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Portalis and Pound: A Debate on "Codification"

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INTRODUCTION

In 2007, the *Fondation pour le droit continental*, or the Civil Law Initiative, was established in France for the purpose of supporting and fostering the influence of European private law throughout the world. Among other projects, the Civil Law Initiative sought to encourage "legal

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1. An article somewhat similar to this one was previously written in French for publication in the *Mélanges en l'honneur du professeur Michel Grimaldi* (Festschrift), in honor of Grimaldi as an exceptional and tireless "oracle" of the civil (or Continental) law. Michel Grimaldi is now Professor of Law Emeritus (University of Paris II); he is a former President of the Association Henri Capitant and a former Director of the Fondation pour le Droit Continental. The Louisiana legal community, the Louisiana Section of the Association H. Capitant, and his many Louisiana friends owe Michel Grimaldi an immense debt of gratitude. Many grateful thanks to Seth Brostoff, Foreign, Comparative and International Law Librarian (LSU). Seth's extensive and incisive research contributed substantially to the English version of this Article. His integrity is the reason why his name does not appear as a co-author.

professionals from Romano-Germanic legal systems to express their views in international forums, which concern over two-thirds of the world's countries, i.e. 56.4% of global GDP and 60% of global population."[2] While not expressly defining *droit continental*, the Foundation's early promotional literature emphasized that "Continental law is characterized by statutes and codification," or "the systematic and rational collection of rules of law into official compilations, such as civil or commercial codes."[3] The Foundation further observed that "almost all Member States of the European Union belong to the continental law family."[4] Based on these excerpts, it is an easy step to make in identifying the Foundation's conception of "Continental law" with the civil law tradition, the adjective "Continental" referring implicitly to *la Manche*, the English Channel, as a "legal-geographic" border marking off the insular "common law of England" from "the civil law of the Continent."

On the other side of the "civilian Atlantic," the relationship between civil law identity and code-making has great significance. Louisiana is the only U.S. state whose private law is based on Continental law. Codification has assumed a crucial place in the state's legal historiography. For many legal scholars, the story of the state's civil law tradition begins, and ends, with the codification of Louisiana's pre-statehood mix of Roman, Spanish, and French law.[5] In fact, the Tulane Law Review's very first article, John Henry Wigmore's "Louisiana: The Story of Its Legal System," published in 1916, is characteristic of local civilian folklore.[6] While presuming to tell the story of the civil law's triumph in Louisiana, Dean Wigmore's account abruptly concludes with the adoption of the state's second civil code in 1825.[7] For the famous scholar of American evidence law, codification marked the denouement, if not the exhaustion, of Louisiana's civilian identity. Wigmore and later

2. FONDATION POUR LE DROIT CONTINENTAL: *CIVIL LAW INITIATIVE*, https://www.fondation-droitcontinental.org/en/ [https://perma.cc/YP7V-RDE4] (last visited Nov. 5, 2020).

3. LE DROIT CONTINENTAL, CONTINENTAL LAW (2011), *available at* www.fondation-droitcontinental.org [https://perma.cc/YP7V-RDE4].

4. *Id.*

5. For an example of Louisiana codification folklore, see Symeon C. Symeonides, *An Introduction to the Romanist Tradition in Louisiana: One Day in the Life of Louisiana Law*, 56 LA. L. REV. 249 (1995) (celebrating Digest of 1808 as triumph of civil law over common law). *See also* John T. Hood, Jr., *A Crossroad in Louisiana History*, 22 LA. L. REV. 709 (1962) (similar account).

6. John H. Wigmore, *Louisiana: The Story of Its Legal System*, 1 SO. L. Q. 1 (1916), *reprinted in* 90 TUL. L. REV. 529 (2016).

7. *Id.* at 15.

historians' neglect of other aspects of the civil law tradition in Louisiana is understandable. After all, the state's first two civil codes, the Digest of 1808 and the Civil Code of 1825, were the primary vehicles for preserving the civil law tradition in Louisiana, and what law was not codified by 1825 was quickly Americanized.[8] Much like the Civil Law Initiative's definition of "Continental law," codification and civil law are two concepts difficult to disentangle in the Louisiana lawyer's imagination.

