

# Report to the Minister of Justice: Second Report of the Civil Code Reform Commission of France

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# REPORT TO THE MINISTER OF JUSTICE

## SECOND REPORT OF THE CIVIL CODE REFORM COMMISSION OF FRANCE\*

*Léon Julliot de la Morandière\*\**

*Translated by Joseph Dainow\*\*\**

[Translator's Note. *The Civil Code Reform Commission of France, established in 1945, presented its first Report in 1953, containing the preliminary draft texts (avant-projet) and explanatory commentary (exposé des motifs) for a Preliminary Title, and for Book I covering Physical Persons and the Family. The second Report of 1961 presents the preliminary draft texts and explanatory commentary for Book II covering Successions and Donations. The chairman's introductory report to this second part of the avant-projet also contains significant observations of a more general nature; it is this report which is translated here.*]

*Monsieur le Garde des Sceaux:*

**A**t the end of the preliminary report which I had the honor on December 20, 1953, to address to Mr. Ribeyre, then Minister of Justice, to present to him the first results of the work of the Civil Code Reform Commission — a preliminary draft covering the Preliminary Book of the Code and Book I on Physical Persons and the Family — I expressed the hope that to this first text there would be added a preliminary draft on Successions and Donations within a few months.

For reasons which I will mention later, these months turned into years. Although the texts herewith attached were discussed during 1953-1957, the Commission is only today in a position to present them to you together with the complete explanatory commentary.

Also, after having outlined the plan of the new draft and the general spirit which inspired the Commission in its preparation, I will take the liberty, *Monsieur le Garde des Sceaux*, of submit-

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\**Rapport à Monsieur le Garde des Sceaux Ministre de la Justice*, dated Paris, March 1, 1961, in *Avant-Projet de Code Civil, Deuxième Partie* 7-16 (Paris 1962); English translation with permission of Dean L. J. de la Morandière and the Minister of Justice of France, and concurrence of Professor Roger Houin, Secretary-General of the Commission. For the first Report, see L. J. de la Morandière, *Preliminary Report of the Civil Code Reform Commission of France* (English translation by J. Dainow) in 16 *LA. L. REV.* 1-56 (1955).

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ting to you some observations upon our Commission's work as a whole and upon the future of this operation.

## I

To begin with, I will recall the general plan which the Commission had outlined for the performance of its work, in order to show the place which today's texts should occupy in it. This plan, prepared with the approval of the Commercial Code Reform Commission, contemplated the making of a large single code of private law, including: a preliminary book on the obligatory force of laws, administrative acts and treaties, conflicts of laws and the abnormal exercise of rights; a first book on physical persons and the family; a book II on successions and donations; a book III on things and real rights; a book IV on juridical acts and facts; a book V on obligations; a book VI on certain contracts; and a book VII on legal persons (*personnes morales*).

It is significant to emphasize that this plan looks forward in reality to a broad division of the Code into three parts, the first devoted to the interests of a personal and family nature, the second reserved for the economic interests, and the third for the collective interests.

In relation to the preliminary draft which is the object of this report today, it will be noted at once that in the present Civil Code the subjects of successions, donations *inter vivos* and wills are placed at the beginning of book III entitled "Of the Different Modes of Acquiring Ownership." In effect, the Civil Code had placed the emphasis on the bond that exists between these institutions and the right of ownership considered as the essential foundation of our civil society. There is no thought of denying the existence of this bond, but the Reform Commission considered that the regulation of successions and donations, as special modes of acquiring ownership, drew its inspiration not only from economic considerations but primarily from considerations of a family nature. It is these considerations which controlled the designation of the relatives normally called to the succession, the working out of the precautions taken for the validity of wills, the establishment of inheritance collations (*rappports à succession*), the légitime (*réserve*) and the disposable portion. Furthermore, history shows us the subordination of the legal regulation of successions and donations in rela-

tion to the general organization of the family. This is the reason why the Commission — which had in the first part of its *avant-projet* brought together the regulation of the matrimonial property regime and the marriage itself — treated successions and donations in a book II following immediately after the first book; the whole (*ensemble*) of these two books can be considered as the Code of the Individual and of the Family.

