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Codification of Administrative Law

A French Oxymoron

DELPHINE COSTA

I. The Definition and Delimitation of Administrative Law

In French law, administrative law is very widely understood. Because French organisation is highly centralised, French administrative law is traditionally the expression of the authority of the state and its administration.¹ Obviously, French administrative law was considered as a true legal discipline towards the end of the nineteenth century, with the advent of the Third Republic (1875–1940); this construction is based on myths that are precisely the foundation of French administrative law.² Even if this legal discipline is linked to the French institutional and political history, it has more or less inspired many other legal systems.³

¹ B Plessix, *Droit administratif général*, 3rd edn (Paris, LexisNexis, 2020) 240: 'le droit administratif français ... est indissolublement lié, jadis à la construction, aujourd'hui à la pérennité de la forme étatique. Au commencement du droit administratif, il faut donc d'abord repartir de cette fameuse création intellectuelle, de ce pur concept juridique, qui sert de support institutionnalisé, rationalisé et sécularisé à l'exercice du pouvoir politique à l'égard d'une population et d'un territoire, que l'on appelait jadis République, Gouvernement ou Couronne, et que l'on nomme État depuis le XVII^e siècle' ('French administrative law ... is indissolubly linked, once to the construction, now to the sustainability of the state form. At the beginning of administrative law, we must therefore start from this famous intellectual creation, from this pure legal concept, which serves as an institutionalised support, rationalised and secularised to the exercise of political power over a population and territory, formerly known as the Republic, Government or Crown, and known as the State since the seventeenth century') (all citations are translated by the author).

² G Bigot, *Ce droit qu'on dit administratif ... Études d'histoire du droit public* (Paris, La mémoire du droit, 2015) ; M Touzeil-Divina, *Dix mythes du droit public* (Paris, LGDJ, 2019).

³ S Cassese, *La construction du droit administratif, France et Royaume-Uni, trad. de l'italien par J Morvillez-Maigret* (Montchrestien, Clefs Politique, 2000); L Neville Brown, JS Bell, with J-M Galabert, *French Administrative Law*, 5th edn (Oxford, Clarendon Press, 1998) 3: 'the developed system of *droit administratif*, centred upon the Conseil d'Etat, forms the basis of many continental systems, and has influenced such international institutions as the Administrative Tribunals of the United Nations Organization and, more importantly, the Court of Justice of the European Communities'.

Moreover, despite of special administrative law in a number of matters, such as urbanism, public procurement and contracts, sustainable development, security, civil service and so on, there is, in fact, a general administrative law.

A. The Definition Criteria of General Administrative Law

There is a set of rules applicable to all persons – public or even private – involved in administrative action. These persons can be in charge of national or local government or even special missions.⁴ They can be tasked with a public service or, at least, with a mission of general interest. When private persons are involved with such a mission, there are under control of a public person.⁵ General administrative law can be thus defined by an organic criterion, but it can also be defined by the intended purpose of the action, when it is a public service or a mission of general interest (purposive criterion). It can further be defined by a material criterion, because those persons in charge of administrative action have elements of public authority such as taxing power, enforcement authority, public policy or unilateral action.⁶ The scope of general administrative law is very wide in the French legal system.⁷

B. The Rules of General Administrative Law

French general administrative law imposes a lot of rules. Some principles regard administrative action: goal of general interest, lawfulness, equality, neutrality and secularism, transparency and impartiality, prohibition of retroactivity, and proportionality (see below, section II).

Further, administrative law applies to both administrative decisions and public contracts, to police activities, to administrative rule-making and regulation,

⁴ At a national level, there is the President of the Republic, the Prime Minister, the ministers and other independent public/administrative authorities; at a local level, there are regional, departmental and communal councils and presidents ('mayors' in communes); at both a national and local level, those persons who have some special missions are qualified as 'public establishments'.

⁵ CE, sect, 22 February 2007, *Association du personnel relevant des établissements pour inadaptés*, Rec CE 92, concl C Verot; F Lenica and J Boucher, 'Chronique de jurisprudence administrative' (2007) *Actualité juridique – Droit administratif* 793. cf the German and EU chapter in this book on the distinction between direct and indirect public administration: M Heintzen, 'Codification of Administrative Law in Germany and the European Union', section I.B.iv.

⁶ TC, 29 December 2004, *Epoux Blanckeman c Voies navigables de France*, n° C3416; TC, 12 December 2005, *EURL Croisières de Lorraine La Bergamote c Voies navigables de France*, n° C3455: 'activités qui, telles la réglementation, la police ou le contrôle, ressortissent par leur nature de prérogatives de puissance publique' ('activities which, such as regulation, police or control, by their nature fall within the prerogatives of public authority').

⁷ It can be compared to Swedish administrative law, as is pointed out in the Swedish chapter in this book: J Reichel and M Ribbing, 'Codification of Administrative Law in Sweden', section II.A.

to administrative punitive power, to public property and to the responsibility (liability) of public persons:⁸ the variety of its application is extraordinarily wide.⁹

As already noted, administrative law concerns both public and private persons: public such as the state, local authorities (territorial communities: communes, departments and regions), public establishments, enterprises and entities, independent administrative authorities; and private such as civil servants, associations and enterprises. It defines relationships between those persons: decentralisation, delegation and devolution.¹⁰

Finally, many principles of administrative procedure are fixed by general administrative law like the right to be heard, the right to participate, the right to fairness ... These principles concern the procedure not only before administrative authorities but also before administrative jurisdictions, even if they are more extensive in the latter option (see below section II).

II. Legal Sources of Administrative Law

Legal sources of general administrative law are the Constitution, laws and codes, secondary legislation,¹¹ and mostly court practice because of the central role of the French Council of State in the delimitation and definition of legal principles of administrative law for more than two centuries.¹² Thus, it is relevant to group legal principles of general administrative law by sources,¹³ distinguishing different questions.

A. The French Constitution

The actual French Constitution was adopted 4 October 1958 and established the Fifth French Republic. The formal text of this Constitution does not set out any

⁸ As Heintzen points out in the both German and EU chapter in this book, 'state liability [is] a codificatory "no go"' (M Heintzen (n 5) section III).

⁹ The fight against the COVID-19 pandemic illustrates the broad scope of administrative law, which has been present in numerous forms of legislation and regulations since March 2020 (see: www.vie-publique.fr/sites/default/files/basic_page/pdf/Textes-Covid-19.pdf).

¹⁰ Specifically: Law n° 82-213, 2 March 1982, relative aux droits et libertés des communes, des départements et des régions; Orientation Law n° 92-125, 6 February 1992, relative à l'administration territoriale de la République. See below, section II.

¹¹ The structure of French law is inspired by the legal categories from Roman law and is based upon legislation, which is the expression of sovereignty since the French Revolution: C Jauffret-Spinosi, 'La structure du droit français' (2002) *Revue internationale de droit compare* 265, esp at 265.

¹² B Pacteau, *Le Conseil d'État et la fondation de la justice administrative au XIXe siècle* (Paris, Presses universitaires de France, 2003) 264; C Jauffret-Spinosi (n 11) 268; G Braibant, 'Le rôle du Conseil d'État dans l'élaboration du droit' in G Teboul, D Pouyaud and J Ziller (eds), *Mélanges René Chapus, Droit administratif* (Paris, Montchrestien, 1992) 91 ff.

