Preliminary Report of the Civil Code Reform Commission of France

Léon Juilliot de la Morandière

Joseph Dainow
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Translated** by
Joseph Dainow***

[Translator's Note. The Civil Code Reform Commission of France was established in 1945. Its drafts and deliberations are being published in annual volumes. The first part of a definitive draft was presented to the Government in December 1953, and appeared in print about a year later. As published, the proposed texts for the Preliminary Title and Book I (Physical Persons and the Family), were accompanied by an explanatory commentary (exposé des motifs) by the Commission and a preliminary report by the chairman of the Commission, addressed to Monsieur le Garde des Sceaux, the official title of the Minister of Justice of France. It is this preliminary report which is translated here.]

Monsieur le Garde des Sceaux:

I have the honor to present, on behalf of the Civil Code Reform Commission, a preliminary draft consisting of 747 articles composing two books: a Preliminary Book on Laws and Their Application, and Book I on Physical Persons and the Family.1

For each of the titles in these two books, there is a commentary (exposé des motifs) explaining the essence of the solutions proposed by the Commission and setting forth the reasons for

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****Footnotes whose numbers are enclosed in brackets are by the translator; the others are from the original text, but have been renumbered. Headings in brackets are likewise by the translator.
1. In addition, the preliminary draft includes—in the form of annexes—a certain number of articles destined to be inserted either in other parts of the Civil Code or in the Code of Civil Procedure.

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these solutions especially when they modify the rules of the present Civil Code.

It is incumbent upon the Chairman of the Commission—without the pretension of making a "Discours Préliminaire"—to recall the reasons for the establishment of this Commission and the mission which was entrusted to it; and then to explain its mode of procedure and methods of work as well as the general plan of the whole project into which are to be fitted the texts submitted today to the Minister of Justice. Thus, there may emerge in due course the general spirit of these texts together with an indication of the most original changes which the Commission submits to the attention of the Government.

I

Everyone recognizes the value of the Civil Code promulgated in 1804; everybody knows the respect in which it was held in the nineteenth century, the authority which it still preserves today, and the radiation which it had beyond our own borders. It is unnecessary to elaborate.

Nevertheless, the question of the general revision of the Code has been discussed on several occasions. The question was raised, in a doctrinal manner, by Rossi in a memorandum presented to the Institute \(^2\) in 1837, and in 1865 by Batbie and Duvergier \(^3\) who likewise presented the matter before the Institute as well as in published articles urging that the Code be recast in a construction favorable to individual liberty of action and freedom of contract. At about the same time, Accollas was proclaiming the need to reformulate the Code Napoleon in a more democratic direction, and a committee of republicans under the chairmanship of Jules Favre instructed Hérold to set up a project along these lines. Other efforts towards code revision appeared in 1876 under the signature of Joubaire and in 1886 by Ambroise Colin.

However, the Government did not take the matter seriously until the centennial celebration of the Code in 1904. In the fine work which was published on that occasion by the Société

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\(^2\) L’Institut de France is the highest cultural organization in France, and comprises the five great Académies.

\(^3\) A. Batbie and J. B. Duvergier were noted French jurists in the latter part of the nineteenth century.
d'Etudes Législatives, the question of code revision was discussed by the best known jurists. And the Minister of Justice appointed a Commission with the assignment of preparing a preliminary draft. That Commission was much too large, and consisted of almost one hundred members—magistrates, attorneys [barristers and solicitors], notaries, professors, members of Parliament, industrialists, and even a novelist. This Commission worked for several months, but in an atmosphere of indifference which constantly increased, and it accomplished only a few partial drafts.

After the war of 1914-1918, the idea was picked up again when there was being discussed the draft of the law introducing the French civil law in the recovered departments of Bas-Rhin, Haut-Rhin, and Moselle. This introduction, or rather this reintroduction, of French law was not complete because certain institutions of local German law were kept in effect provisionally for ten years. Some people expressed the hope that this delay would make it possible to study the general revision of the French Code with a view to reaching a complete unification.

Furthermore, during that period some new states were being established, and others were extensively modifying their institutions. While France offered them a work of undoubtedly high quality, it was old; whereas modern codes had just been promulgated in Germany and Switzerland. Would we not have had an interest, for the sake of an influence abroad, to make over our Code and to present a rejuvenated legislation to the world which had its eyes fixed on us? Our Government and our Parliament were absorbed with other responsibilities which may have been more pressing, and they did not take up the questions. The opportunity was lost. For example, in 1926 Turkey adopted the Swiss Civil Code.

Nevertheless the Government did encourage the initiative taken by the Italian and French jurists, headed by Scialoja in Italy and by Larnaude in France, directed towards the preparation of a Code of Obligations common to both countries. The work was ready in 1926 but was destined to remain purely doctrinal.

After the liberation of France, towards the end of 1944, the Association Henri-Capitant—entrusted with its founder's mission to preserve the influence of French juridical culture—was
the first to bring the question of Civil Code revision to the attention of Le Garde des Sceaux (Minister of Justice) then Monsieur de Menthon. The Association was in close touch with the friends of our culture among the jurists of Latin America, Belgium, Canada, Egypt, Italy, Holland, Japan and Switzerland; and it made known its concern through its president Bâtonnier [president of the Bar] Jacques Charpentier and its secretary-general Professor Jean-Paulin Niboyet. The Minister of Justice took the matter up with the Council of Ministers, and a few months later, on June 7, 1945 there appeared the decree which established within the Ministry of Justice the Commission charged with the preparation of the revision of the Civil Code.

The reasons in justification of that decision are well known. They are the reasons which Larnaude and Pilon had already presented in the Livre du Centenaire as part of the controversy therein contained and in which they were opposed by Planiol and Gaudemet. They are the reasons which — today even more than in 1904 — explain the relative decline of the prestige of the French Civil Code in world opinion. When this Code was promulgated it presented, as a whole, a masterpiece of clarity and precision. Written in decisive language and containing formulas as if struck like antique medallions, it appeared as a monument of a noble, logical ordinance. In the place of a multitude of diverse and vague Customs, there was a single body of law in which the citizens of a great nation could easily find the rules of conduct for their relations among themselves. The one Code contained the complete, yet simple, statement of their reciprocal rights and duties. The Code became for everybody what the Roman law used to be: reason in writing (la raison écrite).

It also achieved this result by its contents. It consecrated the advent of a new world and the work of the French Revolution. It marked the enfranchisement of man, of the individual, from the servitudes with which the feudal régime had for centuries burdened his personality and his property. The Code proclaimed the equality of all before the law, and the sanctity of private ownership; it affirmed the freedom of contract, and consequently the freedom of commerce and industry was thereby relieved of the fetters of the corporate system. It is no wonder that repercussions of the Code on the social or juridical level echoed an emotion which the song "la Marseillaise" stirred among the nations.
Yet, if the memories of this great prestige still continue in our own times, has it not survived in large measure the reasons which explained it at the beginning of the nineteenth century?

[A. DOES PRESENT CODE TRULY REFLECT THE WHOLE CIVIL LAW?]

Does our civil law have now the unity and simplicity it had then? Of course, the Civil Code with its 2,281 articles is still in effect. But does it still reflect the same harmony and above all does it still truly represent the whole French civil law?

The legislative authority, in the different forms under our several constitutions, has seen fit to touch it up and to fill it out. Until the Third Republic this was done with discretion, but thereafter at a more accelerated pace laws followed upon laws regulating anew family relationships, property, contracts. Some of these laws reworked the Code texts at the risk of changing its harmony and successful draftsmanship. Other laws were infinitely more numerous, and while they were not inserted in the Code, they regulated—to cite only some examples—paternal authority, certain forms of property, special contracts, sales, leases, insurance, carriers, companies, labor contracts, and so forth.

The abundance of modern legislation was so great, and was accompanied by such a spirited proliferation of the regulatory texts necessary for the application of all these laws, that Parliament and the Government agreed to undertake the big task of codification and established a general codification commission. And in all fields there appeared new or rejuvenated codes: labor code, tax code, road travel code, pension code, and so forth. Was it not normal then to undertake the revision of the great Napoleonic Code, the Code of Criminal Procedure, the Code of Criminal Law, the Code of Civil Procedure and the Commercial Code; and at the same time to seek to put the civil laws into order and to select the new texts containing provisions of principle which should take their place in the Civil Code while special texts could and should remain in the statutes, other codes, or even in special regulations?

However, from the technical point of view, the incentive for revision was even more pressing. Even where the legislator
has not intervened since 1804, do the texts of the Code give a true picture of our law? To answer in the affirmative would be to deny the functioning of the practice, of custom, and of the jurisprudence [court decisions]. The authors of the original Code had a foreboding of this development, and the magnificent elaboration which Portalis\(^4\) devoted to this subject has remained impressed in the memory of all French jurists.

Furthermore, it is appropriate here to render homage to the work accomplished by the French courts. Just as in the field of public law it is primarily the jurisprudence of the Conseil d'Etat which really established the rules protecting citizens against possible excesses of administrative authority, so in the field of private law it is the jurisprudence of our judicial tribunals and particularly of the Cour de Cassation\(^5\) which enabled our civil law to adapt itself to the vicissitudes of social evolution.

The Civil Code of 1804 was promulgated in the day of the stagecoach and of the craftsman whose work was accomplished by human effort and a few tools. We are now in the era of the automobile and the jet plane. We have gone through the industrial revolution, the concentration of industry, capital and labor, the transformation of the means of production, the utilization of steam, electricity, petroleum, and now atomic energy. If this Code has been able to survive all these developments, if it is still able to govern us and to direct the relationships of people among themselves, it is undoubtedly because it had inherent qualities and because its formulas, while clear, were also sufficiently flexible to permit adaptation; above all, it is due to the fact that it has been applied by a great judiciary composed of men who were both prudent and bold, equipped with a subtle juridical science and a perceptive interpretation of social needs. In this task the judiciary was not alone; it was aided by attorneys and assistants who suggested appropriate solutions, it relied upon the practice, especially the notarial practice with its stability and the strength of its tradition as well as the great confidence of the people, it was buoyed up by a body of doctrinal works (doctrine) which strove to guide and temper and animate

\(^4\) Portalis was one of the four jurists who prepared in 1800 the draft of the French Civil Code which was adopted in 1804. Portalis is especially famous for his "Discours Préliminaire" in which he explained the project to the French legislative body.

\(^5\) The Cour de Cassation is the highest court in the judicial system of France, and is sometimes referred to as the Supreme Court of France.
it by means of its criticism and commendations as well as its analyses and its essays of synthesis. In this manner, the judiciary was able to assure the survival of the old texts and at every turn, through its decisions, to rejuvenate both their appearance and strength.

Now, having rendered this homage to the entire world of French juridical science, one cannot refuse to recognize that in the mere reading of its texts our Civil Code no longer reflects the true features or the real scope of the present civil law. To each article there has become attached a jurisprudence and a customary practice which complete its meaning and adapt it to the present needs of society. In reality, these amount to rules of law which were not dreamed of by the lawmaker of 1804 and cannot be gathered by a careful reading of the law — rules which often contradict the original spirit of the text and sometimes its very letter. The examples are too numerous and too well known for me to name them. It will suffice to think about the development made by the "stipulation pour autrui" in spite of article 1119 which prohibits it, and the generalization of the cases where the plaintiff who has suffered damage is relieved of proving fault on the part of the defendant, despite the unchanged provisions of article 1382 et seq. It is the revenge of the customary law. But then what has happened to the finely drafted statute and the beautiful simplicity of the civil law?

The citizen who wants to know his rights and duties in relation to others can no longer depend upon the Code. He must know how it is interpreted. The real rule is only discovered by a study of the jurisprudence. This assumes the possession and the handling of the copious and complicated collections of reports, also the necessary recourse to specialists who are the only ones capable of finding their way through the multiplicity of decisions. And even then — due to the lack of any customary rule — the interpretation given can be only approximate and uncertain. Despite the distinctness of the decisions of the Cour de Cassation, even these cannot be free from debate because each decision has a positive value only for the case in which it has been rendered.

