VI.

Freedom of Testation in the Revolutionary and Napoleonic Legislation

Von

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Summary: Contrary to what one could have deduced from art. 2 and 17 of the Déclaration des droits de l'homme et du citoyen, where property had been elevated as a natural right, imprescriptible, inviolable, and sacred, and art. 537 and 544 of the Code civil, where the owners had been given the right to use in the most absolute way and dispose freely of their property, neither the Revolutionary nor the Napoleonic lawmakers thought of the right of disposing freely of one's property upon death as self-evident. Although there had been a long tradition of testamentary succession in the South of France, the right to dispose freely of one's properties by testament led to tensions as to its articulation with the pro-intestate customs of the Northern provinces – in 1789–1804 French private law(s) had indeed not yet been unified and the unification process had given rise to several rearguard arguments in favour of local idiosyncrasies –, but most importantly, it led to tensions as to its articulation with the institution of family, one of the pillars, along with property, of the new social order that had emerged from the ruins of the Ancien Régime: the bourgeois society.

Key Words: French Law, Revolutionary and Napoleonic Legislation (1789–1804), Intestate Succession, Freedom of Testation

Zusammenfassung: Anders als man angesichts von Art. 2 und 17 der Erklärung der Menschen- und Bürgerrechte von 1789, worin das Privateigentum als natürliche, unveräußerliche, unverletzliche und geradezu heilige Freiheit verankert ist, und Art. 537 und 544 Code civil, die dem Eigentümer das ausschließliche Recht zur Nutzung und Veräußerung seiner Eigentumspositionen geben, denken könnte, hielten weder die revolutionären noch der napoleonische Gesetzgeber die Gewährung letztwilliger Verfügungsfreiheit für selbstverständlich. Während es im Süden Frankreichs eine lange Tradition testamentarischer Erbfolge gegeben hatte, stand die Testierfreiheit im Kontrast zum Gewohnheitsrecht der nördlichen Provinzen, das ausschließlich Intestaterbfolge vorsah. Vor Schaffung des Code civil gab es noch kein vereinheitlichtes französisches Privatrecht, und der Vereinheitlichungsprozess von 1789 bis 1804 bot Raum für die Auseinandersetzung über derartige lokale Eigentümlichkeiten. Vor allem aber kam in ihm das spannungsreiche Verhältnis zwischen Eigentum und Familie zur Sprache: zwei Grund-

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pfeilern der neuen sozialen Ordnung einer bürgerlichen Gesellschaft, die aus den Trümmern des Ancien Régime hervorgegangen war.

Résumé: Contrairement à ce que l'on aurait pu déduire des art. 2 et 17 de la Déclaration des droits de l'homme et du citoyen, où la propriété avait été élevée au rang de droit naturel, imprescriptible, inviolable et sacré, et des art. 537 et 544 du Code civil, où l'on avait donné aux propriétaires le droit d'user de la manière la plus absolue et de disposer librement de leurs biens, ni le législateur révolutionnaire ni le législateur napoléonien ne considérèrent le droit de disposer librement de ses biens par testament comme évident. Bien qu'il y ait eu une longue tradition de successions testamentaires dans le Sud de la France, le droit de disposer librement de ses biens par testament a soulevé des difficultés quant à son articulation avec les coutumes pro-intestat des "pays" du Nord – en 1789–1804 les droits privés français n'avaient en effet pas encore été unifiés et le processus d'unification avait donné lieu à plusieurs combats d'arrière-garde en faveur des particularismes locaux –, mais surtout, il a soulevé des difficultés quant à son articulation avec l'institution de la famille, l'un des piliers, avec la propriété, du nouvel ordre social qui avait émergé des ruines de l'Ancien Régime: la société bourgeoise.

Mots-clefs: Droit français, droit révolutionnaire et napoléonien (1789–1804), succession ab intestat, liberté testamentaire

"C'est finir en homme vertueux que de soumettre
ses derniers désirs aux loix de sa patrie, de ne pas
affecter de faire régner ses caprices après sa mort,
et de ne laisser enfin que des héritiers légitimes."

Denis Le Brun (1640–1708)[1])

Introduction

Denis Le Brun's plea in favour of intestate succession – "on se plaint toujours des testaments, et jamais des successions"[2]) – finds an interesting echo in the developments that took place in the aftermath of the 1789 Révolution up to the promulgation of the Code civil on 31 March 1804 (10 germinal an XII). Contrary to what one could have deduced from art. 2 and 17 of the Déclaration des droits de l'homme et du citoyen (DDHC), where property had been elevated as a natural right, imprescriptible, inviolable, and sacred[3]),

[1]) D. Le Brun, Traité des succession, 4th ed. Paris 1775, VIII (A virtuous man ought to die by abandoning his last wishes to the law of his land; he ought not to let his whims reign after his death and ought to leave only intestate heirs). All translations are mine.

[2]) *Ibid.* VI (One always laments about testaments, never about succession). As will be seen throughout this article, the term "succession" generally refers, in French law, to "intestate succession".

[3]) DDHC, art. 2: "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression" (The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are liberty, property, safety and resistance to oppression); *ibid.* art. 17: "La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste

and art. 537 and 544 of the Code civil, where the owners had been given the right to use in the most absolute way[4]) and dispose freely of their property[5]), neither the Revolutionary nor the Napoleonic lawmakers thought of the right of disposing freely of one's property upon death as self-evident. Although there had been a long tradition of testamentary succession in the South of France, the right to dispose freely of one's property by testament (le droit de tester) led to tensions with the pro-intestate customs of the Northern provinces. In 1789–1804, French private law(s) had indeed not yet been unified and the unification process had given rise to several rearguard arguments in favour of local idiosyncrasies[6]). But most importantly it led to tensions with the institution of family, one of the pillars[7]), along with property, of the new social order that had emerged from the ruins of the Ancien Régime: the bourgeois society[8]).

I. Freedom of Testation Prior to the 1789 Révolution – the North-South Divide

The laws of the Kingdom of France prior to the Révolution consisted of a mosaic of traditions opposing, along a sinuous line running from the Island of Oléron to the North of Geneva[9]), the Northern provinces of customary law (les pays de coutume) with the Southern regions of written law (les pays de droit écrit), where Roman law had had a momentous influence. Although there had been here and there, notably in matters concerning royal, feudal or ecclesiastical affairs, or in matters traditionally discussed in the light of Roman law, such as with the law of obligations, some unification or unified approaches, one could have argued, as Voltaire (1694–1778) did in his Dic-

et préalable indemnité" (The right to property is inviolable and sacred; no one may be deprived of it, unless public necessity, legally ascertained, obviously requires it, and a just and prior compensation has been paid).

[4]) C. civ. art. 544: "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements" (Property is the right to enjoy and dispose of things in the most absolute way, provided one does not make use of it in a way that is prohibited by law).

[5]) *Ibid.* art. 537 § 1: "Les particuliers ont la libre disposition des biens qui leur appartiennent, sous les modifications établies par les lois" (Individuals are free to dispose of their properties as they want, subject to the limits imposed by law).

[6]) J.-L. Halpérin, L'impossible Code civil, Paris 1992, 84–85.

[7]) Idem, Histoire du droit privé français depuis 1804, 2nd ed. Paris 2012, §§ 11–12.

[8]) A.-J. Arnaud, Essai d'analyse structurale du Code civil français, Paris 1973; see also Halpérin, Histoire (note 7) §§ 5–13.

[9]) Halpérin, L'impossible Code civil (note 6) 19–20.

tionnaire philosophique, that he who would have traveled through the land would have been subject to as many different laws as he would have had to change horse[10]).

This had particularly been true for succession.

Although one would have died in Saint-Malo, Caen, Paris or Reims as one would have died in Pau, Toulouse, Lyon or Marseille, death would have implied radically different legal consequences from North to South, from East to West. In the South, in line with Roman law, the *paterfamilias* (le père de famille) could appoint an heir (instituer un héritier) and dispose as he saw fit of his properties by testament[11]), provided he did not exceed the reserved shares (la légitime[12])) of his non-appointed children (ses enfants non-institués), usually up to a third or half of his estate[13]). In the North, on the contrary, one could not appoint an heir by testament – "institution d'héritier n'a lieu"[14]) –, and one's estate would be transferred by operation of law[15]). Traditionally, this process necessitated to distinguish family properties (les biens propres), which had to return, up to two thirds or four fifths, to their family of origin, and personal properties (les biens meubles et acquêts) in respect of which one had a greater freedom to dispose of – even though most customs adopted the principle of reserved shares to the benefit of one's children[16]).

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[10]) François-Marie Arouet, dit Voltaire *s. v.* "Coutumes", in: Idem, Dictionnaire philosophique, vol. XVIII, Paris 1878 [London 1764], 272.

[11]) J. Poumarède, Le testament en France dans les pays de droit écrit du Moyen Âge à l'Époque moderne, in: Idem, Itinéraire(s) d'un historien du droit, Toulouse 2020, 155.

[12]) C. Pérès, Compulsory Portion in France, in: K. Reid/R. Zimmermann/M. de Waal (ed.), Comparative Succession Law, vol. III: Mandatory Family Protection, Oxford 2020, 78, 97–102.

[13]) Halpérin, L'impossible Code civil (note 6) 29; comp. R. Zimmermann, Protection against Being Passed Over or Disinherited in Roman Law, in: Reid/Zimmermann/de Waal (note 12) 1.

[14]) A. Gotman, L'héritage, Paris 2006, chap. III; see also O. Descamps, Les formes testamentaires de l'époque médiévale jusqu'à la période présente en France, in: G. Otte/M. Schmoeckel (ed.), Europäische Testamentsformen, Baden-Baden 2011, 47.

[15]) J.-J. Clère, Les fondements philosophiques et politiques du droit des successions, in: Mémoires de la Société pour l'histoire du droit et des institutions des anciens pays bourguignons, comtois et romands 43 (1986) 7, 11–15.

