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Codes as Straight-Jackets, Safeguards, and Alibis: The Experience of the French Civil Code

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I. Introduction: The Civil Code as a Straight-Jacket?

Since 1789, which marked the year of the French Revolution, France has known no fewer than thirteen constitutions. This fact is scarcely evidence of political stability, although it is fair to say that the Constitution of 1958, of the Fifth Republic, has remained in force for over thirty-five years. On the other hand, the Civil Code (Code), which came into force in 1804, has remained substantially unchanged throughout this entire period. It has been amended many times, especially since the last war, to take into account the equality of women and to modernize the law of divorce. However, many of its nearly 2,300 articles remain intact. Small wonder that it is sometimes referred to as "the Civil Constitution"—legal stability exists where political stability has been lacking.

Lawyers in common law countries tend to consider the codified civil law systems as restrictive and mechanical. The Code is seen as a constraint, with judges obligated to make a mechanical application of its provisions whenever a case arises which corresponds to the situation described in the Code. Under such a conception, the court is seen as "a sort of judicial slot machine."
There is no doubt that this presumption is wrong for most codes in civil law countries. Certainly, it is not correct as far as the French Civil Code is concerned, as that Code does not contain many detailed provisions. True, a certain number of rather precise articles exist, for example in the chapters on property, but most provisions are phrased in the form of general rules. Moreover, these rules are succinct and well written. Stendhal, one of the greatest writers of the 19th century, expressed a deep admiration for the elegance and conciseness of the French Civil Code.\(^4\) Consider the following example: “Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation of such damage.”\(^5\)

It is precisely in the law of tort that the difference in approach between common law countries and the countries with codified systems is so apparent. In the former countries, the courts look at each case and apply legal principles extracted from precedents which they themselves have created. In the latter, the courts have to apply general principles enunciated by the legislature to a particular set of facts. Paradoxically, although countries such as France claim to be the heirs of Roman law, in fact in many ways the Roman lawyers used the case-by-case pragmatic approach of the common lawyers.\(^6\) Nowhere is this more apparent than in the case of the Roman law of tort, a point which will be developed later.

The general principles are by no means confined to the law of tort. The following examples are typical of the generality of the rules to be found in other parts of the Civil Code:

Agreements legally entered into have the force of law for those who have made them. They can only be revoked by their mutual assent, or for causes that the law would allow. They must be performed in good faith.\(^7\)

Duress exerted against a party obliged under a contract nullifies the contract, even when exerted by a third party.\(^8\)

Duress exists whenever a reasonable person may be influenced by the fear of exposing his person or property to a substantial and present harm. The age, sex and condition of the person have to be taken into account.\(^9\)

[The sale] is perfect as between the parties and property passes by law

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4. When writing his famous novel, *La Chartreuse de Parme*, Stendhal used to read a few provisions every day in order to perfect his style. *Jacques Ghestin & Gilles Goubeaux, Traité de Droit Civil, Introduction Générale* 94 (2d ed. 1983) (citing letter from Stendhal to Balzac (Oct. 30, 1840)). In the 20th century, Jules Romain, in his celebrated play, *Knock* also recommended reading the Civil Code in order to fight insomnia. *Id.*

5. *Code civil* [C. civ.] art. 1382 (Fr.).


7. C. civ. art. 1134 (Fr.).

8. C. civ. art. 1111 (Fr.).

9. C. civ. art. 1112 (Fr.).
to the buyer as against the seller, as soon as they have agreed on the thing and on the price, even if the thing has not been delivered or the price has not been paid.\textsuperscript{10}

The preceding list is by no means exhaustive, and is merely illustrative of the general couching of terms within the Code. Perusing the Civil Code, it soon becomes apparent that judges have wide discretion in interpreting its provisions. For example, in applying Article 1382 of the Code,\textsuperscript{11} the judge has to decide what the term "damage" means. Is it limited to damage to the person or to property? Does it cover economic loss or mental suffering? The task of defining these terms is left to the courts. Similarly, Article 1111,\textsuperscript{12} relating to duress in contract, gives no precise definition of duress. The courts will have to decide whether such things as economic duress are covered by the code provision. The entire Code uses such general terms without giving a definition.

The courts possess great freedom to interpret the Code as they think fit. For instance, they can hold that the provisions of Article 1583,\textsuperscript{13} which states that property passes by law to the buyer at the time of the contract, does not create a mandatory rule but rather only applies when parties have not otherwise stipulated.\textsuperscript{14} Unlike common law courts, decisions by French courts do not create binding precedents, although decisions of the Cour de cassation (the court of highest jurisdiction) do have persuasive authority.\textsuperscript{15}