Has the time not come to put the house in order, to restore the splendor which had been its pride? There can be no question of doing away with all the glosses, all the exuberance of
jurisprudential interpretations [judicial constructions] which have grown around it, on the façade and in the interior of the majestic building which the Code used to be; these have substituted themselves for the Code or have at least masked or deformed its essential characteristics. A clean-up is called for. Furthermore, is it not necessary to reconstruct the doctrine and the jurisprudence, by preserving that which is still solid of the old edifice and by integrating with it all the new and efficient elements which have been furnished by the practice? It behooves us to remake the Code, in the pattern of the 1804 Code but modernized and adapted to the needs of our times as well as endowed with the latest technical improvements. This will be useful not only for the repute in foreign countries of French juridical science; it will enable the French people themselves to have a rejuvenated and serviceable implementation for their legal relationships; it will also restore to the Code its true function of encompassing the reality of the law within its text.

There have been, and there will be, the objections that it would be dangerous or even sacrilegious to tamper with the 1804 Code. The Code was well made and it had proven its worth. There is the doubt that as good a job will be done now. The practice has known how to make use of the Code: magistrates, men of the law, barristers (avocats), solicitors (avoués) and notaries are accustomed to the old text; they knew the texts together with their interpretation and scope. Will it not throw confusion into the 150 year old habits? Furthermore, as soon as the new Code is promulgated, difficulties of interpretation will immediately arise, new controversies will develop, and the courts will have to do their work over again. This judicial function will be even more domineering since the new codification will undoubtedly be of lesser value than the old one.

The merit of this kind of argument can be questioned. Regardless of the confusion caused to the practice by the promulgation of a new Code, and whatever drafting inferiority the new texts might have in comparison to those of 1804, these disadvantages cannot counterbalance the extensive advantages of having a Code which would really be the expression of the present law and which would bring the letter of the law into accord with its actual application. If there is a refusal to recognize this, then why keep on making laws altogether? Why not simply proclaim the superiority of a system of customary law? Such an attitude,
however, would be contrary to the trend found almost everywhere in the world, even in the Anglo-Saxon countries. In these countries, where law rests essentially on judicial precedents, there are many fields in which the need for legislative texts is felt; and even though these statutes may give less flexibility to the legal rules, they do make for more distinctness, stability and strength.

[B. IS PRESENT CODE RESPONSIVE TO NEEDS OF MODERN SOCIETY?]

Moreover, does not the variance, which is too often noted between the Code texts and the rules of law applied in practice, stem from deep-seated causes? Is it merely a remodeling of our old building that we need? Is it not altogether in danger of ruin because its foundations no longer have the solidity with which they are credited? If there have been promulgated a large number of special laws or even particularized codes which contradict the basic principles of the Civil Code, is it not because these principles are debatable and no longer respond to the needs of our time? If the courts are obliged, through their interpretation, to supplement or contort the rules set out in the Code, is it not because the needs of society require such changes?

Undoubtedly, the Code was not drawn up by theoreticians; it was the work of practical men who avoided philosophical declarations while they preserved a maximum of the traditional juridical technique which the centuries had forged in conformity with the particular temperament of the French people. Nevertheless, as already indicated, the Code consecrated the accomplishments of the Revolution as they had been visualized by those who released and directed it [the Revolution]. The Code is impregnated with the spirit of this Revolution and with the philosophy of its authors. Should this spirit and this philosophy still be, and are they, the basis of our current legislation? Since the beginning of the twentieth century, has there not been discussion of the revolt of facts against the Code? Has it not been sheer insistence (tour de force) — due to the cleverness of our judges and by a veritable paradox — that Napoleon's Code can still control the present social order?

It has been asserted — and not without semblance of reason — that the 1804 Code was the code of the middle class (bour-
geoisie) which had been inspired by Voltaire, which had made the Revolution, and which had acquired the lands and had seized power in place of the nobility. These people secularized the law while preserving traditional morality in its foundation. They proclaimed the equality of individuals and their emancipation while remaining strongly attached to the idea of authority and order. Frightened by the relaxation of morals and customs which followed the Revolution, they consolidated the authority of the husband over the person and property of his wife, and the absolute paternal authority over children. They kept divorce but insured the defense of the legitimate family against illegitimate descendants who were reduced to an inferior condition. They made private ownership one of the essential foundations of its framework, but hemmed in the immovable property with special requirements in order to assure its preservation within the families together with the sovereignty of the owner. In the economic field, they rejected the interference of the State and asserted the freedom of contract whereby individuals might enrich themselves through commerce and industry.

Built upon these three fundamentals of (1) strength of the family and preservation of its property, (2) sovereignty of private ownership, and (3) quasi-absolute freedom of contract, this régime developed the spirit of initiative and competition, and it unquestionably produced an astonishing amount of progress in the economic order. However, is it still suitable for our time? Does it not contain within itself the germ of abuse which puts in doubt the permanent value of its foundations? Many people believe it has.

The development of transportation methods, the transformation of the means of production, the transition in many areas from artisanal work to the large industry and to big business, have brought about a modification in the familial duties. The need for the women to contribute by independent work to the household income has also led to the dispersion of the members of the family and to the feelings which each one of them acquired about his own independence. The authoritative régime conceived by the Code has already been severely shaken; the married woman's legal incapacity has been eliminated; in the interest of the development of its future citizens the State tends increasingly to control paternal authority by means of its judicial or administrative agencies; the rights of illegitimate children have been
increased. The importance acquired by movable wealth, and the monetary devaluations, have rendered useless the whole system of the Code tending to preserve property in the family. This system was established to assure the supremacy of a particular class; to what degree should it be preserved?

And if we look into the economic field, is not the maintenance of the individualistic and liberal principles of the Code even more debatable? Their application may have been useful, or even indispensable, in the nineteenth century. But has this not engendered abuses which should bring about their abandonment? Moreover, the Code did not envisage an unrestricted freedom but rather one with responsibility imposed on the person whose exercise of his freedom caused damage to the rights of others. What the Code proclaimed was the liberty of the individual. What it feared was the association, or grouping of private interests, interposing itself between the individual and the State, and creating a threat against individual rights as much as against the general interest.

However, these barriers erected against the possible excesses of this freedom turned out to be weak and fragile. On the one hand, the traditional basis of individual responsibility was inadequate to assure compensation of the risks under which men were placed by the machine developments. On the other hand, the extraordinary power acquired by associations of all kinds is well known. It is already a paradox that the Civil Code makes no allusion to the idea of legal persons and is hostile to collective ownership which is being re-established on all sides. This blossoming of associations has resulted in modern capitalism.

The owners of capital could adapt themselves to the Code, but to establish their supremacy they utilized the Code's freedom of contract without much regard for others. In the struggle for gain, the strong crushed the weak. Who are the weak? They are the working people, the simple folk, the common people. There is no doubt that the Code affirmed the equality of all people, but it was an equality in law which remained theoretical all too frequently and did not cure the inequality of fact. From this there sprung the claims of society and the emergence of doctrines which emphasized social justice rather than freedom. And under the more or less direct influence of these claims and these doc-
trines, there arose the progressive extension of the State's role in the direction of the economic order.

In certain countries, the State was led to "socialize" the greatest part of the means of production and of the distribution of wealth. In France, State intervention has been less complete and less brutal, but it has been translated through a strict and imperative regulation of several kinds of contracts, and by the creation of a social security system based on a collective distribution of risks through taxes; and the State tended toward substituting itself — at least in certain fields — in the place of individual responsibility, through the development of fiscal laws and the nationalization of certain important sections of the economic life. Now, nothing — or almost nothing — of all this translated itself into the Civil Code which remained imperturbably the same. Is there not a paradox and a falsehood? Does not the old Code mask the true countenance and the true bases of our law?

Obviously, this kind of reasoning will likewise be particularly contested. The opponents may hail from opposite sides. Some, remaining attached to traditional principles, will assert that the cohesion of families should be defended more than ever and that the phenomena of socialization are temporary, on account of wars especially, and are accidents in the life of the nation. They will even add that by the maintenance of the principles of the Code and the return to their application, the country will be set right again.

Others who, on the contrary, support advanced socialization will not be any more in favor of the present revision of the Code. The promulgation of a code comes, as it did in 1804, at the end of a revolution in order to consecrate and consolidate its results; such promulgation is dangerous while the revolution is still in progress because there is the risk of slackening its pace or even stopping it altogether.

Nevertheless, these possible objections did not hold back the Government in 1945 in its desire to see the Code revised. It was the period of the Liberation, and great enthusiasm was being expressed. A new world seemed about to emerge from the ruins of the second world war. A great hope bestirred the people. Tremendous reforms were being realized. A new constitution was in preparation, and while it referred to the principles of the Rev-
olution of 1789, it also proclaimed other social principles as necessary in our time. Was it not possible, and should not efforts be made, to construct a new code which would follow the example of the 1804 Code and would seek to reconcile the past with the future, a new Code that would preserve from the old foundations what was still sound and valid in family matters and in the economic field, and would also introduce into the recent building a new spirit in conformity with the aspirations of the modern world and with the techniques placed at its disposition? The Government of that time cannot be reproached for having thought so.

Monsieur le Garde des Sceaux, it now behooves me to tell you how the Commission, entrusted with the difficult and important mission of preparing a preliminary draft, undertook its task.

II

The Commission started its work in October 1945, that is, eight years ago. And yet today it transmits to the Government only a part of the draft which had been requested. While indeed important, this part is relatively small. It is certain that we had been expected, and we ourselves had hoped, to make much greater speed. What then caused this retardation?

[A. REASONS FOR SLOW PROGRESS]

In the first place, our slow progress is probably due to the method chosen for the preparation of the preliminary draft.

There might have been considered the entrusting of this assignment to a single jurist. This had been done in the nineteenth century when Chile asked Andres Bello to make its Civil Code; Switzerland had Professor Huber prepare its Code; Lebanon called upon Dean Josserand of the Faculty of Lyons; Egypt turned to one of its own jurists Dr. Sanhouri. This method is still being followed today by Holland which is requesting its most highly renowned civil law jurist, Professor Meijers, to present a preliminary draft of revision of its 1838 Code. This method probably has the likelihood of assuring a maximum uniformity in the texts that are worked out.

However, the truth of the matter is that this system was not even contemplated by our Government. In France, it is instinc-
tive and traditional to resort to a commission. It was a commission which carried out the instruction of the First Consul and worked out the preliminary draft of 1803; at the time of the centenary of the Code, it was a commission that was brought together to study the question of its revision. It is again a commission which was appointed in 1945.

At the same time, efforts were made to avoid the defects which had led to the failure of 1904. The Commission then was much too large, for in addition to the technicians of the law it included members of Parliament, representatives of the economic world and even of public opinion; it got lost in long and useless discussions. In 1945, it was decided that the Commission would comprise only technicians and a small number at that.

However, it was desired to make place—for representatives of the different disciplines of the juridical technique. Bonaparte selected four magistrates. In 1945, there were appointed three members of the Council of State—since it is also an essential role of the Council of State to help the Government in the preparation of laws; three professors from the law faculties—spokesmen of the "doctrine"; three magistrates—representing the "jurisprudence"; and three representatives of the practice: one attorney (avocat), one attorney of the Court of Cassation, and one notary.6

A secretariat was likewise established, having as its chief a professor of law, and including two magistrates [civic officers in the Ministry of Justice], and one attorney.7

6. The Commission is presently composed of the following: Mr. Julliot de la Morandière, Dean of the Faculty of Law of Paris, Member of the Institute, Chairman; Mr. Lyon-Caen, Président de Chambre of the Court of Cassation; Mr. Cavarroc, Président de Chambre of the Court of Cassation, who in 1949 took the place of Mr. Bateau, Avocat général of the Court of Cassation, resigned; Mr. Oudinot, member of the Council of State; Mr. Delepine, member of the Council of State; Mr. Latournerie, member of the Council of State; Mr. Rouast, Professor of the Faculty of Law of Paris, who in 1950 took the place of Mr. Henri Mazeaud, Professor of the same faculty, resigned; Mr. LeBalle. Professor of the Faculty of Law of Paris, who in 1952 took the place of Mr. Niboyet, Professor of the same faculty, deceased; Mr. Ancel, Président de Chambre, Court of Appeal; Mr. Jacques Charpentier, former Bâtonnier of the Ordre des Avocats of the Court of Appeal of Paris; Mr. Jousselin, former President of the Conseil Supérieur du Notariat; Mr. de Lapanouse, Avocat honoraire of the Council of State and of the Court of Cassation, who in 1946 took the place of Mr. Jean Labbe, Honorary President of the Ordre des Avocats of the Council of State and of the Court of Cassation, member of the Institute, deceased.

