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# Mare Nostrum as the Cauldron of Western Legal Traditions: Stirring the Broth, Making Sense of Legal Gumbo whilst Understanding Contamination

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***MARE NOSTRUM AS THE CAULDRON OF  
WESTERN LEGAL TRADITIONS:  
STIRRING THE BROTH, MAKING SENSE OF  
LEGAL GUMBO WHILST UNDERSTANDING  
CONTAMINATION***

Olivier Moréteau \*

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The author thanks Ignazio Castellucci, Seán Donlan, Nicholas Kasirer, Agustín Parise, and Jacques Vanderlinden for tasting the broth and contributing additional spices. Readers may enjoy the result, add ingredients, and continue the cooking: this is an open-source recipe.

I. OVERTURE:  
OF TIME AND PLACES

In *Metaphysics*, Aristotle told us that the whole is more than the sum of its parts. He invited us to have a holistic view of the world. Holism comes from the Greek *holos* meaning *all, whole, entire, total*. Holism is the contrary to reductionism.

Comparative law exists in the middle, stretching between holistic macro-comparison and reductionist micro-comparison. The zoom is our optical device, and the accordion our musical instrument.

In Malta, we are at the core, at the geographic center of a whole region stretching on three continents. The Mediterranean populated the cosmos with hundreds of gods and heroes before discovering that there is only one God, and giving the world three most influential monotheist religions. It developed the Talmud, the Sharia, Roman and Canon Law. It exported these all over the world and received other traditions, including the Common Law here in Malta, Gibraltar, Israel, and at one time in Egypt.

The French historian Fernand Braudel wrote a most impressive and influential fresco of the Mediterranean, showing that there is no single Mediterranean Sea.<sup>1</sup> He views many seas in it, and describes it as a vast, complex expanse within which men operate. Braudel identified a first level of time, very slow, *la longue durée*, which is the geographical time or time of the environment. Braudel died in 1985, when time was about to accelerate under the effect of climate change. The second level of time comprises social and cultural history. It encompasses social groupings, empires and civilizations. Change at this level was much more rapid than that of the environment, at least in the days when I discovered Braudel's texts, and viewed magnificent programs he presented on television, in the 1970s. The series was called *Méditerranée*.

Braudel added a third level of time, that of events (*histoire événementielle*). It includes the history of individuals with names.

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1. FERNAND BRAUDEL, *LA MÉDITERRANÉE ET LE MONDE MÉDITERRANÉEN À L'ÉPOQUE DE PHILIPPE II* (1949); *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II* (1972).

For Braudel, this time of the *courte durée* is that of the surface. It is deceptive.

We seem now to be in a time of confusion, where the environment changes as rapidly as the second level of time by the effect of global warming and climate change. Meantime, the third level, the level of events, is not counted in years or generations but days and minutes, conveyed by the most sophisticated instantaneous technologies seemingly telling us things before they happen. The latest news, or what will make the news tomorrow, matters more than history. We live in an era of acceleration. Not so long ago, we could watch and analyze the cooking pot of history warm up and the contents simmer. Now we see it reach the boiling point, the point of confusion, in which it gets difficult to analyze and isolate the ingredients. In a sense, our Mediterranean Sea or *Mare Nostrum* may be compared to a boiling cauldron.

Knowing that I was due to give this introductory lecture,<sup>2</sup> Jacques Vanderlinden sent me a *Rêverie d'un alter ego solitaire*. He calls me his *alter ego*, which I view as my highest academic honor, since the day he associated me to the drafting of a general report on the *Structure of Legal Systems*, for the 16th World Congress of the International Academy of Comparative Law, in Brisbane<sup>3</sup> in 2002.

Here it is, in the original French.

## II. RÊVERIES D'UN ALTER EGO SOLITAIRE

Prenez un chaudron. Appelez-le Méditerranée (dite aussi Mare nostrum).

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2. This paper was presented as a keynote lecture at the *Juris Diversitas* Symposium on *Mediterranean Legal Hybridity: Mixtures and Movements* in Malta, June 11-12, 2010, organized and hosted by the Department of Civil Law of the Faculty of Law and the Mediterranean Institute, both of the University of Malta, and organized in conjunction with *Juris Diversitas*. I had the privilege of speaking after Guido de Marco, former President of Malta (1999-2004) leading his country into the European Union. He passed away two months after the Symposium and this paper is dedicated to his memory.

3. LA STRUCTURE DES SYSTÈMES JURIDIQUES (O. Moréteau & J. Vanderlinden eds., 2003).

Enduisez son pourtour intérieur d'une couche de graisse. Appelez-la HistoireS.

Parsemez la couche de graisse de quelques fortes épices, par exemple christianismeS, islamS, laïcitéS, modernitéS, traditionS, cultureS, tous ingrédients délicieux qui donnent du goût au bouillon, mais aussi au nom desquels on commet bien des crimes

Ajoutez-y quelques morceaux de choix, comme un Khadafi, un Sharon, un Papadopoulos, un Berlusconi, un Ben Ali, selon le prix du marché

Versez dedans un bouillon. non de culture, mais d'attentes de millions de gens souvent jeunes, pauvres, et ignorants

Laissez mijoter.