Given the relative flexibility of judges to interpret the general terms in the Code, how then could we get the idea that codes are straight-jackets? Two reasons can be proposed. The first reason is comparative. Traditionally, lawyers in America, England, and other common law countries regard the law as being made by the courts. When faced with a very precise, concrete question, the judge responds by applying a particular rule, which may be distinguished in a subsequent case if the situation in the latter case is slightly different. A legal rule is therefore a precise rule. The legislative technique reflects this conception. In common law countries, a statute has to deal with particular problems with detailed provisions, therefore leaving little room for judicial interpretation. Therefore, many people in common law jurisdictions tend to regard the law in a codified system as rigid, because they tend not to appreciate that the civil law legislature is content with enunciating general principles and are thereby necessarily

\begin{footnotes}
\item 10 C. civ. art. 1583 (Fr.).
\item 11 C. civ. art. 1382 (Fr.). See supra text accompanying note 5.
\item 12 C. civ. art. 1111 (Fr.). See supra text accompanying note 8.
\item 13 C. civ. art. 1583 (Fr.). See supra text accompanying note 10.
\item 15 René DAVID, FRENCH LAW, ITS STRUCTURE, SOURCES AND METHODOLOGY 179-86 (Michael Kindred trans., 1972).
\end{footnotes}
leaving a large margin for interpretation.16

The second reason is political. Lawyers in civil law jurisdictions traditionally insist that in a democracy, the law should be created by the representatives of the people. This idea comes from Montesquieu's concept of separation of powers,17 an idea which is the basis of the American Constitution. In France, since the time of the French Revolution, it has remained heretical to admit openly that judges can be lawmakers or that they may have some normative power.

French lawyers certainly admit the existence of something which may be described as case law. They call it "jurisprudence."18 Any student textbook or general introduction to the study of the law will admit that while some rules may be created by judges, the legislator is the only direct lawmaker.19 Jurisprudence (in the civil law sense of judge-made law) is always described as an indirect source of law.

In France, more than in any other civil law country, this remains the prevailing ideology. French lawyers worship what they call "positive law," the law created by the French legislator. Like Austinians, they cannot dissociate the law from the authority of the State.20 The legislator alone has authority to create the law. When the judge is required to fill a gap in the law, he has to find the support in the text of the Code, and it should not be presumed that his ruling may be binding. The judge contributes to the law, but does not create it.

As always, one has to look back to history to understand such an attitude. Yet, this Article will have the effect of pointing out that the Civil Code was actually meant to be a safeguard.

II. Historical Perspective: The Civil Code as a Safeguard

The main purpose of the Code has been to unify the law of the country. Its style shows that it was meant to be understood by the ordi-

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16 Id. at 78. David compares the attitudes of the French and English lawyers with respect to the conception of legal rules. Id. He then goes on to explain that to an English lawyer, the French legal rule "does not have the precision that is the essence of such a rule. Rather, it is a legal principle." Id.

17 Montesquieu, The Spirit of the Laws 156-67 (Anne M. Cohler et al. eds. & trans., Cambridge University Press 1989). Montesquieu, drawing from principles espoused by John Locke, developed one of the cornerstone concepts of the American Constitution—separation of powers. In his 1669 work, Fundamental Constitutions for the Government of Carolina, which was written in Montesquieu's capacity as Secretary of the Lords Proprietors of Carolina, he set forth the basic premises of the doctrine.

18 The term "jurisprudence" as used in this context should not be confused with jurisprudence in the American and English sense of the term, which is more of a philosophical concept.


20 Rodolfo Sacco, La Comparative Juridique au Service de La Connaissance Du Droit 51-59 (1991) (illustrating how difficult it is for lawyers to reconcile the fact that behind the authority of the State, the only lawmaker, many other forces are at work, such as judges and law professors, that contribute to the creation of the law). See infra notes 64-87 and accompanying text.
nary citizen. Without denying a possible contribution by the judiciary, the codifiers meant the Code to safeguard the citizens against any form of judicial arbitrariness.

A. The Purpose of the Code: Unification of the Law of the Country

During the centuries following the rise of the French monarchy, the French kings strove to unify the country. When Hughes Capet was made king in 987, he only had direct jurisdiction over a very small part of the kingdom, called the Domaine Royal. The Domaine Royal covered no more than a fifth of the country, mainly Paris and the “Ile de France.” Other provinces remained under the jurisdiction of very powerful local lords who kept fighting for independence. It took the skills and the efforts of kings like Charles VII (with the help of Joan of Arc), Louis XI, Francis I, Louis XIV, and Louis XV to impose a strong royal power and the idea of a centralized State.

Yet, these kings never managed to impose a system of law on the whole country. In France, unlike in England where a centralized system of royal courts soon imposed a common law, the judicial power was not in the hands of royal judges. Justice was chiefly local. The local parlements were sovereign courts of justice in their provinces, and the Parlement de Paris did not control parlements in Bordeaux, Toulouse, Aix-en-Provence, or Dijon.

The northern half of France remained a pays de coutume (a land of customary law) with a mosaic of local customs, and the southern half a pays de droit écrit (a land of written law) where the Roman law was chiefly applied. A few major statutes (ordonnances royales) had been promulgated during the reigns of Charles VII, Francis I, Louis XIII, Louis XIV, and Louis XV. The statutes, however, only achieved unification in some limited parts of the law, such as real estate, gifts, and successions. However, even this limited unification paved the way and indicated that: (1) legislation was the only possible way to unify the law of the country; and (2) sound unification implied an acceptable compromise between customs and Roman law.

