

1957

Codification of Legislative Texts on Civil and Commercial Aviation in France

Louis Cartou

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Louis Cartou, *Codification of Legislative Texts on Civil and Commercial Aviation in France*, 24 J. Air L. & Com. 24 (1957)
<https://scholar.smu.edu/jalc/vol24/iss1/2>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

CODIFICATION OF LEGISLATIVE TEXTS ON CIVIL AND COMMERCIAL AVIATION IN FRANCE

BY LOUIS CARTOU

Professor at the Toulouse University
Chief of the Legal Office of Air-France

THROUGH a Decree of November 30, 1955,¹ issued under the Law of May 28, 1953,² the legislative provisions relating to French Civil and Commercial Aviation were codified. This Code is part of a larger work of codification, undertaken pursuant to a Decree of May 10, 1948,³ establishing "a superior commission charged with the study of the codification and simplification of legislative and regulatory texts," usually referred to as the "Precodification Commission."

The unusual feature of these codifications lies in the fact that the codes issued pursuant to the decree of 1948 are not the work of the legislature, which does not participate nor even ratify, but exclusively of the Executive power, assisted by the Precodification Commission.

The Law of May 28, 1953 defines the framework of the codification of laws relating to civil and commercial aviation in complete agreement with the general spirit of the decree of 1948. Article 1 of the law specifies the object of the codification, namely, "the legislative texts concerning civil and commercial aviation," and designates the competent authority, namely, the Executive power acting "through a Decree rendered by the 'Conseil d'Etat' upon advice of the Superior Commission." Article 2 limits the powers of the competent authority, as follows: "The Decree shall make all modifications of form in the laws presently in force, which may appear necessary in the process of codification, but no amendment of substance shall be made."

From the text of the Law of May 28, 1953, it clearly appears that the Code was to be only a rearrangement in logical order of the legislative materials concerning aviation. But there was a great difference between the aim of the codification and the means for achieving it, in other words, between the object and the method. The object was to codify laws, i.e., to disassociate articles (sometimes parts of articles) comprising these laws and to group them again pursuant to a different plan, thus establishing a new law, having the same meaning and containing the same provisions as the codified laws.

But such a task, which is not an easy one in any event, met with an additional difficulty: it was to be left to a simple decree to modify laws as to form, without the slightest change in substance. Not only

¹ "Journal officiel" of December 6, 1955.

² "Journal officiel" of May 29, 1953, page 4843.

³ "Journal officiel" of May 13, 1948.

could the Decree not remedy absurdities which might be brought to light during the codification process, but the job required, in addition, the greatest delicacy of handling since it is not always easy to distinguish between an amendment of substance and a modification of form.

The Decree of November 30, 1955 has made, as a result, a new presentation of existing legislative texts; but it should be examined to determine whether the Decree has remedied the legal uncertainties of the previous legislation.

— I —

The Code of Civil and Commercial Aviation is but a presentation in a new form of existing legislation. In principle nothing of substance has been changed; every provision of a legislation familiar to air lawyers has been maintained; the legislative sources are enumerated in Article 198 of the Code.⁴

The Code is divided into two parts—the codification proper constitutes the first part, which is followed by a concordance between the articles of the Code and those of the codified texts. The second part rounds out the first by an annex, in which are published the legislative provisions relating to civil aviation in the French Union and the International Conventions to which France is a party: Warsaw Convention, Chicago Convention, Chicago Transit Agreement. This Annex raises no problems since it is only a collection of texts of great practical value. Therefore the present study will be limited to the codification itself.

The codification has all the appearances of a well-arranged work, dealing in orderly fashion with the major problems of civil aviation. It is subdivided into five Books, each one devoted to one of the following problems: Aircraft (Book I), Airports (Book II), Air Transport (Book III), Flight Personnel (Book IV), Light Aviation and Sport Aviation (Book V). Each book constitutes the legal basis for the matter with which it is concerned.

Book I is devoted to the laws governing Aircraft and comprises 58 articles taken almost exclusively from the provisions of the Law of May 31, 1924 (a portion of this law however has been allocated to other Books, in particular Book III concerning Air Transport). It is subdivided into Titles corresponding more or less to the divisions of the Law of 1924, each Title dealing with one of the major matters relating to aircraft: civil status of aircraft (registration, nationality, ownership, air traffic rules, damage to third parties, penal sanctions for illegal operation. Strictly from the point of view of codification, this book possesses no originality.

