Maurer School of Law: Indiana University

Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1978

Legal Documentation and Research

Jurij Fedynskyj

Indiana University School of Law

John H. Crabb

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>

Part of the [Legal Writing and Research Commons](#)

Recommended Citation

Fedynskyj, Jurij and Crabb, John H., "Legal Documentation and Research" (1978). *Articles by Maurer Faculty*. 1824.

<https://www.repository.law.indiana.edu/facpub/1824>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.

LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Legal Documentation and Research

John H. Crabb & Jurij Fedynskyj***

GENERAL COMPARATIVE CONSIDERATIONS

Introduction. In writing from the point of view of law in the United States, we seek to explain ourselves primarily to our colleagues of the systems of the legal family of the civil law. We are of course of the same legal family as the British-oriented legal systems of the "Anglo" side of the hyphen of Anglo-American law. However, there are sufficient divergencies within our family that it would be rash indeed for us to seek to include our British-oriented brethren in our discussion. We will leave to them such explanations as they may offer, and will prudently remain on the "American" side of the hyphen.

We will initially offer some general comparative commentary between American and civilian aspects of our subject. In so doing we must necessarily assume some generalizations regarding the system of the civil law that may not be applicable in particular situations or jurisdictions. We will seek to show the elements of commonality as well as contrast.

Lest the contrasts be unduly emphasized, it can always be useful at the outset of discussions of comparative law to remind readers of the underlying unity of the two families of law. This consists of their both being recipients of the "gift" of law which the Romans bestowed on the entire Western world and its extensions. This gift means essentially the establishment of law as a distinct and independent institution of society as an instrumentality for the realization of justice, and separate notably from religion and from governmental administration.

Legal Researchers. Law is a matter of words and writing equally in both systems under review. Thus, all lawyers are necessarily researchers regardless of their particular professional functions or specializations. It suffices for both systems merely to call attention to the broad professional functions, of advocacy, counseling or planning and legal academics. They represent overlapping rather than distinct research activities, but with usually differing priorities and emphases. Perhaps some might consider research in discharge of the judicial function as an additional category, but it also seems admissible to assimilate it with the kind of research associated with advocacy.

* Visiting Professor of Law, University of Louvain.

** Assoc. Professor & Assoc. Law Librarian, Indiana University.

The authors express their appreciation to Professor Thomas J. Holton of Seton Hall University Law School for his assistance in the preparation of this article.

As between American law and the civil law, no significant distinction appears as to the primary functions or categories of legal research. The distinctions lie more in the priorities and manner of use of legal materials themselves.

We consider that these legal materials can usefully be discussed under the three broad categories of statutes, judicial decisions, and doctrine or legal literature. This also corresponds to the three generally recognized principal sources of law which are common to both systems.

Descriptions and explanations of the complicated American legal system and the kinds of its legal publications are too numerous to be cited here. We limit ourselves to the pioneer work *Effective Legal Research*, by M.O. Price and H. Bitner (1953, later editions by Bitner). Most used books in this area at the time of the preparation of this report are: *How to Find the Law*, 7th edition by M.L. Cohen (1976), and Jacobstein and Mersky's *Fundamentals of Legal Research* (1977), a successor volume to the work authored originally by E.H. Pollack.

The Advocate. In both systems the advocate seeks to persuade a tribunal to render a decision favorable to his client. We need not pause to discuss the difference between the American adversary system and the civil law's inquisitorial system as the theoretical bases for the conduct of litigation, as the difference does not significantly affect the function of research. In both systems the advocate seeks to present the law as it is in force at the time of litigation. Thus, he is primarily concerned with presently binding authority.

In the civil law system legislation is the supreme authoritative source of law and also the starting point for the orientation of legal reasoning. Traditionally "doctrine," or legal literature of a substantial nature, has held second rank as legal authority. In third place are judicial decisions, called "jurisprudence" in French terminology, but in recent times they have often been considered as competing with doctrine for the second rank. Thus, the civilian advocate supposedly follows this order of priority in the usual situation when searching for the law that is.