During the 18th century, under the influence of philosophers like Voltaire and Rousseau, the French people came to realize that they

21 Capet was the founding king of the dynasty that ruled over the country for 800 years until the time of the French Revolution in 1789. See François Olivier-Martin, Histoire Du Droit Français Des Origines À LA Révolution (1948).
22 The term “common” refers to the fact that the law was common to the whole country.
23 This term should not to be confused with the English term parliament, which refers to a governing legislative body.
24 By the Ordonnance de Montil-les-Tours of 1454, Charles VII ordained that the customs of the various territories should be written down. Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law 78 (1948). This task was never completed, but it helped in the development of a common customary law of France (droit coutumier commun) without which the attempt to unify the law through codification would probably have been in vain. Id. at 78-79.
were one nation. As Voltaire said in his well-known ironic style, it was absurd for a traveller to change law as often as he changed horses. Voltaire once said: "Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws? . . . When you travel in this kingdom you change legal systems as often as you change horses." Id. at 8.

In 1791, the Constituent Assembly (the first national assembly during the Revolution) decided by a unanimous vote that a code should be drafted. Yet, the turmoil of the Revolution did not favor such a project. At the end of 1799, despite several votes, nothing had been done in that respect. It took the genius of the first Consul, Napoleon Bonaparte, to revive the spirit of the dying Revolution and to fulfill the project of a code. On August 13, 1800, he appointed a committee of four members to prepare the draft of a civil code which would be discussed and voted on by the legislature.

The idea was not new. The royal ordinances of Louis XIV and Louis XV had already been prepared by specialized committees of prominent jurists. But the energy and the genius of Napoleon, who took a strong interest and a personal part in the realization of the project, made it possible to produce a comprehensive code within a very short period of time: the whole code was enacted in 1804.

The members of Napoleon's committee, four prominent jurists (Tronchet, Bigot-Preameneu, Maleville, and Portalis), actually represented the two systems of customs and written law. Never did they claim any intention to create a completely new system. They endeavored to use all their knowledge, experience, and wisdom to effect a smooth transition between the past and the present so that the Code could be a dual compromise between the laws of the North (customs) and the South (Roman law), and between the ideas of the past and the revolutionary ideal.

While in exile, Napoleon said: "My true glory is not that I have won 40 battles; Waterloo will blow away the memory of these victories. What nothing can blow away, what will live eternally, is my Civil Code." There is a certain degree of truth in this emphatic statement. Since the time of the Revolution, France has had approximately fifteen

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25 Voltaire once said: "Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws? . . . When you travel in this kingdom you change legal systems as often as you change horses." Id. at 8.

26 See generally Montesquieu, supra note 17. For a standard treatise covering the history of French law before the French Revolution, see François Olivier-Martin, Histoire du Droit Français Des Origines à La Revolution (1948). For a brief survey of this period, see Zweigert & Kötz, supra note 24, at 76-86.

27 Zweigert & Kötz, supra note 24, at 83 ("A code of civil law common to the whole kingdom will be drawn up.").

28 On the law of the revolutionary period (known as droit intermédiaire), see id. at 82-86.

29 Id. at 84-86. See generally Jean-Louis Halperin, L'Impossible Code Civil (1992).

30 The various parts of the French Civil Code had been enacted by way of thirty-six separate statutes during the years 1803 and 1804. The Code was re-enacted as a whole by the Law of March 21, 1804.

constitutions, but has always kept its Civil Code, which has been described as the "civil constitution" of the country. Although it has been amended many times, the structure and many portions remain unchanged.

B. The Style of the Code: Legislating for the Ordinary Citizen

The style chosen by the drafters of the Code is an indication of their intention to protect the citizen against the wrongful interference of the judiciary. The drafters also intended it to be non-technical. It is almost free of the legal jargon often used by professionals to establish their authority and protect their power. Like the text of a constitution, it is meant to be understood by ordinary citizens, without the interference of verbose lawyers, who sometimes strive to make the law more complicated than it really is.

Interestingly, it is not so in all the civil law countries. The German Civil Code, known in German as the Bürgerliches Gesetzbuch (BGB), is by comparison a very technical text that only a professional lawyer can understand. This is due to the fact that historically, the main authority in German law was the professor. German law is based on a very sophisticated analysis of Roman law sources, chiefly the Pandects, by far the most comprehensive part of Justinian’s Corpus Juris Civilis. Until the time of Bismarck, there was not one Germany but a mosaic of small States with their individual supreme courts. These supreme courts used to refer to academic work in order to decide complicated cases.

The BGB, which came into force on January 1, 1900, almost a hundred years after the French Civil Code, is a pure product of the work of scientists. It is full of complicated terms and abstract concepts. It contains a general part and some special parts, the latter to be construed on the background of the general part, resulting in hundreds of cross references.

