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RECENT REVISIONS OF THE FRENCH CIVIL CODE

*Bernard Audit**

A revision of the French Civil Code was begun in 1964. It was not a revision of the whole at one time, which would have resulted in an entirely new code, but rather a series of systematic revisions of its various parts. At present nearly one-third of the articles of the Code have been reenacted. Some have not been changed at all, but the majority bear significant reforms. Various reasons warrant a discussion of the enterprise at this stage. In the first place, the procedure used and its success are themselves of interest. Secondly, what has been achieved so far may be considered a complete piece of work inasmuch as the revisions already made relate chiefly to the law of persons and family, and change it almost completely. Finally, even though one would wish to be mistaken on this point, there are reasons, peculiar to the French context, to fear that the enterprise will not be carried out further with the same degree of success. On the whole, what already has been accomplished is likely to be of interest to all countries with civil codes modeled after the Code Napoleon, for all will be, or already have been, called upon to modernize their codes.

One purpose of this study will be to show that codification continues to be applicable in a modern society, which in a way differs more from the society of Napoleon's times than the latter differed from the society of Justinian. Another purpose will be to attempt to show that a modern legislated plan of order can be worked out without discarding centuries-old concepts and while devising new ones consistent with them. In other words, the object will be to illustrate the universality of civil law codification through the example of the modernization of the most ancient code yet in force. In that perspective, the procedure and technique of codification should be stressed rather than the substance of the law, for an analysis of the latter would exceed greatly the scope of a law review article. Nevertheless, the substance will be touched upon, for it is necessary to do so to illustrate the main theme and because the modifica-

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tions affect institutions which are as common to civil law jurisdictions as the written nature of their law. It is necessary to begin with a few brief indications of the background of the reform. The procedure and contents of the reform then will be described at greater length. Finally, an effort will be made to point out, in the general perspective of the civil law, the technique and spirit of the new legislation.

I. THE BACKGROUND OF THE REVISION

In the modern period of the history of the civil law, the term "civil law" does not have the meaning which it retains in the Anglo-Saxon countries. There it is used to designate a "family" of legal systems, or to characterize a given legal system derived from Roman law. In civilian jurisdictions, however, the expression merely designates a branch of the law—private law as opposed to public law.¹ Certainly, in a liberal society, this branch of the law is the fundamental one, and this accounts for the symbolic and practical importance of the code which states its rules. However, the evolution of social and economic conditions in those same societies since the enactment of their codes has caused in each of them a decline in the relative importance of civil law and hence of the civil code. This evolution has resulted in the aging of the codes and has prompted the undertaking of revisions in several jurisdictions. Thus, it is necessary to point out the precise role of the Civil Code² in French law today and

1. It would take too much space to give a complete and precise bibliography of the civil law in France today. It should be mentioned, however, that to the list of classical treatises—of which only that of Aubry & Rau is, under the direction of A. Ponsard, being re-edited and updated—one should add today several works of high quality. The most prominent among these are J. CARBONNIER, *DROIT CIVIL* (Presses Universitaires de France); G. MARTY & P. RAYNAUD, *DROIT CIVIL* (Sirey); H., L. & J. MAZEAUD, *LECONS DE DROIT CIVIL* (later editions by de Juglart, Montchrestien); A. WEILL, *DROIT CIVIL* (the latest editions of this work have been made in collaboration with F. Terré, Dalloz). The handbook of B. Starck (*Droit Civil, Libraries Techniques*) was interrupted by the death of the author. That of J. Flour, with the collaboration of J.L. Aubert, has produced only one volume about juridical acts. Each of these works is (or will be) divided according to the major classifications of civil law and of the university curricula, to wit: Introduction, Persons, Family, Property, Obligations, Security Devices, Principal Contracts, Matrimonial Regimes, Successions and Donations. Not all of these works have been completed, but the volumes that have appeared are being re-edited regularly. The *REVUE TRIMESTRIELLE DE DROIT CIVIL* publishes the most recent developments of French legislation, jurisprudence and doctrine; it also publishes reports on Belgian, Swiss and Quebec Law. The Code Civil should be consulted in the current year's Dalloz edition.

2. In accordance with a practice implicitly followed in France, the Code in its present form hereafter will be referred to as "Civil Code" and the original document as "Code Napoleon." For a general presentation of the Code, see Pound, *The French Civil Code and the Spirit of the Nineteenth Century*, 35 B.U.L. REV. 77 (1955); Tunc, *The Grand Outlines of*

to give a brief account of the previous attempts at its revision.

A. The Present Role of the Civil Code in French Private Law

Originally the Code Napoleon embodied the civil law, which was hardly distinguished from private law (as opposed to public and criminal law). In fact, civil law in itself did not incorporate all of private law, because there also existed a commercial code and a code of civil procedure. Moreover, certain matters properly pertaining to civil law, such as copyright or patent law, were not in the Code. These exceptions, however, were of limited importance and one could state rightly that the civil law contained in the Code constituted the essential part of private law. Since that time, a twofold development has restricted the role of the Civil Code in French private law:³ the developments of a body of private law distinct from the civil law, and of a body of civil law outside the Civil Code.⁴

Civil Law and Private Law

Economic and social changes have brought about the development of a body of private law outside the Civil Code. The meaning of this evolution varies according to the area of the law concerned, but its effect is always to minimize, at least from a quantitative viewpoint, the relevance of "civil law" in the traditional sense.

Since the beginning of the industrial society, *commercial law* has experienced a continuous development. In the beginning, and apart from maritime law, the Commercial Code contained only a few specific rules;⁵ commercial life was thus essentially subject to the principles of the

the Code Napoleon, 29 TUL. L. REV. 431 (1955). On its present role, see David, *The Civil Code in France Today*, 34 LA. L. REV. 907 (1974).

3. And, a fortiori, in French law in general; particularly with the development of administrative law within the field of public law. A landmark in the development of that branch of the law is the decision in the *Blanco* case, rendered by the *Tribunal des conflits*, stating that "the responsibility that may attach to the state by reason of damages caused to individuals by the state's agents in the performance of a public service cannot be governed by the principles established in the Civil Code to regulate the relations among private individuals . . ." Trib. conf., February 8, 1873, D. 1873.3.17, S. 1873.3.153. Following this decision and others on the same line, a complete and essentially jurisprudential body of law has developed through the joint action of the *Conseil d'Etat* (acting in its judicial capacity) and doctrine. In addition, the realm of administrative law has been expanded constantly through state intervention in matters previously left to private initiative, particularly by way of nationalizations. See note 32, *infra*.

4. See M. VANEL, *VERBO CODE CIVIL, REPERTOIRE DE DROIT CIVIL* (2d ed.).

5. These rules mainly related to bankruptcy and were reserved exclusively for merchants until a law of 1967 extended them to all legal persons in private law.

Code Napoleon, from which it deviated only on certain issues.⁶ Commercial life today is subject to a host of particular rules.

First, a number of *grandes lois* (auxiliary statutes) were enacted on matters not regulated by legislation at the time of the Commercial Code, or only slightly so.⁷ Secondly, a large body of administrative regulations has developed, with the result that the practice of trade today is enmeshed in a network of controls, declarations, formalities, and authorizations. The nature and spirit of this legislation are foreign to traditional civil law.⁸ Finally, in recent times, this field has been internationalized, particularly by the Treaty of Rome establishing the European Economic Community. The Treaty of Rome sets forth a number of substantive rules (particularly articles 85 *et seq.*, on fair competition within the Common Market). The Treaty also anticipates a harmonization of the member States' legislation on matters which it covers (article 100); thus, the evolution of domestic laws is influenced by "community" concerns.⁹

These developments, as a matter of fact, do not run counter to the principles of civil law. In the final analysis, there has been hardly any increase in the number of commercial law rules bearing exceptions to the principles of civil law. Nevertheless, commercial law—often designated today as business law (*droit des affaires*), particularly in law school curricula—leads a separate existence. It is within its realm that most new legal developments (often borrowed from American business practice) occur, such as those in connection with contracts of "leasing", "factoring", "engineering", "merchandising", or with business takeover offers.

The development of a body of *labor law* is of greater importance because of the inroads it makes on civil law. The Code Napoleon devoted only two articles (articles 1780 and 1781) to the employment contract, which it regarded as an ordinary contract between equals. The emergence of large industrial concerns sharply brought to light the inac-

6. The most notable were, and still are, the freedom of proof in contract matters and the inapplicability of the principle (FR. C. CIV. art. 1202) that solidarity is not to be presumed.

7. The most important are the laws on corporations (1867, 1966), commercial establishments (*fonds de commerce*) (1909), industrial and commercial property, bills of exchange and checks, and banking and stock exchange operations. Some of these laws were inserted into the Commercial Code, but most remained outside of it.

8. The purpose here is to insure the regulation of commerce or to guide the economy. Accordingly, and by way of example, a Commercial Register was set up where individual merchants and corporations must register; rules for the "moralization" of commercial professions (prohibiting certain persons from engaging in commerce) were enacted; measures for the protection of individual merchants against competition from large concerns were recently adopted at the urging of the former, who constitute a powerful political force.

9. See B. GOLDMAN, *DROIT COMMERCIAL EUROPÉEN* (3d ed. 1975).

curacy of that assumption. The result has been profuse legislation aiming, directly or indirectly, at correcting the imbalance between the bargaining powers of the parties to the employment contract.¹⁰ This labor legislation is essentially autonomous vis-a-vis the civil law.¹¹ Designed principally to correct de facto inequalities, labor law differs from civil law in that it does not purport to regulate relations among equals. Moulded under the influence of conflicting forces, it is subject to constant change. Inspired by the notion of social classes, labor law envisages collective rather than individual relationships, and organizes the transition between individual contracts and a general status.¹² All of this borders on public law.¹³ The texts concerning labor law are collected in a Labor Code that is related only distantly to the Napoleonic codes. It consists merely of a compilation of statutes, assembled for convenience.¹⁴ This difference in the presentation of the sources is but the reflection of important differences in the substance.¹⁵

10. The most important labor laws are: Law of May 25, 1864, *cited in* CODE TRAV. 307 (those granting the right to strike); Law of March 21, 1884, *cited in* CODE TRAV. 308 (the right to unionize); Law of Dec. 23, 1946, *cited in* CODE TRAV. 380 (regulating collective bargaining); Law of Feb. 11, 1950, *cited in* CODE TRAV. 119-140, 320, 380 (same); Ordinance of Feb. 22, 1945, [1945] O. No. 45-280, *cited in* CODE TRAV. 350-360 (organizing the representation of personnel in work committees (*comités d'entreprise*)); Law of July 13, 1973 (establishing a special procedure for the discharge of employees).

11. *See* 1 R. DAVID, LE DROIT FRANCAIS 125 (1960); 1 R. DAVID, LE DROIT FRANCAIS 139 (M. Kindred trans. 1972).

12. According to the law of collective bargaining, the provisions of an agreement concluded between unions representing employers and employees may be extended by the Minister of Labor to the whole of the professional branch concerned; these contract provisions then become imperative rules governing every member of the profession, unionized or not, regardless of the principle of the relative effect (privity) of contracts stated in article 1165 of the Civil Code. Since this particular procedure has been utilized frequently, and a great number of labor contracts are otherwise regulated by imperative laws, there is very little of a truly contractual nature left in the relations between employer and employee in the majority of cases.

13. This character is emphasized by the parallel development of a comprehensive social security system, financed through payments by employers and deductions from employee wages. The system is designed to cover the principal "social" risks: illness, maternity, disability, death, work-related accidents, and occupational diseases. For a discussion of the system, (which is the object of a specialized course in university curricula as a section of labor law) *see* J.J. DUPEYROUX, SÉCURITÉ SOCIALE (6th ed. 1975); R. JAMBU-MERLIN, LA SÉCURITÉ SOCIALE (1970).

14. Following the same pattern, a Social Security Code has been promulgated.

15. For a condensed commentary on labor law in France, *see* G.H. CAMERENCK & G. LYON-CAEN, DROIT DU TRAVAIL (7th ed. 1975). For a more complete exposition, *see* 1-8 TRAITÉ DE DROIT DU TRAVAIL (Daloz ed. 1966-1970).

There exist other bodies of law separate from civil law that reduce further its role in private law. An example is *rural law*, that is, the law of farming (including land ownership, relations between landowners and lessees, commercialization of agricultural products, and market regulations).¹⁶ The authors who devote their attention to these branches of law tend to stress their autonomy with regard to civil law, on occasion even overrating it. Some of the developments which they emphasize—such as the existence of special trial courts—are not novel.¹⁷ Others, such as special legislation departing, temporarily or permanently, from traditional principles (*législation d'exception*) are likewise found in the very heart of traditional civil law. Civil law remains the general law (*droit commun*) for all private law, in that it still provides the applicable rules in the absence of particular provisions. Nevertheless, the lawyer who would face everyday life knowing no more than this general law would find himself insufficiently trained for most situations and in certain instances utterly inadequate.

Civil Code and Civil Law

A second movement took place within civil law itself. It affected its sources and technique, thereby reducing the role of the Civil Code. The evolution of society after 1804 necessitated considerable legislative and judicial activity. Thousands of statutes were enacted. Not all have the same importance, but a number of them bear upon essential matters. Some of these matters had not been treated in the Civil Code, and the statutes which contain them have remained outside of it: laws on mortgage recordation (laws of 1855 and 1955), on non-profit organizations (law of 1901), on the insurance contract (law of 1930), on literary and artistic property (law of 1957), on condominiums (laws of 1938 and 1965), and on professional private partnerships (law of 1966). Other statutes dealt with matters governed by the Code, their object being either to modify or supplement it. This legislative effort was often clumsy (including, for instance, uncoordinated changes and defective wording) with the

16. The main texts concerning those matters are also gathered in a special code, the CODE RURAL. The regulation of agricultural markets is largely under the jurisdiction of the European Economic Community.

17. In matters of labor law, social security and rural leases, suits at the trial level are brought before specialized courts, to wit: labor courts (*conseils de prud'hommes*) for labor relations, social security commissions, and special courts for rural leases (*tribunaux paritaires des baux ruraux*), made up of non-professional judges representing the professional communities of the parties involved (employers, employees, lessors, etc.). Yet in France, commercial suits have been always tried in specialized courts, composed by non-professional judges who are nonetheless under the control of the *Cour de Cassation*.

result that the harmony of the Code was damaged.¹⁸

In other instances, the courts were left to deal with unforeseen situations and had to do so with the limited resources of the Code. In so doing, they supplemented and, in some instances, contradicted the Code provisions.¹⁹ The most notable example of a judicial development *outside* the Code is that of civil responsibility. Starting with five articles of the Code (articles 1382 to 1386), the courts developed a complete system of rules, perhaps more akin in its technique to the common law than to the civil law.²⁰ To exemplify a development *contrary* to the Code, one may point to the *stipulation pour autrui* (third-party beneficiary): the courts, to facilitate the development of insurance, gradually ignored the strict conditions still contained in Article 1121.

A considerable evolution outside the Civil Code has thus taken place.²¹ Although it is conventional to praise the perennial nature of the Code, in the latter part of the twentieth century it had also become common to observe that it no longer encompassed the whole of civil law,²² that the law was scattered in adjunctory and poorly drafted statutes and that sometimes it consisted of practices directly contrary to the texts. One author went as far as to suggest that one hundred and fifty years after the promulgation of the Code Napoleon, French law had become customary again.²³ Although this assertion was an exaggeration for emphasis, one could not dispute that a work of reconciling the written and positive law was indispensable in order to maintain respect for the civilian theory of the sources of law.

18. This notably resulted in exceedingly long articles. See, e.g., FR. C. CIV. art. 389 (as it appeared prior to the 1964 revision); *id.* arts. 815, 832.

19. H. CAPITANT, A. WEILL, & F. TERRÉ, LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE (7th ed. Dalloz, 1977). On the relations between the jurisprudence and the legislation in the task of adapting civil law, see Malaurie, *La Jurisprudence combattue par la loi*, in MÉLANGES SAVATIER 603 (1965).

20. H., L. & J. MAZEAUD, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE (Montchrestien 1965) (the last editions are by A. Tunc).

21. For a complete picture of the evolution of French civil law since 1804, see I. A. WEILL, DROIT CIVIL 77 (3d ed. 1973).

22. In order to have a concrete representation of this evolution, one may turn to any Dalloz edition of the Civil Code of the last twenty years. Of these volumes, which include the main civil law texts not contained in the Code, together with the more important jurisprudential citations and some doctrinal references, the actual articles of the Code represent but one third.

23. Terré, *L'entreprise française de rénovation des Codes*, REVUE JURIDIQUE ET POLITIQUE 244 (1966).

B. *The First Revision Attempts*

The developments just described did not occur abruptly. They began in the nineteenth century and simply accelerated in recent times. Likewise, the idea of a revision of the Code is not a recent one. Traceable to 1837, it was converted into action at the turn of this century, when a commission was established to prepare a new Civil Code.²⁴ The Commission, however, which was comprised of some one hundred members, not all of whom were jurists, was unable to work efficiently and soon abandoned its task. Its work did not receive much attention, which tends to show that changes which had occurred in society were not sufficiently important at the time to truly necessitate a revision.

