THE REFORM OF THE FRENCH CIVIL CODE

By LÉON JULLIOT DE LA MORANDIÈRE

The French Code Civil, the Code Napoleon, was at its inception an incomparable monument, a masterpiece of unity and clarity, and the first real codification since the great compilations of Justinian. It brought with it splendor and prestige, and was the signal for a worldwide movement toward codification, for which it long served as the model. Through it French legal science attained universal influence.

This Code, one of the essential foundations of French life for nearly one hundred and fifty years, is to be revised; the monument is to be rebuilt.

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1. “The composition of these codes was the most rational and thorough proceeding of its kind in all history up to that time”. 3 Wigmore, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 1027 (1928). “... men's minds had been fascinated by the Code Napoleon ...”. Pound, The Influence of French Law in America, 3 ILL. L. REV. 354, 359 (1909), 44 BULLETIN DE LA SOCIÉTÉ DE LÉGISLATION COMPAREÉ 390, 391 (1915). “The modern code of France, embracing, as it does, the entire elements of her jurisprudence in the rights, duties, relations, and obligations of civil life; the exposition of the rules of contracts of every sort, including commercial contracts; the descent, distribution, and regulation of property; the definition and punishment of crimes; the ordinary and extraordinary police of the country, and the enumeration of the whole detail of civil and criminal practice and process;—is perhaps the most finished and methodical treatise of the law, that the world ever saw.” Story, Progress of Jurisprudence, 1 AM. JURIST & L. MAG. 1, 32 (1829). Miscellaneous Writings of Joseph Story 199, 238 (Wm. W. Story ed. 1852). Cf. Lobingier, Franco-American Codes, 19 VA. L. REV. 351 (1933); Franklin, Some Observations on the Influence of French Law on the Early Codes of Louisiana, JOURNÉES DU DROIT CIVIL FRANÇAIS 833 (Barreau de Montréal ed. 1936).

2. Literature in English on the Code Civil is abundant. See, notably: STUMBERG, GUIDE TO THE LAW AND LEGAL LITERATURE OF FRANCE 5, 71 (1931); Esmein, Code Napoleon in 5 ENCYC. BRITANNICA 952 (14th ed. 1929 and 1930); Planiol, France in
The idea of a revision of the Code Civil is not new. Napoleon himself felt that imperfections in his work would be revealed with experience, and that it would be necessary to correct them. He speaks of this in a letter to Prince de Bénévent.

The first great work of revision is the one which was undertaken by the Netherlands. The French Code Civil, applicable in Belgium since its promulgation, had been extended in its application to the Netherlands the first of May, 1809. After 1814, it was decided that it should be replaced by a new Code which was the subject of a series of laws adopted from 1822 to 1829. The new Code showed the influence of the Code Napoleon to a great extent, but gave satisfaction to national aspirations, and became obligatory in the Netherlands in 1838 only after the separation which made Belgium an independent state in 1830.

The Belgian Constitution of 1831 declared that it would be necessary to proceed with a revision of the Codes in the shortest possible time. But the general revision was never undertaken in that country. Laurent prepared a project from 1880 to 1885, but it was not taken into consideration. A royal decree of 1884 appointed a commission of twenty members to correct imperfections in, and fill gaps of the Code without changing its principles. This labor accomplished nothing. Belgium has kept the Code Civil as a whole.

In Italy, the French Code Civil was introduced, from 1805 to 1814, in the states annexed to France: Piedmont, Genoa, the Papal States, Tuscany, and in the states constituting the new Kingdom of Italy: Lombardy, Venetia, and the Kingdom of Naples. After 1814, almost everywhere the reaction against the Napoleonic work led to its abrogation, and the Princes reintroduced the old laws. But the superiority of the Code was such that an important reform movement was started almost everywhere. In Piedmont, the Albertin Code was promulgated, a revision of the French Code. It was in 1866, after the political unification of Italy, that the legislative unification was


The most recent translation of the Code Civil is that by Henry Cachard, the second edition appearing in 1930.
achieved. Broadly, it might be considered a revision of the Code of 1804, as applied to the peninsula.

In France itself, Rossi noted in 1837 in a memorandum for the Academy of Moral and Political Sciences, the discomfort which the new society began to experience because it did not feel itself fully at ease any more within the limits drawn by our Codes. In 1865-6, in articles in the *Revue critique de législation*, Batbie and Duverger asked for a revision of the Code in a sense favorable to the freedom of the parties in acting and contracting. In 1866, Acollas spoke of the necessity to revise all of the Codes, and notably the Code Napoleon, in a democratic sense. He asked for the abolition of marital authority, of indissolubility of marriage, of parental powers, of the differences between legitimate and illegitimate children; he asked for freedom of association, and for a revision of the mortgage system. A committee, meeting at Jules Favré, asked Herold to propose a project of revision of the Code, containing provisions on literary and artistic property, patents, corporations and insurance. Other essays on a revision of the Code Civil appeared in 1873 under the signature of Joubaire, in 1886 under that of Ambroise Colin.

