PRELIMINARY ADDRESS ON THE FIRST DRAFT OF THE CIVIL CODE[1]

Presented in the year IX by Messrs. Portalis, Tronchet, Bigot-Préameneu and Maleville, members of the government-appointed commission

A decree of the Consuls of 24 Thermidor VIII charged the Minister of Justice to convene us "to compare the order followed in the writing of the drafts of the Civil Code published to date, to determine the outline we would consider most suitable for adoption, and to then discuss the principal foundations of civil legislation."

This decree is consonant with the desire expressed by all our national and legislative assemblies.

Our consultations are completed.

We are accountable to the fatherland and to the government for the understanding we formed of our important mission, and for the way in which we believed it ought to be carried out.

France, as well as the other great States of Europe, has successively expanded through conquest and through the free union of different peoples.

The conquered peoples and the peoples who remained free have always stipulated, in their capitulations and in their treaties, the maintenance of their civil legislation. Experience shows that men more readily change their masters than their laws.

Hence this prodigious diversity of customs found within a single empire. It might be said that France was but a society of societies. The fatherland was common, and the States separate and distinct; the territory was one, and the nations various.

Commendable magistrates had more than once conceived the plan to establish a uniform legislation. Uniformity is a kind of perfection that, in the words of one celebrated author, sometimes seize great spirits, but that infallibly strike small ones.

But how to give the same laws to men who, though subject to the same government, did not live in the same climate and had such different ways? How to eradicate customs to which the attachment was as to privileges, and regarded as so many impediments to the changing wishes of an arbitrary power? One feared weakening or even destroying through drastic measures, the common bonds of authority and obedience.

Suddenly a great revolution took place. All abuses came under attack; all institutions were questioned. At the simple word of one orator, the seemingly most unshakeable institutions crumbled; they were no longer rooted in either morals or conviction. These successes gave encouragement; and soon the caution that tolerated all things gave way to the desire to destroy everything.

One again conceived of uniformity in legislation, because one glimpsed the possibility of achieving it.

But could a good civil code be born in the midst of the political crises that were troubling France?

Every revolution is a conquest. Does one make laws during the transition from the old government to the new? By sheer force of circumstance, these laws are necessarily hostile, partial, revolutionary. One is swept along by the need to break with all customs, to weaken all bonds, to exclude all malcontents. The concern is no longer for the private relationships among men; there is only the political and general purpose. One seeks confederates rather than fellow citizens. All becomes public law.

If we fix our attention on civil laws, it is not so much to render them more wise or just, as to render them more favourable to those for whom it is important to have a taste of the regime being established. The authority of fathers is overturned, because children are more receptive to what is new. Marital authority is not respected, because it is in giving women greater freedom that new conventions and a new tone are introduced into the commerce of life. The whole system of successions must

undergo drastic change, because it is expedient to prepare a new order of citizens through a new order of owners. Change is continually born of change, and circumstance of circumstance. Institutions follow one another in quick succession, with none being settled upon. And the revolutionary spirit seeps into everything. We call revolutionary spirit the exalted desire to violently sacrifice all rights for a political end, and to no longer allow any consideration other than that of a mysterious and variable State interest.

It is not at such a time that one can resolve to regulate matters and men with that wisdom which prevails in enduring institutions, and according to the principles of that natural equity of which human lawmakers ought to be merely the respectful interpreters.

Today, France breathes again, and the Constitution that guarantees its repose allows it to consider its prosperity.

Good civil laws are the greatest good that men can give and receive. They are the source of morals, the *palladium* of property, and the guarantee of all public and private peace. If they are not the foundation of government, they are its supports; they moderate power and help ensure respect for it, as though power were justice itself. They affect every individual; they mingle with the primary activities of his life; they follow him everywhere. They are often the sole moral code of a people, and they are always part of its freedom. Finally, good civil laws are the consolation of every citizen for the sacrifices that political law demands of him for the city, protecting, when necessary, his person and his property as though he alone were the whole city. Accordingly, the drafting of the Civil Code readily attracted the benevolence of the hero installed by the nation as its highest public official, whose genius imbues all things and who will always believe himself bound to toil for its glory, so long as there remains something for him to accomplish for our happiness.

But what a great task is the drafting of a civil legislation for a great people! The endeavour would be beyond human powers, if it entailed giving this people an entirely new institution and if, forgetting that civil legislation ranks first among civilised nations, one did not deign to benefit from the experience of the past and from that tradition of good sense, rules and maxims which has come down to us and informs the spirit of centuries.

Laws are not pure acts of power; they are acts of wisdom, justice and reason. The lawmaker does not exert an authority so much as a sacred function. He must not lose sight of the fact that laws are made for men, and not men for laws; that they must be adapted to the character, customs, circumstances of the people for whom they are made; that one must be sparing of the new in matters of legislation, because, while one can, in a new institution, calculate the advantages that theory offers, one cannot know all the disadvantages which practice alone can reveal; that one must leave well enough alone, if betterment is uncertain; that in remedying an abuse, one must imagine the dangers posed by the remedy itself; that it would be absurd to indulge notions of absolute perfection in matters susceptible only to relative goodness; that, rather than change laws, it is almost always more useful to present the citizenry with new reasons to love them; that history offers us the promulgation of no more than two or three good laws over the span of several centuries; and finally, the only ones entitled to propose changes should be those born felicitous enough to penetrate, by a burst of genius and by a kind of sudden flash of inspiration, the whole constitution of a State.

Consul Cambacérès a few years ago published a draft code in which the classification of subjects was as precise as it was methodical. This public official, wise and enlightened equally, would have left us nothing to do had he been able to give free rein to his insights and principles, and had pressing and fleeting circumstances not established in axioms of law errors in which he had no part.

After 18 Brumaire, a commission, composed of men whom the national will had placed in various constituted authorities, was formed to complete a project already too often taken up and abandoned. The useful work of this commission guided and abbreviated our own.

At the start of our consultations, we were struck by the view, so widespread, that, in the drafting of a civil code, a few very precise texts on each subject might suffice and that the great art lies in simplifying everything while foreseeing all.

Simplifying everything is a process on which there must be agreement. Foreseeing all is a goal impossible to attain.

There must be no unnecessary laws. They would weaken the necessary laws; they would compromise the certitude and majesty of legislation. But a great State such as France, which is both agricultural and mercantile, which encompasses so many different vocations, and which offers so many different types of industry, cannot have laws as simple as those of a poor or lesser society.

The Laws of the Twelve Tables are continually proposed as a model. But can the institutions of a nascent people be compared to those of a people that attained the highest degree of wealth and civilisation? Was it long before Rome, born for greatness and destined, as it were, to be the eternal city, recognised the inadequacy of its first laws? Were the changes that occurred imperceptibly in its morals not produced in its legislation? Did one not soon begin to distinguish between written law and unwritten law? Did one not see the successive appearance of *senatus consulta*, plebiscites, praetors' edicts, consuls' ordinances, councillors' rules, jurisconsults' responses or decisions, pragmatic sanctions, rescripts, edicts, emperors' Novels? The history of the legislation of Rome is more or less that of the legislation of all peoples.

In despotic States, where the prince is owner of all the land, where all commerce is carried out on behalf of the head of State and for his profit, where individuals have neither freedom, nor will, nor property, there are more judges and hangmen than laws. But wherever citizens have property to protect and defend, wherever they have political and civil rights, wherever honour counts for something, a certain number of laws are needed to confront all situations. The different types of property, the different kinds of industry, the different situations of human life demand different rules. The lawmaker's concern must be proportional to the multiplicity and importance of the matters to be decided. Hence, in the codes of civilised nations there is that scrupulous foresight which multiplies individual cases and seems to make an art of reason itself.

We therefore did not think it necessary to simplify the laws to the point of leaving citizens without rules or guarantees regarding their most important interests.

We have also guarded against the dangerous ambition of wanting to regulate everything and foresee everything. Who would imagine that those who always consider a code too voluminous are the very ones who

dare to imperiously give the lawmaker the dreadful task of leaving nothing to the judge's decision.

Whatever one might do, positive laws could never entirely replace the use of natural reason in life's affairs. The needs of society are so varied, the communication of men so active, their interests so numerous, and their relationships so far reaching, that the lawmaker cannot possibly foresee all.

The very matters on which he fixes his attention involve a host of particulars that escape him or are too contentious and too volatile to be the subject of a statutory enactment.

Moreover, how does one bind the action of time? How to go against the course of events, or the imperceptible inclination of morals? How to know and calculate in advance what experience alone can reveal? Can foresight ever extend to things beyond the reach of thought?

A code, however complete it may seem, is no sooner finished than thousands of unexpected questions present themselves to the magistrate. For these laws, once drafted, remain as written. Men, on the other hand, never rest. They are always moving; and this movement, which never ceases and whose effects are variously modified by circumstances, continually produces some new fact, some new outcome.

Many things are therefore necessarily left to the authority of custom, to the discussion of learned men, to the arbitration of judges.

The function of the statute is to set down, in broad terms, the general maxims of the law, to establish principles rich in consequences, and not to deal with the particulars of the questions that may arise on every subject.

It is left to the magistrate and the jurisconsult, fully alive to the overall spirit of laws, to guide their application.

Hence, in all civilised nations one always sees, alongside the sanctuary of laws and under the watchful eye of the lawmaker, the formation of a body of maxims, decisions and doctrine that is refined daily by practice and by the impact of judicial deliberations; that continually grows from all the

knowledge acquired; and that has constantly been regarded as the true supplement of legislation.

Those who profess jurisprudence are criticised for having multiplied the subtleties, compilations and commentaries. This criticism may be well founded. But in what art, in what science has it not proven merited? Ought a particular class of men be accused of what is merely a general malady of the human spirit? There are times when one is condemned to ignorance because there are too few books; there are other times when instruction is difficult because there are too many.

