The FRENCH LEGAL SYSTEM

an introduction

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Preface

The French legal system has in recent years become a subject of increasing interest to lawyers from Britain and other countries of the common law tradition. Certain institutions of the French system have held a particular fascination: the separate administrative courts headed by the *Conseil d'Etat;* the existence of a constitutional court, the *Conseil Constitutionnel;* the role and function in criminal procedure of the examining magistrate, the *juge d'instruction;* indeed, the inquisitorial nature of criminal procedure in general. However, this interest has tended to be surrounded by a lack of knowledge as to how the French legal system operates. Are the Napoleonic codes really the sole source of law in France? What place is left for caselaw? Is it really true, as some journalists would have us believe, that in France you are presumed guilty until proved innocent? In this book we endeavour to present the French legal system to the lawyer or student of the common law tradition clearly and in terms that are readily understandable.

We have sought to explain the French legal system in sufficient breadth and depth to give the reader a full understanding of how the system operates, although we have not attempted to go into all of the detail that is contained in French textbooks (to which the reader's attention is drawn in a bibliography). We have therefore included not only such topics as the court structure, legal professions, and sources of law, but also matters of proof and procedure before the criminal, civil and administrative courts. We have also included a chapter on the historical development of the system, as many of the aspects of the present system can only be understood in an historical context; the Napoleonic codifications will thus be seen not to have represented as much of a break with the past as may have been thought. Furthermore, we have sought to convey something of the way in which the French themselves perceive their system; thus when examining the constitutional framework, we look at the important role in French constitutional and political thinking played by the notions of *la République* and *la Nation.*

The book assumes no knowledge of the French language or indeed of French law or politics on the part of the reader; the French terms which are used are explained when first mentioned. However, for the reader

who is able to read French, we have included a wide range of primary and source texts and materials in French to enable the reader to carry out further study if he or she wishes to do so. We thus include (in the chapter on the constitutional framework) the text of many of the provisions of the 1958 Constitution, and several important judgments of the *Conseil Constitutionnel.* Similarly, in the chapter on criminal procedure we cite many of the provisions of the Criminal Procedure Code and several decisions of the supreme court (the *Cour de Cassation*). We have also drafted pleadings and a judgment of an imaginary civil case in the lower civil court (the *Tribunal d'Instance*).

This book results from long-standing co-operation between Cardiff Law School of the University of Wales and the law faculty of the *Université de Nantes.* The writers from each institution have experience in teaching comparative law in the other institution. Although each chapter is the product of *trans-manche* collaboration, primary responsibility for the writing of the chapters was taken as follows: Chapter 1, Dominique Gaurier; Chapter 2, Dominique Gaurier and Andrew West; Chapter 3, Yvon Desdevises and Andrew West; Chapter 4, Alain Fenet; Chapter 5, Marie-Clet Heussaff and Andrew West; Chapter 6, Yvon Desdevises and Andrew West.

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June 1992.

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Chapter 1

Historical development of the French legal system

To be properly understood, the modern French legal system must be viewed in the context of its historical development; it is the product of a long evolution which began effectively during the twelfth century with the move towards the reduction into writing of substantive customary law, a process which was largely completed by the end of the sixteenth century. Reforms to both substantive law and procedure were increasingly introduced by royal ordinance during the seventeenth and eighteenth centuries. It is wrong to consider the 1789 Revolution and the promulgation of the Civil Code in 1804 as representing a completely fresh start, as the Code draws heavily on the substantive law of pre-revolutionary times. The Revolution does, however, represent a fundamental break with the past in respect of constitutional law, with the introduction of a written constitution separating legislative, executive and judicial powers. In this chapter, we will examine the development of the legal system from the period of Roman Gaul to modern times.

