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THE FUTURE OF CIVIL CODES IN FRANCE AND LOUISIANA

Olivier Moréteau*

I. Revisiting the Function of Codes in the Civil Law Tradition ...	42
A. Codes are not Strait-Jackets but Safeguards	43
B. May Civil Code Provisions Serve as Alibis?	47
II. Imagining the Future of Codes in a Multicultural World.....	53
A. Codification, Consolidation, and Harmonization	54
B. Linguistic Challenges.....	56
C. Identifying Principles and Values	57
D. The Civilian Method of Interpretation	59

One of my first wishes, as the newly appointed director of the Center of Civil Law Studies (in August 2005), was to invite Professor Saúl Litvinoff to give the Thirty-third Tucker Lecture. However, Don Saúl had his own agenda and his wish was to have me deliver the lecture! I could not start in my new function by contradicting my highly respected and distinguished predecessor. He offered me the splendid opportunity of giving an inaugural lecture here at LSU. I dedicated this lecture to him, as a tribute to his outstanding achievements, as a vibrant homage to his contribution to the development of the civil law inside and outside of the state of Louisiana. In addition to being a highly learned man of science, a walking encyclopedia of the civil law in so many

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languages, a prominent comparatist, Don Saúl is what we call in French *un Grand Seigneur* and, as some still know, nobility is before all a quality of the heart.

In 1938, on the occasion of the Dedication of our “old” Law Building, standing at the top of the outdoor steps between the six high columns, Roscoe Pound presented his thoughts on the influence of the civil law in America.¹ It was published seventy years ago as the first article in the first issue of the *Louisiana Law Review*; I gave my Tucker Lecture in 2006, on the centennial of the Paul H. Hebert Law Center; this was the 33rd Tucker Lecture, a third of a century, the year where I celebrated my 50th birthday, a half of a century. All these are nice signals inviting us to look again where we stand, collectively and individually. Roscoe Pound has influenced legal thought not only in America but also in France, through his friendship and long-lasting intellectual relationship with Edouard Lambert, the founder in Lyon of one the very first Institutes of Comparative Law ever created on the planet Earth. I feel bound to say this because a friend and colleague of mine in Lyon, Hervé Croze, recently published a book on Law on the Planet Mars.² Pound and Lambert exchanged ideas on standards, on the principle of proportionality, and on a number of other things that have made their way into the jurisprudence of both jurisdictions.³

In 1938, Pound described a civil law tradition threatened by too much nationalism, especially in Europe. He said that the development of comparative law could give the civil law a future in America, even outside Louisiana where it was then experiencing a renaissance.⁴ Today, many civil law jurisdictions feel under threat, but this time the enemy is globalization, which seems to promote the American common law as a model all over the world, at least in the field of commercial law. The World Bank complains about too much rigidity and some inadequacies in nations that

1. Roscoe Pound, *The Influence of the Civil Law in America*, 1 *LA. L. REV.* 1 (1938).

2. PHILIBERT LEDOUX, *INTRODUCTION AU DROIT MARTIEN: LE PREMIER ROMAN JURIDIQUE* (2006).

3. Olivier Moréteau, *Le standard et la diversité*, in *LAW AND HUMAN DIVERSITY*, 71, 80 (Mauro Bussani & Michele Graziadei eds., 2005).

4. Roscoe Pound, *Comparative Law in Time and Space*, 4 *AM. J. COMP. L.* 70, 77 (1955).

happen to have a civil law system.⁵ Also, everything around us is changing so fast that some may wonder, especially outside civil law jurisdictions, whether codification may still offer a satisfactory framework in the 21st century. Let me say first that the problems the World Bank is complaining about have little to do with Codes as such, but relate mostly to bureaucracy and corruption and aim mostly at some former French colonies in Africa and the Caribbean.

Louisiana is a civil law island in a common law ocean; France sees its once revered Napoleonic tradition threatened by new models, the German one being strongly promoted by many working on the project of a European Civil Code. Both in France and in Louisiana, there is this growing feeling amongst civilians that the French model of codification may not resist.⁶ I do believe that the reaction cannot be local. In France it is all too often provincial. Coming back from the splendid conferences commemorating the bicentennial of the Code Napoleon,⁷ Rodolfo Sacco noted: “the French may accept a European Civil Code but on three conditions,

- Firstly, it must be written by the French;
- Secondly, it must be written in French;
- And thirdly, it must be the French Civil Code itself.”

The reaction must be open, and comparative, as Pound indicated. It is a strong sign that my two French predecessors giving the Tucker Lecture were great comparatists: René David in 1973⁸ and André Tunc in 1978.⁹ This Law School always understood the importance of comparative law, with a decisive

5. WORLD BANK, *DOING BUSINESS IN 2004, UNDERSTANDING REGULATION* (2004).

6. Bénédicte Fauvarque-Cosson & Sara Patris-Godechot, *LE CODE CIVIL FACE À SON DESTIN 195-198 and 220-223* (Louisiana) (2006); SHAEL HERMAN, *THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES* (1993); Shael Herman, *The Fate and the Future of Codification in America*, 40 *AM. J. LEGAL HIST.* 407 (1996).

7. Impressive collections of papers have been published: *LE CODE CIVIL 1804-2004, LIVRE DU BICENTENAIRE* (2004); *1804-2004, LE CODE CIVIL UN PASSÉ, UN PRÉSENT, UN AVENIR* (2004).