Vous ne savez pas ce que cela va donner, Mais dans votre gros livre de recettes de maître (pas en droit)-coq (pas gaulois)

Il y a celles des common lawyers, des rom- (ah !non)-ano-germaniques, des (si peu) coutumiers, des qui se croient (et le sont encore moins) religieux, des union-européens (tous experts) et unions-de-la-méditerranéens (politiques) Et aussi celles des empoisonneurs qui rendent fou à Wall Street ou dans la City Et qui sait-on encore ?

Peut-être quelques pluralistes radicaux, doublés souvent d'incurables utopistes, Qui pensent que le droit est ce que chacun pense qu'il doit être

Qui, face au chaudron souhaitent que cela ne bouille  
pas « au dessus »  
Qui ne croient plus aux « systèmes » (même pas le  
D)  
dans un monde en désordre (ce qui ne veut pas dire  
chienlit)  
Qui pensent que le dialogue inspiré d'un  
« fondamental » (comme en CE et CM)  
Doit tendre à rétablir l'harmonie entre les attentes  
contradictoires  
De moins en moins satisfaites au quotidien  
A travers le vaste monde, mais aussi à notre porte  
Des femmes et des hommes vivant en société.<sup>4</sup>

Jacques Vanderlinden's cauldron beautifully echoes the gumbo that symbolizes the Group *Juris Diversitas*. The Louisiana gumbo is a soup where ingredients of various origins remain solid and visible but combine in a unique savor.

### III. LOOKING INTO THE CAULDRON

The gumbo is a favorite dish in Louisiana, a remote region in the United States Deep South, peopled by French and Spaniards, Africans, Native Americans, Americans of Scottish or Irish descent, Germans whose names are pronounced as if French, etc. Much like gumbo,<sup>5</sup> this makes for a complex and rich environment and culture, the Gulf of Mexico being to some extent comparable to the Mediterranean, where so many different traditions meet and mix. Louisiana has its mysteries and paradox. Christianity recombines with Voodoo, everything is a matter of festival where food and music are always major ingredients, often mixing with

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4. Jacques Vanderlinden, *Rêveries d'un Alter Ego Solitaire*, unpublished, on file with the author.

5. Here are the ingredients for the chicken-and-sausage gumbo: cut andouille sausage, skinned bone-in chicken breasts, vegetable oil, flour, chopped medium onion, chopped bell pepper, sliced celery ribs, hot water, garlic, bay leaves, Worcestershire sauce, creole seasoning, dried thyme, hot sauce, sliced green onions, hot cooked rice. Good recipes can be found on the web, but it is recommended to enjoy gumbo just anywhere in South Louisiana. Seafood gumbo is another favorite.

the unexpected. Even in times of ecological disaster, after the 2010 explosion of the Deepwater Horizon oil rig and the BP oil spill, the town of Morgan City not far from New Orleans and Baton Rouge celebrated its “75th Shrimp and Petroleum Festival,” with the risk of contaminating the gumbo with the wrong kind of oil.

Two of the initiators of *Juris Diversitas* have close links with the Bayou State.<sup>6</sup> *Juris Diversitas* however did not originate in the bayous. It was born in the back room of a tavern in the oldest part of Edinburgh, at the end of the second Congress of the World Society of Mixed Jurisdiction Jurists, in July 2007. While savoring haggis and indulging beer or scotch, we discussed many possible words that go beyond the idea of a mix. “Contamination” happened to be the word of the night. P.G. Monateri had used it once in the context of the law, in an article focusing on legal discourse and the importance of legal cultures.<sup>7</sup> It is not a clean and comfortable word like the floral “hybrid” or “transplant,” it sounds less inviting than “reception” or “circulation,” and less law and economics than the “import and export” speech. It has unhealthy, dirty overtones. The announcement of a world conference on Legal Contamination may not sound very appealing and yet, as Monateri’s article points out (though without elaborating on the meaning of the word), it focuses on the legal system that borrows and on the impact of the import on its legal culture.<sup>8</sup> Monateri singles out “two major aspects of comparativism: the ‘culture and difference’ branch and the ‘import and export’ branch.”<sup>9</sup> Contamination clearly belongs to the “culture and difference” branch.

Contamination, the ‘C’ word as we called it in later communication, is not a fully negative term. When taken out of the medical sphere where it typically indicates that something is going wrong, the word may return to its etymological sense.

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6. Seán Donlan grew up in Louisiana and received his juris doctor at Louisiana State University, and though I grew up in Lyon where I studied and taught law, very close to the Mediterranean, I now teach and operate at Louisiana State University.

7. P.G. Monateri, *The Weak Law: Contaminations and Legal Cultures*, 13 *TRANSNAT’L L. & CONTEMP. PROBS.* 575 (2003).

8. *Id.* at 591.