Such was not the case two wars later. In 1945, as part of the general task of reconstruction, a decision was made to proceed with the often postponed revision.²⁵ This led to the establishment of a *Commission de réforme du Code civil* composed of twelve members: three law professors (including Dean Léon Julliot de la Morandière of the University of Paris Law School, as chairman), three judges of the Court of Cassation, three members of the Council of State (which assists the government in the preparation of laws) and three practitioners. It was hoped that a new code, intelligible, articulate and modern, would emerge and resume the function of encompassing the actuality of the law, thus equalling in majesty the Code of 1804.²⁶ Shortly thereafter a similar Commission for the revision of the Commercial Code was established, but the question whether the two codes eventually would be merged into one large code of private law was postponed.²⁷

24. The date is not fortuitous. There appeared at that time two "modern" codes, the German and the Swiss, and it was feared that their influence would supplant that of the Code Napoleon. The one hundredth anniversary of the latter afforded occasion for a solemn remoulding.

25. The topic of revision had been taken up again after World War I, but without fruition. Furthermore, in 1927 an official Franco-Italian commission completed the draft of a Franco-Italian Code of Obligations which was intended to unify the law of both countries on that subject.

26. Houin, *The Revision of the French Civil Code*, CIVIL LAW IN THE MODERN WORLD 192 (A.N. Yiannopoulos ed. 1965); Ancel, *The Revision of the French Civil Code*, 25 TUL. L. REV. 435 (1951); Houin, *Reform of the French Civil Code and the Code of Commerce*, 4 AM. J. COMP. L. 485 (1955); Julliot de la Morandière, *The Reform of the French Civil Code*, 97 U. PA. L. REV. 1 (1948).

27. Houin, *La technique française de révision des Codes*, REVUE INTERNATIONALE DE DROIT COMPARÉ 9 (1954), English translation printed in 32 TUL. L. REV. 1 (1956). This did not mean necessarily the fusion of civil law and commercial law. Special provisions for commerce might be inserted in a single code, following the example of the Swiss Code of Obligations.

The Civil Code Commission started work, and it regularly published reports.²⁸ In 1953 it presented to the *Garde des Sceaux* (Minister of Justice) a tentative draft of 747 articles comprising a Preliminary Book and Book I (Of Natural Persons and Family) along with a Report from its chairman.²⁹ Thereafter the Commission resumed its work and in 1961 submitted a draft of Book II (Of Successions and Donations); but by then, it was apparent that the project was doomed to failure.³⁰

The reasons for that failure need to be analyzed because whereas some are particular to the circumstances, others are of a general and technical nature. In the first place, the formulation of a code with as wide a scope as the Code Napoleon requires strong political support for both its ideological foundations and the effort necessary for its realization.³¹ The Code Napoleon, which came at the end of the Revolution, rested on such foundations. It embodied the principal attainments of the Revolution while eliminating its abuses. In contrast, the Commission of 1945 pursued its task in the midst of a political and economic crisis. Post-war France was undergoing a socializing thrust that shook two of the firmest foundations of civil legislation: Property and Contract.

Property law already had experienced many set-backs from special legislation for the benefit of lessees of all kinds (urban, rural and commercial) that was consolidated after the war. Moreover, numerous nationalizations took place at this time,³² and the new Constitution of 1946

28. 1-9 *Travaux de la commission de réforme du Code Civil* (Sirey ed. 1945-1946 to 1954-1955). See Pascal, *A Report on the French Civil Code Revision Project*, 11 LA. L. REV. 261 (1951).

29. AVANT-PROJET DE CODE CIVIL PRÉSENTÉ À MONSIEUR LE GARDE DES SCEAUX, MINISTRE DE LA JUSTICE, PAR LA COMMISSION DE RÉFORME DU CODE CIVIL (Sirey 1955). An English translation of the Chairman's 1953 Preliminary Report appears in Julliot de la Morandière, *Preliminary Report of the Civil Code Reform Commission of France*, 16 LA. L. REV. 1-56 (1955) [hereinafter cited as *1953 Report*].

30. An English translation of the Chairman's 1961 Report appears in Julliot de la Morandière, *Report to the Minister of Justice: Second Report of the Civil Code Reform Commission of France* (English translation by J. Dainow), 23 LA. L. REV. 506-17 (1963). Though the project was a failure from the standpoint of the global revision that had been undertaken, the works of the Commission were extensively used in some of the later revisions.

31. The decisive influence that Bonaparte had in this respect is well known. In contrast, the Commission worked under a political regime (the Fourth Republic) characterized by chronic governmental instability.

32. The armament industries and the railways had been nationalized before the war. The post-war nationalizations involved certain mines (coal); several motor and aeronautical industries (and even automobiles, as in the case of Renault, as a penalty against the founder of the firm); certain transportation companies (Air France); the four largest banks; the main insurance companies; companies engaged in the production and distribution of

declared in its Preamble that "all property and all enterprise whose activity has attained or attains the character of a national public service or a *de facto* monopoly shall be vested in public ownership." This provision indisputably required a re-evaluation of the fundamental article 544 of the Civil Code proclaiming the sanctity of individual property; the exact extent of the re-evaluation, however, was difficult to determine.

In the field of contracts, the wars and the ensuing turmoil produced a proliferation of imperative laws, fixing the terms of numerous contracts or compelling the making of certain contracts or both. The result was that the principle of freedom of contract also was shaken in many ways.³³ There too, it was venturesome to ascertain the significance of the ongoing developments, for if some observers considered this a circumstantial trend, likely to vanish, others viewed it as the first stage of a more profound socialization. Be that as it may, it was extremely difficult to lay down the law while there was such disagreement on these fundamental subjects. Faced with that situation, the Commission turned to the Government, not for instructions, but in order to obtain at least some guidance as to the spirit of the revisions. The more or less pressing calls from the chairman remained unheeded, however, and this fact later enabled him to write that the independence of the Commission had been thoroughly respected.³⁴ It was thus not surprising that the Commission found itself paralyzed soon after it left the politically less sensitive domains of the law of Persons and Family.

More technical considerations, affecting every project of drafting or updating a code, also contributed to the Commission's failure. One is that the task of revision had been entrusted to a *commission*. Even though this one had fewer members than the one organized at the beginning of the century, it still spent a great deal of time in discussions, undoubtedly useful, but at times very heated and ending in deadlocks. This was all the more likely to happen among members chosen for their eminence in their respective fields of activity. Another reason was that the revision project was directed at the *whole* Code, rather than at specific sections of it. Although special subcommittees were established to work on different subjects, the drafts which they prepared were debated in the Commission's general meetings.³⁵ This explains the fact that during

electricity; and others. Even though these enterprises operate like private entities, and generally conform to the rules of private law in their relations with third persons, they are subject to particular rules of operation defined by the nationalization act.

33. See note 12, *supra*. Significantly, the Civil Code Commission Revision excluded the labor contract from its consideration.

34. Julliot de la Morandière, *supra* note 26; 1953 Report, *supra* note 29, at 19.

35. 1953 Report, *supra* note 29, at 15. This process took all the more time because the

the first eight years of its existence, the Commission had produced only one fifth of the proposed Code, and this had yet to be adopted.³⁶ Projecting this experience into the future, one rightly might fear that by the time the program had been completed, the early revisions would themselves have to be revised. These several findings inspired a new approach to the task.

II. THE REALIZATION OF REVISIONS

A. *The New Approach and Its Results*

The government official whose duty it is to supervise the revision of the Civil Code is the *Garde des Sceaux*, the Minister of Justice. In 1964 a law professor, Mr. Jean Foyer, was appointed to that position. In order that the revision task might be completed, he resolved to adopt a new procedure. First he decided, with the consent of the Chairman of the Revision Commission, to attempt to entrust the work to a single redactor.³⁷ Secondly, he abandoned the plan of total revision for one of revision by segments, according to the necessities and the possibilities of lasting reforms. These would be submitted to the legislature as they were completed. The chosen redactor was Dean Carbonnier, an eminent authority in civil law.³⁸ As an experiment, Dean Carbonnier was asked in 1964 to draft a new Title X of Book I on Minority, Tutorship, and Emancipation.³⁹ Very promptly, he presented a projet which was drafted in accordance with the technique of the original code (that is, in short articles with few paragraphs). It also incorporated substantial changes so as to adapt the subject-matter to modern family and economic conditions.

Commission members were not relieved of their regular duties, unlike the redactors of the Code Napoleon.

36. The preliminary draft normally should have been sent to the courts and to the law schools for critical comment before being submitted to the legislature for debate and voting. This undoubtedly would have necessitated a special procedure in view of the extensiveness of the work.

37. Comparative studies reveal many examples of codes, in force or abandoned at the draft stage, whose redaction was entrusted to a single person; most frequently cited are the examples of Chile, Switzerland (Huber), Lebanon (Josserand), Egypt, and Ethiopia.

38. The Carbonnier textbook cited in note 1, *supra*, is characterized by a profound originality in thought and presentation. Each main development is followed by a section entitled "state of the questions" (*état des questions*) which probes more deeply into some aspects: history, sociology, legislative policy, juridical theory, judicial practice.

39. The treatment of these matters in the Code was grossly out of date. Before the reform one could say that on the death of the minor's parent who left some property the alternative was either to administer his patrimony well, while disregarding the law, or to allow it to perish by paying respect to the Code.

Before the end of the year the draft was submitted to the legislature, which adopted it with a few minor modifications.

The success of this attempt inspired the undertaking of a series of revisions following the same general procedure.⁴⁰ The Minister of Justice would organize a committee of experts including practitioners, public officials and law professors. The committee, taking into account the work of the Civil Code Revision Commission and various other legislative drafts, would distill the general outline of a revision. The drafting of the projet would be entrusted to Dean Carbonnier. The draft would be submitted by the government to the Council of State, and then to the legislative bodies. There it would be debated and voted upon following ordinary legislative procedure.⁴¹ In the course of these several stages, various amendments would be proposed and some adopted; whenever possible, however, the single redactor would be entrusted with the task of putting them in proper form. This produced a unity of thought and style indispensable to the quality of the work.

Between 1964 and 1975, seven fundamental revisions were effectuated following this general procedure. They concerned Minority, Tutorship and Emancipation (1964), Matrimonial Regimes (1965), Adoption (1966),⁴² Major Interdicts (1968), Parental Authority (1970), Filiation (1972), Separation and Divorce (1975). Each revision pertained essentially to one part of the Civil Code, but according to the established program, each was accompanied by various other modifications in the Code for the sake of consistency. For example, the revision of matrimonial regimes led to the revision of the legal mortgage between spouses; the revision of filiation had as its corollary a number of modifications in the chapter on successions. Some matters, such as marriage and alimentary obligations, which have not been the object of a systematic revision, were updated considerably in a piecemeal fashion in connection with one reform or another.⁴³ Some other revisions came about in the course

40. Terre, *La rénovation du Code civil français*, in *TJDSCHRIFT VOOR PRIVATRECHT* 563, 564 (1966).

41. Mr. Foyer left the Ministry of Justice in 1967; but, as a member of Parliament, he was later selected and remains Chairman of the Law Commission of the National Assembly and played a decisive role in presenting, defending, and voting on the revisions.

42. The draft law on adoption was prepared by Mme. Simone Veil, a magistrate.

43. The Dalloz edition of the Civil Code contains a chronological table of laws which indicates, for each law, the texts of the Code that it has modified.

In form, a statute revising a section of the Civil Code is presented as a whole composed of about twenty articles. Article I provides that: "The Chapters — of Title — of Book — of the Civil Code are modified as follows: Article —, etc." The revision statute then devotes articles, based on the same model, to modification of texts outside of the main "block": provisions of the Civil Code itself, laws outside of the code, laws from other codes

of the same projet, but on more technical matters. An example is the law of July 3, 1971, on liquidation of successions.⁴⁴ Other modifications have occurred independently of the revision program, having become necessary due to outside events, such as the law of July 5, 1974, lowering the age of majority from 21 to 18.⁴⁵ Altogether, over 550 articles out of 2281 (now 2283) have been re-enacted within the framework of the recent reforms.⁴⁶

The statutes mentioned above do not constitute the totality of the legislation on the matters with which they deal. Each was supplemented in accordance with constitutional rules by one or more *décrets*

(particularly the Penal Code). The latter articles of the revision law are devoted to the effective dates of the new provisions and to conflicts between the former and the new legislation. Generally, the revision does not come into effect until six months after its promulgation, in order to give the government time to adopt the necessary executive orders on application (see note 47, *infra*) and give the practitioners time to become acquainted with the new law.

Given the unity of the object of the revisions—the law of persons and the family—it sometimes proved necessary to adjust recently adopted texts: for example, the revision of parental authority led to some slight adjustments in the law concerning minors; the new law of divorce required some adjustments in parental authority; and so forth. Where such modifications took place, the date of the law that established the present form of the article is shown in the Dalloz edition of the Civil Code.

44. The main objective of this law was to remedy the inequitable effects of monetary depreciation in the liquidation of successions by modifying the rules for evaluating assets in view of the collation (*rapport*) or the reduction of donations. The essential idea is to synchronize the evaluations in time, by transferring them from the date of donation to the date of death, or even to the date of the partition, so that variations of the patrimony which took place at different times are expressed effectively in the same monetary system. On this reform, not discussed further in this article, see P. CATALA, *LA RÉFORME DES LIQUIDATIONS SUCCESSORALES* (2d ed. 1975).

45. J. Massip, *L'abaissement de l'âge de la majorité et ses conséquences*, I. *Repertoire du notariat Defrenois* 1057 (1975); Couchez, *La Fixation à dix-huit ans de l'âge de la majorité*, 1975 *SEM. JUR. I.* 2684.

46. During this period, the regular legislative work went on, occasionally giving rise to modifications or additions to the Civil Code; for example, a law of January 3, 1967, on sales of condominiums to be constructed and the obligation of warranty for hidden construction defects (Fr. C. Civ. arts. 1601-1 to 1601-4). This is an independent legislative work that is outside the scope of the present study.

Yet it should be mentioned that the updating operation has been extended to documents other than the Civil Code. The important Law of July 24, 1966, on corporations (see note 7, *supra*) constitutes a true corporation code. The first two books of a new Code of Civil Procedure (which will comprise five books) were promulgated by a decree of December 5, 1975. The revision of the Civil Code has entailed a reform of the Nationality Code (Law of January 9, 1973, [1973] L. No. 73-42, which provides notably that marriage per se has no influence on nationality).

d'application (executive decrees on application).⁴⁷ This created a proliferation in the sources of civil law that hardly existed at the time of the Code Napoleon and that impairs ready access to the law. However, this was rendered indispensable by the increased complexity of the problems and by the growing intervention of public authority in private law matters.

B. Retention of the Code Structure

Once the decision was made to abandon the plan for promulgating a complete new Code and to proceed with fragmentary revisions of the old one, it became possible to preserve the structure of the old Code. Actually, there was little interest in preserving the classification of subject matters (which was not the Code Napoleon's best attribute); but the possibility of retaining the same numbers for articles on the same subject offered certain advantages. Acquired habits would not have to be disturbed, and the mere use of certain numbers would continue to evoke the same basic provisions (for instance, articles 544, 1134, 1382, and 2279). Thus, the redactor of the new texts took care to see that basic provisions remain in the same places with the same numbers⁴⁸ and that whenever possible the revised articles have the same object as the corresponding

47. Decrees are executive orders issued by the President or by the Prime Minister, and countersigned by the Ministers involved. Some indications of a constitutional order on the relationship of legislation and decrees are necessary here. See Drago, *General Comparative View of the French Constitution*, 21 OHIO ST. L.J. 535-58 (1960). In the constitutional tradition prior to the Fifth Republic (1958), there were matters with which only the legislature could deal, and none was beyond its jurisdiction; executive rulings thus were subordinated to legislation in that they operated only to implement legislation or on matters which the legislature had not considered it useful to act. The Constitution of 1958 took note of the fact that in modern political conditions the legislature cannot deal with everything and that executive power ought to be strengthened. The Constitution therefore spelled out in article 34 the subjects that are imperatively within the domain of legislation, and stated in article 37 that "matters other than those within the domain of legislation have an executive character"—with the result that the regulatory jurisdiction has become the rule and the legislative one the exception (even though it naturally covers the most important matters). Most of the civil law subjects are within the legislative domain under article 34; but civil procedure, for example, is not (hence the introduction by decree of a new Code of Civil Procedure; see note 46, *supra*). The decrees which complement the civil law revisions are thus, on the one hand, implementing decrees, as in the past (occasionally expressly contemplated in the texts: *e.g.*, FR. C. CIV. arts. 433, 456(4), 468), and on the other hand, "autonomous" decrees, whose object is not within the legislative domain (*e.g.*, Decree No. 75-1125 of December 5, 1975, revising the procedure in divorce and separation from bed and board). The most important decrees are reproduced in the Dalloz edition of the Civil Code, following the texts to which they relate.

