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Olivier Moréteau

Louisiana State University Law Center, olivier.moreteau@law.lsu.edu

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AN INTRODUCTION TO CONTAMINATION

Olivier Moréteau*

I. CONTAMINATION DEFINED

The word contamination occupies a central place in the title of the Saül Litvinoff Civil Law Workshop Series, *Civil Law and Common Law: Cross Influences, Contamination and Permeability*. The text announcing the Series left the word contamination unexplained.¹ Influences and cross influences are familiar to legal historians and comparatists alike.² They have been visited and addressed under a variety of names that include reception,³ legal transplants,⁴ migration⁵ or circulation of legal ideas,⁶ diffusion⁷ or transposition.⁸ Contamination is not one of those, though a useful term to indicate the permeability of legal systems and the sometimes less visible influences they may have on one another. It was discussed at the fringe of the Second International Congress of the World Society of Mixed Jurisdictions Jurists in the summer of 2007. At the end of this two day congress, a group of enthusiastic scholars had gathered in the back room of a tavern in the oldest part of Edinburgh. While savoring haggish and sipping beer or

* Professor of Law, Russell B. Long Eminent Scholars Academic Chair, Director of the Center of Civil Law Studies, Paul M. Hebert Law Center, Louisiana State University, Editor-in-Chief, *Journal of Civil Law Studies*.

1. Cited in the *Foreword* by O. Moréteau and R. Scalise, presenting the Series papers gathered in the present volume.

2. For a recent overview, see Michele Graziadei, *Comparative Law as the study of Transplants and Receptions*, in *THE OXFORD HANDBOOK OF COMP. L.* 441 (2006).

3. *LA RECEPTION DES SYSTEMES JURIDIQUES: IMPLANTATION ET DESTIN* (Michel Doucet & Jacques Vanderlinden eds. 1994).

4. ALAN WATSON, *LEGAL TRANSPLANTS* (2d ed. 1993).

5. ERIC AGOSTINI, *DROIT COMPARE* 243 (1988), (*Les migrations de systèmes juridiques*).

6. Rodolfo Sacco, *La circulation des modèles juridiques*, in *RAPPORTS GENERAUX AU XIII^e CONGRES INTERNATIONAL DE DROIT COMPARE– MONTREAL 1990* (1992).

7. William Twining, *Diffusion of Law: A Global Perspective*, 49 *JOURNAL OF LEGAL PLURALISM* 1 (2005).

8. Esin Örüçü, *Law as Transposition*, 51 *INT'L & COMP. L.Q.* 205 (2002).

scotch, we discussed possible terms that may go beyond the word mix. Contamination happened to be the word of the day. P.G. Monateri used it in the context of the law.⁹ It is not a clean and comfortable word like hybrid, transplant, reception, or circulation. It has troubling, unhealthy overtones. Yet, contamination is not a fully negative term, for instance when used in the context of linguistics or musicology.

When taken out of the medical sphere, where it typically indicates that something is going wrong, the word goes back to its etymological sense. Contamination means “to enter in contact with.”¹⁰ The Latin *tamen* (*taminare*) is the fact of touching, and is also connected to impure contact with (*cum*).¹¹

From an anthropological viewpoint, this is a very rich concept, inviting to revisit the interference of legal traditions with a new and less conventional eye. Contact among human beings generates changes in identity and behavior and the same applies to human groups and societies. There is always a risk of being altered by the contact of another. Alter means otherness but leads to alteration, with its ambivalent connotation. The same can be said of contamination. The identity of a group may be altered at the contact of another. Groups, societies, and individuals have fluctuating identities, and they change when influenced by other groups, societies, and individuals. The same applies to legal systems that grow organically in symbiosis with the group

9. Pier Giuseppe Monateri, *The Weak Law: Contaminations and Legal Cultures*, 1 GLOBAL JURIST ADVANCES, Issue 3, Article 5 (2001), available at <http://www.bepress.com/gj/advances/vol1/iss3/art5> (last visited Oct. 8, 2010).

10. Contaminate, from the Latin *contaminatus*, past participle of *contaminare*, bring into contact. THE BARNHART CONCISE DICTIONARY OF ETYMOLOGY (1995).

11. Originally the word was used in a religious context, with a meaning of impure contact: LE ROBERT, DICTIONNAIRE HISTORIQUE DE LA LANGUE FRANÇAISE (Alain Rey ed. 1992). Religion abandoned the word. In the 17th century, contaminate meant “Soil by an impure contact,” (*souiller par un contact impur*) but was marked as an “old” word. Medicine gave it a revival in 1863. Contagion had given the French *contagionner*, which disappeared and was replaced by *contaminer*. The word was the connector to pathology. A figurative sense was “*changer la nature de quelque chose*,” “change the nature of something,” “*altérer*,” “alter.” Remarkably, the word “*altérer*” or to “alter” which means to render other has developed a negative connotation. Linguists use the word contamination in a neutral way. There is no value judgment in describing a linguistic contamination.

generating them and react to the contact with other social groups and legal systems.