If there is one area in which excessive commentary, discussion and writing can be excused, it is, above all, in jurisprudence. One will readily believe this if one considers the innumerable threads that tie citizens; the development and successive progression of subjects with which the magistrate and jurisconsult must concern themselves; the course of events and circumstances that alter social relationships in so many ways; finally, the continuous action and reaction of all the diverse passions and interests. He who criticises the subtleties and commentaries is the very one who, in a personal suit, becomes the most subtle and fastidious of commentators.

It would doubtless be desirable for all matters to be provided for by laws.

But, in the absence of a specific enactment on every subject, an old, consistent and well-established custom, an unbroken succession of similar rulings, a received opinion or maxim serves as law. When not guided by anything established or known, when faced with an entirely new occurrence, one returns to the principles of natural law. For while the foresight of lawmakers is limited, nature is limitless; it applies to every thing that may be of interest to men.

All this assumes compilations, compendia, treatises, numerous volumes of studies and dissertations.

The people, it is said, cannot untangle from this maze what ought to be done or not done to ensure the protection of their possessions and their rights.

But would even the simplest code be within the grasp of all classes of society? Would passions not be perpetually engaged in distorting the true meaning? Is there no need for a certain experience in order to apply laws sensibly? In what nation, moreover, have laws that are simple and few in number sufficed for long?

One would be mistaken in thinking there could exist a body of laws that would anticipate every possible case, yet be within the grasp of the humblest citizen.

Given the present state of our societies, it is most fortunate that jurisprudence forms a science that can focus talent, flatter pride and awaken emulation. A whole class of men now devotes itself to this science, and this class, dedicated to the study of laws, provides advisers and defenders to citizens who could not find their own way and defend themselves and is becoming a kind of seminary of the magistracy.

It is most fortunate that there are compendia, and a continuous tradition of customs, maxims and rules, so that one must, in a sense, judge today as one judged yesterday; and that there are no variations in public judgements other than those brought about by the advance of knowledge and force of circumstance.

It is most fortunate that the need for the judge to improve his knowledge, to investigate, to examine in depth the matters that come before him, never allows him to forget that, while some things are subject to his reason, none of them are subject purely to his whim or desire.

In Turkey, where jurisprudence is no art, where the *bacha* can rule as he wants when not hindered by orders from above, one observes that citizens neither demand nor receive justice without dread. Why is there not the same anxiousness about our judges? Because they have a wide experience in matters; they have insight and knowledge; and they believe they have a constant duty to consult with each other. There is no telling the degree to which this habit of science and reason mitigates and regulates power.

To balance the authority that we give judges to rule on matters not determined by statutes, we invoke the right of every citizen to be judged only according to a previous and constant law.

This right cannot be ignored. But, for its application, it is necessary to distinguish between criminal matters and civil matters.

Criminal matters, which turn only on certain actions, are defined. Civil matters are not. They encompass without limitation all the actions and all the complex and various interests that may give rise to a dispute between men living in society. Consequently, civil matters are not susceptible to the foresight that can be brought to bear in criminal matters.

Secondly, in civil matters, the dispute is always between two or more citizens. An issue of property or any other similar issue cannot remain unresolved between them. A decision must be taken; the dispute must somehow be brought to an end. If the parties cannot themselves reach an agreement, what is the State to do? Unable to give them laws on every subject, it offers them, in the person of the public magistrate, an informed and impartial arbitrator whose decision prevents them from coming to blows, and he is certainly more beneficial to them than a prolonged dispute, neither the repercussions nor the outcome of which they could predict. The apparent arbitrariness of equity is better than the turmoil of passions.

In criminal matters, however, the dispute is between the citizen and the State. The intent of the State can only be represented by that of the law. The citizen whose actions do not contravene the law will therefore not be disturbed or accused on behalf of the State. Here, not only is there no need to judge, but there is no matter to be judged.

The law that serves as the basis for the accusation must precede the action of which one is accused. The lawmaker must not strike without warning; otherwise, the law, contrary to its fundamental purpose, would not set out to make men better, but only to make them more miserable, which would go against the very essence of things.

Thus, in criminal matters, where the judge's action can be based only on a formal, pre-existing enactment, there must be specific laws and no jurisprudence. This is not so in civil matters. Here, there must be jurisprudence, because it is impossible to regulate every civil matter by laws and because it is necessary to end disputes between individuals that cannot be

left unresolved, without forcing every citizen to become the judge in his own case, and not forgetting that justice is the first debt of sovereignty.

On the basis of the maxim that judges must obey laws and are prohibited from interpreting them, the courts, in recent years, have been referring the litigants to the legislative authority, through summary procedures, every time they lacked law or found the existing law obscure. The court of cassation has continually considered this abuse as a denial of justice.

There are two kinds of interpretation: one doctrinal, and the other authoritative.

Doctrinal interpretation consists in grasping the true meaning of laws, in applying them judiciously and in supplementing them in cases where they do not apply. Can one conceive of fulfilling the office of judge without this type of interpretation?

Authoritative interpretation consists in settling issues and doubts by means of rules or general provisions. This mode of interpretation is the only one denied the judge.

When the law is clear, it must be heeded; when it is unclear, the provisions must be further elaborated. If there is no law, then custom or equity must be consulted. Equity is the return to natural law when positive laws are silent, contradictory or vague.

To compel the magistrate to resort to the lawmaker would be to admit the most grievous of principles; it would be to revive among us the disastrous legislation of rescripts. For when the lawmaker steps in to rule on matters arising and heatedly debated between individuals, he is no more protected from surprises than the courts. There is less reason to dread the controlled, timid and circumspect arbitrariness of a judge who can be overturned, and who can be prosecuted for abuse of authority, than the absolute arbitrariness of an independent authority that is never accountable.

Parties who have dealings with each other in an area not defined by positive law are subject to accepted customs or to universal equity in the absence of any custom. Now, observing a point of custom and applying it to a private dispute is a judicial act, not a legislative one. The very applica-

tion of this equity or this distributive justice, which follows and must follow, in each particular case, together with all the little threads that tie one litigant to the other, can never be left to the lawmaker, who is only the agent of this justice or this general equity and who, without considering any particular circumstance, embraces the universality of things and persons. Laws pronounced on private matters would, then, often become suspected of bias and always be retroactive and unjust for the parties to a dispute that preceded the pronouncement of these laws.

Furthermore, resorting to the lawmaker would result in disastrous delays for litigants and, even worse, would compromise the wisdom and sanctity of the laws.

In effect, the law governs everyone: it considers men collectively, never individually; it must not involve itself in individual events or disputes that divide citizens. If it did, new laws would have to be made every day: their sheer number would stifle their dignity and compromise their observance. The jurisconsult would have no function, and the lawmaker, bogged down in the particulars, would soon be no more than a jurisconsult. The legislative power would be besieged by private interests, distracting it, at every turn, from the general interest of society.

There is a science for lawmakers, just as there is one for magistrates; and the one does not resemble the other. The lawmaker's science consists in finding, on every subject, the principles most favourable to the common good. The magistrate's science consists in applying those principles, ramifying them, extending them, through wise and reasoned application, to private hypotheses; in analysing the spirit of the law when the letter is silent; and in not exposing himself to the risk of being, by turns, slave and rebel, and of disobeying out of a sense of servility.

The lawmaker must keep a watchful eye on jurisprudence; it can enlighten him, and he, for his part, can improve it; but jurisprudence there must be. In this vastness of the diverse subjects that constitute civil matters, and the judgement of which entails, in the majority of cases, less the application of a specific enactment than the combining of several enactments that lead to, rather than contain, the decision, one can no more do without jurisprudence than without laws. Now, it is to jurisprudence that we leave those rare and exceptional cases that cannot fit within the framework of a reasonable legislation, the too-volatile and too-

contentious particulars that must not occupy the lawmaker, and all the subjects it would be futile to try and foresee, or whose hasty prediction could not be free of risk. It is left to experience to continually fill the voids we leave. The codes of peoples are made over time; but, strictly speaking, we do not make them.

We thought it useful to begin our work with a preliminary book, *Of law and legislation in general*.

Law is universal reason, supreme reason based on the very nature of things. Legislation is, or ought only to be, law reduced to positive rules, to specific precepts.

Law is morally imperative, but in itself is not constraining. It guides; laws command. It is the map; and laws, the compasses.

Diverse peoples coexist only under the rule of law; the members of a city are governed, as men, by law, and as citizens, by legislation.

Natural law and the law of nations differ not at all in their substance, only in their application. Reason, as it governs all men for all time, is called natural law, and it is called the law of nations as it governs the relations among peoples.

If one speaks of a natural law of nations and a positive law of nations, it is to distinguish the eternal principles of justice that peoples have had no part in making, and to which the various bodies of nations, and every individual, are subject, from the capitulations, treaties and customs that are the work of peoples.

In reviewing the definitions that most jurisconsults have given law, we noticed how flawed these definitions are. They do not allow us at all to appreciate the difference that exists between a moral principle and a State law.

In every city, the law is a solemn declaration of the intent of the sovereign power with regard to a matter of common interest.

All laws pertain to persons or property, and to property for the use of persons.

It is important, even in dealing only with civil matters, to provide a general idea of the various types of laws that govern a people; for all laws, of any kind, are necessarily connected to each other. There is no private matter into which some aspect of public administration does not enter, just as there is no public matter that does not involve, to some degree, the principles of that distributive justice which governs private interests.

To understand the various types of laws, one need only observe the various kinds of relationships that exist among men living in the same society.

The relationships of those who govern with those who are governed, and of each citizen with every other, are the concern of constitutional and political laws.

Civil laws govern the relationships, natural or contractual, forced or voluntary, necessary or merely convenient, that bind every individual to one or more other individuals.

The civil code comes under the protection of political laws; it must be harmonious with them. It would be a great wrong were there to be conflict in the maxims that govern men.

Penal or criminal laws are not so much a particular type of laws as the sanction of all others.

They do not regulate, in the strict sense, the relationships among men, but the relationships of each man to the laws enacted for the benefit of all.

Military affairs, commerce, taxation, and a number of other subjects presume particular relationships that do not belong exclusively to any one of the previous divisions.