In American law judicial decisions occupy the supreme position that legislation does in the civil law. Of course, a statute will typically govern or be in point with respect to a legal problem with which an American lawyer is dealing when functioning as an advocate. But once this has been ascertained, he must search for judicial decisions whose interpretations of the statute are binding authority as to its true meaning. This contrasts with the conceptually persuasive role of judicial precedents in the civil law system (even though for practical purposes they may be decisive in many instances). Doctrine or legal writing has been increasingly vigorous in American law as persuasive authority. But it still is regarded as a supplementary or exceptional source of the law that is.

The Counselor. When functioning as a counselor the lawyer seeks to project the law into the future for the benefit of the client or user of his service. Thus, the research will be oriented toward the end product of projection into the future. Finding the law that is will normally be the point of departure for such research. This alone may well suffice where the future in contemplation is very immediate. But where the matter at hand is of longer range the legal counselor must see the law in additional dimensions than

merely the present, and engage cautiously in prophesying. This means envisaging the range of future contingencies of the law's development that research indicates are reasonably possible and which prudent planning should take into account. American and civilian lawyers are equally concerned with this counseling function while applying the differing techniques of their respective legal systems.

In undertaking such prophesying the counselor is to be distinguished from a soothsayer, as technological aids to legal research do not yet include a juridical crystal ball. Lines of movement of the law and probable future projections are best reflected by its past as carried forward to the present. Thus, the counseling lawyer is concerned with legislative history of laws presently in force and with earlier judicial decisions providing background to those announcing the present state of the law. But probably above all he should seek out relevant legal literature of an analytical and critical nature. These legal authors present an expertise on the particular point involved and can give valuable indications as to probable future courses of the law even if they may abstain from assuming the role of prophet.

The Legal Academician. In our triune division of the functioning lawyer we have just presented the advocate as concerned primarily with the law that is and the counselor with the law that will be. It may be expected that, to complete the symmetry of a sort of tonic chord, we will here ascribe to the legal academician the law that was. This is true at least in the sense that he will expectably be more concerned with the law that was than usually are his two colleagues whom we have just discussed. But that is far from saying that he is limited in the nature of things to the law that was. Some of his research is aimed at *de lege ferenda*.

The legal academician includes the two occupations, so often merged in the same individual, of law teacher and author of legal literature. His primary functions are exposition, analysis and critique of the law. His activities are not focused toward the affairs of any client or individual, but are directed toward the edification of students, the legal profession, or even society at large. His concern is broader and hence more creative than is the case with the advocate or the counselor. Only the nature of his particular project will determine whether he will research more in one than the other among legislation, judicial decisions or legal literature, as any of the three may be equally grist for his mill. He has relatively greater concern for the history of law because it is an indispensable element to a systematic explanation of a segment of the law. These considerations of the legal academician are equally valid for both American and civil law even though their techniques of research vary in accordance with the differences between the two.

LEGISLATIVE MATERIALS

Constitutions. A salient characteristic of America law is the importance and pervasiveness of constitutional issues. They can arise in ordinary litigation without any jurisdictional or procedural distinctions from non-constitutional or "legal" issues. Although the federal constitution commands the greatest attention and is the supreme law for all American sovereignty, each state has its own constitution. Constitutions are in the category of statutory materials, even though they are hierarchically superior to all other forms of legislation.

Of course, it is only the texts of the constitutions that figure as statutory materials. As they are so easily available they present no appreciable problem to the researcher. Particularly the federal constitution, with its brevity of eight original articles and 27 accumulated amendments, is to be found in many places. It appears with any of the various collections of federal statutory materials, as well as with numerous treatises and other publications dealing significantly with the federal constitution. As to state constitutions, their texts (usually far more voluminous than that of the federal constitution) can regularly be found at least in the collections of state statutes.

But if the finding of constitutional texts presents no real problem, these texts rarely resolve matters of significant difficulty relating to constitutional law. For them the researcher will normally be led into the judicial reports of cases which have authoritatively interpreted constitutional texts. He may often be aided in this by finding that the constitutional text is "annotated," meaning that following particular parts of the text appear citations of such cases, often with a precis of the relevant part of the opinion. In addition, exploration of a constitutional issue will often involve research into relevant treatises and other legal literature.

Collections of Statutes. The two principal kinds of books in which statutory texts are published are session laws and compilations. The session laws are contained in the one volume (or more if quantity so requires) in which all the laws of a legislative session are published. Such volumes are necessarily arranged merely in chronological order of enactment without any logical arrangement according to subjects. Since statutory texts must be made available as soon as they are enacted, laws passed during a legislative session are published in pamphlet form, usually called "slip laws," for use until such time as the complete session laws can be published.