7. Presently, the Secretariat comprises: Mr. Roger Houin, Professor of the Faculty of Law of Rennes, Secretary-General, who in 1945 took the place of Mr. Paul Coste-Floret, Professor of the Faculty of Law of Algiers, resigned; Mr. Mallet, Magistrate in the Central Administration of the Ministry of Justice; Mr.
Thus, by calling upon a group of experienced men, it was thought that a work of this magnitude which exceeded the capacity of a single person might be more speedily accomplished; there was also the likelihood of its being considered in its multiple aspects rather than being based on an a priori conception. In entrusting juridical questions to specialists, it was hoped that the work would be technically better done and would in large measure be withdrawn from the influence of special interests.

The Commission has done its very best. It is not for me to praise the Commission. The draft which, in the name of the Commission, I submit to you, Monsieur le Garde des Sceaux, as well as the regular publication of its discussions since 1945, testify to its efforts.

However, I will permit myself to make two observations which, in my opinion, partly explain why we have completed only a fraction of our program.

To begin with, it is because the members of the Commission, who were chosen by reason of their functions in the juridical field, find their activity almost entirely absorbed by these very functions. They have been able to devote only a very small part of their time to the discussion of the draft. Experience has proven that it was very hard to find a few hours each week when all the members of the Commission could be free to meet together. If it had been desired to conclude quickly, it would perhaps have been necessary to entrust the assignment to a few people and to relieve them of all other duties.

Then, it must be stated that the members of the Commission have felt great conscientiousness in the preparation of the draft. They were imbued with the importance of their work, and they know that it would be, and should be, examined, evaluated and criticized not only by the Government and by juridical centers and public opinion, but also in foreign countries as well as in France. In themselves and by their profession endowed with a developed critical spirit, they engaged in long, very long discussions which were frequently marked by a certain passion. Perhaps they sought to do their job too well.

Verrier, Magistrate in the Central Administration of the Ministry of Justice, who in 1946 took the place of Mr. Jacques-Bernard Herzog, Deputy Magistrate in the Central Administration of the Ministry of Justice, resigned; Mr. Boitard, Avocat of the Court of Appeal of Paris, former instructor of the Faculties of Law.
The four persons who were charged in 1803 with the preparation of the preliminary draft of the Civil Code—Tronchet, Portalis, Bigot de Préameneu, Malleville—were ordered by the First Consul [Napoleon] to move quickly. They divided the assignment, each worked on his own, and they hardly got together to compare their opinions. Furthermore, they did not hesitate to borrow extensively from the earlier drafts which had been prepared by Cambacérès and Jacqueminot, and from which many articles were copied literally. For the remainder, they took as guides the classical writers of the end of the eighteenth century; they had the same outlook, the same training; they were in agreement about the bases to give their Code. Despite their haste, and despite their very individualistic method of work, their final product presents a strong feature of unity.

We have sought to proceed more scientifically, and with less improvisation. Undoubtedly with justification, we had less confidence in ourselves.

According to the classical method used by commissions, ours was first divided into four sub-commissions. One sub-commission was to study the matters pertaining to the General Part, a second was to study the matters pertaining to Persons and the Family, a third devoted itself to the study of Obligations and Contracts, a fourth to the matter of Property. The sub-commissions were each composed of a member of the Council of State, a magistrate, a professor, and an attorney or a notary; and each worked separately. Reports and preliminary drafts were presented to them by one of their members or by one of our secretaries, and sometimes with the assistance of a person selected from outside the Commission because he was a specialist in the subject. The texts which the sub-commissions agreed upon were submitted to the full Commission which met every fortnight during the first years.

The method proved to be slow. The texts which the sub-commission had adopted after numerous meetings were discussed all over again; they were subjected to terse, critical examination by the full Commission which often rejected them and sent them back to the sub-commission for a new study. We realized that we would never get anywhere that way, and three years ago we did away with the sub-commissions, whose meetings a certain number of members were too busy to attend any more. It was
decided that the preliminary drafts prepared by our secretariat and one of our members would be submitted to the full Commission. The rhythm of production accelerated.

Of course, we could no longer carry on parallel studies of different large topics of the Code. In doing that, we might have risked getting nowhere in any field. We agreed to limit ourselves first to a study of the Preliminary Book and the Book of Persons and the Family. This enabled us to put into definitive form the texts pertaining to this important part of the civil law.

[B. ADDITIONAL RETARDING FACTORS]

Moreover, other reasons and more basic ones led us to adopt this solution. The slowness of the Commission's work is not explained exclusively by the organization of its program. It is also due to the importance of the problems presented and to the very attitude of the Government towards these problems.

If it had been a matter of only fixing up the Code, of integrating into it the new laws and the results achieved by the jurisprudence, the job could possibly have been done quickly enough, even though (and I will cite an example later) as technicians, the members of the Commission often had their minds set on their own ideas in the purely technical field. But the revision of the Civil Code, as I have already stressed, poses more problems than mere juridical technique. The moral, philosophical, economic and political bases of its rules have to be examined. To what degree do they have to be modified in order to take the social evolution into account?

The question was accentuated before the Commission at the very outset of its work by two remarkable reports. One was on the Civil Code and foreign codifications, presented by Mr. Paul Coste-Floret who was our first secretary-general; the other, about the Civil Code and the Doctrine, was presented by one of our magistrate secretaries, Mr. Mallet. And Mr. P.-H. Teitgen, Garde des Sceaux, who presided over the opening session on June 25, 1945, himself stressed the fact that while a whole group of subjects are independent of political and economic evolution, there are others "such as the law of property and the law of obligations which call for juridical solutions in keeping with the social and economic situation."
Now who is to say what will be the political and social bases of the new Code? This could not be, or it could not be exclusively, the members of the Commission chosen by reason of their technical knowledge. Undoubtedly, they can and they should be advisors to the Government; they can and they should have their own ideas about these serious questions. Relying upon their experience acquired in the course of their professional functions and upon their own ideas, they can offer suggestions, but it is above all the concern of the Government which is responsible for the policy of the country. The Commission risks working in vain if it prepares its draft without taking into account the thought of the ministers who are responsible to the Parliament and to the nation. Mr. Teitgen was very careful to state that in these matters "the Civil Code Commission needs directives in order to undertake its work." But he added—and that is the explanation of our caution—"the provisional Government of the Republic itself does not yet know what will be the evolution of the morrow, and for the time being it must strictly refrain from giving directives to the Commission." And he asked us "to make an inventory of the matters" while we occupied ourselves with those subjects which were not closely linked to the social and political evolution.

You can now understand, Monsieur le Garde des Sceaux, why we ourselves, in feeling the reticence of the Government, directed our effort to the texts of the Preliminary Book which raised almost entirely questions of a technical order, and to the texts concerning persons and the family. No doubt, the social importance of these latter texts cannot be denied; no doubt, various ideas can clash here on numerous issues. Nevertheless, these ideas are perhaps more different in appearance than in basic substance. The great majority of the French people are in accord to preserve our main institutions: marriage, divorce, the legitimate family, tutorship, adoption, and to have a benevolent law concerning illegitimate children. I believe there is agreement on the objective to be attained; only the means and the necessary adjustments can be debated.

In any case, no one is seeking a radical overthrow in these fields as is proposed by certain doctrines in the field of property or of contract. And above all, after the Liberation in 1945, it is the problems of an economic nature which have deeply stirred general opinion. We have seen how many people thought that
liberalism had gone bankrupt, that private ownership must in many cases give way to collective forms of appropriation, that the concept of enterprise (entreprise) would have to replace the private businessman, and that if freedom of contract did not disappear it would at least lose ground extensively before the principles of controlled economy. Was this fever of socialization to be lasting? If so, the appearance of the Code should be profoundly changed by it; if not, the modifications to be made in the books on property and on contracts should be much less significant.

This, therefore, is the true explanation of our caution and our lack of haste. Now that a substantial return to liberal principles has been confirmed, the present Government will undoubtedly feel that we have acted wisely.

III

The foregoing considerations likewise explain, at least in large part, why we have waited to draw up the plan of the future Civil Code. They also explain why this plan which we are presenting to you, Monsieur le Garde des Sceaux, is of a provisional character.

In its first meetings of June and July 1945, the Commission discussed the issue of determining whether it should start its work by drawing up the plan of the new Civil Code to be established. Certain members considered this method necessary and logical. Others in the majority thought that the plan of the Code should depend upon the political and social principles which served as its base. In this regard the 1804 Code discloses the thought of its authors. Book I is devoted to the person, to the individual, with respect to whom the organization of the family is studied; the other two books contain the regulation of all the rights of an economic nature studied in relation to and around the concept of private ownership (Book II — Of Things and the Different Modifications of Ownership; Book III — Of Different Modes of Acquiring Ownership). Such a plan would have to be modified to the degree that it will be necessary to take account of the movement tending "to socialize the economy." However, it was on this very point that we remained in uncertainty and the Government itself advised us to wait.
Thus at first there could be no question but to study a certain number of concrete issues. The Ministry of Justice itself suggested that the Commission formulate its views on the organization of tutorship, at the request of another commission which was charged with the study of the unification of the law in the departments of Alsace and Lorraine. The Commission was also asked to express its opinion about drafts already prepared by other agencies on the matters of absentees and adoption. Thus it would be left to time to clarify the situation if possible. Gradually, as special projects will have been adopted, would not the plan of the future Code begin to take form by itself?

However, as the months passed, and as the activities of the Commission clarified themselves and took on larger scope, the question of the plan was posed anew. It was discussed during the course of the year 1949. And finally, during the meetings of June 23, July 1, and October 25, 1949, a plan was adopted—at least tentatively and with reservation for subsequent modifications which might be required either through directives received from the Government or as a result of the direction taken by the Commission’s own work. This plan appears at the head of the documents which I have the honor to transmit to you today.

This plan renounces that of the 1804 Civil Code; in the present plan, individual and private ownership lose the preeminence which had been attributed to them in the 1804 plan. Nonetheless, our plan does not have anything revolutionary. No doubt it will more likely be criticized as lacking in originality because it is distinctly inspired by the traditional distribution of subjects which is followed especially in the present treatises of civil law: a preliminary book; then books devoted to persons, to the rights of the family, to successions and donations; a book devoted to property and especially to ownership, real rights and intellectual rights; books to contain the regulation of juridical acts and facts, obligations and contracts; finally, a book under the title of legal persons.

However, apart from the fact that one book is set aside for juridical acts, to which I will refer later, a certain number of points must be emphasized.

(a) In the first place, Book I deals with persons not only as individuals but also as members of a family. Perhaps this is only a change of form, because without naming it as such the
1804 Code dealt at some length with the organization of the family. However, we wanted to affirm the unanimous desire of the Commission to see the Code denote distinctly the place which the family has, and should have, in our society. Furthermore, this led us to bring together the personal effects of marriage (Book I, Title II) and the property effects, that is, the regulation of matrimonial property régimes (Title III).

In our plan, it will also be noticed that successions and donations are regulated in Book II, right after the book devoted to the family, because this system of rules is in very large measure motivated by consideration of family interests.

(b) A second observation is made to stress the fact that Book VII will be set aside for legal persons. This further establishes a great difference from the 1804 Code which was hostile to associations and groupings, and kept silent about legal personality. In our time, it is impossible to ignore the importance achieved by collective interests, independently from family interests and national interests.