I. CIVILIAN LEGISLATION: THE ART OF RATIONAL CODIFICATION

In Gérard Cornu's *Dictionary of the Civil Code*, the "scientific meaning" of a code is described as being a "consistent body of rules governing a specific field; a body of legal rules in a given field, stemming from the compilation and arrangement of rules relating to it (usually according to a systematic organization)."[9]

Likewise, under the title "Notions of 'Code' and 'Codification,'" Professor Jean-Louis Bergel writes:

> As Portalis was saying, codification is nothing else than the "spirit of method applied to legislation." In the broadest sense, a code is a gathering of texts of written law in a coherent whole. . . . It is a coherent and consistent aggregate of texts encompassing, according to a systematic outline, all the rules that relate to a subject matter and emanating from legislative works or from regulations. . . . The classical codification called "real" or "substantive" of the Napoleonic type does not consist only in the gathering together of a certain number of texts. It is not a mere compilation. It is a creative work and a work aiming at updating a whole subject matter, that gathers together, under a common inspiration, traditional rules and new rules in a coherent structure designed to establish or to update a juridical order.[10]

Importantly, Professor Bergel is careful to distinguish the modern civilian conception of codification from its common law competitor, the code *qua* Restatement or mere consolidation. Reflecting on the modern civilian approach, Bergel notes that:

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8. *See generally* VERNON VALENTINE PALMER, THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION (2005).

9. *Scientific Meaning*, GÉRARD CORNU, VOCABULAIRE JURIDIQUE; DICTIONARY OF THE CIVIL CODE, LEXISNEXIS (10th ed. 2014).

10. JEAN-LOUIS BERGEL, MÉTHODOLOGIE JURIDIQUE 322–23 (2001) (translated from French by this author).

> This type of codification has not been received in the common law countries. . . . There does not exist a true "code" in England . . . . In the United States, Canada, India and, broadly speaking, in the English-speaking countries, the "compilations" referred to as "Codes," the revised statutes or consolidated laws, are not true codes in the European sense of the word.[11]

According to Bergel, "in common law countries, Codes are considered, in general, as mere works of 'consolidation,' of restatement."[12] The difference with common law codification (and pre-Napoleonic civilian codes) is therefore both a matter of degree: the ambition of comprehensiveness, as well as quality: the presence of a rational and unifying logic otherwise absent from projects of common-law restatement. In the apposite words of the Argentine legal scholar, Julio Cueto-Rua, "Codification is a technique which facilitates the achievement of a high degree of consistency and the enactment of broad, logically unifying, general propositions."[13]

The insights of Louisiana's fellow mixed jurisdiction jurists are particularly helpful in emphasizing the dynamism and complexity of civilian codification in a world of common-law compilation. The *economic* nature of civilian codification**,** with its conserving, creating, and organizing functions, suggests a teleological ethos behind the spirit of code-drafting. Paul Crépeau, a comparatist of worldwide reputation and prominent civil law scholar from Quebec, wrote:

> [A] Civil Code is a comprehensive work that conjures up quite naturally the idea of a gathering of diverse elements that make up a whole. . . . A Code is more than a mere material collection of disparate texts: codes and compilations are two different things. A Civil Code represents an organic whole, well-ordered, structured and laid out of substantial matters of private law. . . . A Civil Code is, par excellence, a work of foresight and planning in this sense that it has for its purpose and mission to devise, on the one hand, the organization of institutions essential to 'civil' life . . . and, on the other hand, to lay down all the reciprocal rights and duties of persons living in society. A Civil Code is a work of simplification. . . . The simplicity of the Civil Code manifests itself . . . in the care of formulating the rule of law, addressed to the 'prudent citizen,' in a precise language, simple and plain in

11. *Id.* at 323.

