INTRODUCTION TO FRENCH LAW

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General Introduction to the Series

It is the intention that the following work be part of the series of introductory books to the laws of various countries. The whole project is intended to prepare books which follow basically the same plan for each country. The books in the series are not designed to be definitive texts on the law of any country. Rather, they will attempt to provide academics, lawyers, businessmen, administrators, government officials, students and others with ther basic knowledge of legal concepts of the country in broader terms with special emphasis on practical issues, so that the interested persons will be able to understand the system and pursue research on special legal problems by knowing the proper questions to ask and the proper place to find the answer.

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General Introduction

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Trying to give an account of a 'national' legal system may be paradoxical and even dangerous. Besides the risks that accompany any such project, we are today witnessing an essential, and often even mandatory, convergence of national legal systems. To this must be added the tendency to mimicry and 'reception' on the part of new States, whether these States are emerging from decolonization or are long-established States subject for decades to Marxist rule.

To be sure, if there is any approach that permits the discovery of legal particularisms, it is the historical method. But, without of course discarding it completely, one has to recognize that this method is not sufficient for analyzing legal systems that in this century have undergone the upheavals of internationalization, the erasure of distances and the transformations brought about by the extraordinary progress of technology.

Each of the 18 contributions that comprise this work tells of both the progress and the deficiencies of the French legal system in each of its fields. The overall specificity of French law is more difficult to articulate and the author of this introduction can only put forward personal views that necessarily reflect his opinions only.

Four givens appear to dominate French law in this beginning of the 21st century. French law is a codified law and it is among the first of them in the modern period dating from the end of the 18th century. It is a dualist law, marked by a fairly absolute divide between private law and public law. It has recently been

George A. Bermann & Etienne Picard, *Introduction to French Law,* xxxix-xl.

completely won over to a constitutionalism that had previously been rejected. Finally, it is in a mode of combat against a quantitative expansion of legal rules that risks devaluing the law qualitatively.

I. AMONG THE FIRST CODIFIED LAWS SINCE THE BEGINNING OF THE 19TH CENTURY

For French jurists, and even for the general public, the year 2004 should have been a splendid one, since it celebrated the bicentennial of the Civil Code of 1804. Colloquia were held throughout France, the French speaking countries and elsewhere on the occasion of this celebration and many studies have been published, both as individual and collective works. Willed by Bonaparte from the time he was First Consul, codification was pursued during the Empire with the Code of Civil Procedure (1807), the Commercial Code (1808), the Code of Criminal Procedure (1808) and the Criminal Code (1810).

But even then, the Civil Code was not the first codification, for the Prussian Code of 1794 had preceded it. However, that particular Code had an altogether different content and was on an altogether different scale. As for the German Civil Code (BGB), it dates back only to 1900.

In the spirit of Napoleon and the drafters, especially Portalis, the Code had above all a unifying mission, in that there was to be but one single civil law for all the territories comprising the Empire. However, the Code, as has often been said, also had a 'constitutional' value, in that it gathered in the whole body of principles of life and of society common to all French people. Its longevity confirms this mission, since none of the many constitutional changes that France has known over the last two centuries has resulted in the Civil Code's abandonment or even its transformation. This is not to say that the Code has not been modified in order to keep up with the evolution of society, especially in the fields of family law, property law, and succession. However, the many works published in 2004 have nevertheless shown that more than half of the Code's 2283 articles remain unaltered. To this extent, the Code's 'constitutional' character has been confirmed. One has only to read the *Discours préliminaire* that precedes the Code, and was written mainly by Portalis, in order to grasp this. Consider, first of all, the various means for ensuring the separation of powers, including not only the role of legislation within the State and the powers of the judiciary, but also the fundamental rights of citizens, the right to property, the principle of equality, the principle of liberty in all its forms (most notably in the form of freedom of contract), and of course civil liability. The Declaration of 1789 had remained a dead letter during the revolutionary period. The Civil Code gave it new life, though in a more concrete way, even as a reconciliation was brought about among citizens – a reconciliation that would last for more than a century, many constitutional modifications notwithstanding.