The entry in force of the new German Civil Code in 1900 and the centenary of the Code Civil were the occasion for studies of this subject. In the *Livre du Centenaire*, Larnaude and Pilon expressed themselves for, Planiol and Gaudemet against a revision. The Minister of Justice appointed an extraordinary commission to prepare a preliminary draft. But this commission was much too large; it worked in an atmosphere of indifference, and did not finish its work.

After the war of 1914-8, the idea of a general revision of the Code was taken up again in connection with the introduction in Alsace-Lorraine of French legislation, but it did not yet find a favorable echo. The Code Civil was introduced in the recovered departments by the law of June 1, 1924; only certain institutions of local law were kept in force in these departments. The continuation was to be provisional and lasted ten years. It was hoped that in the interval it would be possible to study the general reform of the French Code and to take into account experience with the maintenance of some German institutions which were thought to be superior à priori. But nothing was done... and the provisional continuation was maintained until 1939.

After the liberation, since the last months of 1944, the Association Henri Capitant, upon the initiative of Chancellor Charpentier and M. Niboyet, suggested to the Minister of Justice the undertaking of a revision of the Code, and M. de Menthon had the principle adopted
by the Provisional Government of the Republic. By a decree of the 7th of June 1945, a commission was created at the Department of Justice for the task of preparing a general revision of the Code.

**COMPOSITION AND WORKING METHOD**

Taking up the project of his predecessor, M. de Menthon, the Minister of Justice M. Teitgen obtained from the chief of the Provisional Government, General de Gaulle, the 7th of June 1945, a decree providing for the creation of a Commission of Reform of the Code Civil.

Thus it is a commission which is endowed with this task. This system is in contrast with the one which the Government of the Netherlands adopted, since it asked a single person, Professor E. M. Meijers, whose scholarship and authority are recognized by all, to prepare the preliminary draft for a new Dutch Code. The Netherlands has thus followed famous examples, notably those of Chile where Andres Bello was asked, at the beginning of the 19th century, to prepare the code of that country, that of Professor Huber for Switzerland, and that of M. Josserand for the Lebanese Code of Obligations. The question really has not been aired in France. Recourse to a commission is instinctive and traditional, so to speak. It was a commission that the first Consul asked to prepare the preliminary draft of the Code Civil; it was a commission which was formed in 1900 to study the revision of the Code. The proceeding can be defended. It risks giving less unity to the texts which are presented, but it offers, perhaps, a guaranty that the problems will not be envisaged unilaterally. Whatever there may be in it, two observations should be made.

Our commission, in the first place, is much less numerous than the commission which was formed in 1900, which consisted not only of technicians, judges, lawyers, and professors, but also members of Parliament, representatives of the commercial world, and writers. That experience was not a happy one. The commission lost itself in long and idle discussions and came to no results.

Hence the decision was in favor of a small commission, though not as small as that of 1804 which contained only four famous names: Portalis, Tronchet, Bigot de Préameneu, and Malleville. There are twelve members of the present commission.

It should be stressed, in the second place, that all our members are technicians chosen from the legal profession, three Counsellors of State, three members of the highest Court, three professors of law, one at-
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torney at law, one attorney of the highest Court, and one notary. In
turning to specialists of the law, it was thought that the work would
be technically better and more quickly accomplished, and that the texts
would be better drafted. And it was felt that unity of views could-
be more easily achieved than if politicians or representatives of the
interests involved were turned to. A staff including two judges and
an attorney at law has been created with a law professor as head.

The working method chosen by the Commission aims at sim-
plicity and rapidity. The members of the Commission are divided into
four sub-commissions: General Part, Persons and Family, Obligations,
and Property. The sub-commissions work separately. Tentative
drafts are prepared and reports presented to a sub-commission by its
members, a staff member, some outsider, or specialist on whom the
Commission may always call. Texts adopted by a sub-commission are
submitted to the full Commission which is supposed to meet every
two weeks.

Yet our work has not progressed at the speed for which we had
hoped. The first obstacle has been that the members of the Com-
misson are all too busy and do not have sufficient leisure time to
dedicate themselves entirely to the considerable task entrusted to
them. Furthermore and above all, the Commission immediately en-
countered great difficulties which were readily foreseeable.

But why is it necessary to embark upon this task of recasting?
What are the results so far obtained, and what problems remain to be
solved? These are the questions which we shall discuss briefly.

THE NECESSITY FOR REVISION

Will a revision be necessary or useful? The arguments pro
and con have often been stated, and those likely to be presented
today are still those exchanged by partisans and adversaries of the
general revision in the Livre du Centenaire. Larnaude and Pilon
favored that revision; Planiol and Gaudemet opposed it. The argu-
ments of those advocating revision may be grouped under two main
headings: arguments of technical order, and arguments of social order.

Arguments of Technical Order: Our Code soon will be a hundred
and fifty years old. Not only has it aged, but to a considerable degree
it has become obsolete. And, in fact, it is now the French Code Civil
in appearance only. When the Code first made its appearance, it was
a splendid monument of sober lines and noble array externally—logical,
clear, and complete. It secured jurisprudential unity for France.