The lack of logical arrangement of the volumes of session laws means that after a few of these volumes have accumulated they are unusable, or at best grotesquely inefficient for any coherent research into the statutes. Thus, each American state and the federal government reworks these session laws into compilations. These compilations provide effective access to the statutes by arranging them in a logical order, usually alphabetically, by topics, with the normal aids of topical analyses and indexes. These compilations may be done under legislative mandate and subsequently re-enacted by the legislature so as to make authoritative any editings of the original session laws in the compiling process. These compilations are periodically updated and often reissued under the style of "revised laws" or the like. The term "code" is often applied loosely to these compilations of whatever nature. Some states do have codes in a stricter sense of a comprehensive and permanent scheme for legislation into which new statutes are fitted as replacements or additions. Many of these compilations are annotated with case citations, legislative history and other references. These publications may be variously official (public) or private, and there may be more than one set of statute books published for a particular jurisdiction. Such competitive and overlapping publications offer certain different features.

Federal Statutory Materials. Federal statutory publications are the most comprehensive and elaborate of all American jurisdictions. The scheme

which they present reflects the above concepts and is reproduced in varying degrees in the statutory materials of particular states.

Acts of Congress were first published as session laws under the title *Statutes at Large*. Their systematic compilation was first published in 1875 and known as the *United States Revised Statutes*. This was officially enacted into law and superseded the texts of the *Statutes at Large* when they became included in updating editions of the *Revised Statutes*. Since 1926 the functions of the *United States Revised Statutes* have been assumed by a successor publication called the *United States Code*. It is produced by a congressional committee with the collaboration of the editorial staff of the West Publishing Company. Every six years a new multi-volume edition is published. The *Code* contains certain features and aids to research beyond what the *Revised Statutes* had provided. Any title or parts of the *Code* specifically enacted by Congress become authoritative text. Up to 1976 nineteen titles out of fifty were so enacted. In the absence of such enactment the *Statutes at Large* prevail over the *Code* in the event of any discrepancy between the two as to text.

There are two unofficial annotated publications of the code. They are both kept current and supplemented by annual pocket parts and by replacement volumes when necessary and by pamphlets pending the publication of the pocket parts. One of these is the *United States Code Annotated* of the West Publishing Company. The other is the *United States Code Service* of the Lawyers Cooperative Publishing Company, and supplants an earlier publication, the *Federal Code Annotated*, which had been published by Bobbs-Merrill. A further current service relating to statutory materials is the West Publishing Company's *United States Code Congressional and Administrative News*. In addition to current statutory texts, it gives supplementary information such as committee hearings and reports and executive orders.

Federal Administrative Regulations and Materials. In addition to statutes enacted by legislatures, the concept of legislation includes executive and administrative orders and regulations. They may have an independent constitutional basis, resting on the power of the executive. But more typically their authority is based on an underlying statute, or at least is subject to legislative intervention. There are many instances where such orders and regulations are the effectively operative law in a given situation and hence of prime concern to the legal researcher. Again, publications of such materials are most highly elaborated at the federal level, with the pattern reflecting in varying degrees at the state level.

The most central or general repository of federal administrative materials is grouped in what is called the Federal Register System. The most basic information appears in the annually published *United States Government Organization Manual*. It gives a full description of the background, organization and functioning of all federal administrative agencies. The *Federal Register* has functions parallel to those of the *Statutes at Large*. That is, it publishes current, even daily, information on administrative developments and regulations in pamphlet form pending the periodical issuing of bound volumes collecting and indexing this information. But the *Federal Register* is a chronological and unclassified collection. The systematic arrangement by topics appears in the *Code of Federal Regulations*, parallel to the functions

of the *United States Code* with whose organization of materials it is correlated. The insertions and supplements of the *Code of Federal Regulations* appear once a year, thus the *Federal Register* must be consulted for interim current research. The privately published *United States Code Congressional and Administrative News* also deals with current administrative materials.