9. *Id.* at 578.

Here is how I defended the use of the term in an email sent to the participants to of the Edinburgh dinner on May 31, 2008,<sup>10</sup> before another meeting in Lyon, this time around *andouillettes*:<sup>11</sup>

Contamination means “to enter in contact with.”

The Latin *tamen* (*taminare*) is the fact of touching, and is also connected to impure contact. Of course we have the prefix *cum*, with.

From an anthropological viewpoint, this is a very rich concept, inviting [us] to revisit mix[edness] with a new and less conventional eye. In an anthropological perspective, all contact includes the risk of being soiled.

Lawyers use taxonomies as ways of putting things in closed boxes and do not like to admit the existence of grey zones or contact zones where torts are polluted by contracts and contracts by torts etc. to take a conventional example where I did some work. Too many lawyers view law as being pure (see Kelsen and his still formidable influence on legal thinking in the most positivist countries, like France).

Physics and biology show that there is nothing such as hermetic boundaries to things. There is no life without contamination, of course with mechanisms to fight or protect.

What I propose here is a reflection on the ‘C’ word, in view of a better understanding of the heuristic value of the concept of *contamination* in comparative legal scholarship. Contamination happens when, voluntarily or by imposition, one system borrows legal rules or institutions from another, creating a mix that differs from the originating system. In a sense it is what happens in the cauldron, where the mix of the ingredients may sometimes produce an unexpected result. The same happens with social groups that mix or remix, binding or not (like the sauce in the cauldron), and not always in expected ways.

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10. On file with the author.

11. Ignazio Castelluci, Seàn Donlan, and Olivier Moréteau participating.



Monateri described French and German influences on the Italian legal system,<sup>12</sup> concluding that “the borrowing system resulted in a unique mixture of French and German patterns that would have been unthinkable to either of the donor countries. This ‘contamination’ is inherent in the particular selectivity of borrowing. From a wider perspective I maintain that this kind of contamination in legal cultures is the key feature of borrowings and transplants of legal patterns.”<sup>13</sup>

The author further writes: “the process of importing and exporting rules and institutions is an almost *unconscious* process of integrating them into the ideology of the borrowing system. Thus, the meaning of the borrowed institutions depends solely on the struggle among the formants of the receiving system, which almost always will produce something different from the original.”<sup>14</sup> However, Monateri also takes into account the ideology of the original system: “I also think that the ideology of a system is very often not merely a local product, but a contamination of several local traits by foreign ones,”<sup>15</sup> which leads him to conclude that “the actual legal world is more a world of contamination than a world split in different families.”<sup>16</sup>

#### IV. UNDERSTANDING CONTAMINATION

The word contamination focuses on contact and its consequences. The contact with others is an unavoidable necessity in personal and social life. We get born by contact, we feed and are fed by contact, and we may die by contact. To enter into contact with another may be for good or for evil. *Cum tangere* and later *cum taminare*: enter in contact with; originally the word was used in a religious context, with a meaning of impure contact.<sup>17</sup>

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12. Monateri, *supra* note 7, at Part II.

13. *Id.* at 591.

14. *Id.* (italics are mine).

15. *Id.*

16. *Id.*

17. My main source is the *DICIONNAIRE HISTORIQUE DE LA LANGUE FRANÇAISE* (Alain Rey ed., 2006), tracing not only the etymology of words but the evolution of their meaning over time. Religion abandoned the word. Alain Rey shows that in the 17th century, contaminate meant “soil by an impure contact” (*souiller par un contact impur*, Furetière) but was marked as an “old” word. Medicine gave it a revival in 1863. Contagion had given the French

Note that linguists use the word contamination in a perfectly neutral way. The Maltese language is a good example, combining or recombining Latin with Semitic and Arabic. There is no value judgment in describing a linguistic contamination. It is apparently the same in the musical world.

In comparative law we no doubt prefer the use of more neutral terms, especially if they avoid the idea of a soiling physical contact. *Influencer*, to “influence,” is a much cleaner word.<sup>18</sup>

Influence has to do with a flow, *fluere*, fluent . . . taking us back to the ‘C’ word, influence also gave influenza, or flu!

We certainly make much use of the word influence in our comparative work. The word has a very convenient distance and fluidity, to refer once more to etymology. We can describe all kind of influences, positive or negative, internal or external, legislative or jurisprudential, doctrinal or from practice.

The word influence is conveniently neutral, devoid of the troubling, possibly judgmental, dimension of the word contamination. It also has the advantage of allowing reverse flows, cross-influences.

I used it recently in the title of a workshop series that I organized at LSU, but combined it with other words: *Civil Law and Common Law: Cross Influences, Contamination and Permeability*.<sup>19</sup>

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*contagionner*, which disappeared and was replaced by *contaminer*. The word was the connection to pathology. A figurative sense was *changer la nature de quelque chose*, “change the nature of something,” *altérer*, “alter.” Remarkably, the word *altérer* or “alter” which means to render other has developed a negative connotation.