12. *Id.*

13. Julio C. Cueto-Rua, *The Future of the Civil Law*, 37 LA. L. REV. 645, 646 (1977).

avoiding as much as possible the professional jargon.[14]

Comprehensiveness, simplicity, and precision; these are crucial qualities of codification in a mixed jurisdiction such as Quebec (or Louisiana), where Anglo-American law offers a tantalizing menu of options for "filling gaps" in a civil code, a veritable "attractive nuisance" for the pragmatist and a "dam waiting to be breeched" for the anxious purist.[15] The preliminary provision of the Quebec Civil Code of 1991 explains that the flexibility of the code's general legal principles ensures the continuing vitality of the pre-code civilian order rather than weakening it: "The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication."[16] A civil code may therefore serve not only as a set of general legal principles regulating future disputes but even as a bulwark for preserving an entire legal culture.[17]

II. SOME EARLY COMMON LAW PERSPECTIVES ON CIVILIAN CODES

In a cultural milieu of skepticism concerning legislative solutions to discrete legal problems, modern civil codes and their ambitious aspirations to regulate all of private law according to a preconceived blueprint were probably not likely to impress common-law lawyers, even those sympathetic to law reform. The evidence of the 19th century tends to confirm this assumption. Soon after the promulgation of the Code Napoléon, Chancellor Kent in New York complained that the French code had failed to achieve anything like the comprehensiveness and self-sufficiency advertised by its admirers. Kent apparently preferred the *ancien droit* commentaries of pre-codified French law, which was so popular in the United States after the American Revolution:

> The *code Napoleon*, in respect to the contract of sale, and in respect to all other contracts, seems to be in a great degree a

14. P.-A. Crépeau, *Réflexion sur la codification du droit privé*, 38 OSGOODE HALL L.J. 267, 289–91 (2000).

15. *Cf.* T.B. Smith, *The Preservation of the Civilian Tradition*, *in* CIVIL LAW IN THE MODERN WORLD 16 (Athanassios N. Yiannopoulos ed., 1965) (civilian purist warning against use of Anglo-American law's terminology and categories as "alien" jurisprudence "pouring" through "breaches" in civilian cultural boundary).

16. Civil Code of Québec, prel. (1991).

17. As in Louisiana. *See* Symeonides, *supra* note 5 (discussing Louisiana codification as a conservative political act to preserve Roman civil law rather than break with legal past).

> concise abridgment or summary of the writings of Pothier. The utility of the latter, and their great merit in learning, perspicuity, and accuracy of illustration, are far from being superseded or eclipsed by the simplicity and beauty of the code. The aid of the French civilians of the former school has been found as indispensable as ever. The *Code Napoleon*, and *Code de Commerce*, deal only in general rules and regulations. They are not sufficiently minute and provisional to solve, without judicial discussion, the endless questions that constantly arise in the business of life.[18]

A few decades later, a very different critic, the English legal philosopher John Austin, came to similarly negative conclusions about the perceived failures of French codification:

> [T]he judiciary law is, as it were, the *nucleus* around which the statute law is formed. . . . The statute law is not a whole of itself, but is formed or fashioned on the judiciary law, and tacitly refers throughout to those leading terms and principles which are expounded by the judiciary.—And hence, . . . arises the greatest difficulty in the way of codification. For, in order to the exclusion of the judiciary law, and to the making of the code a complete body of law, the terms and principles of the judiciary must not be assumed tacitly, but must be defined and expounded by the code itself: A process which people may think an easy one—until they come to *try* it. . . . [T]he statute law is not of itself complete, but is merely a partial and irregular supplement to that judiciary law which is the mass and bulk of the system.
>
> . . .
>
> [T]he question of codification is a question of time and place. Speaking in abstract (or without reference to the circumstances of a given community) there can be no doubt that a complete code is better than a body of judiciary law: or is better than a body of law partly consisting of judiciary law, and partly of statute law stuck patchwise on a body of judiciary. . . . Are there men, then and there, competent to the difficult task of successful codification? of [sic] producing a code, which, on the whole, would more than compensate the evil that must necessarily attend the change?
>
> . . .
>
> The first and most current objection to codification, is the

18. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 397–98 n.(f) (vol. 1827).

