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Code Napoleon or Code Portalis?

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CODE NAPOLEON OR CODE PORTALIS?

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[*On the occasion of the 200th birthday of Napoleon, the Tulane Law Review presents an important and previously untranslated document. The Preliminary Discourse of Portalis, here translated by Shael Herman, was addressed to the French National Assembly in 1800, and is perhaps the most significant of all the writings preceding the enactment of the Code Napoleon. Its importance is demonstrated by the following article by Professor Levasseur. Its relevance to the current debate concerning a new Civil Code for Louisiana should be obvious to the readers of the Tulane Law Review.*]

INTRODUCTION

Tradition and habit would seem to condemn such a question, *i.e.*, Code Napoleon or Code Portalis, to an inevitable answer. However, despite appearance, the answer is not easy to give. Each element of the alternative question has merit and weight. On one side we have prestige and greatness acquired largely with military genius; on the other side we have glory and fame acquired by talent of rhetoric, method and compromise. Where Bonaparte, the soldier and the military genius, needed officers such as Ney, Murat, and Lannes, Bonaparte, the head of state, needed faithful and able servants to add laurels to his crown. His greatness lay in his wise choices. Justinian had selected Tribonian as the head of the commission appointed to write what was to be the Digest; Napoleon chose Portalis to fulfill the same obligations. They complemented each other very well: one conceived what the other implemented; the former would not have had his name attached to the Civil Code, had the latter lost his life in the horrors and injustices of the Revolution. We feel it is our duty, therefore, to relate briefly the genesis of the Code before it can be shown that the fame and fate of the work were due to the exceptional legal mind and creative genius of Portalis.

THE GENESIS OF THE FRENCH CIVIL CODE (OR CODE NAPOLEON) OF 1804[1]

The idea of unifying the civil laws, aiming essentially at suppressing the imaginary line dividing the French territory into "pays de coutume" and "pays de droit écrit," had, long before Napoleon,

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[1] 1 M. Planiol & G. Ripert, Traité élémentaire de droit civil 37 et seq. (12th ed. 1939.) W. Johnson, Chapters in the History of French Law 228 et seq. (1957).

been one of the main concerns of the monarchy. The national evolution, stimulated by good sense and practical reason, seemed to suggest the natural tendency towards unification. With the improvements in communications, it became absurd to pass from the domain of one law to that of another every time it was necessary to change horses, as Voltaire noticed in a sarcastic remark. Men had come to the point where they felt, thought, acted and worked in exactly the same way; they came to wish to breathe the same law under the same sun, feel the same rules on the same land, live the same social and moral principles under the same leadership. Would it be, then, a voluminous "coutumier"[2] or a modern re-enactment of Roman Law? Wishes were expressed, but circumstances would decide. They could not decide, however, in any other way than that which is inherent in the nature of the Frenchmen and characteristic of the French nation: that of elaborating a compromise. The unification would be made by a compromise between the "customs" of the North and the "written law" of the South, or it would not be!

The "grandes ordonnances" of Louis XIV and Louis XV[3] paved the way, set the example and taught the method. The commissions created by Colbert (and often headed by Louis XIV) served as a model to those later appointed by Napoleon, and the official transcripts of the former constituted precedents to the latter. The main principles of Domat's work[4] had been adopted and understood by these artisans of the first hour, to the point that one can say they drafted the grammar of the legislator's art. The first national assembly during the Revolution, the Constituent Assembly,[5] adopted by unanimous vote in September, 1791, the resolution that a Code should be drafted. The passage of time caused the promises of the Constituent Assembly and the Legislative Assembly[6] to be forgotten until the Convention appointed a committee and ordered it to draft a Civil Code in one month! Cambacérès,[7] the president of the committee, had the impossible task of elaborating a permanent civil code in sympathy with the views of the constantly changing majority of the assemblies, whether under the Convention or the Directory.

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[2] An accumulation of the usages, customs and mores of a territory.

[3] These ordonnances were often referred to as "Codes." *See, e.g.*, Ordonnance of 1667 on civil procedure (familiarly known as the Code Louis); Ordonnance of 1670 on criminal procedure (called Criminal Code); Ordonnance of 1673 on commerce (often called Code Savary).

[4] J. Domat, Les lois civiles dans leur ordre naturel (1690-1697).

[5] The Constituent Assembly governed from June 17, 1789, to September 30, 1791.

[6] The Legislative Assembly governed from September 30, 1791, to September 21, 1792.

[7] Cambacérès (1753-1824) wrote three projets of civil code; the first in 1793, the second in 1794, the third in 1798.