18. In the 13th century (1240), the Latin *influentia* marked the flux coming from stars or celestial luminaries, and acting on human behavior and the course of things. Influence is distant and invisible and suits perfectly the word of concepts and ideas. One forgets however that the word originally referred to astrology, to describe the action of stars on human destiny. The word “influence” was later in the 13th century extended to a slow and continuous action exerted on a person or on a thing. In 1780, at least in French, the word describes the authority or prestige of a person, leading others to adjust to her views. In the 19th century (1814), the word enters the scientific language, to describe in French, *un effet produit à distance* or “a remote effect.” (DICTIONNAIRE HISTORIQUE DE LA LANGUE FRANÇAISE, *supra* note 17).

19. Papers published in 3 J. CIV. L. STUD. (2010).

What is it that the 'C' word expresses and that you cannot find in the other words? Why not stick to the clean and neutral language of influence?

There is always the risk of being changed or altered by the contact with otherness. Alter means other but also gave alteration, with its negative connotation. The same can be said of contamination. Our identity, our multiple identities, are under a constant threat of change or alteration at the contact of others. We never are the same, we change, and this is the history of the Mediterranean people, this is the history of all people on earth.

Rome exerted political, military, and later religious influence over much of the Mediterranean world. This influence still shapes public and private life in many Mediterranean countries. Some of the Greek influence largely receded from Athens to Constantinople and from there to Moscow, moving away from the Mediterranean, when Islam took control of much of the region. The Ottoman Empire later disappeared but Islamic populations and their culture presently penetrate many of the countries that were once strongholds of the Roman influence. All these movements must have an impact on the law, if not always as enacted, at least as applied, not applied, or perceived by the people, in other words on legal culture.

From this comes my question:

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 and its legal culture. This is where contamination takes place.<sup>20</sup>

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20. Olivier Moréteau, *An Introduction to Contamination*, 3 J. CIV. L. STUD. 9 (2010).

V. MOVING AWAY FROM SELF-CENTERED ATTITUDES AND  
UNDERSTANDING THE CONTAMINATIVE EFFECT OF WESTERN  
LEGAL TRADITIONS

Contamination goes many ways and can be reciprocal. Its study is conducive of legal pluralism, even in its most radical forms. In the Mediterranean world, it can be addressed within the civil law tradition, or wherever the civil law and the common law intersect, among themselves or with other traditions such as Islam, the Talmud, Canon law, or any other societal model producing, weakening, or destroying norms.

One may think of possible contamination of the western legal traditions by exogenous elements, though we are more likely to find examples going the other way around. However, imagining the civil law tradition or any western legal model as a contaminating factor is disturbing to many. We western scholars think highly of our legal traditions and systems, which were exported as models. We know they are borrowed from even in those places where we did not impose them. In addition, they are actively marketed by international institutions such as the United Nations and its multiple agencies, the World Bank, and the International Monetary Fund.

The use of contamination when studying non-western systems invites us to open our minds to the cultural experience of others, in order to identify the changes that are taking place in their systems and cultures under western influence. Changes cannot be identified unless we first have a genuine understanding of what these systems and cultures were prior to western influence, whether we address the changes that were brought at the time of colonization or in post-colonial times.

One must adopt a broad approach embracing as many social and cultural parameters as possible, also inviting world history to set the proper perspective. World history is made of invasions and colonization conducive of pervasive influences. Invasions and colonization have oftentimes been the fact of “western” political powers that developed around the Mediterranean or were substantially influenced by it. These powers exported their faith, culture, and legal systems, largely born on the coasts of the Mediterranean or its hinterland. The fact that

“western” invasions and colonization caused millions of people to die and empires and cultures to collapse is a historical fact that we must be mindful of, especially when investigating our present neo-colonial age.

The indigenous people of Central and South America died of contamination also in the medical sense. The conquistadors brought sicknesses and diseases that were unknown to indigenous people and against which they had no protection. True, some unknown diseases were also brought back to the old world. Germs are among the first things human beings exchange when traveling and trading. Talking about culture, much the same happened. Flourishing cultures and civilizations such as the Inca or the Aztec nearly completely disappeared, to which we give the generic name of Pre-Colombian, categorizing them from our western viewpoint. Similar phenomena occurred at the same or different times in Africa, in Asia, in the Pacific Rim, hitting sophisticated and less sophisticated cultures that we keep assessing according to our western standards. So called “westerners” sometimes mean it well: many were or still are convinced that they bring positive things, such as wealth, better health, better infrastructure, and a great legal tradition, not to mention the troubling word “civilization,” casting a blind eye on selfish motives and greed that lead western nations and corporations to plunder natural and human resources of “underdeveloped” nations.

