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Alejandro M. Garro

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CODIFICATION TECHNIQUE AND THE PROBLEM OF IMPERATIVE AND SUPPLETIVE LAWS

Alejandro M. Garro*

INTRODUCTION

The distinction between "imperative" and "suppletive" laws is an ancient one in the civil law tradition. Roman legal literature distinguished between rules of *jus cogens*, which could not be derogated from by the parties, and *jus dispositivum*, which could be set aside by contrary agreement.¹ Most of the modern civil codes, in turn, assume as their basic principle the autonomy of the will, a notion derived from the conceptions of the school of natural law, whereby men should be as free as possible in the regulation of their activities and in the determination of their rights and obligations toward others.² Hence, all that the law does not command nor prohibit is abandoned to the free will of the parties and is permitted. The principle of autonomy of the will has been characterized as one of the cornerstones of the Louisiana civilian tradition.³

*Assistant Professor of Law, Louisiana State University. The author wishes to express his appreciation for the assistance of the Louisiana State Law Institute in the preparation of this article.

1. See R. SOHM, L. MITTEIS & L. WENGER, INSTITUTIONEN. GESCHICHTE UND SYSTEM DES ROMISCHEN PRIVATRECHTS 24 (17th ed. 1923).

2. See R. POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 34-35 (4th ed. 1928). See FRENCH CIV. CODE art. 6: "Individuals cannot by their conventions derogate from the force of laws made for the preservation of public order and good morals." SWISS CODE OF OBLIGATIONS art. 19: "Within the limits of the law, the parties may determine the terms of their contract as they please. Contract terms at variance with provisions of law are permissible unless they are inconsistent with a mandatory provision, contra bonos mores or in violation of the public order or the right of personality." SWISS CIV. CODE art. 27: "No one can renounce his freedom or restrict himself in its use in a degree offensive to law or morality." ITALIAN CIV. CODE art. 31: "Notwithstanding the provisions of the preceding articles, in no case can the laws and acts of a foreign state, the rules and acts of any institution or entity, or private provisions and agreements be effective within the territory of the State, when they are contrary to public policy or morals." MEXICAN CIV. CODE (for the Federal District and Territories) art. 6: "The will of private persons cannot exempt from the observance of the law, nor alter it nor modify it. Private rights which do not directly affect the public interest may be waived only when the waiver does not impair rights of third parties." See also AUSTRIAN CIV. CODE art. 937; GREEK CIV. CODE art. 3; CHILEAN CIV. CODE art. 12; ARGENTINE CIV. CODE arts. 19 & 21.

3. A. YIANNPOULOS, LOUISIANA CIVIL LAW SYSTEM 140 (1971); S. LITVINOFF & W. TÊTE, LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS 161 (1969).

Article 11 of the Louisiana Civil Code⁴ provides the legal framework for the doctrinal distinction between imperative, or mandatory, and suppletive laws. Although neither term is included in the article, traditional civilian doctrine characterizes as imperative those legal precepts rooted in public policy which may not be set aside by private agreement. Suppletive laws, on the other hand, are those legal norms designed to supplement the parties' will in cases wherein its application is not excluded.⁵ French legal doctrine refers also to suppletive norms as interpretative laws [*lois interpretatives*],

See LA. CIV. CODE art. 1901: "Agreements legally entered into have the effect of laws on those who have formed them . . ." LA. CIV. CODE art. 1764: "All things that are not forbidden by law, may legally become the subject of, or the motive for contracts. . ."

4. LA. CIV. CODE art. 11:

Individuals cannot by their conventions, derogate from the force of laws made for the preservation of public order or good morals.

But in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good.