8. René David, *The Civil Code in France To-day*, 34 *LA. L. REV.* 907 (1974).

9. André Tunc, *A Codified Law of Tort—The French Experience*, 39 *LA. L. REV.* 1051 (1979).

impetus under the leadership of Chancellor John Costonis, whom I would like to acknowledge as a man of vision. It is therefore no surprise that I should present a comparative outlook on the situation of the Civil Codes after two hundred years of codification in these two jurisdictions.

It is fair to keep loyal to a tradition, to cherish one's roots and be proud of one's past and ancestors. In this period of doubt we are going through, we are meant to focus on what makes us strong in the global competition. To do that, let us revisit the function of codes in the civil law tradition, adopting a comparative approach.

We may then be able to see more clearly some mistakes we should avoid if we want to keep our tradition alive, and also if we want it to grow in the future. Because Louisiana is a multicultural and bijural state, it is our responsibility to give the civil law a chance to diffuse and permeate other traditions in a global world, which is more and more a mixed or hybrid, as Don Saúl would put it.

Let me get at these two points in turn: revisiting the function of codes in the civil law tradition and imagining the place of codes in a multicultural world.

I. REVISITING THE FUNCTION OF CODES IN THE CIVIL LAW TRADITION

In 1994, during a short visit to the University of North Carolina at Chapel Hill, I gave a talk on codes, which was published under the title of "Codes as Strait-Jackets, Safeguards and Alibis: The Experience of the French Civil Code."¹⁰ My point was to dispel some misconceptions about codes in the common law world, showing a common law audience that codes are not strait-jackets but are meant to safeguard people's rights. I also pointed out that in France, the generality of many code articles not only helps to keep the law flexible but also serves as an alibi to activist judges, who decide cases on the basis of new doctrines, often invented by scholars, then finding some vague provision to support the ruling.

Let us revisit these ideas, looking at them alternatively with civilian and common law eyeglasses, to show that codes are not strait-jackets but safeguards, at least in the French and Louisiana

10. Olivier Moréteau, *Codes as Strait-Jackets, Safeguards and Alibis: The Experience of the French Civil Code*, 20 N.C.J. INT'L & COM. REG. 273 (1995).

tradition, and then to decide whether it is right or wrong to use them as alibis.

A. *Codes are not Strait-Jackets but Safeguards*

As I said in my UNC address, “Lawyers in common law countries tend to consider the codified civil law systems as restrictive and mechanical.”¹¹ I cited Roscoe Pound, who said:

As a critic has put it, the theory of the codes in Continental Europe in the last century made of the court a sort of judicial slot machine. The necessary machinery had been provided in advance by legislation or by received legal principles and one had but to put it in the facts above and take out the decision below. True, this critic says, the facts do not always fit the machinery, and hence we may have to thump and joggle the machinery a bit in order to get anything out. But even in extreme cases of this departure from the purely automatic, the decision is attributed, not at all to the thumping and joggling process, but solely to the machine.¹²

What happens here is that common-law lawyers¹³ project their conception of the detailed and specific statute on their vision of Civil Codes. But the reality is different: most codes in civil law countries contain open-textured provisions, general rules and principles, and they are seldom too detailed even in specific provisions. Saying this, I have in mind Civil Codes rather than Tax Codes or Town Planning Codes, the latter proving that civilians, when they lose their distinct qualities, can be as bad as common-law lawyers in producing lengthy detailed provisions.

To cite a couple of examples from the Civil Code:

Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith.¹⁴

11. Moréteau, *supra* note 10, at 273.

12. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW*, 170-171 (1921).

13. In my oral presentation, I used the traditional term common-lawyer, but I have been led to understand that it is perceived as derogatory in the United States.

14. LA. CIV. CODE ANN. art. 1983 (2007); C. CIV. art. 1134 (FR.).

Any act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.¹⁵

We should pay attention to the way we civilians communicate concerning the use of our Codes, which may cause more prejudice rather than reduce it. When we claim: “our Codes are so well made, they can apply to situations of all kinds,” we refer to the generality of the Code that allows application to situations the drafters could not even have imagined at the age of the stagecoach, such as flying airplanes or sending e-mails. But the common-law lawyer is likely to understand: “This Code must be packed with so many rules! How may Napoleon have thought of everything that could happen on earth?” And who knows, our common-law lawyer might even think further: “If not reformed constantly, their Code must be outdated in so many respects, not a law for the 21st century, but a strait-jacket for retarded or crazy civilians!”

To show that this is not the case, I come now to the political and philosophical reason why the French Civil Code was written the way it still is, even after decades of reforms. The style is simple; sentences are short and easily readable. Some of them are nearly as easy to memorize as old Roman law maxims. The vocabulary is largely non-technical.

This style is an indication of the drafters’ intention to protect the citizen against the wrongful interference of the judiciary, which had been abusive during the centuries preceding the Revolution. As I once wrote, the Code is “almost free of the legal jargon often used by professionals to establish their authority and protect their power. Like the text of a constitution, it is meant to be understood by ordinary citizens, without the interference of verbose lawyers, who sometimes strive to make the law more complicated than it really is.”¹⁶

The French Civil Code has been represented to be the “civil constitution” of the country. It is meant to safeguard people’s rights. France may have had some thirteen constitutions; it is still living under its original Civil Code (of course substantively amended), as much as the Americans live under their original Constitution. The Civil Code largely performs the functions of a constitution, at least if defined in the American sense, and it easily

15. LA. CIV. CODE ANN. art. 2315 (2007), C. CIV. art. 1382 (FR.).

16. Moréteau, *supra* note 10, at 279.

compares to the United States Constitution by its generality and its style.