At the end of 1799, the French people still expected, but with increasing impatience, the Code always promised and always deferred.

It is then that a single man stood, ambitious and conquering, against the destructive forces of the dying Revolution, to revive the spirit and the glow of the first days. Proclaiming the Constitution of the Consulate, on the 15th day of December, 1799, the First Consul told the Nation: "the Constitution is based on the sacred rights of property, equality and liberty. . . . Citizens, the Revolution is stabilized according to the principles that started it. It is finished." Napoleon's genius was that he interpreted the feeling of the greatest majority of the French people and his glory was that, having made a promise, he fulfilled it completely. The legend was born, then, that the whole civil code came out of Napoleon's mind, following the mythological image of Minerva's birth out of Jupiter's brain. This legend is really but a legend. A careful analysis of the law laid down in the code, a glance back on the history of its drafting, show very plainly that almost all of its content had been inherited from the past (pre-revolutionary French law) or received from the previous eve (law of the Revolution). Napoleon's merit was to learn the art of making a law as he learned the art of fighting a war: by practising them. The First Consul presided over the meetings of the Council of State (Conseil d'Etat), as General Bonaparte commanded his army on the battlefield: he could see the victory, he could evaluate his means, and he could adapt the latter to achieve the former. The means at his disposal consisted in a handful of prominent jurists, scions of the noble traditions of the French Parliaments.[8] On August 13, 1800, the First Consul appointed a commission of four members to prepare the draft of a new civil code. The members of the commission, these artisans of the last hour, these faithful workers of a tremendous monument, labored constantly under the supervision of Bonaparte, whose intelligence insatiable of preciseness, whose genius imbued with realism, forced them to create a code commensurate with the glory of an Emperor. Napoleon, while in exile, would then be entitled to say: "My true glory is not that I have won 40 battles; Waterloo will blow away the memory of these victories. What nothing can blow away, what will live eternally, is my Civil Code."

The members of the commission never claimed they intended to act as creators; they were disciples but not prophets, jurists but not witch-lawyers! The First Consul of the Republic appointed Tronchet, who was then President of the Tribunal of Cassation; Bigot-Préameneu, government commissioner in that Tribunal; Malleville, a judge at the Tribunal of Cassation; and Portalis, govern-

[8] These Parliaments, under the monarchy, had judicial functions, political rights, and also a wide power of administration.

ment commissioner in the Prize Council.[9] The wisdom, the experience, and the scholarship of these men led them to understand that their historical responsibility was to operate a smooth transition between the present and the past, so that the Civil Code would remain for the people the French Revolution organized.

PORTALIS

Among all of the jurists who contributed to the drafting of the Code, Portalis played the leading role. He was of those men whom history made great because they were humble and modest, qualities that human memory forgets easily where it can grasp others more readily. Portalis can be compared to these prominent figures of antique Rome whose names Cicero has immortalized, the Publius Scaevola, the Quintus Mucius . . .[10]

Portalis was born in 1746,[11] of a father who was a professor of canon law at the University of Aix-en-Provence. While in college at the Oratorians, he exhibited an unusual ability to speak in public and a precocious maturity of judgment. At the age of 19, he became a lawyer at the Parliament of Aix, where his method of pleading practically revolutionized court procedure. Thibaudeau[12] tells us that after his first pleading, an old colleague of his went to him and said, "You have pleaded with great effectiveness; but you must change your method which is not that of the bar." "Sir," Portalis proudly answered, "it is the method of the bar that needs to be changed, not me."

In 1770, although Portalis was only 24, the Prime Minister, the Duke of Choiseul, asked him for a "consultation sur la validité des mariages des Protestants." This consultation had such an impact on the ideas of the time that Voltaire could write that it "was not a consultation but a real treatise of philosophy, legislation and political morals."[13] In two subsequent works[14] he expressed ideas and thoughts opposed to the necessity for uniform laws, uniformity of legislation being one of the main instruments leading towards despotism. For several years he would raise strong doubts about the

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[9] 1 P. Fenet, Recueil complet des travaux préparatoires du Code civil *lxii* (1827).

[10] Publius Scaevola is mentioned in Cicero's Digest. Quintus Mucius is mentioned in Cicero's De Oratore, De amicitia, De Republica.

[11] At Bausset, near Toulon.

[12] Thibaudeau, Mémoires sur le Consulat par un ancien conseiller d'état de 1799 à 1804 at 414 (See Capitant, *Portalis, le Père du Code Civil*, 56 Rev. crit. leg. jur. 187, 189 n.1 (1936).