But time has passed, society has evolved, thousands of new needs
have appeared, profound transformations have taken place in the way
of living. Multiple and divergent interests have come to light. And what is the result?

The Code is still here. On its cover is still written, "Code Civil". But actually it is like one of those old palaces, its facade mutilated, which always seem to be the seat of a governmental department. Countless repairs have been made without order or plan. Its interior has been upset in the same way. No longer can it accommodate the governmental services which it was to house; only some remain. Others have swarmed to the right and left, to other streets and other buildings, where the individual, trying to find them, risks a loss of time in running from one to the other making inquiries.

Many thousands of laws have been enacted since 1804, especially in the last fifty years. Some have been made part of the Code, but often they have been badly drafted, and inserted in the old Code without consideration for harmony or order. Most of these laws have not been integrated into the Code: e.g., the law of March 23, 1855 concerning the transcript from the register in matters of immovable property; the law of July 24, 1889 relating to forfeiture of parental powers; the law of July 13, 1930 on insurance contracts; and the innumerable laws and regulations regarding employer-employee relations. New structures have been erected, like the Rural Code and the Labor Code, which tend to acquire autonomy and largely to replace the Code in the regulation of social relations.

Superimposed on this legislation has been the work of the courts. The law has followed the evolution of techniques and habits; it had to solve myriad new problems. All gaps of the Code have not been closed by the legislature, nor have all of its obscurities been clarified by new texts. Today, our texts do not relate our true civil law; to learn the truth, one must study also the court decisions which each has occasioned. Onto our written law has been grafted customary law, with the deficiencies inherent in it—complexity, lack of precision, obscurity for the uninitiated. The individual who in his actions relies upon the Code risks bringing himself into conflict with the law that is in fact applied. To keep informed, he must familiarize himself with court decisions. Still, he cannot be certain that the courts will decide tomorrow as they did yesterday. There are famous examples. Our Code forbids, in principle, the stipulation for the benefit of a third


party (Article 1119); but by means of a clever interpretation of the exceptions allowed in limited numbers by the text, our courts validate such stipulations in practically all cases.\(^5\) Article 1382 of the Code requires proof of fault on the part of the one causing damage in order to fix his responsibility; yet, through a subtle interpretation of Article 1384, our courts have generalized the presumptions of fault and relieved the victim of the burden in all accidents where an object or an animal under one's care causes harm.\(^6\) This is beneficent jurisprudence, but it makes the Code say the contrary, or almost the contrary, of what was intended.

The argument runs, then, that it is necessary, from a technical and practical viewpoint, to reestablish order, to bring into accord the statute and the applied law. In order that citizens may know where they stand, and that stability and security may return, old constructions and their unseasonable annexes must be torn down. In their place should be built a clear and modern Code Civil.

It has been said that the prestige of France is also at stake. France really is the country of the civil law jurists. It is the simplicity, clarity, and harmony of the French Code which have made it successful in the 19th century and have assured its influence in the world. This radiation has grown weaker because the French have not had the courage to renew their Code. It is even more difficult for foreigners to find their way in the complexity of our laws and decisions. French juridical influence is lessened by the success of foreign codifications which are more recent, modern, and easier to use.

The answers of Planiol and Gaudemet\(^7\) are still given to the arguments outlined above. These answers admit that it is necessary to refine our Code to some extent to bring into harmony some additions which were made to it imprudently and without plan, and to bring certain of the texts into accord with the solutions reached in the courts. But in any practical work, they say, there are bound to be defects. An old palace keeps its charm and solidarity despite junctions or baroque mutilations applied to its facade. A remaking of the whole

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7. Gaudemet's contribution to the LIVRE DU CENTENAIRE appears in English under the title A Century's Progress in Reshaping the Law; The German and the Swiss Codes, Compared with the French Code, in 11 CONTINENTAL LEGAL HISTORY SERIES: THE PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY 286 (Ass'n of Am. L. Schools ed. 1918).
is not necessary. It is useless and dangerous. The simplification will be in appearance only. Society is in perpetual evolution; new laws will appear the day after the promulgation of the new Code; court decision will undertake their work of adaptation anew. Let us keep the old buildings to which our citizens, practitioners, judges and attorneys are accustomed. The promulgation of a new Code will disorganize our practice, thereby creating uncertainty. It would take years before controversies of interpretation would die down.

They go on to answer that the draft of a new Code might produce some effect abroad. But are we certain to do better than did our old Code which keeps its prestige and has permitted the birth of doctrine and of court decisions, the authority of which extends far beyond our frontiers?