Laws, strictly speaking, differ from mere regulations. It is the function of laws to set down, in every sphere, the fundamental rules and to determine the basic conventions. The particulars of enforcement, the provisional or incidental precautionary measures, the transitory or inconstant objects, in a word, anything that requires far more the vigilance of the administering

authority than the intervention of the instituting or creating power, is the concern of regulations. Regulations are acts of magistracy, and laws are acts of sovereignty.

As laws cannot create obligations unless they are known, we concerned ourselves with the form of their promulgation. Notice cannot be given to every individual. We are forced to content ourselves with a relative publicity, which, if it cannot give every citizen, in time, knowledge of the law with which he must comply, at least manages to prevent any arbitrariness concerning the moment from which the law is to be enforced.

We determined the various effects of the law. It permits or it prohibits. It orders, it establishes, it remedies, it punishes or it rewards. It is binding, without distinction, on all those who live under its rule. Even foreigners, during their residency, are the fortuitous subjects of the laws of the State. To inhabit the jurisdiction is to submit to its sovereignty.

That which is not contrary to the laws is lawful. But that which complies with them is not always fair. For laws have more to do with the political good of the society than with the moral perfection of the man.

As a rule, laws have no retroactive effect. The principle is unassailable. We have, however, limited this principle to new laws; we have not extended it to those that merely mention or explain old laws. Intermediate errors or abuses do not make law, unless, in the interval between one law and another, they have become established through settlements, judgments of last resort, or arbitral decisions that have acquired the force of *res judicata*.

Laws remain in effect until they are repealed by other laws or fall into abeyance. If we have not formally authorised the means of repeal by abeyance or disuse, it is because it might have been perilous to do so. But one cannot ignore the influence and usefulness of this unintentional accord, this invisible power by which, without upheaval or commotion, peoples dispense with bad laws, and which seems to protect society from the surprises sprung on the lawmaker, and the lawmaker from himself.

The judiciary, established to apply laws, needs to be guided in this application by certain rules. We have outlined them. They are such that the

private reason of no man can ever prevail over the law, which embodies public reason.

Having drafted the preliminary book *Of law and legislation in general*, we went on to consider the subjects to be defined and regulated by civil laws.

France, at one time divided into countries of customary law and countries of written law, was governed partly by customs, and partly by written law. A number of royal decrees were common throughout the empire.

Since the Revolution, French legislation has undergone, in important respects, considerable change. Should all that is new be left out? Should all that is old be discounted?

Written law, which is made up of Roman laws, has civilised Europe. Our forefathers' discovery of the Justinian Compilation was a kind of revelation for them. It was then that our courts assumed a more regular form, and the awesome power of judging became subject to principles.

Most authors who criticise Roman law as bitterly as they do rashly, blaspheme that of which they are ignorant. One is soon convinced of this if, in the collections that have brought this law down to us, one can distinguish those laws worthy of being termed written reason, from those that concerned only specific institutions, foreign to our situation and our customs; if one can distinguish the *senatus consulta*, the plebiscite, the edict of the magnanimous, from the emperors' rescripts, a kind of legislation pleaded for, granted on credit or importunity, and fabricated in the courts of so many brutes who devastated Rome and sold judgments and laws publicly.

Among our customs are doubtless some that bear the mark of our initial barbarism; but there are others that are a credit to the wisdom of our fathers, that have shaped the national character, and that are worthy of better times. We have renounced only those whose spirit has given way to another spirit, the letter of which is merely a daily source of interminable controversies, and which are repugnant to both reason and our morals.

In examining the last royal decrees, we kept all those that concern the essential order of societies, the maintenance of public decency, the security of patrimony, and the general prosperity.

Of the laws published by our national assemblies on civil matters, we have respected all those which are connected with the enormous changes the political order has undergone, or which, in themselves, struck us as obviously preferable to worn out and flawed institutions. Change is necessary when the most disastrous of all innovations would be, as it were, not to innovate. One must not give in to blind prejudices. All that is old was once new. What is essential is to impart to the new institutions that character of permanence and stability that can guarantee them the right to grow old.

We have made, if one can express it this way, a compromise between written law and customs whenever we were able to reconcile their provisions, or to modify some in light of others, without disrupting the unity of the system or offending the general spirit. It is useful to protect all that need not be destroyed: laws must show consideration for common practices, when such practices are not vices. Too often one reasons as though the human race ended and began at every moment, with no sort of communication between one generation and that which replaces it. Generations, in succeeding one another, mingle, intertwine and merge. A lawmaker would be isolating his institutions from all that can naturalise them on earth if he did not carefully observe the natural relationships that always, to varying degrees, bind the present to the past and the future to the present; and that cause a people, unless it is exterminated or falls into a decline worse than annihilation, to always resemble itself to some degree. We have, in our modern times, loved change and reform too much; if, when it comes to institutions and laws, centuries of ignorance have been the arena of abuses, then centuries of philosophy and knowledge have all too often been the arena of excesses.

Marriage, the government of families, the status of children, guardianships, matters of domicile, the rights of absent persons, the different kinds of property, the different means of acquisition, protecting or increasing one's property, successions, contracts: these are the main subjects of a civil code. We must explain the principles that motivated our draft laws in these important areas, and state the relationships these laws may have with the common weal, with public morals, with the happiness of individuals, and with the present state of affairs.

It is only in these recent times that we have had clear notions about marriage. The blending of civil institutions and religious institutions had obscured the initial concepts. A few theologians saw in marriage only the sacrament; most jurisconsults saw in it only the civil contract. Some authors made of marriage a kind of hybrid act encompassing both a civil contract and an ecclesiastical one. Natural law counted for nothing in the primary and greatest act of nature.

The confused notions held about the essence and characteristics of conjugal union caused daily predicaments in legislation and in jurisprudence. There was always conflict between the clergy and the empire when it came to making laws or pronouncing judgements on this important matter. Nothing was known of what marriage itself was, of what civil laws had added to natural laws, of what religious laws had added to civil laws, and of the scope of the authority of these various types of laws.

All these uncertainties vanish, all these predicaments dissipate, as one looks back to the true origin of marriage, on the selfsame date as the Creation.

We became convinced that marriage, which existed before the founding of Christianity, which preceded all positive law, and which derives from the very essence of our being, is neither a civil act nor a religious act, but a natural act on which lawmakers have fixed their attention and which religion has sanctified.

Roman jurisconsults, in speaking of marriage, often confused the physical aspect of nature, common to all animate beings, with natural law, which governs men specifically and is based on the relationships that free and intelligent beings have with their own kind. Hence, we questioned whether there was any evidence of morality in marriage considered in the purely natural order.

We appreciate that non-intelligent beings, who yield only to blind impulse or instinct, have with each other only fortuitous encounters or periodic engagements devoid of any morality. But in men, reason always intervenes, to varying degrees, in every act of life, emotion is next to appetite, right follows instinct, and all is refined or ennobled.

No doubt, the general desire one sex feels for the other belongs exclusively to the physical order of nature. But the choice, the preference, the love that determines this desire and fixes it on a single subject, or at least gives it a greater degree of energy for the preferred subject; mutual regard, the reciprocal duties and obligations that are born of the union once formed, and that develop between reasonable and sensitive beings; all that belongs to natural law. Consequently, it is no longer a mere encounter we see, it is a real contract.

Love, or the feeling of preference that forms this contract, gives us the solution to all the problems that arise surrounding the plurality of women or men in marriage. For such is the empire of love that, except for the one loved, one sex is no longer of importance to the other. The preference one grants, one wishes to receive; the engagement must be mutual. Let us be eternally grateful to nature, which, while giving us irresistible instincts, has placed in our own heart the control and check of these instincts. It might be said that in certain climates and in certain circumstances, polygamy is less appalling than in other circumstances and in other climates. But in all countries, it is irreconcilable with the essence of an engagement whereby one gives oneself completely, body and heart. We have therefore established the maxim that marriage can be the engagement of two individuals only, and that for as long as a first marriage survives, it is forbidden to contract a second.

The coming together of two sexes that nature has made so different only to unite them soon has appreciable effects. The woman becomes a mother: a new instinct develops; new emotions, new duties bolster the initial ones. Before long, the woman's fertility is evidenced again. Nature imperceptibly extends the duration of the conjugal union, cementing this union each year with new delights, and new obligations. It makes use of every situation, every event, to produce a new order of pleasure and virtues.

The upbringing of children demands, over a long succession of years, the joint care of their noble progenitors. Men exist a long time before they know how to live, just as, towards the end of their career, they often cease to live before they cease to exist. The cradle of childhood must be protected from the ills and wants that beset it. In later years, the mind needs cultivation. It is important to keep watch over the first stirrings of the heart; to repress or guide the first surgings of passions; to protect the ex-

ertions of a budding reason from all the sorts of seductions that surround it; to keep a close watch on nature so as not to thwart what is at work, in order to achieve with nature the great work in which it deigns to involve us.

All this time, the husband, the wife, the children, brought together under the same roof and by the dearest interests, acquire the habit of the tenderest affections. The two spouses feel the need to love each other, and the need to love each other always. The tenderest emotions known to men, conjugal love and paternal love, are born and strengthened.

Old age, if one may say so, never comes to faithful and virtuous spouses. In the midst of the infirmities of this age, the burden of a languishing life is lightened by the fondest memories, and by the ministrations, so necessary, of the young family, into which one is reborn and which seems to pull us back from the edges of the grave.

Such is marriage, considered, in itself and in its natural effects, independent of all positive law. It offers us the fundamental notion of a contract strictly speaking, and of a perpetual contract by destination.

As this contract, according to the observations we have just presented, subjugates the spouses to each other, to their respective obligations, as it subjects them to shared obligations towards those they have brought into being, the laws of all civilised peoples have believed it necessary to establish conventions for the recognition of those bound by these obligations. We have established these conventions.

The publicity, the solemnity, of marriages may alone prevent those vague and illicit unions that are so unfavourable to the propagation of the species.