This reference to the German experience is presented to show that there is no single method for making civil codes. The French method is more the product of history than legal science. For all the

32 See supra text accompanying note 2.
33 Once the Holy Roman Empire of the Germanic Nation had been abolished in 1806, the German Supreme Court (the Reichskammergericht), which had been created in 1495, ceased to exist. See Francis Deak & Max Rheinstein, The Development of French and German Law, 24 GEO. L.J. 551, 568-70 (1936).
34 This tradition dated back to the Middle Ages, when judges used to refer to the “common opinion of doctors” (opinio communis doctorum). See generally Helmut Coing, The Roman Law as Just Commune on the Continent, 89 L.Q. Rev. 505 (1973) (discussing the influence of legal education during the Middle Ages in spreading Roman legal concepts throughout continental Europe). For a general survey of the historical development of German law, see ZWIEGERT & KÖTZ, supra note 24, at 133-43. See also Deak & Rheinstein, supra note 33, at 568-70.
35 See ZWIEGERT & KÖTZ, supra note 24, at 150-51.
36 It has been retained or imitated inter alia in Belgium, The Netherlands, Italy, Spain, Louisiana, Quebec, and most Latin American countries. Id. at 100-22. On the other hand,
reasons given, it retains the distinctive character of being a safeguard, a "civil constitution" of the country. Its style makes it more comparable to the American Constitution than to any U.S. statute.

It is worth noting that when the French Parliament introduces amendments into the Civil Code, it tries to preserve the Code's original architecture and to draft the new provisions in the same, simple style. If the new provisions are long and technical, then, despite the fact that they refer to questions dealt with in the Code, they are placed instead in auxiliary statutes. The Law of 1978 on consumer credit agreements, the Law of 1985 on road traffic accidents, or the Decree of 1955 relating to land registration are a few examples of such auxiliary statutes. These auxiliary statutes, like the mass of French legislation enacted during the second half of this century, are often as technical and detailed as American legislation.

C. The Paradox of the Code: Trust or Distrust of the Judiciary?

Of course, as indicated above, the judge can play a more creative role when applying the Civil Code than when construing these obscure statutes. In fact, the Code's draftsmen intended judges to play just such a role. For example, Portalis, the most prominent of the four drafters, was a political moderate, a fact made clear in the preliminary speech he delivered to the Assembly charged with enacting the Code. Portalis explained the two extremes that legislators should avoid: oversimplification—"leaving citizens without rule or guarantee concerning their greatest interests"—and going too far into details—keeping "clear of the dangerous ambition of wanting to forecast and regulate everything." Indeed, "society's needs are so varied, the intercourse between them so active, their interests so manifold, and their relations so extensive that the legislator cannot possibly provide for all eventualities."43

Extremely detailed rules, it was thought, could not resist evolution

the German model has been imported in Greece, the former Soviet Union, Hungary, and some other Eastern European countries. Id. at 159-60. Yet, many countries like Italy, Switzerland, and Austria are greatly influenced by German scholarship. Id. at 153.
60 These statutes are often consolidated in some very technical codes like the CODE GENERAL DES IMPORTS (Dalloz 1993) (Taxation Code), CODE DE LA SECURITE SOCIALE (Dalloz 1994) (Social Security Code), CODE DE L'URBANISME (Dalloz 1994) (Town Planning Code).
62 Levasseur, supra note 31, at 769.
63 Id.
64 Id.
and would have to be amended too often, which creates insecurity. According to Portalis, this is not what legislation ought to be:

The role of legislation is to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details of questions which may arise in particular instances. It is for the judge and the jurist, imbued with the general spirit of the laws, to direct their application.\textsuperscript{45}

Turning to the method of interpretation, Portalis made a clear distinction between the task of judges from that of legislators.

When the legislation is clear, it must be followed; when it is obscure, we must carefully analyze its provisions. If there is no particular enactment, custom or equity must be consulted. Equity is the return to natural law, when positive laws are silent, contradictory, or obscure . . . .\textsuperscript{46}

Then, he made this magnificent statement:

There is a science for lawmakers, as there is for judges; and the former does not resemble the latter. The legislator's science consists in finding in each subject the principles most favorable to the common good; the judge's science is to put these principles into effect, to diversify them, and to extend them, by means of wise and reasoned application, to private causes; to examine closely the spirit of the law when the letter kills.\textsuperscript{47}

He concluded on the value of experience: "It is for experience gradually to fill up the gaps we leave."\textsuperscript{48}

It was therefore admitted that judges may contribute to the evolution of the law by way of judicial interpretation. The judge is meant to complement and update the work of the legislator. But the text is there, general but clear. It cannot easily be distorted, and it is therefore a good safeguard.