A. Roman Gaul to feudal France

1. Roman Gaul

Little is known about the legal system before the Roman conquest of Gaul in 52 BC, as writing was not used by the Celts; the sole record of Celtic customs in Gaul is to be found in the *Commentarii de Bello Gallico* of Caesar. Following the conquest, Roman Gaul became a Roman province, into which was implanted the Roman legal system; by the Edict of Caracalla (212 AD) its inhabitants were accorded the status of Roman citizens. The third and fourth centuries AD witnessed the progressive settlement in the north-eastern part of Roman Gaul of groups of people

of Germanic origin, and by the time that the western Roman empire fell to the Ostrogoths (476 AD) large parts of Roman Gaul had come under the control of such tribes as the Salic Franks (north-western region), the Burgundians (south-eastern), and the Visigoths (south-western).

2. From ethnic to local customary law

Gaul was thus divided into independent ethnic kingdoms, the most important of which was the Salic Frank kingdom (as it was called by the end of the fifth century), controlled by the Merovingian dynasty (482–751) and later the Carolingian dynasty (751–987). Each ethnic group continued to apply its own customary laws, the Salic Frank kingdom being subject to Salic customs, the Burgundian kingdom to Burgundian customs, etc. However, these ethnic customs were not imposed on the Gallo-Roman inhabitants of the various kingdoms; their right to continue to be subject to Roman law was recognised, at least in respect of private law matters.

In 438 AD the Emperor Theodosius issued a collection of imperial constitutions passed since Constantine (*Codex Theodosianus*). The rulers of the ethnic kingdoms themselves adopted the practice of reduction to writing in an attempt to ensure the survival of their own customs; the Salic laws (*lex Salica*) were thus codified during the reign of Clovis (482–511) (and subsequently amended under the Carolingian dynasty), the Visigoth customs by Euric in 480, and the Burgundian customs (*lex barbara Burgundionum*) by Gundobad (474–516). There were also codifications of the Roman law applying to Gallo-Roman subjects of the Burgundians (*lex Romana Burgundionum*) and the Visigoths (*lex Romana Visigothorum* (also known as Breviary of Alaric), drawn up by Alaric II in 506); the latter was in time recognised as applying to all Gallo-Romans, and indeed was to prove to be the major source of Roman law until the late eleventh century.

This "personal" principle of law, whereby a person was subject to the customary law of his ethnic group of origin, was progressively abandoned as the various ethnic groups (and hence their customs) became intermingled through marriage and migration. In due course, there grew up a number of sets of customs of local or regional effect, each set reflecting the customs of the differing local ethnic groupings; a general development that can be observed was the waning of influence of Roman law in the northern part of Gaul, although influence was retained in the south-east.

3. The evolution of royal authority

The term *lex* (law) has been used to refer to written customary law; this was not, however, legislation in the modern sense, Germanic custom not recognising the power of the king to legislate without the approval of

assemblies of the freemen of the group; thus the *lex Salica* was not promulgated by royal ordinance of King Clovis but rather approved at assemblies of the Salic Frank freemen.

(a) Attempts to recognise royal authority

The rise to power of the Carolingian dynasty in 751 with the accession of King Pippin (the Short) was to lead to the re-establishment of the Western Roman Empire in 800 with the coronation by Pope Leo III of Charlemagne (the son and successor of Pippin) as Emperor of the Western Empire. Charlemagne sought to establish his imperial authority by promulgating edicts (*capitulaires*) which purported to apply to all subjects of the Empire, regardless of their ethnic origin. This attempt to re-establish imperial power after the Roman model did not last long; the unity of the Empire could not be maintained after the death of Louis the Pious, the son of Charlemagne, and was formally brought to an end in 843 when the Treaty of Verdun divided the Empire into three parts, ruled by separate kings (the grandsons of Charlemagne), Francia Occidentalis (roughly equivalent to the western part of modern France, excluding Brittany, but including part of Belgium, Pamplona and Catalonia), Germania (modern Germany), and Lotharingia (Benelux, Provence and Lombardy); the latter proved to be unviable as a separate kingdom, most of its territory in time being absorbed into Germania.

