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Case Law in a Legal System Without Binding Precedent: The French Example

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Introduction

The role of case law in the French legal system is somewhat paradoxical. On one hand, France has a strong Roman civil law tradition, with written statutes and a distrust of judge-made law. On the other hand, case law has always existed in France, and its importance in the legal system has steadily and sharply grown since the French Revolution of 1789. In France, case law is referred to as "*jurisprudence*" (from the Latin "*juris prudentia*", meaning "the study, knowledge, or science of law"). French legal dictionaries offer varying definitions of *jurisprudence*.[1] These different definitions mirror the simultaneous acceptance and denial of case law as a legitimate and independent source of law in the French legal system. This Commentary will explore the place of *jurisprudence* in the modern French legal system in an attempt to show how it fosters predictability and acts in a manner akin to precedent in the Anglo-American system.

To comprehend the contemporary role and significance of case law in France, it is helpful to first understand the history and development of the French legal system. Therefore, Part I provides a brief background of the shift in the French legal system marked by the French Revolution of 1789. With this groundwork in place, Part II explores the rise of case law within the French legal system from the 19th century to the present, beginning with an overview of the judicial system that has been integral to its rise. Part III concludes with a close examination of the function of case law in the modern French legal system, which, as observed by this author, arises largely out of the dual requirement that cases be published and that judges be required to state the *motivation* or reasoning underlying their decision.

I. Historical Background

1. Pre-Revolution

Prior to the French Revolution of 1789, France was under monarchical rule. The King was the only person entitled to administer justice, by the powers vested in him by God. During his coronation, the King would receive the Hand of Justice and the Sword of Justice from the Archbishop. King Louis IX (Saint-Louis) (1214-1270) used to judge his subjects from beneath an enormous oak tree in Vincennes. Later, kings delegated their judicial powers to specially designated magistrates who would administer justice in the King's name. In this system, parties made payments to judges directly and proceedings were completely private and confidential ("*huis*

[1] Consider, for example, the multiple entries listed under *jurisprudence* in the most commonly cited dictionary of French law, *Vocabulaire juridique*, which provides such varied definitions as those that imply some degree of legal authority ("collection of solutions provided by judgments in the application of law (especially in the interpretation of law when it is obscure), or even in the creation of law (when it is necessary to complement a law, or to supplement a regulation where it is lacking)"; "*ensemble des solutions apportées par les décisions de justice dans l'application du droit (notamment dans l'interprétation de la loi quand celle-ci est obscure) ou même dans la création du droit (quand il faut compléter la loi, suppléer une règle qui fait défaut)*") as well as those that imply mere judicial habit ("the habitual tendency of a particular court or certain category of court to judge in such a sense"; "*tendance habituelle d'une juridiction déterminée ou d'une catégorie de juridiction à juger dans tel sens*") or a simple description of court practice ("embodiment of court actions (as opposed to legislation or doctrine)"; "*personnification de l'action des tribunaux (par opposition à législation ou doctrine)*"). ASSOCIATION HENRI CAPITANT, VOCABULAIRE JURIDIQUE (Gérard Cornu ed., 10th ed. 2014).

clos", meaning "behind closed doors")—two practices that led to numerous abuses. Moreover, magistrates would judge in equity (*ex aequo et bono*), based on custom, local rules and corporative laws,[2] resulting in a considerable lack of legal predictability. In the *ancien régime*, tribunals known as *parlements* were characterized by a very conservative judiciary. The legal maxim "may God preserve us from the equity of parlements"[3] is indicative of the fear inspired by the magistrates. The Revolution did away with this system, along with most of the King's powers.

2. Post-Revolution

Following the close of the French Revolution and the passage of the 1789 Declaration of the Rights of Man and of Citizens (*Déclaration des droits de l'homme et du citoyen*; Declaration of Rights),[4] France adopted a new type of administration of justice based on separation of powers. Laws were enacted by the people through their representatives in Parliament, and a separate, independent judiciary was responsible for their strict application. According to Robespierre, "the word '*jurisprudence*' must be erased from our language. In a State with a constitution [and] legislation, the jurisprudence of the courts is nothing other than the law."[5] Montesquieu, one of the principal architects of the separation of powers in France, wrote that the judicial branch did not make the law; rather, he made clear that "judges […] are only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor".[6]

With this new paradigm came the desire for a more permanent and transparent source of law. France adopted a civil law system based on fixed written laws which are generally assembled in codes.[7] As initially drafted and still today, Article 5 of the Civil Code states that judges may not pronounce by means of general disposition on cases submitted to them, meaning that judges could not create generally applicable rules by exercising their function in specific cases. With the

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[2] Prior to the French Revolution, most professions were organized and regulated in guilds, or professional associations called "*corporations*". *Corporations* controlled the practice of the profession, including their craft and know-how, and its general activities. Rules were enacted locally and independently, and there was no uniformity either at the national level or between professions. The *corporations* were prohibited after the Revolution, as they were considered too powerful and dangerous for the new legal system based on the people's involvement in the creation of the law.