The detailed plan of this book II is quite different from that of the Civil Code of 1804. The texts currently in force are divided into two titles, one for successions and the other for donations *inter vivos* and wills. The present preliminary draft devotes five titles to this material. The first title deals with intestate successions, including the same topics as the present title of the Civil Code on successions, but with the addition of a chapter on the *légitime* (*réserve héréditaire*), because in practice the questions of *légitime* and of reduction present themselves with reference to partition, at the same time as the questions of collation (*rapport*). The four other titles are devoted respectively to testamentary successions (form of wills, revocation, caducity, effect of legacies), to donations, to substitutions and clauses of inalienability, and finally to partition made by ascendants — substitutions, clauses of inalienability and partitions made by ascendants posing problems which can occur with regard to either a will or a donation *inter vivos*.

We will note, finally, that the *avant-projet* deals only with donations in favor of physical persons. Everything that concerns donations in favor of legal persons, in favor of existing [charitable] works or those to be created, likewise everything that concerns foundations, has been set aside for inclusion later in the part of the future Code reserved for groups and legal persons, because this material depends essentially on the general regulation which will be established for collective interests and on the greater or lesser place which will be accorded to the concept of legal person.

## II

The general spirit of the texts which I have the honor to present to you is the one which has inspired the Commission since the beginning of its work. This spirit is just as I defined it in my 1953 report, and it is expressed by a constant concern about

equilibrium between the traditions of our law and the necessities of evolution.

The new texts do not upset our present law, on the contrary they preserve the basic principles of the Civil Code with reference to successions and donations.

For intestate successions, the draft specially preserves the division of heirs into classes (*ordres*), the rules on the seizin of these heirs, on the indefinite obligation for debts, on the option between pure and simple [unconditional] acceptance, renunciation, and acceptance under benefit of inventory, and on the principle of equality in partitions; it preserves the institutions of collation of gifts and collation of debts, the *légitime* and the reduction of donations in excess of the disposable portion.

In the matter of testamentary successions, the draft keeps the traditional forms of will: the holographic, the authentic, and the mystic (hereafter called secret); it preserves the ensemble of the rules on capacity to give and to receive, on revocation, nullity and caducity of testamentary dispositions; it sanctions the distinction between universal legacies, legacies under a universal title and particular legacies, as well as the existing principles of testamentary administration.

In the matter of donations *inter vivos*, the draft maintains the rule of necessary authenticity, and the existing provisions on the capacity to give and to receive. It makes, as did the Civil Code of 1804, a privileged place for donations in favor of marriage; it maintains the contractual institutions within a limited field and it regulates the partition by ascendants according to traditional principles.

Nevertheless, while remaining in line with tradition, our draft still brings something new in comparison to the Code of 1804.

To begin with, the draft fills out and codifies and concisely states the provisions of a number of solutions which the jurisprudence had worked out because the Code was silent.

Thus, to take the more characteristic examples, the draft expressly sanctions the theory of the apparent heir;<sup>1</sup> it regulates

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1. [Note by translator] The "apparent heir" is the person who acts as the universal heir of the deceased, takes possession of succession assets, and is generally considered as being the owner, but who later turns out not to be the rightful heir. The jurisprudence has evolved the "theory of the apparent heir" whereby

at some length the collation of debts; it declares the assimilation of the universal legatee to the heir; it states concisely the effects of impossible and illegal conditions by tying these effects in with the theory of cause; it admits the validity of manual gifts; it also gives precise details for the exercise of the Paulian action in the case of constitution of dowry, for the imputation of the dowry in the succession of the one who dies first (*prémourant*), and for the imputation of gifts made to a forced heir; it consolidates the jurisprudence on alternative conditional legacies, on the validity of certain clauses of inalienability, etc.