Signs that we are convinced of the superiority of our model, be it political, economic, legal etc., appear in the language we use, centering the world on us. Our vision was first Mediterranean centric, everything remote being barbarian; it then became Eurocentric leaving others as salvages, before turning “western centric,” which truly does not mean anything, hence our preference for the word “global,” which conveniently undermines what is not purely western or western influenced, once relegated to a “third world.” We hide our western contaminative influence under the conveniently neutral “global” term.

Comparatists are nowadays blamed for an almost exclusive focus on western legal traditions: we either ignore the others or

marginalize them, relegating them to “otherness.”<sup>21</sup> A few prominent scholars propose to go beyond the western conception of law and order, giving better access to the understanding of Asian and African systems.<sup>22</sup> This cannot be done without revisiting our theories of law and legal order,<sup>23</sup> adopting pluralist views,<sup>24</sup> which is the *raison d’être* of the group *Juris Diversitas*.<sup>25</sup> The concept of contamination helps towards a better understanding of otherness and different approaches to the law.

When presenting this paper orally in Malta, I proposed to explore the effect of contamination in the context of “sophisticated” and “less sophisticated” legal systems. I pointed out that sophistication is not a positive term, indicating that I did not think highly of sophist philosophers. I am not sure however that this is a legitimate disclaimer. It keeps projecting a western vision of legal systems, because I am and remain a western jurist, despite my efforts to learn from anthropologists: they tell us that in order to understand other cultures, we cannot afford to stay at the center.<sup>26</sup> I have to abandon a value-based approach and prefer a more neutral one. Speaking of “western” and “non-western” systems is not any better, since it means we keep mapping the

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21. “Other conceptions of law and the social order:” RENÉ DAVID & DAVID BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* (3rd ed., 1985); RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* (11th ed., 2002).

22. See the many publications of Jacques Vanderlinden on African legal systems and legal anthropology, for instance JACQUES VANDERLINDEN, *LES SYSTÈMES JURIDIQUES AFRICAINS* (1983); and JACQUES VANDERLINDEN, *ANTHROPOLOGIE JURIDIQUE* (1996). See also WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT, THE LEGAL SYSTEMS OF ASIA AND AFRICA* (2006); H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (4th ed., 2010).

23. This is the major project conducted by MENSKI, *supra* note 22.

24. See MENSKI, *supra* note 22; Jacques Vanderlinden, *Trente ans de longue marche sur la voie du pluralisme juridique*, 2 *CAHIERS D’ANTHROPOLOGIE DU DROIT* 21 (2004); Jacques Vanderlinden, *What Kind of Lawmaking in a Global World—The Case of Africa*, 67 *LA. L. REV.* 1043 (2007).

25. See <http://jurisdiversitas.blogspot.com/> (Last visited December 12, 2011).

26. As Maurice Godelier writes, it is our effort to decenter that legitimates anthropology as a social science: “C’est le travail de décentrement qui fait de l’anthropologie une science sociale.” MAURICE GODELIER, *AU FONDEMENT DES SOCIÉTÉS HUMAINES : CE QUE NOUS APPREND L’ANTHROPOLOGIE* 63 (2007). At pp. 52-64, Godelier explains that it is necessary in ethnology to understand in order to compare and to compare in order to understand, pages that should be read by all social science scholars. *Id.* at 52-64.

world from where we are, unless I insist that it is the Mediterranean cauldron that I place at the center, with my being located in a remote position. At least it decenters me a little bit, hopefully enhancing my cognitive self.

Let us look into the cauldron or in the vicinity, first visiting contamination within the western legal systems. Let us also venture some exploration outside the western world, addressing systems where the western influence invited itself or was later invited. Brief concluding remarks will take us back to the *mare nostrum*.

## VI. CONTAMINATION WITHIN WESTERN LEGAL SYSTEMS

I will make the case that western legal systems (I mean national or local legal systems) contaminate one another. Two examples will be briefly discussed, one taking us far away from the cauldron but in a region where its influence is largely felt, and another one bringing us back to Europe.

### A. *The Case of 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.<sup>27</sup> The civil law was maintained<sup>28</sup> 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,<sup>29</sup> as had been done in a number of other states. The Civil Code in its revised

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

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

29. 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.

version makes provisions regarding its interpretation.<sup>30</sup> These provisions, like the rest of the Code, are of civil law fabric.<sup>31</sup>

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

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).<sup>32</sup>

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 nature. 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.<sup>33</sup>

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,<sup>34</sup> a style alas to be found in too many recently revised articles of the Louisiana Civil Code. Even when local universities take efforts to teach the civil law, not all Louisiana judges are trained in the civil law, and are more likely than not to apply common law methods of interpretation when applying the Revised Statutes, moving away from the civilian idea that a code is a system where provisions are to be interpreted by reference to one another. This is a sign of common law contamination. As a consequence, Louisiana resembles its models just like a child resembles both parents, having features of both but being a very

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30. Articles 9-13, revised by 1987 La. Acts No. 124, § 1.