Apart from the Criminal Code, which was profoundly changed in 1832, the other codes have been similarly long-lasting. But the fact that their duration is

comparable does not give them the same significance; sometimes these other codes have even changed names as a consequence of the evolution of ideas and, above all, the transformation of society in economic and social terms. The fact remains that they are still 'codes' in the truest sense of the term, that is, in the spirit that impels them and in the unity they hope to produce.

Curiously, the codification movement stopped along with the Empire. This may have at first revealed a reflexive hostility to Napoleon, even if his Codes were kept in place. The last official edition of the Civil Code is from 1816, already the beginning of Louis XVIII's reign. And the word 'King' still figures in the Code articles on the chief executive (*see* for example Article 2045!).

It is thus likely that the reason for the codification movement's coming to an end was a more serious one. Perhaps it was to lend greater importance and flexibility to legislation. Perhaps it was to allow case law to have a fuller development. Finally, perhaps, it was thought that only the five great legal disciplines for which codes had been adopted were in fact deserving of a Code. Whatever it was, the codification movement, subject to certain minor exceptions, halted until the early years of the Fourth Republic, that is, for some 130 years. To be sure, the Third Republic had what could be called 'law-codes' (*lois-codes*), that is, very long laws regulating a matter in its entirety, such as, in public law, the law of 5 April 1884 dealing with municipalities or the law of 22 July 1889 on procedure before the *Conseils de Préfecture*, or administrative courts. This trend could even be discerned at the end of the Second Empire, with the law of 24 July 1867 on commercial companies.

Can we consider the period after 1945 as entailing a revival of the codification movement? The answer to this question is not clear. Yes, new Codes would appear, like the various versions of the General Tax Code and the Book of Tax Procedures (*Livre des procédures fiscales*). There was also the Public Health Code, the Code of Urban Planning, and the Building and Residence Code. The birth of these Codes was clearly testimony to the expansion of State functions.

But codification has today taken on a different meaning. On the basis of a decree of 12 September 1989, the Government created a 'High Commission for Codification'. Following proposals advanced in 1994 in a report devoted to the 'The State in France', some 8,000 laws and 80,000 decrees were to be codified in a period of five years. The idea was taken up again in a law of 12 April 2000, particularly Article 3, 'dealing with the rights of citizens in their relations with the administration'. These texts suggest that codification should be achieved '*à droit constant*', which is to say that the codes would not be subject to major reform or modification, but rather that existing legislation should merely be made more orderly and coherent.

These efforts have continued and new codes have appeared, such as the Environmental Code, the General Code of Local Authorities, the Education Code and the Monetary and Financial Code.

Thus, French law today is largely codified. Still, codification '*à droit constant*' cannot be compared to a true codification, since it is not, and cannot be,

driven by any fundamental doctrinal thought, and it has been frequently criticized on this account. It will surely not, except in a mathematical and artificial way, put an end to the inflation of norms (*see infra* Section IV). On the contrary, it only confirms and 'stabilizes' that trend. What is more, the expression '*droit constant*' is not respected, and cannot be. Existing texts have been modified without respect for constitutional forms. A great many errors and oversights have come to light. Codifications themselves have been the subject of deep legislative amendments, which itself attests to their precariousness. Law's simplification is to be found elsewhere (*see infra*, Section IV).

II. A DUAL LAW

The recognition of a public law that is separate and distinct from private law goes back to Roman law. One can say more: a special court system applying public law already existed in the France of the *Ancien Régime*, and today is a feature of most States, even common law countries that for so long were opposed to this type of thing – think of Dicey.