Civil laws must interpose their authority between spouses, between fathers and children; they must regulate the government of the family. We have sought, in nature, the blueprint for this government. Marital authority is based on the need to give, in a society of two individuals, the preponderant voice to one of the members, and on the pre-eminence of the sex to which this advantage is given. The authority of fathers is justified by their affection, by their experience, and by the maturity of their reason, and by the weakness of that of their children. This authority is a

kind of public office to which it is important, particularly in free States, to give some scope. Yes, there is a need for fathers to be real public officials wherever the maintenance of freedom requires that public officials be no more than fathers.

When one knows the essence, the traits and the purpose of marriage, one readily discovers the impediments that, on their own strength, render someone incapable of contracting it, and of these impediments, those derived from positive law and those determined by nature itself. Among those determined by nature must be included insufficient years. In general, marriage is permitted of anyone who can fulfil the vow of its institution. There is no natural exception to this rule of natural law other than for persons within certain degrees of kinship. Marriage must be forbidden between all direct ascendants and descendants: we need not give the reasons why; they have occurred to all lawmakers. Marriage must also be forbidden between brothers and sisters, because the family is the sanctuary of morals, and morals would be threatened by all the preliminaries of love, desire and seduction that precede and prepare the way for marriage. When the prohibition is extended to more distant relations, it can only be so by political design.

Lack of freedom, abduction, mistake as to person are likewise natural impediments, because they exclude the notion of true consent. The intercession of fathers, of guardians, is but one condition prescribed by positive law. The absence of this intercession is merely a civil nullity. The lawmaker can, in the interest of public order, establish such impediments as he deems appropriate; but these impediments are then no more than pure positive law.

In weighing the impediments attached to marriage, the conventions and conditions required for its validity, we have indicated those cases where it is more expedient to rectify the wrong than to punish it, and have distinguished those instances where the nullities may be overshadowed by the conduct of the parties or by the mere passage of time, from those where the abuse always calls for the condemnation of laws.

The outcome of what we have just said is that marriage is a perpetual contract by destination. Recent laws permit divorce. Should these laws be preserved?

In permitting divorce, it is not at all the lawmaker's intent to go against the religious dogma of indissolubility, or to decide a matter of conscience. He merely assumes that the most heated passions, those that have caused, and still cause, so much devastation in the world, can destroy the harmony that must prevail between two spouses. He assumes that the excesses can be serious enough to render their shared life intolerable for these spouses. So, out of concern for their tranquillity, their security and their present happiness, which are the only things with which he is charged, he refrains from forcing them to remain inextricably bound to one another despite all the motives that divide them. Without offending against the views of religion, which continues in this and so many other matters to govern men in the nature of merit and freedom, the lawmaker employs his power only to prevent the disruptions most harmful to society, and to set limits on passions and abuses whose source one dare not hope to extinguish completely. Considered thus, the question of divorce becomes a purely civil question whose answer must be sought in the disadvantages or advantages that may result from divorce itself, seen from a political perspective.

Throughout time it has been understood that it is as dangerous as it is inhumane to bind together, with no way out, two spouses who weigh each other down. Hence, one finds, among those very peoples for whom the indissolubility of marriage is consecrated by civil laws, the use of separations, which loosen the bond of marriage, without breaking it.

The advantages and disadvantages of divorce have been variously presented by the different authors who have written on this subject.

It has been said, in favour of divorce, that marriage is deprived of all its sweetness by declaring it indissoluble; that in wanting to tie the conjugal knot too tightly, it is weakened; that domestic sorrows are dreadful when there is nothing more consoling to look to than their eternity; that the life of two spouses who are at odds with each other, and who are inextricably joined, is lost for posterity; that morals are compromised by bad marriages that cannot be broken; that a husband, disgusted by an eternal wife, indulges in dealings which, without fulfilling the purpose of marriage, represent, at best, its pleasures; that the suffering of children need not be any greater owing to divorce than owing to the discord that wracks an unhappy marriage; finally, that absolute indissolubility is as

injurious to the true welfare of families as to the common welfare of the State.

It is answered back that it is dangerous to abandon the heart to its whims and its inconstancy; that one resigns oneself to tolerating domestic unpleasantries, and even works to prevent them, when one knows that there is no opportunity of divorce; that, where this option is allowed, there is no longer marital authority, paternal authority, domestic government; that separation suffices to alleviate the troubles of shared life; that divorce holds little advantage for women and children; that it threatens morals by giving passions too free a rein; that there is nothing holy and religious about men if the marriage bond is not inviolable; that the regular propagation of the human race is much better assured by the trust of two faithful spouses, than by unions that passing fancies may render variable and uncertain; finally, that the continuance and good order of society as a whole depends essentially on the stability of families, which are the first among all societies, the germ and the foundation of empires.

Such have been the considerations put forward for and against divorce. As a result, the usefulness of divorce is founded on the danger and violence of passions, and only an extreme moderation of desires, the practice of the most austere virtues, could remove from absolute indissolubility the disadvantages believed to be inseparable from it.

What is the lawmaker to do? His laws must never be more perfect than the men for whom they are destined. He must consult the morals, the character, the political and religious situation of the nation he represents.

Is there a dominant religion? What are the dogmas of that religion? Or rather, are all faiths allowed without distinction? Is the society nascent or ancient? What is the form of government? All of these questions affect, more than one might think, the question of divorce.

Let us not forget that the question is not whether divorce is intrinsically good, but whether it is appropriate for laws to intervene in something that is naturally so free, and in which the heart must have an equal part.

In a nascent society, marriage is scarcely considered other than in connection with propagation of the species, because a new people needs to grow and multiply.

It is not at all impractical for simple and coarse men to have many children; they would fear not having enough. One sees, with no hint of scandal, a woman pass successively into the arms of several husbands. One permits the exposing of feeble or ill-formed children. One denies the possibility of marriage to persons who, because of their age, are no longer suited to nature's designs. Marriage is, then, governed by a few political laws, rather than by civil laws and natural laws. The former custom that permitted a Roman citizen to lend his wife to another so she would bear finer children, was a political law.

When a nation is formed, there are enough people. The concern for propagation diminishes; the concern is more for the pleasures and dignity of marriage than for its purpose. An attempt is made to establish a constant order in families, and to give love an influence that is so well-defined that this order can never be disturbed.

So the possibility of divorce is banned or allowed, depending on the morals and received notions in each country; on the degree of freedom it is believed wives should be allowed; on the degree to which husbands rule as monarchs; on the interest there is in strengthening domestic government or holding it back, in favouring the equality of fortunes or preventing too great a division of them.

In our modern times, it is primarily religious doctrines that have influenced the divorce laws.

Divorce was permitted among Romans. The Christian religion became established in the empire. Divorce existed until the 9th century; but it gave way to the new principles proclaimed about the nature of marriage.

For as long as the Catholic religion was dominant in France, for as long as religious institutions were inextricably joined with civil institutions, it was impossible for civil law not to declare as indissoluble an engagement so declared by religion, which was itself a law of the State: there must be harmony among the principles that govern men.

Today, freedom of religion is a fundamental law, and most religious doctrines allow divorce. The possibility of divorce is therefore linked, for us, to freedom of conscience.

Citizens may profess diverse faiths; but laws must be for everyone.

We therefore did not think it necessary to forbid divorce among us, because our laws would too formally conflict with the various faiths that permit it, and the laws could not hope for the men who profess these faiths to make of marriage a stronger bond than religion itself.

Moreover, apart from the consideration inferred from the diversity of faiths, civil law may very well, out of fear of greater ills, not use authority and constraint to force unhappy spouses to remain together, or to live in a forced celibacy, which is as harmful to morals as it is to society.

Law that allows all citizens, without distinction, the possibility of divorce, without troubling spouses whose faith opposes divorce, is a result, a consequence of our regime, that is to say, of the political and religious situation in France.

But the desire for perpetuity in marriage being the very desire of nature, the laws must establish a salutary curb on passions; they must prevent the holiest of contracts from becoming the victim of caprice, of inconstancy, or even from becoming the object of all the shameful speculations of a base avidity.

Since our new laws, the mere allegation of incompatibility of temperament and character could bring about the dissolution of the marriage.

To allege is not to prove: incompatibility of temperament and character is not even susceptible of rigorous, legal proof. So, in the final analysis, permitting divorce on a single ground is to give each spouse the grievous right to dissolve the marriage at will. Is there a single contract in the world that only one of the parties can arbitrarily and capriciously dissolve, against the wishes of the party with whom he has contracted?

It is observed that the allegation of incompatibility of temperament and character may conceal the very real causes, public discussion of which would bring shame on families and be a scandal for society. Moreover, the shared life of two spouses can become unbearable through a multitude of hostile behaviours, bitter reproaches, daily scorns, relentless, biting and persistent clashes, in a word, by a host of acts no one of which

may be thought serious, and which together are the misery and torment of the spouses who suffer them.

All that may be so; but it is also true that the mere allegation of incompatibility of temperament and character may conceal merely the absence of any reasonable motive. Who will assure us that sufficient cause to divorce does exist, in a case where none is given?

Marriage is not a situation, but a status. It must in no way resemble those brief and fleeting unions that pleasure forms, that end with pleasure, and that have been condemned by the laws of all civilised peoples.

It is said that we must come to the aid of two ill-matched spouses. We blame our morals and our customs for favouring bad marriages. The only remedy for these ills is found in the facility of divorce.

It is all too true that two spouses often form a union without knowing each other, and are condemned to live together without loving each other. It is all too true that designs of ambition and wealth, and often fantasies and easy morals, govern the formation of alliances and the fate of families. Moral and natural proprieties are usually sacrificed for civil proprieties.

But should these abuses summon others? Should the corruption of laws compound that of men? Because there are bad marriages, is one to conclude that there ought to be none that are sacred and inviolable? When the abuses are the work of passions alone, laws can remedy them; but when they are the work of laws, the ill is incurable, because it lies in the remedy itself.

Laws do everything within their power to prevent, in marriages, errors and mistakes that could be irreparable; they assure the contracting parties of the greatest freedom; they give the contract the widest publicity; they require the consent of fathers, a consent clearly based on the fond consideration that paternal caution, enlightened by the tenderest sentiments, is above all other. If, despite these precautions, the laws do not always achieve their proposed objective, let us blame only the weaknesses inseparable from humanity.