⁴ Law of May 31, 1924 as amended, relating to air navigation; laws of March 30, 1928 and April 4, 1953, relating to flight personnel; law of July 4, 1935, establishing air easements; law of September 19, 1941, concerning commercial aviation; ordinance of October 24, 1945, creating the Paris Airport; laws and decrees of October 2, 1946, August 1, 1950, September 24 and 30, 1953, relating to aerodromes; ordinance of June 26, 1945 and September 26, 1953, relating to air transport; various provisions of Financial Acts (Annual Budget).

In contrast to Book I, Book II is not a mere literal transposition, but is a basic re-editing of the law of airports, achieved by regrouping various laws and decree-laws. Preceded by a general definition of airports (taken from Article 26 of the law of May 31, 1924), Title I of the Book is made up of the provisions of the law of July 4, 1935 on easements created for the benefit of air navigation. Title II deals with "airports open to public air navigation" and is only the transposition of most of the provisions of the Decree of September 24, 1953, with which are mingled those of the law of October 2, 1946 on classification of airports. The other Titles of the Book are devoted to the Bâle-Mulhouse airport (law of August 1, 1950), to airports of general interest located outside the Metropolitan Territory (Decree of September 30, 1953), and finally to various penal provisions concerning airports. Each one of the Titles of Book II is therefore quite homogeneous.

Book III, which deals with Air Transport, is somewhat more complex and gives evidence of more boldness in the handling of the original texts. This essential Book is subdivided into three Titles preceded by a general definition of air transport taken from Article 1 of the Decree of September 26, 1953: "Air transport consists of the movement by aircraft, from one point to another, of passengers, mail and goods." Title I, which deals with the contract of carriage, is essentially a reproduction of the provisions of the law of May 31, 1924 (the only addition being Article 15 paragraph 1 of the law of April 4, 1953 on flight personnel, which allows the pilot in command to offload any passenger who may endanger safety or good order). The following Title, short but important (Articles 127 to 136), regulates "Transport Enterprises." In this Title the Code, using the Decree of September 26, 1953 on "coordination" as a base has included some of the provisions of the law of May 31, 1924 and of the law of September 19, 1941. Finally Title III, dealing with the regulation of Air-France, is taken from the law of June 16, 1948 in a curiously simplified form.

Book IV on Flight Personnel brings us back to simplicity by devoting one long Title (Articles 146 to 193) to professional airmen and one short Title (Article 194) to occasional airmen. This Book picks up the law of April 4, 1953 in its entirety and deals in accordance with a uniform plan with everything that constitutes the regulation of aircrew: classification, definition, terms of reference of the crew and of the pilot in command, contract of employment, indemnities in case of disablement, discipline.

The Code ends with Book V, short and heterogeneous, dealing with Light Aviation and Sport Flying (Articles 195-197).

Finally, Article 198, which enumerates the various provisions of law that have been codified, provides that: "This Code, subject to the conditions of the law of May 28, 1953, is substituted for such legislative provisions." The last sentence—apparently harmless "boilerplate"—raises an embarrassing question of the general legality of the Code.

- II -

What is to be expected of a Civil Aviation Code is that it constitutes a clear legal document destined to replace prior legislative chaos. This clarity, however, must not be achieved at the sacrifice of juridical dependability. It is important that the Code be without surprises and therefore complete. It must not subject the one who uses it to the disagreeable surprise of finding that an essential law has been omitted or that articles which never should have been codified have been included and are illegal.

Does the Civil Aviation Code offer these expected guarantees; is it clear, complete and dependable? We do not think so and the Code appears to us to be laden with a great number of elements of legal unreliability.

The major portion of the defects of the Code stems from the inadequacy of the technique and of the instrument of codification, namely the Decree. The decree is a neutral instrument; it must not introduce any modification of substance, and accordingly it is incapable of making indispensable amendments to the codified texts; it perpetuates their defects, their obscurities and their gaps. Nor does this neutrality of the Decree alter the fact that codification itself has certain inherent difficulties, even if codification is limited to modifications in presentation. By the very fact that the Code codifies all the law, and nothing but the law, it is bound to be the cause of obscurities. On the other hand the Decree is a difficult instrument to handle: the difference between an alteration in form and an alteration in substance can be very slight.

Therefore, the Civil Aviation Code is menaced not only by paralysis but also by illegality, mainly because of the essential defects of its instrument; but this does not explain everything, and some of the obscurities of the Code seem to us to have resulted from errors or just simple omissions. The elements of unreliability may be classified under three headings: errors, obscurities and illegalities.

