PARKER SCHOOL STUDIES
IN FOREIGN AND COMPARATIVE LAW

# GUIDE TO FOREIGN LEGAL MATERIALS: FRENCH

Second Revised Edition

by
CHARLES SZLADITS
CLAIRE M. GERMAIN

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**Second Revised Edition**

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# PREFACE

The present work is a guide for the common-law lawyer to the use of foreign legal materials: laws, reports and books. It is a second edition of Part 1 of C. SZLADITS: *Guide to Foreign Legal Materials: French, German, Swiss (1959)* and deals with the French legal system. It was thought necessary that the bibliographical section should be preceded by a brief description of the sources, their character and their position in the legal system. This also required a brief glimpse at court organization. This introductory description of the sources of law is followed by a discussion of the repositories of law, that is, of the written works which contain the sources and information about them.

The bibliographical part deals in separate chapters with laws (statutes and decrees), case law (reports), encyclopedias and dictionaries, and doctrinal writings (manuals, text-books, etc.). The first two chapters are intended to be comprehensive; the last two are selective, though the selection was attempted on a broad basis. All branches of the law are included: private and commercial law, procedure and penal law, public and administrative law, and even the more theoretical subjects such as legal history and legal philosophy. In the field of administrative law, however, specialized fields like public education, public hygiene, and agricultural services were omitted. The sheer mass of detail in these fields would have overburdened the work with subjects generally of little significance for the foreign lawyer. The basic information on these topics can be found in the more general works within the scope of our selection. The works included are inclusive to July 1983, although the works of importance are added after that date. The work also contains a list of the most frequently used abbreviations in the law. A final chapter on the use of foreign works contains pointers on the most likely difficulties to be encountered in dealing with foreign law.

One of the main aims of the Parker School of Foreign and Comparative Law is to provide American lawyers with the tools necessary in pursuing the study of comparative and foreign law. A guide to foreign legal materials, it was felt, would fall within this scope. Since the publication of the first *Guide,* numerous changes in the law, new publications and areas of law made a second edition necessary. The second edition is a joint work of Charles Szladits, who wrote the First Part and the Conclusion and Claire M. Germain who contributed the Second Part of the work.

The bibliographic information for each entry includes the following:

author's or editor's name and first initial, title, number of volumes (vols.) or *Tomes* (t.). (*Tome* is the French word for volume; a *Tome,* however, may consist of several volumes, e.g., 3 t. in 5 vols.); edition; place of publication, but only if different from Paris; publisher; name of series, if applicable; year of publication; and number of pages.

All English language translations of French texts (Codes, etc) are taken from H. DE VRIES, N. GALSTON, and R. LOENING, *French Law: Constitution and selective legislation,* (New York, Matthew Bender, 1981- ), unless otherwise noted.

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CHARLES SZLADITS CLAIRE M. GERMAIN

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# INTRODUCTION

The legal systems of Continental Europe are frequently contrasted with the Anglo-American legal system as systems of codified law versus an uncodified or judicial system. This fundamental difference between these two great families of law has frequently been misunderstood and misinterpreted. It has invariably been overemphasized.[1] We all know that there is a fair amount of codified law or statute law in the Anglo-American legal systems and that legislation is assuming an increasingly important rôle. The reverse is also true, not all law being codified in the civil law systems. Differences in emphasis and in the relative importance of these various sources of law do exist, however, and it seems advisable to dispel some of the misinterpretations by presenting a brief survey of the sources of law and their relation to each other in French law. Because of a different training, of a difference in "legal method", there is an unavoidable inclination on the part of the Anglo-American lawyer to evaluate the importance of code provisions, of decisions of a higher court or of writings and comments in the light of his own background knowledge. He may attach undue importance to some decisions "as precedents", and underrate the value of treatises or commentaries; he may look for cases where a clear statement in a commentary may be sufficient. He may also underrate the importance of cases and attach too exclusive force to code provisions. In this respect the views of the English and the American lawyer may differ because English legal training in the universities and the familiarity with Roman law render civil law more easily accessible to the English than to the American lawyer whose legal education is more vocational in nature. On the other hand the less rigid application of *stare decisis* in American courts may make it easier for American lawyers than for the English to appreciate Continental case law.[2] Although we cannot overcome here the difference in legal training, which is basic in the reading, interpretation and evaluation of legal materials, we can attempt to give some understanding of the difference in emphasis placed upon the various sources of law.