The conception advocated by Portalis implied a certain degree of trust placed in the ability of the judiciary. The judicial reforms undertaken during the Revolutionary and Imperial periods justify such an optimistic view. A centralized court system had been created, with a supreme court at the top, the \textit{Cour de cassation}, something France never had before. And officially at least, judicial appointments were made regardless of social and feudal privileges.

Yet, the French have never totally lost their prejudice towards the judicial system, which they regarded, rightly, as subservient to an all powerful executive. They have always been apprehensive that judicial power might be abused. This fear, no doubt, arises from the judicial abuses inflicted on the French people under the \textit{Ancien Régime}. Even today, French judges still enjoy little prestige or esteem. They are eas-

\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 771.
\textsuperscript{47} \textit{Id.} at 772.
\textsuperscript{48} \textit{Id.} at 773.
ily criticized both by the population and by politicians. They are nothing but a special category of civil servants.

Prior to the Constitution of the Fifth Republic, which was enacted on October 6, 1958, there was no judicial review of legislative power. The Constitution of the Fifth Republic created a Constitutional Court with very limited jurisdiction. Yet, when the French constitutional judges have attempted to develop a check on the exercise of legislative power, their attempts are denounced as leading to potential government by judges.

As a matter of fact, the French Constitution of 1958 prefers the term *autorité judiciaire* ("judicial authority") to that of *pouvoir judiciaire* ("judicial power"). The latter term would parallel the American terms legislative power and executive power. The word "authority" was meant to be weaker than the term "power."

For these reasons, despite the important powers vested in them, judges have kept a low profile. During the 19th century, French judges claimed to do an exegesis of the Code or, in other words, they interpreted the Code strictly. Exegesis as a technique of interpretation has often been described in France as being a servile and literal interpretation. This is not exactly true. Some brilliant comparatists and at least one French scholar have provided evidence of the creative work made by the so-called "Exegetical School" in the 19th Century.

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49 Fr. Const. arts. 56-63. When a statute has been passed, certain representatives of the executive or the legislative branch may, before the promulgation of the statute, challenge its constitutionality before the Conseil constitutionnel. When held to be unconstitutional, the statute is ineffective and cannot be promulgated. However, if no timely submission to the Conseil constitutionnel is made, the statute is promulgated and its constitutionality cannot be questioned by anyone before any court.

50 For an authoritative survey of this evolution leading to a more developed system of judicial review, see Louis Favoreu, *Le contrôle de constitutionnalité des normes juridiques par le Conseil constitutionnel*, 1987 Revue Française de Droit Administratif (R. Fr. D. Admin.) 845.

51 In July and August 1993, the Conseil constitutionnel was called upon to review six important statutes designed to enforce the newly appointed Balladur Government law and order policy. On August 13, 1993, the Conseil constitutionnel held that some provisions of a statute imposing a strict control of immigration were unconstitutional. The next day, Mr. Charles Pasqua, the Minister of the Interior, declared on the television channel TF1: "The Conseil constitutionnel more and more rules according to expediency than according to the great republican principles. As everyone may notice, there is a real drift. Yet, sovereignty belongs to the people." Michel De Jaeghere, *Minorité de blocage*, 378 Le Spectacle du Monde 10 (1993) (a press article presenting the conservative opinion that judges should not be allowed to challenge the government policy once accepted by the representative of the people).

52 Fr. Const. art. 64.


55 Philippe Rémy, *Elége de l'exégésie, Revue de la Recherche Juridique Droit Prospectif*
The judges' work may look conservative, since they referred to some old historical sources such as the *coutume de Paris*, royal ordinances, Roman law, texts of Domat, or Pothier (whose works influenced the drafters a great deal). Yet, they also knew how to promote a sound evolution, considering the law as a system and working on the assumption that the Code declares rather than creates the law.

During this period, judges had to keep a low profile and to act as if everything they said naturally flowed from the provisions of the Code, as if they were merely giving effect to the legislators' intention. The fact that French judicial decisions contain no individual opinions, but are a brief summary of the majority opinion, with virtually no reference to the arguments presented, greatly assisted judges in maintaining the fiction that they were merely following the Code. It is enough for the court of highest jurisdiction to state: “According to article 1384 paragraph 1, the law is thus.” Such a statement gives everyone the impression that the solution is at least dwelling implicitly in the Code provision. Such statements also made the shift to a more daring attitude possible.

III. Modern Developments: The Civil Code as an Alibi

At the turn of the century, judges did much more than simply keep alive the Code they revered. In order to circumvent some obsolete rules and modernize the law, they did not hesitate to depart from the obvious intention of the legislator and move away from traditional principles supporting some Code provisions. Nonetheless, they kept paying lip service to the Code, citing its provisions as the direct source of their judgments. Such a use of provisions of the Code may be described as "legal fiction." Yet, in the present context, the word “alibi” has been preferred: When accused of departure from the text, the judge can answer that he did not commit the crime of acting as a legislator but remained within the framework of the provision which was cited.

