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# The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law

*Yvon Loussouarn\**

The law of every country reflects its civilization and often the diversity in legal systems may be attributed to differences in culture, philosophy, and the conditions of social life. The comparison of the laws of the Western world with those of China, for example, reveals differences in their conceptions of law explainable in terms of the diversity of the civilizations in which they are found. The comparison of Soviet law with the laws of Western countries, on the other hand, reveals differences of philosophy rather than of general civilization. Among the countries of the Western world, however, no important cultural difference is to be found and yet the laws of these countries do differ greatly. In Germany, Italy, France, England, and the United States moral and religious conceptions are about the same; approximately the same ideas of justice and equity prevail; economic conditions are not profoundly different and entail the same kind of social life. Why, then, do the laws of the European countries differ so widely from those of England and the United States? They differ, it may be observed, not in their general objectives, but in the techniques through which they seek these objectives. The laws of both groups of countries seek the same ideal of justice, but pursue it through different technical procedures. For this reason a full comparison of the laws of the "Common" and "Civil" law countries must be based on their technical aspects, and chiefly on the relative importance of the formal sources of law in those countries. Accordingly this article will deal with the relative importance of the several formal sources of law in the countries of European Roman law, but especially in France. The first part will be devoted to the authoritative sources of law, legislation and custom, and the second part to the persuasive sources, judicial precedent and equity.

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## PART I. THE AUTHORITATIVE SOURCES OF LAW

## LEGISLATION

French, German, and Italian law are "codified," and codification entails a most important consequence, the supremacy of legislation to every other source of law. This does not mean that a French lawyer will find all solutions in the enactments which are the declared will of the legislative assembly, but it does mean that if he finds a solution there nothing in the nature of custom, common law, or tradition can prevail against it. Legislation is the primary authoritative source of law. It is only if the legislation does not cover the question at issue that the lawyer or judge is entitled to look elsewhere for its solution. Thus it is that although modern science can affirm that a child cannot be that of the husband of the mother if their blood types differ, this fact is not enough to support a disavowal of paternity because the French Civil Code lists only two instances in which paternity may be disproved, the remoteness of the husband from the wife at the time of possible conception and the wife's concealment of the birth of the child from her husband. The discovery of modern science not having been foreseen at the time of the redaction of the Code and this ground not having been added by amendment, French judges cannot take it into account in deciding paternity cases.<sup>1</sup>

There can be no doubt, then, that in France legislation is the most important source of law. What are the reasons for its supremacy? The first is certainly a matter of history, chiefly the effect of the French Revolution of 1789. Before the Revolution, French law was neither codified nor unified. The law of the southern portion of France was based primarily on the Roman law as found in the Corpus Juris and for that reason this part of France was known as the *pays de droit écrit*. The northern portion of France was governed largely by custom and was known as the *pays de coutume*.<sup>2</sup> The Revolution brought about the complete discard of these older regimes. Article 7 of the Civil Code expressly repealed the sources of law recognized before its

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1. Barbier, *L'examen du sang et le rôle du juge dans les procès relatifs à la filiation*, 47 REVUE TRIMESTRIELLE DE DROIT CIVIL 345 (1949); Nerson, *Les progrès scientifiques et l'évolution du droit familial*, in 1 LE DROIT PRIVÉ FRANÇAIS AU MILIEU DU XX<sup>e</sup> SIÈCLE 403 (1950); Savatier, *Le droit civil de la famille et les conquêtes de la biologie*, RECUEIL DALLOZ 1948, *Chronique* IX.

2. LEPOINTE, *PETIT PRÉCIS DES SOURCES DE L'HISTOIRE DU DROIT FRANÇAIS* (1949); 1 LEVY-BRUHL, *INTRODUCTION À L'ÉTUDE DU DROIT* 265 (1951); OLIVIER-MARTIN, *HISTOIRE DU DROIT FRANÇAIS DES ORIGINES À LA RÉVOLUTION* (1951).

enactment, and if the purpose of this provision was primarily to secure unification of law in France it was also to affirm the supremacy of legislation over custom.<sup>3</sup> It is probable that without the Revolution the French would not have rid themselves so easily of their former customary and Roman law traditions. England, for example, has never broken completely with her ancient law and even today many solutions there depend on customs or enactments of the twelfth and thirteenth centuries. Yet not every revolution in history has produced such a break with the past, and to understand this effect of the French Revolution it is necessary to understand some of its basic ideas.

The first of these basic concepts was that equality among citizens could be obtained more easily through legislation than through custom, for much of the diversity in French customary law had its foundation in differences among the social categories of persons. The second basic concept was that of freedom, or liberty, which in the French mind led to a sharp and one-way conception of the principle of separation of powers. Liberty included freedom to determine one's laws through elected representatives and, indeed, the French Civil Code provides sanctions for judicial encroachments on the legislative and executive powers, but none for legislative or executive interference with the judicial function. Thus Article 4 of the Civil Code declares that the judge who refuses to decide a case on the ground that it is not covered by legislation may be prosecuted for a "denial of justice" to the parties and, in so providing, at once presumes the all-sufficiency of the legislation and requires the judge to fit the case as best he can into a mold provided by it. Obviously nothing but legislation was to be given the force of law, and nothing but the legislative assembly was to have the power to declare law. Article 5 of the Civil Code further guarantees this exclusive authority of the legislature by forbidding judges to issue *arrêts de règlement*, that is to say, to indicate the constructions or interpretations of the legislation which would be followed in like future cases.<sup>4</sup> Precedent, though only in the form of the judicial interpretation or construction of the declared legislative will, was not to have any effect as law, and in each case the judge was

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3. MARTY, LA DISTINCTION DU FAIT ET DU DROIT, ESSAI SUR LE POUVOIR DE CONTRÔLE DE LA COUR DE CASSATION SUR LES JUGES DU FAIT, thesis, 100 (1929); 1 & 2 PAILLIET, MANUEL COMPLÉMENTAIRE DES CODES FRANÇAIS (1845).

4. 1 MARTY ET RAYNAUD, DROIT CIVIL 202, n° 119 (1956); Cass. civ., July 16, 1955, 1955 DROIT SOCIAL 528.

to apply the legislation itself without reference to past applications of it.

The relative importance of legislation in France is further enhanced by the absence of any ordinary judicial control over its constitutionality.<sup>5</sup> A judge cannot refuse to apply legislation because he considers it unconstitutional. For example, a 1947 enactment concerning letters of credit violated the Bern Convention to which France had been a signatory.<sup>6</sup> Under the French Constitution of 1946 a treaty is paramount to internal legislation. Yet the judge could not apply the constitutional and treaty provisions and ignore 1947 legislation, for this would have amounted to a declaration of the latter's unconstitutionality. The only remedy was for the legislative assembly to repeal the act, but had it refused to do so French courts would have been obliged to enforce the unconstitutional legislation. There is, of course, a difference between constitutional and ordinary legislation in France, but the importance of this difference lies only in the manner in which the one or the other may be formally repealed.<sup>7</sup> An ordinary law cannot repeal a constitutional provision, though it can repeal an ordinary law. Nevertheless, as a practical matter the latest legislation is the primary source of law and it is so simply because a judge does not have the power to declare a law unconstitutional.

This is, nevertheless, a superficial view of the problem. To determine the exact place of legislation in a legal system it is necessary to take into account two main considerations: the interpretation of legislation and the area or scope of subject matter covered by legislation. It may be mentioned in advance that these two factors are rather contradictory in French law, for the evolution of interpretation tends to minimize the importance of legislation and on the other hand the increase of matters specifically covered by legislation in fact augments its importance as a source of law.

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5. Blondel, *Le contrôle juridictionnel de la Constitutionnalité des lois en France*, MÉLANGES HAURIUO, p. 211; Hauriou, *La technique française en matière de contrôle juridictionnel de la constitutionnalité des lois*, 2 MÉLANGES LAMBERT 336; Gény, *De l'inconstitutionnalité des lois et des autres actes de l'autorité publique et des sanctions qu'elle comporte dans le droit nouveau de la IV<sup>e</sup> République française*, 1 JURIS-CLASSEUR PÉRIODIQUE 613 (1947); Mignon, *Le contrôle juridictionnel de la constitutionnalité des lois*, in RECUEIL DALLOZ 1952, *Chronique*, p. 45.

6. See Houin, *La loi inconstitutionnelle du 4 septembre 1947 sur la domiciliation des effets de commerce*, 1 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 209 (1948).

7. PRÉLOT, PRÉCIS DE DROIT CONSTITUTIONNEL no 31; Mignon, *La valeur juridique du Préambule de la Constitution selon la Doctrine et la jurisprudence 1946*, Recueil Dalloz, 1951 *Chronique*, p. 127.

*Interpretation of Legislation*

In a codified system of law interpretation is the fundamental problem. The legislation is nearly always in the form of general rules, but these must be applied to particular cases. In logical terms, the fact situation in the particular case must be given a legal characterization so that it may serve as the minor premise of a syllogism the major premise of which is a general rule of law.<sup>8</sup> Once the lawyer or judge has cast his problem in this form, the result follows with inescapable necessity, without his being able to use the least discretion, for such is the compelling nature of formal logic. It is merely a demonstration of identity or of inclusion. But though the syllogistic form compels a legal solution with logical necessity, there is little necessity about the characterization of the facts for the formulation of the minor premise and still less about the selection of the general rule of law which is to serve as the major premise. This is the reason interpretation is all important, for the inclusiveness or exclusiveness of the general rule of law will determine its applicability to the case at hand. This problem of interpretation presents two main questions: in whom does the authority to interpret legislation rest, and according to what methods and norms is the process to be carried out.