[16]) M. Peguera Poch, Aux origines de la réserve héréditaire du Code civil: la légitime en pays de coutumes, XVI^{ème}–XVIII^{ème} siècles, Aix-en-Provence 2009; see also T. Rüfner, Customary Mechanisms of Family Protection, in: Reid/Zimmermann/de Waal (note 12) 39.

Some coutumes, notably in the West, even granted equal shares of the deceased's estate to his children, which implied that they had to account for all the gifts the deceased had consented to them during his lifetime so as to deduce them from the portion of the estate that would ultimately be transferred to them, a process known as "rapport"[17]).

Of course, this North-South divide could not be regarded as a mere opposition between pro-intestate egalitarian customs and pro-testate inegalitarian laws. Although there had been some strictly egalitarian customs, referred to as the "coutumes d'égalité stricte", most of them were not[18]); one could mention the "coutumes de préciput" in the North and the East where the heir could cumulate his share with what the deceased had bestowed on him by gift or testament[19]); or the "coutumes d'option", notably in Paris, where the heir could "opt" for either his share in the succession or what the deceased had bestowed on him during his lifetime[20]). Furthermore, most customs attributed to female heirs smaller shares than to male heirs, when they simply did not exclude them from their father's succession.

II. Succession and Family – Freedom of Testation in the Light of the Revolutionary and Napoleonic Ideologies

Unsurprisingly, the great diversity characterising the laws of succession of the Ancien Régime, and the different rationals behind them, had given rise to controversies in the early days of the Révolution as it directly challenged fundamental aspects of the political project carried out by the revolutionary elite[21]). Apart from the fact that the question of succession highlighted the

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[17]) J. Yver, Égalité entre héritiers et exclusion des enfants dotés, Essai de géographie coutumière, Paris 1966.

[18]) Even in regions where a coutume d'égalité stricte was applicable, it was relatively common to divide and share estates unequally through more or less devious means, notably by taking advantage of feudal institutions or noble privileges, or by incorporating specific provisions into a contract of marriage, see G. Aron, Étude sur les lois successorales de la Révolution, in: Nouvelle revue historique de droit français et étranger 25 (1901) 444 (part I), 585 (part II), and 673 (part III), 449–455.

[19]) A "préciput" (from the Latin *præcipuus*) is a privilege, often of priority, choice or alternative quantification, conferred either by law or by contract, see R. Besnier, Le cumul des qualités d'héritier et de légataire dans les coutumes de préciput et les pays de droit écrit à la fin de l'Ancien Régime, Aix-en-Provence 1950.

[20]) Halpérin, L'impossible Code civil (note 6) 29.

[21]) Archives Parlementaires de la Révolution [AP], Paris 2012, vol. II, 633; and vol. VI, 123; see also E. Vallier, Le fondement du droit successoral en droit français, Paris 1902, 189. The Cahiers de doléances, *i.e.* the books where public grievances

immensity of the work of unification of French private law(s) and the uneasy compatibility of the Northern customs with the Southern laws, it raised several difficulties as to (1) how the right of property ought to be balanced with the idéal d'égalité so as to prevent properties from being concentrated in the hands of a few – this would be the feature, as Charles de Montesquieu (1689–1755) argued in L'esprit des lois, of an aristocratic society[22]) – and (2) how to prevent succession from being the source of intra-family injustices and *a fortiori* conflicts, which would constitute a disruption of the peace of families (la paix des familles), on which rested the peace of society (la paix de la société) and of the State (la paix de l'État)[23]).

A. Equality in Succession – Freedom of Testation in the Revolutionary Legislation:

In the aftermath of the Serment du Jeu de Paume on 20 June 1789 and the proclamation of the Assemblée nationale constituante (1789–1791) on 9 July 1789, the revolutionaries decided to provide the Kingdom of France – the monarchy would only be abolished on 21 September 1792 – with a Constitution; they did no intend to reform and unify its private law(s); they agreed that such an undertaking would be left to the next assembly. Nonetheless, the Constituante resolved to implement the consequences of the Night of 4 August 1789, where the feudal system had been abolished[24]), by putting an end to the right of male primogeniture (le droit d'aînesse) in respect of noble succession (les successions nobles), whose status had logically been lowered to that of common succession (les successions roturières)[25]). The Constituante also mandated Philippe-Antoine Merlin de Douai (1754–1838), who had been calling for a reform of the law of succession, stressing that it would be of constitutional importance[26]), to write a report on intestate succession.

Merlin de Douai submitted his report on 21 November 1790 and proposed (1) to institute the principle of equality among heirs (l'égalité des

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and suggestions had been compiled in the first months of the Révolution, show that succession had not been a major concern for the lower classes, see Aron (note 18) 462–470.

[22]) C. de Montesquieu, L'esprit des lois, book V chaps. 5 and 9 and book XXVI chap. 6, Geneva 1748; comp. J.-J. Rousseau *s. v.* "Économie politique", in: J. d'Alember/D. Diderot (ed.), Encyclopédie, Paris 1751.

[23]) Halpérin, L'impossible Code civil (note 6) 91.

[24]) Décret des 4, 6, 7, 8 et 11 août 1789, art. 1.

[25]) Décret du 15 mars 1790, art. 11.

[26]) AP (note 21) XX, 598.

partages); (2) to abolish the distinction between personal and family properties – one estate, one succession –; and (3) to recognise, as it had been permitted in certain laws and customs, the right to replace *ab infinitum* in direct line, or up to the degree of nephew and niece in collateral line, a deceased ascendant in one's succession, a technique known as "représentation"[27]). However, at the request of Honoré-Gabriel Riqueti de Mirabeau (1794–1791), the Constituante decided to adjourn the discussions that were supposed to take place and demanded new amendments addressing testamentary succession. Merlin de Douai amended his report and resubmitted it on 12 March 1791[28]).

1. The Assemblée Nationale Constituante and the Décret du 8 avril 1791 – Instituting the Principle of Equality in Succession:

The principle of equality among heirs was uncontroversial: Had it not been declared in art. 1 of the DDHC that citizens were born free and equal in rights[29])? What was controversial however was the rigour of such equality. Assuming that heirs had to be considered statutorily equal in one's succession, would it not be contradictory to let the *de cujus* break this equality with a testament? As Mirabeau wrote in his address to the Constituante, read posthumously by Charles-Maurice de Talleyrand-Périgord (1754–1838) on 2 April 1791[30]):

> Je ne sais comment il serait possible de concilier la nouvelle constitution française, où tout est ramené au grand et admirable principe de l'égalité avec une loi qui permettrait à un père, à une mère, d'oublier à l'égard de leurs enfants ces principes sacrés d'égalité naturelle, avec une loi qui favoriserait des distinctions que tout réprouve et accroîtrait ainsi dans la société ces disproportions résultant de la diversité des talents et de l'industrie au lieu de les corriger par l'égale division des biens domestiques[31]).

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[27]) *Ibid.*

[28]) Aron (note 18) 478.

[29]) DDHC (note 3), art. 1: "Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune" (Men are born and remain free and equal in rights. Social distinctions may only be made for the sake of the common good).

[30]) Mirabeau had passed away a few hours earlier.

[31]) AP (note 21) XXIV, 513 (I do not know how it would be possible to reconcile the new French constitution, where everything is brought back to the great and admirable principle of equality, with a law which would allow a father, a mother, to forget these sacred principles of natural equality; with a law which would favour distinctions which are clearly disapproved by society, and would thus increase the disproportions resulting from the diversity of talent and industry, instead of correcting them by the equal division of properties).

Accordingly, Mirabeau, Maximilien de Robespierre (1758–1794) and Jérôme Pétion de Villeneuve (1756–1794)[32]) advocated a substantial limitation of the freedom of testation (la liberté testamentaire) by prohibiting the *de cujus* from favouring one of his children to the detriment of the others and by narrowing to a tenth the disposable portion (la quotité disponible); such limitation would additionally prevent the *de cujus* from giving his properties to people who did not belong to his family; Mirabeau again:

> La société a senti que c'est moins ici une nouvelle prise de possession par voie d'héritage qu'une continuité des mêmes jouissances et des mêmes droits résultant de l'état précédent de communauté. Enfin, la société a senti que, pour transférer les biens hors de la famille, il faudrait dépouiller cette famille pour des étrangers, et qu'il y aurait à cela ni raison, ni justice, ni convenance[33]).

Naturally, some members of the Constituante, mostly from the South[34]), such as Jacques Antoine Marie de Cazalès (1758–1805), François-Jérôme Riffard Saint-Martin (1744–1814), Louis-Philippe de Vaudreuil (1724–1802), or

[32]) *Ibid.* 515, 564, and 616.

[33]) *Ibid.* 512 (Society felt that succession is not so much a transfer of property but the continuity of the same rights resulting from a previous state of community. Society felt that transfers of property outside families would impoverish them to the benefit of strangers, and that there would be neither reason nor justice or moral in this).

[34]) Some members of the Constituante from Normandy (a province of customary law) also opposed the principle of equality in succession, arguing that it would be detrimental to agriculture and therefore to the prosperity and well-being of the nation, see Aron (note 18) 477. The principle of equality in succession, they claimed, would necessarily lead to the exponential division of estates and the proliferation of small landowners, who would, in the long run, lose the sufficient and adequate means to cultivate the land, thus threatening the sustainability of large-scale farming, vital for supporting the needs of the population; Thomas Louis César Lambert de Frondeville (1757–1816), in: AP (note 21) XXIV, 49, even declared: "Si l'inégalité existe en Normandie et dans le Midi, c'est que l'impérieuse nécessité a commandé le sacrifice d'une portion des droits individuels à l'intérêt de tous" (If inequality exists in Normandy and in the South, it is because an imperious necessity has ordered the sacrifice of a portion of individual rights for the interest of all). Normandy was indeed known for its agricultural wealth and prosperous agrarian estates; Norman politicians who favoured testamentary succession consequently correlated this abundance with their customs, which were known to permit unequal divisions of the deceased's property, usually to the benefit of the deceased's eldest child and to the detriment of the rest of his children, especially his daughters, see Ch. Lefebvre, L'ancien droit successoral en Normandie, in: Nouvelle revue historique de droit français et étranger 41 (1917) 73; see also A. Saillard, L'ancien droit successoral de la Normandie d'après la coutume de 1583, Paris 1913.