In addition to those general coverages of federal administrative matters, the more important agencies publish their decisions and adjudications. These are collected in periodically published bound volumes, with advance sheets or bulletins for interim current coverage. Examples of these official administrative publications are *Decisions of the Comptroller General of the United States* and the Department of Agriculture's *Agricultural Decisions*. There are also important and widely used private publications for these administrative decisions, of which the best known publishers are *Commerce Clearing House* and *Prentice-Hall*. Among their most noteworthy regulatory fields of coverage are corporations, taxation, labor and public utilities. They also provide background to these administrative developments by way of citation or description of relevant statutes, judicial decisions and other administrative adjudications. They are indexed and topically arranged, and use loose-leaf services whereby new material is immediately inserted with the old and thus the entire publication is kept constantly current.

Not all agencies' decisions and regulations are published for general dissemination, presumably because volume and demand do not so warrant. In such cases the agency must be contacted or its files consulted to secure the desired materials.

State Administrative Materials and Local Legislation As was indicated above, the concepts regarding research into administrative materials is the same for the states as for the federal government, but on a simplified and less extensive basis. No state approaches the volume of material or generality of interest that is true with federal administrative matters, and hence none has as elaborate a scheme of publication. Generally, the more populous and wealthy the state the more elaborate will be the scheme of publication of administrative materials. The areas of law where a state's administrative activities tend to be most extensive are trades and professions, public utilities, insurance, taxation, labor and workmen's compensation. In some states these administrative matters and rulings may be found in bound volumes or loose-leaf services, while in others they may be disseminated in mimeograph form or available only through the files of the agencies themselves. Obviously most state administrative materials are of localized interest so that they are not usually found outside the state to which they apply.

A rather different sort of administrative feature which is peculiar to the states consists of opinions of their attorneys general. They are responses to queries submitted by other state officers and are published in bound volumes, sometimes with current interim pamphlets.

Legislation, typically called "ordinances," is also enacted by local jurisdictions of states: counties, cities, towns, special districts and other municipalities. In only the most important of them are bound volumes or systematic schemes of publication of ordinances and other local governmental materials to be found. More frequently they appear as pamphlets printed

at irregular intervals. They are found in larger libraries only. In the absence of any publication the files of local government offices must be consulted.

REPORTS OF JUDICIAL DECISIONS

General Comments. The primacy of the courts in American law as in English law naturally emphasizes the importance of judicial reports among American legal materials. American judicial decisions differ in style from those of the civil law systems. But the significant difference is the concept of *stare decisis* which makes judicial decisions binding precedent in American law as opposed to their lesser role in principle as persuasive authority in the civil law. This difference seemingly explains why virtually all appellate decisions of all American jurisdictions are reported and published while in civil law countries this is done only for selected cases. However, the proliferation of appellate courts reports caused in the last decade a trend toward selective reporting of American opinions, especially in the United States Courts of Appeals, and in the California courts of appeal. American courts of first instance, or trial courts, theoretically figure in the system of precedents when no appeal is taken from their decisions. But because of their low rank they are the weakest of the precedents, and generally (but with exceptions) their cases are not published in the volumes of judicial reporters.

Once a judicial decision is rendered its authority as precedent becomes permanently fixed, regardless of the degree to which it may subsequently be invoked or remembered. It cannot be superseded and discarded like legislation can, and even overruling does not expunge it from the rolls of potential precedents. The overruling case itself may be overruled in the future. It results that the reports of judicial decisions are a constantly increasing mass of authoritative legal materials. A task of the American legal profession has been that of developing techniques and mechanisms to deal with this ceaselessly expanding mass. It has been estimated that there are some three million reported American cases to which about 30,000 new ones are added yearly.

All states and federal jurisdictions publish official texts of their judicial decisions. For nearly a century they have been completely duplicated by the vast National Reporter System of the West Publishing Company. They may also be duplicated by other private publishers on a selective and specialized basis. All the private publications offer some supplementary features in addition to the texts of the decisions. The official publication is the authoritative text in the event of discrepancy between it and that printed by the private publishers. However, the private publishers do not edit the texts so that any discrepancies are merely the result of mechanical errors in the printing process. In recent times some states have suspended publication of their official reports and rely upon the National Reporter System, apparently from motives of economy. Defunct series of reporters or those which were predecessors to existing ones must still be taken into account by legal researchers for older cases.