At what point does one demand the extreme facility of divorce for ill-suited marriages? When marriages become freer than ever; when, political equality having eliminated the extreme inequality of stations, two spouses are able to yield to the tender moods of nature and no longer have to struggle against the prejudices of pride, against all those social vanities that place, in unions and marriages, the nuisance, the need, and, dare we say, the inevitability of fate itself.

What we must fear today is that moral laxity will replace the former nuisance of marriage, and that, because of the considerable facility of divorce, a regular, as it were, libertine outlook, the product of permitted inconstancy, will replace marriage itself.

But, one might say, if the simple allegation of incompatibility of temperament and character is not allowed to stand, all the advantages of divorce are removed. Quite the contrary, we say; the abuses of divorce are merely multiplied and made worse if the means deduced from incompatibility of temperament and character are allowed to remain.

The allegation of this incompatibility will become the means of all those who have no means. The most important, the most noble, of contracts will have no substance and gain no respect; morals will continually be violated by laws.

Divorce could still be obtained by mutual consent, on the basis that marriage is a partnership, and that a partnership cannot exist for all time.

But can marriage be likened to ordinary partnerships?

Marriage is a partnership, but the most natural, the most holy, the most inviolable of all.

Marriage is necessary; the other contracts of partnership are not.

The purposes that become the stuff of ordinary partnerships are determined arbitrarily according to man's will; the purpose of marriage is determined by nature itself.

Ordinary partnerships concern scarcely more than the conveyance, to a greater or lesser degree, of property or industry. Property enters only

incidentally into marriage; the essence of this contract is the union of persons.

In ordinary partnerships, one stipulates for one's own undisclosed and private interests, and as the supreme arbiter of one's own destiny. In marriage, one does not stipulate solely for oneself, but for others. One promises to become the protector of the new family that one will bring into being. One stipulates for the State, for the general society of the human race.

The public is therefore always a party in matters of marriage; and, over and above the public, there are always third parties worthy of the utmost consideration and for whom one can have neither the desire nor the power to do harm. The conjugal partnership is like no other.

Mutual consent therefore cannot dissolve marriage, whereas it can dissolve any other partnership.

Neither do illnesses, infirmities, seem to us to provide legitimate reasons for divorce. Are not the two spouses joined to both their good and their bad fortune? Should they abandon each other when everything requires them to assist each other? Do duties come to an end with the amenities and the pleasures? According to the fine expression of Roman laws, is marriage not a complete and perfect partnership that presumes the sharing, between two spouses, of life's fortunes and misfortunes, the communication of all things divine and human?

The infirmity of the spouse whom one would like to be permitted to repudiate may have been contracted within the marriage itself. How could it become a reasonable opportunity for divorce? Pity, gratitude, ought they not then become the auxiliaries of love?

Nature, which has distinguished men by their emotion and reason, has wanted the obligations born of the union of the two sexes to always be guided by reason and emotion.

It has been claimed, in some writings, that everything that permits the separation of property must permit divorce, and that neither of these two things should operate without the other. Why should means that can legitimise the separation of property dissolve marriage? Marriage is but the

union of persons; the spouses are free not to commit their wealth. Why, then, make marriage depend on the one thing that is utterly foreign to it?

The separation of bodies once led to the separation of property, but the separation of property never led to the separation of bodies.

A man may be a bad administrator without being a bad husband. He may be entitled to the affections of his wife, without being entitled, in some regards, to her confidence. Will this wife then be forced to betray her heart in order to keep her property, or abandon her property in order to follow the impulses of her heart?

As a rule, divorce must not be pronounced without cause. The causes of the divorce must be obvious breaches of the contract. Hence, we allow, as legal causes, only civil death, which imitates natural death, and the crimes or offences of which one spouse may accuse the other. We did not think it tolerable to make divorce easier than separations once were.

Matters of divorce used to be referred to family councils; we have referred them to the courts. The intervention of justice is essential in matters as important as these. A family council, commonly made up of persons prepared in advance to agree to whatever was required of them, was no more than a band of confederates or complacent individuals always ready to conspire with the spouses against the laws. Relatives can, moreover, readily be suspected of love or hate against one party or the other; their self-interest greatly influences their opinion. They rarely retain, in matters so lightly dealt with by their circle, the gravity that morality demands in all that concerns morals. Unhappy experience has shown too well that friends or allies convened for a divorce believe they can fulfil their mission no more effectively than by signing a resolution drafted without their knowledge, and by appearing indifferent to everything that is taking place.

Moreover, all that concerns the civil status of men, their conventions and their respective rights, belongs essentially to the judicial system.

If divorce can now be granted only with cause, this cause must be verified. It is thought that the points of fact and of law to which such verification may give rise can be seriously debated only in a court of law.

To remove the danger from the debate, we have outlined a particular procedure, capable of rendering it sound and adequate, without rendering it public. All the issues of divorce must be dealt with behind closed doors, if one wants to avoid scandal.

We have left all avenues open for the reconciliation, the reuniting of the spouses.

The spouse obtaining the divorce must keep, by way of compensation, some of the benefits stipulated in the marriage contract. For we assume that he can obtain the divorce only for just cause; and his action, while bringing his troubles to an end, deprives him of his status and therefore leaves considerable damage to be repaired. There is no choosing between the person who seeks the divorce and the one who has made it necessary.

We thought it necessary, in the interests of public decency, to make provision for an interval between the divorce and a second marriage.

The judge has the right to order only a brief separation if he is hopeful that peace can be restored in the household. He urges, he invites, until he is obliged to render a decision.

In general, our aim, in all the proposed laws respecting divorce, has been to prevent its abuse and defend marriage from the effects of immorality. The path to evil inclines steeply; one ascends back to good only with some effort.

Families are formed through marriage, and they are the breeding ground of the State. Every family is a separate and distinct society, the governing of which affects the large family that encompasses them all.

Also, according to the notions we have attributed to the marriage contract, it is obviously the consent of the parties that forms this contract. It is fidelity, it is the pledge given, that renders the mate worthy of a man joining her to him as his spouse, a station so honourable that, as expressed by the ancients, it is not sensual delight, but rather virtue, honour itself that gives it that name. But obviously one also needs to be reassured about the true intent of the man and woman forming the union, through conditions and conventions that make known the nature and guarantee the effects of this union. Hence all the precautions, of which we have al-

ready spoken, and which have been taken to ensure the honesty and certainty of the marriage.

By these precautions, the spouses are known. Their engagement is placed under the protection of the laws, of the courts, of all good people. One learns to distinguish inconstancy from marital fidelity, and the straying of passions from the regulated exercise of the most precious rights of humanity.

The workings of nature in the mystery of procreation are impenetrable; it would be impossible for us to lift the veil that conceals them from us. Without a public and solemn marriage, all matters of filiation would remain clouded; maternity might be certain, paternity never would be. Is there a marriage in form, acknowledged by the law and recognised by society? The father is established: it is he who is proven by marriage. The presumption of the law, founded on the cohabitation of the spouses, on the self-interest and vigilance of the husband, on the obligation to assume the innocence of the woman rather than her sin, puts an end to all the uncertainties of the magistrate and guarantees the status of persons and the peace of families.

The rule that the father is he who is proven by marriage is so favourable, that it can yield only to obvious proof to the contrary.

Children born to a valid marriage are termed legitimate, because they are the issue of an engagement whose legitimacy and validity cannot be uncertain in the eyes of the laws.

In the case of a marriage that is invalid but contracted in good faith by either or both parties, the status of the children is not compromised. Positive laws, which never wholly deviate from natural law, and which, when they appear to do so, do so only to better adapt the designs of that law to the needs of society, have paid tribute to the natural principle that the essence of marriage consists in the faith the spouses place in each other. Thus, while normally only a marriage contracted in accordance with the prescribed conventions and the established law can legitimise children, one acknowledges as legitimate those children born of a putative marriage, that is, a marriage which the spouses believed to be lawful, and contracted freely between the parties with the intention of fulfilling the duties inseparable from their status, and of living with the conse-

quences, under the patronage of virtue and in the pureness of conjugal love.

Two main reasons led to the adoption of this principle. The first is the favour that attaches to the name of marriage, a name so powerful that its very shadow suffices to purify, in children, the principle of their birth. The second is the good faith of those who have entered into such an engagement: the fatherland acknowledges their intention to give it legitimate children. They formed an honest engagement; they thought they were doing what was prescribed by law, to leave lawful issue. A secret impediment, an unforeseen event eluded their foresight: one cannot refrain from recompensing them for the desire, the appearance, the name of marriage, and considers less what the children are than what the fathers and mothers wanted them to be.

The favour of common law has been extended so far that the good faith of one of the contracting parties has been deemed sufficient to legitimise the children born of their marriage. A number of former jurisconsults thought that in such cases, the children should be legitimate in relation to one of the spouses and illegitimate in relation to the other; but their opinion was rejected, on the basis that the status of men is indivisible, and that, things being as they are, one must decide wholly for legitimacy.

It was questioned whether subsequent marriage ought to legitimise children born prior to the marriage. English laws permit no legitimisation by subsequent marriage; they regard this sort of legitimisation as capable of promoting loose morals and disturbing the order of families. In France, one looked more to natural equity, which spoke in favour of the children, than to that reason of State which sacrifices all in the interest of society as a whole. Our laws presume that fathers and mothers who marry after having lived in an unlawful union have always intended to commit themselves to each other through the bonds of formal marriage. They assume that the marriage was contracted, at least in wish and desire, from the time the children were born. And through an equitable invention, they give the marriage retroactive effect.

We did not think it necessary to change this provision which the equity of our fathers seems to have recommended to us: but we have brought back the precautions that prevent it from becoming dangerous.