[3] Henri Rolland & Laurent Boyer, ADAGES DU DROIT FRANÇAIS 166 (4th ed., 1999) ("*Dieu nous garde de l'équité des parlements.*").

[4] Déclaration des Droits de l'Homme et du Citoyen de 1789 (Declaration of rights of human and citizen of 1789), https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789.

[5] *See* Maxime Leroy, LA LOI: ESSAI SUR LA THÉORIE DE L'AUTORITÉ DANS LA DÉMOCRATIE 60 (V. Giard & E. Briere, 1908) ("*Ce mot de jurisprudence* […] *doit être effacé de notre langue. Dans un Etat qui a une Constitution, une législation, la jurisprudence des tribunaux n'est autre chose que la loi.*").

[6] Charles de Secondat baron de Montesquieu, THE SPIRIT OF THE LAWS 163 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans. & eds., Cambridge Univ. Press 1989).

[7] The first code was the Napoleonic Code (French Civil Code) of 1804, expanding to the five original Napoleonic Codes which remain the most prominent today, including the *Code civil*, *Code de procédure civile, Code de commerce*, *Code pénal*, and the *Code de procédure pénal*. Today, the French system contains over sixty codes.

guarantee that judges strictly apply pre-existing, codified rules, citizens no longer had to fear unpredictable and arbitrary justice.

A written code provides the advantage of a more transparent and impartial basis for legal judgments. However, it necessarily limits the flexibility of the system, particularly given the infinite circumstances that can arise in specific cases, the evolution of commercial and human relationships, and technological and technical advancement. Therefore, there was a need for judges to create an additional source of law within the framework of the abstract rules of the French legal codes.

Portalis, a French jurist and the principal author of the French Civil Code, understood the legal and political challenge involved in establishing and maintaining a strong civil legal system with an integrated, yet controlled and balanced, case law system. He wrote his Preliminary Address on the first draft of the Code:

> The function of the statute is to set down, in broad terms, the general maxims of the law, to establish principles rich in consequences, and not to deal with the particulars of the questions that may arise on every subject.
>
> It is left to the magistrate and the jurisconsult, fully alive to the overall spirit of laws, to guide their application.
>
> Hence, in all civilized nations one always sees, alongside the sanctuary of laws and under the watchful eye of the lawmaker, the formation of a body of maxims, decisions and doctrine that is refined daily by practice and by the impact of judicial deliberations; that continually grows from all the knowledge acquired; and that has constantly been regarded as the true supplement of legislation.[8]

II. The Rise of Case Law since the 19th century

Since the 19th century, the role of case law has been further defined and has grown in importance, yet this importance has manifested itself differently in private and public law. As cases in private law and public law are handled by different courts in the French judicial system, a brief discussion of the organization of the French judiciary helps provide the context for understanding the different development of case law.

1. The French Judicial System

The French judicial system is divided into two "orders" or court systems, namely, a "judicial order" ("*ordre judiciaire*") and an "administrative order" ("*ordre administratif*"). These

[8] Preliminary Address on the First Draft of the Civil Code, presented by Messrs. Portalis, Tronchet, Bigot-Préameneu and Millville, members of the government-appointed commission, on 1 Pluviôse IX (Jan. 21, 1801), http://www.justice.gc.ca/eng/abt-apd/icg-gci/code/index.html.

two orders are independent and autonomous, and they operate within their own hierarchical structures. Each has its own supreme court at the top of its hierarchy: the Court of Cassation (*Cour de cassation*) for the judicial courts and the Council of State (*Conseil d'Etat*) for the administrative courts. The judicial courts handle criminal, civil, commercial, and labor law cases, which are referred to collectively as areas of "private law", while the administrative courts handle all "public law" matters involving national or local governments, including matters between a citizen and a public authority (including the government, regional departmental or administrative bodies) or State-owned company, financial contracts involving public investments, and any litigation between a civil servant and the administration he or she serves.