Jean Joseph Mougins de Roquefort (1742–1822), did not approve and pleaded in favour of freedom of testation, arguing that it was only the natural consequence of the right of property[35]), and that testaments were necessary for the *patres familias* to govern their families. To Pétion de Villeneuve, who asserted that filial piety could not be bought[36]), de Cazalès even responded that one would obtain with a testament the respect one would vainly expect from the virtue of one's children[37]).

En vain.

Testaments were not very popular with most members of the Constituante; as Pierre Samuel du Pont de Nemours (1739–1817) declared:

> [L]es lois qui favorisent les testaments sont une cause perpétuelle d'intrigues et de bassesses dans l'intérieur des familles; elles avilissent par l'intérêt jusqu'à l'amour filial; elles ouvrent la porte des maisons aux Tartuffes et aux femmes adroites et perverses; elles rendent les pères tyranniques et les enfants trompeurs; elles sont la source d'une grande corruption et d'une foule de crimes sans compter le tort que fait à la société et aux mœurs l'inégalité des fortunes, qu'elles tend à augmenter sans cesse[38]).

Nonetheless, the Constituante did not legislate on testament, perhaps fearing that the question would significantly disrupt the discussions. It simply resolved to establish the principle of equality among heirs in intestate succession, regardless of their gender, age or ascendance[39]).

2. The Convention and the Loi du 6 Janvier 1794 (17 Nivôse An II) – Asserting a Radical Form of Egalitarian Succession:

Contrary to the Constituante and its rather prudent approach to the reform of succession, the Convention nationale (1792–1795) left its mark with its bold legislative policies, described by Jean-Louis Halpérin as "lois de combat"[40]), notably during the second year of the Republican calendar

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35) AP (note 21) XXIV, 606.

36) *Ibid.* 510: "La piété filiale ne se paie pas."

37) *Ibid.* 575: "C'est par la faculté de tester que les pères gouvernent leur famille, c'est par elle qu'ils obtiennent de leurs enfants […] des égards, des respects qu'ils attendraient en vain de leur vertu."

38) *Ibid.* 556 (The laws which favour testaments are a perpetual cause of intrigues and baseness within families; they debase filial love through interest; they open the doors to fraud, as well as to adroit and perverse women; they render the *patres familias* tyrannical and children deceitful; they are the source of great corruption and crimes, not to mention the harm done to society and moral by the inequality of wealth, which they tend to increase constantly).

39) Décret du 8 avril 1791, art. 1.

40) Halpérin, L'impossible Code civil (note 6) chap. 5.

(an II: 1793–1794)[41]). Its first move consisted in abolishing once and for all institutions described as odious and monstrous[42]): the *fideicommissa* (les substitutions)[43]), namely clauses whereby the testator (le substituant, le disposant) could charge in his testament a first-order grantee (le grevé, l'institué) to receive part of his properties on the condition of retaining and returning it on his own death to a second-order grantee (l'appelé, le substitué)[44]). But its most radical move had been about freedom of testation.

Acknowledging the discussions that had taken place within the Constituante and a strong lobbying effort launched by citizens' committees[45]), the Convention decided to impose a radical form of equalitarian succession by a series of statutes and regulations culminating with the Loi du 6 janvier 1794 (17 nivôse an II). First, so as to preserve equality among heirs, the assembly adopted a Décret on 7 March 1793 abolishing the right of ascendants to dispose of their property in direct line either by testament or by gift. It did not however challenge the regimes of reserved shares or the right to dispose outside one's family[46]). Then, it extended, with the Loi du 26 octobre 1793 (5 brumaire an II), the principle of the Décret du 7 mars

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[41]) The Republican calendar began the day after the abolition of the monarchy on 22 September 1792 (1er vendémiaire an I) and entered into force on 6 October 1793 (15 vendémiaire an II); it was abolished on 1 January 1806 (11 nivôse an XIV).

[42]) Aron (note 18) 587.

[43]) É. Haddad, Les substitutions fidéicommissaires dans la France d'Ancien Régime: droit et historiographie, in: Mélanges de l'École française de Rome 124-2 (2012) 365.

[44]) Loi du 14 novembre 1792. (1) The members of the Assemblée legislative (1791–1792) had already enacted the principle of the abolition of the *fideicommissa* on 23 August 1792 but did not adopt a legislation implementing it. (2) The drafters of the Code civil would formally prohibit *fideicommissa* (art. 896) but would nevertheless tolerate them, in very specific situations, in disguised forms (art. 897). (3) In the aftermath of the proclamation of the Empire, these institutions would be renamed majorats and reinstated by a series of imperial decrees so as to provide the new imperial aristocracy with a means of perpetuating itself (the very reason why they had been abolished during the Révolution), see F.-F. Villequez, Étude historique sur les substitutions prohibées, in: Revue historique de droit français et étranger 9 (1863) 97 (part I) and 189 (part II).

[45]) Aron (note 18) 590–593.

[46]) The members of the Revolutionary Assemblies did not abolish the laws and customs of the Ancien Régime retroactively; as a consequence, the latter continued to apply as long as they had not been abolished or modified by a statute or a regulation, Halpérin, L'impossible Code civil (note 6) 82; see also idem, Le droit privé de la Révolution: héritage législatif et héritage idéologique, in: Annales historiques de la Révolution française 328 (2002) 135.

1793 to the collateral line, adding that this would have a retroactive effect to 14 July 1789:

> Les successions des pères, mères, ou autres ascendants et des parents collatéraux ouvertes depuis le 14 juillet 1789 et qui s'ouvriront à l'avenir seront partagées également entre les enfants, descendants, ou héritier en ligne collatérale nonobstant toutes les lois, coutumes, usages, donations, testaments et partages déjà fais. En consequence, les enfants, descendants et héritiers en ligne collatérale, ne pourront, même en renonçant à ces successions, se dispenser de rapporter ce qu'ils auront eu à titre gratuit, par l'effet des donations que leur auront faites leurs ascendants ou leurs parents collatéraux, postérieurement au 14 juillet 1789[47]).

The Loi declared null and void all gifts and testaments that had been made by a parent to the prejudice of the equality among heirs, regardless of when they had been made and whether they had been part of the disposable portion[48]). It did the same with gifts and testaments made by collateral relatives to their presumptive heirs, but only after 14 July 1789[49]).

A few months after, the Convention completed its legislative agenda on succession by enacting the Loi du 6 janvier 1794 (17 nivôse an II) which (1) confirmed the principle of equality among heirs[50]); (2) extended this equality to the succession devolved to ascendants[51]); (3) established that one could only dispose of one's property to the benefit of persons other than those called to the succession up to one tenth of one's estate had one had heirs in direct line and up to one sixth had one had heirs in collateral line[52]); (4) abolished the distinction between personal and family properties[53]); and (5) instituted – contrary to most Roman law-based traditions, where successions had been devolved according to the degree of proximity to the *de cujus* – a devolution model where proximity would be determined by the common ancestor

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[47]) Loi du 26 octobre 1793 (5 brumaire an II), art. 9 (The succession of fathers, mothers, or other ascendants and collateral relatives which have been opened on and after 14 July 1789 and which will be opened in the future shall be distributed equally among the children, descendants, or heirs in collateral line notwithstanding all the laws, customs, usages, gifts, testaments and distributions already made. Consequently, the children, descendants and heirs in the collateral line, even by renouncing these successions, shall not be able to dispense with accounting for what they have received gratuitously by gifts made to them by their ascendants or collateral parents after 14 July 1789).

[48]) *Ibid*. art. 12.

[49]) *Ibid*. art. 13.

[50]) Loi du 6 janvier 1794 (17 nivôse an II), art. 8 and 9.

[51]) *Ibid.* art. 10.

[52]) *Ibid*. art. 16.

[53]) *Ibid*. art. 62.

(l'auteur, la souche), thus structuring succession in concentric circles: first the descendants (children, grand-children, *etc.*); then the collaterals (siblings, nephews and nieces, *etc.*); and finally the ascendants (parents, grand-parents, *etc.*)[54]). In so doing, they intended to institute a new order, a new society, where equality would be ensured from the symbolic date of the Bastille Day – the drafters of the Loi did not challenge the retroactive effect of the Loi du 26 octobre 1793 (5 brumaire an II) –; where there would be no threat of the emergence of a new aristocracy holding in its hands far too much wealth; and, more pragmatically, where any succession strategies devised by wealthy families in the aftermath of the Révolution would be finally frustrated[55]). This new order would ensure that property would not be held by a few – as Nicolas Hentz (1753–1803) put it: There properties would be less concentrated, but more secure, for they would be legitimate[56]) – and that within families, understood as a close and cohesive entity of three concentric circles, equality would reign as it would reign within the Republic[57]).

B. Succession and Authority – Freedom of Testation in the 1804 Code civil:

The Loi du 6 janvier 1794 (17 nivôse an II) had been virulently criticised[58]) for its retroactive effect, which subsequent governments tried to temper with a series of rather odd statutes and regulations after the fall of Robespierre on 27 July 1794 (9 Thermidor an II)[59]), but its substance had not been challenged until the Consulat (1799–1804) and the Loi du 25 mars 1800 (4 germinal an VIII). This Loi extended significantly the scope of the disposable portion – a fourth had the *de cujus* had less than four children, a fifth had he had four, a sixth had he had five, *etc.*[60]) – and entitled the latter to dispose of it as he saw fit[61]). But of course, the masterpiece of the Consulat, and of Napoléon Bonaparte (1769–1821) himself, as he liked to claim[62]), had been the Code civil.

[54]) *Ibid.* art. 63 *et seq.*

[55]) Archives nationales, Paris, ref. AD XVIII C 326, 7ème pièce (exposé des motifs).