31. *Id.*

32. *Id.*

33. *Id.*

34. Though examples of overly detailed and verbose legislation can also be found in most civil law jurisdictions.



different entity. It is said to belong to the “third” legal family of mixed jurisdictions,<sup>35</sup> but may also be described as a legal system of its own in a world of contaminations.

In another article, I discussed a way to resist this contamination in order to maintain a civil law attitude,<sup>36</sup> but this paper so far did not generate comments, indicating that whether they like it or not, Louisianans can live with this form of contamination. I also indicated somewhere else that the use of the case method in the Louisiana law schools lead students, attorneys, and judges to focus on cases and somehow neglect the analysis and interpretation of Civil Code articles.<sup>37</sup>

This being said, examples of contamination of United States law by the civil law are many, the Uniform Commercial Code offering a powerful one. As suggested above, such contamination produces a result very distinct from what we observe in civil law jurisdictions, due to the blending with a predominantly common law culture.

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35. VERNON V. PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* (2001).

36. In *An Introduction to Contamination*, *supra* note 20. I recommend the addition of the preliminary provision tailored on the model of the Civil Code of Quebec, which may say:

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.

*Id.* at 14-15.

37. Olivier Moréteau, *De revolutionibus, The Place of the Civil Code in Louisiana and in the Legal Universe*, in *LE DROIT CIVIL ET SES CODES: PARCOURS À TRAVERS LES AMÉRIQUES* 1, 16 (Jimena Ando Dorato, Jean-Frédéric Ménard & Lionel Smith eds., 2011).

*B. The Case of the European Union*

Until the first enlargement in 1973, the European Communities developed a legal system largely influenced by the French and to a lesser extent the German model. Common law influence developed with the membership of Ireland and the United Kingdom. The presence of common law judges on the European Court of Justice had an impact on its practice, a point I had a chance to discuss with the late Lord Slynn of Hadley, who before becoming Lord of Appeal in Ordinary (1992-2002), served as Advocate General (1981-1988) and Judge (1988-1992) on the European Court; he was impressed by how much his continental colleagues delighted in engaging in the art of distinction, regardless of the fact that traditional civil law interpretation methods command that where the law does not distinguish, we should not distinguish. Interestingly, common law contamination increased with the addition of ten member States in 2004, due to more extensive use of the English language. English being the natural language of the common law, and Europeans (with the notable exception of the Scots), not being used to the practice of the civil law in English, conceptual contamination is taking place, a phenomenon pointed out by Louisiana scholars, who give a number of significant examples.<sup>38</sup> French and German are less used than in the past as the language of drafting and more and more, other linguistic versions of regulations and directives happen to be translated from the English.<sup>39</sup>

Contamination goes the other way as well, with English courts (re)discovering the teleological or purposive approach in interpreting the treaties and directives, consciously borrowing from the civil law tradition and less consciously contaminating the method of interpretation of purely domestic statutes. After showing

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38. Alain Levasseur & Vincenç Feliú, *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); Olivier Moréteau, *Les frontières de la langue et du droit: vers une méthodologie de la traduction juridique*, 61 REVUE INTERNATIONALE DE DROIT COMPARÉ 695 (2009).

39. The phenomenon and ways to solve the problem were described before the enlargement of 2004: Olivier Moréteau, *Can English become the Common Legal Language in Europe?*, in COMMON PRINCIPLES OF EUROPEAN PRIVATE LAW 405 (R. Schulze & G. Ajani eds., 2003).

embarrassment caused by the use of general language in the European treaty and directives and yet understanding that some adjustment had to be made,<sup>40</sup> English courts moved away from literal interpretation to adopt continental methodology, at least as long as community law was to be applied.<sup>41</sup> This eventually permeated the approach to interpretation even on matters not connected to community law,<sup>42</sup> until the House of Lords finally abandoned the prohibition to cite the records of parliamentary proceedings when interpreting statutes.<sup>43</sup> A formidable evolution took place, contribution to a “civilization of the common law.”<sup>44</sup>

This offers no example of a weak system contaminated by a stronger one, but of a strong system that largely resisted the cultural influence of Roman law (though it borrowed some Roman law techniques),<sup>45</sup> contaminated by an equally strong system.

The impact of legal practice is also to be explored in this perspective. Much could be said of the impact of the export of large law American and English law firms on the European continent.<sup>46</sup>

Let us turn to contamination outside the western world, where examples of the “strong” contaminating the “weak” (to

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40. *Macarthys Ltd. v. Smith*, [1979] 3 All E.R. 325 (Court of Appeal), where the opinions of Lord Justice Lawton reflecting the English embarrassment is to be contrasted with that of Lord Denning who understood what adjustments were to be made.

41. See *Garland v. British Rail Engineering Ltd.*, [1983] 2 A.C. 751 (Lord Diplock at 771); *Pickstone v. Freemans Plc.*, [1989] A.C. 66 (Lord Templeman at 123; Lord Oliver of Aylmerton at 126-127); *Litster v. Forth Dry Dock & Engineering Co. Ltd.*, [1990] 1 A.C. 546.