	Judicial Courts *(private law)*	**Administrative Courts** *(public law)*
Supreme Court	Court of Cassation - 3 civil chambers - 1 commercial chamber - 1 criminal chamber - 1 labor chamber Full court: Plenary Assembly	Council of State
Appeals courts	Courts of Appeal	Administrative Courts of Appeal
First instance courts	Tribunals	Administrative Tribunals
Main source of law	Statutes	Case law

A case may only be brought before one of the two orders. In the event of a difficulty or dispute in assigning the case, the Conflicts Tribunal (*Tribunal des conflits*) determines which court system should hear the case.

The Constitutional Council (*Conseil constitutionnel*), which is not part of either judicial hierarchy, rules on constitutional issues to decide whether laws are promulgated and interpreted in conformity with what is referred to collectively as the "constitutional block", encompassing the 1958 Constitution,[9] the Preamble of the 1958 and 1946 Constitutions,[10] the 1789 Declaration of

[9] 1958 CONSTITUTION (CONST.), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur.5074.html. France has had fifteen different constitutions since its first in 1791. The current constitution was adopted in 1958.

[10] *Id.*. Preamble; 1946 CONST., Preamble, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/preambule-de-la-constitution-du-27-octobre-1946.5077.html.

Rights,[11] the 2004 Environmental Charter,[12] the fundamental principles recognized by the laws of the French Republic,[13] and the principles and objectives of constitutional value.

2. Jurisprudence in Private Law Matters

As mentioned above, the French *ordre judiciaire* (i.e., the judicial courts) handles private law cases. Its supreme court, the Court of Cassation, was created after the French Revolution. It is organized into six separate chambers, including three civil chambers, a commercial chamber, a criminal chamber, and a labor chamber. There is also a hybrid chamber (*chambre mixte*), which handles cases with subject matter that falls within the competence of more than one chamber.

French private law is traditionally derived from statutes and written laws, which are generally organized in codes (e.g., the criminal code, civil code, commercial code and labor code). Judges strictly apply these laws to avoid legal uncertainty and prevent arbitrary or excessive legal decisions. Therefore, *jurisprudence* cannot be considered an autonomous source of law; yet it exists as a consequence of codified laws, as the tendency to judge in a certain way in similar situations.[14] This is perhaps best seen in the criminal context, where, as punishment can involve

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[11] Déclaration des Droits de l'Homme et du Citoyen de 1789, *supra* note 4.

[12] Loi Constitutionnelle n° 2005-205 relative à la Charte de l'environnement (JORF n° 0051 du 2 mars 2005 p. 3697) (Constitutional law No. 2005-205 on the Charter of the Environment (JORF No. 0051, Mar. 2, 2005, p. 3697) ; Charte de l'environnement de 2004 (Charter of the Environment of 2004), https://www.legifrance.gouv.fr/Droit-francais/Constitution/Charte-de-l-environnement-de-2004.

[13] The Constitutional Council has identified 11 principles as the "fundamental principles recognized by the laws of the French Republic" ("*principes fondamentaux reconnus par les lois de la République*") ("PFRLR"). PFRLR was first mentioned in Article 1 of the preamble of 1946 Constitution ("*Il réaffirme solennellement* […] *les principes fondamentaux reconnus par les lois de la République.*"). However, specific principles were not listed. The Council has gradually incorporated the following 11 principles through a series of decisions: (1) freedom of association (*la liberté d'association*) (Conseil Constitutionnel (CC) (Constitutional Council) decision No. 71-44DC, July 16, 1971); (2) rights of defense (*les droits de la défense*) (Conseil Constitutionnel (CC) (Constitutional Council) decision No. 76-70DC, Dec. 2, 1976); (3) individual freedom (*la liberté individuelle*) (Conseil Constitutionnel (CC) (Constitutional Council), decision no. 76-75DC, Jan. 12, 1977); (4) freedom of education, particularly higher education (*la liberté d'enseignement et notamment la liberté de l'enseignement supérieur*) (Conseil Constitutionnel (CC) (Constitutional Council) decision No. 77-87DC, Nov. 23, 1977); (5) freedom of conscience (*la liberté de conscience*) (Conseil Constitutionnel (CC) (Constitutional Council) decision No. 77-87DC, Nov. 23, 1977); (6) independence of administrative jurisdiction (*l'indépendance de la juridiction administrative*) (Conseil Constitutionnel (CC) (Constitutional Council) decision No. 80-119DC, July 22,1980); (7) independence of university professors (*l'indépendance des professeurs d'université*) (Conseil Constitutionnel (CC) (Constitutional Council) decision No. 83-165DC, Jan. 20, 1984); (8) exclusive competence of the administrative jurisdiction for the annulment or the reformation of the decisions made in the exercise of the prerogatives of the public power (*la compétence exclusive de la juridiction administrative pour l'annulation ou la réformation des décisions prises dans l'exercice des prérogatives de puissance publique*) (Conseil Constitutionnel (CC) (Constitutional Council) decision No. 86-224DC, Jan. 23, 1987); (9) guardian of the judicial authority of the real estate private property (*l'autorité judiciaire gardienne de la propriété privée immobilière*) (Conseil Constitutionnel (CC) (Constitutional Council) decision No. 89-256DC, July 25, 1989); (10) existence of criminal justice of the minors (*l'existence d'une justice pénale des mineurs*) (decision No. 2002-461DC, Aug. 29, 2002); (11) use of local laws in Alsace and Moselle (*l'utilisation de lois locales en Alsace et en Moselle*) (Conseil Constitutionnel (CC) (Constitutional Council) decision No. 2011-157QPC, Aug. 5, 2011).