What does the word contamination add to the more conventional language describing these phenomena? Reception, transplants, migration, circulation, and the like describe the visible. Contamination refers to the less visible. Its effects, good or bad, may appear later on. A transplant may take place with all its visible effects, yet generating some invisible or less visible changes in the system of the recipient. This is where contamination takes place.

It is important to identify contamination and be aware of it. When contamination has a negative effect, remedies or ways to lessen that effect may be found and implemented. The following is an example of a systemic contamination in the context of Louisiana, with a proposal for a possible remedy.

II. CONTAMINATION IN LOUISIANA

After the Louisiana Purchase in 1803, the Territory of Orleans, later to become the State of Louisiana, resisted political attempts to impose the common law.¹² The civil law was maintained¹³ and the adoption of a Digest of the Civil Laws in 1808 and of a Civil Code in 1825 confirmed that Louisiana belonged to the civil law world at least as far as private substantive law was concerned. The State Constitution contains provision that prohibits the adoption of the common law by reference,¹⁴ as had been done in a number of other states. The Civil Code in its revised version makes provisions regarding its interpretation.¹⁵ These provisions, like the rest of the Code, are of civil law fabric.¹⁶

The Civil Code however does not contain the entire legislation governing matters that fall within the realm of private law. Many

12. For a detailed account, *see* GEORGE DARGO, *JEFFERSON'S LOUISIANA, POLITICS AND THE CLASH OF LEGAL TRADITIONS* (rev. ed. 2009).

13. Act of March 2, 1805, 8th Cong., 2d Sess., 2 Stat. 331, sec. 4.

14. LA. CONST. art. III, §15B: "A bill enacting, amending, or reviving a law shall set forth completely the provisions of the law enacted, amended, or revived. No system or code of laws shall be adopted by general reference to it." This provision appeared in the first Louisiana Constitution of 1812, § 11, and is to be found in all subsequent versions.

15. Articles 9–13, revised by 1987 La. Acts No. 124, § 1.

16. *Id.*

statutory rules affecting matters dealt with in the Civil Code are found in the Revised Statutes. They form Title 9 of the Revised Statutes, under the heading of Civil Code Ancillaries.

The structure of Title 9 runs parallel to that of the Civil Code but the organization is somewhat confusing. It contains . . . the Louisiana Trusts Code, to be found at R.S. 9:1721–9:2252. [Provisions for instance deal] with procedural details that pertain to a topic dealt with in the Civil Code, like in the case of divorce (see R.S. 9:301–9:376). They also contain matters not dealt with in the Code and that could have found a place there, like the law on human embryos (R.S. 9:121 to 9:133).¹⁷

Title 9 is just one among 56 titles:

The big bulk of legislation in Louisiana is to be found in the Revised Statutes. The Revised Statutes are arranged in Titles running in alphabetic order, with General Provisions in Title 1 and running from Aeronautics (Title 2) to Wildlife and Fisheries (Title 56).¹⁸

But there is more to it:

The General Provisions of Title 1 start with a Chapter 1, Interpretation of Revised Statutes, which contains interpretative provisions that differ from the traditional rules to be found in the Civil Code and are of a common law facture. For instance, R.S. 1:7 and 8, providing that singular may denote plural and one gender may denote others, sound like Section 6 of the British Interpretation Act 1978 or similar provisions of other states' codes.¹⁹

As indicated by the amount of detail found therein, the length of the provisions, the lack of systematic organization, the heavy legislative style, the Revised Statutes are of common law fabric.²⁰ Louisiana judges are more likely than not to apply common law methods of interpretation when applying the Revised Statutes,

17. Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103, 1120 (2009).

18. *Id.*

19. *Id.*

20. Though examples of poorly drafted legislation can be found in most civil law jurisdictions.

moving away from the civilian idea that a code is a system where provisions are to be interpreted by reference to one another. This may make sense, since the Revised Statutes are not a code in the civilian sense. But it is a sign of common law contamination, since this conflicts with the civil law tradition.

In civil law jurisdictions, much ancillary legislation is to be found outside the civil code, sometimes compiled in codes that may be described as satellite codes.²¹ These satellite codes revolve around a civil code that tends these days to be weakened by a decodification process, due to piecemeal revision breaking the harmony or consistency of the civil code, or as a consequence of removing provisions from the code to develop the law outside the code, in ancillary statutes or satellite codes.²² These processes are endogenous to civil law systems. They happen regardless of any significant exogenous influence or contamination by another legal system.