Book I of the French Civil Code, entitled “Of Persons,” presently starts with a Title 1, “Of Civil Rights,” where we find the following articles:

Everyone has the right to respect for his private life.¹⁷

Everyone has the right to respect of the presumption of innocence.¹⁸

Article 16, introduced in 1994, deals with human dignity. The articles that follow deal with the protection of the human body.

Of course there is much else in a Code, like rules on the forms of testaments, on prescription and on transfer of obligations. The point is that with Code articles so clear, making frequent use of plain language, it should not be possible for judges to distort the meaning and make unpredictable judgments. The rights of the citizens therefore are safeguarded from the risk of judicial abuse.

This leads us to the great paradox of French law. Judges can play a much more creative role when applying the Civil Code than when construing detailed legislation. In fact, in the opinion of Portalis, the most prominent of the Code’s draftsmen, judges were clearly intended to play such a role. Portalis is well known in Louisiana. Shael Herman has translated his Preliminary Discourse to the Civil Code¹⁹ and Alain Levasseur wrote a splendid article entitled “Code Napoleon or Code Portalis?”²⁰

Portalis was a political moderate and also an impressive philosopher. In his Preliminary speech, he explained the two extremes that legislators should avoid: oversimplification, “leaving citizens without rule or guarantee concerning their greatest interests,” and going too far into details.²¹

Extremely detailed rules, it was thought, could not resist evolution and would have to be amended too often, which creates insecurity. Portalis tells the judge how to deal with legislation:

17. C. CIV. art. 9 (FR.). (Law n° 70-643 of July 17, 1970).

18. C. CIV. art. 9-1 (FR.) (Law n° 93-2 of January 4, 1993).

19. Shael Herman, *Excerpts from a Discourse on the Code Napoleon by Portalis*, 18 LOY. L. REV. 23 (1972).

20. Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762 (1969).

21. Levasseur, *supra* note 20, at 769.

When the legislation is clear, it must be followed; when it is obscure, we must carefully analyze its provisions. If there is no particular enactment, custom or equity must be consulted. Equity is the return to natural law, when positive laws are silent, contradictory, or obscure.²²

This was never written into the French Code but made its way almost verbatim into the Louisiana Civil Code, in original article 21,²³ replaced by article 4 in the 1987 revision, with a regrettable abandonment of the reference to natural law, under the pretence that “the term ‘natural law’ in article 21 of the 1870 Code has no defined meaning in Louisiana jurisprudence.”²⁴ With due respect, the term is meaningful in all civil law jurisdictions, as it is also in the common law world. But it is rejected as contentious by positivists in both systems.

Portalis then made this magnificent statement:

There is a science for lawmakers, as there is for judges; and the former does not resemble the latter. The legislator's science consists in finding in each subject the principles most favorable to the common good; the judge's science is to put these principles into effect, to diversify them, and to extend them, by means of wise and reasoned application, to private causes; to examine closely the spirit of the law when the letter kills.²⁵

And he concludes on the value of experience: “It is for experience gradually to fill up the gaps we leave.”²⁶ This echoes with O.W. Holmes: “The life of the law has not been logic, it has been experience.”²⁷ The value of experience should be acknowledged in all legal systems.

Portalis invites the judge to contribute to the evolution of the law through judicial interpretation. The judge is meant to complement and update the work of the legislator. But the text is there, general and clear. It cannot be so easily distorted and is therefore a good safeguard.

22. *Id.* at 771.

23. Located at the same place in the Civil Codes of 1808, 1825, and 1870.

24. LA. CIV. CODE ANN. art. 4 cmt. (b) (2007).

25. Levasseur, *supra* note 20, at 772.

26. *Id.* at 773.

27. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

Then, looking at the Civil Code with Portalis' eyes, how could one get the idea that Code articles may serve as alibis?

B. May Civil Code Provisions Serve as Alibis?

This is probably the point where the French experience and the Louisiana experience differ most, due to a different vision of what the Civil Code is. The French Civil Code marked the unification of French law, for which the kings of France had been striving, without much success. The draftsmen reached this remarkable compromise between the rich Roman law heritage, chiefly applied in the South of France, and the profuse and diverse customary laws (yet with a predominant and highly sophisticated custom of Paris) applied mostly in the North. They also managed to reconcile some *Ancien Régime* values with Revolutionary ideas, thereby strengthening this fundamental constitutional nature of the Code. The Ancient law was abolished, which indicates a break with the past, but the break is not complete, the Code borrowing much substance from preexisting laws, especially the royal ordinances, and the books of Domat and Pothier.²⁸

In Louisiana, the Civil Code was not meant to change the preexisting law. It was called a *Digest of the Civil Laws in force in the Territory of Orleans*. It was meant to restate Spanish Law in force at the time of the Louisiana Purchase in 1803, borrowing the style and the structure of the French Civil Code and also its substance when it expressed Spanish law as well as the French. Here too a remarkable compromise was achieved between the French and Spanish legal traditions, in producing what Robert Pascal, in his 1998 Tucker lecture, pleasantly and accurately described as a "Spanish girl in French dress."²⁹