[13] Discours, rapports et travaux inédits sur le Code Civil, published by the Vicomte Frederic Portalis (Portalis' grandson) Paris 1845.

[14] "Lettre des Avocats du Parlement de Provence au Garde des Sceaux" (1788); "Examen impartial des nouveaux Edits" (1788).

feasibility of a code. He could not foresee then the strong and heroic hand, the all-powerful sword under which he would work in peace during the Consulate, at the head of the group of the Elders.

During the horrible years of the French Revolution he was sent to prison and might have been sentenced to death had not his son managed to save him. Elected to the Conseil des Anciens under the Directory, Bonaparte noticed him and later Napoléon appointed him, in April 1800, commissioner in the Prize Council and a few months later Conseiller d'Etat (member of the Council of State). At the time of this last appointment, Portalis was already completely blind. A cataract had woven its black veil over his eyes. The loss of his sight in no way affected the intellectual qualities of the man. His wonderful memory[15] served him as a substitute for sight, and France would owe to a blind man one of the greatest of her contributions to the world: the Civil Code. When one reads Portalis one cannot but be stricken by his method, by his style, quite similar to the traditions of the rhetoricians of Antiquity.[16] His memory is filled with maxims, definitions and precepts of moral science and political science. "He [Montesquieu] taught us not to separate details from the whole, he taught us to study the laws in history, which is like the applied physics of the legislative science."[17] Good faith and common sense are the two most important philosophical features of Portalis' personality; he was definitely the most learned, the wisest and the deepest of the members of the Commission. Educated and brought up in the South of France, versed in the knowledge of Roman Law, taught to respect the written law, Portalis wanted very much for the Roman tradition to be adopted, but his wisdom and his belief in the greatness of his responsibility led him, quite naturally, to work towards a compromise with Tronchet, the defender of customary law of northern France.

Portalis' leading role in the drafting of the French Civil Code was acknowledged by his colleagues in the Commission, who entrusted him with the task of writing the general report on the works achieved by the Commission, to bring to light the spirit that inspired and guided the drafters. His previous works, his philosophical mind, his wide knowledge, everything marked him out for this task. He called his report "Preliminary discourse on the projet of Civil Code."[18] This preliminary discourse is a masterpiece of legal science and rightfully considered as such.

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[15] *See* Sainte-Beuve, *Portalis*, 5 Causeries du lundi 441 *et seq.* (1852).
[16] See the translation of the Preliminary Discourse, *infra*.
[17] *See* Sainte-Beuve, *supra* note 15, at 462.
[18] Capitant, *Portalis, le Père du Code Civil*, 56 Rev. crit. leg. jur. 187 (1936).

PRELIMINARY DISCOURSE[19]

NATURE OF THE LAW[20]

Good civil legislation is the greatest asset that men can give and receive; it is the source of morals, the safeguard of property, and the guarantor of peace, both public and private; while it does not establish the government, it maintains it; it restrains power and contributes to its respect, as if the power were justice itself. Every person is affected by legislation, for it intertwines with the principal activities of his life, and follows him everywhere; it often constitutes the only morality of a nation and is always connected with its freedom; finally, it comforts every citizen for sacrifices that political necessity requires him to make for the community by protecting him when necessary in both his person and property, as if he alone were the entire community.

. . . But what a task it is to draft civil legislation for a great people! The work would exceed human strength, if it involved giving this people an absolutely new institution, and if, forgetting it occupies the highest rank among civilized nations, we chose to ignore the experience of the past and the tradition of common sense, rules, and maxims which has come down to us and embodies the spirit of centuries.

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; that it should be adapted to the character, habits, and position of the people for whom it is made; that caution about novelty in legislative matters is necessary because, 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; that one must leave what is good alone if one is in doubt about what is better; that in correcting an abuse, the dangers inherent in the correction itself must be reckoned with; that it would be absurd to surrender oneself to a belief in absolute perfection in matters susceptible of only relative goodness; that instead of changing the laws, it is almost always more useful to give the citizens new

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[19] Translated by M. Shael Herman.

[20] The headings do not appear in the original text. Because we have translated only excerpts from the speech, the headings have been added to guide the reader's attention.

Several short selections from this Discourse have previously appeared. *See, e.g.*, A. Von Mehren, The Civil Law System 57-59 (1957).

grounds for liking them; that history offers us the promulgation of scarcely more than two or three good laws in the space of several centuries; that finally, *it is proper to propose changes only to those whose destiny it is to grasp, by a stroke of genius and a kind of sudden insight, the whole organization of a state.*[21]

THE DYNAMISM OF THE LAW

. . . At the beginning of our discussions, we could not help being surprised by the opinion, so widely held, that in drafting a civil code, a few precise provisions on each subject would suffice and that the great art is to simplify everything while foreseeing everything.