*In whom rests the authority to interpret legislation?* In a legal system in which legislation is theoretically the only source of law, the interpretative function logically belongs to the legislature itself. The legislature should be the entity most capable of clarifying what it means by a statement which purports to express its collective will. This system, known as the *référé législatif*, was much used in France in the period immediately following the enactment of the Civil Code.<sup>9</sup> A judge in doubt about the meaning of a text suspended proceedings until the question was put to the legislative assembly and answered by the enactment of an interpretative act. This procedure still exists, though instances of its use are rare.<sup>10</sup> The difficulties and delays involved are so great that it is resorted to only when no reasonable meaning can be derived from the enacted text. Practically the judge must be allowed to interpret legislation. By acting as an inter-

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8. MARTY, LA DISTINCTION DU FAIT ET DU DROIT, *ESSAI SUR LE POUVOIR DE CONTRÔLE DE LA COUR DE CASSATION SUR LES JUGES DU FAIT*, THESIS, 11 (1929); MOTULSKY, PRINCIPES D'UNE RÉALISATION MÉTHODIQUE DU DROIT PRIVÉ 47 (1948).

9. 2 ENCYCLOPÉDIE DALLOZ, DROIT CIVIL, v° *Interprétation* n° 10.

10. REYMOND, DES LOIS D'INTERPRÉTATION ET DE LEUR RÉTROACTIVITÉ, THESIS (1925).

preter the judge necessarily shares in the process of making law, thus limiting to a degree the supremacy of the legislature; and the extent to which he shares in this law-making process depends on the theory or method of interpretation employed.

*The methods of interpretation.* Two major theories of interpretation have prevailed in France, that of exegesis,<sup>11</sup> or the elaboration of texts, and that of "free scientific research,"<sup>12</sup> in which the enacted texts are in reality only one source of the interpreter's ideas. It is perfectly understandable that exegesis should have become the exclusive method of interpretation in the period immediately after the enactment of the Civil Code. The Code was indeed wonderfully adapted to the necessities and conditions of life of the time and both this fact and the desire to preserve the supremacy of the legislature contributed to the tendency to seek the solution of every legal problem within the letter of its texts. But in the course of the nineteenth century, largely because of the development of industry and the astounding advance of the material sciences, the conditions of social and economic life in France changed more than they had in the ten preceding centuries. General legislative revision did not occur, and thus it became necessary to adapt the old texts to serve the new conditions, to reinterpret them in such a manner as to sever them from the social and economic theories of the Revolution and permit their application in a manner consistent with the prevailing social and economic thought. It was François Géný who more than anyone else formulated the new method and gave it its theoretical foundation. These two methods, that of exegesis and of free scientific research, will be considered in succession.

The exegetical method requires that every solution be based on the enacted legislative texts. Two situations may be differentiated, however. Either there is a text applicable to the case at hand, but whose exact coverage or disposition of the case is not clear, or there is no specific text which of itself can serve to regulate the matter. In the first situation the initial procedure

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11. BONNECASE, *L'ÉCOLE DE L'EXÈGÈSE EN DROIT CIVIL* (2d ed. 1924); GAUDEMET, *L'INTERPRÉTATION DU CODE CIVIL EN FRANCE DEPUIS 1804* (1935); Charmont et Chausse, *Les interprètes du Code Civil*, 1 LIVRE DU CENTENAIRE 131; COHENDY, *LA MÉTHODE D'UN ARRÊTISTE AU XIX<sup>e</sup> SIÈCLE*, LA THEMIS, 1819-1831, SON FONDATEUR *Athanase Jourdan* (2d ed. 1914); COHENDY, *LA MÉTHODE D'UN ARRÊTISTE AU XIX<sup>e</sup> SIÈCLE*: LABBÉ, THESIS (1910).

12. GÉNY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (2d ed. 1954); LAMBERT, *LA FONCTION DU DROIT CIVIL COMPARÉ* (1903); GAUDEMET, *L'oeuvre de Saleilles et l'oeuvre de Géný en méthodologie juridique et en philosophie du droit*, in 5 *RECUEIL D'ÉTUDES SUR LE SOURCES DU DROIT EN L'HONNEUR DE FRANÇOIS GÉNY* 5 (1934).

is to make a profound examination of the provision itself. This is a somewhat unreliable process, for experience has shown that it is fairly easy to discover almost any meaning in a text, especially if one finds it favorable. The second step is to consider the context of the provision to be construed. This is more reliable, for in this case the text can be related to the principle on which it is based or to which it is an exception. Often the very section of the Code in which a provision is found will facilitate the fixing of its scope of application. In the chapter on marriage, for example, it is said that the enumerated causes of nullity are exclusive, but this provision is not applied to contracts generally because of the context in which it is found. Yet even the relation of a provision to its context is somewhat unreliable as an indication of its meaning and application, for the Civil Code is not very systematically or rationally divided. The third book of the Civil Code, for example, includes the legislation on successions, marriage regimes, donations, obligations, and various contracts, matters which have little in common among them. Under such conditions it is at least difficult to sustain that the location of a particular provision should be considered in determining its meaning.<sup>13</sup> The third and last general exegetical procedure for discovering the possible meaning of a text is to consider the *travaux préparatoires*,<sup>14</sup> or the discussions and declarations of objectives and scope which took place in the various stages of the legislative enactment process. Obviously, the resources of the exegetical method are rather limited.

If the case is one which may not be considered covered by any specific text, the theory of the supremacy of legislation nevertheless demands that it be the source of the rule actually applied for its solution. According to the classical doctrine, three logical forms are used to discover the applicable rule, the arguments *a fortiori*, by analogy, and *a contrario*.<sup>15</sup> The argument *a fortiori* consists in the application to the case at hand of a rule legislatively prescribed for a similar case on the ground that the reasons for its prescription for that case apply with even more force to the case to be decided. The argument by analogy also applies a prescribed rule to a similar unprovided for case, but it does

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13. Cass. civ., April 20, 1920, D.P. 1923.1.87; Amiens, July 8, 1954, D. 1955, som., p. 8.

14. Capitant, *L'interprétation des lois d'après les travaux préparatoires*, in RECUEIL DALLOZ 1935, *Chronique*, p. 77.

15. 3 ENCYCLOPÉDIE DALLOZ, DROIT CIVIL, v° *Jurisprudence* n° 16, p. 20 (1952).



so simply because the unforeseen case is similar to that expressly provided for, not because there is more reason for applying the same rule. The arguments *a fortiori* and by analogy, therefore, differ not so much in their essential nature as in the extension recognized for the principle behind the rules legislatively prescribed and to be formulated by the judge for the particular case at hand. The argument *a contrario* is totally different. It consists in denying the applicability of a particular rule on the ground that inasmuch as the legislature has provided expressly for specific situations not inclusive of the case to be decided, it must have been intended that that case not be governed by that provision. Often all of these arguments can be made with equal facility and force for an unprovided for case, and the problem then becomes one of choosing among them. A celebrated problem of this kind involved the validity of arbitration clauses in contracts other than for labor and insurance, for which latter there was express legislative authorization. Some argued *a fortiori* that the laws authorizing arbitration clauses in labor and insurance contracts were merely special applications of a general principle which should be given the effect of a rule of law. On the other hand others urged the argument *a contrario* to deny that arbitration clauses could be inserted in other contracts.

Though both methods of interpretation in fact partake of the legislative function, the classical, or exegetical, in theory does not, for through it the judge seeks merely to discover and apply the legislative will. Thus exegesis recognizes the supremacy of the legislative authority. This interpretative method prevailed throughout the nineteenth century and during that time France was truly a jurisdiction of legislative law. But the reasons for the adoption of the exegetical method, the faith in a well conceived and executed code and the desire to maintain popular control over the law making process, also explain its dissuetude. The Code had been drafted and adopted to reflect and sustain the social and economic life of 1804, but as those conditions changed the provisions of the Code gradually lost their justification or appropriateness. The rules of the Code as written and originally conceived sometimes made a mockery of justice, but exegesis paralyzed the judge and prevented him from adapting the texts to the current conditions of life. Besides, problems nonexistent and unforeseeable at the time of the adoption of the Code multi-

plied at a constantly increasing rate. Thus a new approach to the process of interpreting and applying the law had to be found. French doctrine, led by François Gén<sup>y</sup>, successfully urged the abandonment of exclusive reliance on exegesis and the adoption of a method of interpretation which places more freedom and responsibility in the judge.

The method of free scientific research, as Gén<sup>y</sup> called it, does not ignore legislation where it clearly applies to the question at issue, but seeks to reinterpret it so as to give it an application which is consistent with the changed conditions which it is now called upon to regulate. The original intention of the legislature ceases to be controlling, and instead the judge must seek to give the text that meaning which the legislature would have enacted had it been acting at the present rather than in the past. In cases in which there is no text applicable, the judge engages in a similar activity, attempting to find a rule which the legislature would have enacted had it foreseen the case. Obviously such a method is legislative in its essence. Respect is given the formal expression of the legislative will, no matter what its age, but its meaning may be altered completely to adapt it to conditions calling for other solutions. Its genius is that it eliminates the paralyzing and stagnating effect of exegesis and permits the judge to decide cases without engaging in the hypocrisy that he is doing justice when in fact he applies a rule no longer suited to the purpose or pretends to do so when in fact he has changed the rule by his interpretation. Thus the new doctrine gives legislation a new character, divorcing it from any necessary connection with the original intention of the legislature, making its meaning alterable, and connecting it with other social sciences by imposing on the judge the obligation to consider what its meaning should be. Indeed, the new method of necessity worked a substantial change in French legal thought, for now it must be admitted that justice is not synonymous with legislation, and that the legislation must always be made to do justice. But interpretation through free scientific research has its inconveniences and dangers, and not the least among them is that a judge may experiment too hastily or impose private opinions which may not conform even to an adaption of declared legislative will. Against this danger there is not sufficient safeguard.