A study of the development of the law of tort is particularly illustrative. The law of tort is contained in five Articles of the Code, 1382

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254 (1982). The best key towards the understanding of the law of that time is found in CHRISTIAN ATLAS, ÉPISTÉMOLOGIE JURIDIQUE 21, 47 (1985).
26 LES LOIS CIVILES DANS LEUR ORDRE NATURE (1689-1694).
57 Pothier's famous TRAITÉ DES OBLIGATIONS (1761) was translated into English by W.D. Evans in 1806.
58 Remy, supra note 55, at 259-62.
59 Article 5 of the Civil Code states that "judges are forbidden, when giving judgement in the cases which are brought before them, to lay down general rules of conduct..." C. CIV. art. 5 (Fr.). A judge who violated this prohibition was guilty of a criminal offense. CODE PÉNAL (C. PÉN.) art. 127 (Fr.) (repealed by the new Penal Code which came into force on April 1, 1994). Article 5 was intended to prevent judges from returning to the old practice of making arrêt de réglement, i.e., stating in a judgment a general rule to be applied in forthcoming cases.
to 1386. As already stated, Article 1382, which is the first and principle Article of the Code relating to tort, is couched in very general terms. This part of the Code is inspired, not by the pragmatism of the Roman lawyers but by the ideals of the 18th century philosophers, basing liability in tort on the principle of moral responsibility. According to the Civil Code, apart from a few exceptional cases where negligence was presumed, liability in tort was clearly based on the idea of fault. Evidence had to be adduced that the damage had been caused by some form of negligence.

With the development of industrial machinery, and the advent of the railroad and the internal combustion engine, principles underlying the law relating to third-party liability became obsolete. For instance, was it reasonable to ask the worker/victim of a workplace accident caused by a defective machine to prove, in order to recover damages, that the accident had been caused by some fault or negligence of the employer? Was it fair to deny any remedy to the victim of a road traffic accident who had been behaving carefully but had not managed to convince a court that the driver had been negligent? Who was to bear the risk of such casualties: the innocent victim or the one who, by using the machine, had created the risk?

Two solutions were possible. The first possibility was to ask the legislator to intervene, but there was too much controversy surrounding this option and the French legislators remained stubbornly passive. The second solution was judicial, and, thanks to the creativity of the French judiciary—assisted of course by imaginative academics—the legislature was allowed to sleep until 1985. In the meantime some judicial solutions had been found in the law of contract and the law of tort.

A. Alibis in the Law of Contract

In modernizing personal injury law, the courts relied on the law of contract whenever possible. If there was a contract of carriage between the victim and the carrier, the contract was said to include an implied

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60 C. civ. art. 1382 (Fr.); see supra note 5.
61 C. civ. arts. 1382-1383 (Fr.).
62 There were a few exceptions to this passivity such as the Law of April 9, 1898, which provided compensation for workers who were victims of accidents suffered during the course of their employment. This statute was replaced by the Law of October 30, 1946, Code de la sécurité sociale art. L. 414 (Fr.), which provides for automatic but limited compensation, without any need to prove the employer's negligence.
63 In 1985, the National Assembly passed special legislation on road traffic accidents which provided for a scheme of automatic compensation. C. civ. art. 1384 (94th ed. Petits Codes Dalloz 1994) (Fr.) (codifying L. No. 85-677 of July 5, 1985). The provisions of this auxiliary statute are far more detailed than that of the proposed law of December 5, 1906, which purported to revise the text of C. civ. art. 1386 by adding two paragraphs. See ARTHUR T. VON MEHREN & JAMES R. GORDLEY, THE CIVIL LAW SYSTEM 625 (2d ed. 1977).
obligation to carry the person safely (obligation de sécurité). In the case of railroad transportation, the courts hesitated in deciding the scope of this application. It could start when the passenger entered the railroad station to buy his ticket, or when he eventually bought his ticket, and it would finish once he had left the station at the point of arrival. It could even be limited to only exist during the actual act of transportation. Yet, even if it was fair to hold the carrier prima facie liable in the case of a crash, it was too much to hold him liable for breach of the safety obligation when the traveller had missed a step when boarding the train.

Working on a distinction invented by a law professor, the contractual obligation could be of two kinds. The first type of contractual obligation was an obligation de résultat, which can be described as the standard obligation to perform what is actually promised in the contract, in which case nonperformance gives a right to damages without need to prove negligence. The second type of contractual obligation was an obligation de prudence et diligence, also known as an obligation de moyens. In this type of obligation, the promisor only undertakes a duty of due care but is under no obligation to reach any particular outcome. The aggrieved promisee has to prove negligence if he wants to obtain damages. This second type of obligation is typically the one found by judges in contracts between medical practitioners and their patients. The victim of medical malpractice has a contractual action but must prove negligence. The physician has a contractual duty to act with reasonable care according to the present state of scientific knowledge, but is under no duty to heal the patient.

Returning to railroad accidents, the courts ruled that the carrier’s obligation to carry the person safely was an obligation de résultat beginning when the passenger boarded the train and ending when he had stepped off. When the accident happened inside the station, for instance on the platform, the carrier still owed a contractual obligation, which was analyzed as an obligation de moyens. The victim therefore had to prove the carrier’s negligence.