France would thus not occupy so special a place in regard to this dualism, if its administrative judges and the law they apply did not themselves occupy so special a place by comparison with most other systems. It is not just that the administrative courts in France represent a distinct judicial order (as is also the case, for example, in Germany under Article 95 of the Basic Law), while in many States, administrative courts are merely a part of a single order of courts. Rather and above all, the administrative judge or the order of administrative courts and the Council of State (*Conseil d'Etat)*, which stands at the apex of this order, by virtue of its history and practice (the one helping to explain the other), finds itself in an exceptional situation. This administrative judge is, as some authors have written, the 'hierarchical superior of the administration'. In most States, public law is also a written law, while in France, for a very long time and even up to now, the administrative judge has been, and still largely is, the creator by its own case law of public law.

The author of this introduction had once written that the case law of the *Conseil d'Etat* was a kind of 'praetorian edict', and indeed Marcel Waline devoted a whole work to the 'normative power of case law'. The nearly exclusive role of case law in the development of the fundamentals of public law might even offend the provisions of the Civil Code which forbade judges to make general judicial pronouncements (Article 5), even as it commands them never to refuse judgment on the ground that the Code is silent or obscure (Article 4).

Thus, the basic rules of public law do not emanate from the legislature, but rather from the judge. Seen today, this situation may well be attributed to an inaptitude, timidity, or simple failure to act on the part of the legislature. Indeed, the case law of the administrative courts may be understood as an appeal to the legislature either to confirm or to condemn it. However, the appeal, if that is what it is, has mostly fallen on deaf ears.

From the moment that the Council of State (*Conseil d'Etat)* became a judicial institution, that is to say, since the law of 24 May 1872, this attitude has manifested itself mostly in the *Conseil d'Etat*'s 'objective' adjudication, meaning its review of the validity of unilateral administrative acts, from the highest to the lowest echelon of the administrative hierarchy. This attitude is in a way less marked when it comes to the *Conseil d'Etat*'s 'subjective' litigation, such as litigation over administrative liability in contract or tort, which would explain why, in a majority of countries, administrative litigation of this kind is heard in the ordinary courts.

First of all, in 'objective' litigation – that is, in actions seeking the annulment of a unilateral administrative act and its removal from the legal order through the '*recours pour excès de pouvoir*' – the judge basically asserts the 'principle of legality'. Of course, the 'legality' that this principle enforces itself stems from written law. However, from the end of the 19th century, the judge has expanded the principle of legality through 'general principles of law' that the judge himself has developed, and each one of which he initially 'proclaimed', in disregard of the prohibition against applying legal norms whose existence is not yet established. In this way, the 'principle of legality' has been enriched by norms emanating from the judge alone.

Moreover, application of the principle of legality entails the use of review mechanisms that have not ceased to develop in a subtle fashion, and that in themselves infuse into judicial review a certain dynamism stemming from the judge's willingness to scrutinize the 'reasons' for an administrative act. It is Roger Bonnard who, in 1923, showed that the effect of reviewing the grounds of administrative acts is to subject what had previously been known as the 'discretionary power' of the administration to ever more substantial limitations.

This review of the grounds for administrative action has kept on developing on the basis of language that is peculiar to the administrative judge and often impenetrable to the litigant. Among these we find such notions as:

- 'verification of the material existence of the acts on which the administration relied'
- 'review of the legal characterization of the facts'
- 'whether the facts as found and characterized fall within the scope of application of the law'
- 'review for error of law' as conceived by the judge or 'absence of a legal basis;' 'resort to the "principle of proportionality" between the facts and the measure applied to them' and
- 'removal of poison' ('*retrait de venin*') in order for the measure's legality to be sustained, denoting an interpretation of an administrative text that is contrary to the administration's interpretation, but that is necessary in order for the measure's legality to be sustained. Every one of these expressions could be placed within quotation marks.

But neither is the judge content merely to review the grounds of an act. Roger Bonnard showed how the judge also reviews the 'motives' (in the philosophical sense) behind an act. I refer of course to the notion of '*détournement de pouvoir*' ('misuse or abuse of authority'), the use of which goes back to before the law of 1872. The judge supposes that he has the power to discover the hidden intentions of the administration and thus to annul an act that, for example, is taken out of favouritism or an intent to harm.