Arguments of Social Order: Even more serious criticisms are directed at the old Code Civil. Partisans of a new Code invoke arguments which go much deeper, and attack the very foundations of the Code, which they say rests upon obsolete social concepts. It is bad to keep the Code because it blocks social progress. The Code Civil, it is said, is the Code of the bourgeoisie which led the revolution of 1789, but confiscated the results for its own profit. It has as its basis the main principles which are considered as dogmas by that bourgeoisie: on the one hand, political and economic liberalism and individualism; on the other, authority and conservation of property in the family. First, in the domain of economic law, the Code expresses liberal and individualistic ideas. All rules are designed for the individual, and individually owned property, without mention, even by allusion, of collective persons. It proclaims the sovereignty of the owner and also the quasi-absolute liberty of contracting parties, and this liberty has as counter-balance only the responsibility of the individual in the case of violation of another's rights. As for the institution of the family, the Code strengthens parental authority which was shaken by the revolution. This is true also of the husband's authority over his wife. Attention is drawn to the Code's preoccupation with the conservation of real property in the family despite the abolition of primogeniture and entail.8

If numerous laws have been passed, if new Codes like the Labor Code have been promulgated, if by their interpretation the courts have often changed the results reached under the Code, it is because a profound evolution has taken place. Not only what one used to call

the industrial revolution has resulted in a transformation of values, but the abuses of liberalism and capitalism have favored the development of social and socialistic ideas. In the economic field, the state has been asked to leave its traditional role of gendarme, in order that it direct the economy. More and more has it intervened in production and redistribution of wealth, limiting the exercise of property rights and controlling the freedom of contract in order to secure social justice. The weak, crushed by the strong, have grouped together. The legal persons, the collective persons, have assumed increasingly more importance.

In striking contrast, modern life, by favoring individual development, by substituting work in great industrial plants for family and artisan work, has jeopardized family cohesion as conceived in the Code Civil. It has made necessary the emancipation of married women, the protection of children, and has resulted in profound modifications in the relations between parent and child, and husband and wife. There, too, the state had to intervene to protect the general interest.

Generally speaking, the law “socializes” itself. One tends to eliminate the traditional differences between public and private law and to admit that when a person acts, even with respect to an individual, the act is not indifferent to society; and that the person fulfills a social function which gives to the state, representing the general interest, the right and duty to intervene in order to control the aim and consequences of the accomplished act. Responsibility is in the transformation. For the law’s old foundation, individual fault, the tendency is to substitute a more social basis, “objective risk”. There is the tendency even to replace individual responsibility with a system of collective guaranty, of social security.

The decisions of the courts and the laws have registered this evolution. That is why, in addition to the Code, other structures and theories had to be erected; more modern and equitable solutions had to be adopted in conformity with present necessities. But this evolution, necessary and inspired by facts, could take place only in spite of the Code. In fact, the Code is ruined by it. It is therefore important to replace the Code. The problem is not a revision, but the adoption of a new Code, adapted to the needs and aspirations of modern society which uses the new techniques of electricity, of the aeroplane, of splitting the atom, of social sciences in the domain of observation and statistics, and of biological sciences which allow considerable growth of the population and prolongation of human life.

There is, of course, resistance against these arguments and the conclusion to be drawn from them. All do not admit the reality
of the evolution thus pictured. The interference of the state and the progress of socialization is not denied, but some see in them only temporary phenomena, results of the wars. "Do not meddle with the Code Civil," they say. "Its bases have assured the immense progress of the nineteenth century. It is not true that the principles which it proclaims are obsolete. In letting the Code disappear, you risk shaking the most solid foundations of our society, and may cause the collapse of our civilization."

Others, partisans of socialism, contend that the moment to make a new Code has not come. For a code is promulgated not at the beginning of a revolution, but at its end, to consolidate the conquests. To promulgate a Code Civil today would be to risk a halting of this evolution, and would congeal it before it bears all of its fruits.

**The Rôle of the Government in the Revision**

In the presence of these contradictory movements, our Government has thought that, all things considered, the time has come to remake the Code Civil. It felt that an endeavor must be made to recreate a harmonious whole, which would permit France to secure its rebirth on solid and modern bases. Accordingly, the Government decided after the liberation to have a draft for a new Code Civil prepared. It might be of interest to note here that it also decided to prepare a new draft for a Commercial Code and to take up again the study of proposals for the reform of the Code of Civil Procedure, of the Penal Code, and of the Code of Criminal Procedure.

We asked ourselves immediately what plan we would adopt for our new Code. That plan must be a function of the concepts which we shall accept as the bases for our civil law. Should we place preponderant emphasis on the individual, individual property, freedom of contract? Or should we, instead, place in the foreground the notion of social function, of organization of collective property, of the principle of direction by the state, of relationships of a collective character? Should we not, in the relationship between employer and employee, substitute for the concept of contract that of enterprise?

It was evident that the solution of these fundamental questions did not depend principally upon us. It was for the persons responsible for the conduct of our country, for Parliament and the Government to decide these matters. More particularly, since it is the Government—the Ministry of Justice—that takes the initiative in preparing a reform of our legislation, it is up to it to tell the technicians on what bases this legislation shall be prepared, what concepts of the family, of property, of the exchange of goods, it intends to defend before Parliament.
On the other hand, we members of the Commission should not confine our rôle and consider ourselves merely as the executors of the will of the Government; we should be the counsellors of the Government and we should not give up our concepts; and it is for us to present suggestions, relying upon our experience, and the observations made in the courses of our careers. However, we would do worthless work if we did establish a Code on political and social bases opposed to the views of the Government; our preliminary draft would not even be considered. We have a chance to accomplish something only if we keep in constant touch with the responsible authorities and if we know the directions in which they desire us to move.