To avoid blurred distinctions as to the moment when the contractual obligation was incurred, the courts eventually ruled that when the accident happened outside the scope of the contractual obligation de

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64 Judgment of Nov. 21, 1911 (Compagnie générale transatlantique), Cass. civ., 1913 Recueil Dalloz [D. Jur.] I 249 note L. Sarrut (Fr.).
65 René Demogue, 5 Traité des Obligations en Général § 1237 (1925).
66 Id. For a detailed study, see generally Joseph Frossard, De la Distinction des Obligations de Moyens et des Obligations de Résultat (1965).
résultat, for instance on the platform, before boarding the train, or after having stepped off, the carrier’s liability was in tort. This was the case even if the passenger had already purchased his ticket. The contractual obligation de moyens in rail transportation therefore can no longer apply.

This evolution in the law is entirely judicial. The distinction between obligation de résultat and obligation de moyens does not appear in the Code. The Cour de cassation, the court of last resort in the French system, had to find some legislative support for the distinction. The effort was necessary in order for the Court to be able to determine whether, in the given circumstances, the court below had rightly decided that this obligation was an obligation de résultat or an obligation de moyens.

It was easy to justify the obligation de résultat, which is the typical contractual obligation. The court can resort to Article 1147, which provides:

The debtor is condemned, where this is appropriate, to the payment of damages, whether for the non-performance of the obligation or for delay in its performance, whenever he does not show that the non-performance results from an extraneous event which cannot be imputed to him, even though there is no bad faith on his part.

This is a general provision of the Code covering any contractual obligation, unless otherwise agreed by the parties.

The legal alibi for the obligation de moyens was found in Article 1137. According to this Article, the obligation of looking after a thing one has been entrusted with requires the person so obliged to exercise the care of a “good family father” (bon père de famille or bonus paterfamilias). Through a curious analogy, travellers and medical patients are to be treated as well as things entrusted to bailees.

No French jurists would question this distinction, since it is supported by two articles in the Code. Its academic origin does not appear in any judgment. Indeed, French courts only cite statutes. The Cour de cassation never makes any express reference to cases or to legal writing. Most inferior courts do likewise. French scholars are trained to accept this practice and legal insiders will be able to trace the academic origin of the new theories upheld by the courts anyway.

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71 C. Civ. art. 1147 (Fr.).
72 C. Civ. art. 1137 (Fr.). This is a standard inherited from Roman law; it is the equivalent to the reasonable person in common law countries.
73 The practice is radically different in Germany where books are commonly cited in judgments rendered by the courts of highest jurisdiction.
74 French legal periodicals such as Recueil Dalloz-Sirey, La Semaine Juridique, La Gazette du Palais, usually publish judgments accompanied by a note or comment written by a law professor, a judge, or a practicing attorney. These notes provide interesting details which cannot be found in the very short majority opinion. They refer to the non-legislative sources which do not appear in the court decision. Important Cour de cassation decisions are
ever, any rule of law applied by a court, regardless of whether it is actually of academic origins, has to be presented as if it followed logically from a legislative text.

B. Alibis in the Law of Tort

When no contract exists between the victim and the defendant, a solution had to be found in the law of torts. As indicated above, the Code based liability on fault, which includes lack of care and negligence. This is a general rule, to which the Code makes few exceptions, the whole law of torts being contained in no more than five articles.

Article 1384 paragraph 1 provides: "A person is liable not only for the damage he causes by his own act, but also for that caused by the acts of a person for whom he is responsible or by things that he has under his guard." This provision was designed to cover situations of vicarious liability: of employers for torts committed by their employees, parents' liability for their children, and the presumption that damage caused by an animal or by the collapse of a building is due to the negligence of its owner.

Gradually, the Cour de cassation came to hold, on the basis of Article 1384 paragraph 1, that the guardian of a thing of any kind, not only animals or buildings, is prima facie answerable for any damage caused by the thing. Such strict liability may be pleaded not only when the damage comes from the thing itself (e.g., the explosion of a boiler) but also when the thing is manipulated by a person (e.g., an accident caused by a car in motion). The guardian, who was said by the Cour de cassation to be the person having the use, control, and direction of the thing, can only be exonerated by proving force majeure (i.e., that

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75 C. civ. arts. 1382-1383 (Fr.).
76 See C. civ. arts. 1382-1386 (Fr.).
77 C. civ. art. 1384 para. 1 (Fr.).
78 C. civ. art. 1384 para. 5 (Fr.).
79 C. civ. art. 1384 para. 4 (Fr.).
80 C. civ. art. 1385 (Fr.).
81 C. civ. art. 1386 (Fr.).
83 Id.
85 In a famous case where the automobile that caused the damage had been stolen, the Cour de cassation held that the owner nonetheless retained the guard of it. Judgment of Mar. 3, 1936 (Connot v. Franck), Cass. civ., 1936 Recueil Dalloz [D. Jur.] 125 note R. Capitant (Fr.). The case was remanded to a Court of Appeal that refused to hold the owner liable.
the damage was caused by an irresistible, unforeseeable outside event) or the contributory negligence of the victim.86