For some 40 years, the judge has shown a frequent tendency to invoke the notion of '*erreur manifeste d'appréciation*' ('manifest error of judgment'), a basis for review that, it would appear, grew out of the case law of international and foreign courts. This doctrine gives the judge a power that is both extensive and manifestly subjective, and it has itself shown a tendency these days to subsume all the other grounds of judicial review.

It was said earlier that these various notions show up mainly in 'objective' judicial review of administrative action rather than in 'subjective' litigation, such as in contract or tort, what is comparable to litigation between private parties. But even here, the judge has never hesitated to use his power creatively. The best example of this is the famous decision of the *Tribunal des conflits* of 8 February 1873, in the *Blanco* case, which decided that the State could be held liable for the injuries caused by its agents. This principle is important enough to have deserved being entrenched in statute or even in the Constitution.

To take a recent example of the judge's creative power, when an administrative measure is annulled, the annulment ordinarily takes effect as of the date that the measure was enacted, for it seems unnatural that once a measure has been removed from the legal order, it could still be applied. All of its effects, it would seem, should disappear retroactively. But the *Conseil d'Etat* has just ruled, on 11 May 2004, in *Association AC! et autres*, that it has the power, for particular reasons, to determine the date on which such a measure should cease to be applicable.

Laws are supposed to be known by all. In any case, they should have been deliberated over in Parliament and published in the Official Journal. By contrast, judicial case law is obviously unknown to the public at large, and the subtlety of its language detracts still further from its comprehension. It is simply not normal that these rules should be so secret, and Dean Georges Vedel, in his characteristically brilliant article of 1979 entitled '*Can administrative law be indefinitely jurisprudential?*' urged their codification. Still, the administrative case law has never been codified, other than on rather secondary points, and it doubtless never will be. Drafting such a code would be difficult, on top of which the judges, who are themselves the authors of the case law, may well fear that codification would arrest the development and evolution of the law, and are thus very likely to disfavour it.

III. A LAW NEWLY ATTACHED TO CONSTITUTIONALISM

France was for a long time hostile to judicial review of the constitutionality of laws. Many important debates took place over this in political and legal milieus, especially between the years 1920 and 1930. The most developed – one could almost say official – theory goes back to the themes defended by Jean-Jacques Rousseau, along the lines that 'the general will cannot err.' According to the Declaration of the Rights of Man of 1789, law is 'the expression of the general will', that is to say, the direct expression of the nation. One could not imagine a higher legal norm.

Raymond Carré de Malberg, among the most profound analysts of the legal system of the Third Republic, explored in depth all the aspects of this vision in his writings (*see* the Bibliography), even though he seemed amenable to constitutional review. He was able to show how the legislature, through the system of constitutional laws of 1875, could vote for a law that violated those constitutional laws, and yet not be regarded as violating the Constitution, but merely as 'revising' it. In other words, the law and the Constitution had in effect the same juridical value.

Of course, at that time, the only existing system of review (apart from a very small number of jurisdictions providing review through legal proceedings) was that found in the United States from the beginning of the 19th century. This was a system that the Supreme Court fashioned in 1803, authorizing every judge to determine the conformity of a law to the Constitution by way of a defense in the course of an ordinary legal action. This review would end up, according to the well-known expression of Edouard Lambert, in a 'government of judges'. At that time, the Cour de Cassation, like the *Conseil d'Etat* refused to accept the notion of a defense of unconstitutionality (*l'exception d'inconstitutionnalité*) of legislation as contrary to the 'principles of public law'.

Only following World War II did most States install constitutional tribunals that would entertain direct challenges to the constitutionality of laws. France did not initially follow this fashion; even the Constitutional Council created by the Constitution of 1958 could be considered as, above all, responsible for enforcing the division of legislative and regulatory powers, as between Parliament and the Executive, what Articles 34 and 37 of that Constitution had established.