42. P. Kinder-Gest, *Primauté du droit communautaire et droit anglais ou comment concilier l'inconciliable*, 4 REVUE DES AFFAIRES EUROPÉENNES 19 (1991). The whole evolution is discussed in OLIVIER MORÉTEAU, *DROIT ANGLAIS DES AFFAIRES* 49-51 (2000).

43. *Pepper v. Hart*, [1992] 3 W.L.R. 1032. The ban had first been lifted regarding texts implementing EC law in *Pickstone v. Freemans Plc.*, *supra* note 39.

44. H. Patrick Glenn, *La civilisation de la common law*, 45 REVUE INTERNATIONALE DE DROIT COMPARÉ 559 (1993).

45. David J. Seipp, *The Reception of Canon Law and Civil Law in the Common Law Courts Before 1600*, 13 O.J.L.S. 388 (1993).

46. YVES DEZALAY, *MARCHANDS DE DROIT. LA RESTRUCTURATION DE L'ORDRE JURIDIQUE INTERNATIONAL PAR LES MULTINATIONALES DU DROIT* (1992).

move back to Monateri's terminology)<sup>47</sup> are expected to predominate.

## VII. CONTAMINATION OUTSIDE THE WESTERN WORLD

The less organized and sophisticated a legal system is, the more it is likely to be contaminated by imports from other legal traditions. Such systems may not be equipped with antibodies limiting the impact of the import on their legal practice and culture. During colonial times, the very existence of law in "primitive societies" was simply denied, and this is particularly the case when addressing Africa.<sup>48</sup> Negative views about Africa were expressed long before colonization, by the ancient Greeks and later the Romans.<sup>49</sup>

There is much we can learn from anthropologists and a few comparatists about laws in Africa, especially when they adopt pluralist views.<sup>50</sup> One may safely write that the confrontation with western culture has caused (colonialism by the western powers) and is still causing (neo-colonialism by multinational companies) much disruption and destruction in non-western cultures, proving the dangers of contamination.

Two examples will take us far away from the Mediterranean Sea.

### A. *The Example of Bhutan*

Commenting on a short experience that I had in Bhutan, I wrote:

One must beware not to impose an exogenous western model to people who live under different customs and a different view of what we call legal order. Let us first check with them to determine

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47. Monateri, *supra* note 7.

48. MENSKI, *supra* note 22.

49. *Id.*

50. See the writings of Jacques Vanderlinden.

whether they really need what may look essential to us.<sup>51</sup>

In November 1999, I was invited to participate in a one-week seminar sponsored by the United Nations Development Program in the Himalayan Kingdom of Bhutan, one of the very few “third world” countries having escaped western colonization. One US judge, one US attorney, one Indian law professor and one Indian attorney participated in addition to me, and the forty local participants were legal professionals from the judiciary, government ministries, the financial institutions and the private sector. I chaired the seminar sessions, which had the over-ambitious project, in a very short period of time (one week) to investigate the legal aspects of commercial practice in the kingdom, and to disseminate some basic western knowledge in the field. In my opening statements, I said:

I would also like to express my deep admiration for Bhutan and the Bhutanese and your tradition to solve disputes without resorting to the courts and the law. You might have heard that there is a rather recent movement, in western countries, to promote informal justice, by way of mediation and conciliation. We use the generic term of alternative dispute resolution. We certainly have a lot to learn from you in this respect and it would be very good to invite you in our countries for seminars on the subject. I do not know whether that could be covered by the UNDP<sup>52</sup> . . . We should not forget this tradition and it is our duty, we foreign experts, to try to understand your culture and legal tradition. If we want to bring you something and help, we may only be efficient if listening to you and understanding your problems and existing solutions.<sup>53</sup>

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51. Olivier Moréteau, *Post Scriptum to Law Making in a Global World: From Human Rights to a Law of Mankind*, 67 LA. L. REV. 1223, 1223 (2007).

52. Never again did the UNDP invite my contribution.

53. Olivier Moréteau, *Remarks at the Seminar on Commercial Law, Thimphu* (Nov. 1999) (on file with the author). On Bhutan, see Alessandro

During the fourth day of the seminar, secured transactions and bankruptcy were discussed. The American lawyer leading the debate recommended that the customary rule whereby a minimum five acres of land is protected for each family be abandoned, so that individual entrepreneurs could use such land as collateral. I remember my efforts in having the resource persons and the local participants think about the consequences of such a change, in a country where 90% of the population make a living out of farming and where famine is practically unknown. Such a change could accelerate rural exodus with its flow of adverse consequences.