[14] See, for example, the discussion of the variant definitions of *jurisprudence* provided in *Vocabulaire juridique*, *supra* note 1. As the code inevitably cannot cover every specific situation, judges applying the code to the facts of a case must apply law in a similar fashion in similar situations to close the gap between the code and practice.

the interference with one's liberty (i.e., incarceration), additional care is taken to provide this protection. Here, the principle of *nullum crimen nulla poena sine lege* comes into play—the idea that one cannot be prosecuted, charged or condemned for a crime unless that crime is strictly and unequivocally defined in a legal statute.

In certain situations, the separate chambers of the Court of Cassation may not interpret the law in the same manner, resulting in contradictory decisions in similar cases. In such situations, the Plenary Assembly of the Court of Cassation[15] is convened to issue a single decision to resolve the conflicting interpretations. For example, the chambers of the Court of Cassation historically disagreed on whether a third party could invoke[16] the provisions of a contract in situations where the direct cause of the third party's damage was default in the execution of the contract. For almost a decade, the commercial and civil chambers applied different principles in the resolution of such cases, creating legal uncertainty. In 2006, a Plenary Assembly was called to consider the matter and decided that "a third party can invoke a breach of contract as the basis of a tort claim when he was prejudiced by such breach of contract".[17]

Plenary Assembly "decisions of principle" ("*arrêts de principe*") are binding on the various chambers of the Court of Cassation, and all lower judicial courts will generally apply the principles set forth in such decisions. Decisions by the Plenary Assembly are almost always considered to be decisions of principle. Decisions of principle do not differ in form from any other court decisions. However, they will generally include a phrase explicitly stating a specific rule that applies to a particular situation. In the future, other courts facing similar cases will state the applicable law as well as the rule from the earlier case that applies to such situations as a matter of legal principle. While courts will not explicitly refer to the earlier decision of principle, they will consistently use the same phrasing in order to refer to the rule. As an illustration, take a later commercial chamber decision confirming the Plenary Assembly's decision noted above granting third parties the right to invoke the provisions of a contract as the basis of a tort claim. The commercial chamber did not mention the underlying case or the Plenary Assembly decision, but used the exact phrasing from the Plenary Assembly's decision at the beginning of its own decision, elevating the wording from the earlier decision to the level of a legal principle: "whereas a third party can invoke a breach of contract as the basis of a tort claim when that breach of contract caused him a prejudice".[18]

A Court of Appeal can always resist a position taken by the Court of Cassation. This can occur when the Court of Cassation overrules and remands a decision of the Court of Appeal, and

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[15] The Plenary Assembly is comprised of 19 judges, including the president of the court (*premier président*) and the divisional president, senior trial judge, and a trial judge from each chamber (i.e., each chamber has three representatives).

[16] In French, "*se prevaloir de*".

[17] Cour de cassation (Cass.) (supreme court for judicial matters), ass. plén., Oct. 6, 2006, No. 05-13255 ("*Le tiers à un contrat peut invoquer, sur le fondement de la responsabilité délictuelle, un manquement contractuel, dès lors que ce manquement lui a causé un dommage*.").