[56]) *Ibid.* 6ème pièce (exposé des motifs): "Là la propriété est moins étendue, mais elle est plus sûre parce qu'elle est légitime."

[57]) *Ibid.* 5ème pièce (exposé des motifs).

[58]) Aron (note 18) 673–719; see also J. Poumarède, La législation successorale de la Révolution entre l'idéologie et la pratique, in: Itinéraire(s) (note 11) 307.

[59]) Aron (note 18) 673–719.

[60]) Loi du 25 mars 1800 (4 germinal an VIII), art. 1 to 4.

[61]) *Ibid.* art. 6.

[62]) C. de Montholon, Récits de la captivité de l'Empereur Napoléon à Sainte-Hélène, vol. I, Paris 1847, 401; see also J.-L. Halpérin, L'histoire de la fabrication du code: le code, Napoléon?, in: Pouvoirs 4 (2003) 11.

1. A Composite Codified Law of Succession – the Influence of the Ancien Droit, the Revolutionary Legislation, and the Consular Counter-Reforms:

As Adhémar Esmein (1848–1913) put it, the drafters of the Code civil, Jean-Étienne-Marie Portalis (1746–1807) and Jacques de Maleville (1741–1824), representing the Southern traditions, and François Denis Tronchet (1726–1806) and Félix-Julien-Jean Bigot de Préameneu (1747–1825), representing the Northern customs, were disciples, not prophets[63]); they did not innovate, but reformed in the continuity of the Ancien Droit[64]), the revolutionary legislation, and the consular counter-reforms. This had particularly been true with the law of succession, where they adopted the principle of equality in intestate succession from the Décret du 8 avril 1791; the principle of freedom of testation from the Loi du 25 mars 1800; and, with a few amendments, the rules governing gifts and testaments from the eponymous 1731[65]) and 1735[66]) royal

[63]) A. Esmein, L'originalité du Code civil, in: Société d'études législatives (ed.), Le Code civil 1804–1904: Livre du centenaire, vol. I: Généralité et études spéciales, Paris 1904, 4, 5.

[64]) The concept of Ancien Droit traditionally covers the laws and academic writings of the pre-revolutionary era, although some authors use it so as to designate the law prior to the promulgation of the Code civil, thus reducing the revolutionary legislation to a mere "droit transitoire" (transitional law), see Halpérin, Le droit privé de la Révolution (note 46).

[65]) Ordonnance de Louis XV, Roy de France et de Navarre, pour fixer la jurisprudence sur la nature, la forme, les charges ou les conditions des donations, February 1731; see H. Regnault, Les ordonnances civiles du chancelier Daguesseau, vol. I: Les donations et l'ordonnance de 1731, Paris 1929. D'Aguesseau imposed, *inter alia*, that: (1) All gifts be made before a notary; (2) No gifts be subject to *mortis causa* clauses, thus distinguishing them from testaments; (3) All gifts be expressly accepted by the donee; (4) All gifts import immediate and irrevocable transfer of property from the donor (le donateur) to the donee (le donataire), hence enacting the rule "donner et retenir ne vaut" (making a gift while keeping possession of it does not constitute a valid gift); (5) All gifts be made on properties currently owned, not on future properties (des bien futurs); (6) All gifts be declared in a public record, a process called "insinuation"; and (7) All gifts be revocable on the later occurrence of a child.

[66]) Ordonnance de Louis XV, Roy de France et de Navarre, concernant les testaments, February 1735; see Regnault, Les ordonnances civiles du chancelier Daguesseau, vol. II: Les testaments et l'ordonnance de 1735, Paris 1928; see also L. Thézard, De l'influence des travaux de Pothier et du Chancelier d'Aguesseau sur le droit civil moderne, in: Revue historique de droit français et étranger 12 (1866) 5, § 22. This ordinance mainly introduced reforms on formalities and preserved the North-South specificities. Nevertheless it led to some evolutions, such as the end of oral testaments, which were already in decline, or the consolidation of the appointment of heirs in Roman law-based testaments.

ordinances drafted by Henri François d'Aguesseau (1668–1751)[67]), Minister of Justice of Louis XV (1710–1774).

These composite influences produced a rather surprising but coherent result[68]).

In the Book III, dedicated to the different means of acquiring property[69]), the drafters of the Code civil addressed in a Title I the rules on intestate succession, simply referred to as "les successions"[70]), and in a Title II the rules on gifts and testaments[71]), which had been conceptualised as "libéralités"[72]), namely as acts through which one could dispose gratuitously[73]) of one's properties, either immediately and irrevocably (gifts)[74]), or for the time one will no longer exist (testaments)[75]). Then, in a Title III, they regulated the third

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[67]) F.-J.-J. Bigot de Préameneu, Présentation au Corps législatif, 22 April 1803 (2 floréal an XI), in: P.-A. Fenet (ed.), Recueil complet des travaux préparatoires du Code civil, vol. XII, Paris 1836, 508, 543: "C'est ici que tous les regards se fixent, sur ces lois célèbres qui contribueront à rendre immortelle la mémoire du Chancelier d'Aguesseau" (Here our eyes turn to these famous legislations which shall make the name of the Chancellor d'Aguesseau immortal).

[68]) Halpérin, Histoire (note 7) § 13.

[69]) C. civ. book III: Des différentes manières dont on acquiert la propriété.

[70]) *Ibid.* book III tit. I: Des successions. The drafters of the Code civil often referred to private law institutions in the plural form (*e.g.* des successions; des donations; des testaments). This stylistic device, still used today by the legislator, served to emphasise that all successions would be devolved by application of the rules instituted in the Code civil (hence the use of the indefinite article "des") and that succession had to be considered as a multi-faceted process, involving many parties (descendants, ascendants, collaterals, legatees, the State) and techniques.

[71]) *Ibid.* book III tit. II: Des donations entre-vifs et des testamens.

[72]) *Ibid.* art. 913, 915, 916, and 1052. One would have noticed that the title on gifts and testaments had not been entitled "Des libéralités" but "Des donations entre-vifs et des testamens" (note 71); the concept of "libéralité" had only been used in the aforementioned articles.

[73]) *Ibid.* art. 893: "On ne pourra disposer de ses biens, à titre gratuit, que par donation entre-vifs ou par testament, dans les formes ci-après établies" (One shall dispose of one's property, gratuitously, only by gift *inter vivos* or by testament, in the following forms).

[74]) *Ibid.* art. 894: "La donation entre-vifs est un acte par lequel le donateur se dépouille actuellement et irrévocablement de la chose donnée, en faveur du donataire qui l'accepte" (A gift *inter vivos* is an act by which the donor currently and irrevocably disposes of the thing gifted, in favour of the donee, who accepts it).

[75]) *Ibid.* art. 895: "Le testament est un acte par lequel le testateur dispose, pour le temps où il n'existera plus, de tout ou partie de ses biens, et qu'il peut révoquer" (A testament is an act by which the testator disposes of all or part of his properties for the time when he will no longer exist, and which he may revoke).

(main[76])) means of acquiring property: contracts[77]). Gifts and testaments had thus been thought of as intermediate means of acquiring property, halfway between succession (where property would be transferred by operation of statutory law) and contracts (where property would be transferred by agreement)[78]). Gifts had after all been described as contracts[79]) and testaments could be seen as unilateral contracts[80]). As with contracts, the *de cujus*

[76]) *Ibid.* art. 712: "La propriété s'acquiert aussi par accession ou incorporation, et par prescription" (Property may also be acquired by accession or incorporation, and by virtue of a statute of limitations).

[77]) *Ibid.* book III tit. III: Des contrats ou des obligations conventionnelles en général.

[78]) One might wonder why the drafters of the Code civil did not articulate the law of intestate succession with the law of testaments in a general title on succession, and why they did not integrate the law of gifts into the law of contracts; Jean Domat (1625–1696), whose influence on their work need not be recalled, had after all done so: J. Domat, Les Loix civiles, vol. III, Paris 1697, Partie I: Où il est traité des successions; Livre I: Des Successions en général; Livre II: Des Successions Légitimes ou Abinstestat; and Livre III: Des Successions testamentaires; *ibid.* vol. I, Paris 1695, Partie I: Des Engagements, & de leur suites; Livre I: Des engagemens volontaires & mutuels par les Conventions; Titre X: Des donations entre vifs. The drafters of the Code civil did not mention in the Travaux préparatoires what motivated their choice – one is presented with a fait accompli –, but it could be due to the fact that they considered gifts and testaments as one and the same, *i.e.* acts by which one could dispose gratuitously of one's property (either *inter vivos* or *mortis causa*), thus warranting their incorporation into a common title, and that the law of intestate succession and the law of gifts and testaments already belonged to two distinct branches of French private law, the latter being regulated by the 1731 and 1735 royal ordinances, and the former by the revolutionary legislation. They could also have had in mind the fact that François Bourjon (16..–1751) and Robert-Joseph Pothier (1699–1772), whose work had on them an influence equal to that of Domat, discussed intestate succession separately from gifts and testaments, as they conceptualised the former as a means of acquiring property and the latter as means of disposing of it, see F. Bourjon, Le droit commun de la France et la coutume de Paris, vol. I, Paris 1747, Livre III: Comment les biens s'acquièrent, Titre XVII: Des successions; *ibid.* vol. II Livre V: Comment on dispose des biens, Titre IV: Des donations entre-vifs, and Titre IX: Des testamens; and R.-J. Pothier, Œuvres posthumes: Traités des successions, des propres, des donations testamentaires, des donations entre-vifs, des personnes & des choses, Paris 1777, 1, 295, and 437.

[79]) C. civ. art. 931 *in limine*: "Tous actes portant donation entre-vifs seront passés devant notaires, dans la forme ordinaire des contrats" (All deeds of gift *inter vivos* shall be executed before a notary in the ordinary form of contracts).