> necessary incompleteness of a code. It is said that the individual cases which may arise in fact or practice, are infinite; and that, therefore, they cannot be anticipated, and provided for, by a body of general rules. The objection (as applied to statute law generally) is thus put by Lord Mansfield in the case of Omychund and Barker. . . . "Cases of law depend upon occasions which give rise to them. All occasions do not arise at once. A statute very seldom can take in all cases. Therefore the common law that works itself pure by rules drawn from the fountains of justice, is superior to an act of parliament."
>
> . . .
>
> In France and Prussia . . . the law does not possess that compactness and accessibility, which are the main ends of codes as such . . . .
>
> [I]n France, the code is buried under a heap of subsequent enactments of the legislature, and of judiciary law subsequently introduced by the tribunals. . . .
>
> . . .
>
> The first glaring deficiency of the French code is the total want of definitions of its technical terms and explanations of the leading principles and distinctions upon which it is founded. . . . Unless . . . the code contains a statement of leading principles as well as details, the code itself does not furnish the necessary guides to its own meaning; if those guides exist at all, they exist *en dehors* of the code.
>
> Now, of the necessity of explanations of the leading principles and distinctions and of definitions of the technical terms, the compilers of the French code had no idea. . . . [T]he French code is not a body of law, or is not a body of law forming a substantive whole. It is nothing but a loose abstract of the former law, or an index to a body of law existing *dehors* itself. This very defect in the French code is one principal cause of the fallacious brevity which its injudicious admirers have frequently selected as a matter of praise.[19]

In the early 20th century, Anglophone legal scholars explained common lawyers' aversion to codified legislation by identifying the English nation's conservatism as well as a "psychological"

19. 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 681, 684–86, 689–90, 692 (3d ed. 1869).

imperviousness to civilian models of legal methodology.[20] These scholars resorted both to ahistorical and largely cultural explanations, invoking in particular the supposedly English habit of relying on experience or inductive reasoning, in contrast to the Continent's alleged predilection to grand theorizing. In his 1937 essay, "What is the Common Law?," Roscoe Pound hypothesized that a deep philosophical chasm existed between English and civilian methodologies, and he regarded cultural differences as the best explanation for the former tradition's relative neglect of legislation:

> The civilian is at his best in interpreting, developing and applying written texts. . . .
>
> In contrast the common-law lawyer is at his worst when confronted with a legislative text. His technique is one of developing and applying judicial experience. It is a technique of finding the grounds of decision in the reported cases. It is a technique of shaping and reshaping principles drawn from recorded judicial decisions. Hence while to the civilian the oracles of the law are academic teachers, the books of authority are codes, . . . to the common-law lawyer the oracles are not teachers but judges, the books of authority are reports of adjudicated cases . . . .
>
> If we think of the common law as a taught tradition of decision, it is a tradition of applying judicial experience to the decision of controversies. . . .
>
> [B]ehind the characteristic doctrines and ideas and technique of the common-law lawyer there is a significant frame of mind. It is a frame of mind which habitually looks at things in the concrete, not in the abstract; which puts its faith in experience rather than in abstractions. . . . It is a frame of mind which is not ambitious to deduce the decision for the case in hand from a proposition formulated universally, as like as not by one who had never conceived of the problem by which the tribunal is confronted. It is the frame of mind behind the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of anticipating them by

20. *See, e.g.*, Clarence J. Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation*, 17 TUL. L. REV. 351, 378 (1942) ("[O]nce a typically English system developed and became firmly entrenched, the English national character could be relied upon to defend and retain it to the bitter end.").

abstract universal formulas.[21]

Pound's resort to deeply-entrenched philosophical differences as causal explanations for legal diversity is implicit recognition that the methodological and cultural differences between Europe's two principal legal traditions have proven persistent, pervasive, and, depending on one's attitude to predictions of legal convergence, perhaps intractable.