Therefore, at the opening session, we asked the Minister of Justice, who honored us in presiding over the meeting, to outline the viewpoint of the Government on fundamental social problems. The answer was not very clear. And since that time we have not received instructions which were any clearer. It is true that the Government respects our independence; it lets us work in peace. Undoubtedly, they expect from us a new Code which takes wide account of the evolution of what has been called the socialization of the law. But up to what point should we push that socialization? We have not been told.

**A Result of Government Non-Intervention:** Among ourselves, we have not yet dared to dispose of this problem completely. We began our work in the atmosphere of the liberation, an atmosphere in which Parliament seemed to have definitely committed itself to an advanced form of socialism. Important industrial enterprises were nationalized; enacted were laws on the “Committees of Enterprises”, laws on the status of the farmer. Rationing and directed economy-inspired regulations grew more stringent each day. But would this movement continue? Or would it, on the contrary, be temporary and be followed by a return to more liberalism? Which form would the collective influence take in the future: syndicate, corporate, or state? It was not possible to give an answer to these questions. We decided to wait. No time limit has been placed on our work. Perhaps this was wise. We should not hurry, but let decant the ebullition of facts and ideas which has followed the great crises of the war. We have decided to reserve for a later time the examination of the questions, essential though they are, involving structural reforms, and to begin with the study of those parts of the civil law which raise problems only of order and technique. This is why the work so far accomplished by our Commission may appear somewhat fragmentary and incoherent until now.

Yet even thus limited for the moment, our work does not proceed without difficulties. It is not easy to separate the technical from the
social. Many questions which seem at first to be simply a matter of technical improvement require taking a position on fundamental problems. And even within our Commission, divergencies arise because our political and social inclinations are not identical. And even on technical questions, we are far from always being of the same opinion. We all belong to the legal profession, but some of us have synthetic minds with theoretical inclinations; others have more practical, more analytical, views. It might be added that the former are not always the professors and the latter the judges, as one might believe. Again, there are the counsellors of state, accustomed to move in the field of public law; and the others, the majority, whose reasoning is shaped by their familiarity with private law. Our inclination, therefore, is to be far apart on many issues, so that the required majority vote is often acquired only at the price of reciprocal concessions.

Within the framework of this study, we cannot indicate in detail the controversies which have slowed us and the accords so far reached. We will content ourselves with giving basic accomplishments, note the principal points where our discussions were most vivid, and indicate what remains to be done.  

RESULTS WHICH THE COMMISSION HAS REACHED

The twelve members of our Commission were divided into four Sub-Commissions: General Part, Persons and Family, Property, Contracts and Obligations.  

The most numerous projects so far have come from the Sub-Commission on Persons and Family. On these questions the members of the Commission hold views which differ little. These questions do not create controversies like economic and political problems. All recognize the necessity of preserving family ties and of maintaining those institutions which are the bases of our civilization; marriage, parental authority, guardianship. The difficulties earlier referred to, therefore, occur less frequently in this field.

It should be remembered that our Commission has not worked in a logical order. Circumstances have induced it to occupy itself first with certain special questions: guardianship, adoption, absence, and birth certificates for certain categories of persons. Because the formation of the Commission has not stopped the legislative activity of France, Government and Parliament have put on their agenda certain

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10. This division, made for reasons of convenience, is not the result of a theoretically preconceived plan.
specific reforms. The Commission is kept informed, and often its opinion is requested.

There is at the Department of Justice another commission, entrusted with legislative unification of the departments of Alsace and Lorraine, recovered from Germany with the rest of France. In these departments, French civil law had been reintroduced after the war of 1918 by a law of June 1, 1924. But certain institutions of local law were kept in force. After the liberation of 1944-5, the question arose whether these differences should be eliminated. This can be done only by the promulgation for the whole of France of a new modified system of law which takes into account what is good and adaptable in the special texts of the local law. Thus the Commission for the Reform of the Code Civil received from the Commission for Legislative Unification a project of reform relative to guardianship, and it has studied this question first.

Family Law: We finally proposed to maintain in our Code, and extend to the recovered departments, the French system wherein the protection of the minor rests with the family, and not with a specialized judge. However, the texts which we have adopted greatly simplify the long and expensive formalities provided for in the Code Napoleon. On the other hand, these texts give greater efficacy to the protection of the minor by strengthening the control of the justice of the peace and of the subrogate guardian.

At the request of the Government, our Commission then studied a reform of the texts on adoption. The great number of war orphans, the great increase of births, and the policy followed regarding the protection of children have produced a revision of the texts on adoption in the French law in very recent years. Our law on this point is now in good shape. The present texts in the Code date from 1923, 1939, and 1944. There could be no question of completely changing them, but only of touching up details in order to facilitate the adoption, especially, of children of tender years.