Certain members would have liked to have the Commission go even further in this line and to have its plan stress even more the importance of collective interests in not linking them to the concept of legal personality which [they feel] preserves too individualistic a tinge and which patterns the regulation of collective interests too much after that of private interests.

These people thought we might have recognized the concept of “foundation” in and of itself without taking the detour of a legal person. They thought we might bring together and define, if possible, other even newer concepts, such as the “patrimoine d’affectation,” [property set aside for a specific and exclusive purpose] and especially the concept of enterprise which tends to express the solidarity which links together, in a common purpose, both the capitalist who provides the property to be exploited and the workmen of all kinds who provide the services for the exploitation.

These members thought about withdrawing certain kinds of farm leases (fermage, metayage) from the Title on Contracts in order to indicate better that situations of this kind should be regulated less on the basis of the will of the parties but rather more on the basis of the solidarity which unites them in the success of agricultural exploitation.
Mr. Coste-Floret proposed as a possible plan of the new Code: (1) the family, (2) the profession, (3) relations between the State and individuals, (4) the free sections. Mr. Houin suggested that our last book be entitled "Of the profession and of the enterprise" (De la profession et de l'entreprise), bringing together under this heading partnerships and corporations (sociétés), labor relations, agricultural enterprises, the liberal professions, and associations.

The majority of the Commission were less bold. They felt (at least provisionally, because these questions can be restudied later in accordance with the future form of the social evolution) that it was dangerous to insert in a code and to congeal into texts such indefinite concepts as "entreprise." They felt it was proper to stay within the more traditional, readily understood concepts while devoting a goodly portion to collective interests in the regulation of legal persons.

(c) My final observation is that after a joint meeting on October 25, 1949, of representatives of the Civil Code Reform Commission and of the Commercial Code Reform Commission, it was decided that the drafts prepared by the two Commissions would be presented not as they are at present in the form of two distinct codes — Civil Code and Commercial Code — but in the form of a single code which would constitute a great Code of Private Law.8

The provisions regulating the commercial professions, the commercial register (registre de commerce), the elections for the commercial courts, and the special authorizations for the commercial profession, should not in principle appear in the Code of Private Law but should be the subject of a supplementary code or a special statute of a more administrative than civil nature. However, the question will merit a new study on the provisions concerning the commercial register because the decree of August 9, 1953, has greatly modified the juridical character of this register. Finally, the preliminary draft on bankruptcy, which was adopted by the Commercial Code Reform Commission and was recently submitted by your office (chancellerie) to the courts and to the law faculties, could be included either in the

8. The texts relating to the capacity to do business which should normally appear in the preliminary draft of Book I being presented today could not be included as their reduction has not been definitively settled by the Commercial Code Reform Commission.
The combined Commissions have thus expressed themselves in favor of as extensive a unification as possible of the rules concerning property whether commercial or not, and those concerning contracts regardless of whether they are made by a merchant and in the course of his business.

These decisions will evidently result in making a very large Code of Private Law. The Book on Property will comprise not only real rights, but also intellectual rights including literary and artistic property, industrial property, the rights in a business concern (fonds de commerce) and in various clientelles. The Book on Contracts will encompass not only the contracts of the civil law, but also the regulation of insurance [exclusive of maritime and aviation insurance] which is now classed among commercial contracts, commercial paper, checks and negotiable instruments. Finally, the Book on Legal Persons will contain the regulations for all the partnerships and corporations.

This solution is of course tentative. It is desirable not to await the completion of the entire revision program before putting the drafts into effect, and after the different parts will have been approved and promulgated, a definitive choice can be made about their presentation as a whole.

Even if, after discussion, there is adopted the point of view which prevailed in the Commissions, of unifying in large measure the civil law and the commercial law, nothing will prevent the conception of our legislation on private law as forming several great codes: the Code of Persons and the Family, encompassing successions and donations; the Code of Property, Ownership and Intellectual Rights; the Code of Obligations and Contracts; the Code of Legal Persons. 9

Such a solution might have some advantages; I will take the liberty of pointing out one of them. For a long time, practi-

9. Many other questions have not yet been discussed; we will mention two of them. Should the Book or the Code of Legal Persons deal with nationalized companies, and with companies of mixed economy? Even though these organisms have to operate according to the rules of commercial law, the State is the owner in whole or in part. Should not this fact place their regulation outside of a Code of Private Law? For labor contracts and professional unions—where the law is especially imperative, where State representatives and public agencies intervene directly, where everything tends to have an aspect that is more regulatory than contractual—should the matters be regulated in a Code of Private Law, or should they rather be referred to a separate code or special statutes?
tioners and jurists have been hoping for a unification of private law. An international institute has been established in Rome to work on such a unification, and France is participating in its activities. The representatives of the several European countries are absorbed with this matter of prime importance to international relations. It will be difficult to have an entire Civil Code in common accepted even by the countries of similar civilizations; each people is attached to its traditions of family, its system of successions and perhaps even its property system. However, unification would seem to be somewhat easier in the field of obligations and contracts. There, the common background is more appreciable, coming in large part from Roman law and canon law. The principles adopted are about the same; only the technical procedures are different. However, we are convinced that the needs of business life will prevail here. Already, at a meeting held last summer in Milan, jurists from Belgium, France, Luxemburg and Switzerland expressed a demand for a Code of Obligations common to their different countries. Some day soon, and I personally hope to see it, their voice will undoubtedly be heard.

IV

This describes, according to the views of the Commission, the place to be taken by the texts, which I have the honor to present to you, in a general revision plan of our legislation in private law. There remains the essential part of my task — to outline to you, Monsieur le Garde des Sceaux, the general spirit in which these texts were drafted and to draw your attention especially to the principal reforms which will result from them.

The general spirit of our texts is easy to guess after what I have said in the preceding pages. While replacing our old Code with a new one, we wanted to preserve two essential characteristics of the old one, those which assured it such a great success and such a long survival.

We wanted to make a code, that is to say, a body of rules that will govern the conduct of citizens in their relations with each other. To attain their objective, these rules should be presented in language which is as simple and clear as possible and which should have above all a practical character. We have sought to avoid theoretical formulas which necessarily imply a philosophic-
al system. A code is not a doctrinal work; its diverse articles are not made to be read like the developments of a book which follow after each other. Each is an order directed to the citizens, an order which insofar as possible should be self sufficient. Logic in the presentation is less important than precision in the words. We also know that the Code will live only through the interpretation which judicial practice will give to it. We wanted to give to this practice a guide largely inspired by its own behavior, without binding it with definitions which might hamper its evolution or with enumerations in which the legislator risks a failure to anticipate the hypothesis which will later become important or frequent.

We have likewise sought to follow the example of those who preceded us by 150 years in not looking for originality at any cost. The Civil Code of 1804 was a code of conciliation and of compromise. Of course, it brought into our civil legislation the new spirit of the Revolution, but it preserved the old rules on many points. Some of its articles reproduce old traditional adages, such as “In the matter of movables, possession is equivalent to title.” Some were copied from the Ordinances of d’Agguessseau. Some entire subjects, like the community property system, have kept the form given to them by the ancient customs.

On most points, we too have tried to consolidate the reforms brought about by the most recent statutes and by the jurisprudence. Nevertheless, in certain matters we have not feared to innovate — whether it was to contend against a movement which seemed to us to be dangerous or whether, on the contrary, and more frequently, it was to facilitate a development which seemed to us to be in conformity with justice and the new needs. In the end, we tried to keep a proper balance without, of course, being certain of having succeeded all the time.

These are the two traits — (1) practical language and absence of excessive systematization, and (2) attempt at balance between tradition and evaluation — which I trust, Monsieur le Garde des Sceaux, that you will recognize in each of the two books which I am now presenting to you.

[10.] D’Agguessseau (Henri-François), 1668-1751, was procureur général in the Parliament of Paris and later its chancellor. He drafted and published three of the Great Ordonnances (Donations 1731, Wills 1735, Substitutions 1747) which later served as the basis for those parts of the Civil Code.
A. THE PRELIMINARY BOOK

We have called the first book by this name as a reminder of the present Civil Code which has a Preliminary Title. However, the Preliminary Title contains only six articles, whereas the Commission here presents a total of 147 articles which it thought deserved to appear under the heading of Preliminary Book.

Moreover, the attention of the Government should be directed as much to what the book does not contain as to what is found in it.

1. What the Preliminary Book Does Not Contain

With the exception of article 147 devoted to the abnormal exercise of rights, and also with reservation of what I will say later about certain provisions devoted to private international law, our Preliminary Book presents exclusively the rules pertaining to the promulgation and the scope of application of legislation (la loi écrite) as a source of law.

It does not contain direct rules on the sources of law other than legislation. Thus there is nothing on custom, jurisprudence, the manner in which courts can and should apply and interpret the laws, or a possible resort to equity. It was felt desirable to avoid giving the Code a theoretical appearance, or a dogmatic or philosophical aspect, by the inclusion of texts without much practical significance which embarrass the courts more than they guide them.

The famous articles 4 and 5 concerning the denial of justice and the prohibition against judges rendering decisions in a general and regulatory manner, have been dropped from the Code. Some people will no doubt regret it because these are celebrated articles drawn in distinct terms. However, the Commission thought that these texts were either (1) not useful because the principles they embody are not presently disputed or unnecessary because contained in other codes, or (2) out of place in the Civil Code. These provisions should be transferred to the Code of Civil Procedure (dénit de justice) or even to the Consti-

[11.] CODE CIVIL art. 4: "The judge who refuses to decide a case on the pretext of the silence, obscurity or insufficiency of the law, may be prosecuted as being guilty of a denial of justice."

[12.] CODE CIVIL art. 5: "Judges are prohibited from adjudicating their cases by means of general and regulatory disposition."
Neither is the Preliminary Book presented as a general part, setting out the principles which the other books would merely develop and put into operation: principles regarding persons as the subjects of rights; things as the objects of rights; rights, and juridical acts in general. As already indicated, the Commission felt that the Code was not a book of doctrine but a collection of precise and concrete rules intended for practice. In any case, two observations must be made.

First, at the end of its Preliminary Book, the Commission inserted a text concerning something which our current juridical language calls the abuse of rights and which the Commission regards as an abnormal exercise of rights.

The text of this article 147 implies the existence of subjective rights in favor of people. But it likewise implies that rights are recognized by law on account of a certain social purpose, in such a way that they cease to be protected — that is, they cease to be rights — if they are exercised in conditions which are contrary to this ultimate purpose. In case of difficulty, it is the judges who will exercise their control on this point, either by denying the power of society to enforce the rights arising from the fact or the act accomplished in these conditions or by condemning the author to damages.

[13.] Art. 147 of the draft: "Every act or every fact which, by the intention of its author, by its object or by the circumstances in which it occurred, manifestly exceeds the normal exercise of a right, is not protected by the law and ultimately incurs the responsibility of its author."

"This provision does not apply to rights which by their nature or by virtue of the law can be exercised in a discretionary manner."

[14.] The following are examples of situations in which the French courts have applied the doctrine of abuse of rights, which is now incorporated in the broader scope of the abnormal exercise of rights.

In property matters, it was held to be an abuse of right where a landowner built a false, tall chimney (which he did not need) in order to keep the sun out of his neighbor's garden (Colmar, 2 May 1855, D. 56. 2. 9); likewise, where a landowner adjacent to an airport erected high, pointed stakes upon which dirigibles would be impaled if they came too close to his property in their effort to land on the airfield (Req. 3 August 1915, D. 1917. 1. 79, S. 1920. 1. 300).

In the field of contracts, it has been held to be an abuse of right where an employer discharged an employee without adequate reason (Cass. 9 March 1938; D. Heb. 1938; 305); likewise, where the right to strike is used for political reasons, the workers can be condemned on the basis of abuse of rights (Trib. Civ. Seine 16 November 1949; J.C.P. 1949. 2. 5209).