The United States Supreme Court. Its decisions have been carried since 1791 in the official reporter known as *United States Reports*. While its volumes are numbered consecutively from the beginning, the first ninety

volumes are also identified by the names of the individual in charge of the reporting, for example Dallas (1791-1800) and Cranch (1801-1815).

One unofficial edition is published by Lawyers Cooperate Publishing Company under the title *Lawyers' Edition of the United States Supreme Court Reports*. It covers all the Supreme Court decisions from the beginning, and selectively offers annotations, discussions of points of law and excerpts from briefs of counsel for certain cases. Another unofficial edition is the *Supreme Court Reporter* published by the West Publishing Company. It begins with 1882 and carries all of the cases onwards from volume 106 of *United States Reports*. Its chief editorial feature consists of the headnotes prefixing each opinion with a "key number" for each to tie in with West's comprehensive organization of material.

All three of the above reporters issue pamphlets of advance sheets to cover the interim periods pending the publication of the bound volumes. For these current reportings of Supreme Court cases there are also two other publications, in the form of loose-leaf services. One is the *United States Law Week* published by the Bureau of National Affairs, and the other is the *Supreme Court Bulletin* published by Commerce Clearing House.

Other Federal Courts. West's National Reporter System has three other series of case reporters to cover the inferior federal courts. The *Federal Reporter*, beginning with 1880, presents the decisions of the intermediate appellate courts of federal jurisdiction, namely the Courts of Appeals, the Court of Customs and Patent Appeals, the Temporary Emergency Court of Appeals, the Canal Zone, the District of Columbia, Guam, Puerto Rico and the Virgin Islands, and also more recently the Court of Claims. Until 1931 it also carried opinions appearing at the trial level in United States district courts, but at that date this function was assumed by a new series called the *Federal Supplement*, which for a time also covered the Court of Claims. For the more important, but not all, decisions of the inferior federal courts for the period from 1789 to 1880 the West Publishing Company compiled a series called *Federal Cases*. The same publisher also issues a specialized series entitled *Federal Rules Decisions* carrying cases which interpret federal rules of civil and criminal procedure and other texts dealing with matters of federal practice.

Reports of State Courts. All states have official reports of their appellate judicial decisions except, as we noted previously, that some states have now discontinued their official reports and rely upon West's regional reporter which publishes their decisions. Over half the states now have intermediate appellate courts, and their decisions may be carried in a set of official reports separate from the highest or supreme court. A few states also publish opinions of their courts of first instance.

For its own purposes West groups the states into seven regional reporters. When enough cases have accumulated from a particular region to fill a bound volume of a predetermined approximate size the volume is issued. This occurs every few months, and in the interim pamphlets of advance sheets are distributed to subscribers of the regional reporter. This practice has the convenience of keeping all bound volumes close to a uniform size.

While the average American lawyer is expectably most frequently concerned with the law of his own state, he has many occasions for research into

the law of other states. Since he is more likely to be involved with the law of neighboring states than of distant ones, it was considered practical to group the states into geographical regions for purposes of these judicial reporters. For this purpose the West Publishing Company devised some rather original or arbitrary geographical notions departing to some degree from customary general usages in assigning states to geographical regions. The regions and the states assigned to them are as follows:

Atlantic Reporter (from 1885)—Maine, Vermont, Rhode Island, New Hampshire, Connecticut, New Jersey, Delaware, Pennsylvania, and Maryland;

North Eastern Reporter (from 1885)—Massachusetts, New York, Ohio, Indiana and Illinois;

North Western Reporter (from 1883)—Michigan, Wisconsin, Minnesota, Iowa, North Dakota, South Dakota and Nebraska;

South Eastern Reporter (from 1887)—Virginia, West Virginia, North Carolina, South Carolina and Georgia;

Southern Reporter (from 1887)—Alabama, Florida, Mississippi and Louisiana;

South Western Reporter (from 1887)—Missouri, Kentucky, Tennessee, Arkansas and Texas;

Pacific Reporter (from 1883)—Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington and Wyoming.

In addition to its regional reporters West publishes two special state reporters, the *New York Supplement* (from 1888) and the *California Reporter* (from 1960). These duplicate the appellate cases appearing in the regional reporters, but also carry some cases of courts of first instance. These are the two most populous states and hence the volume of litigation and demand for their judicial reports warrant this largely duplicating localization.