Many other refined distinctions have been developed, with no more legal support than Article 1384 paragraph 1. For instance, the Cour de cassation paid lip service to Article 1384 in deciding a case dealing with a building damaged by fire caused by the explosion of a television set. In that situation, the Court held the manufacturer and not the owner of the set liable, reasoning that it was the manufacturer who guards the structure of the appliance. On the other hand, if the damage was caused by a wrong use of the television set, the courts would decide that the user is liable, because he has the “guard of the behavior” (garde du comportement) of the thing that caused the damage. Once again the Code provision providing the alibi for either rule is Article 1384.87

These interpretations are not necessarily wrong. They usually lead to a fair result. These examples are intended to show that French judges are lawmakers and that the French Cour de cassation creates precedents, even if such precedents only have persuasive authority. But for the reasons set forth above, law making has to be done with an alibi of some Code provisions.

IV. Conclusion: Judges Can Go “Beyond the Code but Through the Code”

To justify such departures from the often obvious intention of the legislature, academics came to say that one had moved to a modern

The Plenary Assembly of the Cour de cassation had to enter a final decision and this time held that the guardian was the thief and not the owner, because the latter had lost control of it and the former now had the use, the control, and the direction of the thing. Judgment of Dec. 2, 1941 (Franck v. Connot), Cass. ch. réun., 1942 Recueil Dalloz [D.C. Jur.] 25 note G. Ripert (Fr.).

The contributory negligence of the victim totally or partially exonerated the guardian. Judgment of Sept. 9, 1940, Cass. civ., 1940 Recueil Dalloz [D.H. Jur.] 141 (Fr.). Yet, in the Judgment of July 21, 1982 (Desmares), Cass. civ. 2ème, 1982 Recueil Dalloz [D. jur.] 449 concl. Charbonnier and note Ch. Larroumet (Fr.), the Cour de cassation held that the victim’s fault could only exonerate the guardian when the result was unforeseeable and insuperable. This theory, extending the protection of the victims of road traffic accidents, was strongly criticized. It was abandoned in 1987, after the enactment of the Law No. 85-677 of July 22, 1985, which created a system of automatic compensation for victims of car accidents. Judgment of Apr. 6, 1987 (Chauvet and Mettelat), Cass. civ. 2ème, 1988 Recueil Dalloz [D. Jur.] 92 note Ch. Mouly (Fr.). The Cour de cassation then decided to move back to the former theory. Id.


The distinction was first rejected by the Cour de cassation. Judgment of June 11, 1953, Cass. civ. 2e, 1954 Recueil Dalloz [D. Jur.] 21 note R. Rodière (Fr.). However, the distinction was later upheld. Judgment of Nov. 12, 1975, Cass. civ. 1re, 1976 J.C.P. II, No. 18479 note G. Viney (Fr.) (explosion of a bottle of aerated water).
method of interpretation.\textsuperscript{88} When a provision is recent, the judge has to explain it and look for the legislative intention, wherever he may find it. He applies the exegetical method in its traditional sense. Yet, when the problem is new and the law was enacted at a time when the problem could not be anticipated, the judge is free to take into account equity and policy elements and to act as a legislator. Still, he must keep within the framework of the Code.

At the beginning of the century, Saleilles put forth the magic formula "\textit{au delà du Code civil, mais par le Code civil}”: One has to go beyond the Code, but through the Code.\textsuperscript{89} To that extent, French lawyers are expert magicians.\textsuperscript{90} This phrase actually points out the great paradox of the French attitude. The legislators should create all rules, and the powers of the courts, which are considered untrustworthy, should be limited. Nevertheless, clear general rules continue to be preferred to detailed enactments, at least in matters covered by the Civil Code. So, let us allow the \textit{Cour de cassation} to complement the legislative work, provided that they conceal the purely doctrinal\textsuperscript{91} or judicial origin of the rules they create and disguise it under the alibi of some general Code provision. They can find great support for such actions in the old tradition of stating the law in judgments shorter than the headnote of a common law decision.

\textsuperscript{88} \textsc{François Geny, Méthodes d'Interprétation et Sources en Droit Privé Positif, Essai Critique} (1899).

\textsuperscript{89} Raymond Saleilles, \textit{Preface} to \textsc{François Geny, Science et Technique en Droit Privé Positif} (1913).

\textsuperscript{90} Or legal priests of the next world, "\textit{Au-delà}" meaning, when used substantively, the "hereafter." Saleilles, at the end of his Preface, insisted on the importance of the term "\textit{Au-delà}," saying that it should become the watchword of all jurists. \textit{Id.}

\textsuperscript{91} In French law, the word \textit{doctrine} is used in the sense of legal writing.