By sources of law to be discussed in the first part we mean, on the

1. According to F.H. LAWSON, the view that the civil law systems are essentially differentiated from the common law systems by their codified form needs to be reconsidered. Comp. *A Common lawyer looks at the civil law* (1953) p. 47 *et seq.*

2. The continental lawyer in contrast, will usually find himself at a loss among the innumerable precedents which are binding, but yet can be distinguished out of existence; he will try to find clear and precise statutory provisions and in reading statutes be lost in a mass of verbosity, and will vainly look for precise concepts among the legal synonyms, loosely phrased decisions and unsystematic textbooks and casebooks.

one hand, the agencies by which rules of conduct acquire the character of law, and on the other hand, also those rules, principles and concepts which the courts use in order to find the applicable norm. We do not mean here the literary sources from which we may acquire information of what the law is. Those will be described in the second, bibliographical, part.[3] Generally speaking, the main sources of law are: Statute, custom, judicial decision and sometimes legal writings (books of authority), general principles of law (sometimes contained in adages, proverbs etc.) and principles of the "law of nature". We shall consider here to what extent codes and statutes, custom, judicial decisions and legal writings are sources of law. We shall limit this brief survey to the living law, and avoid the jurisprudential angle of this problem, although we shall try to point out the divergence between theory and practice in this field.

At the start we must point out a striking difference between the Anglo-American and the Continental legal systems. In Anglo-American law, the historical continuity of the laws is uninterrupted, no distinction is made between old and modern law, except by the legal historian. In most of the legal systems of Europe, on the other hand, there is a sharp dividing line between old and modern law, most of the old law being expressly abolished by the new codes adopted during the 19th century or after.[4] But this break does not mean that the whole content of the codes is new; many, if not most, of their rules and principles existed in the old law, but formally the old law was abolished and became merely historical.[5] These codes, therefore, may be considered as a starting point of

3. The latter will be considered under "repositories of law."

4. The old law of France was mainly based on local laws and customs although from the sixteenth century on the royal ordinances *(Ordonnances du roi)* gain more and more importance, mostly in the public law field. France was divided into two important sectors. The South, called *"pays du droit écrit"* was the part where the Roman law, the "written law" in its Medieval form, was applied. Here, the Roman tradition prevailed over the laws of the Germanic invader. The North was the *"pays de coutumes"*, where the old customary law of the Germanic tribes and the local customs emanating from them were in force. (See OLIVER-MARTIN: *Hist. du droit français,* 1951, No. 78) In Germany the old Germanic laws and the customs issuing from them were, in the course of the so-called reception of Roman law, superseded by a general customary law based on Roman law principles, as evolved in the universities, the so-called *"usus modernus pandectarum"*. This was called the *"gemeine Recht"* (i.e. the commonlaw) which was the general law, but which could not be enforced against the laws of the various states *(Landrecht),* which latter had again to give precedence to the local laws *(Stadtrecht).*

In France, the law of 30 *Ventôse an* XII [1804] which ordered the consolidation of all civil (private) law in the *"Code civil des Français"* also repealed (art. 7) all of the Roman law, the ordinances, the general and local customary laws, all statutes and regulations dealing with subjects which were covered by the new civil code.

5. The overwhelming majority of principles and rules embodied in the modern codes derived from several main bodies of rules: the local customs, the Roman law as it developed during the middle ages, Canon law and the natural law concepts of the 17th

present-day law. Except for this separation of old law from the modern, the main Continental legal systems differ in many ways. We propose here to consider French law with regard to the weight and importance of the various sources of law.

century (law of reason) which also introduced many teachings of Christianity into its system of a law of reason.

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# PART ONE

# Chapter I
# LEGISLATION

**Statutes and Decrees.** The most important source of modern French law is the statute law, the enacted law *(la loi)*. Enacted law may be a statute proper *(loi)* that is, the express, written and promulgated will of the legislator,[1] and it may be a decree *(décret)* if this decree is a general and permanent legal provision emanating from the regulatory power of the executive *(pouvoir règlementaire)*.[2]

The statute is supreme as a source of law: the courts must apply it and are not entitled to question the validity or constitutionality of a duly promulgated statute.[2a] Moreover, a judge may not refuse to decide a case because of the silence, obscurity or insufficiency of the law.[3] According to theory, the codified law or statute is always sufficient to provide a solution to all possible disputes concerning the subject matter which it regulates.[4] French courts, required by an express provision of the law always to motivate their decisions,[5] almost invariably refer to one or more provisions of a code or statute as the basis of their decision, thus demonstrating the overriding importance of the statute law. Statutory law itself consists of a hierarchy of legislative enactments.

Among the sources of law, the statute *(loi)* was dominant from 1804 to 1956; it was the most general and first in "rank."[6] The Constitution,

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1. Acts emanating from the legislator.