[80]) *Ibid.* art. 1103; J.-J. Siméon, Discours devant le Corps législatif, 19 April 1804 (29 germinal an XII), in: Fenet XII (note 67) 215, 217: "[D]es trois grands

could dispose of his properties as he saw fit, but the gifts and testaments he would make had to respect the portions that had been statutorily reserved to the heirs, otherwise they could be reduced[81]).

Legitimate and Appointed Heirs – Intestate and Testamentary Successions: The drafters of the Code civil distinguished two kind of heirs: those designated by statutory law ("les héritiers légitimes" or "les héritiers naturels"), and those appointed by testament ("les héritiers institués" or "les légataires universels") or to whom the *de cujus* consented just one legacy (un leg): "les légataires"[82]). They decided that the héritiers légitimes would *ipso iure* receive the properties, rights and actions of the deceased, subject to the obligation to pay all the costs of the succession[83]). As Tronchet said during the discussion in the Conseil d'État on 16 December 1802 (25 frimaire

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moyens d'acquérir ou de transmettre la propriété [*i.e.* les successions, les donations et les testaments ainsi que les obligations (C. civ. art. 711)] les successions sont les premières dont on s'occupe. // [I]l y a plusieurs raisons de cette préférence. 1. Les successions sont réglées et déférées par la loi: il faut statuer sur ce qu'elle veut avant d'en venir à ce qu'elle permet. 2. La succession est une espèce de continuation du domaine du défunt en faveur de ses proches. Elle opère une moindre mutation de propriété que les donations entre-vifs, testamentaires, ou que les obligations" (Of the three principal means of acquiring or transmitting property [*i.e.* succession, gifts and testaments, or obligations (C. civ. art. 711)], succession is the first to be addressed. [T]here are several reasons for this preference. 1. Successions are regulated by statutory law: one has to decide what the law wants before coming to what it permits. 2. Succession is a continuation of the property of the deceased in favour of his relatives. It creates a lesser transfer of property than gifts, testaments, or obligations). One would have recognised the idea of the intra-family continuation of property formulated by Mirabeau (note 33) during the Révolution.

[81]) C. civ. art. 920: "Les dispositions, soit entre-vifs, soit à cause de mort, qui excéderont la quotité disponible, seront réductibles à cette quotité lors de l'ouverture de la succession" (Dispositions, either *inter vivos* or *mortis causa*, which exceed the available portion, shall be reducible to that portion when the succession is opened).

[82]) Although it would have been more coherent to characterise the appointed heirs as légataires universels, as they had actually been referred to in the section on the legs universels, C. civ. book III tit. II chap. V sec. IV, and in other parts of the Code (art. 610, 873, 1011 and 1012), the drafters of the Code civil decided to preserve, in parallel, the title of héritiers institués (art. 1002) "pour ne pas trop déroger aux usages" (so as not to depart too much from well-established practices), that is those of the South of France, G.-J. Favard de Langlade, Discours devant le Corps législatif, 3 May 1803 (13 floréal an XI), in: Fenet XII (note 67) 627, 641.

[83]) C. civ. art. 724: "Les héritiers légitimes sont saisis de plein droit des biens, droits et actions du défunt, sous l'obligation d'acquitter toutes les charges de la succession."

an XI), this technique, referred to as "la saisine des héritiers"[84]) – "le mort saisit le vif"[85]) – derived from the Northern customs:

> Il y avait dans l'ancienne législation cette différence, qu'en pays de droit écrit la succession testamentaire était la première, et que, par une suite de ce principe, l'héritier institué était saisi de plein droit; qu'en pays coutumier, au contraire, la qualité d'héritier n'était déférée que par la loi: ainsi l'on ne pouvait prendre que de la main de l'héritier les legs universels ou particuliers.
> Une autre différence encore était qu'en pays de droit écrit on pouvait disposer par testament de l'universalité de ses biens; au lieu qu'en pays coutumier il existait des réserves, d'où il résultait que l'héritier naturel devait être saisi, et délivrer les legs, afin qu'il pût examiner si le testateur n'avait pas passé les bornes que lui donnait la loi.
> Le Code civil doit faire cesser cette diversité, qui semblait diviser la France en plusieurs nations; mais comme il ne s'agit pas de rompre avec les habitudes des français, et que le législateur est réduit à choisir, il a semblé juste de préférer les habitudes les plus universelles, qui sont celles des pays coutumiers[86]).

Jean-Baptiste Treilhard (1742–1810) added:

> L'héritier naturel est toujours certain; l'héritier institué, au contraire, tire sa qualité d'un titre qui n'est pas jugé; il ne peut présenter ce titre qu'après un long espace de temps: or, il faut que, dans l'intervalle, la succession repose sur une tête quelconque. Au surplus, la saisine de l'héritier naturel ne cause aucun préjudice à l'héritier institué[87]).

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[84]) *Ibid.* book III tit. I chap. I: De l'ouverture des successions, et de la saisine des héritiers.

[85]) The dead seize the living, see F. Lalière, Le mort saisit le vif, De la saisine héréditaire au droit réel de possession, Louvain-la-Neuve 2020, part 1; see also J. Krynen, Le mort saisit le vif, Genèse médiévale du principe d'instantanéité de la succession royale française, Journal des Savants 3–4 (1984) 187.

[86]) Discussions au Conseil d'État, 16 December 1802 (25 frimaire an XI), in: Fenet XII (note 67) 5, 9 (There was this difference in the old legislation: in the provinces of written law, testate succession was first, and consequently the appointed heir was entitled to the property that had been left to him by the deceased; on the contrary, in the provinces of customary law, the status of heir was conferred by law: thus, the legacies that had been made by the deceased could only be taken from the hand of the heir. // Another difference was that in the provinces of written law, one could dispose of all one's properties by testament, whereas in the provinces of customary law, certain properties could not be disposed of by testament – hence the necessity of transferring *ipso iure* the estate to the natural heirs so that they could examine whether the testator had not exceeded the limits imposed by the law before delivering legacies to the legatees. // The Code civil must put an end to this diversity which seemed to divide France into several nations. But since it is out of question to break with the habits of the French, and since the legislator had to choose, it seemed right to prefer the most universal habits, which are those of the provinces of customary law).

[87]) *Ibid.* 10 (The natural heir is always certain; the appointed heir, on the other

Thus it had been decided that where at the death of the testator there would be heirs to whom parts of the estate had been statutorily reserved, they would *ipso iure* become owners, and the universal legatees would have to demand the delivery of the properties that had been bequeathed unto them by testament[88]). On the contrary, where at the death of the testator there would be no such heirs, the estate would be transferred *ipso iure* to universal legatees at the day of the death of the testator, without necessitating a request for delivery[89]). The légataires à titre universel, namely those to whom the testator had bequeathed a specific part of his properties, such as half, a third, or all of his real properties, or all of his personal properties, or a fixed proportion of all his real or personal properties[90]), and the légataires à titre particulier, that is those to whom a single item had been bequeathed[91]), had to request delivery to the heirs to whom parts of the properties had been statutorily reserved; or in the absence of such heirs, to the universal legatees[92]).

Intestate Succession – Equality and Blood Ties: As Treilhard said in his presentation to the Corps législatif on 9 April 1803 (19 germinal an XI), intestate succession had to be regarded as the presumptive testament (le testament présumé)[93]) of the deceased, *i.e.* the testament he would have written had he had time to write one for all his estate. And in line with the revolutionary legislation, it had been presumed that the deceased would

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hand, derives his right from a title not yet adjudicated; he can only rely on it after a long period of time; in the meantime, the estate must rest on someone's shoulders. Moreover, the *ipso iure* transfer of the estate to the natural heir would cause no prejudice to the appointed heirs).

88) C. civ. art. 1004: "Lorsqu'au décès du testateur il y a des héritiers auxquels une quotité de ses biens est réservée par la loi, ces héritiers sont saisis de plein droit, par sa mort, de tous les biens de la succession; et le légataire universel est tenu de leur demander la délivrance des biens compris dans le testament."

89) *Ibid.* art. 1006: "Lorsqu'au décès du testateur il n'y aura pas d'héritiers auxquels une quotité de ses biens soit réservée par la loi, le légataire universel sera saisi de plein droit par la mort du testateur, sans être tenu de demander la délivrance."

90) *Ibid.* art. 1010 § 1: "Le legs à titre universel est celui par lequel le testateur lègue une quote-part des biens dont la loi lui permet de disposer, telle qu'une moitié, un tiers, ou tous ses immeubles, ou tout son mobilier, ou une quotité fixe de tous ses immeubles ou de tout son mobilier."

91) *Ibid.* art. 1010 § 2.

92) *Ibid.* art. 1011: "Les légataires à titre universel seront tenus de demander la délivrance aux héritiers auxquels une quotité des biens est réservée par la loi; à leur défaut, aux légataires universels"; see also *ibid.* art. 1014.

93) J.-B. Treilhard, Présentation au Corps législatif, 9 April 1803 (19 germinal an XI), in: Fenet XII (note 67) 136, 136.

have granted equal rights to his heirs; as Joseph Jérôme Siméon (1749–1842) declared in his address to the Corps législatif on 19 April 1803 (29 germinal an XII):

> Les enfans et leurs descendans succèdent à leurs ascendans par égales portions. Plus d'injustes distinctions, ni de sexe, ni de primogéniture, ni même de lit. Les femmes ne sont ni moins nécessaires ni moins précieuses à la société que les hommes, les cadets que les aînés, les enfans d'un second mariage que ceux d'un premier. La loi les voit tous d'un œil égal et leur donne à tous les mêmes droits. C'est aux parens qu'il appartiendra de les distinguer sans injure, de marquer à ceux qui l'auront méritée une juste prédilection. Leurs dispositions seront le jugement domestique, la loi particulière de leurs familles: elles pourront y introduire une inégalité raisonnable et modérée. Mais l'égalité sera le droit commun, le vœu et la disposition générale de notre droit civil[94]).