In procedural matters, it has been held to be an abuse of right where one party seeks to harass another party or to delay the exercise of his rights; likewise, an appeal which is taken for abusive or dilatory reasons will result in damages on the basis of abuse of rights.
exceptional rights will escape this control — rights which by their nature cannot be other than discretionary, or which the law has so classified by reason of the precision with which it has specially surrounded their exercise.

Despite the theoretical import of this article, the Commission insisted upon placing it at the beginning of the Code. It has a great practical importance. Above all, it is but legislative incorporation of a well-established jurisprudence which finds application in all the fields of private law (family law, property law, law of contracts and obligations, law of judicial proceedings...). It suffices to cite the utilization of the theory of abuse of rights in the matter of employment contracts of indefinite duration: this example alone shows what an instrument of social progress this theory has been in the hands of the courts. The Commission could not overlook this; its silence would have left doubt as to whether the courts would still be able to employ it after the promulgation of the new Code. All indications are that the courts will continue to make use of it, as they have up to now, with moderation and in a spirit of adaptation to the social evolution.

Second, the Commission did not have much difficulty in deciding that the beginning of the Code should not contain general texts on persons, property and rights, but that the possible inclusion of certain texts of this nature should be referred to the respective individual titles. On the contrary, it devoted long hours of discussion to the question of whether the Preliminary Book — after dealing with legislation and its application — should regulate the juridical act itself, independently of the different forms it can take.

Some members were insistent that this should be done and that the texts thus drafted should be placed at the beginning of the Code. The general rules should apply to every juridical act and thus they govern all the subjects of the Code: family law and succession law, as well as property law and obligations; they even extend beyond private law. To use this method is to work scientifically; it also shows that the will of the individual in certain conditions is a source of law, alongside legislation.

[15.] Examples of rights which are absolutely discretionary and not subject to the principle of abuse of right are the following: The right to refuse to contract; the right of parents to consent to marriage of their minor children or to make opposition thereto; the right to make a will or to disinherit.
Other members of the Commission were opposed to this approach precisely because it tends to give the Code a theoretical aspect; they were also opposed because the existence of general texts on the juridical act alongside and superior to the appropriate rules of each category of acts — especially contracts — is susceptible of leading to repetitions or contradictions, and of encouraging the existence of difficulties of interpretation. Brazil's experience has been a disquieting one. The general part of its Code contains texts on the juridical act, yet certain of its jurists have told us that it is thinking of dropping them on account of the uncertainties and the lawsuits to which they have given rise.

Nevertheless, a majority of the Commission decided to propose articles setting forth the general rules of the juridical act. It is a noteworthy fact that the vote was carried by the members of the Council of State. Even though this body of high jurisdiction does not consider itself bound by the rules of the Civil Code, it refers to them often because the difference between public law and private law is largely formal. It was stated to the Commission that, while the Council of State might not find strict rules in the general principles of the juridical act, it would find at least a useful inspiration susceptible of being applied to administrative acts as well as to the acts of individuals in their relations among themselves.

Yet, illogical though it might seem, the Commission decided not to include the prepared texts in the Preliminary Book — undoubtedly so as not to place legislation and the juridical act on the same basis. Instead, the Commission adopted the idea of a separate book, Book IV, to be placed after the Book on Property and Real Rights, and immediately before the Book on Contracts and Obligations.

Furthermore, the development of the proposed texts was entrusted to the collaboration of the two sub-commissions which were charged with the Preliminary Book, and with contracts and obligations, respectively. This was done specifically for the purpose of avoiding contradictions between the general articles and those devoted to contracts.

By way of simple information and in the form of an appendix, we are presenting to you a chapter of the Book on Juridical Acts and Facts. This chapter deals with the formation of juridical acts and is not of a definitive nature; it will be re-
worked in the course of the preparation of the other parts of this book. Without having to examine now the tentative provisions adopted, the Government has to take a definite position on the matter with reference to the double question of the utility of texts on the juridical act in general and on the eventual place it should be given in the Code.

2. *What the Preliminary Book Does Contain*

The detailed outline will be found in the special reports drawn up by our secretariat. I must limit myself to a brief survey of a general nature.

The *first title* is the development of the first article of the present Code. On the matter of putting laws into effect, there is merely the codification of the current solutions with a few points made more specific. These solutions come, on the one hand, from texts which have thus far remained outside of the Code and, on the other hand, from judicial decisions. There are also two chapters devoted to the putting into effect of administrative acts and diplomatic treaties. I will mention only the solution given by article 25, which permits the judicial interpretation of treaties, about which our present-day jurisprudence has been undecided.

*Title II* takes the place of the present article 2 of the Code concerning the non-retroactivity of laws. Of course, the principle is preserved; however, a certain number of articles are added to the striking but succinct formula of 1804. These were adopted on the report of Mr. Roubier, Professor of the Faculty of Law of Lyons and author of a celebrated book on the conflict of laws in time. These articles seek to incorporate the tendencies which have been established by the jurisprudence in this difficult field. There are only a small number of articles which are still of a general nature, in order not to bind our courts by unduly strict orders except on certain points.

*Title III* replaces article 3 of the Civil Code. It is very much longer since it incorporates 113 articles devoted to the matters of *private international law* (status of foreigners, conflict of laws, conflicts of authorities and of jurisdictions). These articles were drafted on the report and under the inspiration of Mr. Niboyet. At this point, it behooves the chairman of the Commission to render homage to the memory of this scholar and the author of a work on private international law which had
assured him a world reputation; this professor was as good a jurist of civil law as he was of international law; he was appreciated by his students for his clarity and for the strength of his views; the establishment of the Commission was due to his initiative and as a member he attended its sessions until the eve of his death. He was taken from us prematurely, but he had been able to put into good shape the texts which I am now discussing with you, Monsieur le Garde des Sceaux.

Basically, and in the majority of cases, these texts incorporate the solutions of our present laws. These solutions come especially from a magnificent jurisprudence which knew how to construct a whole system of private international law by leaning on tradition to supplement the insufficient text of the Civil Code and by preserving as keen a sense of national interests as of the needs of international trade. On certain points, however, our articles depart from solutions presently followed. They have already been, and will no doubt continue to be, the object of discussions especially in the matter of conflict of laws and the execution of arbitration awards, where they indicate a return towards the territoriality of private international law and towards more distinct affirmation of French sovereignty. The ardent manner in which Mr. Niboyet defended his personal views on these points won the adherence of the Commission. The Government will have to judge whether our texts, which are based upon the consideration of national interests, are of a nature that would impede the present movement in favor of a broader international conception.

Finally, it must be noted that Title III deals not only with conflict of laws in space, with the sphere of application of French law in relation to the application of foreign laws, but also with the status of foreigners, conflicts of authorities, conflicts of jurisdiction, and the execution of foreign judgments and foreign arbitration awards. The proposal is to include all these rules in the Preliminary Book so as to present a coherent unit comprising the field called private international law, and to indicate that this whole group is governed by the same principles and the same considerations.

However, two other solutions would be possible. The one towards which Mr. Niboyet leaned was to detach this unit from the Civil Code and make a separate Code of Private Interna-
tional Law which would take its place alongside the Nationality Code in the compilation of our laws. This method is certainly contrary to the tradition of 1804; it would emphasize that private international law has its own spirit and its own method, and that it is not simply a projection of the civil law on the international plane.

Another and contrary solution would be to split up the different subjects, as in the present Code: to take up in the Preliminary Book the conflict of laws in space following the conflict of laws in time, and to refer the status of foreigners to the books on physical persons and on legal persons, while matters pertaining to conflicts of jurisdiction could be included in the Code of Judicial Competence and of Procedure. The Government will decide whether the intermediate solution, adopted by the Commission for practical reasons, is the right one.

B. Book I—of Physical Persons and of the Family

Here again, and especially on this subject, in the numerous articles (articles 148-747) destined to replace the present Code articles 7-515 and 1387-1581, the Commission sought to accomplish balance and moderation in its work. The Commission took account of the evolution of customs; it proposed solutions tending to define or to channel properly this evolution; it took account of the needs born of the transformations which the development of technology and education has imposed upon the life of individuals and of social groups. However, the Commission also considered that, if the new Code was to be flexible, the traditional framework of this life should be maintained and the new Code should preserve our traditional fundamental principles whose development is due to the contributions of the great movements that make our civilization: the ancient customs of our ancestors, the Greco-Latin contribution, Christian morality and canon law, the ideas of the philosophers.

These principles have been affirmed and reaffirmed by our Constitutions, our lawmakers, our writers and our judges. They include the recognition of the rights of the human person and of the civil equality of individuals, the necessity of the family and of its cohesion, the necessity also for the protection of the infirm and of children as well as those whose mental or physical condition places them in a status of obvious inferiority.
Moreover, it must be emphasized that these principles are not contested by anybody. They are not denied even by states which proclaim doctrines that we call totalitarian and which are inspired by historical materialism with its ideal of social justice. These states proclaim the emancipation and the blossoming of the human person as their ultimate goal, yet they accept and want a firmly established family, and they look out for the protection of childhood, the sick and the deficient. All the more reason then why a nation like the French nation, which has remained attached to the democratic ideal, cannot do away with the protection of the human person and his rights on which emphasis has been placed. Neither can it do away with the respect for family institutions in the center of which this personality is brought into being and developed. Nor can it do away with the necessity of protecting — by the combined action of the family and the public authorities — those who by reason of age or illness are not sufficiently competent to look after their interests properly by themselves.

Thus, in the heading and the plan of our Book I, these principles are put into practice.

Title I is devoted to the status of physical persons. In Chapter 1, the rights of the individual personality are affirmed and regulated. There follows a study of the juridical elements of this personality which tend to individualize it in the eyes of the law; then follow the acts of civil status intended to preserve the record and furnish proof of status (Chapter 2), the name (Chapter 3), domicile (Chapter 4), and the status of absence (Chapter 5). There is nothing here but the classical.

Likewise classical and traditional is the framework set up for the family institutions governed by Titles II to V. There could be no question of doing anything to marriage, the cornerstone of the family. The draft preserves the aspect which was given to it by the 1804 Code and which has been re-established in our customs since 1884; that is, a union of a secular and civil character which in principle is indissoluble but which can nevertheless be relaxed by means of separation from bed and board or dissolved by divorce for serious and limited causes and by means of judicial intervention.

From marriage flow the concepts of filiation and legitimate relationship with their strict modes of proof on account of the
importance of the moral and financial interests involved. However, while the law may wish that sexual relations should only take place in marriage, it cannot ignore the violations of these established rules because of human nature and passions, and it cannot be unconcerned especially about the fate of illegitimate children born out of wedlock or sometimes in formal contradiction of this institution.

Next, our draft had to sanction adoption, the development of which has been encouraged by the evolution of customs and by the ravages of war.

Finally, while the financial consequences of marriage and relationship will be translated especially in the Book on Successions, our draft had to discuss (and did so in Title V) the alimentary obligation, which marks the family solidarity which should exist between certain relatives. Without disregarding the questions which are raised on this subject by reason of the development of Social Security, the Commission thought that this development should not result in the disappearance of the role of the members of the family in the mutual support which they owe to each other. The family allowances [of Social Security] can facilitate and perhaps lighten the family duty, properly so-called, but cannot be completely substituted for it. If, to take care of the most urgent needs, public bodies undertake a part of the burden involved in the maintenance of a family, especially of the children, the reciprocal obligation of close relatives — ascendants and descendants in particular — remains of the first order. Should not the official agencies have a recourse against the members of the family who have not done their duty or who have not done enough and in time?