¹³ P Gonod and O Jouanjan, 'À propos des sources du droit administratif. Brèves notations sur de récentes remarques' (2005) *Actualité juridique – Droit administratif* 992.

human rights or fundamental liberties, because it was adopted during a political crisis.¹⁴ Therefore, it refers to other constitutional sources, such as the French Declaration of Human and Civil Rights of 26 August 1789 and the Preamble to the Constitution of 27 October 1946, both of which state two different kind of human rights – first political and second social and economic.¹⁵ In the French constitutional sources, there is no precise reference to the public administration. However, some legal constitutional principles of public law relate to administration:¹⁶

- *Principles of administrative action*: only secularism and equality are stated in the constitutional sources. Article 1 of the French Constitution of the Fifth Republic reads as follows: ‘France shall be an indivisible, secular, democratic and social Republic ... It shall respect all beliefs.’ And equality is one of the most significant principles in the text of 1958, even in Article 1: ‘It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion.’ Equality is also present in the French Declaration of 1789 (Articles 1 and 6).¹⁷
- *Forms of action*: no constitutional principle regards administrative forms of action. Some articles concern only the division of powers between the two major administrative authorities – the President of the Republic and the Prime Minister – for the exercise of general regulatory power by decree.¹⁸
- *Administrative organisation*: since 2003, decentralisation has been stated in Article 1 of the French Constitution: ‘France ... shall be organised on a decentralised basis.’ Many details are described in the formal text of the Constitution as relationships between the state and territorial communities, some being rather autonomous and others very independent¹⁹ (for example, New Caledonia).²⁰ However, in the Preamble to the Constitution of 1946,

¹⁴ Comité national chargé de la publication des travaux préparatoires des institutions de la V^e République, *Documents pour servir à l’histoire de l’élaboration de la Constitution du 4 octobre 1958* (Paris, La Documentation française, 4 vols, 1987, 1988, 1991, 2001).

¹⁵ The French Constitution has been supplemented by the 2004 Environmental Charter, which proclaims the main principles relating to the preservation of biodiversity and the rights and duties towards future generations (the precautionary principle, sustainable development): constitutional law n° 2005-205, 1 March 2005, relative à la Charte de l’environnement, *Journal officiel*, 2 March 2005.

¹⁶ cf the Austrian chapter in this book on the codification of the administrative law by the Constitution: K Lachmayer, ‘Codification of Administrative Law in Austria’, sections III.A and IV.A.i.

¹⁷ Article 1: ‘Men are born and remain free and equal in rights. Social distinctions may be based only on considerations of the common good.’ Article 6: ‘The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents.’

¹⁸ Article 13: ‘The President of the Republic shall sign the Ordinances and Decrees deliberated upon in the Council of Ministers. He shall make appointments to the civil and military posts of the State.’ Article 21: ‘The Prime Minister shall direct the actions of the Government ... Subject to article 13, he shall have power to make regulations and shall make appointments to civil and military posts.’

¹⁹ Title XII: ‘Of Territorial Communities’, arts 72 to 75-1.

²⁰ Title XIII: ‘Transitional provisions pertaining to New Caledonia.’

‘nationalisation of public services’²¹ is planned, but these days, it is privatisation rather than nationalisation that is allowed by statutes.²² ‘Nationalisation’ then becomes an obsolete principle of administrative organisation.

- *Administrative procedure*: there is no constitutional principle concerning administrative protection. Some general principles only relate to the judicial authority²³ and not the administrative authorities.

B. General Legislation and Codes

General legislation and codes²⁴ were not frequently used in French administrative law, which was more concerned by sectorial and limited laws.²⁵ Yet, since the 1970s, some general legislation concerns public administration and sets out a number of principles of general administrative law. These general legislation are now continued by a new general code that groups together many of these principles:

- *Principles of action*: since 2016, legality (lawfulness) is affirmed in a new general code, the Code of relations between the public and the administration, at its beginning.²⁶ Impartiality, equality, neutrality and secularism are also mentioned in this code,²⁷ but these principles are not defined precisely.²⁸
- *Forms of action*: no general legislation relates to forms of action. The new 2016 code only distinguishes three sorts of administrative acts: regulatory, individual,

²¹ Paragraph 9: ‘All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society.’

²² For example, about ‘Aéroports de Paris’ and ‘La Française des jeux’: Law n° 2019-486, 22 May 2019, relative à la croissance et à la transformation des entreprises (loi PACTE), arts 130 and 137.

²³ Title VIII: ‘Of Judicial Authority’, art 66: ‘No one shall be arbitrarily detained. / The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute’; art 66-1: ‘No one shall be sentenced to death’. In the Declaration of 1789, some principles concern criminal procedure (prohibition of arbitrary detention, lawfulness of offences and penalties, presumption of innocence: arts 7, 8 and 9).

²⁴ On the structuration of the French legislation even by the codification, see C Jauffret-Spinosi (n 11) 266.

²⁵ M Touzeil-Divina, ‘De Gérando et l’enseignement du droit administratif’ (2013) *Revue d’histoire des facultés de droit et de la science juridique* 395.

²⁶ Code des relations entre le public et l’administration, CRPA (Code of relations between the public and the administration), art L. 100-2: ‘L’administration agit dans l’intérêt général et respecte le principe de légalité. Elle est tenue à l’obligation de neutralité et au respect du principe de laïcité. Elle se conforme au principe d’égalité et garantit à chacun un traitement impartial’ (‘Administration acts in the general interest and respects the principle of legality. It is bound by the obligation of neutrality and respect for the principle of secularism. It complies with the principle of equality and guarantees everyone impartial treatment’).

²⁷ P Terneyre and J Gourdou, ‘L’originalité du processus d’élaboration du code : le point de vue d’universitaires membres du “cercle des experts” et de la Commission supérieure de la codification’ (2016) *Revue française de droit administratif* 9.

²⁸ C Vautrot-Schwarz, ‘Codifier et définir. L’exemple des définitions dans le Code des relations entre le public et l’administration’ (2016) 8 *Droit administratif* 23; D Costa, ‘Nullus codex sine definitione’ (2014) *Actualité juridique – Droit administratif* 185.

and not regulatory and not individual.²⁹ These distinctions have some important consequences for the legal regime of these acts, especially in relation to their coming into force, or amending or deleting them.³⁰

- *Administrative organisation*: some general legislation defines principles of administrative organisation, especially decentralisation.³¹ There is a special code that governs this matter.³² But there is no legislation about principles of administrative organisation such as hierarchy or delegation. Since 2017, there has been general legislation on public and independent administrative authorities.³³ However, some other forms of general legislation have related to rights and obligations of public servants since 1983–84, albeit subject to numerous modifications (the last of which was in August 2019).³⁴ A new general code dedicated to civil service was finally adopted in 2021.³⁵
- *Administrative protection*: since 2016 and the adoption of the Code of relations between the public and the administration, few principles are stated in this code, such as the right to be heard³⁶ and the right to fairness.³⁷ These

²⁹ CRPA (Code of relations between the public and the administration) art L. 200-1: 'Pour l'application du présent livre, on entend par actes les actes administratifs unilatéraux décisifs et non décisifs. / Les actes administratifs unilatéraux décisifs comprennent les actes réglementaires, les actes individuels et les autres actes décisifs non réglementaires. Ils peuvent être également désignés sous le terme de décisions, ou selon le cas, sous les expressions de décisions réglementaires, de décisions individuelles et de décisions ni réglementaires ni individuelles' (For the purposes of this section, unilateral administrative acts are decisory and non-decisory administrative acts. / Unilateral administrative acts include regulatory acts, individual acts and other non-regulatory decisory acts. They may also be referred to as decisions or, as the case may be, as regulatory decisions, individual decisions and decisions that are neither regulatory nor individual).