2. On the sources of law in general, especially on enacted law, comp. G. MARTY & P. RAYNAUD, *Droit civil I,* 2d ed (1972) nos. 77-99, p. 145-164; G. RIPERT & J. BOULANGER, *Traité de droit civil I* (1956) nos. 197-216, p. 91-99; J. CARBONNIER, *Droit civil,* llth ed. (1977), nos 22-27, p. 111-139; DALLOZ, *Encyclopédie Juridique. Répertoire de droit civil,* 2d ed. Vol. V. *Lois et décrets.*

2a. Previous to its promulgation the constitutionality may be questioned by submission to the Constitutional Council. See infra p. 10.

3. *C. Civil* art. 2. If he does so he becomes liable for the crime of *déni de justice* (denial of justice).

4. This is the theory of the sufficiency of written law. See infra p. 23.

5. *C. proc. civile* art. 141 - *Loi du 20 avril* 1810, art. 7: ". . . The decisions without motivation are [declared] void."

6. Before the creation of the codes, customary law was almost the only source of private law, and was also of great importance in other branches of the law. Only from the second half of the seventeenth century was private law substantially influenced by legislation. In the course of the seventeenth century the ordinances of 1667 on civil procedure, of 1673 on commerce on land, of 1681 on merchant marine and maritime commerce were the most important. In the first half of the eighteenth century the ordinances of 1731 on donations (gifts), of 1735 on testaments and of 1747 on fideicommissary substitutions caused further changes in private law.

also considered a statute, had a somewhat higher position because of the formal requirements of its enactment and modification under special provisions by the legislature. Decrees had a subordinate position.

In times of upheaval, it happened that provisional governments passed laws without parliamentary action in the form of decree-laws *(décrets-lois)* or ordinances *(ordonnances)*. These were the Government of National Defense in 1870, the Vichy Government, the Government of Liberation in 1944-1945. Moreover, in times of emergency or of exceptional conditions, the government has been granted special powers by the legislature to promulgate statutes or to modify and abrogate existing statutes by way of decree-laws, decrees with the force of statutes.[7]

The forms and hierarchy of enacted law were fundamentally changed by the Constitution of 1958. Accordingly, at present three main categories of enacted law can be distinguished: the statute *(loi)*, the decree *(règlement)* and ordinances which may have legislative force under special constitutional provisions.

*Statutes.* The statute *(loi)* is generally voted by parliament, but may also be passed by referendum on the initiative of the President of the Republic according to Article 11 of the Constitution. There are three categories of statutes: 1) Constitutional laws *(lois constitutionnelles)* which hold a superior position; no other statute may derogate from their scope and provisions.[8] 2) Organic laws *(lois organiques)* which determine the rules of organization and functioning of government and whose enactment is by a special procedure.[9] The purpose of organic laws is to complete the Constitution by adopting specific regulations implementing some of its provisions. It is the Constitution itself which specifies the subject matters which can be regulated by organic laws; these cannot, however, modify constitutional provisions. 3) Ordinary statutes voted by Parliament. The earlier supremacy of statute law, which could regulate

---

The term "law" *(loi)* in French legal language has a double meaning; from the *substantive* point of view, it indicates any rule of law which has a general binding force, and frequently indicates - usually in the plural form, "*lois*" — the totality of legal rules applicable irrespective of their source; from the *formal* point of view, it means the statute, the act which is enacted by the legislature in conformity with the formalities prescribed by the Constitution.

7. The powers were granted for a limited period, and the decrees required eventual parliamentary ratification, e.g. during the first World War the government had delegated power in matters of tariff legislation and supplies for the civilian population. Powers to legislate by decree-laws were first used in peacetime in 1926, and were demanded by and granted to the Government for every year but one after 1933 until 1945.

8. They are the Constitution of October 4, 1958, the Preamble of the Constitution of 1946, and the Declaration of the Rights of Man and the Citizen of 1789.

9. Article 46 of the Constitution. They may not be promulgated until the Constitutional Council has declared their conformity to the Constitution.

any matter, has been curtailed; only subjects specified in article 34 of the Constitution are determined by statute law and voted by Parliament. Even these subjects have to be differentiated: some are within the exclusive sphere of parliamentary legislation; as to others, only their fundamental principles can be determined by statute.[10]

International treaties or agreements when duly ratified or approved have, upon their publication, an authority superior to that of laws.[11]

France is a Member State of the European Community and is subject to Community law in accordance with the Treaty of Rome of March 25, 1957. It is a basic rule that a directly effective provision of Community law always prevails over a provision of national law.[12] This rule, firmly held by the European Court of Justice, "applies irrespective of the nature of the Community provision (constitutive Treaty, Community act or agreement with a non-member state) or that of the national provision (constitution, statute or subordinate legislation)."[13] It makes no difference

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10. Matters within the statutory power of parliament are the following:

Civil Rights and fundamental guarantees accorded to the citizens for the exercise of public liberties; the obligations imposed by the national defense upon the persons and property of the citizens;

The nationality, circumstances and qualifications of persons, matrimonial, inheritances and gifts.