American Law Reports and Others. The *American Law Reports*, published by Lawyers Cooperative Publishing Company, represent selective rather than comprehensive and exhaustive publication of judicial decisions. This series, in existence since 1918, is the successor and merger of two earlier publications, *Lawyers Reports Annotated* and *American Annotated Cases*. It has no limit as to jurisdictions covered and selects among all the states and the federal courts, except that it generally abstains from cases of the United States Supreme Court to avoid duplication with the same publisher's annotated *Lawyers' Edition of the United States Supreme Court Reports*. The cases are selected on the basis of the publisher's conclusion that they present matters and issues of particular interest to lawyers. Particular points in an opinion are singled out for treatment in a note consisting of an analysis and assembling of pertinent cases and authority. It offers the user a sifting through of the mass of cases accumulated and a presentation of those that are of greater significance. This selective reporting of cases with annotated discussion and annotation following bears resemblances to the method of reporting cases in civil law countries.

There are some specialized reporters carrying cases dealing only with a specified subject-matter, for example aviation, public utilities, patents.

Digests and Indexes. The permanent bound volumes of case reports necessarily appear only in chronological order. Even if individual volumes may have topical arrangements and indexes, this is of minimal help when it is a question of finding one's way through sets of hundreds of volumes. Therefore these sets are accompanied by independent volumes or sets of digests and indexes. Systematic research must commence with these topically or alphabetically arranged supplements.

The digests consist of topically arranged precis of points of law determined by the case, often a reproduction of the headnotes supplied by the court or by the publishers preceding the opinion itself. The relevant case is cited, together with the number of its headnote identifying the particular part or aspect of it dealing with the point at hand. "Descriptive word indexes" and "words and phrases" are specially designed to help the researcher find the digest topic of concern to his problem. The researcher may have the name of a particular case as the entering wedge to his task. A table of cases in the form of plaintiff-defendant and defendant-plaintiff alphabetical index will provide both the citation of the case and the digest topic under which it and cases of similar subject-matter have been entered.

The American Digest System of the West Publishing Company is the most comprehensive and general of all. It services all 13 of West's case reporter series. In addition it undertakes to digest all regularly published cases antedating the National Reporter System, including English cases prior to American independence going back to 1658. The entire period from 1658 to 1896 is covered in the *Century Digest*. Beginning with 1896 a new digest called a *Decennial Digest* has been put out with appropriate serial numbers: 1896 - 1906 being the *First Decennial Digest*, 1906 - 1916 the *Second Decennial Digest*, 1916-1926 the *Third Decennial Digest*, etc. The *Eighth Decennial Digest* (1966-1976) is being completed in 1977. A prime feature of this publication is the "key number" system which the publisher devised. All digest topics, down to the most minute, are assigned key numbers which run consistently throughout all the digests and thus provide a means of easily tracing a topic through the different digests. The same key numbers also appear with the headnotes of cases published in the National Reporter System. The temporary volumes for a current decade pending the appearance of a new *Decennial Digest* are called the *General Digest*.

Citators. A citator is a device whereby a researcher can trace the treatment or experience of a case subsequent to its rendition. The status of a case as authority is subject to modification or reinforcement by later cases. The principal experiences which it may undergo are: being followed, overruled, distinguished and criticized. Obviously such matters cannot be reflected from a reading of the case itself. It is equally apparent that such matters are crucial for the researcher concerned with the present status of a case as authority. It is an essential part of such researcher's task to check the cases he is using through the citators. The mechanism of the citators is simple but nevertheless it would be cumbersome to attempt to explain it in a text such as this.

By far the most comprehensive and best known of the citators is the series of publications called *Shepard Citations*. It is of such common currency in the American legal profession that the process of tracing a case through

the citators is routinely referred to as "shepardizing." Shepardizing extends also to legislation.