The status of children born outside of marriage is always more or less uncertain because, unaided by any presumption of law, it relies only on obscure facts that are often impossible to prove. It happened that, under cover of legitimisation by subsequent marriage, mysterious persons, who could not close their eyes to the vice of their origin, threatened, through contrived demands, the peace of families. These demands, almost never made until after the death of those who might have effectively dismissed them, filled the courts with quarrels so scandalous and dangerous as to shake all of society.

These troubles will be prevented if the law legitimises by subsequent marriage only those children legally recognised at the actual time of the marriage.

As the law presumes nothing, and cannot presume anything about children born of a union it does not recognise, these children must be acknowledged by those who brought them into being, in order to lay claim to rights. Were it otherwise, the honour of women, the peace of households, the wealth of citizens, would continually be in peril. The new laws made provision for ill intent, and we are retaining the provisions of these laws in this regard.

Possession was the first, and for some time the only, proof of a man's status. A man was reputed to be a husband, a child, who lived publicly, in one or other of these relationships, within a specific family. Since the discovery of writing, all that has changed: marriages, births, deaths are recorded in registers. Consequently, the most legitimate proof, in civil matters, is that derived from public registers. This principle is a kind of law of nations common to all civilised peoples.

But this proof, as authentic and legitimate as it may seem, is not the only proof. And just as it is not right for the neglect of parents, the corrupt practices of those who maintain the public registers, the misfortunes and abuses of the times, to make it impossible for a man to prove his status, so it is right for the law to provide, in all these instances, another proof that can compensate for the defect and repair the loss of registers. And that proof can only be the proof derived from other instruments and the deposition of witnesses.

Let us be mindful, however, that in matters of status, testimonial evidence ought not to be admitted without caution; it never has been admitted without a commencement of proof in writing. There must be some reassurance against a type of proof that inspires such mistrust: witnesses can be corrupted or seduced, their memory can deceive them, they can unwittingly be swept along by strange notions. Everything warns us that we must guard against simple testimony.

It would be unsound reasoning to argue, with regard to status, the ease with which testimonial evidence is accepted in criminal matters.

In criminal matters, the law would be powerless to learn of the crime it wants to suppress, if it did not allow testimonial evidence. For crimes are deeds which seldom, and only incidentally, involve writing. Now, pure deeds can be proven only by witnesses. The admission of testimonial evidence when seeking out and investigating crimes therefore derives from necessity.

The same necessity is hardly encountered in matters of status. The law intends the status of men to be recorded in public written records: it is more concerned with families than with individuals. The obscure fate of a citizen whose status may be unfairly compromised, is of less concern than the danger that may threaten all of society if, by a few solicited or suspect testimonies, one could admit into a family lowly persons who do not belong to it.

Secondly, seeking out a crime involves enquiring into an event that does not date back to a distant time, but is, in a manner of speaking, before our very eyes. Now, testimonial evidence is the natural evidence of recent events. This kind of evidence is less suitable in matters whose origin is nearly always lost in times long since past, and which, because of their complex circumstances, do not usually hold out either certainty or peace of mind.

Finally, in the investigation of a crime, the evidence of witnesses is refined through inconsistencies, through the reproaches of the accused, and through all the conventions that guarantee the accused the right to defend himself, whereas in matters of status, the dispute almost never arises until after the death of those persons who might solve the mystery or

dismiss the calumny. There are none of the means which, in criminal matters, serve so well to thwart lies and deceit.

We have therefore established the maxim that, in matters of status, testimonial evidence is admissible only when supported by a more impressive commencement of evidence, namely, by domestic documents, by writings of deceased and non-suspect persons, by letters missive sent and received in proper fashion, and finally, by a certain concurrence of events leaving permanent traces that might successfully be combined to shed light on the truth.

Having determined the evidence that guarantees the civil status of persons, we turned to the particulars of family government. The husband is the head of this government. The wife can have no domicile other than that of the husband. He administers all, he oversees all, the property and morals of his mate. But the administration of the husband must be sound, and his supervision moderate. The husband's influence is more a matter of protection than of power; it is the stronger one who is called on to defend and support the weaker one. A boundless dominion over women, such as we see established in some lands, would be repugnant to both the character of the nation and the gentleness of our laws. We allow in an amiable sex indiscretions and weaknesses that are blessings; and without encouraging the actions that might disturb order and offend decency, we exclude any measure that would be incompatible with public freedom.

Children must submit to the father; but he must heed only the voice of nature, the tenderest and sweetest of all voices; its name is at once the name of love, of dignity and of power. And his civic office, which has so religiously been called paternal devotion, has only that severity that can bring repentance to a wayward heart and is intended less to inflict punishment than to make worthy of forgiveness.

When children reach majority, the power of fathers ceases; but it ceases only in its civil effects. Respect and recognition continue to demand considerations and duties that the lawmaker no longer requires, and the deference of children to their noble progenitors is then the work of morals rather than of laws.

During the Revolution, majority was set at age twenty-one. We did not think its reform necessary, despite many possible reasons for doing so. In

our century, a thousand reasons combine for youth to mature at an earlier age; all too often, youth itself falls into decrepitude as childhood draws to an end. The influences of society and industry, today so widespread, motivate minds, taking the place of the lessons of experience, and preparing every individual to carry, at a younger age, the weight of his own destiny. Yet despite these considerations, we have extended to the age of twenty-five the need for paternal consent to marry. An act such as marriage determines one's happiness for a lifetime. It would be unwise, in the case of something so intimately governed by the most tremendous passions, to curtail the time during which the laws combine the wisdom of fathers with the resolve of children.

Guardianship is, in domestic government, a kind of subsidiary civic office whose duration and functions we have determined based on rules that are common to virtually all civilised nations. A guardian is in charge of person and property. He must be chosen by the family and from within the family, for he must have a real interest in protecting the property, and an interest, born of honour and affection, in overseeing the person's instruction and security. He cannot alienate, without cause or form, the property entrusted to his care. He must administer intelligently, and manage reliably. He is accountable, since he is the administrator; he answers for his conduct. He cannot do wrong without being held to account for the wrong he commits. There you have the whole theory of guardianships.

Matters of domicile are, for the most part, linked to matters of the status of persons. Thus, as the wife's domicile is that of her husband, the domicile of any minor children is that of their father or their guardian.

Civil domicile has nothing in common with political domicile. One can exist without the other, for women and minors have a civil domicile, but no political domicile. The latter type of domicile is dependent on the right of citizenship, since it designates the place where, in fulfilling the conditions prescribed by the constitutional laws, one is permitted to exercise the political rights attached to the status of citizen.

Civil domicile is the place where one has carried the seat of one's affairs, one's wealth, one's usual dwelling. Mere absence does not terminate domicile. One can change domicile whenever one wants. The whole question of domicile is a mingling of law and fact. We have set down the rules for determining a man's true domicile because, in all legal procee-

dings, and even in the normal affairs of life, it is important to know where someone is domiciled, for purposes of contacting him.

Absence is an impermanent situation. One may be absent in one's own self-interest or in the interest of the Republic. Absent persons, and especially those absent for reasons of government, have special rights to the protection of laws: we have established these rights. It was also necessary to establish the presumed existence of the absent person of whom one has no news, so as not to leave families and estates in a state of dire uncertainty. We compared the various precedents on the different points relating to absent persons; and we opted for the principles we considered most equitable and least susceptible to unfavourable consequences.

It will be seen that in all the proposed laws relating to the status of persons, we concerned ourselves solely with civil status; the political status of men is determined by the Constitution. We did, however, discuss foreigners, to show the extent to which, in civil matters, they can be likened to Frenchmen, and the extent to which they differ from them.

It must be acknowledged that in former times, various peoples communicated little with each other; there were no relations between States, and they came together only in war, that is to say, to exterminate each other. It is to these times that the author of *The Spirit of Laws* traces the origin of the senseless rights of escheatage and shipwrecks. Men, he said, thought that, because foreigners were not bound to them by any civil law, they owed them neither justice of any kind, nor mercy of any kind.

The expansion of trade cured us of barbarous and destructive prejudices. It united and mingled men of all countries and all regions. The compass opened up the universe; trade made it hospitable.

Thus, foreigners have been treated justly and humanely. The relations between peoples have multiplied, and we have learned that if, as a citizen, one can belong to only one particular society, as a man, one belongs to the general society of the human race. Consequently, while political institutions continue to be peculiar to the members of each State, foreigners are permitted to participate, to varying degrees, in civil institutions, which affect far more the private rights of the man than the public status of the citizen.

Having reviewed all that pertains to persons, we turned to property.

There are different kinds of property; there are different modes of acquiring and disposing of it.

Property is divided into moveable and immoveable property. This is the most general and most natural division.

The immoveable property of every country is jointly owned by its inhabitants. Thus far, most States have had laws to deter foreigners from acquiring their lands. Exploitation of the latter requires the presence of the master. This type of wealth therefore belongs to each particular State. But moveables, such as coin, banknotes, bills of exchange, shares in banks or companies, vessels, all goods, belong to the entire world, which, in this connection, constitutes a single State to which all societies belong. The nation that owns the most of these moveables is the richest. Each State acquires them through the export of its goods, through the labour of its factories, through the industry and discoveries of its merchants, even through chance.

The distinction between immoveable property and moveable wealth gives us the idea of purely civil things and commercial things. Moveable wealth falls within the scope of commerce; immoveables fall specifically within the scope of civil law.

There are, however, moveables that are considered immoveables, because they can be regarded as dependencies or appurtenances of tenements and other civil things.

In the former regime, the distinction between privileged and non-privileged persons, nobility and commoners, resulted, in terms of property, in a host of distinctions that have disappeared and cannot be revived.

It might be said that things were classified the same as persons. There was feudal and non-feudal property, servant property and free property. None of that exists any longer. We have retained urban servitudes and rural servitudes, made indispensable by the coming together of men, and deriving from the obligations and considerations that alone can make society possible.

In speaking of the different kinds of property, we have distinguished mere use from usufruct, and usufruct from ownership. We have listed the various types of income and entitlements that may enter into an individual's patrimony.