III. PORTALIS, AN ORACLE OF THE CIVIL LAW'S PERSPECTIVE

In his *Discours préliminaire*, a sort of drafters' report to the French Assemblies included with the *Projet*, Portalis articulated his view of the creative collaboration between the lawmaker, as the primary source of law, and case law and doctrine, as secondary sources of law, in the application of the new French code.[22]

Nineteenth-century common-law lawyers such as Kent and Austin would have found some enlightening and wise statements in Portalis's comments that would have both aroused their sympathies and emptied their false dichotomy of "legislator versus judge" of any substance. Indeed, these commentators would have found much to admire in Portalis's profound statements to the Assemblies about the role of judicial practice and custom, pronouncements inherited from this civilian oracle's own experiences as lawyer, judge, and lead member of the French code's drafting commission:

> Legislation is not a pure act of power; it is an act of wisdom, justice, and reason. The legislator does not exercise authority as much as he serves a sacred office. He must not forget that legislation is made for men, and that men are not made for legislation; . . . while it is possible in a new undertaking to calculate the advantages a theory offers, it is impossible to anticipate all the drawbacks that practice alone can reveal . . . .
>
> . . .
>
> A host of things is thus necessarily left to the province of custom, the discussion of learned men, and the decision of judges.
>
> The role of legislation is to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details of

21. Roscoe Pound, *What Is the Common Law*, 4 U. CHI. L. REV. 176, 186–87 (1937).

22. *See Discours préliminaire*, *in* PROJET DE CODE CIVIL iii (An. VIII [1800]).

> questions which may arise in particular instances.
>
> It is for the judge and the jurist, imbued with the general spirit of the laws, to direct their application.[23]

Legislation being "an act of wisdom, justice, and reason," and "being made for men," Portalis claims that the code must leave interpretation "by way of doctrine" to judges and jurists imbued with the spirit of the laws. They will direct the laws' application. In doing so, civilian judges and jurists, like their common law brethren, must rely on the culture, values, and beliefs of the people when searching the "spirit of the laws." In Portalis's view of civilian legal methodology, human experience, judicial and extrajudicial, is not a separate reservoir of legal knowledge at odds with the code's general principles, but reliable evidence of the correct application of codal provisions and the means of their gradual and continuous renovation.

IV. CIVILIAN LEGAL METHODOLOGY: A TRIANGLE

According to Portalis, legislation, doctrinal writing, and case law are like three angles of a "triangle" of legal methodology. Statutory law or legislation, the top angle, jurisprudence or cases and legal writing or doctrine as the bottom two angles, exist in both the civil law and common law traditions. However, the legal culture, values, ideology, and institutions prevailing in these two legal traditions have driven them to elaborate two different approaches in ranking their sources of law and in devising their working relationship. As regards the civil law, the most authentic and reliable understanding of its sources of law and their working relationship is found, once again, in Portalis's report to the French Assemblies, in their capacity as lawmakers. Here are some of Portalis's instructions to the "lawmaker":

> [W]e find in the codes of civilized nations the kind of meticulous attention *which covers a multiplicity of particular issues and seems to make an art of reason itself.*
>
> . . .
>
> We also kept clear of the dangerous ambition of wanting to forecast and regulate everything. . . .
>
> No matter what we do, positive laws could never entirely replace the use of natural reason in the affairs of life. . . . [T]he legislator cannot possibly provide for all eventualities.

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23. *See* Alain Levasseur, *Code Napoléon or Code Portalis?* 43 TUL. L. REV. 762, 767–69 (1969) (translation of *Discours préliminaire*).

. . .

> In any case, how can one fetter the movement of time? . . . How can one know and calculate in advance what only experience can reveal? Can a forecast ever encompass matters that thought cannot reach?
>
> A code, however complete it may seem, is hardly finished before a thousand unexpected issues come to face the judge. For laws, once drafted, remain as they were written. Men on the contrary, are never at rest . . . .[24]

Turning then to the relationship that a civilian "code" assumes between the lawmaker on one side and judges and jurists on the other side, Portalis makes clear that:

> [I]n all civilized nations, we always witness the formation, alongside the temple of enacted laws and under the legislator's supervision, of a repository of maxims, decisions, and doctrinal writings which is daily refined by the practitioners and their clashing debates in court, which steadily grows as all acquired knowledge is added to it, and which has always been regarded as the true supplement of legislation.
>
> . . .
>
> [I]f there is no precise provision on a particular matter, then an ancient custom, constant and well established, an unbroken line of similar decisions, an opinion, or an accepted maxim takes the place of enacted law. . . .
>
> All this presumes compilations, collections, treatises, and numerous volumes of research and analysis.
>
> . . .
>
> It would thus be erroneous to think that there could be a body of laws that would provide in advance for all possible cases and yet at the same time would be within the grasp of the humblest citizen.
>
> In the present state of our societies, it is very fortunate that the study of case law is a science that attracts talent, enhances self-respect, and awakens emulation. A whole class of men then dedicates itself to this science . . . .
>
> It is very fortunate that we have compendia . . . so that it becomes necessary, in some way, to judge today much as we judged yesterday, and that there be no variations between judicial decisions other than those resulting from the progress of enlightenment and the force of circumstances.

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24. *See id.* at 768–69.

. . .

> The legislator must pay attention to case law; it can enlighten him, and he can correct it; but there must be a body of case law. . . . [O]ne cannot dispense with case law any more than he can dispense with legislation. . . . It is for experience gradually to fill up the gaps we leave. The Codes of nations are the *fruit of the passage of time*; but *properly speaking*, we do not make them.[25]

In 1901, the French law professor Adhémar Esmein, writing in the first issue of the *Revue Trimestrielle de Droit Civil*, explained in more practical terms how these three sources of law feed on each other and how they merge into one voice, the voice of "one law," the voice of jurisprudence:

> [T]he judge, to set down his decision and his thinking, has in our country a particular form to which he is tied. It is not the English system in which the magistrate, *putting down the law*, pronounces freely and orally his *judgment* . . . in which, in principle, each judge, if there are several, gives in turn his independent judgment . . . . The judgment of a French court is a written verdict, the collective work of the court, which must suit all the members of the bench, preceded by considerations in which the thinking, necessarily compressed, is kept to the briefest and most concentrated expression. For all these reasons the interpretation of the Civil Code by the tribunals could not always be the same as that of the professors and writers. It is thus thta [sic] *case law* has formed beside *doctrine*.
>
> . . . Case law in its entirety, with partial divergences, such as doctrinal writings also offer, forms a true system . . . . That comes only from the powerful and healthy instinct which pushes administrations and established bodies to conform their future conduct to their past conduct. . . .
>
> . . .
>
> M. Labbe . . . inaugurated one of the first scientific and detailed annotations of important decisions, giving them a value and scope that they had never had before. . . .
>
> . . .
>
> [I]t is not a dead legislation which the pages of the Civil Code contain. It is a living law . . . . [I]t has transformed itself and will transform itself even further. These transformations could only have been produced (where the lawmaker did not intercede anew) by respecting the ancient texts, by softening them through

25. *See id.* at 769–73.

> interpretation; but they were produced in numbers and in depth. . . . The written law had to adapt to the new milieu. Now, these transformations of the civil law, what noted them down and at the same time consecrated them? It is case law. Case law is the true expression of the civil law; it is the real and positive law, as long as it has not been changed. Thus, it, as much as the civil code itself, must be studied directly and scientifically. . . .
>
> . . .
>
> The right and duty of every jurist is to fight, with all his strength, against all case law he considers wrong or bad. The courts, fallible like any assembly of men, the Supreme Court itself cannot be obstinate if the solid and incontestable demonstration of their mistake is supplied. Therein lies an important and delicate task which falls upon doctrinal writers. . . .
>
> . . .
>
> [T]he scattered decisions rendered by the tribunals, on the various institutions which the civil law includes, form a system in which all parts fit.
>
> . . . But this general harmony, with its subordinate irregularities, who can formulate and demonstrate its existence? Not the tribunals; they supply and cut the materials, but are not charged with constructing the building. It is the theoreticians, the men of learning; it is for the study and the rostrum of the professor.[26]

As previously stated, in a civil law system, this "trio" of sources of law can be described as forming the three angles and sides of a triangle. They are, as such, in a relationship in which a statute or a code, having preeminence of place, lies on the top of the triangle, while jurisprudence and doctrine form the bases, or the bottom angles of the triangle. This triangular relationship is such that "alongside the temple of enacted law" exists a myriad of "compilations, collections, treatises, and numerous volumes of research and analysis."[27] In the words of Esmein, the harmony between the three sources of law is achieved by the tribunals who "supply and cut the materials, but are not charged with constructing the building. It is theoreticians, the men of learning; it is for the study and the rostrum

26. A. Esmein, *La jurisprudence et la doctrine*, 1 REVUE TRIMESTRIELLE DE DROIT CIV. 5–19 (1902) (translated by M. Shael Herman, *Excerpts from a Discourse on the Code Napoleon by Portalis and Case Law and Doctrine by A. Esmein*, 18 LOY. L. REV. 23, 30–35 (1971–72)).