Furthermore, there are closely linked to the family institutions questions of the protection of children and of deficients. In the Commission’s draft, it is still largely within the framework of the family that this protection will remain assured. The draft maintains paternal authority, legal administration, tutorship, emancipation, interdiction and curatorship; it keeps the family council as an essential organ of tutorship because the Commission was not quite satisfied with the experiments of Alsace and Lorraine in the substitution of a judge of tutorships for the agency of the family.16

16. See the Exposé des Motifs of Title VI of the draft.
However, this is far from preservation of the 1804 Code as such. It has been extensively worked over. The adjustments made at times are of varying significance: (1) Some are of a purely technical nature and were inspired by a concern to put the texts into logical order. (2) Others are for the purpose of giving the Code its true appearance by the insertion of legislative texts [statutes] which have supplemented it, and especially by the sanction or the increased precision of the interpretations which the jurisprudence has given to its provisions. (3) Others contribute new material and, without changing the spirit of the old solutions, tend better to assure them by simplifying unduly complicated rules and by eliminating old and useless details. (4) Finally, there are still others about which I will speak at greater length, which really accomplish reforms in changing the status of the old law by putting, or tending to put, the projected Code into harmony with the evolution of the modern world.

[1. Technical Changes]

On the technical level, the draft tried in the first place to put the Code in order. I will not elaborate on this point and I content myself with a statement of the principal procedures that were used.

(a) Only rarely was it necessary to make adjustments in the drafting of the Code articles which were kept. However, despite the praises of the great masters of French writing, sometimes there was occasion to correct certain impropriety of terminology and certain obscurities of language.

It is true that I must be modest in this respect. On the contrary, should we not be apprehensive of the criticism that, in our anxiety to do too well, we have used a style less sensitive and less perfect than that of the present Code?

(b) Occasionally, the draft attempted a regrouping of the articles. By way of illustration, I will cite the grouping in the chapter “of the rights of personality” (rule _infans conceptus_ . . ., rules on the relationships between the birth and the conception, etc.), and the insertion of the title on matrimonial property régimes in our Book I so as to bring the effects of marriage on property closer together with the regulation of the marriage itself, thereby indicating that the idea of the family is more
important than the concept of contract. I will also cite the transfer into the Title "Of Marriage" of the provisions concerning the certificate of marriage, in order not to separate from the celebration of marriage, the preparation of the documentary certificate which establishes the evidence thereof. There is also the insertion of the rules contained in articles 217-219 of the present Code [husband’s approval or judicial authorization for married woman in certain cases] into the general provisions on matrimonial property régimes since these rules deal essentially with the financial relations between spouses.

I will likewise point out that a special title has been placed after the Title "On Filiation" and is devoted to the obligation of support; the present Civil Code deals with the alimentary obligation in relation to the effects of marriage whereas this duty arises as much from filiation and from the bonds of relationship in the legitimate family and even from the bonds of illegitimate relationship.

A certain number of texts have been removed from the Civil Code. Some will have to be transferred to the Code of Procedure (see the appendices concerning the rules of procedure for divorce, procedure for adoption, procedure for educational assistance and forfeiture of paternal authority, the recourses against the deliberations of the family councils, the sale of the property of minors, the procedure of interdiction and for the curatorship of majors). Others will be referred to the regulatory texts (see in particular the matters pertaining to acts of civil status and to the name).

[2. Integration]

Next, the draft has rejuvenated the Code. The Commission wanted the Code to reflect the true appearance of the French law on the subject of persons and the family, the appearance it should have by taking into account not only the old articles, but also the statutes which have remained outside of the Code and the interpretation given to the texts by our jurisprudence.

Thus, to cite only a few examples, there have been integrated into the draft the provisions of the law of 11 Germinal of the year XI on first names and the changes of name, the law of June 30, 1838 on the insane concerning the capacity of those committed to an institution, the law of July 24, 1889 concern-
ing the conditions of the forfeiture of paternal authority, and
the law of November 18, 1887 on funerals.17

Above all, the Commission was inspired at every moment of
its activity by the accomplishments of our courts; the Commiss-
on tried to distil the essence of this work, striving never to be
false to it while at the same time seeking not to hinder the
future evolution in any way. Illustrations are abundant; I will
cite only a few.

For example, our present Code differs from the Swiss Code
in that ours does not contain any text for the protection of the
personality, yet in fact these rights are protected by our juris-
prudence, which generally bases itself on article 6 of the Civil
Code relative to public policy and good morals, or on article
1382 concerning civil responsibility. These solutions served as a
point of departure for the Commission’s discussions on this
subject.

Similarly, the solutions of the jurisprudence will be found as
the basis of the draft articles on the probative value of acts of
civil status, on the protection of civil and commercial names, on
betrothals, on the nullities of marriage and putative marriage,
on the determination of certain property (**propres**) of the in-
dividual or of the family (reinvestment by anticipation, delayed
reinvestment, rights of literary or artistic property, supple-
ments of “**propres,**” rights attached to movable securities
[**valeurs mobilières**]). The same is also the case in the com-
munity property system, in the presumptions of ownership in
the system of separate property, the preventive disavowal, the
contestation of legitimacy, the situation of the child born within
180 days of the marriage, the place of blood tests in the proof
of illegitimate filiation, the conflicts of paternity, in certain
difficulties in the matter of the alimentary obligation (the prin-
ciple that the allowance due should not fall into arrears where
there are several debtors), in certain points regarding the in-
capacity of minors (e.g., the possibility of a minor himself
making a contract of employment) or of adults (extent of the
incapacity of the prodigal; the role of the person assigned to
assist him). I could without difficulty extend this enumeration.

17. See articles 158-161 of the draft.
However, our role has not been limited to register what our legislators and judges have done since 1804. We have tried to simplify the previous law. Without interfering with the basis of certain institutions and without changing their spirit, we wanted to make their operation easier and more useful for those concerned. This was done, on one hand, by ridding them of unduly complicated formalities, by pruning away useless or dead branches, and, on the other, by developing certain rules which have shown themselves to be efficient and which have filled certain gaps.

It is in this manner that the chapter on acts of civil status develops and defines the system of registration and marginal notations. Some people will undoubtedly think that the Commission should have gone further on this matter and they will regret that we have not adopted the "easier civil" [civil register of families and individuals]. It was with regret and after long debate that the Commission gave up that idea, feeling that the reform was not ripe. Modern methods of compiling statistics and of reproducing documents would perhaps permit this to be realized; but could the burden imposed on the budget of the State and of the communes be supported by the present condition of our finances? Above all, the Commission fears that this system might cause the maintenance of the acts and of the civil register (casier civil) to devolve into a bureaucratic administration not under the supervision of Justice, which is the impartial guardian of the status of people.

Simplification is also sought in the subject of absence: inspired by previous projects prepared by the Council of State, the draft reduces the delays while it defines and increases the powers of those sent into possession.

Similarly in the subject of marriage: in order to facilitate legitimate unions, the draft reduces the publications to a minimum and does away with the oppositions to marriage. It also abolishes the antenuptial [medical] certificate. No doubt, the Commission will be strongly reproached on this point. The Commission is not unmindful of the misfortunes which the transmission of physical defects brings into families, nor of the dangers which this transmission risks to the race, to the spouse, and to
the children. However, it feels that the remedy is to be found, on the one hand, in the development of medicine and the biological sciences and, on the other, in the education of the youth and in the warnings it should be given as well as in the appeal to the moral sense of responsibility. Even with the modest effects which the present law attributes to the antenuptial certificate, it is only a formality which complicates marriage and can only result in driving young people towards free union, in which the risks of contagion and corruption of the race are even much greater.

The draft abolishes the dotal régime. A report made by Mr. Kayser, Professor of the Faculty of Aix, disclosed that this régime is little practiced nowadays. The rigorous provisions set up by the law to protect the dowry have turned back against the wife and the family on account of the economic evolution. The Commission thought it was sufficient to provide for clauses of inalienability which, furthermore, can be combined with the whole matrimonial property régime.

The draft simplifies the procedure for divorce by abolishing the plaintiff's preliminary petition, the uselessness of which had been demonstrated by experience. The draft does away with the old institutions such as the restoration of indivision (retrait d'indivision) in matrimonial property régimes, the curatorship of the unborn child, and the counsel which the predeceasing father could give to the mother as tutrix of their child's tutorship. Moreover, in this latter subject, the Commission has given more freedom to the tutor and to the father who is legal administrator for the administration of the minor's estate; it has abolished the homologation of the court; and in certain urgent cases permits the authorization of a justice of the peace in lieu of the family council.

The Commission has simplified the forms of adoption and abolished the contract of adoption; and by making its procedure uniform with that of adoptive legitimation, the Commission has given a purely judicial character to the accomplishment of adoption.

Finally, as a last example, we will cite the simplification sought by the draft in bringing together as much as possible the organization of the protection of prodigals, deficients, and emancipated minors, under the single heading of curatorship.
However, Monsieur le Garde des Sceaux, the Commission has not been content to preserve, clean up, rejuvenate and simplify. Its mission was much broader and of a higher order, as well as more difficult. The Commission had to try to adapt our civil law to modern needs. It had to make something new to take into account the evolution of our ways. However, we insisted that this should not be done without regard to cost. The old house has some firm foundations which ought to be kept; only certain parts have to be made over to take care of the present and to prepare for the future.

These are the original points, or at least the principal ones, to which I must draw your attention, Monsieur le Garde des Sceaux, before I bring this rather lengthy report to an end, because it will be especially these points that will give rise to controversy and criticism.

[a. Personality and Status]

Concerning the individual and his status, the most original part of the draft is located in the chapter on the Rights of the Personality. I have already mentioned above that this part is not entirely new and had its source in the decisions of our jurisprudence. This is no more than a legislative enunciation of solutions already adopted in practical reality, and the fact should merit mention. It is an affirmation of the significance which our law attaches to the respect for the rights of the human person. This importance already flows from the Declaration of Human Rights in the preamble of our Constitution as well as from France's adherence to the Universal Declaration of Human Rights.

I do not overlook the fact that human rights and rights of the personality are not to be confused. Neither am I unmindful that the draft does not define the latter. While it announces in articles 164 and 165 that "the rights of the personality are outside of commerce" (hors de commerce) and that "every illegal infringement (atteinte) of the personality gives to its victims the right to demand that this be stopped without prejudice to the responsibility which may be incurred by its author," the draft leaves to the jurisprudence the function of deciding whether a voluntary limitation on the exercise of the rights of
the personality is contrary to public policy, which may vary according to the rights and the importance of the limitation. It also leaves to the jurisprudence the function of deciding when an infringement of the personality is illegal. However, this flexibility appeared to us to be necessary alongside the affirmation of the principle.

In addition, the draft expressly asserts certain rules concerning the right to dispose of one’s body, to submit to a treatment or to a medical experiment, the right to dispose of one’s own corpse or of the corpse of another person, and finally certain rules concerning protection of one’s picture and of sealed letters. Current events make these problems impassioned and difficult ones. In our solutions we have tried to conciliate the rights of the individual with scientific or social needs. But we should not fail to take note that the progress of the biological and psychological sciences opens perspectives which are not without danger to the freedom of the personality of individuals. Our texts will at least have the merit of drawing attention to the issue and of bringing about the necessary confrontation of the points of view of the men of science and the men of the law.

Compared to the problems which we have just mentioned, those raised by the regulation of domicile will appear much more technical and more modest. However, we ought to point out that the draft changes our present law rather considerably on this subject, principally in (1) giving domicile a purely objective definition associated with the habitual residence without reference to an element of intent, (2) dropping the principle of the unity of domicile, and (3) establishing new rules for the domicile of nomads and itinerants, and for the domicile of origin.

[b. The Family]

I return to the questions which are more likely to evoke public opinion, with the innovations which the draft brings to the subject of the family.

In effect, the draft provisions in this matter (1) mark a significant advance towards the civil equality of men and women in marriage, (2) bring substantial improvements to the situation of illegitimate children, (3) take into account the problems raised by recent biological discoveries, and (4) lean towards favoring adoption.
The respective positions of husband and wife in the marriage, as set out in the draft provisions, brought out long and often heated debates in the meetings of the Commission. These provisions will probably encounter objections. The draft adopts intermediate solutions marked with a spirit of moderation, of compromise and of balance. It is feared that they may be criticized both by those who will reproach us as having been revolutionaries and of having shaken the stability of the French family, and by those who will be indignant that we stopped half-way and did not provide for absolute equality between husband and wife.