³⁰ CRPA (Code of relations between the public and the administration), arts L. 240-1 ff; see above, section III.D.i.

³¹ Law n° 82-213, 2 March 1982, relative aux droits et libertés des communes, des départements et des régions; Law n° 2015-991, 7 August 2015, portant nouvelle organisation territoriale de la République ('loi NOTRe'); Law n° 2022-217, 21 February 2022, relative à la différenciation, la décentralisation, la déconcentration et portant diverses mesures de simplification de l'action publique locale.

³² Code général des collectivités territoriales, CGCT (General Code of Local Authorities): Law n° 96-142, 21 February 1996, relative à la partie législative du Code général des collectivités territoriales; Decree n° 2000-318, 7 April 2000, relative à la partie réglementaire du Code général des collectivités territoriales.

³³ Organic Law n° 2017-54, 20 January 2017, relative aux autorités administratives indépendantes et autorités publiques indépendantes; Law n° 2017-55, 20 January 2017, portant statut général des autorités administratives indépendantes et des autorités publiques indépendantes.

³⁴ Law n° 83-634, July 13th 1983, portant droits et obligations des fonctionnaires; Law n° 84-16, 11 January 1984, portant dispositions statutaires relatives à la fonction publique de l'État; Law n° 84-53, 26 January 1984, portant dispositions statutaires relatives à la fonction publique territoriale; Law n° 86-33, 9 January 1986, portant dispositions statutaires relatives à la fonction publique hospitalière; Law n° 2019-828, 6 August 2019, de transformation de la fonction publique.

³⁵ Code général de la fonction publique, CGFP (Civil Service General Code): Ordinance (delegated legislation) n° 2021-1574, 24 November 2021, portant partie législative du code général de la fonction publique, *Journal officiel*, 5 December 2021; C de Salins, B Chavanat and J Michel, 'Le code général de la fonction publique, enfin!' (2022) *Actualité juridique – Droit administratif* 287; F Melleray, 'Le code général de la fonction publique : une arlésienne?' (2019) *Actualité juridique – Fonction publique* 309.

³⁶ CRPA (Code of relations between the public and the administration), arts L. 121-1 ff.

³⁷ *ibid* art L. 100-2 (see above n 26).

principles were first stated in some general laws adopted in the 1970s³⁸ and updated in 2000.³⁹

C. Secondary Legislation and Sectorial Codes

Secondary legislation and sectorial codes concern more special administrative law⁴⁰ than general administrative law:

- *Principles of action*: no secondary legislation concerns these principles. It is logical because precisely principles of action belong to general and not special administrative law.
- *Forms of action*: many sectorial codes relate to some forms of action, such as local authorities (code général des collectivités territoriales),⁴¹ public contracts (code de la commande publique),⁴² public property (code général de la propriété des personnes publiques)⁴³ or police activities (code de la sécurité intérieure).⁴⁴
- *Administrative organisation*: as previously noted, there is a sectorial code for relationships between the state and the territorial communities. In addition, many special laws delegate some missions of general interest to private

³⁸Law n° 78-753, 17 July 1978, portant diverses mesures d'amélioration des relations entre l'administration et le public; Law n° 79-587, 11 July 1979, relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public.

³⁹Law n° 2000-321, 12 April 2000, relative aux droits des citoyens dans leurs relations avec les administrations; P Ferrari, 'Les droits des citoyens dans leurs relations avec les administrations; commentaire général de la loi n° 2000-321 du 12 avril 2000' (2000) *Actualité juridique – Droit administratif* 471.

⁴⁰In the Italian chapter in this book, R Caranta explains the same about sectoral codification (R Caranta, 'Administrative Proceedings in Italy', section II).

⁴¹G Braibant, 'Le code général des collectivités territoriales' (1996) *Revue française de droit administratif* 177; see before n 32.

⁴²Code de la commande publique (CCP; Public Procurement Code), see below n 65; H Hoepffner and P Terneyre, 'La place des principes dans le code de la commande publique' (2019) *Revue française de droit administratif* 206; C Maugué and S Roussel, 'La codification de la jurisprudence dans le code de la commande publique : jusqu'où?' (2019) *Revue française de droit administratif* 213; F Melleray and R Noguellou, 'La codification de règles jurisprudentielles' (2019) *Actualité juridique – Droit administratif* 381; P Bourdon, 'Le code de la commande publique: une codification à droit quasi-constant' (2020) *Actualité juridique – Droit administratif* 149.

⁴³Code général de la propriété des personnes publiques (CGPPP; Public Property General Code): Ordinance n° 2006-460, 21 April 2006, relative à la partie législative du code général de la propriété des personnes publiques; Decree n° 2011-1612, 22 November 2011, relatif aux première, deuxième, troisième et quatrième parties réglementaires du code général de la propriété des personnes publiques; P Yolka, 'Naissance d'un code: la réforme du droit des propriétés publiques' (2006) 24 *La semaine juridique – édition entreprise act* 269; C Maugué, G Bachelier, 'Genèse et présentation du code général de la propriété des personnes publiques' (2006) *Actualité juridique – Droit administratif* 1073.

⁴⁴Code de la sécurité intérieure (CSI; Internal Security Code): Ordinance n° 2012-351, 12 March 2012, relative à la partie législative du code de la sécurité intérieure; Decree n° 2013-1112, 4 December 2013, relatif à la partie réglementaire du code de la sécurité intérieure; Decree n° 2013-1113, 4 December 2013, relatif aux dispositions des livres Ier, II, IV et V de la partie réglementaire du code de la sécurité intérieure.

entities, in the cultural, social or sporting field. For example, the Sport Code allows some ‘federations’ – under powers delegated by the minister of sports – to exercise missions of public service such as the organisation of national or international competitions.⁴⁵

- *Administrative protection*: no specific secondary legislation concerns this protection, except the Administrative Justice Code, which has existed since 2001, but especially dedicated to administrative jurisdictions, not to administrative authorities. This code concerns administrative tribunals, administrative courts of appeal and the Council of State, and outlines, at its beginning, the main principles of judicial protection and processual organisation.⁴⁶

D. Court Practice

Court practice is very important in French administrative law; often, it precedes legislation or codes.⁴⁷ As one great French jurist said, ‘administrative law is fundamentally jurisprudential’.⁴⁸ Despite the fact that in France there is a three-tiered system of administrative courts (as previously exposed, administrative tribunals, administrative courts of appeal and the Council of State),⁴⁹ the main producer of general administrative law is the French Council of State itself, which has existed since 1799, despite its dual function as advisor and judge. It is the source of many principles of general administrative law.⁵⁰ Created under the ‘Consulate’ (1799–1804)⁵¹ headed by Napoleon Bonaparte, this institution is still the nerve centre of administrative law and beyond in French law, both because of its dual function and the influence of its members, inside and outside of the

⁴⁵ Code du sport (Sport Code), arts L. 131-1 ff, L. 131-14 and 15; Ordinance n° 2006-596, 23 May 2006, relative à la partie législative du code du sport; Decrees n° 2007-1132 and 2007-1133, 24 July 2007.