A. ERRORS IN THE CODE

Most of the discrepancies of the Code have some explanation; there are some, however, for which we were unable to find a rational one. Among these is Article 17, made up of Article 19 paragraph 1 and Article 8 of the law of May 31, 1924, which read respectively as follows: "Aircraft may freely be flown above French territory subject to the provisions of Article 8" (Article 19 paragraph 1); "Foreign aircraft may only be flown above French territory if this right is granted them by a diplomatic convention or if they have received an authorization to this effect, which shall be special and temporary" (Article 8).

Now Article 17 of the Code, which takes up these matters, is drafted as follows: "Aircraft may be flown freely above French territories. However, foreign aircraft may not be flown above French territory,

etc. . . ." The Code, for no good reason, makes a distinction between French territory and French territories. This could lead to many fanciful interpretations. France is sovereign in the airspace above all territories under its control, and by statute it regulates flight in these spaces. It is quite conceivable that a law could proclaim freedom of flight above the territories comprising all that falls under Article 2 of the Chicago Convention, that is to say all territories placed under "the sovereignty, suzerainty, protection or mandate" of France, while restricting flight over French territory in the narrow sense, French Territory being understood as meaning Metropolitan France. Thus what is probably only a drafting slip of the Code might have the effect of opening the skies of the French Union to aircraft of all nationalities subject only to the condition that police regulations be observed.

More curious yet is the elimination of Article 6 of the law of June 16, 1948 (concerning the status of Air-France). A simple clerical error is improbable here: the reference chart set up at the end of the Code specifies clearly that this text is "not codified." This is, however, the law which creates the positions of, and specifies the nomination procedure for President and Director General of the National Company. These two offices still exist; their powers and the cessation of their functions are still defined by Article 140 of the Code, which just reproduces on this point the law of June 6, 1948 (Article 8). It is difficult to perceive why Article 6 of this law has disappeared from the Code without leaving any trace or substitute.

B. OBSCURITIES IN THE CODE

The Code furthermore harbors sources of unreliability due to the very nature of the codification decree. We have seen that this decree is a neutral instrument without power to alter substance and incapable of remedying even known defects in the law. Such neutrality has inherent defects in itself: it obliges the draftsmen of the Code to include all the law and nothing but the law. Nothing but the law was responsible for the gaps in it; and all the law merely underlines and revives contradictions. Gaps and contradictions are quite apparent when one examines the articles of the Code concerning airports.

Gaps. Book II on Airports gives the impression of great straightforwardness. Apart from provisions concerning easements and those relating to airports to which a special status has been given (Paris, Bâle), the essence of this Book is reduced to the provisions of Title II relating to airports open to "public air traffic." This Title is subdivided into chapters covering: creation, classification, operation and airport charges.

The straightforwardness however is but an illusion: the Decree-law of September 24, 1953 and the law of October 2, 1946, the provisions of which constitute Title II, do not embrace all the statutes on airports. To begin with, it is regrettable that this Code, which ought

to cover all basic principles, is silent on airports not open to "public air traffic." These airports are governed by regulations and therefore could not be codified.

But more important, there exists a provision which remains outside the Code though it has a great importance as a principle: the Decree of December 31, 1949. This decree governs the status of non-autonomous aerodromes in Metropolitan France and in its overseas territories. They are therefore, rules which define and regulate the airports concerned according to totally different standards from those laid down in Title II of Book II: applicability of the rules is based not on the use to which the airports are put but on the type of management. This decree establishes classifications foreign not only to those of the Code but to the law presenting its applicability, as well, and distinguishes between main aerodromes and secondary aerodromes. The decree of December 31, 1949 provides, therefore, for a particular status ignored to the Code. One does not see how this material could have been hinged on the Code. For a decree to be attached to a law it must be a measure giving effect to the law as a development of the principle previously defined in the law. However, the simple decree of December 31, 1949 does not reflect any provision of the Code and cannot therefore appear as a measure applying the Code. This decree is thus an autonomous text based on a principle of its own. In consequence, the Code is an incomplete document, as it does not embody all the principles.

The Contradictions. By codifying the law and only the law, the Code has created gaps; inasmuch as it has codified all the law, it has, if not created, at least underlined and aggravated some of the contradictions of existing law.