Consequently, when French judges referred to the Ancient law in order to apply a new provision, it was safe for them to hide that part of the reasoning and to refer exclusively to the intention of the legislator, claiming they were doing the exegesis of the Code. On the other side of the Atlantic, their Louisiana colleagues would openly refer to the ancient Spanish law not only in order to explain the rule as it appeared in the Code, but upon the understanding that

28. See for a comprehensive historical approach, JEAN-LOUIS HALPÉRIN, *THE CIVIL CODE* (David W. Gruning trans., 2000).

29. Robert A. Pascal, *Of the Civil Code and Us*, 59 *LA. L. REV.* 301, 303 (1998).

this was the proper manner to complement the Code provision when too general or incomplete, the now two hundred year old Civil Code of 1808 being meant to be a Digest of preexisting laws.³⁰ Article 3521 of the Civil Code of 1825 repealed the preexisting law on all matters covered by that Code. Article 3521 resembles the repeal clause adopted in the Act promulgating the French Civil Code.³¹ The absence of such a repealing clause in the Digest of 1808 made the experience of codification a different story in France and in Louisiana. Further studies may be needed to check to what extent this difference has been increased by the fact that, more often than not, the Louisiana Civil Code was applied by judges trained in the common law.³²

In 19th century France, judges hid behind the letter of the Code when referring to Ancient law. In 19th century Louisiana, the letter of the Code was sometimes seen as printed on transparent windows opening to the past, pretty much like the English codifying statutes of the Victorian age, the presence of common law trained judges being of course instrumental.

Again, through a civilian perspective, this appears as sheer loyalty to the Code in both France and Louisiana. Having identified the law to the general will of the people, and legislation as the privileged expression of that general will, the French claim that the exegesis of the Code leaves no room to judicial creativity but is based on the research of the intention of the legislators. Working on a similar premise, the Louisianans feel justified to rely on pre-code authorities, the Code being meant to be a restatement of such authorities.

Now, how do things appear if looked at from an outsider's perspective? It is easy to trace what the Louisiana judge is doing, since judgments are drafted almost the same way as in common law jurisdictions. In France, however, the *Cour de cassation* writes extremely brief and not informed judgments, where one

30. Cottin v. Cottin, 5 Mart. (O.S.) 93 (1817); see RICHARD KILBOURNE, A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS 1803-1839 (1987).

31. French Law of March 21, 1804 re-promulgating the Civil Code as a whole.

32. The Bicentennial of the Louisiana Digest of 1808 is generating such studies, the Center of Civil Law Studies at LSU having commissioned a world expert on codification to work out the problem. See JACQUES VANDERLINDEN, LE CONCEPT DE CODE EN EUROPE OCCIDENTALE DU XIII^E AU XIX^E SIÈCLE, ESSAI DE DÉFINITION (1967).

hardly gets information about the facts and never reads a single reference to previous cases or to doctrinal sources. Code articles are interpreted in paragraphs of three lines, creating the impression that the solution flows directly from the article. It takes legal expertise to understand a Court of Cassation judgment, and one has to rely on comments written by scholars or distinguished practitioners to understand where the jurisprudence goes.

The *Cour de cassation* acts covertly, using the visa of the article like a Mardi Gras mask. It often goes far beyond the text or the spirit of the Code, sometimes for the good, sometimes wrongly. It may be argued that when, in the law of contract, it introduced the doctrinal distinction between obligations to provide a certain result (*obligations de résultat*) and obligations to provide certain means (*obligations de moyens*), finding some support in the articles of the Code, it acted within the spirit of the Code.³³ But when it implements a shift from liability based on fault, as provided for in article 1382 (corresponding to article 2315 of the Louisiana Civil Code), to liability based on a supposed necessity to guarantee victim's rights, creating multiple cases of strict liability wherever the damage is caused by a thing the defendant had under his custody, it then denies the spirit of the Code and interferes with the exercise of legislative power.³⁴

Interpretation based on exegesis already gives judges an immense latitude, yet legitimated by the spirit of the Code. Inviting them to go further, in the guise of "free scientific research" as recommended by Gény and Saleilles some hundred years ago, may sometimes lead to a denial of the principle of separation of powers, although supposedly revered by the French. Saleilles's celebrated formula, "*au delà du Code civil, mais par le Code civil,*" inviting to go "beyond the Civil Code but through the Civil Code," is an elegant pirouette, providing a smart alibi.³⁵ It is a very fertile strategy, enabling judges to go well beyond the text and also sometimes beyond the spirit of the Code. It is to be remembered that until 1993, it was a criminal offence in France for

33. Moréteau, *supra* note 10, at 284-287.

34. *Id.* at 287-288.

35. Raymond Saleilles, *Preface to Francois Geny*, SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF (1913). I owe to Paul Baier the origin of this famous phrase, modeled on Jhering's words: *durch das römische Recht über das römische Recht hinaus*. Rudolf von Jhering, *Unsere Ausgabe*, 1 JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 52 (1857).

a judge to decide a case on the basis of general rules or principles devised by the courts.³⁶ Until then, many Court of Cassation judges would have been in prison if not allowed to wear elegant Mardi Gras masks.