### *B. The Example of Vanuatu*

When created in 1980 after the independence of the British-French condominium of the New Hebrides, the Republic of Vanuatu kept a complex legal system with colonial law remaining in force unless changed by the legislature. It meant a mix of English common law and French civil law, “wherever possible taking due account of custom.”<sup>54</sup> French law was immediately abandoned but the country remained multilingual, with English and French retaining a special status of language of education.<sup>55</sup> Recent research on the interaction of norms in the Republic of Vanuatu<sup>56</sup> reveals that judges tend to ignore and despise custom, and that local chiefs are intimidated and do not manage to

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Simoni, *A Language for Rules, another for Symbols: Linguistic Pluralism and Interpretation of Statutes in the Kingdom of Bhutan*, in *L'INTERPRÉTATION DES TEXTES JURIDIQUES RÉDIGÉS EN PLUS D'UNE LANGUE* 273 (Rodolfo Sacco ed., 2002).

54. Constitution, art. 95(2) reads,  
Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.

55. Constitution, art. 3(1) reads, “The national language of the Republic of Vanuatu is Bislama. The official languages are Bislama, English and French. The principal languages of education are English and French.”

56. Laurent Chassot, *Juridicité et internormativité: Les défis des droits pré-européens entre exception et globalisation, l'application au Vanuatu*, (2009) (unpublished doctoral dissertation, Université Paris 1).

communicate adequately to make their custom known to the judge. The inferiority complex of the local population causes its culture to be contaminated by the dominating model, though the supreme law of the land gives a special status to custom, especially regarding the ownership of land.<sup>57</sup>

This is a powerful example of contamination of local practice by the western model. When traveling in Bhutan and Vanuatu, I have discovered rich local legal traditions, and yet always the shy deference to westerners who supposedly know better and are expected to tell the locals how to do it. As Monateri says in his article,<sup>58</sup> and Menski explains in his book,<sup>59</sup> we cannot develop comparative law leaving *rappports de force* and culture on the side. The concept of contamination proves to be a powerful tool in our genuine efforts to go beyond the study of legal techniques, rules, and institutions, in order to understand how legal formants interplay and how they blend in unique legal cultures.<sup>60</sup>

#### VIII. CODA:

##### OF KNOWLEDGE AND CONTAMINATION, BACK TO GENESIS

Bringing knowledge to man is a dangerous exercise. Our Creator knows it, but did we understand his message? Let us revisit the first book of the Bible. Genesis, Chapter 2, mentions the forbidden fruit. As a human being and a scholar, I never understood why God would restrict access to knowledge, prohibiting man from eating the fruit of the tree of knowledge.

“And out of the ground made the Lord God to grow every tree that is pleasant to the sight, and good for food; the tree of life also in the midst of the garden, and the tree of knowledge of good

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57. Constitution, art. 74 reads: “The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.”

58. *Supra* note 7.

59. *Supra* note 22.

60. With a pastiche of the final verses of Hamlet, Jacques Vanderlinden (*Is the Pre-20th Century American Legal System a Common Law System? An Exercise in Legal Taxonomy*, 4 J. CIV. L. STUD. 1, 21 (2011)) invites us to leave our dear little boxes or categories on the side: “Here cracks a noble scientific process, Good night sweet taxonomy, And flights of angels sing thee to thy rest.”

and evil.”<sup>61</sup> A few verses down: “And the Lord God commanded the man, saying, Of every tree of the garden thou mayest freely eat: But of the tree of the knowledge of good and evil, thou shalt not eat of it: for in the day that thou eatest thereof thou shalt surely die.”<sup>62</sup>

Did our loving God mind our having access to the knowledge of good and evil? After all, He created, “man in his own image, in the image of God created He him; male and female created He them?”<sup>63</sup> May be He simply tried to protect us from the danger of contamination, to those not prepared to contact with some kind of knowledge. Beyond the risk of too much information (a real threat in the present world) this points to the danger of not being open-minded and placing too much reliance on officially recognized sources.

The Sacred Book tells us that our ancestors were cursed and expelled from the Garden of Eden.<sup>64</sup> Paintings and engravings show them bending and suffering. They might have eaten too much of the forbidden fruit, and were not prepared for it. They had to run not to soil the Paradise God had given to them, and the angel shows them the way out.

Let's face it, Adam and Eve would have been better off picking and mixing fruit from the many various trees God had grown around them. He might have cast a blind eye on their using one apple from the tree of the knowledge of good and evil, diluting its effect in a diversified fruit salad.<sup>65</sup>

As the Book goes saying, Adam and Eve multiplied. Their offspring populated the surface of the earth, experiencing wars, famines, and epidemics. They cultivated the land, built cities, and developed empires. Cities grew larger and larger; men domesticated nature and the elements, tamed unknown energies. In recent generations, human development ran out of control, like a cancer that threatens the future of our species. This time we have

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61. Genesis 2, 9:9, King's James Version.

62. Genesis 2:16-17.

63. Genesis 1:27.

64. Genesis 3:9-24.

65. Back to the legal field, this contributes to a famous salad bowl: Esin Öricü, *Law as Transposition*, 51 INT'L & COMP. L. Q. 205 (2002).



soiled the earth, but unlike Adam and Eve, we have no other place where to go.