It is really only through its own decision of 16 July 1971 that the Constitutional Council declared itself to be the judge of the constitutionality of laws. This decision in turn prompted a revision of Article 61 of the Constitution through a constitutional law of 29 October 1974, allowing sixty members of the National Assembly or sixty members of the Senate to convene the Constitutional Council. Until that time, only the Head of State, the presidents of the two legislative chambers, or the Prime Minister, could invoke the Council's jurisdiction. Thus, constitutional review is performed through legal proceedings that are not 'open', but rather reserved to the categories of applicants just mentioned. It does have the advantage, though, of being preliminary, in the sense that it is available before the challenged law has been promulgated.

The passage of 30 years since then has witnessed France throwing itself with fervour in the direction of constitutional review – a move that France had for so long rejected. Going forward, the case law of the Constitutional Council during this period represents a fundamental contribution to the French legal system, one that is indubitably equal to the contribution of the American, German, Italian and Spanish constitutional judges.

This rallying to the notion of constitutionalism may now be viewed as a major 'given' of the French legal system, and it is only in this context that a few further remarks are worth making.

The first remark entails a comparison between the Constitutional Council and the Council of State, as described in the previous section. One can say that the new constitutional judge has ways of behaviour and a legal method that resemble those of the *Conseil d'Etat*. With jurisdiction to determine the conformity of a law to the Constitution – that is to say, conformity to a well-delimited text – the constitutional judge has widened the basis for his constitutional review in two ways. First, he has utilized the formula within the Preamble which proclaims the French people's 'attachment' to the rights and principles 'as they have been defined by the Declaration of 1789, and confirmed and completed in turn by the Preamble to the Constitution of 1946' so as, in effect, to add these two texts to the framework for constitutional review. Then, like the Council of State, only with greater precision, the Constitutional Council has affirmed a dozen or so 'fundamental principles recognized by the laws of the Republic', such as, for example, freedom of education and freedom of association. Taken together, these additions constitute, along with the formal text of the Constitution itself, what is known in legal milieus as 'the block of constitutionality' (*bloc de constitutionnalité*), a notion which clearly suggests an extension of the possibilities for review, all the more so since, as in the *Conseil d'Etat*, the list of sources and components of this 'block' can be freely expanded.

A final remark still needs to be made. When a suit is brought to the constitutional judge, its purpose is to have the challenged law annulled. If the suit is unsuccessful, the law is valid. But, just as when the *Conseil d'Etat* practices its technique of 'poison removal' (*retrait de venin*), the Constitutional Council can accompany its rejection of a claim with a 'constructive' or 'reductive' interpretation that, while not reflecting the exact intentions of the legislature, ends up binding those who will be applying the law.

To a degree then, albeit a different one – since the Constitution in the strict sense is necessarily a written one – we have a situation parallel to the one described in the previous section.

IV. A LAW NEWLY INTENT ON RESISTING THE QUANTITATIVE EXTENSION AND QUALITATIVE DEVALUATION OF LEGAL NORMS

The quantitative growth of law is by no means peculiar to France. It is true of most States, and is really only the consequence of an expansion in the functions of the State and the complexity of the modern world. It was already observed, and criticized, in ancient times. The famous phrase of Portalis comes to mind: 'Law governs badly when it governs too much'.

The difference between France and other States is that many of them have tried, often without significant results, to remedy the situation by setting up special procedures of analysis and reform. France thought it could find its solution in codification, as described in Section II. But this mechanism solves neither the quantitative nor the qualitative problem. The solution must be found upstream, that is to say, principally in the making of the law and the procedures by which the law is enforced. Moving even further upstream, it is a question of knowing whether a matter should be legislated at all. Happily, in many countries, including France, the science of drafting legislation is thriving. However, the means of reform that are being advocated are often complex and run into opposition or indifference in political and bureaucratic circles.