(b) Towards feudalism

The mid-ninth century saw incursions into Francia Occidentalis particularly by Norse Vikings in the north and west and to a lesser extent by Hungarians and Arabs in the east and south; the Carolingian kings (replaced by the Capetian dynasty (named after Hugues Capet) in 987) found themselves unable to exercise effective authority over their kingdom, and increasingly had to leave the *comtes, ducs* and other noblemen to defend their own territories. The monarchy had little power to resist the demands of the noblemen to exercise powers of administration and control within their territories; indeed, as early as 877 at the meeting of Quierzy-sur-Oise, the Carolingian king Charles the Bald was forced to accept a system of government in which power was shared with a council (*conseil*) of *comtes* and bishops. The authority of the Capetian monarchy in time became effectively limited territorially to the region of Paris and parts of the Loire valley, the other regions being autonomous counties or duchies (among the most important of which were the *comtés* of Flandres, Maine, Champagne, and Toulouse, and the *duchés* of Normandie, Bourgogne, Aquitaine, Bretagne and Gascogne).

(c) Feudal France

From the ninth to the thirteenth century, France was a feudal society, at the heart of which was the feudal bond between the lord (*seigneur*)

and his vassals, whereby the latter swore personal loyalty (homage) and service (fealty) to the former, and agreed to serve as advisers in his courts; the lord for his part guaranteed the protection of his vassals. During the ninth century the practice grew of a lord granting to a vassal whose services he valued a gift or *bénéfice* of land; in time, this developed into tenure, the vassal's right to remain on the land (his *fief*, which was heritable) being conditional on the fulfilment of a tenurial service, usually military in nature.

The lord ruled over his own domain (*seigneurie*; which was regarded as comprising not only the land but also the serfs), and exercised administrative and judicial powers over his subjects. The land constituting the domain was regarded as belonging to him, in contrast with the English feudal system in which all land was held of the king as tenant-in-chief; this is because, as we have seen, the Capetian king exercised effective control only over his own domain. He was, however, regarded as being sovereign amongst the feudal lords, as he was the successor to the Carolingian kings, his authority thus being sacred, deriving from God alone; indeed, the other feudal lords swore loyalty to him as his vassals. This notional sovereignty (suzerainty) was not to become true sovereignty until royal authority was effectively established within the kingdom.

(d) Reassertion of royal authority

The king, like all other members of society, was bound by custom. Indeed, it was his duty to uphold custom; thus, he would confirm the customs of a town or district by means of charters, and make rulings on the content of disputed customs. From the twelfth century, the practice evolved of granting privileges to certain towns or churches by way of exception to the general custom.

Where situations arose to which custom provided no answer, the king was recognised as having the authority to promulgate legislation of general effect (known as *nouveaux établissements* or *ordonnances*). However, this power was subject to the consent of the *Conseil* (of nobles and bishops), as the king ruled the kingdom only by consent, and a royal *ordonnance* would only be effective throughout the land with the consent of the various nobles and lords. The first *ordonnance* to have general effect in this way was that of Louis VII in 1155, in which the nobles, sitting in *Conseil*, agreed to keep the peace in the land for a period of ten years. This important provision emphasised the growing authority of the monarchy, recognising as it did that it was for the king to guarantee peace within the realm, this not being simply a local issue for the feudal lords.

There was a gradual assertion of royal legislative authority, and by the middle of the thirteenth century the king had sufficient authority to be able to promulgate *ordonnances* of general effect to which only a majority of the members of the *Conseil* had assented; the legislation was no longer issued in the name of all of the consenting lords, just that of

the king. By 1285, Philippe IV found it sufficient to obtain the consent of merely some of the members of his *Conseil* (whose members were in any event appointed at his sovereign choice).

This growing royal authority was buttressed by the recognition by doctrinal writers (especially Philippe de Beaumanoir) of the sovereign power of the king to legislate. A primary source of this theory was Roman law (the study of the Code of Justinian (525 AD) having been revived), which recognised the inherent sovereign legislative power of the ruler (*quod principi placuit habet legis vigorem*). Thus in his work on customary law (*Les Coutumes de Beauvaisis*) Beaumanoir accepted the right of the king to legislate by royal ordinance in certain circumstances (ie times of war or necessity, or in times of peace where the ordinance was "reasonable" and for the common good, and promulgated with the consent of the *Conseil*). Philippe IV promulgated much royal legislation, a practice which was to be adopted by subsequent monarchs.