The rules on aerodromes again offers an example of codified contradiction; definition and classification present one of the difficulties. A given aerodrome may be defined and classified according to various criterions: who owns the land (State owned); who initiated the project (created by the State); who is responsible for its technical or commercial management (concession, direct State operation); the importance of the airport (main or secondary); its use or purpose (open to "public air navigation"). Every statute and all coherent juridical systems must have as their starting point a common concept or a general definition, sufficiently broad to embrace all distinctions and partial definitions. However, so far as aerodromes are concerned, the designation of a basic criterion, which is indispensable to a general definition, is lacking: successive regulations, particularly the law of May 31, 1924 and the decree of September 24, 1953 have adopted divergent standards (probably due to differences in legal or technical concepts). Codification has now erased this historical aspect and has united in a single document these widely different concepts whose relation is not clearly shown; Article 23 makes a distinction between public airports, airports open to the public, and private airports legally established; Article 25

is concerned with custom airports; all of Title II of Book II refers to "airports open to public air navigation" (numerous subdivisions being provided in this category); Article 110 provides for penal provisions relating to the punishment of offenses committed on airport property and prohibited by the regulations governing aerodromes "dedicated to public use."

It is apparent that there are contradictions at least in the terminology. The Code did not create them, but by bringing them together has brought them to light. The technique consisting in codifying laws without distinction as to their very different ages, can even impede the necessary evolutionary process which experience brings to legislation. Indispensable "legislative erosion" exercises a selection among legal notions by letting those which have lost their practical value fall into oblivion; codifying these concepts risks restoring them to life.

C. THE ILLEGALITIES OF THE CODE

The definition and classification of airports is proof of the paralysis of the Code with regard to the laws codified. The draftsmen could not evade this paralysis without falling, even involuntarily, into the field of illegality—the frontier between modifications of form and of substance being too uncertain. Therefore, there is nothing astonishing in the fact that the Code is strewn with illegalities of detail, which seem involuntary if not inevitable. However, as these illegalities accumulate they have finally altered greatly the nature of the legislation on a particularly important point—Air Carriage.

1. *Minor Illegalities.* These are the typical illegalities due directly to the codification process and result from additions or omissions made by the draftsmen of the Code.

a. What can be called *illegality by action* is the result of an involuntary breach of the very slender frontier between the modification of form and that of substance. The codification has mainly been a matter of changing the location of texts, separating laws from their context and putting them in a different context. Such an operation obviously entailed the risk of altering the meaning of the displaced provision.

A typical example of a change in meaning of a displaced provision is found in the way the Code makes use of certain provisions of the law of September 19, 1941. This law had enacted a statute for civil aviation that, though never repealed, had in fact remained ignored. The greater part of this law was not codified, but some articles were placed in the Code as attachments to the provisions of the Decree-law of September 26, 1953 on coordination. Thus Article 19 of the 1941 law provided that "the enterprises which have been certificated or authorized must, upon request of the civil servants responsible for their supervision, place at the disposal of such civil servants all documents necessary for the fulfillment of their mission."

This text is now Article 135 of the Code (the "certificated" enterprises have been dropped out, and the text is thus incomplete—a first illegality). But Article 19 of the 1941 law codified in this manner has in reality changed meaning: the "authorized enterprises" of Code Article 135 designates the concerns which have been authorized in accordance with Article 127 of the Code, that is, the reproduction of the provisions of the decree-law of September 26, 1953. However, the authorization mentioned in the 1941 law and that of the 1953 decree-law are two entirely different things. By including Article 19 of the 1941 law in Article 135, the Code has in fact completely changed the legal meaning of the codified text.

This simple example reveals the essential difficulty present in separating particular provisions from their context and placing them in the middle of very different laws without either altering their significance, or without creating something different, and without in fact disregarding the terms of the law of May 28, 1953.

b. A change in substance could also result from the omission of a law. The reference charts at the end of the Code show a great mass of material as "not codified."

In principle non-codification could not mean abrogation. The Code, which is a mere decree, has no power to repeal laws (Articles 27, 28, 29, of the law of May 31, 1924 that the Code indicates as repealed were in fact repealed by the Decree-law of September 24, 1953).

When a law relating to the subject matter codified has not been included in the Code, its omission is susceptible of several interpretations. Such omission appears entirely appropriate where it causes the disappearance of transitory and formal clauses of a law which have lost all interest.

Still within the realm of what is perfectly appropriate is the omission from the Code of a law which could not have been codified without contradiction or absurdity. Thus the law of September 19, 1941, regulating commercial aviation, had never been formally repealed, but it was absolutely irreconcilable on several points with the decree-law of September 26, 1953, on coordination. Thus, the law of 1941 made the franchise the basis for regulating the operation of air transport lines, which the decree-law of September 26, 1953, totally ignored and subjected air transportation to a system of authorizations and permits. If both laws had been codified, only contradiction could result. The problem was solved by the non-codification of those provisions of the law of 1941 which were incompatible with the decree of September 26, 1953. In this instance non-codification of the earlier law can be interpreted as a formal recognition of repeal by implication contained in a subsequent legislative enactment.