⁴⁶ Administrative Justice Code, arts L. 1 to L. 11; F Lombard, ‘L’utilité contentieuse du Titre préliminaire du Code de justice administrative’ (2009) *Actualité juridique – Droit administratif* 1755; see above section III.D.ii.

⁴⁷ As S De Somer and I Opdebeek point out in their chapter in this book, French general administrative law, like Belgian general administrative law, ‘is still to a large extent judge-made law’ (S De Somer and I Opdebeek, ‘Codification of Belgian Administrative Law: “Nothing is Written”’, section II.F.

⁴⁸ R Chapus, *Droit administratif général*, 15th edn, vol 1 (Paris, Montchrestien, 2001) 6, fn 11; G Vedel, ‘Le droit administratif peut-il être indéfiniment jurisprudentiel?’ (1979) 31 *Études et documents du Conseil d’État* 31.

⁴⁹ It is the same in the Swedish system, as is pointed out in the Swedish chapter in this book: J Reichel and M Ribbing (n 7) section III.B. The same remark can be noted in France as in Sweden: ‘the administrative courts were still considered to constitute a form of ‘superior authorities’ and to fall within the administrative structure rather than the judiciary’ (section III.B).

⁵⁰ M Long, P Weil, G Braibant, P Delvolvé and B Genevois, *Les grands arrêts de la jurisprudence administrative*, 23rd edn (Paris, Dalloz, 2021) 1160 (hereinafter *GAJA*); see also J-C Bonichot, P Cassia and B Poujade, *Les grands arrêts du contentieux administratif*, 8th edn (Paris, Dalloz, 2022) 1592 (hereinafter *GACA*).

⁵¹ The contemporaneous Council of State was established by the Constitution of the Consulate in 13 December 1799 (22 Frimaire an VIII).

Council of State (government, public establishments, private companies, Superior Codification Commission⁵²).⁵³ The Council of State was, at its creation, contemporary with the ‘Civil Code’, another Napoleonic achievement, but was built ‘against’ the latter, unrivalled in administrative field, and ‘against’ the Court of Cassation – the supreme court in private law – in order not only to create French administrative law but also to justify its own existence.⁵⁴

- *Principles of action*: the principle of legality was first established by case law before being enshrined by statute law with the 2016 Code.⁵⁵ The same is true for principles of equality,⁵⁶ neutrality,⁵⁷ secularism⁵⁸ and impartiality.⁵⁹ But some other principles are still only jurisprudential, such as proportionality⁶⁰ and the prohibition of retroactivity.⁶¹
- *Forms of action*: many rules are specified by case law. The French Council of State defined the categories of regulatory acts⁶² and individual decisions, as well as that of public contracts,⁶³ because legislation was often silent on these matters. However, the Code of relations between the public and the administration and the Public Procurement Code have codified – and have been tempted to simplify – the previous case law,⁶⁴ although in relation to contracts, EU law has challenged its influence on French case law.⁶⁵

⁵² See below n 78.

⁵³ G Bigot (n 2) 31 ff; D Lochak, *Le rôle politique du juge administratif français* (Paris, LGDJ, 1972); B Latour, *La fabrique du droit, Une ethnographie au Conseil d'État* (Paris, La Découverte, 2002); B Pacteau, *Le Conseil d'État et la fondation de la justice administrative au XIX^e siècle* (Paris, PUF, 2003); A Hachemi, *Le juge administrative et la loi (1789–1889)* (Paris, LGDJ, 2020).

⁵⁴ F Burdeau, *Histoire du droit administratif* (Paris, PUF, 1995); G Bigot, *L'autorité judiciaire et le contentieux de l'administration : vicissitudes d'une ambition (1800–1872)* (Paris, LGDJ, 1999); S Gilbert, *Le juge judiciaire, gardien de la propriété privée immobilière, étude de droit administratif* (Paris, Mare et Martin, 2011).

⁵⁵ CE, ass, 17 February 1950, *Min Agriculture c Dame Lamotte*, Rec CE 110, GAJA (n 50) n° 56, 383.

⁵⁶ CE, ass, 7 February 1958, *Syndicat des propriétaires de forêts de chênes-lièges d'Algérie*, Rec CE 74.

⁵⁷ CE, ass, 28 May 1954, *Barel et autres*, Rec CE 308, GAJA (n 50) n° 63, 444.

⁵⁸ CE, ass, 2 November 1998, *Kherouaa et autres*, Rec CE 389.

⁵⁹ CE, sect, 2 March 1973, *Dlle Arbousset*, Rec CE 190.

⁶⁰ CE, 19 May 1933, *Benjamin*, Rec CE 541, GAJA (n 50) n° 42, 280. As Heintzen points out in the German and EU chapter in this book, this principle ‘owes its establishment to the case law of the Prussian Higher Administrative Court’ (M Heintzen (n 5) section I.A.ii).

⁶¹ CE, ass, 25 June 1948, *Société du Journal « l'Aurore »*, Rec CE 289, GAJA (n 50) n° 55, 375.

⁶² CE, 6 December 1907, *Compagnie des chemins de fer de l'Est et autres*, Rec CE 913, concl J Tardieu, GAJA (n 50) n° 17, p 106.

⁶³ CE, 6 February 1903, *Terrier*, Rec CE 94, concl J Romieu, GAJA (n 50) n° 11, p 71; CE, 4 March 1910, *Thérond*, Rec CE 193, concl G Pichat, GAJA (n 50) n° 19, p 121; CE, 31 July 1912, *Sté des granits porphyroïdes des Vosges*, Rec CE 909, concl L Blum, GAJA (n 50) n° 23, 148.

⁶⁴ See above, nn 26 and 42.

⁶⁵ Directives 2014/24/UE and 2014/25/UE, 26 February 2014, JOUE L 28 March 2014; decree n° 206-360 and 361, 25 March 2016, relatifs aux marchés publics et aux marchés de défense et de sécurité; directive 2014/23/UE, 26 February 2014, JOUE L 28 March 2014; decree n° 2016-65, 1 February 2016, relatif aux contrats de concession; ordonnance n° 2018-1074, 26 November 2018, portant partie législative du code de la commande publique; decree n° 2018-1075, 3 December 2018, portant partie réglementaire du code de la commande publique.

- *Administrative organisation*: judge-made law outlines some principles of administrative organisation, such as relationships between the state and the territorial communities⁶⁶ or even between the main administrative authorities such as the President of the Republic and the Prime Minister.⁶⁷
- *Administrative protection*: all principles of administrative protection originated, first, in judge-made law. Moreover, the theory of ‘general principles of administrative law’ has been born in many famous cases, for example on the right to be heard.⁶⁸

Lastly, one further remark can be made: some questions of general administrative law are influenced by the European Convention on Human Rights, especially principles of action and administrative protection and procedure. Judge-made law by the European Court of Human Rights is very important and can thus be a main source of French administrative law. A similar comment can be made about the Court of Justice of the European Union in relation to both special administrative law (public procurement) and principles of good administration in the EU Charter of Fundamental Rights.⁶⁹

III. The Codification of Administrative Law

The codification of administrative law presents some peculiarities in French law and has both benefits and disadvantages. But first the consequences of the legal sources of administrative law must be mentioned.