[18] Cass., com., Mar. 6, 2007, No. 04-13.689 ("*Attendu que le tiers à un contrat peut invoquer, sur le fondement de la responsabilité délictuelle, un manquement contractuel, dès lors que ce manquement lui a causé un dommage.*").

the latter does not alter its judgment to conform to the Court of Cassation's decision. The Plenary Assembly is then summoned to issue a decision of principle which will generally be followed by all courts in the *ordre judiciaire*.

3. The Leading Role of Case Law in the Development of French Administrative and Constitutional Law

Case law has played an even larger role in the development of French administrative and constitutional law.

a. Administrative Law and the Council of State

In the case of administrative law, the rise of case law was first associated with the Council of State's (*Conseil d'Etat*) efforts to curtail the power of the state and submit the state to judicial review, contrary to the administrative court's initial purpose of shielding the government from the judicial branch. The present result is a system where the force and function of administrative law is largely rooted in case law.

The Council of State, which has existed since 1578, was established in its modern form in 1799 by Napoleon. The Council of State was given a dual mission: to advise the government (the government is required to consult with the Council of State in certain cases, including the promulgation of bills of law),[19] and to serve as a sort of "supreme court" of the administrative courts.

French administrative law regulates the activities of public authorities (state, regional, departmental, and municipal, as well as public companies) and the relationships both among such authorities and between public authorities and private citizens (as opposed to public agents). The Council of State, as the supreme court of the administrative courts, ensures the harmonization of administrative case law. Depending on the cause of action, the Council of State may be competent to hear an appeal, or even to serve as the court of first instance or as the functional appeals or supreme court.

There has been substantial codification of administrative law since the 20th century (including the Code of Public Procurement[20] and the General Code on Public Property,[21] among others) as well as the enactment of more and more administrative statutes by the Parliament, and regulations (*règlements*) by the executive branch. Despite this increased codification of administrative law, administrative jurisprudence has remained powerful, with some Council of State decisions being qualified as "great decisions" ("*grands arrest*"), which are accorded a weight akin to Supreme Court decisions in the U.S. legal system. Some decisions reveal "general

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[19] 1958 CONST. Articles 37–39, *supra* note 9.

[20] Code des marchés publics (édition 2006) (Code of Public Procurement (2006 edition)), https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005627819.

[21] Code général de la propriété des personnes publiques (General Code on Public Property), https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070299&dateTexte=20080505.

principles of law" ("*principes généraux du droit*"), which are recognized in the French hierarchy of norms as having the same legal value as a law. In universities, students learn a substantial amount of administrative case law in order to understand the basic principles of administrative law.

As in the judicial courts, French judges can always reverse prior *jurisprudence*, even decisions by higher courts, and the Council of State can always reverse its position.

b. Constitutional Law and the Constitutional Council

French constitutional law is entirely judge-made law. The Constitutional Council, created by the current French Constitution of 1958,[22] has many functions, but mainly serves to verify the compatibility of laws and regulations with the constitutional block. In 1971, the Constitutional Council ruled that conformity with the Constitution entails conformity with the Declaration of Rights and the preamble to the Constitution of the Fourth Republic.[23] Through this Constitutional Council decision, these two texts, both enumerating constitutional rights, were accorded legal status and became part of French constitutional law.

Unlike the Supreme Court in the American legal system, the Constitutional Council does not oversee the judicial or administrative courts. However, its decisions are binding on all administrative and judicial authorities.[24]

The procedure of referral of a law to the Constitutional Council for verification that it is in conformity with the Constitutional block traditionally had to be initiated after the vote of the bill by the Parliament but prior to its promulgation by the President of the Republic. The referral procedure can be initiated by the President of the Republic, the prime minister, the president of the Parliament or the Senate, or, from 1974, by a group of sixty members of Parliament or the Senate. In 2010, it became possible to verify ex post whether a legal provision is in conformity with the Constitutional block or violates the rights and freedom guaranteed by the Constitution.[25] This is referred to as the QPC procedure (in full, the "*question prioritaire de constitutionnalité*", or "preliminary ruling on constitutionality"). The QPC procedure allows any individual in any court to ask the judge to pause the procedure in order to verify the conformity of a legal disposition with the Constitutional Block. Prior to arriving at the Constitutional Council, the question is filtered twice, first by the judge in the court of first instance (or the Court of Appeal, as the case may be), and then by the Court of Cassation or the Council of State, depending on which court has jurisdiction. Several conditions apply to trigger a QPC: (i) the law in question must be applicable to the case; (ii) the law's conformity with the Constitution must not have already been declared; and (iii) the QPC must raise a new or serious issue. The Constitutional Council answers the question and the court proceeding resumes, taking the new element of law into account.