It is well known how the question presented itself to us. The Civil Code gave supremacy in the household to the husband. This was done in consideration of the customs of the period of its promulgation, of the small amount of education of women, of the retiring role which they played in the community life outside of their homes, of the artisanal character of agricultural labor, and also by reason of the authoritarian ideas of the time. The Code gave the husband marital authority over the person of his wife. It made him chief, lord, and master of the community which was proclaimed in accordance with the customary traditions as the legal régime of persons married without [ante-nuptial] contract. The Code also decided that the wife did not have legal capacity, and in principle she could not perform juridical acts without the authorization of her husband.

A slow but sure evolution took place during the course of the nineteenth and twentieth centuries. Under the influence of the development of use of machines, the creation of large commercial and industrial establishments, and the increased cost of living, the wife has had to work more and more outside of her home and independently of her husband. She has become eligible to receive the same education as men, and to participate increasingly in the social, economic, and political life of the country. This evolution was hastened by the wars, in the course of which she had to accept the burden of tasks which could not be performed by the men in the army.

In the civil field, this evolution brought about the law of July 13, 1907 on the free salary of the married woman, and especially the laws of February 18, 1938 and September 22, 1942 which abolished the [husband's] marital authority and the
[wife's] legal incapacity. However, these laws still announced that the husband remained the "head of the family," and in particular they did not affect the property régime or the community property system, which left the primacy to the husband. After the Liberation, women obtained political equality.

What should the Commission have done? The direction of the evolution is very distinct. It tends towards the complete equality of the spouses. For this equality has already been achieved in certain countries—in the Anglo-Saxon countries, the popular democracies, and Japan.

As I have indicated, the Commission adopted a mixed solution. In the personal relations of the spouses, it proclaims their equality and deprives the husband of his status as head of the family. Yet on the financial plane, it keeps the community property system as the legal régime and, in principle, reserves to the husband the quality of head of this community. That is not simply a solution in the nature of a compromise reached at the end of long discussions. It translates the profound sentiment of a majority of the members of the Commission.

To these members, it appeared that it was time to establish equality between spouses in the field of personal relationships and also in the relationships with the children, and to abolish the status of head of the family which the present texts acknowledge to the husband.

This decision engendered very violent criticisms. The Commission was accused of wanting to destroy the family. And there was a feeling of shame about this "family without a head," dedicated, it was said, to anarchy and disorder. The Commission received these criticisms calmly because it considered them profoundly unjustified. None of our members wants to impair the cohesion of the family; it is quite the contrary. However, the problem is to know whether to be satisfied with a facade of cohesion, a cohesion in words, or whether real cohesion is desired.

The authority of a chief is justified if the family has to defend itself by force of arms; it is also explained if by reason of social and economic condition the husband is socially stronger and is the only one to act for the family, and if the wife is weaker than he is. This is not the case; or if they had once
been, things are no longer that way. Three centuries ago, Molière had already emphasized that women often have a stronger will than men. And we have all known families in which the wives re-established a situation jeopardized by the husband.

In any case, at the present time, it is no longer the husband alone who earns the livelihood in the household. Generally, his wife has the same education and she has the same political rights. Thus the concept of head of the family becomes an absurdity for it is based on an untruth. In these conditions, true cohesion does not depend upon the authority that will be given to one of the spouses — this authoritarian concept can only lead to conflicts; it depends on the union of the two spouses. If they understand each other — and their understanding will be more difficult if the subjection of one is demanded — the family will hold. If they do not get along with each other, the exercise of an authority which is not accepted will only irritate matters.

Moreover, at the present time, what is meant by the formula “the husband is the head of the family”? In the personal relationships between the spouses, its consequences are reduced to very little: the choice of the family residence, and the husband’s possible opposition to the wife’s choice of a profession deemed contrary to the family’s interest. Furthermore, the texts provide a possible recourse by the wife against the husband’s decision. What will be changed by the articles which the Commission proposes? If there is serious disagreement, especially on the points mentioned above, it will be necessary — as it is today but no more so — to resort to judicial recourse. And why should the wife not be able to defend the dignity of her home in criticizing the profession chosen by her husband?

The proposed reform fits in with the whole of our legislation and the provisions of our Constitution, and its only purpose is to put the law in accord with the facts.

But, it will be asked, why was the idea not carried through all the way, and why were its necessary consequences in the financial field not accepted? In fact, some members of the Commission felt that the reforms made in favor of the married woman in the personal relationships with her husband and her children ought to be translated by a general matrimonial property régime giving her the administration of her estate. These
people further ask what good did it do in 1938 to abolish the legal incapacity of the married woman if all the property of the household is left under the authority of the husband while the wife is not given the opportunity to exercise her capacity? Did not the legislator of 1942 show us the path to follow, by reducing the husband’s power over common property in the matter of gratuitous transactions and by increasing the scope of representation between spouses?

There is only one stage left to overcome. No doubt, it may seem necessary to correct the serious shortcoming of the separate property system which does not normally (except by way of succession or concealed gifts) permit one spouse to share the gains made during the marriage with the assistance of the work of the other spouse, and thereby risks leaving the widow without a share of the savings which her thrifty spirit was able to effect in the salaries and earnings of her husband. For this purpose it would suffice to adopt the régime which the Government had proposed to Parliament in 1932 — the system of the sharing of acquisitions (participation aux acquêts). This system is already used in the Nordic countries and in Colombia; each spouse freely manages his own estate but the acquisitions (acquêts) are divided at the dissolution.

After lively debates, the majority of the Commission were not in favor of this reform. They felt that it clashed with our traditions, that it would encounter a poorly prepared public opinion, and that it was premature. If the wife and mother can be placed on the same basis as the husband insofar as her own person is concerned and for the exercise of authority over the children, it does not yet appear that the same can be done in financial matters. Among the peasants, it is still the husband who represents the household in property matters; among the middle class (bourgeois), it had been the notarial experience [in the preparation of marriage contracts] that, in many cases where the spouses adopt the separate property régime, the wife in fact leaves the administration of her property to the husband and she does not then have the benefit of the guarantees offered by the community system.

It was therefore decided that the community property system would be kept as the legal régime, but as a modified and an improved community system. The common property is re-
duced to acquisitions \((acquêts)\) during the marriage— as contemplated in the draft voted by the Senate in 1938-1939; this permits each spouse to keep as his own \((propres)\) everything owned at the date of the marriage, movables as well as immovables. However, the husband remains head of the community, and he even continues to administer the separate property of his wife. To decide otherwise would deprive the régime of its strength, namely, the unity of administration. Nevertheless, certain changes have been made. As is the law today and since 1942, the husband acting alone cannot make any gratuitous alienation of common property and, furthermore, the participation of both spouses is necessary for a series of important acts involving such property. Even now, through the operation of her legal mortgage the wife must participate in the onerous disposition of immovable property. In addition, article 395 of the draft requires the consent of both spouses for the collection of capital sums, for the alienation of intellectual property rights, for the sale or lease of a business, for the leasing of immovable property, for the alienation of movables which are necessary for the current life of the household, or for the exercise of the common profession of the spouses.

There is a movement in the direction of a common management of the common property. The husband's rights are kept only for movable securities \((valeurs mobilières)\) and movables of non-current utilization, because this is required by the necessity for the circulation of these stocks and shares, and for the security of commerce.

For the administration of the separate property, the wife's consent is also indispensable (article 397) not only for acts of disposition but also for leases of immovables, the concession of exploitation rights on intellectual property, and for the collection of capital sums.

Of course, there are kept, with their principle, the rules adopted in 1942 on the possibility of one spouse obtaining judicial authorization to represent the other or to override the refusal of the other spouse whose consent was necessary.

It must be emphasized that the Commission proposes to abolish a substantial part of the rules which had been introduced into our legislation on July 13, 1907; the supporters of a bolder reform in favor of the wife will not fail to raise this
point and criticize it. The rule is being kept that the wife can freely collect her earnings and profits, and dispose of them. Also, the rule is kept that either spouse who is left in need can effect a seizure on the revenues of the other. However, there is no further mention of reserved property (biens réservés); in the draft, things acquired with the savings made from the wife's earnings fall into the common fund under the husband's administration. The position of the wife who may have substantial profits, or who operates a business, or who engages in a liberal profession, is going to be impaired. Insofar as the business-woman is specially concerned, it must be added that under the present law the husband is still held (contrary to the opinion of the writer of this report) as solidary surety for the debts of his wife. Article 391 expressly discards that solution. Does not the draft, on this point again, mark a retrogression with reference to the wife's situation?

The majority of the Commission did not think so. The provisions concerning reserved property (biens réservés) have seldom been applied in practice because of the difficulty of proving the origin of the property. Furthermore, the existence of reserved property resulted in unbalancing the community régime in favor of the wife. The savings which she effects are not her own but are part of the common property even though she actually manages them. However, at the dissolution, she can keep them in any case even though she renounces the community, whereas the husband is obliged in any case to share the savings made out of the products of his work and to be responsible personally for the debts resulting from his wife's profession. The draft re-establishes the balance between the spouses.

If the spouses prefer to leave a greater freedom to the wife because she exercises a profession, let them adopt the separate property system. Moreover, the draft provides for and studies the régime of sharing acquisitions (participation aux acquêts) not as the legal régime but as a contractual one brought to the attention of the public which is thereby informed about it.

Likewise, the spouses can adopt the community régime with the modification of increasing or decreasing the husband's power, or even of giving the power of the head of the community to the wife. The draft accepted these ideas, which will seem revolutionary to some people; to the Commission they appeared
as the logical consequences of the theoretical equality between the spouses. It also appeared that they could correspond to the exceptional situations for which satisfaction cannot be obtained under the present rigidity of our law.

The draft presents this flexibility as a result of another important reform. The spouses could have been poorly informed at the time of the marriage, and new circumstances can make the previously-chosen régime unsatisfactory. For example, the wife can become a merchant or enter a profession during the course of the marriage. Here again, the draft provides a remedy in abandoning the principle of the immutability of the matrimonial property régime. This reform had already been prepared by certain developments of the jurisprudence as well as by certain flexibility emanating chiefly from the texts of 1942. The draft accomplishes this reform. Moreover, it submits the change of régime to judicial control, and permits it only if the application of the previous régime turns out to be against the interest of the family.

(2) On the reforms concerning filiation, our remarks will be shorter. This is not because they are socially less important, but in general they gave rise to less animated discussions in the Commission and were adopted by a large majority, if not unanimously. From three principal points of view they tend to improve the condition of illegitimate children with reference to the establishment of a bond which unites them to their parents.

It will be asked, however, whether whatever favors the situation of the illegitimate children does not thereby risk weakening the strength of the legitimate family? We do not think so. What can weaken the pre-eminence of the legitimate family is the very existence of illegitimate children, and the fact that people procreate outside of marriage. But this is a matter of customs, and the severity of the law with reference to children born out of wedlock has not had a perceptible influence in this respect. The law offers the shortcoming of leaving innocent children without protection; they cannot claim from their parents the performance of the most elementary moral duty, and they are likely to become embittered. Let parents be educated; let them be reminded of their moral and civic duty to have children only in marriage; and let not the consequences of their mistakes be
made to fall on the children. That a substantial part of the patrimony be reserved for the legitimate children, and that the illegitimate child should not share in it or only for an inferior part, is an idea that some people will possibly find severe and impregnated with material considerations that are a little base. However, it is a traditional idea justified by the thought that the patrimony generally comes in large part from the family or is destined in the future to the family. The illegitimate child is not legally part of the family, which is an institution of stability based upon the solemn promises of marriage, whereas free union is essentially precarious and often transient.

Be that as it may, here are three essential reforms which the Commission proposes:

(a) The establishment of illegitimate filiation is facilitated. According to a system already used in many foreign countries, illegitimate maternity will be established by the simple mention of the mother's name in the birth certificate or by the possession of the status, without need for an authentic act of acknowledgment. Illegitimate paternity, which has not been established by acknowledgment, can be sought under article 516 of the draft in judicial proceedings if it is proved by any means that the father had relations with the mother during the period of the conception, or that the father had admitted his paternity especially by contributing as father to the support of the child. The court reserves its judgment in accordance with the proofs and counter-proofs adduced.