5. Although this distinction is also known in common law jurisdictions, no general common law doctrine has as yet developed to deal with this matter. See A. YIANNPOULOS, *supra* note 3, at 73; David, *The Distinction Between lois imperatives and lois suppletives in Comparative Law*, 22 REV. JUR. U.P.R. 154 (1952). The term "suppletive" has given a hard time to the reporter of decisions of the United States Supreme Court, whose principal job is to catch errors in the Justices' opinions. In an interview conducted by Professor Paul R. Baier of the Louisiana State University Law Center, Henry Putzel, jr., who retired in February, 1979, as the thirteenth reporter of decisions of the United States Supreme Court, described thus his encounter with the term "suppletive":

[O]ne day I was sitting in my office, and I got a note delivered by one of the messengers in which Justice White asked me what the word "suppletive" meant, as used in an opinion of Justice Harlan . . . In my letter to Justice White I said: After receiving your note from the bench . . . asking for the definition of suppletive as used in *Labine v. Vincent*, 401 U.S. 532, 540 (1971), certain smoldering memories were sparked and I took a look at the original copy of the opinion with our editorial suggestions to Mr. Justice Harlan. We had circled the word 'suppletive' and asked is this word intended? The definitions in neither Webster's nor the [Unabridged Oxford Dictionary] seemed to fit. The reply was 'stet'—leave it as it is. After all these years our same observation holds. The definition in Webster's II is this: 'Characterized or constituting an instance of 'suppletion' and 'suppletion' is defined as 'the occurrence of phonemically unrelated alimorphs of the same morpheme whether the morpheme is a base of an affix.' Please tell me what that means! . . . [I] was amused at that because it was one instance in which we had singled out the word, couldn't find out what it meant and either Justice Harlan or his law clerk was satisfied that he knew what it meant, so there it was. Now it may turn out to be a—although I must have looked it up in Black's Law Dictionary, too, but I'm not sure—but it may be a civil law term or something of that sort. I couldn't find out . . .

P. BAIER, *A Report on the Reporter: 'Double Revolving Peripatetic Nitpicker'*, SUPREME COURT HISTORICAL SOCIETY, YEARBOOK 10, 15 (1980).

for the legislator interprets the will of the parties whenever their silence allows the application of suppletive laws.⁶

The classification of laws as imperative or suppletive has been confused at times with the categorization of laws as prohibitory and permissive.⁷ In fact, both categories were devised in response to different legal problems. Article 12 of the Louisiana Civil Code speaks of prohibitory laws,⁸ statutes which are to be distinguished from permissive laws. Prohibitory laws are those norms cast in imperative form but exhibiting a negative command, that is, prohibiting a certain conduct. Permissive laws, by way of contrast, are norms which prescribe a positive, rather than negative, conduct.⁹ The classification of prohibitory and permissive laws dates to the *Corpus Juris*,¹⁰ was incorporated into article 9 of the *Projet du Gouverna-*

6. See A. WEILL, *DRIT CIVIL. INTRODUCTION GÉNÉRALE* 107 (1973); B. STARCK, *DRIT CIVIL. INTRODUCTION* 23 (1972); 1 F. JULLIOT DE LA MORANDIERE, *DRIT CIVIL* 19 (1965). This terminology has been criticized by Marty and Raynaud, who state that the lawmaker does not construe the will of the parties but simply commands what the parties should do in case they have not provided their own rules. 1 G. MARTY & P. RAYNAUD, *DRIT CIVIL* 162 (1956). Although suppletive laws may conform to the presumed intent of the parties, this is not necessarily so. Thus, if the spouses do not modify by contract the legal regime of community of acquets and gains, they will be subject to the legal regime even though it can be established that they did not enter into a matrimonial agreement because of a misunderstanding or lack of knowledge of the rules governing the ownership and management of the property of married persons. See 1 A. VON TUHR, *DERECHO CIVIL TEORIA GENERAL DEL DERECHO CIVIL ALEMÁN* 41 (T. Rava Span. transl. 1946).

7. See Morrison, *Legislative Technique and the Problem of Suppletive and Constructive Laws*, 9 Tul. L. Rev. 544 (1935); R. DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY* 83-92 (M. Kindred transl. 1972). Morrison characterizes laws as constructive or suppletive, and subdivides the constructive laws into imperative and prohibitory. David refers to prohibitory laws as synonymous of imperative laws. See also *E. L. Burns Co., Inc. v. Cashio*, 302 So. 2d 297, 300 (La. 1974).

8. LA. CIV. CODE art. 12: "Whatever is done in contravention of a prohibitory law, is void, although the nullity be not formally directed."