48. As an example, article 312 still enunciates the presumption of the paternity of the husband of the mother.

old articles.⁴⁹ Whatever the talent of the redactor—and that talent was immense—this plan could not avoid producing gaps in numbering in some places and subdivision of articles in others. The former were due to simplifications of the law on some subjects.⁵⁰ The latter were more numerous and attributable to several causes: the breaking down of some articles which had become too long as a result of periodical additions; the incorporation of laws which had remained outside the Code; the insertion of solutions established by *jurisprudence constante*;⁵¹ and the regulation of new matters.⁵² The problem of the gaps was solved by leaving some article numbers without text.⁵³ The difficulty presented by the new provisions was resolved by assigning intermediate numbers (as had been done in some previous amendments): for example, articles 220, 220-1, 220-2, 221. This method obviously is detrimental to elegance and to facility in presentation;⁵⁴ it engenders risks of confusion⁵⁵ and it may induce one to believe in a hierarchy of texts which does not exist.⁵⁶ The

49. This may be verified especially in matrimonial regimes and filiation, despite the important substantive revision in those subjects. To give a single example, article 1428 deals, as in the past, with the administration of the separate assets of the spouses under the community regime; but whereas the old text consecrated the husband's power over the wife's property, the new one enunciates the principle of free administration of separate assets by each spouse.

50. This is particularly noticeable in matrimonial regimes law.

51. This consolidation was made not only with the object of respecting the principle that the law is found in legislation; it also was meant to prevent a resort to useless litigation that might again put in issue the ruling of a *jurisprudence constante*.

52. The two latest revisions, filiation and divorce, have included provisions relating to the conflict of laws. FR. C. CIV. arts. 310, 311-14 to 311-18. This was done following the failure of several projects to codify this subject, one that is essentially jurisprudential. But far from consolidating a body of jurisprudence which was on the whole satisfactory, the legislature somewhat hurriedly introduced new dispositions that have met with sharp doctrinal criticism. See H. BATIFFOL ET P. LAGARDE, *DROIT INTERNATIONAL PRIVÉ* ¶¶ 442, 458 (6th ed. 1976).

53. E.g., FR. C. CIV. arts. 483-486, 1452-1466, 1492-1496, 1528-1535, 1543-1568. However, the legislature occasionally has utilized an "available" article of the Civil Code as a place to insert new provisions: for example, articles 1450 and 1451, left vacant after the 1965 revision, were given new provisions in the 1975 divorce revision. Unfortunately, sometimes the legislature has also utilized an available article to insert provisions which had no relation to the former text, or even to the chapter where it is located. For example, in 1970, article 9 was used for a provision relating to the protection of privacy, and in 1972, article 10 was used to enunciate the obligation of cooperating in judicial proceedings for the determination of truth.

54. The greatest number of enumerated subdivisions occurs in article 311, which is separated from article 312 by articles 311-1 to 311-18.

55. It is easy to confuse phonetically articles 220-1 and 221 or, while reading, articles 371-2 and 372-1.

56. One could think that article 220-1 is a sub-rule to the one contained in article 220,

acceptance of the plan in practice, however, tends to demonstrate that these defects are minor.

C. *Outline of the Main Revisions*

The task presented to the legislator was essentially that of adapting family law to the evolution of society, of customs, and even of the economy, for personal relations entail pecuniary relations. The main currents of these evolutions are well known. The most pronounced is the narrowing of the concept of the family, which has evolved from a patriarchal structure to a conjugal or nuclear structure. A second change is the promotion of the married woman, who had been relegated by the original code to a subordinate position in relation to her husband. The principle of civil equality also called for an end to the inferior status which the law had imposed on illegitimate children, particularly adulterine ones. Another factor affecting the organization of the family in modern society is the development of the role of the state in this matter of traditionally private concern. The state has undertaken gradually to assist the family in various functions (such as education and welfare) and even to replace it when it does not or cannot fulfill its duties to children. On this point it must be noted that whereas the new legislation has increased the role of the state, it has firmly, though implicitly, maintained the protection of the family in the realm of private law; public authority has been called upon to intervene rather as an arbitrator, through judges.

In patrimonial matters, all the impact of the industrial society on family law had to be taken into account. This includes the fact that today the majority of married women are gainfully employed, that the composition of patrimonies has changed,⁵⁷ that transactions have become more rapid and therefore no longer suited to cumbersome formalities, and that sometimes brutal economic fluctuations call for greater flexibility in patrimonial structures. A study focusing on the substance of the reforms

which it is not. In fact, certain wholly "autonomous" and even fundamental provisions are found under "indexed" numbers. An illustration is article 489-2 which, reversing prior jurisprudence, announces the principle of the civil responsibility of the mentally ill. See text at notes 142-43, *infra*.

57. It long has been trite to state that the Code Napoleon, which was promulgated shortly before the industrial revolution, did not have much concern for movable assets—which were to achieve great importance with the development of business corporations (*sociétés par actions*)—whereas immovables were overly protected. In late years, there has appeared a new factor: the desire of the typical family to own a home, and then a country home (*résidence secondaire*) as well. Both are acquired through the aid of loans and are paid for throughout a large part of a person's life. They constitute today the most important element of the acquired patrimony of the average family.

would attempt to demonstrate, in synthetic fashion, how these several factors were taken into consideration.⁵⁸ The object to this study, however, is limited to an analysis of the codification technique used and accordingly the reforms will be presented here only as a necessary background. It will suffice, therefore, to survey them briefly in chronological order.⁵⁹

*Tutorship and Emancipation*⁶⁰

A main feature of the revision is a new distribution of legal administration and tutorship in the strict sense. A tutorship does not begin unless the child has lost both parents. The law systematically entrusts the interests of the child to the surviving parent; his legal administration simply becomes "under judicial control", but without an undertutor or a family council.⁶¹ Regarding tutorship itself, the family council's composition has been modernized. The imperative requirement of absolute equality between the paternal and maternal lines has been abolished (articles 408 and 423) and consideration has been given to the habitual relationships of the child as well as to his emotional attachments (articles 408 and 409).

The management of the minor's property has been made more dynamic in that there is no longer a systematic attempt to preserve his property in kind until his majority. The rules of management are rendered more flexible in that they no longer enumerate the formalities for specific kinds of acts involving particular kinds of things, but simply dis-

58. See *Réformes du droit de la famille*, ARCHIVES DE PHILOSOPHIE DU DROIT (Sirey, 1975).

59. Each revision has given rise to a number of commentaries in the form of monographs and articles. It is not within the scope of the present article to give a complete bibliography of these works. Only the principal studies will be indicated, at the risk of omissions or arbitrariness. A complete listing can be found in the recent editions of the general works cited in note 1, *supra*. For what may have been published after the date of the edition consulted, one may refer to the REVUE TRIMESTRIELLE DE DROIT CIVIL, each issue of which contains a systematic survey of doctrine.

60. Law of December 14, 1974, [1974] L. No. 64-1230 (revising Civil Code provisions concerning tutorship and emancipation). This law principally modifies chapters two and three of title X of Book I, covering articles 389 to 487. The most extended commentary is that of P. BLONDY & G. MORIN, *LA RÉFORME DE L'ADMINISTRATION LÉGALE, DE LA TUTELLE ET DE L'EMANCIPATION* (2d ed. 1967).

61. In fixing the respective domains of legal administration and tutorship, the legislature provided that the rules applicable to the illegitimate child are modeled after those provided for the legitimate child, but keeping in mind that the former needs greater protection (even though frequently he has no assets to be protected); therefore, the legal administration of the illegitimate child's patrimony always is under judicial control, in order to compensate for the absence of a family structure.

tinguish systematically between conservatory acts, administrative acts and acts of disposition.⁶² Finally, while maintaining a definite family character in tutorship, the law establishes a judge for tutorships (a trial judge who is a professional justice of the peace) charged with the supervision of all tutorships and legal administrations in his jurisdiction. By the same law, emancipation has become tantamount to a declaration of anticipated majority. Emancipation is now possible after the age of sixteen.

*Matrimonial Regimes*⁶³

The revision of the law on matrimonial regimes is quantitatively the most important, involving over two hundred articles of the Code, and perhaps also qualitatively, given its role in the legal emancipation of the married woman. A fundamental feature of the new law is the dichotomy in the rules governing the patrimonial interests of the spouses, which is made manifest by the very location of the provisions in the Code. Articles 214 and following, which appear under the title "Of Marriage", contain a number of imperative rules, that is, rules applicable to all spouses whatever their particular matrimonial regime. They have been labelled by doctrine as the "primary" matrimonial regime. Though generally expressed in a neutral fashion ("Each spouse . . ."), these rules contain the principal measures designed to insure the independence of the wife. For one thing, the law grants "each spouse" power vis-à-vis third persons with reference to funds, securities and movables, so that the wife no longer has to prove her matrimonial regime before entering into routine transactions (articles 221 and 222). In addition, the law confirms the complete professional independence of the wife, by abolishing the former right of the husband to oppose her engaging in a professional activity and by reaffirming that she has the same rights over her earnings that the husband has over his own (articles 223 and 224). Finally, as much in the interest of third persons as that of the spouses, the spouses are obligated solidarily for the debts of either incurred for household necessities

62. See note 139, *infra*.

63. Law of July 13, 1965, [1965] L. No. 65-570 (revising matrimonial regimes). This law principally modifies articles 214 to 226 of the Civil Code, and title V of Book III covering articles 1387 to 1581. See Ponsard, *La réforme des régimes matrimoniaux*, D. 1966, Chron. 111; see also J. PATARIN, G. MORIN & M. MORIN, 1-2 LA RÉFORME DES RÉGIMES MATRIMONIAUX (1966 & 1967); G. CORNU, LES RÉGIMES MATRIMONIAUX (1974). For discussions in English, see Colomer, *The Modern French Law*, in *COMPARATIVE LAW OF MATRIMONIAL PROPERTY* 80 (A. Kiralfy ed. 1972); Soubbotitch, *Recent Important Reforms in the French Matrimonial Regime*, 12 N.Y.L.F. 244 (1966); Brown, *The Reform of the French Matrimonial Property Law*, 14 AM. J. COMP. L. 308 (1965).

or the upbringing of the children (article 220).⁶⁴

With regard to matrimonial regimes properly so called, the most noticeable revision is the adoption of a community of gains (*communauté d'acquêts*) as the new legal regime, that is to say, the one detailed by suppletive law and presumed to have been contracted tacitly by the spouses in the absence of a particular agreement between them. This change should not be considered alone, however, since a matrimonial regime is not characterized solely by the distribution of the ownership of assets between the spouses, but also by the distribution of power over these assets. In the former legal regime (the community of movables and gains), the husband was the administrator of his and his wife's separate assets because he administered the community and the community received the income from all separate property. The wife's administrative powers were thus limited to the naked ownership of her separate property. In order to effectuate the principle of the wife's independence, article 1428 of the Civil Code now provides that "each spouse has the administration and enjoyment of his separate assets, and may dispose of them freely." Consequently, today, the notion of gain (*acquêt*) is restricted, and therefore the common mass which henceforth consists solely of the savings (*économies*) from the revenues of the spouses.⁶⁵ Concerning administration of this property, the logic of the revision called for a shared management. The legislature retreated before the practical difficulties that would have resulted from such a rule, however, particularly in transactions involving securities. Thus, the principle that the husband alone administers the community assets (subject to accountability) was retained (article 1421), but qualified with a provision for the intervention of the wife in most important acts (article 1424). The practical effect is that the inequality between spouses is greatly reduced, although not eliminated entirely.⁶⁶

The new legislation abandoned certain no longer used conven-

64. FR. C. CIV. art. 220. See note 147, *infra*.

65. This had led to a statement that, despite its name, the new legal regime is more a regime of separation of property than one of community. 4 H., L. & J. MAZEAUD, *LECONS DE DROIT CIVIL* ¶ 93-3 (3d ed. 1969).

66. The practical effect of the provisions is that the only alienations of community assets that the husband may make alone are those of securities and ordinary movable effects. To estimate the precise significance of this, one must note that in France the average person is much less likely to own securities than is his counterpart in the United States, and that securities are owned mainly by those strata of society that practice the regime of separate property.

tional regimes that had been provided for in the Code Napoleon⁶⁷ and offered new alternatives to the spouses. They may remain within the framework of a community while modifying its composition, their respective powers over the different categories of assets, or the forms of liquidation.⁶⁸ The law also offers them the possibility of choosing a separation of property, a regime that some would have liked to have as the legal regime. It also offers an entirely new regime which, for that reason, deserves more attention: the "sharing of gains" or "participation in acquisitions" (*participation aux acquêts*).

This new regime aims at combining the advantages of the community and the separation of property regimes, while eliminating their respective inconveniences. The separation of property may be regarded as more satisfactory during the existence of the regime because it respects the independence of the spouses, while the community seems preferable after the regime's dissolution because it allows a partition of the assets accumulated during common life. The regime of sharing the gains thus combines a separation of property during the marriage and a community at the time of dissolution. This is achieved through accounting operations based on a simple principle: at the time of the marriage the original patrimonies of the spouses are evaluated; at dissolution an evaluation is made of their final patrimonies, and each spouse has a right to one half of the *value* of any increase in the patrimony of the other.⁶⁹ In fact, the compromise effectuated by the new legal regime is hardly different from that of *participation aux acquêts*, considering the extensive independence afforded to the spouses in the former.⁷⁰ On the whole, it may be surmised that the conflicting purposes of achieving the independence of the wife while maintaining some degree of conjugal association have

67. This refers to the total regime and the regime without community. See note 108, *infra*.

68. The provisions concerning management are the most interesting. They allow the legal regime to be made more communal in nature, by stipulating in a "common hand" (*main commune*) clause that the community shall be administered by the two spouses; or conversely, to be more separate in nature, when the two spouses, through "a mutual representation" clause, give to each other the power of administering the community assets alone. FR. C. CIV. arts. 1503, 1504.

69. The essential features of the new regime are contained in article 1569 of the Civil Code.

70. The main difference is that in the participation in acquisitions a spouse is not entitled in any part of the specific assets acquired by the other. The new *communauté* still recognizes the right of each spouse to share in the community assets acquired by the other. In this respect, the latter is closer to that recommended for Louisiana by Professor Robert A. Pascal. Pascal, *Updating Louisiana's Community of Gains*, 49 TUL. L. REV. 555 (1975).

been reconciled with great skill in both the new legal regime and in the participation in acquisitions.

*Adoption*⁷¹

The revision has been less innovative in this area than in the others. Since 1804, adoption had been transformed profoundly by a series of laws, so that by 1966 it retained only a distant relationship with the institution contemplated by the Code Napoleon. There, the principal objective of adoption was the transmission of a name and a patrimony; it took the form of a contract between the adoptive parent and the adoptive child who, for that reason, had to be a major. It was only a century later, in the years following World War I, that adoption became what it now is: an institution of social charity enabling a minor to become a member of a family. The successive laws enacted after that time all sought to facilitate adoption and to bring the status of the adopted child closer to that of the legitimate child by creating forms of adoption with more extensive effects than those of "simple" adoption in which the links with the original family are not dissolved. The 1966 law represents the culmination of that evolution, because it embraces the type of adoption that places the adopted child in the situation of one legitimate by blood, designated as "plenary" adoption (*adoption plénière*) as the general rule, while the one that produces the least extended effects (*adoption simple*) has become only an alternative mode. In the Code, plenary adoption (articles 348 to 359) precedes simple adoption (articles 360 to 370-2) and the latter is regulated by reference to the former.⁷²

Plenary adoption is subject to strict conditions because of its far-reaching effects. These conditions are designed to prevent a conflict between the adoptive family and the blood parents who might desire to recover the child after having given it up.⁷³ This has led to stringent provisions defining what children may be adopted (articles 347 *et seq.*), and to precise regulation of the adoption proceedings (articles 351 *et seq.*). The shortcoming of these precautions was that all the requests for

71. Law of July 11, 1966, [1966] L. No. 66.500 (revising the law of adoption). This law modifies mainly title VIII of Book I covering articles 343 to 370-2. See Raynaud, *La réforme de l'adoption*, in D. 1967, Chron. 77.

72. Article 361 incorporates, by reference to plenary adoption, whatever is not provided for specifically in the rules for simple adoption. The primary rôle thus conferred on plenary adoption is confirmed by its prevalence in practice: in 1974 there were in France 1,739 simple adoptions, and 3,055 plenary adoptions.

73. Several such conflicts have attracted public attention. They are all the more apt to arise since, outside war periods, the majority of children who are candidates for adoption are not orphans but children whose mothers abandoned them at the time of their birth.

adoption could not be satisfied.⁷⁴ In order to overcome this problem, the requirements for adoption have been relaxed somewhat by a law of December, 1976.⁷⁵ Unfortunately, any step taken to increase the number of adoptable children is bound to increase the risk of painful conflicts between the adoptive families and the biological parents.