A. The Consequences of the Legal Sources of Administrative Law

Differences between sources of administrative law have some consequences: when an administrative action or act is controlled by the administrative judge, the control depends on which source is the foundation of this action or decision.⁷⁰ This control, in relation to the French law on which the administrative act or action is based, is dissymmetrical: the control of constitutionality is indirect – through the Constitutional Council – while the control of conventionality is direct.

⁶⁶ CE, sect, 18 April 1902, *Commune de Nérès-les-Bains*, Rec CE 275, GAJA (n 50) n° 9, 61.

⁶⁷ CE, 27 April 1962, *Sicard*, Rec CE 279; CE, ass, 10 September 1992, *Meyet*, Rec CE 327, concl D Kessler.

⁶⁸ CE, sect, 5 May 1944, *Dame Trompier-Gravier*, Rec CE 133, GAJA (n 50) n° 50, 338; CE, ass, 26 October 1945, *Aramu*, Rec CE 213.

⁶⁹ Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

⁷⁰ cf the Italian chapter in this book, R Caranta (n 40) section IV.D.

- *If the source is constitutional*, the administrative judge cannot control by himself the legality of the administrative action or the administrative decision. He can only, if certain conditions are fulfilled, ask the constitutional judge to control the constitutionality of the national law which is the basis of the administrative action or decision.⁷¹
- *If the source is international* – for example, EU law or European Convention on Human Rights law – the administrative judge can control the compatibility between international law (primary and secondary) and administrative actions or decisions directly or indirectly by controlling, if necessary, the internal law which is the basis of these actions or decisions.⁷²
- On the contrary, when the source of administrative action or decision is *general or sectorial legislation or codes*, the control of the administrative judge is direct and extensive: he can control the action or the decision directly against the legislation or the codes.
- The control of the administrative judge is even deeper when the source of the administrative law is *judge-made law* because he has full discretion to modify its own jurisprudence. Incidentally, the French Council of State does not hesitate to interpret laws and codes, or even to amend them.⁷³

Because of these differences, codification seems to be a good solution to provide the administrative judge with a large degree of control over both administrative acts and actions.

B. Peculiarities of the Codification of French Administrative Law

In French law, the legislative codification is defined as the process to bring together and classify in thematic codes all the laws in force on the date of the adoption of these codes.⁷⁴ As Issalys points out in his chapter in this volume, in law, and especially in administrative law, codification refers 'to the action of formulating in a single, orderly, systematic and coherent enactment all the essential rules forming

⁷¹ Article 61-1 of Constitution of 4 October 1958: 'If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council which shall rule within a determined period.'

⁷² CE, ass, 20 October 1989, *Nicolo*, Rec CE 190, concl P Frydman, GAJA (n 50) n° 82, p 612; CE, ass, 19 April 1991, *Belgacem & Mme Babas*, Rec CE 152 and 162.

⁷³ CE, ass, 17 February 1950, *Min Agriculture c Dame Lamotte* (n 55); see also CE, ass, 13 July 2016, *Czabaj* (see n 126).

⁷⁴ Article 3, Law n° 2000-321, 12 April 2000 (n 39): 'La codification législative rassemble et classe dans des codes thématiques l'ensemble des lois en vigueur à la date d'adoption de ces codes.'

a fairly extensive branch of the legal system’;⁷⁵ such an enactment is thus called a ‘code’. In French law, it is composed of two parts: a legislative one, adopted by the Parliament or, more frequently, by governmental delegated legislation; and a regulatory one, directly adopted by the government.

In 2016, the codification of general administrative law especially concerns general administrative actions and acts: it provides principles and forms of administrative action.⁷⁶ Thus, it is both procedural and substantive.⁷⁷ The process of the codification of the relationship between administrative authorities and citizens has taken a long time because of peculiarities of the French codification system.

The French Council of State is both the supreme administrative judge and the government’s advisor. Further, the influence of its members on the state apparatus is very significant, because they are present in the highest echelons of the state. Legally, it is the Prime Minister who presides the Superior Codification Commission, but its vice-president – who is involved in the day-to-day codification process – is a member of the Council of State.⁷⁸ That is the reason why the codification of administrative law was so time-consuming: unofficially, it is because the Council of State did not trust the transformation of judge-made law (ie, administrative law made by itself) into codified law.⁷⁹ Its fears were exaggerated because, since 2016, the Council of State interprets the Code of relations between the public and the administration⁸⁰

⁷⁵ See in this book P Issalys, ‘A Persistent Taste for Diversity: Codification of Administrative Law in Canada’, section III.

⁷⁶ Article 3, Law n° 2013-1005, 12 November 2013, *habilitant le gouvernement à simplifier les relations entre l’administration et les citoyens*: ‘Ce code regroupe et organise les règles générales relatives aux procédures administratives non contentieuses régissant les relations entre le public et les administrations de l’État et des collectivités territoriales, les établissements publics et les organismes chargés d’une mission de service public. Il détermine celles de ces règles qui sont applicables aux relations entre ces administrations et entre ces administrations et leurs agents. Il rassemble les règles générales relatives au régime des actes administratifs’ (This code brings together and organises the general rules relating to non-contentious administrative procedures governing relations between the public and the administrations of the state and the local authorities, public institutions and bodies entrusted with a public service mission. It shall determine those rules which are applicable to relations between these administrations and between these administrations and their servants. It brings together the general rules on the system of administrative acts); T Boussarie, *La codification de la procédure administrative : Études autour du code des relations entre le public et l’administration* (Paris, Mare & Martin, 2021) 698; A Zaradny, ‘Le Code des relations entre le public et l’administration est-il la *lex generalis* des relations entre l’Administration et le public?’ (2016) 8 *Droit administratif* 33; A Zaradny, ‘Codification et État de droit’ (thesis, Paris, Université Paris II, 2011) 896.

⁷⁷ It is different from the APA (Administrative Procedure Act, 1946) in US administrative law: cf the US chapter in this book: EL Rubin, ‘The United States: Systematic But Incomplete Codification’, section V and also section III on the presentation of the APA, which ‘divides administrative action into two categories: rule-making and adjudication’.

⁷⁸ Decree n° 89-647, 12 September 1989, *relatif à la composition et au fonctionnement de la Commission supérieure de codification*; Code of relations between the public and the administration, art L. 351-1; see below, section III.C.

⁷⁹ P Gonod, ‘La fin de “l’exception française”?’ (2014) *Actualité juridique – Droit administratif* 395.

⁸⁰ Code des relations entre le public et l’administration, CRPA (Code of relations between the public and the administration) – see above, n 26.

in the way it thinks necessary. Thus, there is neither petrification nor ossification⁸¹ of the general administrative law, since it had been codified. Actually, when the case law is codified, the Superior Codification Commission distinguishes the petrifying codification from the reforming codification: the former does not modify the codified principle or rule, unlike the latter.⁸² In administrative matters, the latter way has been preferred.