LEGAL LITERATURE

General Comments. The approximate counterpart of what is termed in the civil law systems as "doctrine" is generally referred to in the American system as "legal literature" (or sometimes "legal writing"). Although it would be not entirely incorrect to employ the expression "doctrine" for this phenomenon in the American context, it involves some linguistic strain and is susceptible of creating misleading nuances. We have already noted the relatively lower ranking authority of American legal literature compared with civil law doctrine. A visible sign of this is the fact that so many legal treatises published in civil law countries include bibliographies of writings cited, while American legal treatises include tables of cases cited. Nevertheless, American legal literature is very voluminous and highly developed, and any legal researcher must be familiar with its system. For some decades there has been an upgrading of the status of legal literature as authority in American law. This is reflected particularly in the increased frequency with which it is cited as at least a partial basis for decision in judicial opinions. Formerly such citation of "secondary authority" was extremely rare. It still does not compete in frequency or volume with citation of judicial precedents, but citation of legal literature no longer seems unusual. Periodical articles' citations by courts may be traced by Shepard's Law Review Citations.

The expression "literature" connotes writing of a minimal, though undefined, level of seriousness, dignity and intellectual content. Legal writing of such quality falls into these principal categories: treatises, periodical literature, encyclopedias, dictionaries and, a peculiarly American phenomenon, restatements of the law.

Treatises. There is no appreciable difference as between American and civil law regarding the concept of the treatise. Taken in its broad sense, it refers to any treatment of normal book length or more of a defined legal topic which the author or authors have selected. They may range in size from a slim book to multivolume sets of ponderous tomes. Their topical coverage may be limited to a very narrow field or point of law or may extend over entire fields as broad and basic as contract or property. Their style can vary from descriptive exposition of a one-dimensional nature to intricate analysis and polemic commentary. Faced with this variety, it is of course up to the researcher to select those which best respond to his particular purpose. As a generalization it may be said that a treatise or a pertinent part of it is often a good place for a researcher to begin to get an orientation to his topic and citations to other authorities.

The word "treatise" can also carry a limited and prestigious connotation of work of significant breadth and depth and of high quality of scholarship. Some of these have become standard classics in their fields as multi-volume treatises. Some of those with solidly established reputations are continually revised and updated by the publisher, perhaps long after the original distinguished author has ceased activity or died, but the work is still presented under his name. Examples of this are *Williston on Contracts*, *Wigmore on Evidence* and *Scott on Trusts*. Such treatises may also be presented in

abridged one-volume editions, often with a view to servicing the needs of law students. Some of the major treatises, particularly the multi-volume ones, are kept current by periodic pocket part supplements and replacement volumes. Otherwise they are updated by new editions of varying frequency. A kind of treatise used particularly in connection with law teaching is known as a "hornbook." These are one-volume works explaining a field of law which usually comprises a law school course, and they may be correlated with casebooks intended for classroom instruction. A particularly well-known example of a hornbook is *Prosser on Torts*.

The access to legal treatises is alleviated by a number of subject bibliographies. The largest general legal bibliography is *Law Books Recommended for Libraries*, published in 1967-70 (with later supplements) under the auspices of the Association of American Law Schools.

Legal Periodicals and Articles. The usual generic term for American legal periodicals is "law review," regardless of the style of the name that a particular publication may use. Nearly all law reviews are published by law schools or other institutions of an academic nature or by professional organizations, notably bar associations, without any commercial motive. Some are specialized as to subject matter, which is usually indicated by their title, as the *American Journal of International Law*. Some, while unspecialized as to subject-matter, will seek to cater in varying degrees to state and local matters, this being true with many of the law reviews published by law schools. The great majority of articles are written by law professors, with the balance being written by jurists of other occupations and occasionally by a non-legal specialist. Law school reviews are edited by law students.

The articles are usually on a precise point of law of current interest or moment in the legal community on which they typically offer analysis in depth. Law reviews provide a forum for critique of the law, and this may take the form of polemics with articles and responding articles of conflicting points of view. Thus, in-depth analysis of a specific aspect of law and indications of current legal trends are perhaps the two most significant services the law reviews offer to the researcher. And there may be descriptive articles or actual news departments giving information about events and activities transpiring in the legal world and its institutions. And most law reviews have also notes and comments, students' case notes or case comments section as well as book reviews.

The American law reviews are so numerous and prolific that they present their own problems of mass. Almost all of the 160 or more law schools publish their own law reviews, and some more than one. The principal guide through this maze is the *Index to Legal Periodicals*. Organized alphabetically by topic it lists systematically, by title and by author, all the articles in the periodicals that it handles. There are almost exactly 400 law reviews which it considers of sufficient regularity, substance and repute to be included in its servicing.