In the last analysis, current French interpretative doctrine is a mixture of the exegetical and that of free scientific re-

search.<sup>16</sup> The method actually used in any instance depends on the subject matter, the age of the provision, its clarity or lack of it, and whether or not the case or issue has been foreseen. Criminal legislation is given a very restricted meaning and application. In private international law the judge has the utmost freedom. In civil law an intermediary method prevails. If the issue has been provided for in the legislation, usually there is only a matter of construction. On the other hand, if the matter is new and unprovided for, a rule derived by free scientific research is applied. No doubt the supremacy of the legislation has been affected and the authority of the judge increased, but at the same time the tendency to cover more situations in detailed legislation, a movement to be considered next, has given legislation a new importance in fixing the rule of law.

*The Enlargement of the Area of Detailed Imperative Legislation*

Although the now accepted role of interpretation tends to detract from the supremacy of legislation as a formal source of law, the role of legislation in the total specification of order has become more important by reason of another development, the very substantial increase in the coverage of detailed imperative laws.

*The Code Civil's emphasis on freedom or private order.* The philosophical conceptions dominant after the French Revolution held equality before the law and maximum freedom to be the ideals of order. All men were to be as free as possible in their activities and in determining their rights and obligations toward others, and imperative, non-waivable rules of law were to be kept at the minimum required to preserve these conditions of equality and freedom. The Code Civil reflected these conceptions. The primary principle was announced very compactly in Article 6, which is identical with the first paragraph of Article 11 of the Louisiana Civil Code:

“Individuals cannot by their conventions derogate from the force of laws made for the preservation of public order and good morals.”

Thus only laws enacted for the preservation of public order and

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16. Bonnecase, *La pensée juridique française de 1804 à nos jours*, REPORTS OF THE INTERNATIONAL WEEK ON LAW (1950); ROUAST, LES SOURCES DU DROIT ET LE CODE NAPOLEON; ROUBIER, LA METHODE DEPUIS LE CODE CIVIL DE 1804 AU POINT DE VUE DE LA TECHNIQUE JURIDIQUE; BOULANGER, LA METHODE DEPUIS LE CODE CIVIL DE 1804 AU POINT DE VUE DE L'INTERPRETATION JUDICIAIRE.

good morals were imperative. Other laws declared what the legislature considered good rules for the regulation of the rights and obligations among private persons; but these laws, deemed enacted in the interest of individuals rather than in the interest of the general public, could be waived by them if they saw fit.<sup>17</sup> Article 1134 of the Code, which corresponds to Article 1901 of the Louisiana Civil Code, went so far as to state that:

“Agreements legally entered into have the effect of laws on those who have formed them.”

So strong was the theory of freedom of self-determination that some legal scientists interpreted this article to mean that contract was a source of law and not merely of rights and obligations for the parties.<sup>18</sup> Of course this was error, for it is the law itself which authorizes and sanctions the contracts of persons, but the point does illustrate the force with which the notion of self-determination prevailed.

Self-determination was evidenced strongest in the economic order, which reflected this concept in terms of *laissez-faire* individualism. But even where contract as such was not involved, equality and freedom characterized the law. The laws relating to property assured the owner of almost absolute license to use his property as he wished, a minimum of restrictions existing in favor of other individuals. The absolute right to partition assured the owner opportunity to gain complete control over specific property rather than remain a partner, as it were, in a larger amount of property. The prohibition against substitutions gave the living maximum control over their property during life, and the laws on forced heirship worked a compromise between freedom of disposition at death and equality in the treatment of the heirs. Only in the area of personal status and family relations did the ideals of freedom and equality have less effect.

*The present emphasis on a regulated social and economic order.* The changes in social and economic conditions during the nineteenth and present centuries, greater than in the preceding thousand years, especially the development of industry and its consequences, soon made it evident that men were not in fact equal in working out their rights and obligations and that the freedom granted under the laws frequently gave the economically

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17. 1 MARTY ET RAYNAUD, DROIT CIVIL n° (1956); Niboyet, *La force des règles de droit*, in ETUDES SUGIYAMA 241 (1941).

18. GOUNOD, LE PRINCIPE DE L'AUTONOMIE DE LA VOLONTÉ, THESIS, 240 (1912).

strong the means of taking advantage of the economically weak. It was increasingly necessary, therefore, to replace the free economy with a more regulated one, and this required much legislation both detailed and imperative in character.<sup>19</sup> Thus the area of public order, as opposed to private order, was augmented considerably.<sup>20</sup> Regulation of the use of private property has replaced its free use, which so often had been abused, and this has been accomplished largely by the enactment of an immense body of legislation. The principal example here is that of monetary and trade control. Freedom of contract has been much curtailed. Contracts for labor, insurance, and house rentals, for example, must contain mandatory provisions, or be in certain standard forms, or otherwise conform to a large measure of regulation. These laws, all considered enacted in the public interest, must apply imperatively if they are to accomplish their purpose and are considered to pertain to the public order.

Thus it is that the public order has come to encompass a very large area of activity either non-existent in the early nineteenth century or then left to private determination. If formerly public order encompassed mostly purely personal relations and the social rather than economic aspects of property, now an economic element has been added. Doctrinally, a distinction is made between "classical public order" and "economic public order,"<sup>21</sup> but these expressions should be understood as references to the different contents of public order in classical and present times, and not as references to different kinds of public order. The concept, or principle, of public order does not change; but its specification varies with the conditions of life which the law is called upon to order. Today the general interest demands the imperative regulation of relations among men to a far greater extent than in 1804.

Many French legal scientists are of the opinion that the increase in imperative legislation has offset whatever loss legisla-

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19. CHARMONT, *LES TRANSFORMATIONS DU DROIT CIVIL* (1912); MORIN, *LA RÉVOLTE DES FAITS CONTRE LE CODE CIVIL* (1920); RIPERT, *LE RÉGIME DÉMOCRATIQUE ET LE DROIT CIVIL MODERNE* (1936); Ripert, *Le droit privé français au milieu du XX<sup>e</sup> Siècle*, in *ETUDES OFFERTES* (1950); SAVATIER, *LES MÉTAMORPHOSES ÉCONOMIQUES ET SOCIALES DU DROIT CIVIL D'AUJOURD'HUI* (1948); Savatier, *Destin du Code français*, 6 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 637 (1954).

20. Julliot de la Morandière, *L'ordre public en droit privé interne*, in *ETUDES CAPITANT*, p. 381; RIPERT, *LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES* 23 (4th ed. 1949); Dabin, *Autonomie de la volonté et lois impératives: ordre public en bonnes mœurs*, in *ANNALES DE DROIT ET DE SCIENCES POLITIQUES* 190 (1940); MALAURIE, *L'ORDRE PUBLIC ET LE CONTRAT*, THESIS (1952).

21. Ripert, *L'ordre public économique*, in *MÉLANGES GÉNY* (1927).

tive supremacy may have suffered by reason of current methods of interpretation, which, as we have seen, have caused French legal method to approach that of the common law systems.<sup>22</sup> The opinion, however, is not completely justified, for account must be taken of the fact that the extensive *prolifération législative* tends to deprive legislation of its cogency and to make the judge less respectful of the written law. Perhaps it would be more accurate to say that legislation has lost supremacy as the supposedly unique source of *right (droit)*, but remains supreme as the most important single source of law or legal rules (*loi*).

### CUSTOM

The fact that legislation no longer is regarded as the sole source of law (in the sense of *droit* or *right*) opens the question whether *custom* can be considered either a primary or a supplementary source of law. But first some effort must be made to determine the nature of custom.

#### *Definition of Custom*

Article 3 of the Louisiana Civil Code declares:

“Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent.”

Unfortunately for French jurists, the *Code Civil* does not provide a definition of custom and their opinions vary concerning its proper content.

One opinion would include in custom every legal formulation not included in the written law itself, *i.e.*, the practice, usages, received doctrine, and even the circumstances of social life.<sup>23</sup> This definition is too broad for custom which is to have the force of law, for certainly the judge is not obliged to follow or respect all practices, usages, doctrinal opinions, and social habits, and coerciveness is a prime quality of law. A second opinion assimilates custom to usages of daily life, social, business, industrial, and agricultural, and even the rules of etiquette and moral and

22. RIPERT, LE DÉCLIN DU DROIT, ÉTUDES SUR LA LEGISLATION CONTEMPORAINE (1949); Savatier, *Réalisme et idéalisme en droit civil* in *Le droit privé français au milieu du XX<sup>e</sup> siècle*, in 1 ÉTUDES OFFERTES À G. RIPERT 75.