Then we turned our attention to projects of detail, urgent because of the problems resulting from the war. These were absence (persons who have disappeared) and birth certificates for abandoned or adopted children.

It is noteworthy that the Commission has adopted new texts relative to marriage. Only technical improvements could be considered. Thus, we have filled a gap in our Code by following court decisions in matters of breaking an engagement to be married. We

have simplified the formalities of marriage, especially in the require-
ment for publication, and we have dropped the obsolete and rarely
used provisions relative to opposition to a marriage.\(^{13}\) We have
clarified questions concerning annulments, granting absolute effect to
judgments in this matter, and have added to the rules of the Code
on the effects of a putative marriage.

On all of these points, accord was easy.

Two Questions of Family Law Which Have Led to Dispute:
Greater differences appeared on two points. The Commission for
Legislative Union with Alsace-Lorraine had given us a project regard-
ing the introduction into French civil law of the provisions of the local
law under which a child of an adulterous and incestuous marriage may
be legitimized by way of recognition or court action, but under which
only the right to alimentary allowance is given to the child. The Sub-
Commission had given a favorable opinion, with certain reservations.
But the full Commission has been of a different opinion. A large
number of its members thought that this was an attack on the dignity
of marriage and the legitimate family. In any event, study of the
question was postponed until the Commission takes up the problem
of filiation in its entirety. Already, there has been a clash between
those who are partisans of strict rules for the protection of marriage
and legitimate children, and those who would like to see more humane
legislation, legislation more sympathetic to the child.

Clashes of the same type have occurred in connection with the
study of the texts on divorce. All of the members of the Commission
agree that divorce is an evil, disastrous to the family, and that an
effort should be made to stop the increase in the number of divorces
which had been troubling us even before the war. But opinions differ
as to the means to be employed. The Sub-Commission had thought
that these law suits should go, not before the civil tribunal, but before
a specialized judge who could be the judge of the children's court,
whose jurisdiction could be extended to include family questions; it
thought also that to avoid the multiplication of collusive judgments,
where husband and wife, in complicity with their counsel, plainly
fabricate false reasons for the divorce, it would be better to re-establish
divorce by mutual consent under certain conditions.\(^{14}\) These in-
novations frightened the majority of the Commission, which has been
afraid that public opinion might see in it an encouragement to divorce.
We compromised by adopting some reforms of detail which give the
court more extended powers in the investigation of proof.

\(^{13}\) CODE CIVIL, Art. 325, 342.
\(^{14}\) See Simon, Divorce in French Law, 57 JURID. REV. 18 (1945); Amos, op. cit.
supra note 2, at 226.
Property Law: The Sub-Commission on Property had first before it a project of the Commission on Alsace-Lorraine relative to the reform of the land transaction system, in view of the establishment of a uniform system applicable to Alsace and Lorraine. In these territories, the register of land would be abolished, as well as the institution of the land book judge. The French system of the Conservation of Mortgages would be introduced, but improved with the help of certain local institutions. The Commission of the Reform of the Code Civil has considered these solutions as premature. It is doubtful whether in Alsace-Lorraine the abolition of the register of land would find a favorable reception. In the rest of France, many competent people ask for a revision of our system. A more elaborate study has been deemed necessary.

The Sub-Commission on Property has had adopted by the full Commission only certain texts on the distinctions between "property" and "possession". Three points deserve to be noted. They are mainly of a technical nature: (1) The abolition of the category of immovables by destination; (2) clarification of the concept of public domain; (3) extension of the concept of possession, to be declared applicable not only to corporeal things, but also to choses in action.

Contract Law: The Sub-Commission on Obligations has been occupied with accessory projects, such as the responsibility of the tenant in case of fire, and compulsory insurance against accidents for which one may be responsible. It has begun the revision of the texts on contracts and obligations, but it was soon hindered in its task by a difference of opinion which brought it into conflict with the Sub-Commission "General Part."

General Law: That commission had been asked to prepare texts containing a general theory of the law; promulgation and publication of laws and regulations (the project is ready, but has not yet been discussed in full commission), application of the law, role of the judge, domain of the law, conflict of laws in space and intertemporal conflict of laws. M. Niboyet has just presented to it a preliminary draft on conflict of laws in space.

But since the opening of our debates, the question has arisen whether the General Part should not contain also texts on principles governing the whole field in the Code Civil of persons, subjects of the law, rights or legal situations, modes of acquisition or extinction of these rights. Certain codes more recent than ours have a general

part thus conceived. That of the German Code is famous, and its
element has been followed by the Brazilian Code.