At the same time (*toutefois*), the draft is not satisfied with stating concisely and completing the Code currently in force; on certain points it modifies the earlier solutions, often doing so in the desire for simplification. Thus, it rearranges the texts relating to separation of patrimony; it eases the procedure of inventory and the formalities of judicial partition; it renounces the theory of persons dying in the same event (*comourants*); it abandons certain rules creating retroactivity prejudicial to third persons, such as the revocation of donations of existing property as between spouses, the revocation of donations for unexpected birth of child, the legal return (*retour légal*), the successional retraction (*retrait successoral*); it discards in principle the collation and reduction in kind, permitting only collation and reduction in value, and taking every precaution to state precisely at what date the valuation is to be made.

However, even more important reforms are proposed. To begin with, I will cite the texts relating to hereditary indivision; in these provisions the draft tends to favor the retention of this indivision much more broadly than was done by the reforms begun (*amorcées*) in 1938, and in particular it organizes again the operation of an indivision which is even susceptible of extending itself for many years. In the next place, I will cite the substantial change proposed in the rights of the surviving spouse who would hereafter be assimilated to a legitimate child; not only would the surviving spouse have the same inheritance share as such a child, but like the child would also be considered a forced heir. Finally, it is necessary to emphasize that, in keeping with the course traced in contemporary legislation, the draft increases the rights of both common illegitimate children and adulterous children.

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protection is afforded in certain situations to third persons in good faith who have acquired any of this successional property from such an apparent heir. See PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT-CIVIL FRANÇAIS*, vol. 3, nos. 243-246 (2 ed. 1952); vol. 4, nos. 340-346 *bis* (2d ed. 1956).

These are profound changes which seemed to the Commission to be required by the evolution of customs and the evolution of the concepts of the family. The explanatory commentaries, prepared by the secretariat of the Commission, will give more detail about the substance of these changes and will explain the reasons which led the Commission to propose them.

### III

*Monsieur le Garde des Sceaux*, the Reform Commission hopes that you will examine its draft as soon as possible and that you will transmit it for opinion to the organizations which you will consider qualified (Court of Cassation, Courts of Appeal, trial courts, law faculties, bar associations, the notarial *Conseil supérieur*, perhaps family welfare organizations, etc.). The Commission entreats you to kindly stress upon these organizations that they should take an interest in the draft and send you their observations within the shortest time. The Commission will then be at your disposition to help your services, if you deem it useful, on the basis of the observations received, to re-examine the preliminary draft and establish the final draft.

In effect, the wish of the Commission is that the work done for over fifteen years should not remain unused. This work, published and disseminated, is undoubtedly known in legal circles; it has been the object of many studies both in France and in other countries. I take the liberty of saying that it has demonstrated the vigor of French legal science. However, the purpose of so much work would not be achieved if the proposed reforms did not serve effectively towards the rejuvenation of our civil law. Well, in this respect, the situation does not appear to be fully satisfying. Indeed, our works have inspired, more or less directly, certain fragmentary laws, for example, the law of July 15, 1955, on illegitimate and adulterous children, the law of March 26, 1957, on collateral successions and the rights of the surviving spouse, the ordinances of December 23, 1958, relating to the protection of childhood and adolescence in danger, and to the system of adoption and adoptive legitimation. But in 1958 it required the special initiative of certain members of the Senate to introduce a bill (*projet de loi*) born of the work of our Commission — a proposal purporting reform of the matrimonial property regime. Nothing more has been done thus far to transform into law the texts which we prepared.

There are many causes for this state of things. Undoubtedly the most profound is that the Civil Code reform, undertaken in the feeling of well-being and buoyancy of the Liberation, no longer appeared of primary importance as the months and years slipped by. Paramount political and economic problems justly absorbed the activity of the government and of the Parliament. As far as the civil life of the citizens was concerned, it was left to be governed by the Code of 1804 — a code shrouded in a somewhat superstitious respect, also a code which has been able to maintain its authority thanks to the incomparable work of adaptation to which our jurisprudence has devoted itself. Furthermore, this reason explains the insufficiency of the means which the government agreed to put into operation for the realization of the Civil Code reform.