23. LEBRUN, LA COUTÛME, SES SOURCES, SON AUTORITÉ EN DROIT PRIVÉ, THESIS (1932); ENCYCLOPÉDIE DALLOZ, 1 DROIT CIVIL v° *Coutume* (1951).

religious practices.<sup>24</sup> It is true the written law itself occasionally refers to and incorporates usages of various kinds, which thereby gain coercive quality, but otherwise these usages are not binding juridically and of necessity cannot have the force of law. A third opinion limits custom to *jurisprudence* or case law. This, too, must be rejected, for under Article 5 of the *Code Civil*, which prohibits *arrêts de règlement*, judicial decisions may not be considered binding for the future.<sup>25</sup>

Thus it would seem that for a practice to be considered custom it must not only be generally recognized and constant, but also generally regarded as juridically binding.<sup>26</sup> It is practice reflecting a juridical sentiment. This definition has three advantages. First, if the practice is not regarded as binding in law, it is mere usage, and custom and usage are thus distinguished. So it is that in France the wife's assumption of the husband's name is custom rather than usage precisely because there is the general sentiment that the practice is binding.

The second merit of the definition of custom just given is that it permits differentiation of *custom* and *conventional usage*, a practice which many consider custom, but which in reality lies between custom and usage. These conventional usages, those practices, sometimes general, more often local or professional, which cover completely the formation of contracts, are particularly frequent in commercial law. By virtue of the principle of the autonomy of the will limited by the notion of good faith, these conventional usages are implied in every act in order to construe or to complete the intention of the parties. Such usages are very numerous in the relations between merchants, in labor law, in letters of credit, in maritime contracts, and usually in international trades. Some references are made to them in the legislation on these subjects.

Often the French Civil Code, in stating general rules for the interpretation of contracts or determining their contents, alludes to conventional usages, and an act of June 13, 1866, has fixed legislatively the most important of them for commercial sales.

For most of the authors these conventional usages are only

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24. PACHE, *LA COUTÛME ET LES USAGES EN DROIT POSITIF*, THESIS (1938).

25. Meynial, *Sur le rôle joué par la doctrine et la jurisprudence dans l'oeuvre d'unification du droit en France*, 27 *REVUE GÉNÉRALE DU DROIT ET LA JURISPRUDENCE* 326, 446 (1903).

26. I GÉNY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF*; *ESSAI CRITIQUE* 316 (2d ed. 1954); comp. Lambert, *Etude du droit commun législatif*, *Introduction*, 1 *LA FONCTION DU DROIT CIVIL COMPARÉ* (1903).

one aspect of custom. Some of them go further and think that only conventional usages constitute custom. This was the position adopted by Lyon-Caen and Renault.<sup>27</sup> For them the value of usages, just as the value of custom, rested upon the idea of a tacit convention. This confusion is understandable, for it seems there is a great analogy between conventional usages and custom. Each consists in practices having, in the thought of the persons concerned, a juridical value. Furthermore, because the role of conventional usages is to supply or to construe the intention of the parties, they are in that respect a real rule of the law; legislation, when not imperative, has exactly the same function. Nevertheless, a deeper examination of the question enables us to question this analogy. Doubtless conventional usage resembles custom in that it too presupposes an accepted and constant practice. But it is doubtful that it contains the psychological element, which is the second element of custom, the *opinio juris*, or juridical sentiment, according to which the practice is considered binding in law. The usages of merchants and the usages of business, in most cases, may be referred to in order to supply or construe the intention of the parties only because the parties are presumed to have taken these usages into account. This very choice excludes from the minds of the parties any feeling of being juridically bound by the usage.

Yet to deny to conventional usage the character of real custom does not imply that it cannot be in some way a source of law. But between the rules derived from conventional usages and the rules which issue from an interpretative, non-imperative legislation, there are two fundamental differences. On the one hand, legislation contains in itself and directly expresses the rule designed to supply the expression of the intention of the parties, whereas the rule derived from conventional usage is discovered indirectly by the application of a different principle, that of the autonomy of the will. On the other hand, and this is the second difference, on practical grounds, if the law automatically construes the will of the parties, conventional usages merely suggest an intention which is not expressed, and then only if the facts of the case permit this induction of the unexpressed intention of the parties. It would seem, therefore, that conventional usages are nearer in nature to contract than

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27. 1 LYON-CAEN ET RENAULT, *TRAITÉ DE DROIT COMMERCIAL* 90 (10th ed. 1921); comp. Escarre, *La valeur juridique de l'usage en droit commercial*, in *ANNALES DE DROIT COMMERCIAL* 97 (1910); Valéry, *La coutume commerciale*, *REVUE CRITIQUE DE LÉGISLATIF ET JURISPRUDENCE* 418 (1916-1924).



they are to custom, and this conventional nature entails an important consequence which makes them very different from custom.

Conventional usages, not implying the *opinio juris*, the juridical sentiment which is one element of custom, can be considered as a source of law only if they were known to the parties, or, at least, if it is possible to presume that they intended to adopt them. On the contrary, a customary rule supplying the will of the parties should be binding for the judge even if it is completely unknown to the parties, for the presumption which constitutes its basis exists precisely to establish a fixity in juridical relations and to avoid difficulties of fact.

The third and last advantage of the definition of custom above given is that it explains the decline of custom in the modern systems of law. It is obvious, certainly, that the complication of social relationships, the confusion of ethnic groups, and the alteration of national aspirations by the cosmopolitanism now necessary for a strong political organization, all compel customary law to yield to the more and more important role of written law. Indeed, custom implying a common juridical sentiment can be developed only in small groups close to that Old World influence under which the common decision is imposed on every member of the group. But this condition requires small groups. When the state grows, general customs become less frequent and special customs appear in autonomous groups. But if this autonomy of the small group disappears by virtue of a politically powerful government, the last source of custom is exhausted, for a common, general juridical sentiment no longer can arise.

For this reason, the social and political evolution which we have experienced limits the role of custom even in the countries of common law. But does this mean that in a codified system custom cannot be a source of law?

### *Custom as a Source of Law*<sup>28</sup>

A solution to this question is not to be found in the different codes of France. Doubtless Article 7 of the *Code Civil* and Article 1041 of the Code of Civil Procedure repealed all legisla-

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28. Esmein, *La coutume doit-elle être reconnue comme source du droit civil français*, BULLETIN DE LA SOCIÉTÉ D'ÉTUDES LÉGISLATIVES 533-44 (1905).

tion and custom on the same subjects existing prior to the enactment of these codes. But these articles do not deal with the question of the validity of custom arising subsequent to the enactment of those codes. As to the Commercial Code, Article 2 repeals the former commercial legislation without alluding to commercial custom. For this reason, in the absence of an express legislative provision, a solution must be sought in the doctrine and in the jurisprudence.

From a doctrinal basis, the importance of custom in French law has been closely allied to the development of the methods of interpretation. The school of exegesis, the most prominent school of the nineteenth century, did not consider custom as a source of law. For its exponents legislation was the only source of law. They believed there could be no place for a tacit manifestation of the will of the people (custom) as long as their express will (legislation) existed. The school of exegesis sought everything in the Code. Later, with the appearance of the method of free scientific research, the role of custom grew considerably in French law and modern French and other European writers admit that custom is a source of law. There is, however, some misunderstanding as to the exact importance of custom which results from a failure to distinguish two entirely different species of custom: that which is called custom *praeter legem*, or custom as to a matter not covered by legislation, and custom *contra legem*, or custom contrary to existing legislation on the subject.

Today custom *praeter legem* is generally admitted to be a source of law and, in this respect, French civil law acknowledges its legitimacy. Our courts believe there is no reason to exclude this kind of custom and there are some rules of civil law which are exclusively customary. For instance, in France all the rules regarding names and surnames are customary. So it was that in a decision of March 5, 1944, the *Chambre des Requetes*<sup>29</sup> decided that in a non-codified matter like that concerning names custom has "sovereign" authority for the simple reason that modern legislation has not provided for it.

The second problem is much more controversial. May custom be a source of law when it is in conflict with a provision of legislation which has foreseen the case?<sup>30</sup> To answer in the

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29. S.1945.1.40.

30. Charmont, *La coutume contre la loi*, REVUE MÉTAPHYSIQUE ET DE MORALE 469 (1917).

affirmative is to admit that legislation may be repealed by non-usage or *desuetude*. In application, the later rule, customary or legislative, would be considered paramount and custom would have the same force as legislation. This conflict is not resolved by Article 7 of the *Code Civil*, which repeals only such custom as existed at the time of its enactment, but does not mention custom arising subsequent to the *Code Civil*. Some French writers contend that custom has the same authority as legislation and that custom *contra legem* can repeal a provision of the Code. This was the position adopted chiefly by Colin and Capitant.<sup>31</sup> But the solution is not admitted by the French courts, which deny both custom *contra legem* and the repeal of legislation by *desuetude*.<sup>32</sup> A provision of law remains valid, at least theoretically, even if it has not been applied for many years. Thus the *Cour de Cassation* in two decisions of February 4, 1898,<sup>33</sup> considered valid and in force two decrees of March 2 and 21, 1848, even though they had never been applied.

In order to understand this position fully, two situations must be distinguished. In practice, if persons prefer to observe a custom *contra legem*, the provision of law which it contravenes may remain without being applied for many years. But this is true only in the absence of dispute between the parties. If one of them invokes the legislation in his favor, it will be applied by the judge even if it is contrary to a custom. There is, however, one exception which is admitted by certain courts in the field of the commercial law. Several decisions of the French courts have admitted the validity of custom against legislation, basing their decisions on the fact that Article 2 of the Commercial Code repealed only the legislation and not the custom which existed prior to its enactment.