The codification of the relations between the public and the administration was specific: it was 'experimental' for the Superior Codification Commission, for many reasons.⁸³ First, it was elaborated with the collaboration of a 'circle of experts'.⁸⁴ Second, there has been a derogation from the 'codistic' techniques of numbering the articles of the code: legislative and reglementary articles are not separated into two parts of the code, but interspersed throughout the sub-parts of the code.⁸⁵ Third, it was not a 'general' code (understood in the sense of being 'total' or 'global'), but it intended to bring together all 'general rules' concerning the relations between citizens and public administration.⁸⁶ Lastly, the codification has obviously brought together existing principles and rules, whether they were legislative, regulatory or jurisprudential, but it has also innovated by creating new rules.⁸⁷ The case law has then been greatly simplified – and amended – by the codification, but this has not prevented the administrative judge from again interpreting the code base on advances in case law.

One example is typical: in the Code, there are three types of administrative acts: regulatory, individual, and not regulatory and not individual. The Code also adds that these acts are administrative decisions,⁸⁸ ie, which changes the legal order; thereby those acts and decisions can be controlled by the administrative judge. However, in March 2016, the Council of State held, in an important judgment, that some administrative acts are not decisions, but can still be controlled

⁸¹ cf the Norwegian chapter in this book: JC Fløysvik Nordrum, 'Codification of Norwegian Administrative Law', section VII.B; cf also the Australian chapter in this book: J Boughey, 'The "Codification" of Administrative Law in Australia', sections IV.C and IV.C.iii on 'ossifying the common law'.

⁸² On the Public Property General Code (n 43), see Superior Codification Commission, *Rapport annuel 2015* (Paris, Les éditions des Journaux Officiels, 2016) 14.

⁸³ Superior Codification Commission (n 82) 8 ff; Superior Codification Commission, *Rapport annuel 2014* (Paris, Les éditions des Journaux Officiels, 2015) 21 ff: avis sur le projet de code des relations entre le public et les administrations (advice on the draft code on relations between the public and the administrations), 28 March 2014.

⁸⁴ Superior Codification Commission (n 83) 21; see P Terneyre and J Gourdou (n 27) on the participation of scholars to this circle and thus the elaboration of this code.

⁸⁵ Superior Codification Commission (n 83) 22; Superior Codification Commission (n 82) 8, 68 (Conseil d'État, avis de l'assemblée générale (advice of the general assembly), 8 October 2015).

⁸⁶ Superior Codification Commission (n 83), p 21.

⁸⁷ Article 3, Law n° 2013-1005, 12 November 2013 (n 76).

⁸⁸ cf the Swiss chapter in this book: F Uhlmann, 'Codification of Administrative Law in Switzerland', section II.B.

by the administrative judge.⁸⁹ The court practice is against the Code, but prevails over it.⁹⁰ Moreover, the Code did not change following this new interpretation, which nevertheless prevails. This would not be possible without the central role played by the French Council of State in the process of the creation of both legislation (and codes) and judge-made law, especially in the administrative field.⁹¹

In addition, when the process of codification was successfully undertaken, it was led by two persons at the head of the 'circle of experts', one member of the Council of State, one another member of a subordinated administrative court, who in turn became a member of the Council of State. They proceeded by codifying the administrative case-law, especially from the Council of State.⁹² Actually, the process of codification is unusual not only in administrative law, but also in the entire legal system.

C. The Process of Codification in the French Legal System

In the legal French system, there were three major periods of codification (1804, 1948 and 1989) and nowadays codification is an integral part of a bigger process – the simplification of law – the objectives of which are both the accessibility and intelligibility of law required by constitutional law.⁹³ It has a pedagogical aim, which distinguishes it from the ordinary legislative writing.⁹⁴ Even if 'codification is a cooperation tool between the legislative and the executive',⁹⁵ it has become a governmental matter, and only partially parliamentary,⁹⁶ with some exceptions.

⁸⁹ CE, ass, 21 March 2016, *Fairvesta International GmbH*, req n° 368082, *Rec CE* 77, concl S von Coester; CE, ass, 21 March 2016, *Société NC Numericable*, n° 390023, *Rec CE* 89, concl V Daumas; both *GAJA* (n 50) n° 113, 955.

⁹⁰ It seems the same in England and Wales, as Nason points out in her chapter in this book: S Nason, 'Codification of Administrative Law in the United Kingdom: Beyond the Common Law', section IV.1.

⁹¹ See above, nn 53 and 54.

⁹² M Vialettes and C Barrois de Sarigny, 'Le projet d'un code des relations entre le public et les administrations' (2014) *Actualité juridique – Droit administratif* 402; M Vialettes and C Barrois de Sarigny, 'La fabrique d'un code' (2016) *Revue française de droit administratif* 4.

⁹³ J-E Schoettl, note sous CC, décision n° 99-421 DC, 16 December 1999, *Codification par ordonnances*, (2000) *Actualité juridique – droit administratif* 31; S Lamouroux, 'La codification ou la démocratisation du droit' (2001) *Revue française de droit constitutionnel* 801; C Cerda-Guzman, 'Codification et constitutionnalisation', thesis (Bordeaux, Université Bordeaux IV, 2010).

⁹⁴ Superior Codification Commission, *Rapport annuel 2017* (Paris, Les éditions des Journaux Officiels, 2018) 6; Superior Codification Commission, *Rapport annuel 2018* (Paris, Les éditions des Journaux Officiels, 2019) 7: 'À la différence de la loi ordinaire qui doit ne comporter que des dispositions de portée normative, la spécificité d'un code est de pouvoir comprendre, dans la mesure du strict nécessaire, des dispositions de nature exclusivement pédagogique afin d'éclairer et de guider les usagers, pour un meilleur accès au droit' (Unlike the ordinary law which must include only provisions of normative scope, the specificity of a code is to be able to understand, to the extent strictly necessary, provisions of an exclusively pedagogical nature in order to enlighten and guide users, for better access to the law).

⁹⁵ Article 1.3, Circular, 30 May 1996, relative à la codification des textes législatifs et réglementaires, NOR: PRMX9601534C.

⁹⁶ cf Y Robineau, 'Droit administratif et codification' (1995) *Actualité juridique – Droit administratif* NS 110, 111: 'le Parlement devient acteur de la codification' (the Parliament becomes actor of the

- It is only when some *social issues* are involved that codes are amended directly by the Parliament, which discusses the draft codification, as was the modification of the 'Civil Code',⁹⁷ on homosexual marriage⁹⁸ or medical assistance for procreation.⁹⁹
- These exceptions aside, for most codes, the Parliament is only consulted by the government, which obtains the power to adopt some delegated legislation by 'ordinance'.¹⁰⁰ The whole process is coordinated by the Superior Codification Commission, which is composed of senior officials, including magistrates, parliamentarians (deputies and senators) and scholars, in close contact with the government's General Secretariat.¹⁰¹ Often, the process is facilitated by working groups:¹⁰² some are ministerial or interministerial, while others are composed by members of the Council of State; less frequently, some scholars can participate to those working groups.¹⁰³ The Superior Codification Commission shall draw up an annual report on its activities, which details the codification process in the past year.¹⁰⁴
- Methods of codification have been thoroughly experienced since the existence of the Commission (1989), even though they have been criticised:¹⁰⁵ more than 65 codes exist in the French legal system, almost all based on a similar plan of formal distribution of the articles in two separated parts: the legislative one and the regulatory one.¹⁰⁶ These methods use software tools, especially 'Magicode', which was developed by both a private company and the Superior Codification Commission in 1991 and has been constantly upgraded

codification) and 114: 'il y a un temps pour codifier et un temps pour réformer' (there is a time to codify and a time to reform); G Braibant, 'Problèmes actuels de la codification' (1994) *Revue française de droit administratif* 663, 664: 'On est passé de la codification "administrative" ... à une codification partiellement législative' (We have moved from an 'administrative' codification ... to a partially legislative codification).