However, even where the civil code is losing some of its density and attractive force, it is understood that it contains all basic rules that would apply by default in the absence of specific provisions to be found in satellite codes or ancillary statutes. This means that satellite legislation is interpreted by reference to the civil code. If the civil code grants a right and a special statute limits this right, the limitation will be regarded as an exception to the rule and will therefore be interpreted restrictively: *exceptio est strictissimae interpretationis*.²³ This means that the scope of the special rule that makes exception to the general rule may not be enlarged by analogy. Likewise, a special rule (*lex specialis*) found outside the civil code will derogate the general law (*lex generalis*) found in the civil code (*specialia generalibus derogant*),²⁴ which means that the civil code must apply whenever a situation falls outside the scope of the special provision.²⁵

21. Moréteau & Parise, *supra* note 17, at 1109–1112.

22. *See id.*

23. *See* HENRI ROLAND, *LEXIQUE JURIDIQUE, EXPRESSIONS LATINES* 83 (3rd ed. 2004).

24. For instance, the New Home Warranty Act, *see* LA. REV. STAT. §9:3141–3150 (2010).

25. The fact that ancillary legislation sometimes provides for “exclusiveness” (*See e.g.* New Home Warranty Act, LA. REV. STAT. §9:3150 (2010)) does not exclude the application of the Civil Code for claims not falling within the ambit of the ancillary provisions. As a matter of fact, such

Under the influence of the common law methodology, some judges in Louisiana tend to forget these rules and to interpret the Revised Statutes as if they were autonomous, using common law methodology and making no reference to the Civil Code. It is fortunate that other judges continue interpreting satellite legislation on the background of the Civil Code. The fact however that courts may be divided on the issue indicates that some contamination is at work, which is not at all surprising in a mixed jurisdiction.²⁶

III. THE CASE FOR A PRELIMINARY PROVISION

Other mixed jurisdictions are similarly affected. To avoid common law contamination, Quebec adopted a preliminary provision in its 1991 Civil Code,²⁷ reminding citizens and jurists alike that the Civil Code is a central star in the private law galaxy. The Preliminary Provision says:

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.²⁸

“exclusiveness provisions” are redundant in civil law jurisdictions where judges know that the applicability of the *lex specialis* excludes that of the *lex generalis*. “Exclusiveness” provisions exist in Louisiana because the State is a mixed jurisdiction where a number of attorneys and judges operate without having a full training in the civil law.

26. See e.g. *Carter v. Duhe Construction, Inc.*, 921 So.2d 963 (La. 2006) with a powerful dissent by Knoll J. applying Civil Code methodology in interpreting the New Home Warranty Act, LA. REV. STAT. §9:3150 (2010).

27. See CODE CIVIL [C. CIV.], Preliminary Provision (Que.). 1991, c. 64, in force since January 1st, 1994.

28. *Id.* The words “droit commun” used in the French version were translated by *jus commune*, for lack of a better word in English. The term “common law,” though linguistically correct, had to be rejected, by fear of . . . contamination!

In a recent reflection on the place of the civil code in Louisiana and the legal universe, I advocate the adoption in Louisiana of a Quebec style Preliminary Provision.²⁹ The provision could read as follows:

The Civil Code comprises a body of rules governing basic obligations and rights of citizens regarding their person, property, and relations between persons and property which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it. It must be interpreted in harmony with the general principles of law and subject to norms having a constitutional nature.³⁰

A debate over such a draft provision would help reveal and assess the extent of the ongoing contamination. Further research on the Quebec Preliminary Provision tends to prove the efficiency of the proposed remedy,³¹ in helping keep the civil law tradition and methodology alive and fertile throughout the major areas of private law that are not directly governed by the Civil Code, much as the sun dispenses light and energy to all planets within the solar system.

29. Olivier Moréteau, *De Revolutionibus: The Place of the Civil Code in Louisiana and in the Legal Universe* (forthcoming 2010).

30. *Id.*

31. On the Quebec Civil Code Preliminary Provision, see Alain-François Brisson, *La Disposition préliminaire du Code civil du Québec*, 44 MCGILL L. J. 539 (1998-1999). See also Jean-Maurice Brisson, *Le Code civil, droit commun?*, LE NOUVEAU CODE CIVIL, INTERPRÉTATION ET APPLICATION (1992); H. Patrick Glenn, *La disposition préliminaire du Code civil du Québec, le droit commun et les principes généraux du droit*, 46 LES CAHIERS DE DROIT 339 (2005).