Thus it may be said custom is only a subsidiary source of law; but in spite of this limitation of its role, it has a real importance which depends ultimately on the question of its proof. This problem of the proof of custom is fundamental because it is not sufficient to affirm theoretically that custom is a source

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31. 1 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS n° 30 (10th ed. 1953).

32. Cass. crim. June 30, 1827, Dalloz, Jur. Gén. v° Forêts, n° 1769; Cass. crim. October 3, 1828, Dalloz, Jur. Gén., v° Cassation, n° 1407; Cas. civ. January 25, 1841, S.1841.1.105; Cas. civ. July 11, 1855, D.P. 1856.1.9; Cas. civ. April 13, 1897, S.1897.1.404; Cass. réunies, January 31, 1901, D.P. 1901.1.69; Cass. civ. October 20, 1902, D.P.1902.1.519; Cass. crim. January 4, 1917, D.P.1922.5.5; Cass. com. May 16, 1949, D.1950.629, note Ripert.

33. D.1898.1.369.

of law. On practical grounds, the litigant who invokes a custom must be able to prove its existence, if he wants to win his lawsuit; but it is much more difficult to prove the existence of custom than it is to prove the existence of a legislative provision. To prove the existence of a legislative provision it is only necessary to open the Code; to prove the existence of a custom, it is necessary to prove a constant practice, and that this practice corresponds to a juridical sentiment. This is very difficult to do.<sup>34</sup>

It will suffice here to discuss only the problem of the burden of proof of custom. Here, we have to take into consideration the fact that every legal relationship raises a double difficulty of proof to the judge, the proof of the fact which gives rise to the application of the rule of law, and the proof of this rule of law itself. If the judge must consider the two aspects of the problem, his position is not the same with regard to each. Whereas proof of a fact must be made by the litigant who alleges it, the judge takes judicial cognizance of legislation. For custom, the difficulty as a rule of law is that it has its origin in a succession of facts and practices, so that it may be difficult to choose between the rules governing the proof of facts and the rules governing the proof of law.

On practical grounds, the situation of the plaintiff is very different according to the solution given. If the burden of proof rests upon the plaintiff, it is difficult for him to win his suit. If, however, the judge must take judicial cognizance of custom, the situation of the plaintiff is improved. But, on theoretical grounds, this very fact gives some indication of the real character of custom. If custom is really a source of law, cognizance of it must be taken by the judge. This connection between the nature of a rule of law and its proof is illustrated by the French rule on the proof of foreign law. In France a foreign law is applied only as a fact made significant by the French conflict of laws rule, and for this reason the plaintiff is obliged to prove the content of the foreign law.<sup>35</sup>

Before the enactment of the *Code Civil* the courts and doctrinal writers, wishing to assure the supremacy of Roman law over the local customs, considered custom as a mere fact and authorized the application of custom only if the litigants alleged

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34. 1 MARTY ET RAYNAUD, DROIT CIVIL 195 (1956).

35. BATIFFOL, TRAITÉ ÉLÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ 382 (2d ed. 1955).

and proved it. During the nineteenth century this position was adopted by the school of exegesis. The first reaction against this solution had its origin in German doctrine, which pointed out its illogical character. Doubtless customary law has its origin in situations of fact and it is proved by the existence of these situations of fact. But these facts constitute of themselves a rule of law which the judge has to apply. This solution was adopted in France by the adherents to the doctrine of free scientific research and it led to a revival of custom at the end of the nineteenth century and during the twentieth.

What exactly is the present position of the French courts on this question? Since its decision of December 22, 1902,<sup>36</sup> the *Cour de Cassation* holds that the judge must take cognizance of a custom, if he knows of its existence, even if the litigants do not invoke it. Nevertheless, the existence of custom being less certain than the existence of legislation, the judge must be cautious. He will apply custom of his own accord only if he is certain of its existence. If the existence of a custom is disputed, the judge must require the litigants to prove it. In those instances in which the legislation has made custom imperative, as in some areas of labor law, the judge is obliged both to discover and to apply it, according to the decision of the *Chambre Sociale* of the *Cour de Cassation* rendered June 19, 1947.<sup>37</sup> This solution reveals perfectly the position of custom in French civil law. Custom is regarded as a source of law, but it does not have exactly the same value as legislation. It is a subsidiary rule of law and even its recognition in legislation can do no more than reinforce its validity and place it at the same level as the legislation itself.

In summary, the respective importance of legislation and of custom in a codified system of law reveals that legislation remains the primary source of law, for if there has been a revival of custom as an authoritative source of law it nevertheless remains a subsidiary one.

## PART II. THE PERSUASIVE SOURCES OF LAW

A system of law based only upon legislation and custom would be very insufficient in two respects. First, it would be a static system unadaptable to the evolution and changes in the

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36. D.P.1903.1.149.

37. May 24, 1948, S.1948.1.175.

political, economic, and social conditions of modern life. The legislature cannot keep pace with these developments, unless it enacts the necessary reforms daily, and even if it attempts to do so, as it often has done in France in the last few years, the frequent reforms tend to deprive the legislation of any cogency and of the respect of the judge. As to custom, it is perfectly understandable that its formation is too slow to follow the fast evolution of society; often it would be dead before its birth if it were the only authoritative source of law. Under these conditions the courts have the task of giving life to the rules of law, the task of adapting them to the needs of modern life. Their role is particularly important in the countries where codification occurred many years ago, as in France, and their importance gives rise to an important and difficult problem, that of judicial precedent in a codified system.

There is a second defect from which a system based only on the authoritative sources of law would suffer. Legislation is an expression of the will of the legislator and its validity rests upon a delegation of power made by the people. For this reason, the legislation should reflect the common sentiment of the people, which in turn is necessarily based on the principles of justice, morality, and equity, which are in the heart of every man. Accordingly, these notions are the very bases of every system of law and must be guides for both the legislature and the judge. It is this role of equity which must be considered after that of judicial precedent.

There is a close connection between precedent and equity, for often the case law is only a means of doing equity and rendering some legislative solution consistent with morality.

### *Judicial Precedent*

The authority of judicial precedent and its relation to legislation in a codified system like the French will be considered in succession.

The authority of judicial precedent in a codified system can be summed up in two propositions. The first is that in theory judicial precedent is not a source of law. The second proposition is that in practice the situation is very different and in fact precedent is a source of law.

On theoretical grounds, precedent cannot be considered a

source of law because Article 5 of the *Code Civil* expressly prohibits *arrêts de règlement*, or judicial decisions intended to be controlling in the future. This provision was prompted by the desire to deny to the judge all power to create law, a desire which followed naturally from the then prevailing notion that legislation was the best possible expression of the law, the result of the collective wisdom of the legislators, so that even the natural law and the older principles, which themselves are likely to be a guide for the legislators, should not be taken into consideration by the judge. As a result of this Article 5 a judge is never bound by an older decision rendered either by the same court or by another court. For this reason, on theoretical grounds, former judicial decisions may be ignored or overruled very easily. Of course, even in a system in which judicial precedent is a source of law, judges have a way of overruling past decisions, but there remains an important difference between systems in which precedent is theoretically binding and those, like the French, in which it is theoretically unlawful. In the first, the lawyer and judge are bound by the position of the highest court, but in the second, as in the French, they are not. Thus, in France the overruling of a decision of the *Cour de Cassation* may be foreshadowed by a decision of a lower court or court of appeal. For instance, until 1930 in France a child born during the first 180 days following the marriage of his parents was considered conceived before the marriage and therefore illegitimate.<sup>38</sup> This solution was very unjust, because there is no reason to make a difference between two children because one of them had the good fortune of being born longer after the marriage of his parents. But a court of appeal refused to apply the decision of the *Cour de Cassation*. On review of the case the *Cour de Cassation* agreed that the decision of the court of appeal was more consistent with equity and changed its position.<sup>39</sup>

The real authority of the jurisprudence, however, is essentially an authority of fact. For this reason, it is incorrect to invoke arguments based on constitutional law, such as, for instance, the principle of the separation of legislative and judicial powers. It would be an encroachment of the judicial power on the legislative if the judge avoided the application of legislation on the ground that he was obliged to follow a judicial precedent. This would be placing judicial precedent above legislation. But

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38. Cass. civ. June 28, 1869, D.1869.1.335, S.1869.1.440.

39. Cass. civ. January 8, 1930, D.1930.1.51, S.1930.1.257, note Géný.

he does not do this. The judge follows precedent only as an *interpretation* of the legislation, and it is not possible to reproach him for this attitude. In France, a strange experiment, known as "the experiment of Judge Magnaud," has shown that it is precisely when the judge makes a purely subjective application of the law, rather than adhere to precedent, that there is real danger of compromising the authority of legislation.<sup>40</sup>

M. Magnaud, a judge of the trial court of Château-Thierry for twenty-five years at the end of the nineteenth century, rendered his decisions without taking any account of the legislation and of the rules of law. He believed he had a peculiar sense of equity and rendered his decisions according to his personal convictions. The result was a great variation in his decisions, thus revealing that if the judge does not take account of the rule of law reflected in judicial precedent, there is absolutely no security for the people.