*Major Interdicts*⁷⁶

The law of January 3, 1968 constituted the second facet of the revision of incapacities and it paralleled the law of 1964 on Minority and Tutorship.⁷⁷ Persons whose intellectual faculties are reduced as a result of physical condition (article 490) are now included among those to be protected. Thus, a person impaired by age or traumatized by a physical accident now can enjoy the protection of the law.⁷⁸

The protection of interdicts should extend primarily to their persons (by way of formalities in order to prevent unnecessary commitment) and then to their patrimonies. However, the new law deals almost solely with the second of these aspects. Protection of the person itself had been left unregulated by the Code Napoleon. It was the object of several laws enacted after 1838, which remained outside of the Code.⁷⁹ In 1968, the matter apparently was considered to be too dependent on imprecise medical considerations to be integrated into the Code. This disassociation of medical and legal considerations also is apparent in the patrimonial protection of the person: whereas the Code Napoleon provided for

74. The number of petitioners for adoption is two or three times greater than the number who actually succeed in adopting a child.

75. Law of Dec. 22, 1976, [1976] L. No. 76-1181 in D. 1977. L. 12, expanded the definition of the "abandoned child" (FR. C. CIV. art. 350) in order to reach more cases; it repealed the provision making adoption by spouses with blood children impossible; and it eliminated or relaxed the age requirements for petitioners for adoption. The 1966 revision had been innovative in allowing unmarried persons to be adoptive parents (*id.* art. 343(1)), thus creating the possibility of a legitimate filiation by relation to just one person. The same was also made possible later through "legitimation by court order." See text at notes 86-88, *infra*.

76. Law of January 3, 1968, [1968] L. No. 68-5 (revising the law on interdicted majors). This law modifies notably title XI of Book I covering articles 488 to 514. See J. MASSIP, LA RÉFORME DU DROIT DES INCAPABLES MAJEURS (1969).

77. On the mechanics of their coordination, see text at notes 148-49, *infra*.

78. The law also applies to those who "by their prodigality, intemperance or idleness expose themselves to falling into a state of destitution, or jeopardize the execution of their family obligations . . ." FR. C. CIV. art. 488(3); this constitutes an updated and expanded version of the former provision concerning spendthrifts.

79. They are collected in the Code of Public Health. For a discussion of these provisions, sometimes thought insufficiently protective, see 2 J. CARBONNIER, DROIT CIVIL ¶ 474 (8th ed. 1969).

two regimes of protection—interdiction and assistance—based on mental abnormalities,⁸⁰ the new law limits itself to offering more of less extensive regimes of protection. The definition of incapacity thus will depend on the regime of protection chosen and not the reverse.⁸¹

Prior to dealing with the specific regimes of protection, the law addresses the situation of a person who is by nature incapacitated, but who has not been the object of any judicial protection. Given the absence of particular provisions in the Code Napoleon, jurisprudence on the one hand had turned to the theory of vices of consent, especially article 1108 of the Civil Code, to annul the person's juridical acts (upon proof of the absence of lucidity at the time of the act) and on the other hand had chosen to exempt him from civil responsibility. The new law expressly confirms this jurisprudence on the first point (new article 489) and overrules it on the second (article 489-2).⁸²

There are three available regimes of protection: the placement of the person under judicial protection (*sauvegarde de justice*), tutorship and curatorship. The first is an innovation and is distinguished from the two others in that it does not establish a representative for the incapable, or even declare him incapacitated. Provided a medical certification stating the need for a person's protection has been delivered to the *Procureur de la République* (district attorney), his acts are subject to resolution for lesion or reduction for excessive or useless expenditures (article 491-2). The law thus creates a reduced capacity with a retroactive protection. This does not, however, present a serious danger for the security of transactions because lesion and excess are here appraised subjectively, in order to reach only the person who has knowingly profited from the weakness of the mentally handicapped person.⁸³

The other two regimes drew upon the former regimes of supervision by a judicially appointed advisor and of interdiction, although there are many nuances. These become effective by a judicial decision based

80. These were defined in a particularly rudimentary fashion as lunacy and feeble-mindedness. On the "humanization" of language in the new legislation, see text at notes 128-42, *infra*.

81. On this point the new law follows the teachings of modern psychiatry, according to which there is no relation between the acuteness of the disease and the actual incapacity to look after one's interests. This is emphasized by article 490-1, which states that the methods of medical treatment are independent of the regime of protection to be applied in civil affairs, and vice versa.

82. See text at notes 142-43, *infra*.

83. Article 491-2(3) instructs the court "to take into consideration the wealth of the person protected, the good or bad faith of the persons who have contracted with him, [and] the usefulness or uselessness of the expenditure."

on the opinion of a medical specialist. The interdicted major under *curatorship* (like the minor under curatorship in Louisiana law until 1830) is a semi-capable individual in that he himself participates in legal transactions. Regarding the most important transactions he is assisted by a counselor, the curator, without whose participation the act is invalid; in transactions of lesser importance he is protected by the same rules as a person placed under judicial protection (article 510-3). The interdicted major under *tutorship* (like the interdict under curatorship in Louisiana law) is in principle affected by a complete incapacity and is represented in all juridical acts by a tutor. In the extra-patrimonial domain, the new law has special provisions relating to the marriage of the interdicted major under tutorship (article 506) and under curatorship (article 514).

*Parental Authority*⁸⁴

The institution of "paternal power" (*puissance paternelle*) received a new name (*autorité parentale*) which conveys the spirit of the reforms: "power" became "authority" to denote that it is a function encompassing duties as much as prerogatives and "paternal" became "parental" because henceforth it normally will be shared equally by the father and the mother (article 371-2). The law draws a distinction between parental authority in respect to the person of the child and parental authority in respect to his patrimony. With respect to the latter, the essence of the former rules of legal enjoyment of the child's patrimony is retained; however, the rules themselves are enunciated with greater clarity (articles 382 *et seq.*).

The law distributing parental authority over the person of the child takes into consideration the various possible family situations, setting out different provisions for each. In the *legitimate family*, the law starts from the normal—or ideal—hypothesis wherein the parents exercise their authority together, and then contemplates the possible deviations that may arise: disagreement of the spouses, divorce or separation from bed and board, disability or death of one or both of them (articles 372 to 373-4). Regarding *illegitimate filiation*, voluntary acknowledgment prevails over judicial proof of parentage in every case. When the child has been acknowledged by both the father and the mother, the law innovates by entrusting the parental authority to the mother, thereby heeding to social reality. In all cases the law provides for the child's relationship with his

84. Law of June 4, 1970, [1970] L. No. 70-459 (concerning parental authority). This law modifies mainly title IX of Book I, covering articles 371 to 387. See R. LEGEAIS, *L'AUTORITÉ PARENTALE* (1973). For a short comment in English, see Lasok, *Parental Authority—French Style*, 20 I.C.L.Q. 323 (1971).

grandparents, and even allows visitation and correspondence rights to other persons in "exceptional situations" (article 371-3).

Modifications in parental authority can occur in order to meet crisis situations, that is, "if the health, security or morality of the minor is in jeopardy or if the conditions of his upbringing are gravely undermined" (article 375). Depending on the gravity of the situation, parental authority may be either supplemented, attenuated or suspended. It may be supplemented by measures designed to assist the parents in the upbringing of the child (*assistance éducative*). These measures may vary from parental counseling to the entrustment of the child to a public institution. Attenuation occurs with delegation of parental authority to a third party (an individual person or an institution). This may be partial or complete and may result from the petition of the parents themselves or as a consequence of their neglect. In the most serious cases, parental authority or certain prerogatives pertaining to it will be withdrawn, but in a spirit appreciably different from that of the former law; these last measures are considered less as sanctions against the parents than as provisions for the protection and welfare of the child.

*Filiation*⁸⁵

The system of the Code Napoleon was characterized by a strict hierarchy of filiations and by very harsh conditions for illegitimate children; adulterine and incestuous children could not even establish their filiation. That system had been somewhat attenuated, legislatively and jurisprudentially, notably by the possibility of legitimizing an adulterine child by remarriage, by the introduction of an action to establish illegitimate paternity, and later by making available an action for financial support to the child not allowed to establish paternity. However, the general scheme of the Code remained unchanged, with its retinue of injustices and "juridical truths" which sometimes ran counter to all semblance of reality. The new legislation has purported to put an end to both of these. It has eliminated every distinction in principle between legitimate and illegitimate children, as well as among the different categories of illegitimate children. It has attempted to end the "juridical truths" by paying closer regard to reality in its proclamation of filiations,

85. Law of January 3, 1972, [1972] L. No. 72-3 (filiation). This law modifies title VII of Book I, covering articles 311 to 342-8, as well as sections VI, VII and VIII of chapter III, title I (Of Succession) of Book III, covering articles 756 to 767. For a discussion of this reform, see C. COLOMBET, J. FOYER, D. HUET-WEILLER & C. LABRUSSE-RIOU, *LA FILIATION LÉGITIME ET NATURELLE* (2d ed. 1977); J. MASSIP, G. MORIN, & J. L. AUBERT, *LA RÉFORME DE LA FILIATION* (2d ed. 1973).

especially by granting more weight to a child's "possession of status" (*possession d'état*) as an element of proof or of refutation of filiation.

The freedom to prove every sort of filiation is established, with the sole exception—in the child's own interest—of the most serious cases of incest. In principle, the effects in all cases are identical, notably in the field of successions. Some restrictions concerning the adulterine child have been retained, however, in order to protect the rights of the spouse and of the offspring of the marriage.⁸⁶

This equalizing of the rights of all children rendered useless the retention of fictitious legitimacies resulting from a rigorous application of the presumption of paternity to the mother's husband. The husband henceforth may challenge this presumption through all means appropriate to demonstrate that he could not be the father (article 312 par. 2). Furthermore, the action, under the name of "contestation of paternity," may be brought by the mother, once married to the real father, in order to legitimate the child (article 318). Moreover, in certain cases, the presumption of paternity does not apply, thus making it unnecessary for anyone to contest the presumption. The most important of these is the case where a child has been registered with no indication of the name of the husband and has "possession of status" only with regard to the mother (article 313-1).⁸⁷ Additionally, the possibility of legitimation was expanded by a "legitimation by court order" (*autorité de justice*), available when it appears that marriage between the two parents is impossible (article 333).⁸⁸

Concerning the establishment of illegitimate filiation, the rules relating to voluntary acknowledgment (articles 335 to 339) and judicial proof of parentage (articles 340 *et seq.*) were not profoundly modified. Article 337 is innovative in providing that the birth registry in which the name of the mother appears is tantamount to acknowledgment by her

86. An adulterine child may not be raised in the home of its married parent without the consent of the latter's spouse. FR. C. CIV. art. 334-7.

87. This seemingly complicated formulation covers the very practical situation where a married woman who has been living separate from her husband for many years gives birth to a child. Under the former law, the presumption of paternity of the husband was applied to even this situation, and only he could disavow the child; moreover, it was necessary to find him, to persuade him to bring the action, and that one of the limited grounds for disavowal be available to him.

88. The notion of "impossibility" already has given rise to problems of interpretation, particularly on the question whether an impossibility is constituted when the parents refuse to contract marriage simply because they wish to retain their "liberty." The Court of Appeal at Paris said it is not. *See* Nerson, 72 REVUE TRIMESTRIELLE DE DROIT CIVIL 589 (1974).

when corroborated by the child's possession of such status.⁸⁹ The most ardent legislative debates concerned the introduction of a partially new action called the action for subsidies (*action à fins de subsides*). This enables an illegitimate child, whose filiation to the father is not established and cannot be established for reasons of proof or of law, to claim support from an individual who had sexual relations with the mother during the legal period of conception. The action also is open to a child legally legitimate, but who is likely to be adulterine because his birth registration has not been corroborated by a possession of status with respect to the husband. This action was justified by its proponents not so much on the likelihood of the defendant's paternity, but out of a sense that he should be responsible for the child's support if he could be its father. The main consequence is that several defendants might be condemned to pay subsidies to the child.⁹⁰ The law, however, does not follow this justification to its ultimate consequence, for it allows a defendant to extricate himself from paying subsidies by demonstrating either that he cannot be the father of the child or that the mother acted as a prostitute (article 342-4).

The new provisions of the Civil Code on filiation are more complete than the former ones. The new law inserts a new chapter containing provisions common to all filiations (articles 311 to 311-18): presumptions concerning conception,⁹¹ definition and proof of possession of status (*possession d'état*), regulation of actions concerning filiation and conflict of laws rules in filiation matters. The new legislation also incorporates into the Code the provisions of a former law concerning the name of the illegitimate child (articles 334-1 *et seq.*).

89. Frequently the natural mother would believe that she had acknowledged her child by the mere fact that it had been declared (by a third party) to be hers in the birth registry. The child would discover after the mother's death that his filiation had not been established regularly and would be exposed to loss of succession rights unless he was successful in an action to establish maternity. The new role given to the child's possession of status puts an end to this inconvenience, without impairing the possibilities of adoption if the mother does not rear the child. Adoption would have been impeded if the mere declaration of civil status in the birth registry had been considered as tantamount to acknowledgement (as it is under several European legislations).

90. In the face of numerous criticisms, this position has been justified because it offered a solution to the case where there has been a collective rape. Abortion was a crime at the time the bill was introduced in the legislature, but in 1975, abortion during the first ten weeks of pregnancy was legalized on an experimental basis for a period of five years.

91. The child is presumed to have been conceived at that moment between the three hundredth and the one hundred and eightieth days preceding birth that will serve his interest best, but proof to the contrary is admissible. FR. C. CIV. art. 311.

*Divorce and Separation from Bed and Board*⁹²

Under the former law, only one type of divorce was allowed: *divorce-sanction*, decreed on grounds of marital misconduct by one or both of the spouses. Consequently, many couples who wished to separate by mutual agreement were compelled to participate in a judicial farce (for example, by sending each other derogatory letters drafted under the direction of their counsels), but one which had to be skillfully played because the judicial appreciation of the relative fault of each spouse determined the financial and other consequences of the divorce. The former law also left much to be desired in dealing with these consequences, for there were serious difficulties in enforcing the payment of alimony to the wife and to the children. The new legislation attempts to align the law with prevailing mores in providing new grounds for divorce, and to regulate its consequences in a more realistic fashion.

The new legislation provides for three categories of divorce. The first is the contractual divorce, of which there are two varieties: divorce "by mutual petition," which can be called divorce by mutual consent pure and simple, and divorce "petitioned by one spouse and accepted by the other" (articles 233 *et seq.*). The latter actually is a hybrid: it is contractual because it is accepted; but it also has a contentious nature, because it is petitioned for by one spouse who must "establish a set of facts, originating with both parties, which renders continuation of the common life intolerable" (article 233), and because it produces the effects of a divorce by mutual fault (article 234). The legislature here envisaged the situation in which one spouse is not anxious for the divorce, even though he or she recognizes the failure of the marriage, and the other spouse takes the initiative of filing suit. The agreement takes place while the divorce proceedings are in process.

The second category is the *divorce-remède*, which is based on the objective finding of failure of matrimonial life. More precisely, the law has introduced this category in two instances where neither fault nor consent are applicable: a prolonged separation fixed by the law at six years (article 237); and the impairment of the mental faculties of the other spouse for the same number of years, to such an extent that there is no longer any community of life between the spouses nor any reasonable

92. Law of July 11, 1975, [1975] L. No. 75-617 (revising the law of divorce). This law modifies notably Title VI of Book I, covering articles 229 to 310. See J.C. GROSLIÈRE, *LA RÉFORME DU DIVORCE* (1976); Massip, *La réforme du divorce*, REP. NO. 1975.1. I. 1345. In English, see Lasok, *The Reform of French Divorce Law*, 51 TUL. L. REV. 259 (1977). For a discussion of this revision project, see Carbonnier, *La question du divorce. Mémoire à consulter*, D. 1975. Chron. 115.

hope of it being restored in the future (article 238). The introduction of this type of divorce has generated vigorous criticism in public opinion and in Parliament as allowing "repudiation" and, moreover, as doing so in a situation which seemed to call for the strengthening of the matrimonial bond rather than its severance. Thus, to render it more acceptable, this "divorce for rupture of community life" was supplemented with several mitigating qualifications. In the first place, the judge may reject the petition if it appears that the divorce would result in material or moral consequences "of exceptional harshness" to the other spouse or the children (article 240). (A rule similar to this provision is enunciated two articles earlier in connection with divorce for mental illness). Secondly, the petitioner bears all the costs of the proceedings and the divorce is declared against him. Finally, his alimentary duty (including medical treatment in the case of mental illness) is maintained notwithstanding the divorce (article 281).

The third type of divorce is divorce for fault, which the law retained while making it more flexible. There is no longer any peremptory ground,⁹³ and all the faults of one spouse are examined in the light of conduct on the part of the other spouse which may have provoked them (article 245).

In divorce matters procedural rules are of particular importance, for they may affect the very availability of the divorce; hence their presence in the Code Napoleon itself.⁹⁴ The new legislation follows that tradition (articles 247 to 260), but in view of the new constitutional rules a great number of provisions have been relegated to a decree⁹⁵ and the Civil Code contains only the most significant rules. One is the establishment of a specialized trial judge for matrimonial affairs, who is particularly charged with supervising the interests of minor children (article 247 par. 2). This judge sits alone (an exception in civil law countries) when adjudicating a divorce by mutual consent.⁹⁶ In other types of proceed-

93. The peremptory causes, adultery and certain penal sentences, obligated the judge to grant a divorce when the materiality of the facts was established. This automatic character was considered especially inappropriate in cases of adultery. At the same time adultery was decriminalized (article 17 of the revising statute).