My point is not to blame Gény and Saleilles, two giants who have made a huge contribution to the development of the civil law, promoting the jurisprudence whilst keeping the codes alive. As Paul Baier puts it, “Life after text frees the judge.”³⁷ Rather, I would blame the French for this to be done in some hypocritical way, more than two hundred years after the Revolution. We allow the *Cour de cassation* to dress up its ruling as if flowing naturally from the text of the Code, even when it is not so. The French jurisprudence is a world of fiction. On the one hand, the literature and the teaching in the law schools deny that jurisprudence may be a direct source of the law, and on the other hand, everyone seems to accept the existence of an activist, uncontrolled jurisprudence. To me, it is a social wrong to allow the jurisprudence to be formulated covertly, without the court disclosing its reasoning, its sources. The late André Tunc, who gave the 7th Tucker Lecture at LSU,³⁸ once urged for fully argued and reasoned judgments, especially at the Court of Cassation.³⁹ However, nobody demonstrated in the streets of Paris to fight for more transparency in judicial opinions: things stayed more or less where they were. Yet, under the enlightened presidency of Guy Canivet, the Court of Cassation made substantial progress in disclosing the arguments supporting its rulings.⁴⁰

36. Article 5 of the Civil Code states that “judges are forbidden, when giving judgement in the cases which are brought before them, to lay down general rules of conduct...” C. CIV. art. 5 (FR.). A judge who violated this prohibition was guilty of a criminal offense. Code pénal [C. PEN.] art. 127 (FR.) (repealed by the new Penal Code which came into force on April 1st, 1994). Article 5 was intended to prevent judges from returning to the old practice of making *arrêts de règlement*, i.e., stating in a judgment a general rule to be applied in forthcoming cases.

37. *La vie après le texte libère le juge*: Paul Baier, *The Supreme Court, Justinian, and Antonin Scalia: Twenty Years in Retrospect*, 67 LA. L. REV. 489, 514 (2007); footnote 81 offers a stimulating translation exercise.

38. Tunc, *supra* note 9.

39. Touffait & Tunc, *Pour une motivation plus explicite des décisions de justice, notamment de celles de la Cour de cassation*, [1974] REV. TRIM. DR. CIV. 487.

40. Guy Canivet was *Premier Président* between 1999 and 2007. He has promoted the use of foreign sources and transparency. See Guy Canivet, *La pratique du droit comparé par les cours suprêmes, Brèves réflexions sur le dialogue des juges dans les expériences françaises et européennes: en*

Using Civil Code articles as alibi to judicial activism is not as easy in Louisiana. The Louisiana judge is bound to give and develop arguments in the judgment and one may believe that any betrayal of the letter or the spirit of the Code would not go unnoticed. Yet, this does not prevent Louisiana judges from injecting rules or principles that are not based on the Civil Code.

To conclude this section, I regard transparency in public affairs as a virtue and I disapprove of alibis, even when dressed up with French elegance. Here are some recommendations to keep our Civil Codes healthy for a better future. I will venture four, of unequal importance.

1. We must clarify our speech when we talk about the sources of the law. When addressing the matter from the top end of the pyramid of norms, it may be right to say that legislation and custom are the direct sources of the civil law. Both are based on the will of the people, as expressed by their representatives in the case of legislation, and as produced and evidenced by the people in their daily life in the case of custom. But when considering the matter from the people's viewpoint, turning the pyramid top down,⁴¹ it may be wrong to say that legislation and custom are the only sources. We must acknowledge that the law is shaped by a number of other actors or factors. In good days, our belief in higher values often referred to as "natural law," "equity," and "general principles of the law" shapes positive rules established by legislation, influences judges when deciding cases in the absence of applicable law and also trumps positive laws when courts sanction an abuse of right or apply the maxim *fraus omnia corrumpit*, fraud corrupts everything. The teaching and publications of law professors, referred to as "doctrine" in the civil law tradition, shape the way laws are made, applied, interpreted. The decisions of judges, referred to as "jurisprudence," have a direct impact on the people,

commentaire de l'article de Sir Basil Markesinis et Jörg Fedtke Le juge en tant que comparatiste, 80 TUL. L. REV. 221 (2005).

41. This metaphor is used by Jacques Vanderlinden, *Réseaux, pyramide et pluralisme ou regards sur la rencontre de deux aspirants-paradigmes de la science juridique*, 49 REVUE INTERDISCIPLINAIRE D'ÉTUDES JURIDIQUES 11 (2003).

whether judges apply the Code, distort it or create rules *ex nihilo*. The acts and deeds of practitioners referred to as “practice” also have a tremendous impact on the people, for the good and occasionally for the bad. All these shape the rules we apply, in such a way that Rodolfo Sacco came to call them “legal formants.”⁴² Acknowledging the existence and the role of all actors and factors helps us to have a better understanding of what is going on in the civil law, as in all other legal systems. The development of the law is indeed based on the interaction of such actors and factors. Making that clear would no doubt help us to have a better grasp of what the law is. This helps to identify the driving forces, which are at times customary, legislative, jurisprudential or doctrinal and very often a combination of all, including legal practice. This way we would enrich, rather than revise the doctrine of sources, being mindful of a duality of perspectives, distinguishing the law as it ought to be (the upstream lawmaker’s perspective or formalistic doctrine of sources) and the law as it is applied and perceived by those subjected to the rule (the downstream citizen’s perspective or pluralistic doctrine of sources). This way of looking at things may also help transcend a narrow positivist approach, the moral dimension of norms and judgments being inescapable in both perspectives.