Theoretically, the judge is entitled to ignore the decisions of other courts and even his own. From this, Gény and others have concluded that the jurisprudence, or decisions, is not a source of law.<sup>41</sup> This opinion need not be true. It must be kept in mind that there is neither a duality nor a competition between legislation and case law, between the written law and judicial decisions. The jurisprudence is the legislation itself as it appears in the light of the judicial decisions. The real problem would seem to be whether the judge may consider as null and without value all the work of interpretation made before him, or whether, for the purpose of a new decision, he accepts the provision with all the explanations, additions, and transformations arising from the preceding decisions. This last solution seems absolutely necessary. The independence of the judge in the intellectual field must be combined with a constant psychological work which is the demand for a necessary continuity in the law. Judges succeed each other, but they have the common character of being the servants of a rule which of its nature must be stable and they would be seriously inconvenienced by perpetual controversy over judicial interpretation. This is the first reason for the permanence and force of judicial precedent.<sup>42</sup>

40. 2 GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF; ESSAI CRITIQUE, n° 145 (2d ed. 1954).

41. Esmein, *La jurisprudence et la doctrine*, 1 REVUE TRIMESTRIELLE DE DROIT CIVIL 5 (1902).

42. Sauvel, *Essai sur la notion de précédent*, RECUEILS DALLOZ ET SIREY 1955, *Chronique*, p. 93.



This inherent permanence of judicial precedent is, in addition, augmented by the *collegiate* organization of French courts. Every court is composed of several judges, and in reality it is the court and not the individual judges which renders a decision. Even if the members of this court change, the court remains as an entity. Every judge of a court has an intellectual and moral solidarity not only with his colleagues, but also with the former judges of the same court, and this feeling of solidarity contributes to the stability of interpretation. Another factor which augments the value of judicial precedent is the judicial hierarchy. The French system is based on three courts, the trial court, the court of appeal, and the *Cour de Cassation*. This system secures the permanence of the jurisprudence through the psychological coercion of the lower courts by the highest. When a juridical difficulty presents itself in a lawsuit, every court is free to reach its own decision, but when the *Cour de Cassation* has rendered a decision on the question, the problem is transformed. Theoretically the judge is not bound; but a court of appeal does not like to see its decisions reversed by the *Cour de Cassation*, and ninety percent of the judges adopt the position of the *Cour de Cassation* rather than risk reversal. This influence is not limited to the judge. It extends to the practice, and especially the notarial practice.<sup>43</sup>

If the importance of the *Cour de Cassation* is so great, it is because the judges are required to state the grounds for their decisions; and it is paradoxical that it was precisely the legislature of the Revolution, the enemy of the courts, which imposed this obligation which later became the means by which the extension of the rule of the courts was achieved. The judge must state the motives for his decisions, the juridical reasoning by virtue of which the decision is made. In other words, the motives of law are the expression of the juridical opinion of the judge, and this opinion is the source of the stability of judicial decisions. In a codified law the judge bases the decision on a legislative provision. But he is not content with alluding to the provision; he gives the meaning which he attaches to it. Therefore, in every decision of the *Cour de Cassation* there is the affirmation of a certain juridical doctrine about the question at issue. This imposes on the lower courts not only the solution itself but also its rationale, the juridical opinion from which the solution

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43. BOUCHAUD, LA PRATIQUE NOTARIALE ET LE DROIT DES RÉGIMES MATRIMONIAUX, THESIS (1957); 3 ENCYCLOPÉDIE DALLOZ, DROIT CIVIL, v° *Jurisprudence*.

is drawn. For this reason it often happens that formulas of the *Cour de Cassation* are repeated by the lower court until they acquire the value of a legislative provision. The opinions of the *Cour de Cassation* in important decisions are really substituted in the practice for the provisions of the legislation. The famous *Jand'heur* decision of the *Cour de Cassation* in 1930 affords an example.<sup>44</sup> This decision presumes responsibility on the part of one causing damage in automobile accidents and similar cases unless he proves *force majeure*, the act of a third person, or the fault of the victim. Today this formula is found in every decision of the lower courts and of the *Cour de Cassation* involving this type situation.

In the light of this unusual case it may be said that in practice the authority of judicial precedent consists in the fact that a series of decisions involving a question of law gives rise to the conviction that the solution must be adopted. But it is not sufficient to observe this fact. It is necessary to determine on what conditions this authority of judicial precedent depends, and it seems there are two: a certain publicity must be given to the decision, and it must give rise to the conviction that it is mandatory. The first condition does not raise any difficulty. It is obvious that if a judgment is not published it is not known and cannot have any influence upon other courts. On the contrary, it is more difficult to determine the objective data which will give rise to the conviction that a precedent is binding.

#### *The Intervention of the Cour de Cassation*

The jurisprudence does not impose itself, and only the opinions of the *Cour de Cassation* give rise to any feeling they must be followed.<sup>45</sup> As long as the *Cour de Cassation* has not rendered a decision involving the question at hand, the tendency of each of the courts of appeal is to follow its own opinions rendered in previous decisions, or, if there be none, the decisions of other courts of appeal are considered suggestive, but not binding. This does not mean that the decisions of the courts of appeal and of the trial courts are without interest. Indeed, the solutions given by the courts of appeal often foreshadow the position of the *Cour de Cassation*. Besides, the solutions of the courts of appeal and of the trial courts must be taken into consideration even

44. Cass. réunies February 13, 1930, D.P.1930.1.57, rapport Cons. Le Marchandour, *Concl. Proc. Gén. Matter*, note Ripert.

45. Maury, *Observations sur la Jurisprudence en tant que source de droit*, in *Le droit privé français au milieu du XX<sup>e</sup> siècle*, 1 ETUDES OFFERTES A G. RIPERT 28 (1950); 3 ENCYCLOPÉDIE DALLOZ, DROIT CIVIL, v° *Jurisprudence* 20 (1952).

after the decision of the *Cour de Cassation*. If they are in agreement with the decision, their agreement is likely to augment its authoritativeness, for then the agreement indicates acceptance of the interpretation by the common opinion of jurists. On the other hand, disagreement with the opinion of the *Cour de Cassation* may be the point of departure for an eventual overruling of its *jurisprudence*.

The importance of the decisions of the courts of appeal and of the trial courts, however, is subsidiary. In France most authors think that the expression *jurisprudence* must be reserved for decisions of the *Cour de Cassation*. Some modern authors go further and affirm that *jurisprudence* is not made simply by the fact that the *Cour de Cassation* has rendered a decision or even several decisions on the point. The decisions of the *chambres réunies* have an authority which is sometimes at least equal in fact to the authority of legislation, and since the reform of the *Cour de Cassation* by the act of July 23, 1947,<sup>46</sup> the decisions of the *assemblée plénière civile* have about the same authority as the decisions of the *chambres réunies*. But, the decisions of the *chambres réunies* and of the *assemblée plénière* excepted, isolated decisions of the *Cour de Cassation* cannot be considered as judicial precedents. The judicial precedent exists only if the solution is affirmed by a series of consistent decisions, the analysis of which proves the continuity of juridical thought.

Even so, however, it must be stressed that judicial precedent does not have any theoretical foundation in French law. Even if there is a legal precedent, there is always the possibility of a change in the position of the courts. The *jurisprudence* cannot have the same cogency as legislation because the judge is obliged to arrive at an understanding of the rules of law through the decisions. For this reason the formation of the *jurisprudence* resembles the formation of custom, and this resemblance appears very clearly in the second element of judicial precedent.

#### *Assent Given to the Solution by the Common Opinion of the Jurists*

Some specialists in public law, in order to explain the authority of judicial precedent, invoke the idea of a delegation of power by the legislator to the judge. The legislator would im-

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46. Hébraud, *La loi du 23 juillet 1947 sur la Cour de Cassation*, RECUEIL DALLOZ 1947, *Chronique*, p. 125.

PLICITLY give to the judge the power of completing his work, and the coercive power of the judge would arise from the implied approval of the legislator. There would be an implicit reception of the rule by the legislator. But this explanation rests upon a pure fiction and most modern French authors give another. According to this explanation, the judge has the power of "telling" the law (*dire le droit*), but this power is limited by the eventual resistance of the jurists' common opinion so that there is a reception of the rule not by the legislator, but by this opinion of the jurists. If the opinion agrees with the solution given by the court, it has a full authority; if there is disagreement, experience shows that it often leads to an overruling of the jurisprudence. Under these conditions, it is necessary to consult both the decisions of the lower courts and the practice to discover the reaction of the jurists.

It is obvious that the common opinion of the jurists has a determining influence upon the decisions of the courts of appeal and of the trial courts. When, after a first petition to review, the solution of the first court of appeal having been reversed by the *Cour de Cassation*, the case comes down before a second court of appeal (*cour de renvoi*) which refuses to adopt the solution of the *Cour de Cassation*, the resistance of the court of appeal is based on the encouragements of public opinion. Sometimes the influence of public opinion entails an overruling of the jurisprudence of the *Cour de Cassation*. For instance, in the case of *Franck v. Connot*<sup>47</sup> the question was whether when an accident is caused by a stolen automobile the person who is liable is the thief or the owner of the car. The civil section decided that the owner was liable, but most jurists considered that such a solution was contrary to justice. This common opinion was certainly the basis of the resistance of the second court of appeal and of the overruling by the *chambres réunies* of the solution given by the civil section.

The role of the practice is less apparent because most of the time it accepts without protest the decisions of the legislator and of the judge, but there are nevertheless in French law some instances in which the practice has manifested its disapproval.<sup>48</sup>

In the light of this analysis of judicial precedent it is possible to define exactly the existing relation between legislation

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47. Cass. réunies, December 2, 1941, D.C.1942, 25, rapport Lagarde, note Ripert, S.1941.1.217, note Mazeaud.