9. Article 2 of the Louisiana Civil Code anticipates this distinction while stating that the law "permits" and "forbids." See *Badon's Employment, Inc. v. Smith*, 359 So. 2d 1284, 1286 (La. 1978); *E. L. Burns Co., Inc. v. Cashio*, 302 So. 2d 297, 301 (La. 1974). In *E.L. Burns*, the Louisiana Supreme Court held that a contractual clause of a surety bond providing a prescriptive term of two years was invalid because it contravened article 3460 of the Louisiana Civil Code. The supreme court held that insofar as the Public Works Act, LA. R.S. 38:2247 (Supp. 1962), established a one-year prescriptive term in favor of the surety, a stipulation extending that term to two years amounts to an anticipatory renunciation of a prescription not yet acquired, and, as such, is in violation of the prohibition of article 3460. The majority opinion considered article 3460 not only a prohibitory law but also a rule vital to the public order.

10. Code, 1.14.5:

There is no doubt that he violates the law who, while obeying its letter attempts to destroy its spirit, for he will not escape the legal penalties prescribed, if, contrary to the intention of the law, he frequently and fraudulently takes advantage of its words; for We desire that no agreement, act, or convention shall take place

ment de l'an VIII, and later was eliminated from the final text of the Code Napoleon as self-evident.¹¹

Article 12 of the Louisiana Civil Code addresses the problem of tacit and express nullities, establishing the rule that whenever the law forbids a certain conduct, even though the sanction to the violation is not expressed, nullity will follow.¹² Legal provisions like the ones prescribing that separation from bed and board "cannot be made the subject of arbitration,"¹³ that a married person "cannot adopt without the consent of the other,"¹⁴ or that "one cannot renounce a prescription not yet acquired"¹⁵ are examples of prohibitory laws, the violation of which is sanctioned with nullity even though the nullity is not expressly stated. It is not within the scope of this article to deal with the question of tacit or implicit nullities, but it should be borne in mind that imperative laws are not to be identified with prohibitory laws, since neither the text of article 12 nor the relevant Roman texts support that interpretation. Whereas public order is an element necessarily connected with imperative statutes,¹⁶ a prohibitory law is not necessarily a norm "made for the

between any contracting parties when the law forbids this to be done. We order that this shall apply to all legal interpretations in general, whether they are old or new, so that it will be sufficient for a legislator merely to have prohibited what he did not wish to be done; and that it is permitted to ascertain other matters from the intention of the law, just as if they had been expressed, that is to say, that where anything is forbidden by law and is done, it shall not only be void, but be considered as if it had not been done at all; although the legislator may have only made the prohibition in general terms, and did not expressly state that what had been done should be considered void . . .

12 THE CIVIL LAW 87 (S. Scott transl. 1973). See CHILEAN CIV. CODE art. 10: acts prohibited by law are null and without validity, unless other effects than nullity are expressly provided in case of contravention. Article 18 of the Argentine Civil Code of 1869 adopted almost verbatim the provision of the Chilean Civil Code.

11. A. YIANNPOULOS, *supra* note 3, at 73. See Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4, 45 (1971).

12. See *Barnebe v. Sauer*, 18 La. Ann. 148 (1866); *Van Hook v. Woodard-Walker Land & Timber Corp.*, 49 So. 2d 471 (La. App. 2d Cir. 1951); *Kennedy v. Johnson Lumber Co.*, 33 So. 2d 558 (La. App. 2d Cir. 1948); S. LITVINOFF & W. TÊTE, *supra* note 3, at 187-88. Professors Litvinoff and Tête stress the importance of article 12 of the Louisiana Civil Code while discussing the category of inexistent juridical acts within the context of the theory of nullities.

