the health of both the social and the legal system.

²⁸ In some languages, such as the German, and for instance in Turkish by derivation, the general word used for these activities is reception (*rezeption*). However, for me reception is a specific instance of 'trans-frontier mobility of law', which involves the willingness on the part of the recipient to borrow (other forms being, imposition, imposed reception, imitation and the like). See generally for terminology, Watson, above n 1; E Örüçü, 'A Theoretical Framework for Transfrontier Mobility of Law' in R. Jagtenberg, E. Örüçü and A. de Roo (eds) *Transfrontier Mobility of Law* (The Hague, Kluwer International, 1995), 5.