Furthermore, it had been presumed that the deceased would have disposed of his properties in consideration of blood ties[95]): the children or their descendants would thus succeed to their father and mother, grandfathers, grandmothers or other ascendants, without distinction of gender or primogeniture, even if they came from a different marriage[96]). Had the deceased died with no posterity, no brother or sister, or no nephews or nieces, the estate had to be split into two parts and shared equally between the ascendants from the paternal line and those from the maternal line[97]). Had the father and mother of

[94]) Siméon (note 80) 226–227 (Children and their descendants will succeed to their ascendants in equal portions. No more unjust distinctions, neither of gender, nor of primogeniture, nor even of bed. Women are neither less necessary nor less valuable to society than men, younger children than older ones, children from a second marriage than those from a first. The law considers them equal and gives them equal rights. It is up to their parents to distinguish them without offending them, to show a just predilection to those who earned it. Their arrangements will be the internal order, the particular law of their families: they can introduce a reasonable and moderate inequality. But equality will be the general law, the wish and the rationale of our civil law).

[95]) G.-A. Chabot de l'Allier, Rapport au Tribunat, 16 April 1803 (26 germinal an XI), in: Fenet XII (note 67) 161, 170 and 185–186.

[96]) C. civ. art. 745 § 1: "Les enfans ou leurs descendans succèdent à leurs père et mère, aïeuls, aïeules, ou autres ascendans, sans distinction de sexe ni de primogéniture, et encore qu'ils soient issus de différents mariages."

[97]) *Ibid.* art. 746 § 1: "Si le défunt n'a laissé ni postérité, ni frère, ni sœur, ni descendans d'eux, la succession se divise par moitié entre les ascendans de la ligne paternelle et les ascendans de la ligne maternelle." This rule confirmed the abolition of any distinction between family and personal properties, Treilhard, Présentation (note 93) 142–143; see also C. civ. art. 732: "La loi ne considère ni la nature ni l'origine des biens pour en régler la succession" (The law does not consider the nature or origin of the properties for settling the succession).

a person who died without posterity already died, his brothers, sisters or their descendants would be entitled to the estate, thus excluding other ascendants and collaterals[98]). It had also been decided that the children of the *de cujus*' deceased children, or their grand-children, *etc. ad infinitum*, could replace, through the fiction of représentation[99]), their parents, or grand-parents, *etc. ad infinitum*[100]), but not the ascendants of the *de cujus*' ascendants[101]). However, in collateral line, the benefit of représentation had been admitted in favour of the *de cujus*' nephews and nieces, and their descendants, only where they had been called to the succession with their uncles or aunts, or where the succession had been devolved to them, had all the brothers and sisters of the deceased already died[102]). Finally, it had been decided not to extend the benefit of the représentation to the first cousins (les cousins germains), for, as Bonaparte declared during the discussions in the Conseil d'État, they had to be regarded as heads of separate and distinct families, only knowing each other as individuals[103]), hence narrowing down the statutory understanding of family as an institution (a process already initiated during the Révolution)[104]).

2. Freedom of Testation – Facilitating and Controlling the Government of the Paterfamilias:

Contrary to the liberal majorities of the Revolutionary Assemblies, which had advocated the emancipation of individuals from the authority of the fa-

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[98]) *Ibid.* art. 750 § 1: "En cas de prédécès des père et mère d'une personne morte sans postérité, ses frères, sœurs ou leurs descendans sont appelés à la succession, à l'exclusion des ascendans et des autres collatéraux."

[99]) *Ibid.* art. 739: "La représentation est une fiction de la loi, dont l'effet est de faire entrer les représentans dans la place, dans le degré et dans les droits du représenté" (Representation is a fiction of statutory law by which a person is put into the place, degree and rights of another).

[100]) *Ibid.* art. 740 § 1: "La représentation a lieu à l'infini dans la ligne directe descendante"; comp. Chabot de l'Allier (note 95) 170–171.

[101]) C. civ. art. 741: "La représentation n'a pas lieu en faveur des ascendans; le plus proche, dans chacune des deux lignes, exclut toujours le plus éloigné"; comp. Chabot de l'Allier (note 95) 172.

[102]) C. civ. art. 742: "En ligne collatérale, la représentation est admise en faveur des enfans et descendans de frères ou sœurs du défunt, soit qu'ils viennent à sa succession concurremment avec des oncles ou tantes, soit que tous les frères et sœurs du défunt étant prédécédés, la succession se trouve dévolue à leurs descendans en degrés égaux ou inégaux."

[103]) Discussions au Conseil d'État, 16 December 1802 (note 86) 20: "[Les cousins germains] sont chefs de familles distinctes et séparées, et ne se connaissent que comme individus."

[104]) Halpérin, Histoire (note 7) §§ 11–12.

thers (les pères), the reactionary Consular legislators had undertaken to establish, *via* the idealised figure of the Roman *paterfamilias*, an authoritarian and patriarchal model of family[105]), where the *paterfamilias* had been vested with the primordial magistracy[106]) over his wife and his children, who had been statutorily assigned to a regime of incapacity[107]). Accordingly, they designed testaments as instruments for facilitating the authoritarian paternal government, giving the *paterfamilias* sufficient leverage to reward or punish whoever deserved it or not, and ultimately ensure public peace and order – an argument that had already been brought forward during the Révolution by de Cazalès[108]). Nevertheless, the drafters of the Code civil had been cautious to curtail the freedom of the *paterfamilias* so as to make sure that he would dispose of his properties within his own family – gifts and testaments made to the benefit of strangers had unanimously been seen as something that ought to be limited to the performance of a duty of gratitude[109]) – and prevent his children from becoming the victims of his passion and pride, although they thought that such situations would be very hypothetical[110]).

Bigot de Préameneu, who considered that the right of disposing freely of one's property upon death derived naturally from the right of property[111]), proposed in a first draft to limit the disposable portion to a quarter of the deceased's estate, so as to ensure that he would respect his parental duties vis-à-vis his children and society:

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[105]) *Ibid.* § 12.

[106]) H. de Carion-Nisas, Rapport au Tribunat, 19 March 1803 (28 ventôse an XI), in: P.-A. Fenet (ed.), Recueil complet des travaux préparatoires du Code civil, vol. IX, Paris 1836, 510, 511: "[L'homme marié] n'est plus un simple individu, c'est un chef, c'est pontife, investi de la magistrature primordiale, du plus antique sacerdoce qui existe parmi les hommes" ([The married man] is no longer a mere individual, he is a chieftain, he is a pontiff, invested with the primordial magistracy, the most ancient vocation that exists among men).

[107]) This explains why women are barely mentioned in the Travaux préparatoires, and why the Napoleonic legislation is mostly structured around men.

[108]) AP (note 21) XXIV, 575: "Plus votre gouvernement devient libre, plus il est dans sa nature que le ressort de la police publique y soit relâché, plus il devient nécessaire de fortifier la puissance paternelle qui seule peut la remplacer" (The freer your State becomes, the more the power of its police is relaxed, the more necessary it becomes to strengthen paternal power, which alone can replace it).

[109]) Discussions au Conseil d'État, 10 February 1803 (21 pluviôse an XI), in: Fenet XII (note 67) 299, 311–312.

[110]) *Ibid.* 314.

[111]) Discussions au Conseil d'État, 20 January 1803 (30 nivôse an XI), in: Fenet XII (note 67) 244, 244.

> L'ordre conforme à la nature est celui dans lequel les père et mère ne voudront disposer de leur propriété qu'au profit de leurs enfans. S'ils réclament sur une partie des biens une liberté absolue, c'est encore en faveur des enfans, et pour qu'en réparant les inégalités qui peuvent résulter des talents, des infirmités, des faveurs ou des revers de la fortunes, ils puissent rétablir la balance entre leurs enfans, et leur conserver à tous l'existence civiles: mais dans le cours ordinaire des évènements, le quart des biens n'est-il pas suffisant pour cette espèce de nivellement entre les enfans, ou pour remplir, avec d'autres que les enfans, des devoirs de reconnaissance; et cette quotité ne sera-t-elle pas trop considérable si elle est destinée à une préférence que la raison désavouerait[112])?

Maleville opposed the principle of such a portion, reminding his colleagues that punishments and rewards were the most powerful force driving human actions[113]) and that it would be rather vain for the legislator to establish a system relying on the sincerity of the children's affection towards their parents: testaments ought to be used to force them to behave properly; often, he said, the appearance of virtue is as effective as virtue itself; it would force children to adopt the happy habits which shape morals and ensure the peace of families[114]). Advocating for the adoption of the Coutume de Paris, where

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[112]) *Ibid.* 248 (The natural order is where the fathers and mothers wish to dispose of their properties for the exclusive benefit of their children. If they claim absolute freedom to dispose of it, it should be in favour of the latter, so as to repair inequalities arising from their talents, infirmities, or a reversal of fortune, so as to re-establish equality among them, and preserve their civil existence. Would not a quarter of the estate be sufficient for this sort of levelling out? Or for fulfilling, towards others, duties of gratitude? Would this portion not be too large if it were intended for a purpose that reason would disavow?).

[113]) Discussions au Conseil d'État, 20 January 1803 (note 111) 254: "Les peines et les récompenses sont le ressort le plus puissant des actions des hommes." The drafters of the Code civil had a rather pessimistic view of human nature, justifying a legislation where collective order would take precedence over individual freedom. Portalis, in: Discussions au Conseil d'État, 14 August 1801 (26 thermidor an IX), in: P.-A. Fenet (ed.), Recueil complet des travaux préparatoires du Code civil, vol. VII, Paris 1836, 92, 120, famously declared: "S'agit-il du droit, l'individu n'est rien, la société est tout; s'agit-il de faits, chaque individu est la société toute entière" (As for the law, the individual is nothing, and society everything; as for the facts, each individual has to be regarded as the society as a whole); see Halpérin, Histoire (note 7) § 8; see also X. Martin, L'insensibilité des rédacteurs du Code civil à l'altruisme, in: Revue historique de droit français et étranger 4 (1983) 589; idem, Nature humaine et Code Napoléon, in: Droits 2 (1985) 117, and idem, L'individualisme libéral en France autour de 1800, Essai de spectroscopie, in: Revue d'histoire des Facultés de droit et de la science juridique 4 (1987) 87.