13. See LA. CIV. CODE art. 140.

14. See LA. CIV. CODE art. 214; *Succession of Arthur Bush*, 222 So. 2d 642 (La. App. 4th Cir. 1969).

15. See LA. CIV. CODE art. 3460.

16. Weill contends that though all laws of public order are imperative, not all the imperative laws are made for the preservation of public order. He refers to the solemnities imposed by law to certain juridical acts as an example of a norm which cannot be altered by the parties' will and yet does not affect the public order. A. WEILL, *supra* note 6, at 107. This rationale is based upon the premise that those solemnities are exclusively designed to protect the interest of the parties to the transaction;

preservation of public order or good morals."¹⁷

Article 12 of the Louisiana Civil Code has been a helpful rule of interpretation in determining the nullity of a juridical act through the imperative and negative formula of a statutory text.¹⁸ Yet analysis of textual language as the key to determining the relative or absolute nature of the nullity cannot be carried too far. Any methodology for characterizing the type of nullity must include an examination of the interest that the sanction of nullity is designed to protect. Nullities designed to protect purely private interests are relative nullities, while those established to preserve public order or good morals are absolute nullities.¹⁹ Therefore, the prohibitory formula of the legislative text does not necessarily entail the sanction of absolute nullity. The violation of prohibitory laws like the ones prescribing that the succession of a living person cannot be sold²⁰ or that one cannot renounce a prescription not yet acquired²¹ is sanctioned with absolute nullity, not because of the formula of the text, but because those kinds of legal transactions affect a matter of public order. If an emancipated minor who has only the power of administration sells or encumbers any of his immovable property without the required authorization of the court, the act will be subject to a relative nullity even though it is done in contravention of a prohibitory law.²² It follows that not every prohibitory law involves a matter of public order and, consequently, imperative and prohibitory laws cannot be considered as equivalents. A more accurate analogy can be drawn be-

however, the modern role played by formalities required *ad validitatem* is the protection of third persons. For example, when article 3305 of the Louisiana Civil Code commands that a mortgage be in writing, the imperative character of the text is given by legislator's will to promote stability of titles, a matter which no doubt concerns public order. A statute which cannot be set aside by the will of the parties amounts to an intrusion into the parties' freedom to contract, and the only justification for such an infringement is the preservation of public order. Consequently, a statute can be classified as imperative only and insofar as it involves a matter of public order.

17. It follows that a prohibitory law does not necessarily entail an absolute nullity. Article 12 speaks of nullity as a sanction and its relative or absolute character will be determined according to whether the noncompliance with the legal requirement affects the public order.

18. See *Symposium—Contractual Incapacity in the Louisiana Civil Code*, 47 TUL. L. REV. 1085, 1119 (1973).

19. See S. LITVINOFF & W. TETE, *supra* note 3, at 166-168; *Symposium, supra* note 18, at 1130.

20. LA. CIV. CODE arts. 1887 & 2454.

21. LA. CIV. CODE art. 3460.

22. LA. CIV. CODE art. 373. Since the nullity of the transaction is established to protect the interests of the minor, such a protection is accomplished by giving the protected party the choice of ratifying the act or demand its annulment. To consider the act absolutely null, and therefore not susceptible of confirmation, would punish rather than protect the minor. See *Symposium, supra* note 18, at 1089.

tween the notion of imperative law and absolute nullity, for in both cases the interpreter must examine extraneous factors like the ethical, political, social, and economic values that the statute or the sanction of nullity is supposed to protect.²³

The Civil Code contains numerous provisions which operate only in the absence of the declared or ascertainable will of the parties, and the point has been raised as to whether such provisions should have any place in legislation.²⁴ Strictly speaking, the notion of suppletive laws—or laws from which the parties may derogate at will—seems difficult to reconcile with the notion of the obligatory force of laws.²⁵ However, a functional approach indicates that the inclusion of suppletive statutes is justified. The mere existence of such provisions in no way restricts the autonomy of the will, while on the other hand they materially aid individuals by supplying a system of generally accepted and approved rules and principles to regulate legal relations.

CODIFICATION TECHNIQUE

Professor René David has pointed out that the line drawn between imperative and suppletive laws has been confined to the province of private law, and that no such classification is sponsored by *droit public* writers who, whenever they discuss the subject, simply make a blunt statement that all rules of public law are imperative.²⁶ While wondering why the common law world has failed to elaborate on

23. See F. GÉNY, *METHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* § 175, at 424 (La. St. L. Inst. transl. 1963). Because of the relativity and vagueness attached to the notion of public order, the Civil Code does not include a list of imperative laws nor a list of absolute nullities.