As I have said in my 1953 report, the Commission is composed of experts, members of the Council of State, of the main judicial bodies, of the law faculties, and law practitioners.<sup>2</sup> These people are all very busy with the responsibilities of their professions and they can devote only a few hours per week to the study of the new Civil Code. For the preparation of the preliminary draft on successions and donations, which we are presenting to you, they had to call upon certain specialized reporters and I must express acknowledgment here for the work done on this basis by Professors Boulanger, Rodière, and Loussouarn.

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2. The present composition of the Commission is as follows: Mr. Julliot de la Morandière, *Doyen honoraire* of the Faculty of Law and Economic Sciences of Paris, Member of the Institute, *Chairman*; Mr. Ancel, *Conseiller* of the Court of Cassation; Mr. Cavarroc, *Premier Président honoraire* of the Court of Cassation; Mr. Charpentier, former *Batonnier* of the *Ordre des Avocats* of the Court of Appeal of Paris; Mr. Desfougères, *Conseiller honoraire* of the Council of State; Mr. Jousselin, *Notaire honoraire*, former *Président* of the *Conseil Supérieur du Notariat*; Mr. Latournerie, *Président de Section* of the Council of State; Mr. Le Balle, Professor of the Faculty of Law and Economic Sciences of Paris; Mr. Lyon-Caen, *Premier Président honoraire* of the Court of Cassation; Mr. Oudinot, *Conseiller honoraire* of the Council of State; Mr. Rogues, *Avocat* at the Council of State and the Court of Cassation; Mr. Rouast, *Professeur honoraire* of the Faculty of Law and Economic Sciences of Paris.

The former members of the Commission are the following: Mr. Delepine, *Conseiller honoraire* of the Council of State, member of the Constitutional Council, resigned, replaced by Mr. Desfougères on July 15, 1954; Mr. Labbe, *Président honoraire* of the *Ordre des Avocats* at the Council of State and the Court of Cassation, Member of the Institute, deceased, replaced by Mr. de Lapanouse on July 24, 1946; Mr. de Lapanouse, *Avocat* at the Council of State and the Court of Cassation, deceased, replaced by Mr. Rogues on March 12, 1958; Mr. Henri Mazeaud, Professor of the Faculty of Law and Economic Sciences of Paris, resigned, replaced by Mr. Rouast on December 4, 1950; Mr. Niboyet, Professor of the Faculty of Law and Economic Sciences of Paris, deceased, replaced by Mr. Le Balle on October 3, 1952; Mr. Rateau, *Avocat General* at the Court of Cassation, resigned, replaced by Mr. Cavarroc on November 14, 1949.



I will stress particularly the difficulties of our secretariat.<sup>3</sup> Its operation was assured by the devotion of Mr. Houin and his collaborator Mr. Falque, but it was flooded with the many tasks which had been assigned to it. The secretariat found it impossible at one and the same time to prepare the printing of the volumes reporting each year's work of the Commission, to assure the editing of the minutes (*procès-verbaux*) of each weekly meeting, and to abstract all the observations concerning the first part of the preliminary draft which had been sent in by the organizations consulted. Also, in 1957, when the government asked the Commission, in conjunction with certain members of the Senate and of the National Assembly, to establish the final text of the draft on matrimonial property regimes, the Commission and its secretariat were not materially able while concentrating their efforts on the preparation of the final draft in this matter, to proceed at the same time with putting the *procès-verbaux* in order and to draft the explanatory commentaries relating to the texts worked out between 1953 and 1957 on successions and donations. That is the reason, *Monsieur le Garde des Sceaux*, why these latter texts are only today being presented to you.

The government of the Fifth Republic was indeed willing in a certain measure to listen to our grievances, and did grant to the Commission an additional secretary, Mr. Douay, thanks to whom we could avoid being completely swamped; it was possible for the work to be accelerated a little.

After the completion of the final draft on matrimonial property regimes, the Ministry of Justice requested the Commission to prepare, on the basis of its previous work, a legislative bill on minority, the authority of the father and the mother, tutorship and emancipation. This draft is now ready and we think it will be introduced shortly in one of the two parliamentary assemblies.