Apart, however, from these perfectly explainable and legitimate instances, there remain cases which are less justifiable. The drafters of the Code have in fact "not codified," on their own authority, certain

laws which have not been repealed, either expressly or by implication. This is the case, for example, of several articles of the law of June 16, 1948, regulating Air-France, particularly Article 12, which is the legal basis for the financial arrangements between the company and the government. In this case, how is the failure to codify to be regarded? Article 198 of the Code provides that "Subject to the provisions of the law of May 28, 1953, this Code shall be substituted" for the legislative enactments cited in the article. Should it not be concluded that if the Code "is substituted" for the laws it codifies then only the Code is applicable, and the laws enumerated therein continue to have effect to the extent they have been codified? If this interpretation is correct, it must be concluded that the non-codified provisions are no longer applicable and that as a result, failure to codify is the equivalent of repeal. But since repeal is certainly the most radical change in substance that any law can undergo, it follows that non-codification is contrary to the law of May 28, 1953.

All such illegalities, born of changes which have been made under various guises in the laws and decrees codified, are only the most striking of the technical defects of the codification. But there remains one area, however, where the petty illegalities, by reason of their additive and cumulative effect, have brought about a transformation of the legislation, one where the authors of the Code, by acting in excess of their powers—not merely through the unhappy handling of a poorly conceived instrument—have dangerously trespassed upon the legislative domain.

2. *Transformation by the Code of Rules Relating to Transportation by Air.* After the Ordinance of June 26, 1945 which nationalized air transport, the early rules governing civil air transport were limited to the law of June 16, 1948 organizing the National Company, Air-France. Later on private companies were created notwithstanding the law of September 19, 1941, and having gone into the field of regular airline operation they could not be overlooked. That was the reason for the Decree-law of September 26, 1953 regulating air transport coordination.

The 1948 law and the 1953 decree make up the present statutory structure of Air Transport. The decree of 1953 is, moreover, limited in its purpose, its duration and its effects. *Its purpose is limited:* the coordination decree's sole aim is to regulate competition arising from the existence of private operators, beyond the scope of any legal provision, and to subject this competition to some sort of control. *Its duration is limited* and will end with the enactment by Parliament of a civil aviation statute: "The provisions of the present decree have the sole purpose of establishing the rights and duties of private operators and of allowing the government to perform quickly the coordination that appears indispensable, while leaving to Parliament, where a bill has already been introduced, the general organization of French air transport and the delimitation of the respective fields of activity

of the National Company and of private operators" (extracted from the "exposé of motives" preceding the 1953 decree). Finally with regard to the National Company, to the extent this text is applicable to it, *it is only on a subsidiary basis*. Article 4 of the 1953 decree which enumerates some of the duties imposed on authorized operators, states that: "The provisions of this article do not impair the application of the special rules for the management and supervision [of the Company] contained in the law of June 16, 1948 creating the National Company, Air-France."

The civil aviation code has incorporated both the 1948 law and the 1953 decree; but the codification was accomplished in such a way as to upset completely the meaning of the legislation, not only on minor points but in its very essence. It may be stated that in the Code the provisions of the decree of September 26, 1953 in effect constitute a permanent and basic regulatory action, which, so far as Air-France is concerned, loses its subsidiary character.

The Code has transformed the provisions of the 1953 decree into permanent ground rules for air transport. The mere fact of including these provisions in the Code, added to the inability of Parliament to enact the statute so often announced, would suffice to ensure this result. The 1953 decree, anonymously lost in a permanent Code, has excellent chances of becoming definitive. This result appears to be in accordance with the views of the draftsmen of the Code, who eliminated from the codified laws all references to a future civil aviation statute; this is the case of Articles 1 and 10 of the law of June 16, 1948, which have been codified (Articles 137 and 142), but with the omission of any provisions concerning a future permanent act. The drafters therefore gave to the provisions of the 1953 decree, a permanent and definitive character which it did not originally have.