24. Rousset looked upon suppletive texts as an invasion on the parties' freedom to contract and advocated a code entirely composed of imperative rules, while all suppletive provisions were to be relegated to comments. See Rousset, *De la lettre des lois, ou de la codification et de la rédaction rationnelles des lois*, 9 *REV. CRITIQUE DE LÉGISLATION ET DE JURISPRUDENCE* 324 (1856).

25. See La. Civ. Code art. 9. See generally Morrison, *supra* note 7, at 546. Traditional civilian doctrine refers to imperative and suppletive laws while classifying legal norms according to their "obligatory force." In this regard, it has been pointed out that this terminology is inaccurate insofar as it implies that suppletive texts are less obligatory than imperative ones. See 1 H. & L. MAZEAUD, *LECONS DE DROIT CIVIL* § 67, at 94 (1955). The observation is correct, since the difference between both kinds of laws lies in the scope of their application and not in their intrinsic obligatory force. Both types of norms bind the parties in the same way, although the parties are free to agree that certain suppletive laws will not apply to them. Suppletive laws operate only in the absence of the declared or ascertainable will of the parties, and once that gap has been left, either consciously or unconsciously, the suppletive norm becomes as obligatory as any other legal rule. See R. SCHLESINGER, *COMPARATIVE LAW* 402 (3d ed. 1970).

26. See David, *supra* note 5, at 158.

this doctrinal distinction, Professor David suggests the possibility that in view of the fact that only private law has been codified in France, the classification of laws between imperative and suppletive may be tied up with the phenomenon of codification.²⁷ This is an interesting suggestion if it is considered that the movement for codification in civil law countries was inspired by a desire to break definitively with the past, and that a Code, in order to do away with the past, must be comprehensive.²⁸ The necessity of including a large number of suppletive rules in a civil code, therefore, is closely related to that element of comprehensiveness which every civil code is supposed to have. It becomes apparent then, that in order to harmonize the principle of autonomy of the will with the necessity of covering any conceivable fact situation, a civil code must contain a set of norms designed to be applied in case the parties have not provided their own rules. It involves the problem of inserting in a code of laws legal provisions to cover contingencies that have arisen in the course of performing the obligations and which were not thought of, and consequently were not provided for at all either consciously or unconsciously.²⁹

The distinction between imperative and suppletive laws is but an aspect of the idea that public interest is supreme and cannot be set aside by a private agreement: *jus publicum privatorum pactis mutari non potest*. Demarcation between the two kinds of laws becomes clear when it is examined in the light of concrete

27. *Id.* at 159.

28. See A. YIANNOPOULOS, *supra* note 3, at 41.

29. One of the problems arising from the comprehensive character of a Civil Code is the one related to the classification of contracts as nominate and innominate, a distinction which has been at times confused with the problem of imperative and suppletive rules. Nominate contracts are those which are subject to a special regulation contained in the Civil Code (*e.g.*, sale, lease, partnership, etc.), whereas innominate contracts are those which, although subject to the general principles of conventional obligations, are not subject to a special regulation under the Civil Code. See LA. CIV. CODE arts. 1777-78. The practical importance of this classification is reflected in article 1764 of the Louisiana Civil code, which distinguishes between essential, natural, and accidental contractual elements. Essential elements are those without which there is either no contract at all or a contract of another description. Thus, capacity of the contracting parties and their consent legally given are essential elements of every contract, LA. CIV. CODE art. 1779, while the price and the transfer of ownership of the thing sold are essential elements of the nominate contract of sale. LA. CIV. CODE art. 2439. Natural elements of a contract are those provided by law but which the parties may modify or renounce without affecting the nominate character of the contract. An onerous mandate, for example, is nonetheless a mandate because it is of the nature and not of the essence of a mandate to be gratuitous. See LA. CIV. CODE art. 2991. Finally, accidental elements are those provided by the parties in their agreement and not found in the particular part of the Code dealing with nominate contracts. LA. CIV. CODE art. 1764(A)(3).