The rules that we have established on these different subjects, the particulars of which need not be presented here, are consistent with what the practice has always been. We changed or modified only those that no longer bore any relation to the current state of affairs, or whose weaknesses had been shown by experience.

Contracts and successions are the main means of acquiring what one does not yet have, and of disposing of what one does have.

With regard to contracts, we first elaborated the principles of natural law that are applicable to everyone.

We then discussed the forms in which contracts must be written drawn up.

The written instrument is, in all civilised nations, the natural proof of contracts. However, in accordance with all previous laws, we allow testimonial evidence in cases where there is a commencement of proof in writing. This commencement of proof in writing is not even necessary in commercial transactions, which are often concluded at the Stock Exchange, in the public square, or in a casual conversation.

As a rule, men must be able to deal freely in whatever is of interest to them. Their needs draw them to each other; their contracts multiply according to their needs. There is no legislation in the world that could determine the number and diversity of the agreements to which human affairs are susceptible. Hence this multitude of contracts known, in Roman laws, as innominate contracts. The freedom to contract can be limited only by justice, by good morals, by the public interest.

But it is precisely when it comes to setting these limits that difficulties arise in every quarter.

There are subjects on which justice shows itself clearly. For example, a partner wants to share in all the profits of a company without sharing in the risks: the claim is appalling. One need not seek outside such a pact an inequity accomplished by this pact's very terms. But there are matters on which the question of justice is complicated by other questions, often unknown to jurisprudence. Thus, it is in our acquired knowledge of agriculture that we must look for the justice or injustice, the utility or danger, of certain clauses or pacts stipulated in farm leases. It is our knowledge of commerce that has ended our interminable debates about the interest-bearing loan, the monopoly, the legitimacy of conditions attached to shipping contracts, and a number of other similar subjects. It has become clear that, in these matters, the question of law or morals is subordinate to the question of computations or administration.

Money is the mark of all worth; it procures all that yields profit or bears fruit. Why, then, would he who is in need of it not pay for its use, just as he pays for the use of everything he needs? Like all other things, money can be given, loaned, rented, sold. The annuity with loss of capital is an alienation; the loan with interest is a rental; the permitted free-of-charge use of a sum of money is a simple loan; the bounty with no stipulation of interest and no expectation of return is a donation. The donation and the loan are generous acts; but rental and selling are not at all unjust acts.

In order for the affairs of society to go well, money must have a price; otherwise, there would be no lenders, or, to be more precise, there would be lenders, but they would know how to make up for the ineptitude of the laws with sham stipulations, and exact a very steep price for risking the offence. Usury has never been more appalling than when interest has been prohibited. In forbidding something honest and necessary, one merely debases those who engage in it, and makes them dishonest.

If money must have a price, then this price also must not be too high. Moderate interest for money encourages all useful enterprises. It gives landowners who want to cultivate new crops the well-founded hope of obtaining assistance at a reasonable price. It puts merchants and manufacturers within reach of successfully competing with foreign industry.

The relationships that determine the price of money are independent of government. Governments can never hope to set the price by means of imperious laws. Nevertheless, legal interest has been adopted for mort-

gage contracts and for all public acts. It was not thought that, in ordinary civil matters, where relationships can be assessed with some certainty, the rate of interest ought to be left to the disparities of avarice, to the private schemes and lax morals of moneylenders. But independent of the legal interest that regulates civil order, there is in commerce a current interest that cannot be subject to a constant and specific law.

We have not touched on the setting of legal interest. This rests with the government alone; and the measures the government can take in this regard must not be precipitated.

The legal interest can only be respected to the extent that it is in harmony with the money rate in commerce. Right now, thousands of known reasons disrupt this harmony. Peace, in giving a new boost to commerce, in reducing the expenditures of the State, and in putting an end to the forced dealings of the government, will restore equilibrium and return affairs to the bosom of probity.

Civil laws can, however, prepare for this happy revolution by giving moneylenders a measure of security so that they are content with a moderate recompense. Thus, institutions that inspire confidence, sound rules about the joint or several liabilities of sureties, sensible laws that ensure the stability of mortgages and that, by simplifying the proceedings of creditors against debtors, make them swifter and less costly, are very apt to maintain this activity of circulation that so greatly affects the interest rate and the national prosperity.

What is certain is that the interest rate is the pulse of the State; it indicates all the maladies of the political body. Moderation in this rate is the clearest indication of true wealth and public good fortune.

Money governs the price of all other things, both moveable and immoveable. This price is a function of the relative abundance or scarcity of money compared with the relative scarcity or abundance of the things or goods one buys. It cannot be set by rules. The broad principle in these matters is to give free rein to competition and freedom.

Before the use of money, all dealings of a society were transacted by simple loan or by barter. Since money has come into use, one has proceeded by sale, by purchase, and by numerous activities that constitute what we

call the commerce of civil life, and to which we have assigned the main rules governing them.

The routine commerce of civil life, reduced solely to the engagements contracted between individuals brought together by mutual needs and certain conventions, must not be confused with commerce in the strict sense, whose function is to bring together nations and peoples, to provide for the needs of the universal society of men. Such commerce, whose workings are nearly always linked to the grand designs of administration and politics, must be regulated by specific laws, which have no place in the plan of a civil code.

The spirit of these laws differs fundamentally from the spirit of civil laws.

Of course, in civil matters, as in matters of commerce, there must be good faith, reciprocity and equality in the contracts. But to ensure this good faith, equality and reciprocity in the agreements, it would be wrong to apply the same reasoning to civil matters as is applied to matters of commerce.

One would do very well, for example, to exclude from matters of commerce actions for recovery, because such matters turn on moveables that circulate rapidly, leave no trace, and whose identity it would be virtually impossible to verify and recognise. One could not, however, except unjustly and absurdly, refuse to allow actions for the recovery of property in civil matters, nearly all of which pertain to immoveables that have a fixed location, that can be traced to the few hands through which they pass, and that, because of their permanence, make possible, even easy, such examination as the interests of justice may require.

In commerce, rescissory actions for injury of more than half the fair price have never been allowed, because the mobility of commercial things, the risks, the uncertainties, the unforeseen circumstances that surround commercial transactions do not permit such actions. In the time of paper money and the fairly rapid deterioration of this paper, rescissory actions were abolished even in civil matters, with good reason, since these matters were as mobile and uncertain as matters of commerce. But today we thought it ought to be restored, because justice can, without unfavourable consequences, reassert itself, and private contracts are no longer threatened, as they once were, by the disorder of public affairs.

In commerce, where the greatest fortunes are often invisible, it is the person rather than the property that is followed. Hence the pledge, the mortgage, are virtually unknown in commerce. But in civil matters, where it is the property rather than the person that is followed, there is a need for mortgage laws, that is, laws than can give property all the desired security. The precautionary measures must not, however, be excessive. Our last laws in this regard are extreme, and the political good, like the moral good, always lies somewhere between two extremes.

Excessive governance is bad governance. A man who has dealings with another man must be watchful and wise. He must watch out for his own interest, obtain the appropriate information, and not disregard what is useful. The function of the law is to protect us from the fraud of others, but not to excuse us from using our own reason. If it were otherwise, a man's life, under the vigilance of laws, would be but a long and shameful infancy, and this vigilance would itself degenerate into inquisition.

It is another principle that laws, made to prevent or repress the wickedness of men, must display a certain frankness, a certain candour. If one starts from the notion that it is necessary to ward off every evil and abuse of which a few people are capable, then all is lost. The conventions will be multiplied to infinity, the protection granted citizens will be ruinous, and the remedy will become worse than the ill. Some men are so wicked that, in order to govern the masses with moderation, one must imagine the wickedest of men to be better than they are.

These principles seem to have been wholly forgotten when drafting our most recent laws governing mortgages.

Certainly, men must not be allowed to deceive each other in their dealings together; but some room must be left for trust and good faith. Disquieting and injudicious conventions lose credit but do not extinguish fraud; they overwhelm but do not protect. We in fact became convinced that our last laws in this regard could only paralyse all the affairs of society, put a strain on all interested parties, through disastrous procedures, and, with the apparent aim of protecting the mortgage, would merely be apt to compromise it. We thought it necessary to return to a less suspicious and more moderate system.

We cannot delude ourselves as to the real origin of the laws governing the protection of mortgages. This origin is entirely fiscal, as is the origin of laws governing the control or registration of various civil acts. We know that finance can form a sound alliance with legislation, and that the interest of taxation can be profitably joined with that of law and order. But let us be careful, let us always be wary that, in these alliances, the interest of legislation or law and order is not sacrificed for that of taxation. For example, registration is one of those tax institutions that offer the good of finance and the good of citizens. It ensures the truthfulness of contracts and acts between individuals; but it ceases to be useful, it even becomes harmful, when it becomes excessive. Excessive fees prompt men, always more stirred by a present benefit than a future danger, to become confident through avarice, and to compromise their security by oral or hidden agreements that cannot guarantee it. It is a great ill also when registrar's fees, whether moderate or excessive, are perceived too contentiously; that is, when the levying of these fees is linked to the thorniest questions of jurisprudence, and the bailiff or farmer can, owing to this mysterious obscurity, exercise the most dangerous of powers. What we say about registration applies to the mortgage code. In all these institutions, let us avoid subtleties. Let us not multiply the onerous precautions. Let us seek to reconcile the interest of taxation with that of legislation. Experience shows that, in the areas concerned, an excess of fees means fewer are apt to be collected, and taxation cannot do harm to the citizen without doing harm to itself.

We have kept those salutary reforms which, since the Revolution, have been implemented with respect to sales of immoveables. These sales are no longer hampered by that multitude of entitlements, of statutory redemptions, that had the dreadful disadvantage of leaving, for one or more years, the sold property with no assured owner, to the great detriment of agriculture. But we thought excessive the proscription, on the pretext of eliminating the slightest traces of feudalism, of the perpetual lease and the ground rent lease, which have never been feudal contracts, which encouraged land clearing, which engaged large landowners to sell holdings they could not cultivate with care, and which gave farm labourers, whose labour was their whole fortune, ready means of becoming landowners. We could not, however, ignore the considerable disadvantages that would attach to the wholly particular and very complex legislation such contracts always required, and we have left to the wisdom of the government the question of whether it is appropriate to bring it back.