94. Another reason is that the Code Napoleon preceded the Code of Civil Procedure by several years.

95. Decree of Dec. 5, 1975, [1975] D. No. 75-1124 (containing a revision of the proceedings for divorce and separation from bed and board).

96. In the case of divorce by mutual consent, the petition may be submitted by a single attorney selected by mutual accord, but in every case the judge must make certain that each spouse has given his consent freely and that the agreement sufficiently preserves the interest of the children and of each of the spouses. FR. C. CIV. art. 232.

ings, he will be solely responsible for taking interim measures concerning mainly the residence and maintenance of spouses and children. Another feature of the procedure as regulated in the Code is that conciliation is encouraged at every stage of the proceedings, at least to induce the spouses to settle amicably the consequences of their divorce (article 252-2).⁹⁷ In the case of a divorce for fault, the spouses may request that the judgment not disclose the nature of the wrongs (article 248-1). This amounts to a renunciation of the right to appeal on the merits, since it leaves only the correct application of procedural rules for the appellate judge to review.

The principal change concerning the pecuniary consequences of divorce is the replacement of traditional alimony (*pension alimentaire*) by a compensatory payment (*prestation compensatoire*). The inconveniences of the former were that, because it depended on the assignment of fault in the divorce decree, the spouses were encouraged to discover wrongs, and that, being in the form of regular payments, it maintained a relationship between the divorced parties that occasioned numerous conflicts. In contrast, the compensatory payment in principle does not depend on the culpability of the spouses, but on the actual needs of the one who claims it. Only the spouse solely at fault cannot claim the compensatory payment, and even this rule is subject to an exception (article 280-1). Article 272 sets out the principal factors to consider in determining the needs of the spouse making the demand: listed are elements concerning the physical condition (age, health, etc.) of the spouse, the time devoted (or to be devoted) to the rearing of the children, and the professional qualifications and prospects of his employment. In order to avoid future litigation, the compensatory payment is in the nature of a lump sum and cannot be revised even in the case of a change in the situation of either spouse. In principle, it is paid at one time, in the form of capital.⁹⁸ The reduced role of fault also has repercussions with respect to the question of the children. The jurisprudence already had freed itself from the old law that, as a rule, awarded custody to the spouse not at fault.⁹⁹ This jurisprudence is ratified by the new article 287 which provides that the

97. In the same spirit, every other type of divorce may at all times be the object of an agreement analogous to that provided for divorce by mutual consent. *Id.* art. 246.

98. The compensatory payment does not apply in the case of divorce for "rupture of the community life," for the spouse who demands the divorce remains liable for support. In the divorce by mutual consent, the spouses themselves determine, as a part of their agreement, the amount and conditions of the compensatory payment, if any. FR. C. CIV. art. 278.

99. Prior to the revision, the mother was given custody of the children in over 80% of the cases.

custody of minor children is entrusted to one or the other spouse depending on the children's welfare.

One of the problems already mentioned under the former law was the difficulty of securing alimony payments after divorce, particularly as time passed. This is one reason why the new law favors the lump sum compensatory payment. The *pension alimentaire* continues to exist, however, in the case of divorce for rupture of the common life, and it was necessary to make allowance for all alimony judgments still pending. A law of January 2, 1973 provided for the possibility of a direct payment by the debtor of an alimony obligor (particularly an employer). Another law, number 75-618 of July 11, 1975, accompanying the revision of divorce legislation, also strengthened the rights of the alimony creditor. Whenever private law recourse fails, it permits the collection of an alimentary pension through the agents of the Revenue Service. Given the special means of investigation and pressure allowed to the Revenue Service, it is expected that these measures will prove very effective.¹⁰⁰

III. THE TECHNIQUE AND SPIRIT OF THE REVISION

In order to single out the main theoretical and technical features of the work accomplished, it is useful to recall the characteristics of a code in a civil law system. A code may be defined as a legislative enactment on an area of law, regarded as a single unit even though it may contain many different subject-matters, all with a view of ordering social relations in as complete and lasting a manner as possible. Its provisions should be arranged systematically, proceeding ideally from principles or precepts to rules, all presented in a simple, logical and coherent exposition. The Code Napoleon, although containing certain recognized imperfections, was praised as approaching the codification ideal. Its success was facilitated by the political and social conditions of the times when it was drafted and applied. Promulgated by a vigorous political authority, then confirmed by the acquiescence of the dominant class, it came as a sort of divine commandment. Popular approval was not even called for since the Code was inspired by Natural Law philosophy.

Conditions at the end of the twentieth century are very different. Natural Law thought has suffered serious attacks from materialistic doctrines; democracy has become more of a reality because of a higher level of general education, and the average citizen is less inclined to accept

100. Concerning separation from bed and board, suffice it to say that the institution has been retained mainly to respect the religious convictions of spouses who desire to separate without being divorced, and that it benefits, by transposition, from the reforms in the law of divorce.

without discussion a law which does not seem fair or which is too abstract. The work of revision, therefore, implemented a definite desire to bring the Code closer to popular sentiment, both in content and in expression.¹⁰¹ In doing so, however, it was necessary to guard against repudiating those qualities of the Code which remain as necessary as ever, especially its precision and coherence. Tradition and modernism thus had to be reconciled. In order to accomplish this, the law maker (a) drew inspiration from previously untapped sources, (b) was careful to maintain the formal qualities of the Code, and (c) has perhaps breathed a new spirit into the Civil Law.¹⁰²

A. *The New Sources of Inspiration*

The redactors of the Code Napoleon, who were called to unify the law in a country where great diversity had prevailed, were faced essentially with a task of synthesis. In particular they had to choose between rules of customary origin and of Roman origin, while accentuating the rational characters of both to conform to the principles of Natural Law.¹⁰³ Their work enjoyed such great success that during the nineteenth century scholars lost their critical sense toward legislation and confused "legislation" with "law."¹⁰⁴ This vision was unsettled later by two successive developments. The first was the promulgation of codes in various foreign countries which—although products of the same philosophical inspiration and derived from neighboring cultures—incorporated different substantive rules on various matters. One consequence was the development of comparative studies. Secondly, with the aging of the French Code, there emerged the consciousness that a discrepancy, occasionally profound, existed between written law and daily practice. This realization gave rise to the development of legal sociology. In the preparation of the new laws the teachings of both of these

101. That precise tendency is pointed out by the redactor of the revisions in the brief statement that the new legislation purported to be "more popular and less technical." I J. CARBONNIER, *DROIT CIVIL* ¶ 14 (8th ed. 1969).

102. At this time the only specialized study devoted to the reforms is a mimeographed "course" of the University of Paris Law School that appeared while the revision was in progress: G. CORNU, *L'APPORT DES RÉFORMES RÉCENTES DU DROIT CIVIL À LA THÉORIE DU DROIT CIVIL* (Les cours de droit 1970-1971). Several further developments of the present article were suggested by this work.

103. This synthesis already had been achieved in certain matters (Donations, Wills, *fidei commissa* substitutions) by various royal ordinances, notably the ordinances of d'Aguesseau in the eighteenth century.

104. See R. DAVID, *LES GRANDS SYSTEMES DE DROIT CONTEMPORAINS* ¶¶ 49 *et. seq.* (6th ed. 1974).

disciplines were utilized systematically— especially legal sociology, even though its development was more recent. Thus it can be noted that, just as at the time of the Code Napoleon, the task was one of combining sources of both popular and scholarly origin.¹⁰⁵

Legal Sociology

Sociology constituted the newest and most significant source of inspiration. Its importance to the revision is attributable chiefly to the development of legal sociology in France during recent years, especially through the initiative of the redactor of the new laws, Dean Carbonnier.¹⁰⁶

Some indications about the manner in which legal sociology is conceived in France are necessary to explain its role in the legislative undertaking. Sociological jurists contrast themselves—specifically indicating that they do so without pejorative intent—to dogmatic jurists. The “dogmatic” jurist narrows the law to what is written in the statutes, practiced by the courts and taught in law schools. The sociological jurist studies legal processes from the outside and observes patterns of action that contradict the dogmatic concepts. Sociologists thus find substantial areas in which the law is not applied or is ineffective, areas of autonomous law which rival state law (particularly within organized groups), and even zones of “non-law,” that is, the absence of law in a number of human relationships where theoretically it should be present.¹⁰⁷ It is the first of these phenomena which concerns the legislator most. He must strive to reduce and prevent discordance between law and practice, or the command of public authority and popular sentiment. To accomplish this he resorts to the usual techniques of general sociology: study surveys and public opinion polls.

105. Two other points should be mentioned concerning the sources, even though they do not lead to further development. The first is the use made of previous revision projects on some of the matters involved, whether these projects originated in the Civil Code Revision Commission (such as tutorship, matrimonial regimes) or in legislative initiatives (such as divorce). The second is the redactor's immense civil law culture without which a work of such quality would have been impossible.

106. In addition to the civil law handbooks cited in note 1, *supra*, see J. CARBONNIER, *SOCIOLOGIE JURIDIQUE* (1972); J. CARBONNIER, *FLEXIBLE DROIT, TEXTES POUR UNE SOCIOLOGIE DU DROIT SANS RIGUEUR* (3d ed. 1976); Carbonnier, *Le Code civil des Français a-t-il changé la société européenne? Programme pour une recherche sociologique sur l'influence du Code de 1804*, D.1975. Chron. 171 [hereinafter cited as *Programme*]. See also Arnaud, *Une enquête sur l'état actuel de la sociologie juridique en France*, 71 REV. TRIM. DR. CIV. 539 (1972). As an example of a legal sociology study on a matter covered by the revision, see M.P. MARMIER, *SOCIOLOGIE DE L'ADOPTION* (1969).

107. J. CARBONNIER, *FLEXIBLE DROIT* 3, 20, 99 (1969).

Many of the revisions have benefited from this approach at the initiative of the Ministry of Justice and thus constitute an interesting experience in legislative sociology. The revision of matrimonial regimes was preceded by a survey by the French Institute of Public Opinion concerning the actual distribution of conventional regimes,¹⁰⁸ then by an inquiry with married persons to ascertain the extent of their knowledge and their reactions regarding the law of matrimonial regimes.¹⁰⁹ A 1966 inquiry concerning the area of successions, although it has not yet led to a revision of this subject, was utilized for the revision of the law of filiation in regard to the succession rights of illegitimate children.¹¹⁰ The revision of divorce laws was preceded by extensive research, public opinion polls and elaborate inquiries put to the general population¹¹¹ as well as to divorced individuals, in order to ascertain the sources of conflicts, the climate in which the judicial procedure of divorce takes place and the effects of divorce on the subsequent relations between the spouses.¹¹² Other investigations also have been made with a legislative perspective, some of which are of interest to civil law.¹¹³

The systematic recourse to sociology has raised reservations. A number of jurists—who were not necessarily “dogmatic” jurists—considered that civil law is too technical a matter to be geared directly to public opinion. Among the general public, many people criticized this method as leading to a subordination of law to *mores*, whereas the converse should be true, particularly in the field of family law. Indeed, “liberalization” was the word which came most frequently to characterize the reforms (e.g., filiation, divorce). Drawing out the criticism to the point of caricature, it easily could be suggested that Parliament be replaced with public opinion institutes (as is regularly observed with respect to the polls preceding political elections).

108. Carbonnier, *Un essai de statistique de la répartition des régimes matrimoniaux conventionnels à la veille de la réforme de 1965*, in L'ANNÉE SOCIOLOGIQUE 443 (1965) (includes a table of results). These statistics emphasized the complete disuse of the dotal regime and of the regime without community which were abandoned.

109. The results were published in *SONDAGES* No. 11 (1967). The survey disclosed that a large majority (71%) favored the community regime. On the influence of sociology on the reform, see Sebag, *La méthode quantitative en droit civil et la réforme des régimes matrimoniaux*, D. 1963, Chron. 203; Terré, *La signification sociologique de la réforme des régimes matrimoniaux*, L'ANNÉE SOCIOLOGIQUE 3 (1965).

110. The results of the survey were published in the periodical *SONDAGES* No. 4 (1970). A 1967 study of unmarried couples also was used for this revision.

111. 1 LE DIVORCE ET LES FRANCAIS, ENQUÊTE D'OPINION (1974).

112. 2 LE DIVORCE ET LES FRANCAIS, L'EXPÉRIENCE DES DIVORCÉS (1975).

113. For example, one study concerned civil responsibility for traffic accidents. See A. WEILL & F. TERRÉ, OBLIGATIONS ¶ 599 (1976) and sources cited therein.

Indeed sociologists had already considered these objections by stating that sociology was not used in order to provide the norm. "Lawmaking remains a complex process of intelligence and will for which the legislator as the law-maker must retain responsibility."¹¹⁴ In fact, the results of these studies were corrected by way of interpretation (as an elementary precaution)¹¹⁵ and some majority opinions on specific questions were discarded.¹¹⁶ The polls certainly did influence some decisive choices, as for instance the retention of a form of community as the legal matrimonial regime. They also have facilitated the adoption of proposals which had encountered sharp hostility in certain sectors of the public and of Parliament.¹¹⁷ Such recourse to sociology is not limited to the preparation of laws. Since its use was prompted by the finding of a certain ineffectiveness of laws, sociologists also are bound to examine the effectiveness of the laws that they helped shape. This is the object of the "post-legislative sociology" that presently is being used to study the application of the new laws.¹¹⁸

Comparative Law

The idea of utilizing comparative law for the purpose of improving national legislation is not novel. This inspired the creation of the Society of Comparative Legislation in France in 1869. Accordingly, a century later, when the means of information had permitted a great development of comparative studies, it was natural that the legislature turned to this source of inspiration. Therefore—most of the revisions were preceded by studies of foreign law. The most recent topic of revision—divorce—was

114. J. CARBONNIER, *SOCIOLOGIE JURIDIQUE* ¶ 294 (1972).

115. For example, the statistics concerning contractual matrimonial regimes revealed a perceptible rise in that of separation of property. But these statistics were not used in determining the new regime because it was recognized that spouses who do make express marriage contracts belong to particular classes (in general, the more well-to-do) and consequently do not have the same preoccupations or aspirations as those married without a marriage contract. This was confirmed by a subsequent poll. See note 109, *supra*.

116. For example, the poll concerning matrimonial regimes elicited a very clear opinion among all the classes that the power to sell securities and stocks belonging to the community without the consent of the wife should be withdrawn from the husband. Nevertheless, on the recommendation of the banking profession, this solution was eliminated from the law as being a source of excessive complications. J. CARBONNIER, *SOCIOLOGIE JURIDIQUE* 313 n.3 (1972). Similarly, the fact that most of those questioned believed that the legal community was a universal community did not lead to the conclusion that this regime must become the legal regime.

117. Thus divorce by mutual consent received a massive approval in public opinion and even divorce based on failure of the common life won majority support, at least in the absence of children. See text at notes 92-93, *supra*.

118. Arnaud, *supra* note 106, at 546, 551.

the occasion of a systematic comparative study requested by the government.¹¹⁹ These comparative studies were not limited solely to other civil law systems, but also extended, for example, to English law where reforms had occurred recently in institutions the regulation of which is not too closely associated with the technique of the particular legal system.

The principal effect of the study of foreign law has not been, as one might be tempted to think, the adoption of foreign institutions. Its primary utility seems to have been to furnish arguments promoting the adoption of new legal principles and policies which might otherwise have met with strong opposition. For instance, the principle of nearly complete equality between legitimate and illegitimate children, as well as between different categories of illegitimate children, received support from recent reforms of German law (Law of August 19, 1969), English law (Family Reform Act, 1969) and Dutch law (new Civil Code of 1970). Likewise, the liberalization of divorce by adding *divorce-remède* (as a consequence of an objective breakdown of the marriage), to *divorce-sanction* (as a consequence of matrimonial misconduct), was supported by a general trend observed in England, the Netherlands, Sweden and even in Italy with the introduction of divorce in 1970.

Another function of comparative law, nevertheless, has been to furnish models for new institutions and rules. The most notable example is the introduction into French law of the new matrimonial property regime of the sharing of gains; this follows closely the German legal regime (*Zugewinnngemeinschaft*) established in 1958, which was itself modeled on the Swedish law of 1920.

As has been done regarding sociology, the exact significance of recourse to comparative law must be specified. As a matter of fact, its limits are outlined by sociology itself. Studying the phenomenon of acculturation, defined as the grafting of one culture on another, sociologists observe that complete reception of a foreign law or institution occasionally provokes a process of rejection.¹²⁰ Thus, the imitation of foreign institutions must be surrounded with precautions and accompanied by adaptations.¹²¹ In the Civil Code revision program, the specific borrow-

119. M. ANCEL, *LE DIVORCE À L'ÉTRANGER*, CENTRE FRANCAIS DE DROIT COMPARÉ (1975).

120. Concerning juridical acculturation, see J. CARBONNIER, *SOCIOLOGIE JURIDIQUE* ¶¶ 166-68 (1972) (the author attributes the word to an American ethnologist). Some examples of total ineffectuality of the reception of foreign law are well known, as with the Chinese and Japanese Codes inspired by European models. See R. DAVID, *supra* note 104, ¶¶ 485-88, 497-500.