2. Those civil law countries—I mean France and the countries following the French model—not imposing on their higher courts the duty to give reasoned opinions together with their judgments should be pressed to do so.

3. We should insist on what makes the strength and the value of Civil Codes: being written in clear and precise style, free of legal jargon, wherever it appears suitable to state the law in advance, *ex ante* (e.g., testaments, matrimonial regimes, securities), and as clearly but less precisely, in the form of general rules or principles, where the law may not be very detailed in anticipation of a great variety of events, such as in the case of civil liability or

42. Rodolfo Sacco, *Legal Formants: a Dynamic Approach to Comparative Law*, 39 AM J. COMP. L. 1 (1991).

torts, where most rules happen to be developed by the courts *ex post*, once particular events happen. It may be enough there for the Code to give a framework in order to safeguard people from sometimes obscure doctrines that never got a chance of being discussed publicly.

4. We should also be able to identify these driving forces and principles in common law jurisdictions. I could cite quite a few cases, mostly English, where wise and learned judges reject a proposed distinction, insisting that the principle underlying the precedent does not allow such a distinction to be accepted. Such principles innervate codifying statutes such as those adopted in England in the late 19th century. They innervate the Uniform Commercial Code and also the United States Constitution. I am not sure this is a civil law influence. This may simply be in the very nature of what a legal system is.

We would then be better equipped to promote the French and Louisiana model in a multicultural environment.

II. IMAGINING THE FUTURE OF CODES IN A MULTICULTURAL WORLD

Talking about the place of Civil Codes in a multicultural world, I would like to stress the following point. My insisting on the civil law and common law traditions does not mean that I tend to ignore other legal traditions. They do exist and have a huge impact outside western societies and should not be ignored inside western societies.⁴³

I will make four points here, some very brief.

1. Codification, under different forms, is a predominant technique to harmonize the laws in mixed jurisdictions.

2. A true Code may bring homogeneity only if linguistic problems are properly taken into account.

3. Comparative law should help identify principles common to diverse human societies and identify the underlying values.

43. See my comments in 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).

4. Then, the civilian method of interpretation may be promoted, even outside civil law jurisdictions.

A. Codification, Consolidation, and Harmonization

The European Union is spending significant amounts of money on research projects that may lead to a unification of the civil law (in the sense of private law, excluding commercial law). Had I believed in the suitability and feasibility of a European Civil Code, who knows, I might have stayed in Europe to try to dispute with others the glory of being called the European Portalis!

However, I am a European federalist and a legal pluralist, believing that we should allow Member States to keep their own private laws, in all fields not regulated by the Union, as is the case in the United States.

Ongoing projects give an idea of what could be the features of a European Civil Code. Professor Christian von Bar of the University of Osnabrück is piloting a flotilla of working groups in different areas of private law.⁴⁴ This may work only if groups and sub-groups communicate well and if someone keeps an overall view.

The Commission on European Contract Law, chaired by Professor Ole Lando, of the Copenhagen Business School, already produced the Principles of European Contract Law.⁴⁵ More recently, the European Group on Tort Law published the Principles of European Tort Law.⁴⁶ These are great achievements, based on careful comparative studies, but they lack the comprehensiveness of an overall view of the law of obligations, a major input of the civil law tradition.⁴⁷ Only a comprehensive and comparative

44. Visit the website of the Study Group on a European Civil Code: <http://www.sgecc.net/> (last visited October 17, 2009).

45. THE PRINCIPLES OF EUROPEAN CONTRACT LAW PARTS I AND II (Ole Lando & Hugh Beale eds., 1999); PRINCIPLES OF EUROPEAN CONTRACT LAW, PART III (Ole Lando, Eric Clive, André Prüm & Reinhard Zimmermann eds., 2003). See http://frontpage.cbs.dk/law/commission_on_european_contract_law/ (last visited October 17, 2009).

46. EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW, TEXT AND COMMENTARY (2005); see also <http://www egtl.org/> (last visited October 17, 2009).

47. Olivier Moréteau, *Revisiting the Grey Zone between Contract and Tort: The Role of Estoppel and Reliance*, in EUROPEAN TORT LAW 2004, 60, par. 4-6 (Helmut Koziol & Barbara Steininger eds., 2005).

approach may help to clarify issues. It is essential to have an overall view when making a Code.

Now, these sets of Principles are not Codes in the traditional sense, meaning that they lack this comprehensive character of Civil Codes. Also, they are purely doctrinal. In a recent article, I called them “doctrinal codes.”⁴⁸ They have been compared to the American Restatements of the Law. Like in the Restatements, articles are followed by a comment. By the way, I am somehow astonished to see the almost binding force recognized to the comments under the revised articles of the Louisiana Civil Code. This reminds me of the comments Boissonade, a French scholar of the 19th century, wrote under the articles of his project of a Civil Code for the Empire of Japan, a text that remains very influential despite the adoption of the German model.⁴⁹ A commentary is certainly suitable in a doctrinal code, but is it right to have it in a Civil Code? I do not think so.

However, these sets of Principles do share some features of the traditional codes: the so-called principles take the form of rules that are phrased in a rather general and brief style, avoiding heavily technical terms; they are organized in a rather systematic way, with some cross-references and some basic principles. One may question the legitimacy of such codes. They are the work of scholars and never received the approval of a legislature. Actually, they are model laws that may inspire the European and national legislators, or judges where they do not find clear guidance in their domestic law.