Marriage contracts occupy a special place in the proposed civil code.

We allowed the greatest latitude to these contracts, which bind families, which form new ones, and which contribute so much to the propagation of men.

The system of dowry was the system of countries of written law. Community was the custom in countries of customary law.

Spouses will be free to form, in this regard, by their agreements, any particular law they deem appropriate.

When there is no particular agreement, the spouses will have community of property.

We have determined the benefits they can extend to each other. We have adhered to the spirit of the matrimonial partnership, which is the most agreeable and necessary of all partnerships.

As for other contracts, we confined ourselves to outlining the common rules. In this regard, we will never transcend the principles that have been passed down to us since time immemorial, and which came into being with the human race.

That part of the civil code devoted to establishing the order of successions seemed no less important to us.

Is the law of succession based in natural law, or merely in positive laws? The system that ought to be put in place depends on the solution to this major problem.

Man is born with needs; he must be able to feed and clothe himself. He therefore has a right to the things necessary for his subsistence and his maintenance. This is the origin of the right of property.

No one would have planted, sown or built, had estates not been divided, and had each individual not been assured of peaceably owning his own land.

The right of property in itself is therefore a direct institution of nature, and the way in which it is exercised is an accessory, a development, a consequence of the right itself.

But the right of property ends with the life of the owner. Consequently, after the death of the owner, what will become of his goods, which his death has left ownerless?

Common sense, reason, the public interest, do not permit their abandonment. There are powerful grounds of expediency and equity for leaving them to the owner's family; but, strictly speaking, no one member of this family can lay absolute claim to them. How will they be distributed among the children, and, if there are no children, among the next of kin? Will one sex be favoured over the other? Will preference be accorded to primogeniture? Will natural children and legitimate children be treated the same? If there are no children, will all collaterals be summoned without distinction, regardless of their degree of kinship? Will testamentary capacity be recognised? Will it be proscribed, or merely limited?

In all of these matters, the intervention of the State is indispensable, for a person must be given and guaranteed the right of succession, and the means of distribution must be determined. With respect to goods left ownerless upon the death of the owner, one sees, first of all, no other right, strictly speaking, than that of the State. But make no mistake; this right is not, and cannot be, a right of inheritance. It is merely a right to administer and govern. The right to succeed to private fortunes has never been among the prerogatives attached to public authority. And we see, in Tacitus' *Life of Agricola*, that one has always cursed as tyrants those Roman emperors whom one was forced to appoint heir to a portion of one's estate, in order to ensure they would not become usurpers of some other portion. The State therefore does not inherit; it is brought in only to determine the order of successions.

It is necessary that such an order exist, just as it is necessary that there be laws. The right of succession in general is therefore a social institution. But all that pertains to the method of distributing successions is merely political or civil law.

Political law, which disregards private considerations when it has some broader design in mind, is guided more by the reason of State than by a

principle of equity. In contrast, civil law, whose principal function is to regulate rights and conventions among individuals, is more inclined towards equity than towards the reason of State.

The Romans' first rules governing successions were guided by political law: these rules also contained provisions that seem strange to us. Lands were distributed evenly; the desire was to maintain, as far as possible, the equality of this distribution. Hence, daughters destined to enter, through marriage, into foreign families, could inherit nothing from their own families. A female only child inherited nothing. These regulations are unjust and repugnant, when considered in the light of civil reason.

Similarly, it is political law that inspired our old French customs, all relating to the spirit of the monarchy, which wants distinctions, privileges and preferences everywhere.

The last laws of Rome, collected in Justinian's compilation, are drafted wholly with a view to propriety and natural equity. The succession of fathers and mothers devolves in equal shares upon all children, without regard to sex, and, where there are no children, to the next of kin.

Unless a nation finds in its particular situation powerful grounds for following political reason, it would do well to be guided by civil reason, which offends against no one, which prevents rivalries and hatred within families, which propagates the spirit of fraternity and justice, and which more firmly upholds the overall harmony of society.

In these recent times there has been much inveighing against testamentary capacity. And in the system of our new French laws, this capacity had been so restricted that it very nearly no longer existed.

We agree that no man has, through a natural and innate right, the power to command after his death, and to live on, as it were, through a will. We agree that it is up to the laws to establish the order or manner of succession, and that it would be derisory and dangerous to allow each individual the unlimited capacity to arbitrarily undo the work of laws.

But ought laws, which can govern only by general, constant and absolute principles, not leave something to the arbitration of the citizen, owing to

the changing circumstances of life? Is the power a testator derives from the law not the power of the law itself?

Is it fitting to deprive a man, in his final moments, of the tender commerce of kindnesses? Will an old and infirm collateral languish without relief or resources, if those he might gather around him are without expectation? What will become of the bond of distant kinship if it is not strengthened by other bonds? Ought the self-interest that so often divides men not be used to advantage, when possible, to bring them closer together and unite them?

Ought not domestic virtues, paternal authority, family government be given sanction? If one fears there may be unjust fathers, why would one not fear there may be corrupt sons? Depending on a family's circumstances, might not the equal distribution of property among the children itself produce the most monstrous inequalities? Among the working classes of society, what child will resign himself to joining his labour with that of his noble progenitors, if he does not anticipate some reward for his troubles, and if he risks being deprived of the fruit of his own industry? And what will become of craftsmen, of farmers, if, in their old age, they are abandoned by all those to whom they have given being? Moreover, are there not fortunes whose distribution needs to be guided by the wise purpose of the father of the family?

No doubt we have done well, for the freedom of circulation and for the good of agriculture, to proscribe those absurd substitutions that subordinate the interests of the living to the whims of the dead, and whereby, through the will of the past generation, the current generation is continually sacrificed for the generation to come. It is prudent to subject testamentary capacity to rules, and to give it bounds. But it must be retained and allowed some latitude. When the law, in matters so intimately related to all human affections as this, permits men no freedom, men work only to evade the law. Disguised liberalities, simulations, will replace wills if testamentary capacity is forbidden or too restricted, and the most horrible frauds will be perpetrated within even the most honest of families.

In intestate succession, the representation of collaterals, pushed too far, goes against good sense. It summons strangers, at the expense of closer kin. It extends the relationships of bounty beyond all presumed relationships of affection. It leads to interminable disputes about the status of

persons, and absurd divisions in the distribution of property. It is injurious to all notions of justice, propriety and reason.

The favour of marriage, the maintenance of good morals, the interest of society, want natural children not to be treated the same as legitimate children. Moreover, it goes against the order of things that the right of succession, which is considered, by all civilised nations, not a right of citizenship, but a right of family, could come within the competence of persons who are doubtless members of the citizenry, but whom the law, which establishes marriages, cannot recognise as members of any family. They must only be guaranteed, to an equitable degree, the relief humanity solicits for them. In vain does one claim for them the rights of nature. The right of succession is not a natural right; it is merely a social right wholly regulated by political or civil law, and it must not act against the other social institutions.

Such are the basic principles that have guided our writing of the proposed civil code. Our aim has been to link morals to laws, and to propagate the spirit of family, which is so favourable, whatever one might say of it, to the spirit of citizenship. Sentiments grow weak as they become generalised. Some natural hold is required in order to form conventional bonds. Private virtues alone can guarantee public virtues, and it is through the smaller fatherland of the family that one forms an attachment to the greater fatherland. It is good fathers, good husbands, good sons who make good citizens. Now, it is essentially up to the civil institutions to sanction and protect all the honest affections of nature. Will the outline that we have drawn of these institutions fulfil the purpose that we set ourselves? We request some indulgence of our humble work in consideration of the zeal that sustained and encouraged it. We will doubtless fall short of the honourable expectations held out for the results of our mission. But we are consoled by the fact that our errors are not irreparable. Serious discussion, enlightened debate, will correct them; and the French nation, which has won liberty with arms, will protect and affirm it with laws.

Signed Portalis, Tronchet, Bigot-Préameneu, Maleville.

NOTE

[1] Preliminary Address delivered on the occasion of the presentation of the draft of the government commission, on 1 Pluviôse IX (21 January 1801).

Promulgated on 21 March 1804, the Civil Code of France still stands today as a towering monument in French legal history. Some jurists under the Old Regime dreamed of unifying the old French private law, which was divided between regions with customary law and regions with statute law. The Constituent Assembly had promised a new, unified Code. To carry out that dream Cambacérès presented three successive drafts (1793, 1794 and 1796), but the revolutionary assemblies failed to pass them. With the encouragement of Bonaparte, and supported by a number of jurists drawn to the new power, the Consulate successfully completed its codification project. Resumed soon after the coup of Brumaire, the task of drafting the code was given to a government commission whose four members – Tronchet, Portalis, Bigot de Préameneu and Maleville – worked on it for five months. After the courts reviewed and commented on the draft, it was reworked by the Council of State over almost a hundred sessions, half of which were chaired by Bonaparte himself, who frequently intervened in the debates, and then submitted to the Tribunate and the Legislative Corps.

The Preliminary Address could be considered the preamble to the draft Civil Code produced by the government commission between August 1800 and January 1801. Although bearing the signatures of all four commission members, the Preliminary Address is actually the work of Portalis, whose moderate spirit inspired the drafters of the Code. According to Portalis, legislators should remain modest: a code should not try to say everything; it must leave room for interpretation by the courts and jurists. This principle led to the well-known saying, "the codes that govern peoples are created over time; but, in reality, we do not create them." Apart from its significance and value as a document of legal history, the Preliminary Address is also a magnificent piece of propaganda that presents the future code as a synthesis of new ideas and the law of the Old Regime while at the same time exalting the peacefulness of the Consulate after the Revolution.

Despite its great importance and near-legendary status, the text of the Preliminary Address (*Discours préliminaire*) can be difficult to find in French and, to our knowledge, did not exist in English. Thus, we thought it would be useful to make it available to everyone on the Internet in both English and French.

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