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3. The present composition of the Secretariat of the Commission is as follows: Mr. Houin, Professor of the Faculty of Law and Economic Sciences of Paris, *Doyen honoraire* of the Faculty of Law and Economic Sciences of Rennes, *Secretary General*; Mr. Boitard, *Avocat* at the Court of Appeal of Paris, former *chargé de cours* of the Law Faculties; Mr. Douay, *Magistrat*; Mr. Falque, *Magistrat* in the Central Administration of the Ministry of Justice.

The former members of the Secretariat are the following: Mr. Paul Coste-Floret, Professor of the Faculty of Law and Economic Sciences of Montpellier, *Secretary General*, resigned, replaced by Mr. Houin on October 30, 1945; Mr. Jacques-Bernard Herzog, *Premier Substitut du procureur de la République* at the *Tribunal de Grande Instance* of the Seine, resigned, replaced by Mr. Verrier on January 22, 1946; Mr. Mallet, *Conseiller* of the Court of Appeal of Paris; Mr. Verrier, Judge of the *Tribunal de Grande Instance* of the Seine.

Quite obviously, the Commission would have preferred that the projects born of its deliberations should be presented in the order which it had chosen. It was a little paradoxical to introduce a proposed law on matrimonial property regimes before having had Parliament discuss the texts on marriage and its effects in general, and it may seem a little extraordinary to detach from the preliminary draft another part on minority without having voted the texts on filiation. But it must be recognized that serious reasons have been able to justify this method of procedure, however illogical it might appear. The problem of the wife's position in the administration of the family patrimony is one of those problems which have been on the agenda of parliamentary assemblies for more than thirty years; it interests and sometimes even impassions a part of public opinion. It is the same, and even more so, with the struggle against juvenile delinquency, a serious problem closely related to the regulation under the Civil Code of minority, paternal authority and tutorship.

Be that as it may, the Reform Commission is pleased that its work serves as a basis for projects considered by the government as urgent. It hopes that these proposals will be voted quite rapidly; the government will then be able to resume the work from the beginning. The government will have to examine whether it should present a draft of the whole, aiming at the preliminary book and the two first books of the Civil Code at the same time, or whether, according to the method followed in 1804, it will present these books in separate drafts. It could do so, as of now, because the Commission is presently finishing its reexamination of the 1953 preliminary draft and is drawing up the final draft in taking account of the observations gathered by the legal organizations consulted. The Commission will have finished the revision of the first part of its preliminary draft when the observations on the second part relating to successions and donations will reach it. Then, in a relatively near future, Parliament will be in a position to express its thoughts on the whole thus formed, the Code of the individual and of the family.

#### IV

The task will still not be finished; there remains to be settled the part of the Civil Code concerning ownership and real rights, the part on obligations and contracts, and the part which will regulate legal persons both civil and commercial.

I think, *Monsieur le Garde des Sceaux*, in order to carry on well the substantial remainder of the work, that the composition of the Commission and its working methods will have to be changed. This is not the place to say what will need to be done; permit me only to set forth some of the reasons which, in my opinion, will require this transformation.

1. A first complication comes from the Constitution promulgated in 1958 and the distinction which its articles 34 and 37 establish between the domain of legislation (*la loi*) and regulation (*le règlement*).<sup>4</sup> Legislation establishes all the rules concerning the status and the capacity of persons, matrimonial property regimes, successions and donations; it is thus possible to contemplate for these matters a code of the classical type; this is what the Commission has done in setting forth the two first parts of the preliminary draft, presented in 1953 and today. But in what concerns the right of ownership, civil and commercial obligations, legislation only determines the fundamental principles. Thus a distinction will have to be made between the legislative code of ownership and the legislative code of obligations, on the one hand, and [on the other,] the regulatory codes relating to the same matters. This is a delicate distinction especially if one thinks about the multitude of texts relating to the problems raised by immovable property (construction, reconstitution of several tracts into a single ownership (*remembrement*), land registry (*publicité foncière*), etc. or by movable property (securities (*valeurs mobilières*), incorporeal assets