121. Carbonnier, *L'apport du droit comparé à la sociologie juridique*, *LIVRE DU CENTENAIRE DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE* 75 (1969). The author contrasts

ings were made on an experimental basis or in small doses, and not without departures from the foreign model. Thus the matrimonial regime of the sharing of the gains, which reasonably could be viewed as the most satisfying regime from a theoretical standpoint, was proposed only as a conventional regime because it was felt that its adoption as the legal regime would disrupt unduly both tradition and practice.¹²² The institution of a *juge des tutelles* marks the intervention of public authority in the domain of tutorship, on the model of German law; but it is still considerably removed from the German source, because tutorship definitely remains in the family framework following the French tradition. Other examples easily could be found.¹²³

In short, the same can be said about comparative law as has been said above about sociology. Just as public polls have not legislated, there has never been a pure and simple reception of foreign law. This is attributable not only to a legal nationalism, indisputable in France where the Civil Code is concerned, but follows from reflection upon the proper use of comparative law.¹²⁴ Nevertheless, the attention given to foreign law in the preparation of reforms is important to the history of the civil law. Whereas separate codifications had struck a blow at its unity by crystallizing national differences, now the code renovation programs conducted in France and elsewhere could bring about a reduction of differences in substantive rules.¹²⁵

the objectives of comparative law, inclined to imitation, and those of sociology, a non-normative discipline.

122. The regime of sharing of gains met with opposition from legal practitioners, and particularly from the *notaires*. In France, this regime is distinguished by an essential trait of the original model: the claim of each spouse to the acquisitions of the other is in principle a claim in value and not in kind. See note 70, *supra*.

123. In tutorship, the new possibility of entering into a contract with a "solvent and professionally competent" third party for the management of securities and stocks of the minor (article 454(3)) can be considered as inspired by the example of the trust, an institution unknown to French law. See FR. C. CIV. art. 454(3).

124. Carbonnier, *A beau mentir qui vient de loin ou le mythe du législateur étranger*, in MÉLANGES DORHOUT MEES 61 (1974). The author identifies and analyzes a universal myth of the foreign bearer of laws, who derives his authority from his mystery. For him, the modern version of the myth is the image of a certain law on a specific point, conveyed by the mass media and the "sociological" observations of the tourist crowd (*e.g.*, to modernize family law, refer to Scandinavian models; to better protect shareholders, refer to American law). *Id.* at 66.

125. The French revision, in its turn, cannot fail to inspire reform of foreign laws. Thus, one may assume its influence on the new Italian family law (as enacted by the Law of May 19, 1975, modifying the Civil Code) considering the numerous analogies to French law on essential points: adoption of the community of acquisitions as the legal regime, sharing of parental authority by the father and mother, relaxing of the presumption of the

B. The Formal Technique

A fundamental quality of the Code Napoleon, and perhaps the most frequently commended, was the incisive clarity of its rules. Drafted in beautiful prose, the rules were clear and concise, and the Code was relatively simple to use considering the breadth of its scope.¹²⁶ The occasional modifications and additions since 1804, particularly in modern times, had the effect of depreciating these qualities perceptibly. Having occurred at different periods and without a general plan, they lacked the unity of thought indispensable to a code. Products of circumstantial considerations, often they were hastily and poorly drafted.¹²⁷ The revision work therefore did not have as its sole object the modernization of the substance of the law, but also the restoration of the formal qualities of the Code. Such being the project, its realization could be doubted because the classical perfection of the Code was the reflection of a social order that no longer exists. Moreover, the industrial society does not cultivate qualities of form to the same degree as early nineteenth century France. It can be said, nevertheless, that the redactor of the new texts managed to restore the formal qualities of the Code. This can be seen by examining the language, formulation and coordination of the rules.

The Language

One of the objectives of legal codification is to place the law within the reach of a large part of the population. Without achieving this entirely, the civilian codes probably are more successful than the common law in making the law more accessible to the laymen. This was true of the Code Napoleon in particular. Nevertheless, the desire that the law be drafted in yet more popular language was expressed frequently at the time of the current revisions. From a general point of view, however, it remains to be seen whether this objective can be attained fully. The answer probably is negative because the law, like every discipline, cannot dispense totally with characteristic and appropriate language.¹²⁸ This is

paternity of the husband, equality of rights for the illegitimate child. See Brulliard, *La réforme du droit de la famille en Italie*, REV. INT. DR. COMP. 645 (1975).

126. Actually, these qualities of the Code Napoleon were more apparent for the jurist than for the layman, for, as simple as it was, the Code was above all a technical work. The question, however, is whether it is possible to produce a code truly accessible to the nonjurist. See text at notes 127-43 *infra*.

127. No civil law textbook in France will fail to mention that Stendahl recommended reading the Code Napoleon for the formation of style. It occasionally has been said, concerning the additions to the Code prior to the present revision, that Stendahl no longer would find his model there.

128. To remove, for example, the word "mortgage," particularly irksome to the

all the more pronounced in a code where the necessary conciseness can be achieved only through language of quasi-mathematical precision. Thus it would have been illusory to hope that the new provisions would be drafted entirely in common language. However, it is evident that the redactor was sensitive to the demand for simplification, to which his sociological approach no doubt made him sympathetic. On the whole, a compromise seems to have been reached: the language was modernized, without losing the necessary technicality.¹²⁹

The old texts contained a number of archaisms which today carry a strange connotation and gave the impression that the Code was an instrument of another age.¹³⁰ A superficial comparison of the former and the present provisions is sufficient to show that new expressions were substituted for most of the archaisms.¹³¹ It is difficult to point out examples because translation can account only imperfectly for nuances and also because several of these archaisms do not appear in the Louisiana Civil Code whose redactors had to adapt expressions without English equivalents.¹³² Nevertheless, it may be noted, for example, that the word *héritage* designating immovable property (Code Napoleon article 466) has disappeared, and that *infidélité* of the tutor (Code Napoleon article 444) was modernized to "dishonesty."¹³³ The new provisions elsewhere include expressions borrowed from contemporary language. Thus "lifestyle of the household" (*train de vie du ménage*) is the expression describing the norm by which to appraise whether an expenditure incurred by

nonjurist, and to replace it in each provision where it appears by the description of that institution would demand several lines each time and would render the text illegible.

129. On this question, see especially G. CORNU, *supra* note 102, at 32 *et seq.*, from which some of the following examples are borrowed.

130. For an exhaustive listing of the archaisms of the Civil Code see Cornu, *La lettre du code à l'épreuve du temps*, MÉLANGES SAVATIER 157 (1965).

131. Many archaisms also have disappeared because they figured in provisions which have been repealed. An example is the *linges et hardes* which the wife could retain pending liquidation of the community. Code Napoleon arts. 1192(2), 1495, 1566. The redactors of the Civil Code of Louisiana had in one case modernized them as "effects." LA. CIV. CODE art. 2411. In another case the Louisiana redactors converted them into "linen and clothing," while adding "jewelry" which singularly contrasted with the *hardes* ("rags") of the French text. *Id.* art. 2369.

132. For example, the *curateur au ventre* of article 393 became the "curator for the preservation of the rights of the unborn child," which described quite precisely the functions of the interested party. LA. CIV. CODE art. 252. The *traité* of article 472 became an "agreement." *Id.* art. 361. For other reasons, the *myriamètres* (no longer used today) of articles 407, 411 and 432 of the Code Napoleon were expressed in miles.

133. Actually, the term "infidelity" was more accurate since it concerned precisely the lack of received confidence, but the term is seldom used now except in a sentimental context.

one spouse is excessive or not (article 220 par. 1); and the child is to be kept in his "present environment" (*milieu actuel*), if it is suitable, even though measures of educational assistance are necessary (article 375-2).¹³⁴

Certain cases of modernization of language have a real substantive significance. The Code Napoleon occasionally employed quite coarse language. This has been mitigated, reflecting the progress of ideas and the humanist inspiration which permeates all the new law. Thus, the adulterine child became—in a particularly symbolic manner, considering the heaviness of a periphrasis which its author must have used with regret—the child who "at the time of its conception had its father or mother engaged in the bonds of marriage with another person" (article 334 par. 3). The incestuous child became the one "between whose parents exists one of the consanguinity impediments to marriage stated in Articles 161 and 162" (article 334-10). In the same spirit, the "interdicted major" became the person "protected by law" (Book I, Title XI). He is no longer described as an individual "in an habitual state of imbecility, of insanity or of rage" (articles 489 and 493 C. Nap.) but as one whom "a deterioration of his personal faculties prevents from attending alone to his interests" (article 488 par. 2).¹³⁵ "Confinement" became "placement," "interdiction" became "tutorship." All the new law of divorce was drafted—in an excessive manner, according to some—in terms which attempt to "dedramatize" the rupture of the marriage (for example, by using "facts" rather than "faults" in articles 233 and 242). One commentator has summarized this trend by writing that "the civil law becomes more civilized by rejecting language of humiliation or irritation."¹³⁶

134. See FR. C. CIV. art. 375-2. On the other hand, some expressions of the Code Napoleon remain which, although familiar to the jurist, surprise the layman: the minor "*habile*" (with legal capacity) to contract marriage (Code Napoleon art. 1398), that is to say, capable in the sense of Louisiana Civil Code article 2330; or the "industry" of the spouses (Code Napoleon art. 1401) to designate their productive activities. See LA. CIV. CODE art. 2402. Some phrases from the era of the Code Napoleon were revived. For example, the operations in which the husband drew a profit are again designated as having "turned to his profit." See FR. C. CIV. arts. 1430, 1541. Occasionally the redactor parodied the Code Napoleon (but only its best parts); for example, article 372-1(1) which provides that, in case of disagreement between the parents as to the best interest of the child, "the practice that they may have followed previously on similar occasions shall be the rule between them," uses a formula clearly reminiscent of that of Code Napoleon article 1134.

135. FR. C. CIV. art. 488(2). This also expresses the policy of no longer fitting a regime of protection to the nature of the infirmity, but simply of offering more or less extended regimes of protection. See text at notes 76-84, *supra*.

136. G. CORNU, *supra* note 102, at 77.

However, the language of the new texts is none the less technical in character. First, a number of expressions which make little sense to the layman were retained. Some were kept because they are found in provisions, particularly those relating to the matrimonial regimes, intended for use by professionals (*notaires*) for which they hold no mystery:¹³⁷ *émolument* (emolument or perquisite) (article 1486); the "*préciput*" clause, that is, the right of a spouse to take a sum or certain assets before the other in the liquidation of a community regime (article 505). Other phrases were retained because they pertain to branches of the Code awaiting revision, and it seemed preferable that the new terminology be adopted at that time.¹³⁸ Such is the case of "fruits," retained to designate the revenue of property that is less and less often agricultural (articles 456, 1401, and 1403).

The technical language was augmented further by the utilization of terms coined by doctrine or which, appearing occasionally in the original Code, were since made the object of systematization by doctrine: "patrimony" (articles 417, 418, 1499 par. 2, and 1501); "legal person" (article 496-1), "real subrogation" (article 1406 par. 2); "rights attached exclusively to the person" (article 1404).

Other concepts, thus far only doctrinal, have become fundamental notions of the new law. Thus, in defining the powers of a person as to a patrimony (tutor, spouse) there has been systematic resort to the distinction between acts of conservation, administration and disposition.¹³⁹ One may see nevertheless that the new notions are most often coined from contemporary language: the "placement with a view to adoption" (articles 351 *et seq.*), the "rupture of the common life" (articles 237 *et seq.*), and "compensatory payments" (articles 270 *et seq.*). When entirely new institutions were introduced, they generally received simple names intended to indicate their purposes, as in the case of the action "*à fins de subsides*" (for maintenance of a child)¹⁴⁰ or of the "plenary adoption."¹⁴¹

137. *Id.* at 59.

138. *Id.* at 68.

139. On these concepts, see 2 J. CARBONNIER, *DROIT CIVIL* ¶ 157 at 512 (10th ed. 1977).

140. See text at notes 89-91, *supra*.

141. See text at notes 71-76, *supra*. An exception must be made for the "placement under the judicial protection" (see text at notes 82-83, *supra*), which is not all what its name seems to indicate. See 2 J. CARBONNIER, *DROIT CIVIL* 498 (9th ed. 1972) ("One is led to imagine the immense army of psychopaths, invalids and other crippled individuals descending upon the courts.") The name is a carry-over from the ancient placement under

This attempt at simplification and adaptation, even in the technical words, shows the limits of the colloquialization of the language in a Code. Even if a Code were to use only everyday terminology, it would be unavoidable for some of its words to be charged with a particular significance outside of common usage. It would be unrealistic to ignore the necessity for some measure of such technicality.

The Formulation of Rules

Although placed on the same level, not all the articles of a code are endowed with the same intensity. Implementing provisions follow general principles. Some articles constitute true maxims, that is, solemn proclamations destined to denote the purpose of an institution, to clarify the meaning of provisions which implement them or to furnish a guide for the solution of cases not foreseen. There is no need to emphasize the care with which they must be drafted. Yet care in the formulation of implementing rules is no less important for the purpose of indicating their place in a hierarchy or their particular character of illustration or application. On all these points, the model established by the redactors of the Code Napoleon was followed.

In the first place, the new texts contain some maxims that set forth a whole legislative program. Article 334 proclaims the end to the discrimination against illegitimate children: "An illegitimate child has in general the same rights and duties that a legitimate child has in relation to his father and mother He enters the family of his parent" Article 371-2 proclaims that parental authority is a function which is a source of duties as much as of rights: "The authority is bestowed upon the father and mother to protect the child in his security, health and morality They have towards him the right and duty of custody, supervision and education." Article 427 introduces tutorship in a formula which contains the essential traits of the institution: "Tutorship, a protection owed to the child, is a public responsibility."¹⁴² Article 489-2, reversing the prior jurisprudence, states the principle of the civil responsibility of the mental incompetent in terms which parallel the general Article (article 1382) on civil responsibility: "He who caused an injury to others while in a condition of mental imbalance is nonetheless

protection of the King. In the same fashion, legitimation by authority of justice, is the modern version of legitimation by decree of the prince. See text at notes 87-88 *supra*.

142. The term "protection" defines the ultimate purpose of the tutorship. "Charge" gives notice that under no circumstances should it become a source of advantage for those involved in the administration of the tutorship. Charge is "public," in that it is not possible to escape it as a matter of public order, and that the State must serve as a substitute where the family fails to perform.

obliged to make reparation." One might also cite the texts which proclaim the new equality of spouses in their mutual relationships and their relationships with their children (articles 213 and 372), or in the administration of their separate property under the legal regime (article 1428).

Other more specific provisions set forth an entire regime in a single phrase. In order to express that emancipation is a declaration of anticipated majority, article 481 states that "[a]n emancipated minor has the same capacity as a major for all the acts of civil life." To state in one phrase the effects and the limit of plenary adoption, article 356(1) provides: "Adoption confers upon the child a filiation which is substituted for his original filiation; the adopted child ceases to belong to his blood family, subject to the exception of the prohibitions of marriage listed in Articles 161 to 164."¹⁴³

Occasionally, an article sets forth a general clause which serves as a reference for specific provisions. Thus, article 490 defines the cases in which a major qualifies for the protection of the law. Then, article 492 defines tutorship as a regime suitable for the major who "for one of the causes contemplated in Article 490, needs to be represented continually in the acts of civil life." Article 508 defines curatorship as the regime suitable for a major who "due to one of the causes contemplated in Article 490, without being incapable of acting by himself, needs to be counselled or supervised in the acts of civil life." Also, article 249-4 prohibits divorce by mutual consent if one of the spouses "has been placed under one of the protective regimes contemplated in Article 490."

The articles setting forth specific substantive rules also reflect the criteria for construction honored by the redactors of the Code Napoleon. Generally, they are short and deal with one single idea. The wording may be concise.¹⁴⁴ In some instances, the rule is paired with its converse.¹⁴⁵ In others, it is completed by an example covering the one case which might raise doubts.¹⁴⁶ In some instances, the same article contains

143. In the same manner, article 364(1), pertaining to simple adoption, states that: "The adopted child remains in his family and there conserves all of his rights, particularly his succession rights."

144. For example, article 359 states, "Adoption is irrevocable."

145. Article 490-1, paragraphs 1 and 2, enunciates the reciprocal independence of the methods of medical treatment of a mentally ill person and of the regime of protection applicable to his civil interests.

146. A most characteristic example is the provision of article 456, paragraph 1, which confers on the tutor the power to perform, as a representative of the minor, "all the acts of administration." Paragraph 2 adds: "He thus can alienate by onerous title, movables subject to ordinary use and things having the character of fruits." Indeed, although a sale constitutes in principle a typical act of disposition, the legislator recognized that certain

the rule and the exception so that the entire regime is described.¹⁴⁷ More frequently, however, in order to respect the imperatives of brevity and homogeneity, the stated regime is broken down into several different rules. In these cases, extensive use is made of adverbs and expressions intended to fix the scope of the rule in relation to the principle which it implements (*i.e.*, whether it is an example, a consequence, an exception, a subsidiary rule), and thereby to furnish the appropriate rule of construction (extensive or restrictive, by analogy or *a contrario*).