To simplify everything is an undertaking on the meaning of which we would all have to agree. *To anticipate everything* is a goal impossible of attainment.

There must be no useless laws; they would weaken those which are necessary and compromise the certainty and majesty of the legislation.

. . . The laws of the Twelve Tables are constantly proposed as models; but can we compare the institutions of a nation just being born with those of a nation that has already reached the pinnacle of wealth and civilization? Didn't Rome, *born to greatness* and destined, so to speak, *to be the eternal city,* quickly recognize the insufficiency of her original laws? Didn't the changes which had gradually taken place in her mores provoke a change in her legislation? . . . The history of Roman legal development is very much that of all nations.

In despotic states, where the prince owns all the land, where all commerce is carried on in the name of the head of state and for his benefit, where individuals have neither liberty, nor free will, nor property, there are more judges and hangmen than there are laws; but wherever citizens have property to preserve and defend, wherever they have political and civil rights, wherever honor counts for something, a proper number of laws are needed to encompass everything. The various kinds of goods, the various kinds of industry, the various predicaments of human life demand different rules. The concern of the lawmaker must be divided in proportion to the multiplicity and importance of the matters which require legislation. As a consequence, we find in the codes of civilized na-

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[21] This passage is believed to be a flattering reference to Napoleon. *See* A. Esmein, 1 L'Originalité du Code Civil 5 (1904).

tions the kind of meticulous attention *which covers a multiplicity of particular issues and seems to make an art of reason itself.*

Thus, we did not think we should simplify the laws to the point of leaving citizens without rule or guarantee concerning their greatest interests.

We also kept clear of the dangerous ambition of wanting to forecast and regulate everything. Who would imagine that those to whom a code always seems too voluminous are the very people who dare imperiously to assign the lawmaker the arduous task of leaving nothing to the discretion of the judge?

No matter what we do, positive laws could never entirely replace the use of natural reason in the affairs of life. Society's needs are so varied, the intercourse between men so active, their interests so manifold, and their relations so extensive that the legislator cannot possibly provide for all eventualities.

In the very matters that particularly call for his attention, there is a host of details which either escape him or are too much open to contention or instability to become the subject of a legal provision.

In any case, how can one fetter the movement of time? How can one resist the course of events or the steady pressure of customs? 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; they are constantly active, and their unceasing activities, the effects of which are modified in many ways by circumstances, produce at each instant some new combination, some new fact, some new result.

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 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.

Hence, in 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.

We reproach those who expound jurisprudence for having multiplied subtleties, compilations, and commentaries. This reproach may have merit. But in what art or science is one not exposed to such a reproach? Should we accuse a particular class of men of something which is only a general disease of the human mind? There are times when we are condemned to ignorance because we lack books; there are others when it is hard to learn because we have too many of them.

. . . Undoubtedly, it would be desirable that all matters be regulated by legislation.

But if 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. When we are guided by nothing which is established or known, when what is involved is an absolutely new occurrence, we go back to principles of natural law. For if the lawmaker's foresight is limited, nature is infinite; she applies to all things that concern men.

All this presumes compilations, collections, treatises, and numerous volumes of research and analysis.

Some say the people, trapped in this labyrinth, cannot discern what they must avoid or what they must do to attain security for their possessions and rights.

But would even the simplest code be within the grasp of all classes of society? Wouldn't passions constantly be busying themselves with distorting its true meaning? Is not a certain amount of experience needed wisely to apply the laws? In any event, where is the nation which has found a small number of simple laws sufficient for very long?

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; and this class, devoted to the study of the laws, supplies advice and defenders to citizens unable to manage their affairs or to defend themselves, and becomes like a seminary for the judiciary.

It is very fortunate that we have compendia, and a constant tradition of customs, maxims and rules 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.

It is very fortunate that the judge's need to learn, to do research, and closely to examine the questions presented to him never permits him to forget that, while there are things within his discretion, there are none which are entirely up to his caprice or whim.

In Turkey, where deciding cases is not art at all, where the pasha can decide as he wishes whenever higher orders are not in his way, we see the parties ask and receive justice only in fear. Why don't we have the same anxieties before our judges? It is because they are well-versed in their craft, are enlightened and learned, and believe themselves under a constant duty to rely upon the enlightenment and learning of others. One can hardly realize how much this scientific and rational practice mitigates and controls power.

METHOD OF INTERPRETATION

. . . There are two types of interpretation: one by way of doctrinal theory, and the other by way of authority.