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4. [Note by translator] Laws are enacted primarily by the Parliament which is the legislative branch of the Republic; these are called "*lois*." There is also a legislative function in the executive branch which enacts laws called "*décrets-lois*," "*décrets*," "*ordonnances*," and "*règlements*." The cited provisions of the 1958 Constitution of the Fifth Republic are the following:

Art. 34. "*La loi est votée par le parlement.*

"*La loi fixe les règles concernant:*

" . . .

"— *du régime de la propriété, des droits réels et les obligations civiles et commerciales;*

" . . .

"— *la nationalité, l'état et la capacité des personnes, les régimes matrimoniaux, les successions et les libéralités;*

" . . .

Art. 37. "*Les matières autres que celles qui sont du domaine de la loi ont un caractère réglementaire.*

"*Les textes de forme législative intervenus en ces matières peuvent être modifiés par décrets pris après avis du Conseil d'Etat. Ceux de ces textes qui interviendraient après l'entrée en vigueur de la présente constitution ne pourront être modifiés par décret que si le Conseil constitutionnel a déclaré qu'ils ont un caractère réglementaire en vertu de l'alinéa précédent.*"

(*propriétés incorporelles*), businesses (*fonds de commerce*), literary and artistic property, etc.).

2. Another problem will need examination. The Commission had envisaged a single code of civil and commercial obligations. If one sticks to this solution, should it not call for the appointment of a single commission composed of both *civilistes* and *commercialistes*? If one takes the side in favor of the duality of the civil law and the commercial law, it will be necessary to establish between the Civil Code Reform Commission and the Commercial Code Reform Commission a closer relationship than that which has existed up to this time between those two commissions.

3. We must even ask ourselves if France has an interest in pursuing alone the study of one or several codes of private law relating to obligations and to contracts. The European economic unification is in process of realization; in any case, the Treaty of Rome between the six countries of the Common Market comes into play; is it conceivable that a real common market can develop without unity of legislation? Its operation will then constantly run up against the conflicts of laws. Undoubtedly, international agreements can settle these conflicts, and conventions of this sort have already been worked out by the Hague Conference of Private International Law. There is also no doubt that agreements between the large economic groups can bring about the drafting of standard contracts (*contrats types*), notably standard by-laws (*statuts types*) of a European company (*société*). But these are only preliminary stages. Is it not necessary to tend towards a common code of obligations and contracts? Belgium, Holland, Luxembourg and Italy have the same Civil Code as ours, or very close to it. Already a code of obligations, common to France and Italy, had been prepared in 1942. Germany operates on the same legal principles as we do, but its civil and commercial codes have been established according to techniques which are often very different from ours. Nevertheless, is it unthinkable that the governments might instruct their jurists to reach agreement on common techniques? And should not France, instead of thinking about remaking by itself the part of its Code relating to obligations and contracts, take the initiative to propose, at least to the signatory countries of the Treaty of Rome, an international conference with a view to the working out of single (*uniques*) rules? Evidently, that is a ques-

tion which is not within the competence of the chairman of the Civil Code Reform Commission, but he owes it to himself to draw your attention, *Monsieur le Garde des Sceaux*, to a point which appears to him to be of capital importance.

Without further stressing the future, it is necessary to finish what forms the first part of the task assigned to the Commission in 1945: the Code of Physical Persons and of the Family. The preparation of the whole ensemble of the texts which were remitted to your predecessor in 1953 and of those which I have the honor to remit to you today, was well performed thanks to the competence of all my colleagues and to the devotion of our secretariat. The best recompense that all of us can hope for, *Monsieur le Garde des Sceaux*, in the near future and thanks to your support in the councils of the government as well as to your high influence before Parliament, is to see our work, revised and perfected, take its place among the fundamental texts of the French civil law.

Paris, March 1, 1961,

L. de la Morandière.