A rule regarded as being on the same level as the preceding one is signalled by the words "similarly" (*pareillement*) (articles 327, 452 par. 2, and 488 par. 3), "also" (*aussi*) (articles 342-1, 1404 par. 2, and 1420 par. 2), "nor" (*non plus*) (articles 1424 par. 2). A non-restrictive example is characterized by the adverbial phrase "in particular" (*notamment*) (articles 220-1 par. 2, 272, and 457 par. 2), or "thus" (*ainsi*) (article 456 par. 2). Exceptions are sometimes expressly indicated: "under the exceptions which follow" (*sous les exceptions qui suivent*) (articles 495 and 1421 par. 2); or implicitly by the expression "in general" (*en général*) (articles 334 and 1469). When the exception is not announced in this manner, it is characterized by the adverbs "however" (*toutefois, cependant*) (articles 244, 280-1 par. 2, 322-1, 340-4 par. 2, 346, 1413, and 1419) or "nevertheless" (*néanmoins*) (articles 312 par. 2, 313 par. 2, 481 par. 2, 488 par. 2, 1411 par. 1, 1498, and 1527). An alternative rule is characterized by "in lieu of" (*à défaut*) (article 276). This technique of drafting and articulation enables many rules to carry a significance which extends beyond their immediate object—a necessary condition for regulating a whole branch of law within the limits of a chapter of a Code.

sales are only acts of administration either because of the very nature of the thing, or because of its slight value, or because of the necessity of the sale to preserve the patrimony of the pupil. Hence the precision of paragraph 2 cuts short a foreseeable difficulty of interpretation. One also may cite article 418 which, after stating that the tutorship is a personal charge, specifies that it does not extend to the tutor's spouse (nevertheless, paragraph 2 foresees the plausible hypothesis in which the spouse will be involved in the management of the pupil's estate).

147. FR. C. CIV. art. 220:

Each spouse has the power to conclude without the concurrence of the other contracts whose object is the upkeep of the household or the upbringing of the children. All debts thus contracted are binding solidarily on the other.

The rule of solidarity nevertheless does not apply to expenditures which are obviously excessive considering the lifestyle of the household, the utility or inutility of the transaction and the good or bad faith of the other contracting party. Nor does it apply to obligations arising from installment purchases unless they have been concluded with the consent of both spouses.

The Coordination of the Provisions

The redactors of a civil code not only must be sparing with the words expressing the rules, they also must be economical regarding the rules themselves. To that end, they must avail themselves of the advantage of expounding the whole of the law on a given matter at one time in a single instrument in order to state it most concisely and coherently. This can be done by resorting as often as possible to a regulation by reference so as to avoid enumeration and repetition. What is meant here is not the simple reference from one article to another or to a group of others,¹⁴⁸ but the systematic utilization of prior regulation involving similar legal categories and concepts. Two examples will be described.

Let us consider the question of regulating the administration of the patrimony of an incapable person, or one suffering from some incapacity. This question is treated in great detail when dealing with the minor, for minority is the ordinary instance of incapacity. Two regimes are provided: legal administration (which can be pure and simple, or under judicial control) and tutorship. The one which requires the most detailed regulation is tutorship because, in the legitimate family, it applies to the child who has lost both parents; in other words, to one who is most likely to have assets and who also will require greater protection. Consequently, the law regulates meticulously the management of the patrimony of a minor under tutorship. It distinguishes the acts which a tutor may enter into alone (article 456, completed by articles 460, 463, and 464 par. 1), those for which he must be authorized by the family council (articles 457, completed by articles 461, 464 par. 3, 465, and 467) or simply by the judge for tutorships (article 468), and those for which special formalities in addition to authorization by the family council are required (articles 459 and 466).

These rules being stated, the less serious or less frequent cases (minors under legal administration, protected majors) are regulated by reference. Under *legal administration pure and simple* (legitimate child having both parents), each of the spouses is considered in regard to third persons to have received from the other the power to enter or perform alone "the acts for which a tutor needs no authorization" (article 389-4). The legal administrator (who remains the husband) performs with the consent of his spouse the acts "which a tutor could do only with the authorization of a family council" (article 389-5 par. 1). In *legal adminis-*

148. For example, when article 361 declares a certain number of provisions enunciated in the chapter on plenary adoption to be applicable to simple adoption, or when article 342-6 refers the action for subsidies to certain rules on the action inquiring into natural paternity.

tration under judicial control, the administrator must obtain an authorization from the judge for tutorships to perform acts "which a tutor could do only with authorization" (article 389-6). Finally, article 389-7 states, "furthermore, the rules of tutorship are applicable to legal administration, with modifications stemming from the fact that the latter involves neither a family council nor an undertutor, and moreover without prejudice to the rights which the father and mother have under the title 'Of Parental Authority', particularly with regard to the education of the child and the usufruct of his property." In the same manner, concerning the regimes of protection for *incapable majors*, article 495, dealing with *tutorship*, expressly refers to the tutorship of minors (with certain exceptions announced in the text), including the possibility in certain circumstances of transforming such tutorship into legal administration under judicial control (article 497). Concerning *curatorship*, article 510 provides for the assistance of the curator for all acts that "under the regime of tutorship of majors require an authorization of the family council." Thus all the regimes of incapacity are fashioned by reference to the model established for the most regulated incapacity—that of the minor under tutorship.

The second example is shorter but just as illustrative. It concerns the regulation of the patrimonial and extrapatrimonial legal condition of the minor. Out of respect for the hierarchy of values and the realities of life as well (generally, a minor does not have a personal fortune), the rules regulating the care of the person take precedence over those concerning the administration of his patrimony. The law, therefore, regulates in great detail the attribution of parental authority by envisioning all possible familial situations, contemplating successively both the legitimate and the illegitimate child (articles 372 to 374-1).¹⁴⁹ Turning to the question of the administration of the patrimony, it suffices to state that legal administration as a rule follows the exercise of parental authority (article 389).¹⁵⁰

This technique of coordination in setting out the rules is indispensable for the preparation of a code. It permits the attainment of the neces-

149. FR. C. CIV. arts. 372 *et seq.* See text at notes 84-85, *supra*. Concerning the adopted child, article 365 refers to the rules on parental authority and to legal administration and tutorship.

150. See FR. C. CIV. art. 383. If the father and mother are deceased or incapable of exercising parental authority, the parental authority disappears. FR. C. CIV. art. 373-4. A tutorship then is established in which the administration of the patrimony comes to the fore. However, whereas the family council becomes the depository of the attributes of parental authority (drawing together articles 449 and 371-2(2)), the tutor "takes care of the person of the minor" in the rearing of the child. *Id.* art. 450.

sary combination of conciseness and substance. It also assures the homogeneity and rational character of the law.¹⁵¹

C. Some Aspects of the General Legislative Policy

The present discussion will not deal with the legislative principles which inspired the revision of the substance of the law but rather with those of interest to codification.¹⁵² The question is whether there emerges from the new legislation an evolution in the concept of civil law. In this regard, it is noted that the Napoleonic legislation had certain characteristics that, with the passage of time, became inconveniences, and that the modern legislator has endeavored to modify.

First, the Code Napoleon gave more attention to general principles than to the regulation of concrete situations. This characteristic, while certainly consistent with the conception of a civil code, was without doubt accentuated by the Code's learned character, which resulted in some detachment from the realities of daily life.¹⁵³ Secondly, there was in the Code a definite rigidity stemming from the historical context of the work. Among its primary goals were the unification of French law, the elimination of social classes and the recognition of individual equality. Thus, generally, one rule and only one applied to a given situation, notwithstanding the actual differences between individuals.¹⁵⁴ Finally, the Code Napoleon was infused with a pretension of being absolute,

151. There exist both more simple and more elaborate examples of this technique. As to the first, one may cite the regulation of the powers of the spouses with regard to the common property in the legal matrimonial regime. There are two categories of common property: ordinary common property and property reserved to the wife (which she acquired with her earnings in the exercise of a separate profession). *Id.* art. 224. Articles 1421 to 1424 enunciate the powers of the husband over the ordinary common goods and also the restrictions on these powers; article 1425 then adds, "The wife has the same power in administering the reserved property that the husband has in administering the rest of the common property."

As to the second, in the same field of matrimonial regimes, the law provides for a certain number of possible judicial modifications of the powers of the spouses in crisis situations; for example, a spouse who is incapable of manifesting his will, who unjustifiably refuses to perform an act for which his consent is necessary, or who habitually fails in his responsibilities. These measures are scattered in different passages of the code: *id.* arts. 217, 219, 220-1 ("primary" regime); *id.* arts. 1426, 1429, 1443 (legal community). When the law elsewhere contemplates a petition by one spouse for a total modification of the matrimonial regime, all of the former hypotheses are collected under the apparently banal formula of "judicial measures of protection." *Id.* art. 1396(3); see G. CORNU, *supra* note 102, at 55.

152. On the general legislative policy, see text at notes 56-59, *supra*.

153. On the civilian concept of the rule of law and its opposition with that of the common law, see R. DAVID, *supra* note 104, ¶¶ 69, 320.

154. For example, the cumbersome rules of tutorship, conceived to protect the patri-

having drawn from both reason and Natural Law. This is manifest in the permanent character of the rules it laid down and their "eternal" vocation. These different traits can be summed up as the *abstraction* of the Code Napoleon. With the passage of time, this caused the Code to collide more and more harshly with reality.¹⁵⁵

The sociological approach of the modern legislator induced him, on the contrary, to seek a greater effectiveness for the laws being promulgated. To that end, he paid closer attention to the realities which the Code attempts to address, and this brought commentators to speak of a new era in the concept of civil law.¹⁵⁶ To illustrate this, it is helpful to analyze three tendencies in the new legislation which were not found, at least to the same degree, in classical legislation: the sense of realities, the sense of diversity and the sense of limits.¹⁵⁷

The Sense of Realities

The law falls short of reality when it pretends to impose rules following an abstract logic or ethic, without taking into account human weaknesses or the resistance with which customs may oppose ideals. It thus exposes itself as being only a fiction, and the ensuing permanent disregard of it discredits the whole legal system. This is the reason why, for example, various jurisdictions with statutes attempting to confine divorce within narrow limits experienced evasion by fraud, either through feigned injuries or by resorting to receptive foreign courts (such frauds often being reserved to the most favored classes). Diverse examples of such situations could be found among the topics revised.¹⁵⁸ The Napoleonic legislation, even as retouched since 1804, was permeated with a certain stoicism assuming virtue in individuals and therefore, deliberately

mony of the wealthy child, were applicable equally to those who had little or no assets; hence, their frequent disregard prior to the revision.

155. "The most arrogant code is thwarted by ineffectiveness, rivaled by custom." Carbonnier, *Programme*, *supra* note 106. It should be pointed out in the defense of the redactors of the Code Napoleon that the "fetishism" of their work is due less to their will than to the admiration they excited. The redactors and Bonaparte both envisioned that the Code would be completed by jurisprudence and that it should be renovated.

156. See G. CORNU, *supra* note 102.

157. An observation formulated by the redactor of the new laws concerning one of the revisions seems to summarize the inspiration of all of them: it was legislated "not by aspiring to the absolute, but by drafting, for daily difficulties, an empirical *modus vivendi*." Carbonnier, *Préface* in R. LEGAIS, *supra* note 84.

158. Besides the subject of divorce, that of filiation furnished significant examples. In particular, the rigidity of the presumption of the husband's paternity of his wife's child gave rise to "disavowals by complacency," that is to say, disavowals in situations other than those allowed by the law.

or simply as a consequence, attached rigorous effects to situations which deviated from the envisioned ideal.

In order to escape these flaws, the new legislation pays greater attention to factual situations and it takes into consideration some which occur with sufficient frequency for the law not to ignore them. In the law of filiation, where a concern for truth inspired the revision, a more important role was given to the child's possession of status because this factual situation evidences a relationship whose existence or absence is a prime indication of the existence or absence of blood ties, or that replaces them advantageously.¹⁵⁹ Another *de facto* situation, which typically was ignored by the Code Napoleon, is the informal separation of the spouses. In contrast, the new law makes such separation a possible ground for divorce even at the request of the deserting spouse when the situation is prolonged.¹⁶⁰ When it becomes necessary to convene a family council to supervise the personal care of a child, the law acknowledges the modern dispersion of the patriarchal family and provides the possibility of calling persons outside of the family who have a genuine interest in the child (article 409).

In a similar vein, the law strives as much as possible to obtain the full consent of individuals to any measure concerning them and does so by evoking expressions of their wills.¹⁶¹ This is most evident in the case of divorce, where not only is mutual consent indicated to be the ordinary type of divorce by its position in the Code, but where it is given effect even in disputed divorces wherever it can be obtained.¹⁶² The minor

159. The role of the child's possession of status as a mode of proof is reinforced in all types of filiation. FR. C. CIV. art. 311-12 (relative to conflicts of filiations). Particularly, this is true in establishing natural filiation. *Id.* arts. 337, 340(5), 341(3). Possession of status is required as a condition of all legitimation. *Id.* art. 331-1(2). In contrast, the absence of possession of status diminishes the force of the presumption of the husband's paternity (*id.* art. 313-1), renders fragile a legitimacy which rests only upon the certificate of birth (*id.* art. 334-9), and introduces the possibility of an action for subsidies against a third party. (*Id.* art. 342-1; see text at notes 89-91, *supra.*)

160. The *de facto* separation is envisaged also in the law of matrimonial regimes, where the law affords an abandoned spouse the necessary remedies to cope with the situation. See the judicial measures of protection discussed in note 151, *supra.*

161. The redactor of the revisions spoke of "the private will as the irreplaceable instrument of the law." Carbonnier, *Preface*, in P. CATALA, *supra* note 44, at 14. This will even can be posthumous, as in the case of article 408(2). In order to constitute the family council, this text calls for the consideration, before all else, of the "habitual relations that the father and mother had during their lives with their different relatives."

162. All divorces other than that on joint demand can borrow this form during the course of the proceedings. FR. C. CIV. art. 246. In the divorce for fault, the agreement of spouses not to mention the precise cause of the divorce judgment is taken into account. *Id.* art. 248-1. In appointing the custodian of the child, agreements between the spouses are

child himself is sometimes consulted on decisions which concern him, whereas he was treated in this regard as a nonperson by the Code Napoleon. Thus, he can be called to make observations in respect to a demand for legitimation by authority of justice (article 333-3), he can initiate and attend a meeting of the family council (article 415 par. 3), he can receive an account of tutorship before his majority (article 470 par. 3). Furthermore, in a divorce suit, the judge may take into account the sentiments the minor expresses regarding the award of his custody to the father or mother (article 290 par. 3).¹⁶³ The attention thus given to situations which contradict ideal standards and to the individual will is an evident sign of the liberalism which guided the revision of family law (an attitude which was the object of some criticism). This approach, however, has significance beyond the subject matter and touches on the very concept of the role of law. It has been termed a "disengagement" of the law, prompted by the awareness of the risks it incurs when it is overly idealistic and dogmatic.

At the same time, dogmatism is not altogether absent from the new legislation, and this afforded the legislator another opportunity to demonstrate realism. When the law reaffirmed principles that in fact had not been applied, or where it introduced new ones that one might fear would not be applied, it has implemented them with rules, characterizable as radical, intended to assure the effectiveness of the principles. This could be illustrated by many specific provisions,¹⁶⁴ but the best example is provided by those pertaining to the equality and independence of married women. There already had been strenuous efforts to give the married woman more autonomy than she was allowed by the Code Napoleon. This was particularly the purpose of a law of 1907 giving the married woman control of certain community assets (called "reserved assets" or *biens réservés*)¹⁶⁵ and of laws of 1938 and 1942 granting her full legal capacity. However, whether because of a lack of reflection on the part of the legislator or deliberate planning on the part of some, these

considered. *Id.* art. 290(1); *see id.* art. 376-1. During the divorce proceedings, the spouses can settle by agreement the problems of liquidation and partition of the community existing between them. *Id.* art. 1450, 1451.

163. *Id.* art. 290(3). In each case, the participation of the child *vel non* is governed by consideration of age and appropriateness. On the subject of adoption, the child over 13 years must consent personally to his plenary adoption. *Id.* art. 345(3).

164. As indicated above, in the case of divorce, one of the spouses can be held to pay the other a compensatory payment in capital. See text at notes 97-98, *supra*. To make the rule more effective, article 275(3) allows the judge to subject the effect of divorce to actual payment of this capital sum or to the execution of particular guarantees (suretyship).