⁹⁷ Civil Code, promulgated on 21 March 1804 and amended many times subsequently.

⁹⁸ Law n° 2013-404, 17 May 2013, ouvrant le mariage aux couples de personnes de même sexe.

⁹⁹ Law n° 2021-1017, 2 August 2021, relative à la bioéthique: arts 6 and 7 amend the Civil Code, while arts 1-5 amend the Public Health Code.

¹⁰⁰ P Gonod, 'La simplification du droit par ordonnance' (2003) *Actualité juridique - Droit administratif* 1652. In the Italian chapter in this book, Caranta explains the same in Italy (R Caranta (n 40) s VI).

¹⁰¹ G Braibant, 'Codifier pour mieux réformer: entretien avec O Dufour', (1997) 140 *Les petites affiches* 5; G Braibant, 'Codifier: Pourquoi? Comment?' (1995) 73 *Revue française d'administration publique* 127. Article 2, Decree n° 89-647, 12 September 1989, relatif à la composition et au fonctionnement de la Commission supérieure de codification, amended since 1989.

¹⁰² Article 1.1.4, Circular (n 95).

¹⁰³ This was the case for the codification of the Code of relations between the public and the administration; see above, n 84.

¹⁰⁴ See www.legifrance.gouv.fr/contenu/menu/autour-de-la-loi/codification/rapports-annuels-de-la-commission-superieure-de-codification.

¹⁰⁵ H Moysan, 'La codification à droit constant ne résiste pas à l'épreuve de la consolidation' (2002) 4 *Droit administratif* 6. cf *contra* R Schwartz, 'Éloge de la codification' (2002) 12 *Droit administratif* 11.

¹⁰⁶ M Guyomar, 'Les perspectives de la codification contemporaine' (2014) *Actualité juridique - Droit administratif* 400.

and improved.¹⁰⁷ Actually, these methods have fostered the emergence of a new discipline, alongside ‘legistic’:¹⁰⁸ ‘codistic’.¹⁰⁹ Thanks to these methods, the codification can operate in different ways:¹¹⁰ without any change of positive law, by simple reorganisation or by depth consolidation.¹¹¹ The first possibility is the default methodology, which admits the other two as exceptions, when it is necessary but rare to rewrite principles and rules.¹¹² Codifying existing laws makes it possible to separate two successive steps of legal evolution: ‘the recasting of the law on the one hand and its reform on the other’.¹¹³ When codification is innovative, it recasts and reforms at the same time, as the Superior Codification Commission did with the Code of relations between the public and the administration (see above, section III.B).¹¹⁴

D. Advantages and Disadvantages of Codification

i. Advantages of the Codification of Administrative Law

When it is codified, administrative law offers the advantage of being reliable. The chapter on the Netherlands in this volume points out in relation to the Dutch General Administrative Law Act (GALA) that the codification allows certainty,

¹⁰⁷ Annex 24, ‘Un outil informatique pour la codification: Magicode’ in Superior Codification Commission (ed), *Rapport annuel 2007* (Paris, Les éditions des Journaux Officiels, 2008) 78 ff.

¹⁰⁸ Premier ministre (Secrétariat Général du Gouvernement), Conseil d’État, *Guide de légistique*, 3rd edn (Paris, La documentation française, 2017) 109 ff (1.4.2. Codification).

¹⁰⁹ See above, n 94.

¹¹⁰ As Caranta points out in the Italian chapter in this book, ‘testi unici’ can be ‘compilativi’ or ‘innovativi’ (R Caranta (n 40) s VI).

¹¹¹ M Guyomar, ‘Y compris à droit constant, la codification revêt une dimension non seulement formelle mais aussi substantielle. Entretien avec Mattias Guyomar’ (2015) 48 *La semaine juridique édition générale* 1271.

¹¹² Article 3, para 2, Law n° 2000-321 (n 39): ‘Cette codification se fait à droit constant, sous réserve des modifications nécessaires pour améliorer la cohérence rédactionnelle des textes rassemblés, assurer le respect de la hiérarchie des normes et harmoniser l’état du droit’ (Such codification shall be carried out with existing laws, subject to such modifications as may be necessary to improve the consistency of the texts collected, to ensure compliance with the hierarchy of norms and to harmonize the state of the law); art 2.1.1, Circular (n 95): ‘la discussion devant le Parlement peut conduire à ajouter à la codification à droit constant quelques amendements de fond tendant à améliorer la législation.’ (the discussion before Parliament may lead to the addition to the codification of the existing laws of some substantive amendments aimed at improving legislation).

¹¹³ Superior Codification Commission (n 82) 12: ‘L’avantage de la codification à “droit constant” est de permettre de clairement distinguer deux opérations de nature différente et qui doivent, en principe, être successives: la refonte du droit, d’une part, puis sa réforme, de l’autre’ (‘The advantage of codification under “existing law” is that it is possible to distinguish clearly between two operations of a different nature which must, in principle, be successive: the recasting of the law, on the one hand, and its reform, on the other’).

¹¹⁴ See above n 87.

accessibility, and uniformity of the legal rules applicable to the administration.¹¹⁵ That is the reason why the French general administrative law was codified: to be more easily understood by both administration and citizens and to be most likely applied, especially by the administrative authorities.¹¹⁶

- For example, the withdrawal of an administrative act (ie, revocation with retroactivity) was submitted to very unclear judge-made law. Schematically, the Council of State decided in 2001 and 2009 that both past and future revocation and even only future revocation was subject to two main conditions: one attached to a time limit of four months after the elaboration of the administrative act and the other attached to the unlawfulness of the act.¹¹⁷ Other conditions affected the discretion of the administrative authority to revoke the act, whether optionally or obligatorily, retroactively or not. In this peculiarly tricky field, codification simplifies matters. It is considered to be a codification of the judge-made law.
- Another example results from the codification of the rule which states that the silence of an administrative authority, following a citizen's request, becomes a positive answer. Until a 2013 Law,¹¹⁸ which was codified in 2016,¹¹⁹ an opposite rule was applicable (the administrative silence became a negative decision). Nowadays, since 2013, without any modification in 2016: 'The two-month silence of the administration on a request is a decision on acceptance.' Because this new rule contained mainly exceptions, the 2016 Code is clear and more applicable than the 2013 Law. However, it refers to a governmental website: it is possible to find some tables which describes the exceptions, but some of them only have an information value, not a legal value. Thus, the Code does not cover all administrative law.

¹¹⁵ See the Dutch chapter in this book: Y Schuurmans, T Barkhuysen and W den Ouden, 'Codification of Administrative Law in the Netherlands', sections III.C and V. See also the British chapter in this book: S Nason (n 90) section IV.C.

¹¹⁶ M Vialettes and C Barrois de Sarigny, 'Questions autour d'une codification' (2015) *Actualité juridique – Droit administratif* 2421. cf the Belgian chapter in this book: S De Somer and I Opdebeek (n 47) section III.E.