They are much more than compilation, and it is to be wished that if the European Union pushes the idea of a European Civil Code, they will look in the direction of such projects rather than produce a huge compilation of European Rules and Regulations, which would only be a code in name.

The French are fearful of such projects. Part of it is nostalgia, but France is less and less loyal to the model of its ancestors. The new codes are mere consolidations (*codification à droit constant*) and some of them, like the Consumer Code, are pumping substance out of the Civil Code. France also fears too strong a German influence. In my view, the German Civil Code cannot be the

48. Olivier Moréteau, *Boissonade revisité: de la codification doctrinale à une langue juridique commune*, in DE TOUS HORIZONS, MÉLANGES XAVIER BLANC-JOUVAN, 103, 116-117 (2005).

49. *Id.* at 109-113.

model of a European Civil Code. The BGB is too much a product of abstract legal science; it addresses the lawyers and not the citizens. Only lawyers can find their way around this code. It may contain very scientific and refined concepts, it may be much more precise and systematic than the French Civil Code, yet it lacks this quality France and Louisiana once considered paramount: it is not an accessible and easily readable code.

My point here is that we should keep promoting the ideal of Codes accessible to citizens, even if we know that citizens often need lawyers to explain and defend their rights. We do not want to make their situation any worse. A plurality of good models, of national codes and doctrinal codes, will no doubt help towards the improvement of national codes and European legislation, and it may be helpful elsewhere in the world.

B. Linguistic Challenges

I will not be long on linguistic challenges, although it is a central field in my scholarship.⁵⁰ They may be daunting when one has to deal with a transsystemic approach (civil law and common law) in too many languages: the EU now has to cope with more than twenty official languages. In my opinion, it is wise to have a limited number of working languages and we should develop a standard or transsystemic terminology that would then translate easily in different languages.

I will just say that Louisiana offers the rest of the world a rich contribution as to expressing the civil law into English. The translations from French into English of the Codes of 1808 and 1825 may contain a number of mistakes, using “door” where the

50. Olivier Moréteau, *Can English become the Common Legal Language in Europe?*, in COMMON PRINCIPLES OF EUROPEAN PRIVATE LAW 405 (Reiner Schulze & Gianmaria Ajani eds., 2003). See also, in French, *L'anglais pourrait-il devenir la langue juridique commune en Europe?*, in LES MULTIPLES LANGUES DU DROIT EUROPÉEN UNIFORME 143 (Rodolfo Sacco & Luca Castellani eds., 1999); *Le prototype, clé de l'interprétation uniforme: la standardisation des notions floues en droit du commerce international*, in L'INTERPRÉTATION DES TEXTES JURIDIQUES RÉDIGÉS EN PLUS D'UNE LANGUE (Rodolfo Sacco ed., 2002); *La common law en français et l'Europe*, 5 REVUE DE LA COMMON LAW EN FRANÇAIS 135 (2003); *Premiers pas dans la comparaison des droits*, in JURILINGUISTIQUE: ENTRE LANGUES ET DROITS; JURILINGUISTICS: BETWEEN LAW AND LANGUAGE 407 (Jean-Claude Gémar & Nicholas Kasirer eds., 2005); O. Moréteau & D. Lamèthe, *L'interprétation des textes juridiques rédigés dans plus d'une langue*, REV. INT. DR. COMP. 327 (2006).

French says “croisée,” a term meaning window,⁵¹ and yet the Louisiana civilians have been very inventive in developing a breadth of new English terms. I started promoting the Louisiana legal terminology in the area of comparative obligations,⁵² and will keep working on this, since it is so useful in the context of the European Union and globalization.

C. Identifying Principles and Values

In civil law countries operating on the French model, principles are clearly articulated and easy to find in the codes and literature, and the lawyer’s job is often to look for exceptions. It is not so in the Germanic model where rules are more explicit and precise, and less accommodating for exceptions. However, there are some fundamental principles in German law as well, like for instance the fundamental concept of wrongfulness in tort law, whereby compensation may be due only where something wrong was done to the plaintiff. I avoided a doctrinal war with the Germans when accepting the reference to wrongfulness in the Principles of European Tort Law:⁵³ I believe this principle should also underlie French law, even if not expressed in the Code and abandoned by the *Cour de cassation*.

In the common law, principles do not appear upfront. Legal reasoning is built on the facts of the case. This does not mean that principles do not play a role. They are to appear faintly in the background. If thrown forward in the judgment, they will be described as *obiter dictum* on account of their generality, but they are there: the comparatist sees them.

The principle in the Code is part of what we civilians call the rule. In the common law judgment, it is not so, if you look at things from a formalistic point of view. The principle is not a technical part of the rule, it is not part of the *ratio decidendi* or holding, but functionally it commands the rule to be applied. For instance, we may say that there is, in the law of negligence, a

51. See Louisiana Civil Code art. 2716, before the 2004 Revision, and *Shelp v. National Surety Corp.* 333, F.2d 431 (5 Cir. 1964), discussed in *L’interprétation des textes juridiques rédigés dans plus d’une langue*, *supra* note 50, at 341-342.