27. Levasseur, *supra* note 23, at 770.

of the professor" to perfect this harmony.[28] As Roscoe Pound acknowledged:

> [I]t is important to keep in mind that the methods of civilians have been chiefly determined by the circumstance that the modern Roman law is, and from its very beginning has been, a law made in the universities. The oracles of the civil law are not judges and practicing lawyers. They are teachers. The great repositories of the law are treatises and commentaries upon texts, not reports of judicial decisions. Moreover, the traditional technique of the civilian is one of developing the grounds of decision from written texts.[29]

A few years later, Roscoe Pound added:

> From the time that the Law of Citations gave legislative authority to the writings of the great jurisconsults, [the civilian] has thought of the form of the law as typically that of a code, ancient and modern. His method has been one of logical development and logical exposition of supposedly universal enacted propositions. His whole tradition is one of the logical handling of written texts.

In contrast, the common-law lawyer is at his worst when confronted with a legislative text.[30]

CONCLUSION

It would appear proper to conclude, from the above attempt at making a rapprochement between Portalis and Pound, that the latter, Roscoe Pound, had accurately understood and appreciated the originality, the inner wisdom, the writing skill, and the artistic drafting technique of the process of "codification" as evidenced in the *Code civil des français* also known as the Code Napoléon. The following thoughts expressed by Pound encapsulate the acumen of his understanding of "codification," as a new form of legislating by relying on judges and doctrine to "grasp[] the true sense of the laws, applying them . . . and supplementing them in those cases which the laws have not provided for."[31]

Pound emphasized that:

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28. Esmein, *supra* note 26, at 35.

29. Roscoe Pound, *Classification of Law*, 37 HARV. L. REV. 933, 967–68 (1924).

30. Pound, *supra* note 21, at 186.

31. Levasseur, *supra* note 23, at 771.

> the civilian reasons by analogy from a statutory provision the same as from any other legal rule. Thus, it is as easy for him to administer justice by a code as it is difficult—I had almost said impossible—for us. To him a series of code sections involves the same problems that a series of decisions involves for us. He fails to understand how we can treat the latter as giving a series of legal rules. We fail to see how he can administer justice by means of the former in the multitude of cases that do come within the four corners of the text.[32]
>
> . . .
>
> With us a precedent will govern a case "on all fours." But it may do much more. We distinguish it and limit it, or we extend its application and develop its principle. The French, on the other hand, think only of a definite proposition as established by a settled course of judicial decision. Neither a decision nor a course of decision can lay down a general rule. . . . In other words, the art of working with the materials of the legal system is no less different than the content of the materials themselves.[33]

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32. *Id.* at 769:

> No matter what we do, positive laws could never entirely replace the use of natural reason in the affairs of life. . . . [T]he legislator cannot possibly provide for all eventualities. . . . In any case, how can one fetter the movement of time? . . . How can one know and calculate in advance what only experience can reveal? . . . A host of things is thus necessarily left to the . . . discussion of learned men and the decision of judges. The role of legislation is to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details of questions which may arise in particular instances.

33. *Compare* Roscoe Pound, *The Theory of Judicial Decision I. The Materials of Judicial Decision*, 36 HARV. L. REV. 641, 647–49 (1923), *as quoted below*, *with* Levasseur, *supra* note 23, at 772:

> [L]egislation governs everyone; it considers men *en masse*, never as individuals; it must not interfere in individual matters or lawsuits . . . . Magistrates would lose their function, and the lawmaker, fettered by details, would soon be nothing more than a magistrate. . . . 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 . . . .