165. On reserved property, see note 151, *supra*.

provisions were largely ineffective. The legislature had proclaimed legal principles without considering their coordination with the law of matrimonial regimes, or their application in daily practice where third parties continued to require the participation of the husband in all important transactions by the wife.¹⁶⁶ In the new law, the independence of the wife is implemented with measures intended to cut short all resistance to their execution. This is the purpose of the irrebuttable presumptions granted to the spouses in their relations with third parties by the primary matrimonial regime.¹⁶⁷

The same method was utilized to ensure that the transformation from "paternal" power to "parental" authority would not be limited to semantics and that the mother would not run up against the demands from third parties—particularly administrative agencies—that the father intervene in any act concerning the child.¹⁶⁸ Certainly such rules do more for the effectiveness of an enacted principle than its regular and solemn repetition. This method attenuates one of the major flaws in civil legislation, particularly the French one: that of believing, or feigning to believe, that it suffices to proclaim principles in order to change the law.¹⁶⁹

The Sense of Diversity

For the historical reasons indicated above, the Code Napoleon was unifying and unique. Today, however, the problem of diversity of law no longer exists in France. As regards the principle of civil equality, actual experience since its proclamation indicates that it can be an instrument

166. "[T]he first feminist reforms did not recognize sufficiently that the autonomy of the wife must be won less from husbands than from bankers and notaries." J. CARBONNIER, *FLEXIBLE DROIT* 141 (1969).

167. See text at notes 63-64, *supra*.

168. FR. C. CIV. art. 372-2: "With regard to third parties in good faith, each spouse is considered to be acting with the agreement of the other when he alone performs an ordinary act of parental authority regarding the person of the child." This provision was extended in 1975 to acts of a patrimonial nature. *Id.* art. 389-4, (limits the impact of maintaining the rule entrusting legal administration to the father).

169. This search for effectiveness is particularly evident where it leads to the sacrifice of other principles, such as the community character of the legal matrimonial regime. See text at notes 64-65, *supra*.

The sense of reality which inspired the legislator is evident again in his treatment of questions that he would have formerly neglected or left to general law. See FR. C. CIV. arts. 490-2, 1125-1 (provisions for the conservation of the house and the furniture of a person who has been confined for mental reasons); *id.* art. 215, par. 3 (in every matrimonial regime, a spouse cannot, without the consent of the other, dispose of the rights whereby the lodging of the family is secured; this applies even when the home is owned by that spouse alone); *id.* art. 285-1 (award of the home in case of divorce).

of injustice, or simply of inconvenience, to the extent that it ignores social diversity. As between individuals, there are differences of age, education, income, life style and beliefs, all of which call for nuances and some flexibility in the organization of the civil regime.¹⁷⁰ One characteristic of the new legislation is that it diversifies the regimes of most of the revised institutions, arranges intermediate levels between them and organizes transitions from one to another. This can be illustrated briefly through the institutions for the protection of incapables and through matrimonial regimes.

It already has been mentioned that the law provides for three regimes for the protection of minors, taking into account the greater or lesser degree of protection required by the particular situation.¹⁷¹ None of this, however, is immutable. Legal administration under judicial control (and even, for serious reasons, legal administration pure and simple) can be transformed into tutorship if it appears that the protection of the minor is not sufficiently assured (article 391). Conversely, the somewhat cumbersome system of tutorship can be adjusted or alleviated. To take into account the diverse aptitudes of the persons called to perform the duties of tutor, the system permits a division into a tutorship of the person and a tutorship of his patrimony; and in order to take into account the particular components of a given patrimony, the administration of certain specific property can be entrusted to an associate tutor (article 417).¹⁷² In order not to impose formalities where they would be more troublesome than protective, the required authorization of the family council can be replaced by permission from the judge for tutorships when the act in question involves property under a certain value (article 468).¹⁷³ Concerning majors, the law likewise organizes three regimes according to the degree of protection required.¹⁷⁴ The tutorship regime unfolds into three branches: *ordinary tutorship*, which can be replaced by simple *management* if the patrimony in question does not warrant the organization of a complete tutorship (articles 499 and 500), or by *legal administration under judicial control* if there exists a spouse or a close relative capable of managing the patrimony (article 497). The regimes of

170. These differences arguably are more pronounced in French society than in American society, resulting in greater differences in life styles.

171. See text at notes 60-62, *supra*.

172. FR. C. CIV. art. 417. To this is added the possibility mentioned in note 123, *supra*, of entering into an agreement with a third party for the management of the pupil's securities and stock.

173. FR. C. CIV. art. 468. This was fixed at 10,000 francs (Decree of November 5, 1965, [1965] D. no. 65-961), that is, approximately 2,000 dollars.

174. See text at notes 76-84, *supra*.

tutorship and curatorship, furthermore, can be described as *à la carte*, for the judge may adapt them to the actual incapacity of the interested party. A tutorship can be relaxed by authorizing the concerned party to perform certain acts alone (article 501). Curatorship, already an intermediate regime between placement under judicial protection (*sauvegarde de justice*) and tutorship, also can be made closer to one of these regimes either by an extension of the autonomy of the party concerned or by the reinforcement of control exercised over him (article 511). The most benign regime of placement under judicial protection is inherently a contingent regime for it was invented to deal with two situations: one is that of a mild or presumably temporary incapacity (see article 491-6 par. 1); the other is that of the most serious incapacities, where placement under judicial protection was intended as a means of providing immediate protection, pending the completion of judicial proceedings for the effectuation of one of the more extended regimes (see article 491-6 par. 2). This flexibility of the different regimes and the constant possibilities of interchange between them appears to leave no situation which could not fit at any time into an appropriate regime.¹⁷⁵

The flexibility of the new law undoubtedly is even more noticeable in the area of matrimonial regimes, for alongside the legal regime there is the possibility of choosing a conventional regime.¹⁷⁶ The observation might be made that such variety already was provided by the Code Napoleon. This, nevertheless, is a characteristic expression of the new flexibility of the civil legislation, because the freedom of matrimonial agreements in the Code Napoleon and that in the 1965 amendment do not originate from the same idea.¹⁷⁷ The redactors of the Code Napoleon were confronted with two opposing secular traditions: the community regime derived from the Germanic customs of Northern France and the Roman dotal regime prevailing in Southern France. Inasmuch as the law was being unified in France, it was necessary to make a choice and the issue was decided in favor of the community regime (and precisely that of the Custom of Paris). Because the choice had been a difficult one, however, it was not thought desirable to impose the chosen regime on

175. The eventual necessity for immediate protection when a minor attains majority is envisioned by article 494(2), providing that a petition to establish a tutorship can be filed in the last year of the minority of the child concerned. It has been observed that through this provision, together with that for the simplification of the tutorship by legal administration entrusted to a relative and those pertaining to the marriage of the person under tutorship, there emerged a specific regime for handicapped persons. Carbonnier, *Preface*, in J. MASSIP, *supra* note 76, at 11.

176. See text at notes 66-71, *supra*.

177. G. CORNU, *supra* note 102, at 83.

everyone. Consequently, particularly in consideration of the populations formerly living under customs of Roman origin, the possibility of selecting an alternative regime by convention was left open.

More than a century and a half later, when the question of picking a legal matrimonial regime arose again, the issue did not appear under the same terms at all, for no longer was there a regionalism requiring tactful treatment of sensitivities,¹⁷⁸ and the community regime indeed has become the general law (*droit commun*) of the French people.¹⁷⁹ It therefore would have been conceivable to impose one single regime. The social diversity previously mentioned, however, had to be taken into account. The new legislation therefore preserves the spouses' right to regulate their matrimonial agreements "as they deem appropriate" (article 1387), that is to say to alter the legal community "by every kind of agreement" (article 1497)¹⁸⁰ or to repudiate the community by choosing one of two separate property regimes provided by suppletive law. This flexibility, moreover, is not confined to the choice of a matrimonial regime at the time of the marriage; it also is available during the whole of married life. It was realized that the increasingly rapid economic fluctuations can produce perceptible modifications in the patrimonial situation of the spouses, that the matrimonial bond is not as strong as it used to be, or that, conversely, the spouses may desire to strengthen their patrimonial union when time has tested the stability of their personal bond. For all of these reasons, the principle of immutability of the matrimonial regime was relaxed and the spouses were afforded the possibility, "in the interest of the family, to modify it or even to change it completely" (article 1397 par. 1).

One thus may see the determination of the legislator to offer systematically a number of legal arrangements, wherever conceivable, in order to take into account the diversity of particular situations and then to organize the transition from one to another in order to provide for

178. This resulted in the significant disappearance of the ancient article 1390 which provided that: "The spouses may no longer stipulate in a general manner that their association will be regulated by one of the local customs, laws, or local statutes which formerly governed the various parts of the French territory, and which are abrogated by the present code."

179. This point was confirmed by sociological studies. See text at notes 116-17, *supra*.

180. FR. C. CIV. art. 1497. Those proposed were not taken from the observation of particular local practices, as had been done in 1804, but were arrived at by considering, in a systematic manner, the different features of the community regime which are susceptible of modification (that is, its composition, administration, and liquidation) together with the more communal or separatist orientations which the spouses may wish to give their contractual community.

possible evolutions.¹⁸¹

The Sense of Limits

The project of setting forth the law in a code is an ambitious one, and its accomplishment may generate an excess of arrogance. Whether the fault was that of its redactors or even more so that of the first commentators, such was to some extent the case with the Code Napoleon. It was long pretended that the Code—or other written law—contained the answer to every question and there was great reluctance to face the fact that civil society might differ from the Code's pattern. It is well known that subsequent evolution led, at the end of the nineteenth century, to an admission that jurisprudence may be a legitimate source of law. More recently, a further step was taken by the admission that not all social behavior is governed directly by the law.¹⁸² These acknowledgments were reflected in the modern legislation by a greater humility and, in certain cases, even a true relativism.

The legislator first acknowledged the vanity of pretending to set exact rules in certain matters, and therefore expressly referred to custom. This is the case in defining the acts that a minor can perform alone (article 389-3, minor under legal administration; article 450 par. 1, minor in tutorship) or those for which the father or the mother is presumed to have the consent of the other when acting alone on behalf of the child (article 372-2):¹⁸³ These questions are indeed regulated by custom, and an attempt at precise legislation—assuming that it be possible—would entail a casuistry incompatible with the characteristics of a code.¹⁸⁴ Indeed, recourse to custom in a system of written law does not constitute a novelty. Jurisprudence always has drawn inspiration from that source, particularly in exempting minors from their incapacity to engage in the

181. This legislative policy could have been evidenced by all of the revisions. Parental authority is diminished through delegation and forfeiture, either of which can be partial. The action for subsidies is a smaller version of the action to establish illegitimate paternity, and the latter, if it fails, nevertheless can produce the effects of the former. FR. C. CIV. art. 340-7. To the single concept of the *divorce-sanction* was added divorce for objective cause (failure of the common life) and divorce by mutual consent. All the previous forms can be merged into the latter. *Id.* art. 246. Only the revision of adoption is characterized by a reduction of legal types, and these were reduced from three to two in the effort not to introduce psychologically detrimental distinctions between adopted children. One will note, however, that simple adoption can be converted into plenary adoption. *Id.* art. 345(2).

182. See text at notes 105-118, *supra*.

183. FR. C. CIV. art. 372-2. See note 168, *supra*, for the text of this article.

184. The acts that a minor may perform alone vary according to both the time and the age of the minor at a given time.

acts necessary to daily life. There is innovation, however, in the express reference to custom (even repeated, in reference to the minor). It demonstrates that the legislature no longer is inhibited in recognizing the limits of its reach.

However, it is the implicit recognition of custom that is most remarkable. In some situations where the law introduced new principles, it considered the probable survival of habits. One such case was particularly foreseeable regarding the status of the married woman. While total independence had been demanded loudly by some groups, it hardly is doubtful that the silent majority of women would have remained satisfied for a long time with the former status.¹⁸⁵ Therefore, to presume that, solely by the effect of a revision of matrimonial regimes, all married women would take control of their economic destinies, would have been as unrealistic as it had been at the time of the Code Napoleon to assume that all individuals would become equal because their equality had been proclaimed. Furthermore, this would have entailed some dangers because, while the revision augmented the powers of married women, it logically diminished the specific safeguards previously provided to counterbalance their lack of power.¹⁸⁶

These factors account for the existence in the new law of certain surprising, indeed illogical, provisions; they respond to the hypothesis of a "sociological survival of the old law."¹⁸⁷ Thus, articles 1419(1) and 1420(2) determine the consequences of the husband's consent to an obligation assumed by his wife, although such consent is not necessary. This was done because it was thought that the husband would continue to be called upon to co-sign with his wife or would intervene in her acts.¹⁸⁸ Similarly, articles 1430 and 1435 contemplate a husband's in-

185. Although the emancipation of women always was supported by the more progressive political parties, women's vote in France, as revealed by surveys, always has been as a whole more conservative than that of the men.

186. In particular, the wife under the legal regime has lost the right to renounce the community.

187. Carbonnier, *Quelques remarques sur l'esprit de la loi française du 13 juillet 1965 portant réforme des régimes matrimoniaux*, 14 MCGILL L.J. 590, 595 (1968): "A certain pessimism born of realism was part of the legislative policy followed in 1965 A feminist reform, if it intends to keep its feet on the ground, must not assume that overnight all married women will have sufficient information, will or vigilance to exercise the new rights which will be given to them."

188. All of article 1419 constitutes an exception to the provision of article 1418(2) dealing with the case where "a spouse gives his or her consent to the obligation undertaken by the other." The exception thus provides for one of the only two possible cases—consent of the husband to a debt contracted by the wife—which shows clearly that it is doomed to be repealed in the future. Carbonnier, *supra* note 187, at 597 n.11.

volvement in the reinvestment of his wife's separate property, although this could, and should, be done by the wife alone. Conversely, regarding safeguards, articles 1471 and 1472 maintain preferences for the wife in regulating reimbursements (*récompenses*) between spouses. Such provisions are, in the spirit of the new legislation, intended to disappear when time has accomplished the modifications of behavior. The image of a dead branch probably was in the mind of the redactor when he took care to enact some of these rules in separate paragraphs at the ends of the articles.¹⁸⁹

CONCLUSION

The few observations that can be made concerning the future of the revision program are less important than the lessons which can be learned from what has been accomplished regarding the general theory of civil law.

On the first point, mention already has been made that there are reasons to doubt whether the project can follow its course with the same success. Indeed, as the completed revisions of portions of the Code followed one another, it was noticeable that their adoption met with increasing difficulties. The latest one—divorce—seems to have experienced particular difficulties in the drafting stage. Nevertheless, the revision of the law of persons and of the family soon might be completed with the updating of the provisions on domicile and absence, and even the complete revision of the title "Of Successions," a topic that raises problems of a much greater scope.

Yet, supposing this accomplished, it will be necessary then to take up the matters on which the Civil Code Revision Commission previously encountered problems of legislative politics.¹⁹⁰ These difficulties are by no means abated. In the law of property, uncertainties continue to exist regarding the future of the right of ownership. Besides, profuse administrative regulations have developed, the essential part of which, regrouped under the label of law of urban planning (*droit de l'urbanisme*), would be difficult to incorporate into the Civil Code or even to reconcile with it.¹⁹¹ In the law of contracts, imperative provisions, and others dero-

189. *E.g.*, FR. C. CIV. arts. 1471, 1472. This is the case of the above mentioned provisions giving the wife precedence over the husband in the recovery (*reprises*) and reimbursements (*récompenses*) when the community is liquidated.

190. See text at notes 30-34, *supra*.

191. Law of Dec. 31, 1976, [1976] L. No. 1286, in D. 1977. L. 62, has inserted into the Civil Code articles regulating co-ownership (*indivision*). While maintaining the general rule that any co-owner may demand partition at any time, the law permits agreements not to

gating from the general law, continue to develop in particular areas.¹⁹² It would be possible to limit the revision to a restatement of principles that hardly have changed since the Code Napoleon, but inasmuch as France is oriented toward a rapprochement of European laws on this point, it is felt that an isolated endeavor would be inopportune.¹⁹³

Of more general interest are the conclusions to be drawn concerning the impact upon the general orientation of civil law of what has been done. A first observation is that the civilian technique by no means has become obsolete. When used with competence it permits, as much today as in the past, the enunciation of the law in a clear, reliable and relatively simple form. In this regard, the sort of "family code" which has been inserted into the old Code Napoleon can be regarded as a masterly example of codification. It would be quite inaccurate, however, to see here only an academic exercise in imitation of the past. Although the technique is the same, the spirit is a new one. A new concept of the role of written law and codification emerges throughout the revisions.¹⁹⁴ While retaining its primary "directive" role in many matters, the law has become perceptibly more "functional". The legislator has descended from his elevated plateau in order to give moderate and pragmatic solutions to concrete problems. He was concerned continually with making the new laws effective so that no discordances should arise between them and the living reality. The steps taken in that direction may seem at first to be a blow to the omnipotence of written law, but considering the taint of fiction in this dogma, codified law should receive new vigor from what at first appears to be a restriction.

partition for a certain length of time and even allows one or more co-owners to petition the courts to the same effect. The law provides rules for the management of the undivided assets in such instances.

192. An example is the law of December 22, 1972 that provides for the protection of consumers who have been solicited in their homes by enunciating specific conditions for the validity of contracts thus concluded.

193. A reform of title IX of Book III, *Du contrat de société* (partnership) has been effected by a Law of January 4, 1978, [1978] L. No. 9, in D. 1978. L. 69.

194. Thus a study of the reform has reached the conclusion that a "new era" of civil legislation has begun, that of "sociological legislation." G. CORNU, *supra* note 102, at 155.