[114]) Discussions au Conseil d'État, 20 January 1803 (note 111) 255: "Bien souvent,

the disposable portion had been limited to half of the estate, he argued that it would be fair vis-à-vis the burden resting on the shoulders of the *patres familias*:

> Ce droit accordé au père de se départir de ses biens entre ses enfans suivant leurs besoins et leur mérite n'est qu'un faible dédommagement des peines et solicitudes attachées à sa condition. Un individu isolé ne souffre que de ses maux personnels; mais il n'en est pas ainsi d'un père: il est malade de la maladie de ses enfans, tourmenté de leurs chagrins, déshonoré par leur mauvaise conduite. Pourquoi les droits ne seraient-ils pas en proportion avec les devoirs ? Pourquoi les peines seraient-elles toutes du côté des pères, et les avantages du côté des enfans[115])?

He then summoned the authority of Montesquieu:

> Montesquieu dit très-bien que, par le droit naturel, les pères sont obligés de nourrir et de protéger leurs enfans jusqu'à ce que ceux-ci soient en âge d'y pouvoir eux-mêmes, mais non de les instituer héritiers[116]).

Maleville added, after having reminded the members of the Conseil d'État that a disposable portion of half of the succession had been instituted in Roman law so as to give equal importance to property and filial piety (la piété filiale) and to allow the *paterfamilias* to correct injustices, that the peace of the State depended on subordination and tranquillity within families:

> [Ce dernier point] a acquis, depuis la Révolution, un bien plus grand degré de force par l'accroissement de l'insubordination et de la dépravation des mœurs de la jeunesse. Qu'on vérifie dans les greffes des tribunaux criminels l'âge des condamnés, et l'on trouvera qu'ils sont presque tous au-dessous de trente ans. Les pères sont la providence des familles, comme le gouvernement la providence de l'État: il serait impossible à celui-ci de maintenir l'ordre s'il n'était efficacement secouru par les premiers: il userait ses ressorts en déployant sans cesse sa puissance; et le meilleur

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l'apparence de la vertu a l'effet de la vertu même; elle fera contracter aux enfans les heureuses habitudes qui forment les mœurs et assurent la paix des familles."

[115]) *Ibid.* (The right granted to the *paterfamilias* to divide his properties among his children according to their needs and merits is but a small compensation for the pains and solicitude attached to his condition. An isolated individual suffers from his own torments, but not the *paterfamilias*: he suffers from his children's illnesses, he is tormented by their sorrows, and is disgraced by their bad conduct. Why should the rights of children not be proportionate to their duties? Why should the pains be all on the side of the fathers, and the advantages on the side of the children?).

[116]) *Ibid.* 309–310 (Montesquieu says very well that according to natural law the fathers are obliged to feed and protect their children until they are old enough to do so themselves, not to make them heirs). Maleville referred to Montesquieu (note 22) book XXVI chap. 6, 234: "La loi naturelle ordonne aux pères de nourrir leurs enfants, mais elle n'oblige pas de les faire héritiers" (Natural law commands the fathers to feed their children but does not oblige them to make them heirs).

de tous les gouvernements est celui qui, sachant arriver à son but par les causes secondes, paraît gouverner le moins[117]).

[117]) Discussions au Conseil d'État, 20 January 1803 (note 111) 309 ([This last point] has acquired, since the Revolution, a much greater degree of force by the increase in insubordination and the depravity of the moral of the young generation. If we look at the age of convicts in the criminal courts, we find that they are almost all under thirty years of age. // The *patres familias* are the providence of families, just as the government is the providence of the State: it would be impossible for the latter to maintain order if it were not assisted by the former: it would wear out its force by constantly deploying its power; the best of all governments is the government that, knowing how to reach its goal through secondary means, seems to govern the least). Maleville, in: Discussions au Conseil d'État, 10 February 1803 (note 109) 310–311, also mentioned, in defence of a large disposable portion, and therefore of a greater freedom of testation, an argument similar to the one made by Lambert de Frondeville (note 34) during the Révolution: "Dans une grande ville, dans un pays commerçant où l'argent abonde et où les richesses sont principalement en mobilier, il y a moins d'inconvénient à ce que la portion disponible soit plus restreinte, parce que, même à l'égard des propriétés foncières, l'un des copartageans trouvera facilement du numéraire pour garder une terre en son entier et payer aux autres leurs parts: aussi à Paris, à Bordeaux même, au centre du droit romain, et quoique la légitime ne fût que de moitié, l'usage général était-il de partager également. // Mais dans les départements méditerranés et sans commerce, où le numéraire est rare et les richesses mobilières presque nulle, où les hérédités sont absolument composées de propriétés foncières, chaque ouverture de succession amènera à un partage réel, et subdivisera les héritages de manière à ne pouvoir plus composer une ferme, une métairie: ce sera la ruine de la culture et la destruction des familles; aussi dans ces pays l'usage à peu près général est-il de faire un héritier. // Ainsi chaque province s'est faite aux institutions les plus conformes à ses intérêts; et ce serait la plus mauvaise de toutes les politiques que de chercher à les contrarier: il faut porter une loi qui puisse convenir à toutes les habitudes; et certainement l'ancienne quotité de la légitime [de moitié] est celle qui s'accommode le mieux à tous les usages. Il convient aux goûts et à la position des uns de faire un partage égal; la loi n'y porte point d'obstacle: mais pourquoi voulez empêcher les autres de faire autrement, si l'intérêt de leur famille l'exige? Ce serait une tyrannie à laquelle le législateur ne peut pas se prêter" (In a large city, in a region where trade is important, where money abounds and wealth is mainly constituted of movable properties, there is less of an inconvenience if the disposable portion is smaller, for, even with regard to landed property, a co-heir will easily find some money to keep a piece of land in its entirety and pay the others their shares: so in Paris, in Bordeaux itself, at the centre of Roman law, and even though the disposable portion was of half of the estate, the general practice was to divide it equally. // But in the inland provinces, where there is not much trade, where money is scarce and movable wealth almost non-existent, where estates are composed entirely of landed property, each succession would lead to divisions and would eventually subdivide estates in such a way that it would be impossible to create a farm and small tenancies: this would be the ruin of agriculture and families; so in these provinces it is more or

Tronchet, who had already expressed rather sceptical, not to say hostile, opinions about freedom of testation during the Révolution[118]), disagreed:

> Ici les Romains ne peuvent être pris pour modèles: ils s'étaient érigés en législateurs suprêmes dans leur famille: leur testament était une loi; ils exerçaient sur leurs enfans une puissance illimitée. C'était s'écarter de la loi naturelle. Elle veut que celui qui a donné la vie à un enfant lui laisse aussi ses biens. Il semble donc que la totalité du patrimoine paternel devrait passer aux descendans en ligne directe, et que le pouvoir du père devrait être réduit à faire quelques legs rémunératoires d'une valeur modique[119]).

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less the general practice to appoint an heir. // Each region developed institutions that are best suited to its interests; and it would be the worst of all policies to contradict them: It is necessary to adopt a provision that can accommodate all customs; and certainly the old disposable portion [of half of the estate] is the one that best accommodates all of them. It suits the tastes and position of those who want to share equally; the law does not forbid it. But why should the others be prevented from doing otherwise, if the interests of their family so require? This would be a tyranny to which the legislator cannot lend itself).

[118]) AP (note 21) XXIV, 564–570.

[119]) Discussions au Conseil d'État, 20 January 1803 (note 111) 258 (Here Romans cannot be taken as an example, for they established themselves as supreme legislators of their families; their testament was a law and they exercised unlimited power over their children; this was a departure from natural law. [Natural law] requires that he who has given life to a child should leave him with his properties. The whole estate ought to be transferred to the direct descendants of the *paterfamilias* and the latter's powers should be reduced to making only a few remunerative legacies of modest value). Pierre-François Réal (1757–1834), in: Discussions au Conseil d'État, 10 February 1803 (note 109) 315–316, supported Tronchet's position and replied to Maleville (note 117), who claimed that a limited freedom of testation would eventually result in the ruin of agriculture and families, as it would naturally lead to an exponential (and ultimately harmful) division of properties. Réal argued that he had not observed any adverse effects when the principle of equality in succession instituted by the Loi du 6 janvier 1794 (17 nivôse an II) had been implemented, and that it would be good, on the contrary, to have a steady division of properties from one generation to the next, as it would gradually reduce the number of proletarians and increase the number of owners – the Consular elite thought after all that public peace and order rested on property, see J.-É.-M. Portalis, Présentation au Corps législatif, 17 janvier 1804 (26 nivôse an XII), in: P.-A. Fenet (ed.), Recueil complet des travaux préparatoires du Code civil, vol. XI, Paris 1836, 112, 132–134 –; he added, analogising with the right of male primogeniture (which was the *de facto* outcome of many succession laws and customs): "[L]oin de conserver la famille, cette théorie la détruit en chassant de l'héritage paternel la plus grande partie des membres qui composent cette famille, en établissant entres les enfans d'un même père des motifs bien fondés de jalousie et de haine. // C'est ce qui arrivait en Normandie, en Gascogne, où les cadets dépouillés par la coutume, végétaient dans les privations et la misère à côté d'un aîné

Portalis dismissed Tronchet's argument, emphasising that freedom of testation was essential for society:

> Le droit de disposer est encore un droit d'arbitrage, par lequel le père répartit son bien entre ses enfans, proportionnellement à leurs besoins. Et il faut remarquer que ce droit est avantageux à la société car le père, en donnant moins aux enfans engagés dans une profession lucrative, réserve une plus forte part à ceux que leurs talents appellent à des fonctions utiles à l'État, inutiles à leur fortune.
> Là où le père est législateur dans sa famille, la société se trouve déchargée d'une partie de sa solicitude.
> Qu'on ne dise pas que c'est là un droit aristocratique. Il est tellement fondé sur la raison, que c'est dans les classes inférieures que le pouvoir du père est le plus nécessaire. Un laboureur, par exemple, a eu d'abord un fils qui, se trouvant le premier élevé, est devenu le compagnon de ses travaux. Les enfans nés depuis étant moins nécessaires au père, se sont répandus dans les villes et y ont poussé leur fortune. Lorsque ce père mourra, sera-t-il juste que l'aîné partage également le champ amélioré par ses labeurs avec des frères qui sont déjà plus riches que lui[120])?