52. *Project to Reform the Law of Obligations (Catala Project): One Project, Two Translations, France*, in *EUROPEAN TORT LAW 2006*, 196, 196-197 (Helmut Koziol & Barbara Steininger eds., 2007).

53. Art. 1:101, *supra* note 46.

general rule that the defendant must compensate the victim of the tort if found in breach of a duty of care. And there is a principle that such a duty exists wherever the defendant was in a position reasonably to foresee that an act or omission of his may harm the plaintiff. Technically, this is not binding, but we have to accept that it is there in all cases where the defendant is found liable.

Some lawyers do not like to be reminded of these principles, may be because they are too indicative of the values that underlie the rules. The famous *dictum* by Lord Atkin in *Donoghue v. Stevenson*, where the learned judge referred to the moral principle that one must love one's neighbor, becoming in law a rule that one must not injure one's neighbor is found embarrassing by some.⁵⁴ Lawyers, especially in America, claim that laws are legitimate when matching the needs of a liberal economy. French lawyers refer constantly to some social values which often end up in the questionable protection of particular groups. Lawmakers are today acting under the pressure of lobbyists and the general idea of a public good is too often left aside, because it may contradict some strategies and private interests.

The great Civil Codes of France and Louisiana cannot be reduced to a body of positivist norms. They are inspired by a vision of law as social order promoting the public good, in the best interest of individuals who would otherwise fight and litigate endlessly. Legal judgment is value based: the respect of human dignity on the one hand, and the future of mankind as a whole on the other hand, are for me the two landmarks we should never forget in any judgment on human affairs. They are our best guides to decide the trickiest cases, especially those linked to environment or bioethics.⁵⁵

I cannot defend the French and Louisiana Civil Codes if reduced to a positivist norm. But I do believe they offer mankind a suitable model if we read them and apply them with Portalis' eyes, or if we project into them the sense of human values that great judges of the 19th and early 20th centuries developed into Anglo-American jurisprudence.

Then, the methods of interpretation that civilians have inherited from their Roman law ancestors can make sense, to interpret

54. *Donoghue v. Stevenson*, [1932] A.C. 532 (H.L.).

55. Moréteau, *supra* note 43.

whatever code, constitution or charter that will be written in clear and simple terms.

D. The Civilian Method of Interpretation

Regrettably, we do not spend much time talking to our students about the common good and shared principles. My experience is that all over the world, students want to master the rules and learn them like recipes. Easy and effortless learning is as popular as fast-food.

We do not spend enough time exploring the civilian method of reading and interpreting the codes. At least in my Law of Obligations class I try to do so, prolonging what I taught in Legal Traditions. My students are sometimes bemused when I ask them, in a case, how the judge applied or interpreted an article of the Code. Their spirit rather jumps from one case to the other, like their appetite from the burger to the freedom fries.⁵⁶

Judges in France and Louisiana, like those in any other civil law jurisdiction, apply some traditional rules of interpretation that sometimes sound mysterious to common-law lawyers. *Specialia generalibus derogans*: where two rules seem to control the same facts, the specific rule controls and the general rule is to be left aside.

Yet, if this specific rule creates an exception to the general rule, it is to be construed restrictively, and no extension by analogy is permitted.

Another rule is more difficult: *ubi lex non distinguit, non distinguere debemus*. The judge is not supposed to introduce in a text a distinction that is not there. For instance, if Code provisions state that the victim of a tort is entitled to compensation for the whole damage, and constantly refers to damage without breaking down the concept into various categories of damage, a court may not exclude mental suffering or pure economic loss if no such exclusion appears in the Code. The common-law lawyer is at a loss there, because of mental structures based on the by-gone system of the writs, opening remedies only in particular types of cases. The writs are gone, but the mental structure remains, like when you remove the cake from the form, as I described with

56. Again recognized as French fries after the election of President Nicolas Sarkozy as President of the French Republic.

Jacques Vanderlinden in our work on the structure of legal systems.⁵⁷ The endless discussions on compensation of pure economic loss would give a good illustration, but may take us too far.

Wherever we find a Code, a Charter, a Bill of Rights, a Constitution written in general terms, the civil law tradition brings adequate tools to interpret or to work out definitions. I remember a workshop with my Boston University colleagues where we discussed the interpretation of the Commerce Clause in the United States Constitution and their amazement when I told them: let's first try to define the term and find out what falls into it by nature. If agriculture or industry do not fall into the definition of commerce, does the phrasing of the Constitution, and its spirit, allow for analogies? How may we work out these analogies? Well, we are back to Roscoe Pound and his plea for a comparative approach, to show the relevance of the civil law in America.

To conclude, we may go much further showing that system building is not creating strait-jackets but safeguarding rights, if we legislate in simple terms and agree to look at the reason behind the words (the *ratio legis*) and ultimately, the principles or values behind the legal systems (*ratio iuris*). A body without a soul is a corpse. A Code or Constitution without a spirit is just a maze of dead words. We may be trained in the civil law or in the common law, but what is the point of what we do if we do not bring life into it?

57. *Rapport Général*, in LA STRUCTURE DES SYSTÈMES JURIDIQUES 13, 45-48 (Olivier Moréteau & Jacques Vanderlinden eds., 2003); also published in CONVERGENCE OF LEGAL SYSTEMS IN THE 21ST CENTURY, GENERAL REPORT DELIVERED AT THE XVITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, BRISBANE 2002, 167, 196-199 (2006).