(b) The draft discards article 337 of the present Code. This provision was greatly criticized because it set up an unfavorable position for the illegitimate child of one person who had relations before his marriage with another person whom he did not marry, and who acknowledges the illegitimate child only after his marriage.

(c) Finally, the draft discards the present prohibition against the establishment of adulterous filiation, at least when it concerns the establishment of filiation with regard to the father.

[18.] CODE CIVIL art. 337: "The husband's or the wife's acknowledgment of an illegitimate child born before the marriage, from a union with a person who is not the present spouse, shall not prejudice the latter nor the children of the marriage.

"Nevertheless, the acknowledgment will produce its effect after the dissolution of the marriage, if there remain no children of the marriage."
who is married to a woman other than the mother. It will be possible to establish the adulterous filiation as to the father under the same conditions as simple illegitimate filiation, but the effects of this filiation will remain restricted to alimentary support as long as the adulterous father's marriage is not dissolved and as long as there remain any legitimate descendants of this marriage.

(3) Recent biological discoveries raise questions which are serious ones for the jurists concerned with family law and with the law of filiation in particular. The Commission took these into account.

(a) The draft is no longer opposed — as is the Civil Code — to the contention that the wife's sterility or the husband's impotence be a cause for disavowal of legitimae filiation. There is no longer need to fear the scandals which used to be caused by investigations on this subject during the old régime. Science has made enough progress for physicians to be able to determine these infirmities by discreet and definite procedures.

(b) Artificial insemination is the order of the day. Certain countries practice it and certain jurisdictions expressly permit it. The Commission did not take that path. This procedure gives rise to too many debates of a moral, religious or social nature. It does not seem to have entered into the customs of our country sufficiently for the Civil Code to regulate its use. However, the Commission has expressed the wish that regulation should be introduced on the administrative and penal level. Yet, in the case where there has been artificial insemination, can there not be civil consequences?

It might have been asked whether it would not be adultery where insemination is made from a donor who is not the husband. This would render ineffective the husband's consent to the insemination. The Commission did not deal with the question because it did not define adultery in the draft any more than does the present Civil Code.

However, in regulating disavowal on the ground of remoteness, the Commission provided in article 390 that "this disavowal will not succeed if it is proven that the child was conceived by artificial insemination and with the written consent of the husband, regardless of whether the donor be the husband or a third person."
Finally, the role of blood tests in contestations of filiation is recognized by the draft in several instances, as I have already mentioned. Direct reference is made in article 154 which decides that "when a person refuses to submit to a medical examination, ordered by the court and only involving methods in conformity with science and without serious danger to the human body, the judge can consider as established the facts which the examination intended to prove." Another instance is in article 517 which refuses to sanction an action to establish paternity "if the alleged father proves by a definite medical method that he cannot be the father of the child." In addition, blood tests may be contemplated in the cases where the draft permits the setting aside of maternity or paternity on the basis of all facts which are appropriate to establish that the child is not the son of the alleged mother or father.19

Finally, adoption and adoptive legitimation are favored in the Commission's draft. In this respect, the draft is inspired by numerous proposals of law and by the draft prepared by the Committee for the protection of children who are wards of the court. On two occasions, in 1945 and 1953, the Commission took up its work on this point which engrosses a substantial share of public and parliamentary opinion. I will not go into the details of the principal reforms proposed on this subject; these will be found in the texts and in the special exposé des motifs. These reforms tend to encourage the development of adoption and adoptive legitimation with their present character of being legal transactions intended to supply a home for children who are deprived of their natural one. In any event, the Commission felt that it had to be cautious — for fear of excesses, abuses and blackmail.

c. Protection of Incapables

There remain to be described the principal innovations of the draft on the subject of the protection of incapables.

(1) In the matter of paternal authority over minor children, I emphasize that the draft sanctions the equality of the
father and the mother as a sequence of the equality established between the spouses in their personal relations. The present Code already affirms in article 213, paragraph 2, that “the wife concurs with the husband to assure the moral and material management of the family, to provide for its maintenance, to bring up the children and to help get them settled.” This text presents some contradiction with the first paragraph of the same article 213 and with the first paragraph of article 373, both of which recognize the husband as head of the family.

In the draft this contradiction disappears. The father and mother concur in the management of the family and jointly exercise the authority over the children. Moreover, the decision of one is presumed to have been in agreement with the other; fortunately, this will in most cases correspond with the reality. If it is not the case, each spouse can interpose opposition to the decision reached by the other, and the president of the court will settle the matter by making an immediate provisional order.

Here, it seems that the equality of the spouses is justified even more than in their personal relationships. In the maintenance and education of the children, the mother is at least as important as the father.

However, in conformity with the view expressed above, the Commission left the administration of the child’s property to the father. A joint administration would bring about internal conflicts and especially complications in dealings with third persons. However, there again, as in the community régime, the mother’s consent will be necessary for the accomplishment of the more important acts.

(2) Judicial Supervision. It must be pointed out that the draft sets up a more active judicial supervision over the exercise of paternal authority. Formerly, the law refused to intercede, and it took reverberating abuses and scandals to bring about the passage of the law of July 24, 1889 on the forfeiture of paternal power. However, this law was strict at first and made it possible to deprive the parents of their authority only in limited and serious cases, and then it was a matter of total forfeiture. Successive reforms relaxed the system.

Moreover, the subject is closely linked to the question of juvenile delinquency. Delinquent children are generally children
over whom the exercise of paternal authority has been neglectful or wrongful or in a direction contrary to what it should be. The criminal law intervened and gave to the judges and the courts the power to order measures of correction and of education. Special courts for children were established. Why should not such measures be taken when the parental authority is deficient or abusive, without waiting until the child does something wrong? The right of paternal punishment (correction) has already been modified; the methods of correction have become methods of special education.

Picking up and completing the provisions of a draft of law which was presented in 1948 by the Ministers of Justice and of Health concerning the protection of children in danger, the draft thus provides the possibility for the judicial authority to cut down the parents' right of custody and to order measures of educational assistance. These measures even become the essence of the state's control over the exercise of authority by the father and mother; forfeiture is merely an exceptional procedure.

3) Children's Courts. The measures thus contemplated, educative assistance and forfeiture of paternal authority, will no longer come within the jurisdiction of the regular courts but of children's courts composed of judges who specialize in child psychology and are acquainted with modern procedures of re-education.

Furthermore, the Commission has extended the jurisdiction of these courts to include questions of custody of illegitimate children, of children whose two parents are not in condition to express their will or have been condemned for family abandonment, and of questions concerning adoption and adoptive legitimation of minors. At one time, the Commission even thought of giving these courts jurisdiction over divorce, at least when there would be children in the family. However, this solution would have led to the establishment of family courts to which there would also have been submitted all the conflicts between spouses in their personal relationships, and it was turned down. This would have dethroned the civil courts and have taken away from them matters in which the financial interests involved can lead to the discussion of delicate juridical questions.

Nevertheless, even restricted to the scope of the draft, the contemplated reform marks an important stage in the increasing
humanization of the law and of the social role of the children’s judge.

(4) The formalities of tutorship and legal administration have been alleviated. I will add that the supervision of the tutor has been reinforced and the role of the sub-tutor increased; in particular, the latter has been given the right to demand accountings. However, the administration of the minor’s property remains based in the family organs; it is rather the judicial control that has been reduced. In this there is translated the changed conception since 1804. At that time, what the law wanted to assure was the preservation of property in the family. In its quality of supreme authority in matters of tutorship, the court was charged with watching over this, not so much in the interest of the incapable as in the family interest confused with the social interest. In return, the parents were sovereign, or nearly so, over the person of the child. Today it is the latter who ranks first, and the State controls the education of the future citizen through its specialized judges; whereas less importance is attached to the preservation of the property for the administration of which there is more freedom and less judicial control.

(5) The law on emancipation has also been recast for similar reasons. The minor emancipated by marriage has been assimilated to the status of majority, and greater ease has been granted to the ordinary emancipated person in the management of his property.

(6) The law concerning the insane, prodigals, and feebleminded has also been completely revised with reference to the conditions of the management of their property. These conditions have been defined and relaxed, and in particular there has been an increase in the powers of the provisional administrator of the property of a confined person.

V

In its main lines, such is the work thus far accomplished by the Civil Code Reform Commission.

In presenting it to you, Monsieur le Garde des Sceaux, I must render homage to those who have so kindly helped me to achieve it.
The Commission members themselves would be angry with me for praising them. All worked wholeheartedly at this important task, and some deeply regretted that the heavy burdens of their high positions did not permit them to attend our sessions as regularly as they would have liked.

I owe a very special acknowledgment to our Secretary-General, Mr. Houin, and to his collaborators Messrs. Boitard, Mallet and Verrier. Their task has been heavy; their work has been efficient. They had to compile the texts of laws for us, to analyse the decisions of the jurisprudence, to research the books of doctrine, and to consult foreign laws and decisions because comparative law has in my opinion been of great service to us. These men prepared the drafts, polished the wording of our texts, drew up the reports and the exposés des motifs. Thanks to them, the Commission today is able to bring you a body of coherent and interesting laws.

These men also prepared the published volumes which contain our preparatory work (travaux préparatoires). We must thank your department, Monsieur le Garde des Sceaux, for having permitted this publication. Not only will it be useful for the interpretation of the texts when they will be promulgated, but it has already served the cause of French law in the world. Thanks to this publication, it has been possible for our work to be followed in the juridical world both in France and abroad. Discussions in learned societies have already been set up. Liaison has been established with other countries which have started or which contemplate the revision of their Codes, especially Holland and Louisiana. The men in charge of these undertakings — Professor Meijers of Leyden; Mr. Tucker, president of the Louisiana State Law Institute — have attended several of our meetings.20

The prestige of France in the juridical domain remains great. It is known throughout the world that France has undertaken the revision of its Civil Code, and there is interest in the manner that this will be accomplished.

This increases the pride of the Commission members, but also the feeling they have about their responsibility. They know that their work is not only incomplete; it is also imperfect. If the defects are recognized, they can and ought to be corrected.

The Commission knows that you intend to communicate our

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20. The translator attended most of the meetings during the spring and summer of 1954, after this report was written but prior to its publication.
preliminary draft to the Court of Cassation, the Courts of Appeal, and the Law Faculties, and to request their observations. We await these observations with confidence and impatience.

The length of this report is explained only by my desire to set off better the essential points on which these observations ought to bear. On the basis of the observations received, the Commission stands ready, Monsieur le Garde des Sceaux, to assist your department in the amendment of the preliminary draft. No doubt, it will then be sent to the Council of State, which is charged with advising the Government in the preparation of drafts of law.

However, what then? The Commission would be pleased if its efforts do not wind up as a purely theoretical work. The Commission hopes that its amended texts will become laws. It will be up to the Government to propose to the Parliament an efficient method for such a realization.

Of course we hope that the Code may be promulgated as a whole. However, the preparation of the preliminary drafts is in itself far from being finished. Even if new procedures are used to speed the work of the Commission, it will still take a long time to finish the complete Code. If the Government deems it preferable, it will be able either (a) to obtain passage and promulgation of an important unit like the one that we are submitting today and to which the preliminary draft on successions and donations will be added in a few months, or (b) to detach from our draft the separate parts which are susceptible of being promulgated quickly.

In any case, the Civil Code of 1804 will attain one hundred and fifty years within a few weeks. This long duration attests its stability. It is with deference that the Commission members have considered it and have ventured to remodel it. If they have done so, it is to permit the Code to take on a new appearance. However, for the part on which they worked they preserved — at least they hope so — the fundamental principles of the Code (respect for the rights of the human person, cohesion of the family, efficient protection of incapables), while adapting them to the needs of the social evolution. This is the motif which makes them have confidence in the work which they have the honor, Monsieur le Garde des Sceaux, to present to you today.

Paris, December 20, 1953

L. de la Morandière