What is more, the Code has eliminated the subsidiary character of the 1953 decree with regard to its application to the National Company. In the Code the articles of the decree become the primary legal basis of air transport. First, this is the result of certain modifications made in the codified laws. Thus Article 1 of the law of June 16, 1948 subjects Air-France to "this *law*" and where no provision is made therein, to the laws on corporations. As codified, this article (Article 137) subjects Air-France to "this *Code*" (and where no provision is made therein to the laws governing corporations). The *Code*, however, is much broader than the *law* of 1948, and in particular comprises the decree of September 26, 1953. The National Company is therefore made subject to this decree, and the effect is even more telling, in view of the fact that Article 4 of this decree, which made provision for "the special rules of management and control provided by the law of June 16, 1948," has not been codified. Therefore, through these modifications, the Code has destroyed the priority or independence which the laws governing Air-France enjoyed with regard to the 1953 coordination rules.

Furthermore, this new predominance of the provisions of the 1953 decree is confirmed by the non-codification of certain laws which reserved to the National Company a special status. The most significant elimination in this respect is that of Article 12 paragraphs 1 and 2 of the law of June 16, 1948, as amended by the decree of September 30, 1953. This law governed relations between the Company and the State: it was left to the Company to achieve financial equilibrium in its operations, but the duties imposed upon it in the general public interest were to be delimited and provided for by contracts with the State. This system replaced the uncertain system of overall subsidy. Non-codification has caused the disappearance of this provision, which certainly cannot be said to have lost all practical interest. The Code has replaced these provisions by a more general principle taken from a Finance law of December 31, 1953 (very much altered in form) and inserted in Article 137, which forbids any subsidy to Air-France in respect of routes operated in competition with other French air transport companies.

It therefore appears quite clear that, both with regard to Air-France and to the general organization of air transport, the Code has so modified the legislation as to invade the field of policy itself. It has created a new statute on commercial aviation by changing the nature of existing laws, and this quite obviously is *ultra vires* on the part of the draftsmen of the Code.

* * *

It thus appears to us, at the close of this study, that the Civil Aviation Code is an instrument which passes with one jump from stagnation to an over-stepping of powers. Its application is therefore rendered uncertain and dangerous. It can be noted in fact that the most recent laws, decrees or other acts, published in the "Journal Officiel" do not refer to the articles of the Code but to the laws themselves.

Such are the defects of this Code, mostly due to faulty methods and techniques. One can ponder, however, if the instrument given to the drafters is alone responsible.

All that precedes appears to be a case against a method and against a bad use of inadequate means at hand. But in reality the reasons behind the defects of the Code lie deeper: if the method and the instrument turn out to be faulty, it is because their purpose was to apply a wrong concept of codification to a faulty concept of the law.

Indeed the codification decree was to apply to a faulty legislation. In general the 1948 codification movement was to remedy this faulty legislation "sometimes enacted in a hurry,"⁵ but above all forgetful of tried principles. "The purpose of the law" says Portalis "is to define in broad terms the general maxims of law; it is to create in consequence

⁵ Report on the Decree of May 10, 1948. See Bulletin Législatif Dalloz, 1948, page 473.

fruitful principles and not to go into the details of questions which may arise on each matter.”⁶

Forgetful of these principles, the modern legislature has in every field let law grow in elaborate details while leaving essential matters to regulation by decree. It is indeed this type of legislative situation that the codification movement was to combat according to the preamble of the decree of May 10, 1948: “Accordingly it will be possible in particular to take action against the tendency to regulate matters by law relating to the application of given principles which generally belong in the field of regulation.”⁷

The material on which the draftsmen of the Code had to work was therefore bad in the first place; the concept of codification itself was no better. Moreover, one can scarcely talk of “codification,” the movement of 1948 being so completely opposed, in spirit and method, to the great codes of history, from the Roman law of the XII tables to the codes of the nineteenth century. To produce their great works, those legislatures looked to the past, and with all the authority at their command, studied proved acts, customs and law, modified and adapted them, and produced works which, if not good for all time, were of lasting quality. “Codes of peoples are made with time, but strictly speaking, they are not made” (*Portalis*). The codification of 1948 is not any such adaptation for the future of solidly established legislation. The goal was purely short range: to bring a measure of order out of legislative chaos, without pretense of lasting quality—in order to permit the legislature itself to know the law and to permit amending it without too great a risk of getting lost in its toils. It was only a question of making intelligible a very imperfect set of laws. Was such a task—difficult enough for a sovereign legislature—within the reach of an executive branch endowed with inadequate powers?

⁶ See J. E. M. Portalis “Discours, rapports et travaux sur le Code civil.” Paris, 1844, page IV.

⁷ Report on the law of May 10, 1948.