Since our first meeting, the members of the Sub-Commission
"General Part" have defended this point of view. In the first place,
this seems to them to be the only scientific method. Certain rules
dominate the whole, or an important part of the solutions of the Code.
At the present time these rules are dispersed or presented with regard
to certain legal situations, and they are extended by analogy to other
cases. They argue that it is more scientific and also more logical and
practical to concentrate them at the beginning, to demonstrate that
they govern the whole. Thus there are general rules on legal acts
which apply not only to matrimonial contracts, but also to acts regard-
ning the family relationship, to marriage, to adoption, as well as
to acts in contemplation of death and to wills. There are general rules
which apply to all prescriptions, acquisitive and extinctive, to all time-
limits, and to all nullities.

A second reason has been advanced. Such a general part will
be very useful for the development of public and private law as well.
Undoubtedly public law exists within the framework which is its own.
Administrative jurisdictions, especially the Conseil d'Etat, entrusted
with the control of its application, do not consider themselves bound
by the texts of the Code Civil, applicable to the relationships among
persons. And yet the rules of the civil law do not fail to have in-
fluence on the evolution of public law. This is especially the case when
these rules present themselves as formulae of general bearing. After
all, there is no ditch between public and private law. Important no-
tions are common to them. Would it not be of interest to insert in the
Code Civil a general part on the legal act, on nullities, and on prescrip-
tion? It is certain that texts of this nature, bringing clarity to notions
which have remained vague in doctrine, would have an important
action on the administrative judge, would govern both disciplines,
and would help bring them closer together. This appears the more
useful because, with present socialization and nationalization, it has
become more and more difficult to discern the frontiers between the
two domains.

Those who answer these arguments reply that a Code is not a
course in the law, nor a book of science, but a practical work which
offers solutions as concrete as possible. The example of the German

16. See Schuster, The Principles of German Civil Law 17 (1907); Smithers,
The German Civil Code, 51 Am. L. Reg. 14 (1903).
17. See Borchard, Guide to the Law and Legal Literature of Argentina,
Brazil and Chile 844 (1917).
18. See Garner, French Administrative Law, 33 Yale L. J. 597 (1924); Mestre,
Droit Administratif, 3 Camb. L. J. 355 (1929).
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Code should not be followed. And in Brazil there is some desire to eliminate the general part from its Code, since it is considered useless and even dangerous, such rules and theoretical definitions often hindering the judge because of a wide applicability unsuspected by their authors. They argue that in reality, the regulation of legal acts is very different as between family and economic matters, and between private and public law.

The Commission after some hesitation finally adopted a compromise solution, which I opposed and personally consider unsatisfactory. There will be no developed General Part in the Code. But a book or chapter will be devoted to the legal act and to its regulation. Few have been opposed to that. The great majority, even the practitioners, have been attracted by the argument of the necessity of giving to public and private law a common guide, and by the appeal made by the Counsellors of State. Yet the examination of texts which we are now undertaking shows the difficulties which exist in reaching a result in this way, i.e. in stating general rules which at the same time are clear and correct.

PROBLEMS WE FACE

These are the main accomplishments to date. Serious questions remain.

Married Women: We have already referred to one of these problems. It is the concern of both the "Family" Sub-Commission as well as the "Property" Sub-Commission which have met jointly to work on the problem. It is the problem of the matrimonial system—the status to be accorded to married women. Our Constitution proclaims equality of men and women. Since the liberation, women have obtained political equality; they mix their voting cards with those of men. But it is claimed that actual civil equality does not exist. Thus, although the law of February 18, 1938 abolished marital authority and the old incapacity of married women, the matrimonial system of the common law remains that of community property, a system where the husband, as chief of the community, has an almost absolute power of disposition over the common property and the administration of the separate property of the wife. It is also true that the law of July 13, 1907 has given women who engage in a profession the free disposition of assets resulting from the exercise of the profession. In

20. AMOS AND WALTON, op. cit. supra note 11, at 289, 290.
1942, the rights of women were further enlarged. Has the moment not come to go farther and replace the old system of community property with a system which leaves to each of the spouses the freedom to act alone during marriage with respect to property possessed or acquired, save for providing for a division of the acquisitions at the dissolution of the relationship? We have not yet taken any position. The partisans of the old community property concept adhere to this system on the basis of French tradition and the cohesion of the family. Public opinion, which was relatively indifferent, seems to have awakened and is asking for a system which takes better account of the modern emancipation of women, and for a simpler system which eliminates bureaucratic formalities from which, in the final analysis, only the business adviser profits. The question, however, is not yet settled, and we cannot say which solution will be chosen.

**Definition of Property:** How should property be defined? The new French Constitution of 1946\(^{21}\) refers to the Declaration of the Rights of Men of 1791 according to which “the right of property is inviolable and sacred”,\(^{22}\) but it also proclaims in its preamble that “all property, all enterprise, the exploitation of which has, or acquires the character of a national public service or of a monopoly in fact, shall become the property of the collectivity.” What conclusions are to be drawn from this text? Might it not be deduced that private property is abolished since by definition the right of “property” over a thing consists precisely in a monopoly of exploitation? Thus, to say the least, our Constitution\(^{22a}\) lacks clarity on this point. There remains the problem, how far shall limitations in the right of property be extended in the social interest? The question is important and an answer must be found.