48. 3 ENCYCLOPÉDIE DALLOZ, DROIT CIVIL, v° *Jurisprudence* 20 (1953).

and *jurisprudence*. It is deeply erroneous to consider legislation and jurisprudence as two independent sources of law and to oppose them. Such an opposition is purely artificial because the courts work on and in connection with the provisions of the legislation. One of the most eminent French authors clearly defined the problem when he wrote: "Beside the materially unalterable legislative provision, there is another provision which is extended, restricted, or transformed by the courts according to the cases. The skill of the interpreter of jurisprudence is to discover through the decisions this new, living provision from which the decisions arise. A jurisprudence which is really elaborated can be recognized by the fact that it is possible to condense it in terms of formulas which have the form, clarity, and generality of a legislative enactment." In that respect the role of doctrine is particularly important and helpful for lawyers. The authors condense the formulas of the decisions and construe them. Often the formulas of the authors are used by the courts, so that there is a close cooperation between doctrine and jurisprudence.

Even in a codified system, the power of the courts is very important. They fashion and adapt the rule for the purpose of its concrete application. This power increases more when the provision of law is insufficient and the judge must resort to the fourth source of law, which is a guide both for the judge and for the legislator, namely equity.

#### EQUITY

It is not easy to define equity, and the definition which is usually given is subject to exceptions. In the abstract, equity is a conception of justice based upon the equality of everyone and respect for the rights of each. It gives rise to the sentiment of equity, the spirit of equity which must be the basis of the elaboration of law and justice. In concrete, equity means the application of such justice, especially in cases not foreseen by any legal provision, or which do not exactly correspond with the juridical rules. Equity fills the unavoidable gaps in the positive law and, in its absence, governs the case. In a strict meaning which follows from the preceding, equity is opposed both to the formal aspect of law and to a positivistic conception of it; and it is this meaning which is used to characterize the work of the praetor in Roman law and of the Courts of Chancery in English law.

The notion of equity has certainly a moral nature. Aristotle defined it as "what is just and unwritten and introduces into the law moral considerations, a better justice, improving the legal justice."<sup>49</sup> For Cicero equity was "the application of justice according to equality," and the Romans usually included equity in a broad definition of law: "*Jus est ars boni et aequi.*" Domat considered equity as an aspect of natural law. In reality the words "justice" and "equity" are nearly synonymous and the idea of morality is not very different. They constitute the *natural law*. Therefore it is necessary to sketch the evolution of the natural law and its influence upon the positive law before explaining the main applications of equity in French law.

### *The Natural Law Considered as a Basis of the Positive Law*

Legal philosophers distinguish between positive law and natural law. *Positive law* is the law which is in force in a determined country at a certain period. It is the expression of the legislature and has its source in the authority of the State. The *natural law* is a series of rules having an abstract character. It is not a binding rule in the same sense as the positive law because it does not have State-imposed sanction; but the legislator, being obliged to make a reasonable, rational work, must be guided by the natural law. Even though the legislator cannot translate perfectly the principles of natural law into positive law, these principles are an ideal which he must strive to reach. Nevertheless the concept of natural law is not admitted by every author; some deny its existence; others give it a content which changes according to their philosophical conceptions. Under these conditions it is not surprising to observe that natural law has had many ups and downs in history.

The concept of natural law seems as old as the world. Greek philosophy already knew of its existence.<sup>50</sup> Its first traces may be found in Greek literature. When Creon reproaches Antigone for having given a burial to her brother, although this was forbidden by the positive law, she replied: "I did not know that your orders might be paramount to the will of the immortals, to the laws which are unwritten and cannot be blotted out. It is not since today or since yesterday that these laws have existed. No-

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49. SALOMON, LA NOTION DE JUSTICE CHEZ ARISTOTE (1938).

50. BURLE, ESSAI HISTORIQUE SUR LE DÉVELOPPEMENT DE LA NOTION DE DROIT NATUREL DANS L'ANTIQUITÉ GRECQUE, THESIS (1908); GERNET, RECHERCHES SUR LE DÉVELOPPEMENT DE LA PENSÉE JURIDIQUE ET MORALE DE LA GRÈCE, THESIS (1917).

body can tell when they arose." Thus Sophocles already knew the concept of natural law and most of the ancient civilizations have been sensitive to this notion. Professor Escarra has shown that in the Chinese civilization when there was a conflict between positive and natural law, the second was considered as paramount to the first.<sup>51</sup> From antiquity to the seventeenth century the idea of natural law never completely disappeared. After having decreased during the barbarian invasions, its importance increased with the development of Christianity. According to the Christian philosophy there is a natural order intended by God and which the reason can know. It is the meaning of the formula "*omnius potestas a deo.*"<sup>52</sup> The natural law survived until the decline of the middle ages and the sixteenth century witnessed the first important criticism of it in the work of Machiavelli in Italy and of Jean Bodin in France.<sup>53</sup>

It is strange that it is precisely at the time its existence was seriously threatened by criticism that the natural law experienced a new development with Grotius<sup>54</sup> and Puffendorf,<sup>55</sup> who attempted to systematize and emphasize the classical conception of natural law. In this classical conception natural law may be defined as the body of rules of which man can have a knowledge through the exercise of his reason. Man being a "reasonable animal," it is normal for him to have an intuitive knowledge of justice and to be able to deduce rules of law. This entails an important consequence. Human reason being the same in all places and in all times, the natural law consists of some general and unalterable rules available in every country. Nevertheless, even in the classical conception, some divergences appear when we approach the problem of the source of natural law. Some authors think that natural law has a religious source, that the godlike will is the basis of natural law. It was the argument used by the King's legists in order to secure the authority of the Monarchy when it was threatened by feudalism. The King being the representative of God is the guardian of the godlike will. Bossuet<sup>56</sup> affirmed that the King had received his power from God and

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51. ESCARRA, LE DROIT CHINOIS (1936).

52. LACHANCE, LE CONCEPT DE DROIT SELON ARISTOTE ET SAINT THOMAS, THESIS (2d ed. 1948); STANG, LA NOTION DE LOI DANS SAINT THOMAS D'AQUIN, THESIS (1926); LOTTIN, LE DROIT NATUREL CHEZ SAINT THOMAS D'AQUIN (2d ed. 1931).

53. CHEVALLIER, LES GRANDES OEUVRES POLITIQUES DE MACHIAVEL A NOS JOURS 38 (1950).

54. DE JURE BELLI AC PACIS (1625).

55. DE JURE NATURAE ET GENTIUM (1672).

56. POLITIQUE TIRÉE DE L'ÉCRITURE SAINTE (1679 and 1709).

must exercise it in the interest of the people. Others, and chiefly Domat, thought that every law has a divine origin, but distinguished the laws revealed by God (divine positive laws) and the natural law revealed by reason without divine influence.

During the eighteenth century, the natural law remained very important. Doubtless it was at this time that its influence on the positive law was most pronounced. Some kings in Europe, and chiefly Frederic II, tried enacting a positive law directly arising from the principles of natural law. However, under the influence of the individualistic philosophy of Jean-Jacques Rousseau, the notion of natural law was considerably modified.<sup>57</sup> The tendency was toward a generalization of natural law in terms of the dictates of reason, but at the same time the tendency toward individualism led to the conception of a natural law devoid of social character. The end of the law was not the common interest, but the individual interest. The principles of natural law, it was thought, must emphasize the rights of personality in order to protect it. The root of this conception is in the philosophy of Rousseau.<sup>58</sup> Society is a fact subsequent to the individual. A contract, the social contract, has been made between man and society. By virtue of this contract, the individual has alienated one part, but only one part, of his rights. The purpose of natural law is to watch over the rights which have not been alienated and to extend them as much as possible. This conception of natural law was embodied in the French positive law of the end of the eighteenth century. This should not be surprising if we remember the influence of the philosophers on the revolutionary work and the similarities existing between individualistic philosophy and the ideas of the legislator of 1789. This is particularly clear in the *Déclaration des Droits de l'Homme* of 1789.

The importance of the natural law in Europe decreased during the nineteenth century mainly because of the influence of the German historical school. In the German doctrine of historical materialism, the most eminent representative of which was Savigny,<sup>59</sup> the law is not of divine or rational origin. It is con-

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57. Léon, *Le contrat social avant Rousseau*, in ARCHIVES DE PHILOSOPHIE DU DROIT ET DE SOCIOLOGIE JURIDIQUE, no. 4, p. 157, at 160 (1935); Richard, *La critique de l'hypothèse du contrat social avant Jean-Jacques Rousseau*, ARCHIVES DE PHILOSOPHIE DU DROIT 45 (1937).

58. CHEVALLIER, LES GRANDES OEUVRES POLITIQUES DE MACHIAVEL À NOS JOURS 147 (1950); Léon, *Le problème du contrat social chez Rousseau*, ARCHIVES DE PHILOSOPHIE DU DROIT, No. 4, p. 157 (1935); Hubert, *Rousseau et l'École positiviste*, ARCHIVES DE PHILOSOPHIE DU DROIT 407 (1932).