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22 1958 CONST. Articles 56–63, *supra* note 9.

23 Déclaration des Droits de l'Homme et du Citoyen de 1789, *supra* note 4; 1946 CONST. Preamble, *supra* note 10.

24 1958 CONST. Article 62, *supra* note 9..

25 The constitutional reform of July 23, 2008 introduced Article 61-1 of the 1958 Constitution, which came into force on March 1, 2010.

III. Publication and "*Motivation*": The Two Pillars of the Integrity of Case Law

Although, as shown above, the importance of case law takes a different shape depending on the area of law, case law serves multiple functions within the French legal system, including:

- Interpretation: Judges interpret abstract rules of law, and their decisions create a *jurisprudence* that adapts the law to specific cases. In this context, judges tailor general rules of law to fit a given situation.
- Substitution: Judges have a duty to issue decisions under all circumstances, even in situations where the law is silent, obscure, or insufficient to address the circumstances of a specific case.[26] To refuse to do so would amount to a denial of justice. Therefore, judges can create specific rules to resolve an individual case.
- Adaptation: When the law is unclear or obsolete, judges can adapt the law to the "needs of society". Fixed rules of law can be too rigid or strict to fit the needs of an evolving society. The main challenge of *jurisprudence* is to ensure the evolution of applicable law, allowing the law flexibility to fit the needs of society.
- Harmonization: To ensure that different jurisdictions interpret the law in a uniform manner, a court (generally, the Court of Cassation) can create a true rule of *jurisprudence*, referred to as a decision of principle. Such a decision is recognized as a guiding principle by other courts facing similar cases. However, the Court of Cassation, which is the guardian of such harmonization efforts, can always reverse its earlier decisions.

The separation of powers allows for judicial independence, which lends legitimacy and weight to judges' decisions. The present French Constitution distinguishes the power of the legislature (*Parliament*), the power of the executive branch, and mere judicial authority (*autorité judiciaire*).

However, it is public trials and the publication of decisions that form the primary guarantee of the integrity of *jurisprudence* in France, allowing case law to serve its many functions. This principle is based on both the European Convention on Human Rights and French procedural codes provisions.[27] The publication of decisions ensures accountability, which in turn accords legitimacy to judges and gives weight to their decisions. A decision can be well-reasoned,

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[26] CODE CIVIL (C. CIV.) Article 4.

[27] *See* EUROPEAN CONVENTION ON HUMAN RIGHTS, Article 6, open for signature Nov. 4, 1950, came into force 1953, http://www.echr.coe.int/Pages/home.aspx?p=basictexts. This article outlines the right to a fair trial, providing:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

efficient, fair, and just, but it will not be legitimate unless it can be challenged by the parties and criticized by any interested party. The publication of decisions provides this legitimacy, as well as the possibility of referring to the logic and the ruling of such decisions in future cases. As a result, *jurisprudence* is considered a source of law within the French legal system's "hierarchy of norms".[28]

While court decisions can be accessed by the public, France does not have a comprehensive official case reporting system for all judicial decisions. The majority of the decisions of the Court of Cassation are published in two reporters, one for civil cases and one for criminal cases (*Bulletin des Arrêts de la Cour de Cassation rendus en matiere civile* and *Bulletin des Arrêts de la Cour de Cassation rendus en matiere criminelle*, respectively). The presiding justice of the relevant chamber decides whether or not to publish the decisions. For administrative law, the Council of State's decisions are published in the *Recueil Lebon* by a private publisher, sponsored by the Council of State. This reporter, which is considered semi-official, incorporates the decisions of the Conflicts Court. Outside of these reporters, the best source of French court decisions are the legal reviews (*revues juridiques generales*), which are published weekly. Legal reviews, such as *Recueil Dalloz*, *La Semaine Juridique*, and *La Gazette du Palais*, include various items including current news updates, legal writings, annotated full texts of court decisions, legislation, and summaries of new cases.