Still, as far as legislation is concerned, the Constitution of 1958 has armed France with a very interesting mechanism that unfortunately has not yielded all the results that had been hoped for. According to Article 34 of the Constitution, legislation's domain is limited to fundamental matters – a delineation that reflects an old and largely incontestable vision. The same article goes on to distinguish between statutes that prescribe 'rules' and those that lay down 'fundamental principles.' In the first category, legislation may govern a subject in its entirety, so that administrative regulations for applying the legislative norms are either non-existent or reduced to a strict minimum. For the second category, legislation establishes only a *loi-cadre* – a legislative framework – which formulates principles only, and leaves their elaboration to the regulatory authorities.

Beyond those matters falling within this restrictive jurisdiction of the legislature, Article 37 provides that all other matters fall within what one may call 'the autonomous regulatory power' (*le pouvoir réglementaire autonome*), that is to say, decrees emanating directly from the executive power as set out in the Constitution and without limitation by statute.

This separation of powers reflected a reform movement of the utmost importance. But one could see, almost immediately, that it simply would not be applied. The procedure provided for in Article 41, which allows the Government to assert the lack of jurisdiction of Parliament and, in the event of disagreement, to convene the Constitutional Council, has practically fallen into disuse. Moreover, the courts and even the Council have declined to recognize in such a case the claim of lack of jurisdiction of Parliament. The procedure foreseen by Article 37, paragraph 2, whereby a law can be subsequently 'reclassified' as regulatory rather than legislative in content, is rarely used (subject to a jump in its use in the

very last years). The distinction between 'rules' and 'fundamental principles' seems to be ignored.

A return to a rigorous application of the constitutional texts would itself already produce important results. This aspect of the 1958 Constitution deserves a great deal more recognition; all the more so since practically speaking, the French Constitution is the only one in the world to have established such a division of lawmaking competence, and this is something from which France ought to have deservedly derived prestige.

Clearly, this is not the only possible solution. As a number of States have already done, the legislative process and the drafting of laws should be drastically reformed. This is especially so as concerns the role, the powers and the sheer number of parliamentary committees. It is also a matter of the style of legislation, the abandonment of purely declaratory laws lacking any effective legal impact, and the intelligibility of legislation, as to which one should bear in mind certain remarks that the Constitutional Council itself has made in this regard.

However, more has to be done. For a long time, public authorities have shown a kind of indifference to solving this entire major problem, apart from the codification effort, whose limits have already been described and though public opinion, which is so inclined to criticize the slowness and complexity of government, still has not incited the government to take action. The year 2003 represented for the current government the time for action on a very large scale, finally bringing France into line with other States that have taken action in this domain.

The action in question is the law of 2 July 2003 'authorizing the government to simplify the law', that is to say, to resolve the major problem reflected in the title of this section. The reforms would be chiefly accomplished through orders issued on the basis of Article 38 of the Constitution, and they would deal with simplification of administrative procedures (Article 2), the organization of trades and professions, the system of state property, defence and the system of banking and financial regulation (Article 34). This action program is explained in a circular of the Prime Minister dated 26 August 2003 'on controlling the inflation of norms and improving the quality of regulation', as supplemented by a circular of the Secretary-general of the Government of 30 September 2003 concerning 'the quality of regulation'. Since then, a large number of important orders and decrees have been issued on the matters covered by the legislation, putting into place mechanisms on both the governmental and ministerial levels.

One can perhaps hope that this mission of simplifying the law and administrative action, now that it has finally been proclaimed, can be achieved. The effort will be further supplemented by certain experimental procedures, at the level of both the State and its territorial subdivisions, which have been introduced by constitutional amendment (Article 37-1 and Article 72, paragraph 4), as well as by a set of procedures for evaluating progress.

Here we see a reform of the utmost importance that has an essential place on the landscape of French law in this beginning of the 21st century. It is obviously too early to pass judgment on the undertaking. One must first hope that public