The determination of crimes and offenses as well as the punishments applicable to them; penal procedure; amnesty; the creation of new juridical systems and the statute of magistrates.

The base, the rate and the methods of taxation of all types; the system of issuing money.

The law determines also the rules concerning:

The electoral system of the parliamentary assemblies and the local assemblies;

The establishment of categories of public institutions;

The fundamental guarantees accorded to civil and military employees of the state;

The nationalization of enterprises and the transfers of property from the public to the private sector.

The law determines the fundamental principles of:

The general organization of the national defense;

The free administration of local communities, of their powers and their resources;

Education;

The status of property, real estate laws and civil and commercial obligations;

Laws pertaining to employment, unions and social security.

In addition peace treaties, commercial treaties, and some other treaties specified in Art. 53 must be ratified and approved by law.

11. This authority poses a delicate question since Art. 55 of the Constitution subjects each treaty to a requirement of its application by the other party. This becomes especially problematic for multilateral treaties.

12. Comp. HARTLEY, T.C.: The foundation of European Community law (1981) p. 219 *35 seq.* In order to be *directly effective* the provision must be clear and unambiguous, it must be unconditional, and its operation must not be dependent on further action being taken by Community or national authorities. Ibid. p. 191.

13. Ibid. p. 220.

whether the Community provision came before or after the national provision. The national provision must give way to Community law and consequently a national court must give full effect to Community provisions and must not apply any conflicting provision of national legislation.

However, the Member States' attitudes towards the rule of immediate effect and priority of Community law over national law differ. In France, the Cour de cassation recognized the abrogative effect of directly applicable Community law concerning decrees[14] and later accepted its superior force over a statute (even posterior to it).[15] The *Conseil d'État*, however, has refused to recognize the supremacy of Community regulation over French legislation and the direct effect of directives.[16]

All other matters not enumerated in Article 34 are within the exclusive regulatory decree power of the executive; even legislative texts (e.g. earlier statutes) pertaining to these matters may be modified by decree after an opinion has been given by the *Conseil d'État*.[17]

An ordinary statute which covers one or another major field of law is called a code. The Napoleonic codification of the early nineteenth century produced five great codes; The Civil Code, the Code of Civil Procedure, the Commercial Code, the Penal Code and the Code of Criminal Procedure.[18] These codes cover the most important fields of the law, but not completely; there are minor codes and simple statutes supplementing them.[19] Under the present Constitution, codes may be

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14. Crim. 7 janv. 1972, D.1972, 497 note J. Rideau.

15. Cass. ch. mixte, 24 mai 1975, D.1975, 497 concl. Touffait, sem. jur. 1975 II 18180bis concl. Touffait.

16. Cons. d'État, 22 déc. 1978, D.1979 155 concl. Genevois, note Pacteau.

17. Article 37 of the Constitution. Moreover, legislative texts made after the coming into force of the new constitution may only be modified by decree if the Constitutional Council declares that they have a regulatory character by force of their subject matter.

18. The *Code civil* came into force piecemeal consolidated by the Law of 30 *ventôse* of *an* XII (1804)and then was published in a united form called "*Code Civil des Français*" on March 21, 1804. The *Code de procédure civile* came into force on January 1, 1807; the *Code de commerce* on january 1, 1808; and the *Code d'instruction criminelle* and the *Code pénal* on January 1, 1811.

19. It must be emphasized that administrative law, one of the most important branches of French law, is not codified and its general principles are purely jurisprudential. There are other important fields like tax law which are not codified. In this respect one must not be misled by publications like the *Code Administratif, Code Général des Impôts,* or *Code Social,* which are not true codes but only names for the collections of the numerous relevant statutes and decrees.

Since 1948 measures of partial "codification" in the form of consolidation of various parts of administrative law has been envisaged (comp. Part II, footnote ). Recently the Law no. 58-346 of April 3, 1958 brought into force thirty-one such consolidating codes (e.g. pensions for veterans, postal and telegraphic services, savings banks, public health, housing, urbanisation, aviation, agricultural laws, film industry etc.) and repealed all