59. SAVIGNY, DE LA VOCATION DE NOTRE TEMPS POUR LÉGIFÉRER ET POUR UTILISER LA SCIENCE DU DROIT (1814).



stituted by the habits of men living in society. Law is a science based upon observation, a product of history which cannot be unalterable because it necessarily follows the evolution of society. The feeling of the representatives of the German historical school is that custom is better than legislation because it can be adapted more easily to changing social conditions. The success of the German school during the nineteenth century led to an eclipse of natural law which persisted with the appearance of the sociological doctrine of Durkheim and Levy-Bruhl.<sup>60</sup> For them, the rule of law rests upon the observation of the existence of a collective conscience which is different from the individual conscience. Therefore a particular social structure necessarily gives rise to a particular type of law. Such an opinion is the juridical counterpart of sociological determinism. It denies the existence of an universal and unalterable natural law, the law changing with the evolution of society.

This conception suffers from two defects: first, it is purely descriptive, based upon observation and does not take into consideration the fact that law is chiefly a deductive science. With this theory, it is impossible to pass from what exists to what must exist, and the activity of the legislator cannot be justified. Second, sociological determinism has been criticized by Bergson, who has emphasized the existence of a free will in man which is important in the elaboration of law, and explains why the rules of law may be different in countries with about the same civilizations.

The criticism and the decline of positivist philosophy explain the revival of natural law in Europe during the twentieth century. However, the lessons of history have been useful, and today we have a less ambitious, but more exact, conception of natural law which is revealed by the analyses of the main theories.

*Theory of natural law with a variable content.* For the most eminent representative of this theory, Raymond Saleilles,<sup>61</sup> natural law is the whole of the ideal principles that every man has in himself. The natural law is variable according to the psychology and the conscience of every man, *e.g.*, in antiquity, slavery was consistent with the natural law; today it is not. The theory of

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60. BOUGLÉ, BILAN DE LA SOCIOLOGIE FRANÇAIS CONTEMPORAINE (1935); MAUNIER, INTRODUCTION À LA SOCIOLOGIE (1938).

61. Gaudemet, *L'oeuvre de Saleilles et l'oeuvre de Génny en méthodologie juridique et en philosophie du droit*, in 2 RECUEIL D'ETUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANÇOIS GÉNY 5 (1934).

Saleilles was popular in the beginning of the twentieth century, but it was criticized very quickly. Saleilles was reproached for confusing the *principles* of natural law and the *applications* of natural law. The change in the condition of the slave may explain the prohibition of slavery by modern law. The existence of slavery in antiquity does not prove that at this time the principle of human liberty was unknown. Principles are unalterable; only the applications change. On the other hand, Saleilles' opinion leads to the ruin of natural law. If the natural law is both psychological and individual, it is of no interest for the legislator, whose work is necessarily general.

### *Theory of the Natural Law as the Objective Law*

Duguit considers social solidarity the basis of law. Individuals having to live in society, life is possible only if there is social solidarity.<sup>62</sup> From this solidarity arise general principles which must have an influence upon the positive law, and these are principles of natural law. Duguit's theory suffers from the same defect as the preceding. Social solidarity is a fact which does not provide a basis for a rule of law. Neither does it provide the means of building a system of natural law, nor does it explain the existence of particular obligations, social solidarity giving rise only to the concept of duty.

*Theory of natural law limited to few general principles.* According to Gény<sup>63</sup> it is a mistake to be too ambitious, for it is impossible to build a complete system of natural law. However, the ideal of justice must be pursued because the negation of such an ideal would prevent all initiative and social progress, the search for justice and equity being the most important factor of human activity. But the content of the natural law must be reduced to a few general principles resting upon morality, justice, and equity (e.g., the rights of property, liberty, and indemnification for wrongs). These principles are so general that they exist in every legislation. The differences appear only in the applications which must be adapted to the social character of each civilization. Gény's opinion is adhered to by most of the jurists in France. It explains how the natural law remains a guide for the

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62. DUGUIT, L'ÉTAT, LE DROIT OBJECTIF ET LA LOI POSITIVE (1901); LEFUR, LE FONDEMENT DU DROIT DANS LA DOCTRINE DE LÉON DUGUIT; RÉGLADE, THÉORIE GÉNÉRALE DU DROIT DANS L'ŒUVRE DE DUGUIT; WALINE, LES IDÉES MÂITRESSES DES DEUX GRANDS PUBLICISTES FRANÇAIS; DUGUIT ET HAURIU, ANNÉE POLITIQUE ET PARLEMENTAIRE (1929).

63. 2 GÉNY, SCIENCE ET TECHNIQUE, EN DROIT PRIVÉ POSITIF 192 (1922).

legislator and at the same time allows for the practical role of positive law.

*The Role of Equity in French Law*

Equity is a guide both for the legislator and for the judge.

When elaborating an act the legislator must keep in mind the fundamental principles of justice and equity. Every act which would not take these principles into account would be repealed quickly. Montesquieu was right when he affirmed: "Useless legislation weakens the necessary." However, the legislative task is very difficult because both the needs of justice and equity and the security of persons must be satisfied. Sometimes these two aims are contradictory, as in acquisitive prescription, but in most instances justice and equity must be taken into account first and security second. Equity is rarely sacrificed to security.

Equity is a guide for the judge too and many institutions of French civil law are based upon justice and equity. Occasionally the legislation itself gives the judge discretionary power. For instance, Article 1135 of the *Code Civil* states that the judge must construe contracts according to equity; alimony must be fixed by reference to the resources of the debtor and the needs of the creditor; and in determining the custody of children after divorce the judge must seek the interest of the children. At other times, the judge extends an institution by resort to equity. For instance, Articles 201 and 202 of the *Code Civil* state that the nullity of a marriage is not retroactive when the spouses were in good faith. French courts have extended this institution of the putative marriage in such a way that a finding of putative marriage is now the rule and retroactive nullity the exception;<sup>64</sup> the *Code Civil* foresaw only a few limited causes for suspension of acquisitive prescription, but the French courts have extended them by reviving the maxim *contra non valentem agere non currit praescriptio* because they considered it unjust to allow prescription to run against a person who cannot bring an action.<sup>65</sup>

There are, too, several institutions of French civil law which are based exclusively on equity. For example, the *theory of the*

64. Cass. civ. November 5, 1913, D.P. 1914.1.281, note Binet; Cass. civ. January 8, 1930, D.P. 1930.1.51; Paris, March 30, 1938, D.H.1938.344; Trib. civ. Montpellier, July 16, 1946, Gaz. Pal. 1946.2.183.

65. Cass. civ. December 11, 1918, D.P.1923.1.96, S.1921.1.161, note Morel; Cass. req. November 28, 1938, D.H. 1939.99; Paris, March 16, 1949, J.C.P. 1949.11.4960, note Becqué.

*abuse of right* certainly rests upon equity, for the exercise of a right may under certain circumstances cause a prejudice to another person and be contrary to equity.<sup>66</sup> This theory, which had its origin in connection with property rights, has had an extraordinary development in French law and now extends to many fields, *e.g.*, labor law, strikes, the right to bring an action in justice. The abuse of right does not exist only when there is an intentional fault. Mere negligence may entail abuse of right and give rise to damages. The basis of this theory is the notion of equity. Everyone has some prerogatives, but if their exercise is likely to cause an injury, he must be very careful to limit the injury as much as possible. In that respect the ideal of equity conforms to the needs of social life. The *theory of unjust enrichment* rests upon the same basis.<sup>67</sup> There is absolutely no provision in the *Code Civil* specifying a general rule on unjust enrichment. There is, however, a general principle of equity according to which a person must not be unjustly enriched at the expense of another. French courts tried to fill the gap by using *negotiorum gestio*, but this institution, which presupposes the intention of administering the affair of another person, was too narrow and in 1892 the *Cour de Cassation*, starting from the idea of equity, created the rule of unjust enrichment and its sanction, the action *de in rem verso*.<sup>68</sup> The character of this action demonstrates perfectly the role of equity in French law. The action *de in rem verso* exists only if there is no other action available. It has a subsidiary character, which proves that equity is a subsidiary, indirect source of law. The judge uses it as a last resort when there is no other remedy. It is even considered desirable that the judge not use it without legislative direction.

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In summary, we can say that the study of the respective importance of the different sources of law in a codified system reveals that legislation retains its supremacy, but that the pro-

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66. JOSSEMAND, DE L'ABUS DES DROITS (1905); Saleilles, *De l'abus du droit*, BULLETIN DE LA SOCIÉTÉ D'ÉTUDES LÉGISLATIVES 325 (1905); Capitant, *Sur l'abus des droits*, 28 REVUE TRIMESTRIELLE DROIT CIVIL 365 (1928); Rouast, *Les droits discrétionnaires et les droits contrôlés*, 42 REVUE TRIMESTRIELLE DROIT CIVIL 1 (1944).

67. RIPERT, LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES n° 133 (4th ed. 1949); Chevallier, *Observations sur la répétition des enrichissements non causés*, in *Le droit privé français au milieu du XX<sup>e</sup> siècle*, 2 ÉTUDES OFFERTES À G. RIPERT 237; Rouast, *L'enrichissement sans cause et la jurisprudence civile*, 2 REVUE TRIMESTRIELLE DROIT CIVIL 35 (1922); BÉGUET, L'ENRICHISSEMENT SANS CAUSE, THESIS (1945); GORÉ, L'ENRICHISSEMENT AUX DÉPENS D'AUTRUI, SOURCE AUTONOME ET GÉNÉRALE D'OBLIGATIONS EN DROIT PRIVÉ FRANÇAIS, THESIS (1949).

68. Cass. civ. June 15, 1892, D.P.1892.1.596.

liferation of legislation lessens the respect given it by the judiciary. One of the main purposes of the civil code reform is to revive the cogency of the legislation without which a codified system of law cannot work satisfactorily.