Legal articles are also found elsewhere than in periodicals. Books are published which are anthologies or collections of essays on a given topic, though some may be reprintings of articles previously published in law reviews. Another source of articles are proceedings of professional confer-

ences which publish the papers and interventions submitted. However, such articles are outside the scope of the *Index to Legal Periodicals*.

Legal Encyclopedias. The nature of a legal encyclopedia is the same in American and civil law. An encyclopedia's descriptive, expository text can serve to orient the reader broadly in the area of his efforts. American legal encyclopedias are very heavily footnoted, primarily with citations to cases furnishing authority for the text. But the researcher is not supposed to rely upon or cite the encyclopedic text itself as authority, but rather to look up the cases in point to which the footnotes refer him. Yet in recent times courts have been quoting encyclopedic texts as influencing their decisions, this presumably reflecting what appeared in the lawyers' briefs.

There are two general and widely used encyclopedias of American law. One is the West Publishing Company's *Corpus Juris Secundum*, successor in everything but the footnotes to the same publisher's *Corpus Juris*. The other is the Lawyers Cooperative Publishing Company's *American Jurisprudence Second*, which is a complete rewriting in all respects of the same publisher's predecessor, *American Jurisprudence*. Both construct their texts from their respective publications of case reports, to which their footnotes primarily refer as authority. Thus, *Corpus Juris Secundum* together with its predecessor, purports to be based comprehensively on, if not actually citing, all reported cases since 1658. *American Jurisprudence Second* is constructed from the cases reported in its publisher's *American Law Reports Second* and its predecessor series of reporters, based on a selective rather than comprehensive principle of reporting, to which it, too, footnotes its text. This principle of selectivity is not designed to abridge or create gaps in law, but rather to eliminate a mass of cases which are considered to be merely repetitive of authority already firmly established otherwise in judicial precedents.

There are also encyclopedias limited to the law of a particular state, some of the more important and populous having been so singled out. And there are encyclopedias addressing themselves only to a particular field of law. Among them are those dealing with automobiles, banking, corporations, insurance, oil and gas, and procedure.

Legal Dictionaries. We shall briefly mention, without elaboration, the existence of American legal dictionaries. The principal ones of long standing go under the names (in alphabetical order) of Ballentine, Black and Bouvier (the three B's, *si l'on veut*).

American legal publishers have yet, if ever, to enter the difficult field of foreign language legal dictionaries, to translate between American-English legal terms and those of other languages. This has been done to varying extent by some non-American publishers, to whom one must look for such facilities

Restatements of the Law. This is a peculiarly American form of legal literature, inspired by the particularities of law in the American context. They are written anonymously and published by the very prestigious private (i.e., unofficial or non-governmental) American Law Institute. This Institute consists *ex officio* of all appellate judges of all American jurisdictions and all deans of all American law schools plus selected members. For its Restatement projects it acts through committees, subject to approval by the plenum.

The idea of the Restatements is to make a clear declaration of what is the dominant American position in specified areas of the law. This is designed to cut through the welter of the many autonomous American jurisdictions and the mass of their judicial pronouncements. However, these Restatements are formally only more "literature" and not binding or authoritative in any American jurisdiction. Nevertheless, they have achieved a high level of prestige and acceptance. This has been manifested by the extent to which courts have cited Restatements as having been a basis of their decisions.

These Restatements have been issued in terms of selected fields of law which the American Law Institute viewed as being feasible and desirable for the purpose. The selection and statement of these fields is an arduous and delicate process, requiring years in the doing, as have second editions of some Restatements. The fields of law so far selected by the American Law Institute and published as Restatements are agency, conflict of laws, contracts, foreign relations of the United States, judgments, property, restitution, security, torts and trusts. The Restatements consist of the setting forth of propositions of law which the drafters find represent a composite of positions taken by all American courts that will have spoken on the point. No authority whatever is cited for the propositions, but concise explanations and examples are given after them. The Restatements vary in length, but can number 1,000 or more propositions, published in one or more volumes.

The Restatements may be seen as tending toward making American law more uniform. But probably of greater significance is the point of repair and common denominator which they furnish to orient discussion and analysis of the law.