A second important safeguard of the integrity of French *jurisprudence* is the obligation that judicial decisions have a legal basis: the "duty of *motivation*", or the duty to state the legal reasons supporting the judgment.[29] Ethically, the obligation to state the reasoning supporting a judgment prevents arbitrary and partial decisions. On an intellectual level, providing the rationale behind a decision requires rigor, factual evidence, reasoning and consistency. This duty to state the supporting reasoning is essential, as it delivers to the public the underlying rationale for a particular legal determination and provides the basis for any eventual contestation of that decision.[30] Michel Grimaldi wrote that the requirement to provide the legal reasons supporting a decision "aims at informing, but is not subject to discussion […]. It can also be a motivation for the purpose of challenging the decision. Often, the duty to state reasons extends to the submission

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[28] Pursuant to the principle of legality, each legal norm must comply with the set of rules superior to that norm within the hierarchy of norms. Failure to respect this principle leads to legal imbalance and may engage the State's responsibility before national, European or international courts. In France the hierarchy of norms places the Constitution and international laws on the top, followed by ordinary law, ordinances, regulations and *jurisprudence*.

[29] This "*devoir de motivation*" is based on French civil, criminal and administrative procedural codes.

[30] Though *devoir de motivation* is paramount in France, it is important to note that contrary to opinions issued by American courts, French court decisions are very brief and concise and do not include an exhaustive discussion of the relevant facts and legal analysis. The French courts emphasize the abstract interpretation of general law, rather than the concrete facts of the specific case. Further, there is no publication of dissenting opinions, nor any trace of internal discussion or doubt. *See* Laurent Cohen-Tanugi, LE DROIT SANS L'ETAT (LAW WITHOUT THE STATE) (1985) 79–82 (1985).

to a control. And I rejoin my initial observation: the right to a reasoned judgment, should it exist, is not only a right to know, it is also the [initiation of the] right to challenge."[31]

In practice, French judges never expressly base their decisions upon earlier judgments, but instead follow prior interpretations and arguments from such judgments and any resulting legal principles. When a French judge issues a decision, legal specialists (i.e., lawyers and legal scholars) issue commentaries analyzing the decision. In later trials, lawyers can refer to the ideas developed in earlier decisions and make use of these commentaries.

Conclusion

Although French court decisions are not formally binding, case law has been essential in the development of the French legal system, both in producing decisions of principle that are referenced by later courts adjudicating similar issues and in establishing the fundamental principles of administrative and constitutional law. Further, the publication of decisions and the obligation to state reasons, discussed above, play a critical role in promoting the rule of law.

To close, it is interesting to note how the practice of using cases has grown since the establishment of the European Court of Human Rights ("ECHR"). Now, national authorities in Europe are bound by the decisions of the ECHR.[32] Failure to follow its decisions would result in member states being condemned and required to pay a substantial fine. Therefore, French courts often refer to ECHR decisions as binding precedent. As case law becomes an ever-more integral part of the civil law legal systems of the EU, these jurisdictions become an important point of reference for China as it develops its own system for the selection and reissuance of Guiding Cases in a civil law system.

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[31] Michel Grimaldi, *in La motivation,* Tome III année 1998, TRAVAUX DE L'ASSOCIATION HENRI CAPITANT, 2 (2000) ("*Ce peut être une simple information: la motivation vise à renseigner, mais n'appelle pas la discussion.* […] *Ce peut être aussi une motivation en vue d'un contrôle. Souvent, le plus souvent même, l'obligation de motiver se prolonge par la soumission à un contrôle. Et l'on rejoint ici la première observation: le droit à la motivation, s'il existe, ce n'est pas seulement le droit de savoir, c'est aussi l'amorce du droit de contester.*")

[32] The ECHR has addressed a court's obligation to state reasons, for example, noting in *Atanasovski v. The Former Yugoslav Republic of Macedonia* case (*application no. 36815/03*, *judgment of Jan. 14, 2010*) that the existence of an established judicial practice should be taken into account in assessing the extent of the reasoning to be included in a decision. In situations with well-established case law, courts must provide a detailed explanation as to why the case was determined contrary to existing case law. The court's failure to do so in that case meant that the court did not satisfy the requirements of a fair trial. This principle was invoked in a similar case involving France (*Boumaraf v. France, application no. 32820/08, decision of Aug. 30, 2011*), but while the ECHR stated the principle established in *Atanasovski*, and noted that a more reasoned opinion would be desirable, it held that the French court had satisfied the Article 6 requirements for a fair trial as the applicant had failed to prove that the case law at issue was sufficiently well-established.