¹¹⁷ CE, ass, 26 October 2001, *Ternon*, *Rec CE* 497, concl F Seners; CE, sect, 6 March 2009, *Coulibaly*; Code of relations between the public and the administration, arts L 240-1 ff; G Éveillard, 'La codification du retrait et de l'abrogation des actes administratifs unilatéraux' (2015) *Actualité juridique – Droit administratif* 2474; Superior Codification Commission (n 82) 45 ff, avis portant sur le projet de code des relations entre le public et l'administration (advice on the draft code on relations between the public and the administration), séance du 10 février 2015: this advice refers specifically to the judgments of the Council of State of 2001 and 2009. cf the German chapter in this book: M Heintzen (n 5) section I.B.ii.

¹¹⁸ Law n° 2013-1005, 12 November 2013, habilitant le Gouvernement à simplifier les relations entre l'administration et les citoyens.

¹¹⁹ Code of relations between the public and the administration, arts 231-1 ff.

ii. *Disadvantages of the Codification of Administrative Law*

The French codification of administrative law has some disadvantages. Like any other source, the code can be interpreted or even transformed by the administrative supreme judge.¹²⁰ Some examples are very surprising in this respect:

- There is a French code specifically dedicated to the judicial rules of the administrative trial, which came into force in 2001: it is the Administrative Justice Code.¹²¹ As usual with French codification, its elaboration was supervised by the Superior Codification Commission and prepared by a working group, composed mainly of members of the Council of State, who were especially interested in this codification insofar it concerns the procedure before administrative jurisdictions (the Council of State, administrative courts of appeal and administrative tribunals).¹²² Some estimate that this Code has been elaborated only by the members of the Council of State, but the working group set up to prepare this Code included one very famous Parisian Full Professor of Administrative Law, René Chapus.¹²³ Yet, once again, the Council of State plays a key role to codify some rules that were mostly old and needed to be amended and reordered; most of these rules concern precisely the Council of State and the other administrative ordinary courts, which is not in the least bit surprising.¹²⁴
- In the Administrative Justice Code, there was a rule favourable to citizens: when an administrative decision did not mention in the written notification the time limit and the competent judge, the recipient could contest this decision forever. In the Code, the rule was very clear: ‘Time limits for appeals against an administrative decision may be invoked only on condition that they have been mentioned, together with the means of appeal, in the notification of

¹²⁰ As De Somer and Opdebeek explain in the Belgian chapter in this book, ‘Codification does not necessarily reduce the importance of case law as a source of law’ (S De Somer and I Opdebeek (n 47) s III.6.3).

¹²¹ J Arrighi de Casanova, ‘Commentaire de l’ordonnance n° 2000-387 du 4 mai 2000 relative à la partie Législative du Code de justice administrative; Commentaire des décrets n° 2000-388 et 2000-389 du 4 mai 2000 relatifs à la partie Réglementaire du Code de justice administrative’ (2000) *Actualité juridique – Droit administratif* 639; R Chapus, ‘La justice administrative: évolution et codification. Lecture du code de justice administrative’ (2000) *Revue française de droit administratif* 929.

¹²² The French Council of State can be the judge of first instance, for important requests, such as actions against governmental Acts, rarely the appeal judge and frequently the judge of Cassation (ie, last instance).

¹²³ J-M Sauvé, ‘L’apport de René Chapus au contentieux administratif’ in B Plessix (ed), *Hommage à René Chapus* (Paris, Éditions Panthéon-Assas, 2020); arrêté du vice-président du Conseil d’État, 27 December 1987, instituant la ‘Commission spéciale pour l’examen des textes intéressant le contentieux administratif’; R Denoix de Saint Marc, ‘Le Conseil d’État, acteur déterminant de l’élaboration des lois et règlements’ (2006) 10–11 *La Semaine Juridique* 118.

¹²⁴ J Arrighi de Casanova, ‘Le Code de justice administrative’ (2000) *Actualité juridique – Droit administratif* 639; R Chapus, ‘Lecture du Code de justice administrative’ (2000) *Revue française de droit administratif* 929; S Deygas, ‘La création du Code de justice administrative’ (2000) 7 *Procédures* 3.

the decision.¹²⁵ The redaction of this rule did not change in the Code, despite a very important judgment of the Council of State, which in July 2016 decided that this rule could apply only for a reasonable time, bearing in mind that for the Council of State, one year was considered reasonable.¹²⁶ Thus, the article of the Code which imposes no time limit for recipients is outdated. It must be understood in the light of the 2016 judgment. The question is: why was the Code not modified by the government? Why does the judgment of the Council of State prevail despite any regulatory change? Perhaps because precisely a regulatory change is operated by an administrative act of the Prime Minister, which can be contested before the administrative judge, that is, for Prime Ministers' acts, the Council of State. Even if the new rule is justified by the principle of legal certainty, which is an important non-codified underpinning of administrative action, and even if a regulatory act of the Prime Minister can be considered as legal by the administrative judge, it is easier not to change the Code.

IV. Summary and Conclusion

In this context, there is no major difference between codified and uncoded general administrative law. There is no difference for the administrative judge, who interprets all administrative rules as he thinks necessary. The difference is for the administrative authorities and for citizens who should have some clear and reliable rules when codified.

The clearness of codes comes from the sequencing of norms: all general principles – when they exist – and specific rules conform to a precise and mostly complete schedule. This means that, without prior consolidation, most of the time, codification is not effective, but, conversely, codification does not prevent reform.

In addition, when rules result from EU law (as for public contracts)¹²⁷ or are involved in new areas (for example, sustainability),¹²⁸ it is easier to codify them. No doubt the influence of the Council of State is less significant in those areas than for defining principles of administrative action. In the future, perhaps codification may be of interest to some specific areas of administrative action.

¹²⁵ Article R. 421-5, Administrative Justice Code: 'Les délais de recours contre une décision administrative ne sont opposables qu'à la condition d'avoir été mentionnés, ainsi que les voies de recours, dans la notification de la décision.'

¹²⁶ CE, ass, 13 July 2016, *Czabaj*, *Rec CE* 340, concl O Henrard.

¹²⁷ Code de la commande publique (Public Procurement Code) about procurement contracts and concessions – see above, n 65.

¹²⁸ Code de l'environnement (Environmental Code): Ordinance n° 2000-914, 18 September 2000, and Decree n° 2005-935, 2 August 2005.

In conclusion, in a country which imagines that it is the birthplace of codification,¹²⁹ the codification of administrative law can be improved. It is necessary to remember the following sentence by Portalis, one of the writers of the Civil Code in the Napoleonic period (1804): 'laws are made for humans, not humans for laws'.¹³⁰

¹²⁹ M Guyomar (n 111) 1271: 'La codification est une des caractéristiques du génie juridique français' (Codification is one of the characteristics of French legal genius).

¹³⁰ J-E M Portalis, *Discours préliminaire sur le projet de Code civil présenté le 1er pluviôse an IX par la Commission nommée par le gouvernement consulaire*, in *Discours, rapports et travaux inédits sur le Code civil publiés par le Vicomte de Portalis* (1844) 5: 'les lois sont faites pour les hommes, et non les hommes pour les lois'.