4. Evolution of the judicial system and legal procedure

(a) Merovingian and Carolingian dynasties

Germanic peoples had traditionally had a system of "popular justice" whereby disputes were brought before an assembly, known as a *mallus* (or Hundred Court), presided over by an elected judge (*thunginus*), who sat with the tribal elders (to confirm the customs) and freemen. This assembly, acting jointly, identified the appropriate customary rule and applied it to the case in question. The custom would prescribe tariffs of compensation payable to the victim in any given circumstance. No appeal was possible from such a decision, a "popular" judgment being regarded as sovereign.

A modified form of this system of popular justice was introduced into Gaul by the conquering Germanic groups. A local assembly, dealing with criminal and civil matters, was presided over by a royal appointee, the *comte*, who sat with at least seven nobles (the *rachimbourgs* (later known as *scabini*) appointed by the *comte*; they had the role of law-finders) and with the freemen of the *hundred*. The *comte* would go on circuit around his county. In time, the role of the freemen diminished, and most cases were dealt with by the *scabini* (sitting with the *comte* or his deputy), the freemen meeting in assembly only three times a year to deal with major cases and to discuss the general affairs of the county (*comté*). Some authors consider that this marks the origin of the distinction between later seigneurial high and low justice. A Carolingian reform was the introduction of an itinerant superior jurisdiction (the *missi dominici*, whose authority came directly from the king) which acted as a supervisory and appellate court from the proceedings of the courts of the *comtes* and also heard cases involving the king's interests.

As in England during the Anglo-Saxon period, procedure was essentially accusatorial and oral in nature; it was for the plaintiff or accuser to prove his case against the defendant. As there was no public authority who could issue a writ, an action was commenced by the plaintiff physically bringing the defendant to the *mallus* (the procedure of *mannitio; lex Salica, Tit.1*). There was public prosecution (by the *mallus*) only in respect of certain serious criminal offences (which could lead to the imposition of the death penalty). In respect of other criminal offences it was for the victim to prosecute the alleged offender before the *mallus*. Means of proof were not rational; a defendant could successfully counter the allegations against him by swearing an oath corroborated by the production in court of a given number of character witnesses (*co-jureurs*; the number, which varied with the seriousness of the case, being fixed by custom). If he were unable to do this satisfactorily, he could have recourse to the judgment of God and claim trial by battle (between the two parties or their champions) in civil cases, or ordeal (hot iron or boiling water) in criminal cases. If the case was proved against the defendant, the penalty took the form of the payment of compensation in accordance with tariffs fixed by custom. The procedure of the *missi dominici* contrasted with that of the *mallus*, as it favoured written evidence, and was inquisitorial in nature; it also relied on more rational means of proof, such as the interrogation of witnesses of fact.

(b) Feudal courts

During the feudal period, the local courts gradually came under the control of the lord of the domain. The lord's vassals were obliged to act as his advisers in his court, which dealt with feudal issues such as the failure of a vassal to meet his feudal obligations. Vassals were entitled to be judged by their equals, a right which did not extend to those of lower social standing, the serfs, who were judged by an appointee of the lord. The feudal court system was subject to a great deal of local variation, but for the majority of the population it can be said to have represented a reduction of justice compared with that of the Frankish Hundred Courts. Criminal and civil procedure was very similar to that of the latter, with continued recourse to ordeals and other irrational means of proof; this was to be a cause of the withering of the feudal courts to the profit of the royal courts, particularly following the prohibition in 1215 (by the Fourth Lateran Council) of the participation of the clergy in trials by ordeal.

(c) Royal courts

(i) Parlements

During the tenth and eleventh centuries there was a royal feudal court which, due to the monarch's limited authority, was of little importance outside the king's domain. However, from the mid-twelfth century Louis