Interpretation by way of doctrine consists in grasping the true sense of the laws, applying them in a discerning fashion, and supplementing them in those cases which the laws have not provided for. Without this kind of interpretation could we think of fulfilling the judge's function?

Interpretation by way of authority consists in resolving questions and doubts by means of regulations (*règlemens*) or general dispositions (*dispositions générales*).[22] This last means of interpretation is the only one forbidden to the judge.

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] *Règlements* are rules having a limited scope and application. *Dispositions générales* are governmental bills of broad scope and application. [Translator's footnote.]

. . . Parties who deal with each other on a subject not regulated by positive law submit themselves to received customs, or to universal principles of equity in the absence of any customs. Now, to make a finding on a point of custom and then apply it to a private dispute is a judicial act, not a legislative one. The application of this equity or case-by-case justice which considers and must consider, in each particular case, all the little threads which bind one litigant to the other can never be in the legislator's domain, for he is uniquely the minister of this justice or general equity, that without regard to any particular circumstance, embraces the universality of persons and things. Legislation that intervened in private affairs would then often be suspected of resulting from partiality; it would always be retroactive and unjust for those whose lawsuits were instituted before its enactment.

Besides, recourse to the legislator would involve fatal delays to the parties; and, what is worse, it would jeopardize the wisdom and sanctity of the legislation.

In effect, legislation governs everyone; it considers men *en masse*, never as individuals; it must not interfere in individual matters or lawsuits where citizens are pitted against one another. Were the situation otherwise, it would be necessary to enact new laws daily; their number would stunt their dignity and hinder their observance. Magistrates would lose their function, and the lawmaker, fettered by details, would soon be nothing more than a magistrate. Individual interests would besiege legislative power; at each instant, they would divert its attention from society's genral interests.

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; and not to expose himself to the risk of being alternately slave and rebel, and of disobeying because of a servile mentality.

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. In the host of subjects that make up civil matters, the judgments of which, in most cases, require less an application of a precise provision than a combination of several provisions leading to the decision rather than containing it, one cannot dispense with case law any more than he can dispense with legislation. It is to judicial decision

that we surrender the rare and extraordinary cases incapable of fitting into a mold of rational legislation, the details so varied and so much disputed that they should not concern the lawmaker at all, and all the issues that one would try vainly to anticipate or that a hasty prediction could not safely provide for. 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.

NATURAL LAW AND POSITIVE LAW

Law (*Droit*) is universal reason, supreme reason based upon the very nature of things. Legislation (*lois*) is or should be no more than law reduced to positive rules and individual precepts. Law is morally obligatory; but by itself, it does not involve any constraints; law guides, legislation commands; law serves as a *navigator's compass*, and legislation as a *geometer's compass*.[23]

Nations live among themselves only beneath the authority of law. Members of each community are ruled as men by law, and, as citizens, by legislation.

Natural law and the law of nations (ius gentium) do not differ in terms of substance, only in terms of their application. Reason, insofar as it governs all men, is called natural law, and this reason is called the law of nations (ius gentium) when applied to relations of one people with another.

When we speak of a natural law of nations and a positive law of nations, it is to distinguish eternal principles of justice, which nations have not created but which dominate them like the humblest of men, from conventions, treaties, and customs that are the work of nations.

. . . We have determined the various effects of legislation. It permits or defends; it orders, establishes, corrects, punishes or rewards. It obliges without distinction all those living under its sway; even foreigners, during their residence, are the temporary subjects of the laws of the State. To inhabit its territory is to submit to its sovereignty.

Whatever is not contrary to legislation is licit. But whatever conforms to it is not always morally honest; for legislation is more concerned with society's political welfare than with men's moral perfection.

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[23] Portalis' metaphor suggests that law (*droit*) points the directions that moral behavior should take. Legislation (*les lois*) defines the limits of conduct which society permits or demands.

. . . Judicial power, established to apply the laws, needs to be guided in this application by certain rules. We have defined them: laws are such that a man's private reason cannot prevail over the law, which is public reason.

CONCLUSION

"I was correct in designating Portalis as the father of the civil Code."[24] Invested with the confidence and esteem of Napoléon, Portalis died in August 1807 at the age of 61. The Empire was then at the peak of its glory and spared one of its most outstanding servants the pains and sufferings of the mistakes and disasters of the second half of its existence. The spiritual father of the Civil Code had deserved well of France and the world.

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[24] Capitant, *Portalis, le Père du Code Civil*, 56 Rev. crit. leg. jur. 187, 199 (1936).