In a more general way, the same problem is presented with respect to all rights. Should not the evolution of habits and ideas lead to the abandonment of the concept of “subjective rights” considered as powers of the individual to act for the satisfaction of his own interests, and more or less inherent in his capacity as a human being? Is it not necessary to consider that the alleged “rights” are nothing but “social functions” defined by objective law with respect to general interests, and necessarily limited by the social end which serves as their foundation? This idea is very widely accepted in family law; the prerogatives recognized for the husband, father, and guardians are recognized as

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22a. 12 Current History 161 (1947).
stemming from family functions which include as many duties as rights. Thus, Article 213 of the Code Civil, as modified by the law of September 22, 1942, expressly says, in speaking of the position as chief of the family recognized for the husband, that this is a "function" which he exercises in the common interest of the household and children.

Should not this concept be extended to economic law? Should not property, usufruct, creditors' rights, the rights of the partner and so on be treated and regulated as social functions? Such a concept is a dangerous one. By denying subjective law, do we not disregard the value of the person as a subject of the law? Is it not contrary to the chief function of our civilization and Constitution, namely to maintain the position, dignity and initiative of the individual? Does it not mean favoring the development of totalitarian regimes which would lead to the crushing of the individual by the state? To the members of our Commission, (at least to the majority of them) the solution appears to lie in an equilibrium, in a golden mean. I believe that we will not let ourselves be persuaded to adopt dangerous formulae. We believe that without changing the foundation, we can maintain these rights in their traditional subjective aspect, but at the same time attempt to regulate them for the social welfare. However, the difficulty is found in translating the desired equilibrium into precise language.

**Limits on Contracting:** It is the same with the limitations to be recognized to the freedom of contracting. To what extent should the interventionist experiences which took place under the influence of the theories of a directed economy lead us to a reform of the rules of the Code Civil? There is one point which particularly preoccupies us. Should certain legal relationships wherein the legislature has intervened closely still appear in the new Code as regulated by contract? Is it not contrary to legal truth to say that the relationships between owners of dwellings and tenants are regulated by the contract of lease when the rent, duration, and terms of the lease are all regulated in a peremptory way, when the owner cannot obtain the eviction of the tenants even at the expiration of the lease? Is it not possible to say as much of the relationships between land owners and farmers? Do not the recent laws on renting of farms tend to give to that legal situation a peremptory status? Is it still possible to speak of a labor contract when everything in the relations between employers and workers is governed by law, regulations, or collective contracts?

But what concepts should take the place of the idea of contract? Can a real right in the property be recognized for the tenant? Should this status take effect with the occupation of the premises? Should
it be recognized that it is the labor relationship which creates the legal relationship between employer and worker? Should not new concepts be agreed upon which translate the factual solidarity, and recognize the community, of those who participate in the same exploitation? And should not legal regulation be construed on the basis of the notion of "enterprise" instead of "contract"?

We think that these ideas may frighten the majority of our members to some extent. Perhaps the ideas are not yet ripe. Perhaps they have not sufficiently stood the test of time to become a part of the Codes. The problem will have to be left to further experience in order to make the solutions more precise if such solutions are really needed. We cannot, however, avoid discussing them.

Undoubtedly we could avoid the difficulty and rationalize that we have been asked to make a Code Civil applicable to the normal relations of citizens, without being concerned about special situations. Is not the regulation of the relationship between employer and employee the subject of a special code, the Labor Code? Cannot the task of drafting an Agricultural Code be left to others as in the case of the Commercial Code? Have not special jurisdictions been created of professional character and with equal representation for labor, and for farmers in lease matters? Traditionally in France there is a Commercial Code distinct from the Code Civil. There are specialized commercial tribunals. But it is admitted that the commercial rules are governed to a great extent by the principles of the Code Civil and derogate from them in certain points only. This is the opinion of the commission entrusted with the preparation of the reform of the Commercial Code, which strongly desires to work in conjunction with us and to limit its domain.

Certainly there may be a Labor Code and a Code of Agriculture. But there too the solutions adopted must be functions of the principles of the Code Civil. To admit the autonomy of these Codes, to admit the possibility of their independence from the Code Civil, amounts in reality to the deterioration of the Code Civil itself. If all of the special situations wherein the individual may find himself are allowed to escape from that Code, what will remain for the Code's own domain? The truth is that it was necessary to make special Codes because the principles of the Code Civil were not adapted to modern life. If modern life forces us, in the principal domains of economic activity, to adopt rules differing from those of the Code Civil, this means that

24. See Burdick, Bench and Bar of Other Lands 325 (1939).
the rules of the Code are not satisfactory any more and must be modified.

The detailed regulation of the relationship between employer and employee, owner and tenant, insurer and insured, partners, may be in special laws. But the general principles which govern this regulation must be affirmed by the Code Civil; otherwise, in our opinion, it would no longer merit its name. It would no longer be the "Code of the City"; it would be only the exception and not the rule.

We do not underestimate the difficulties of the task which our Commission still has to accomplish. But we are confident. We trust that we shall be able to bring it to a good end.