Eventually, the drafters of the Code civil decided to adopt Jean-Jacques Régis de Cambacérès (1753–1824)' idea[121]) of a progressive disposable por-

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qui nageait dans l'abondance est le superflu. // On parle de l'ancienneté de cet ordre de choses. Mais nos institutions ont changé; et ce qui convenait lorsqu'il y avait des privilèges et un tiers-état ne peut convenir sous le régime de l'égalité" (Far from preserving families, this theory destroys them by excluding most of their members from the estates of their fathers, by establishing between children justified reasons for jealousy and hatred. // This is what happened in Normandy, in Gascony, where the youngest children, stripped of their possessions by the customs, vegetated in deprivation and misery next to the eldest, who thrived in abundance and superfluousness. // Some mention that this order of things is ancient. But our institutions have changed; and what was appropriate when there were privileges and a Third Estate cannot be appropriate under the regime of equality).

[120]) Discussions au Conseil d'État, 20 January 1803 (note 111) 259 (The right to dispose is a right to choose, a right through which a father distributes his properties among his children, in proportion to their needs. And it should be noted that this right is advantageous for society, for the father, by giving less to children engaged in a lucrative profession, reserves a larger share for those whose talents call them to functions that are useful for the State, but are useless for their fortune. // Where the father is a legislator in his family, society is relieved of part of its solicitude. // Let it not be said that this is an aristocratic right. In fact, it is in the lower classes that it appears to be necessary. A ploughman, for example, had a son who, being the first born, became his work companion. The children born after, being less necessary to the father, have spread to the cities and have made their fortune there. When this father dies, would it be fair for the eldest to share equally the field improved by his labours with brothers who are already richer than he is?).

[121]) *Ibid.* 300.

tion of half of the deceased's estate had he died leaving one (legitimate[122])) child behind, one third had he died leaving two, or one quarter had he died leaving three or more[123]). Had he died childless, his ascendants would obtain half of the estate if they represented both paternal and maternal lines and a quarter if they only represented one[124]). They then moved on to discuss the title on gifts and testaments: their discussions, more focused on the forms of these acts, were far more serene.

[122]) The fate of illegitimate children (les enfants naturels), which had been a real source of controversy during the Révolution, hardly moved the drafters of the Code civil, who elevated marriage as a structuring element of family and society. Bonaparte, in: Discussions au Conseil d'État, 17 November 1801 (26 brumaire an X), in: P.-A. Fenet (ed.), Recueil complet des travaux préparatoires du Code civil, vol. X, Paris 1836, 71, 77, even declared that "la société n'a pas intérêt à ce que des bâtards soient reconnus" (society has no interest in the recognition of bastards). Unsurprisingly, illegitimate children were excluded from their parents' succession, or more precisely, they could only benefit from a "succession irrégulière", had they been recognised by their fathers, C. civ. book III tit. I chap. IV art. 756: "Les enfans naturels ne sont point héritiers; la loi ne leur accorde de droits sur les biens de leur père ou mère décédés que lorsqu'ils ont été légalement reconnus. Elle ne leur accorde aucun droit sur les biens des parens de leur père ou mère" (Illegitimate children are not heirs; the law grants them rights to the properties of their deceased father or mother only when they have been legally recognised. It does not grant them any rights to the property of their father's or mother's parents); Siméon (note 80) 230: "Les enfans naturels n'exerceront pas des droits de la famille; ils sont hors de la famille: mais le sang de leur père et de leur mère coule dans leurs veines; ce sont les droits du sang que le Code leur adjuge" (Illegitimate children do not have family rights; they are outside the family: but as the blood of their father and mother flows in their veins, the Code will grant them rights of blood). Illegitimate children who had been recognised by their fathers had thus been entitled to a third of the properties a legitimate child would have received had the *de cujus* died leaving legitimate descendants behind; half had he died leaving only ascendants or siblings; and three quarters had he died without descendants, ascendants or collateral relatives (C. civ. art. 757 § 1); they could claim all the estate had the *de cujus* died with no one to succeed him (C. civ. art. 758).

[123]) C. civ. art. 913: "Les libéralités, soit par actes entre-vifs, soit par testament, ne pourront excéder la moitié des biens du disposant, s'il ne laisse à son décès qu'un enfant légitime; le tiers, s'il laisse deux enfans; le quart, s'il en laisse trois ou un plus grand nombre." One would have of course recognised the principle of the Loi du 25 mars 1800 (note 60).

[124]) C. civ. art. 915 § 1: "Les libéralités, par actes entre-vifs ou par testament, ne pourront excéder la moitié des biens, si, à défaut d'enfant, le défunt laisse un ou plusieurs ascendans dans chacune des lignes paternelle et maternelle; et les trois quarts, s'il ne laisse d'ascendans que dans une ligne."

In accordance with the Consular Constitution of 13 December 1799 (22 frimaire an VIII), the members of the Conseil d'État agreed on the final drafting[125]) of the title on intestate succession on 5 April 1803 (15 germinal an XI)[126]). The members of the Tribunat approved it on 18 April 1803 (28 germinal an XI)[127]) and the members of the Corps législatif adopted it on 19 April 1803 (29 germinal an XI)[128]). Bonaparte promulgated[129]) the Loi containing it on 29 April 1803 (9 floréal an XI)[130]). As for the title on gifts and testaments: the members of the Conseil d'État agreed on the final drafting[131]) on 14 April 1803 (24 germinal an XI). The members of the Tribunat approved it on 30 April 1803 (10 floréal an XI) and the members of the Corps législatif adopted it on 3 May 1803 (13 floréal an XI). Bonaparte promulgated the Loi containing it on 13 May 1803 (23 floréal an XI)[132]).

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[125]) The first draft had been submitted for discussion on 30 December 1802 (9 nivôse an XI).

[126]) Constitution du 13 décembre 1799 (22 Frimaire an VIII) art. 52: "Sous la direction des consuls, un Conseil d'État est chargé de rédiger les projets de lois et les règlements d'administration publique, et de résoudre les difficultés qui s'élèvent en matière administrative" (Under the direction of the consuls, a Council of State is responsible for drafting bills and regulations for public administration, and for resolving difficulties that arise in administrative matters).

[127]) *Ibid.* art. 28: "Le Tribunat discute les projets de loi; il en vote l'adoption ou le rejet" (The Tribunat discusses bills; it votes on their adoption or rejection).

[128]) *Ibid.* art. 34: "Le Corps législatif fait la loi en statuant par scrutin secret, et sans aucune discussion de la part de ses membres, sur les projets de loi débattus devant lui par les orateurs du Tribunat et du gouvernement" (The Corps législatif votes by secret ballot, and without any discussion between its members, on the bills debated before it by the rapporteurs of the Tribunat and the government).

[129]) *Ibid.* art. 25: "Il ne sera promulgué de lois nouvelles que lorsque le projet en aura été proposé par le gouvernement, communiqué au Tribunat et décrété par le Corps législatif" (New legislation shall not be promulgated until the draft has been proposed by the government, communicated to the Tribunat and enacted by the Corps législatif); *ibid.* art. 37 *in limine*: "Tout décret du Corps législatif, le dixième jour après son émission, est promulgué par le Premier consul" (Any decree of the Corps législatif, on the tenth day after its adoption, shall be promulgated by the Premier consul).

[130]) Loi du 19 avril 1803 (29 germinal an XI) on succession. The codification process consisted of the adoption of thirty-six Lois, discussed and passed one after the other from 23 July 1801 (4 thermidor an IX) and 15 March 1804 (24 ventôse an XII), and brought together in a code by the Loi du 21 mars 1804 (30 ventôse an XII), promulgated on 31 March 1804 (10 germinal an XII).

[131]) The first draft had been submitted for discussion on 20 January 1803 (30 nivôse an XI).

[132]) Loi du 3 mai 1803 (13 floréal an XI) on gifts and testaments.

Conclusion

There is a continuity between the revolutionary and consular legislation regarding freedom of testation. Although the revolutionary elites almost put an end to it so as to ensure the equality of children in their fathers' succession and prevent the *de cujus* from giving his properties to strangers, while the consular lawmakers gradually reinstated it so that it could serve as a prophylactic instrument, all approached the question of testament with great caution. Of course, there had been strong ideological oppositions between the revolutionary and consular legislation concerning testamentary succession: contrary to the revolutionary lawmakers, who considered testaments as instruments of domination and potential sources of conflict, the consular legislators regarded them as essential devices for ensuring the authority of the *patres familias* and the discipline of their families. Notwithstanding, all agreed that this institution could undermine, if not properly regulated, the peace of families, and incidentally the peace of society and the State, which led them to limit substantially the right to dispose freely of one's properties by testament and to prefer the model of intestate succession.

This has not been without consequences[133]).

As the Congrès des Notaires de France noted in its annual report two hundred years after the promulgation of the Code civil, less than a tenth of successions in France are devolved by testament[134]). The French have thus by and large followed Le Brun's advice and decided to die virtuously …

[133]) On the application of the unified and codified law of succession in the 19th century, see J. Hilaire, Vivre sous l'empire du Code civil: les partages successoraux inégalitaires au XIXème siècle, in: Bibliothèque de l'École des Chartres 156-1 (1998) 117; see also Ph. Steiner, L'héritage au XIXème siècle en France, Loi intérêt de sentiment et intérêts économiques, in: Revue économique 59-1 (2008) 75.

[134]) Congrès des Notaires de France, Rapport annuel: La transmission, Dossier de presse, Montpellier 2012, 37.