agreements between individuals, rather than in the light of the notion of public order, a concept which defies definition. The distinction reduces itself to a simple question: Can the parties, on their own initiative, set aside the application of a particular rule of law and submit their legal relationships to the operation of such other rules as they may agree upon? Laws relating to the capacity of persons, the regime of property rights, the protection of third persons, or the protection of one of the contracting parties against the other are inspired by a general interest which would be adversely affected if private agreements were allowed to circumvent their application. Thus, prospective spouses cannot set aside the application of a rule imposing a minimum age to marry;³⁰ parties may not take property out of commerce by declaring it to be inalienable nor create a usufruct of unlimited duration;³¹ a debtor cannot agree to confer a general privilege unless it is expressly granted by law;³² a purchaser cannot renounce in advance the right to demand the rescission of the sale on account of lesion;³³ and one cannot renounce a prescription not yet acquired.³⁴ On the other hand, the parties to a contract can stipulate that an obligation shall be performed at the place of their choice,³⁵ that the expenses attached to the performance shall be borne by the obligee,³⁶ that the sale shall not be subject to any warranty,³⁷ that the surety shall not have the benefit of discussion,³⁸ and that the lessee shall not have the right to sublease.³⁹

The problem of distinguishing between imperative and suppletive rules can be analyzed from another standpoint. Instead of attacking the problem from the top, trying to determine the character of a particular provision, more light would be cast if attention is focused on the particular clause of the agreement which does away with a rule of law, and the question is asked whether the enforcement of the clause would be against public policy.⁴⁰ Thus, by contrasting a contractual clause whereby it is stated that the expenses of the act of sale shall be paid by the seller with article 2466 of the Louisiana Civil Code, which attributes that obligation to the buyer, the suppletive nature of this code article can be easily determined by veri-

30. See LA. CIV. CODE art. 92.

31. See LA. CIV. CODE arts. 535 & 607-09.

32. See LA. CIV. CODE art. 3185.

33. See LA. CIV. CODE art. 2589.

34. See LA. CIV. CODE art. 3460.

35. See LA. CIV. CODE art. 2157.

36. See LA. CIV. CODE art. 2158.

37. See LA. CIV. CODE art. 2503.

38. See LA. CIV. CODE art. 3045.

39. See LA. CIV. CODE art. 2725.

40. See David, *supra* note 5, at 157.

fyng that the enforceability of such a contractual clause is not against the public interest.

It has been said that it is the legislator's task to furnish a uniform criterion for the identification of imperative and suppletive texts.⁴¹ However, as it will be shown, the redactors of the Louisiana Civil Code, as well as of the Code Napoleon, rarely have fulfilled this task. The determination of which are rules of public order and which are merely supplementary of the parties' will is a difficult question, and physical limitations of time and space discourage any attempt to list exhaustively the laws of public order or good morals that are to be found in the Louisiana Civil Code. This difficulty notwithstanding, and in view of the numerous revision projects of the Louisiana Civil Code that are being undertaken currently, it seems appropriate to examine in a cursory review which method, if any, the Code provides for the identification of "laws made for the preservation of public order or good morals."

Assuming that the redactors of the Code have adopted a criterion of distinction, the question arises as to whether such a technique has been followed invariably and thus is a safe guide in the interpretation of the Code. Last but not least, it would be worthwhile to determine whether this technique has proved efficacious enough to justify its adoption in current revision projects of the Louisiana Civil Code.

A distinction should be drawn between the technique of fragmentary legislation and that of codification, each presenting specific peculiarities and involving different considerations.⁴² In this regard, it should be remembered that Louisiana is a mixed jurisdiction and that it is the intention of its main law-formulating agency to follow the civilian legislative technique in the Civil Code revision projects.⁴³ It seems therefore appropriate to survey the way in which the French Civil Code, as well as two modern codes, have met the problem under consideration and which contributions they have to offer to its solution.

THE FRENCH CIVIL CODE

The only article in the Code Napoleon similar to Louisiana Civil Code article 11 is article 6: "Individuals cannot by their conventions

41. F. GÉNY, *supra* note 23, § 175, at 424.

42. See F. Gény, *The Legislative Technique of Modern Civil Codes*, in 9 THE SCIENCE OF LEGAL METHOD 498 & 505 (1921). This English translation belongs to "The Modern Legal Philosophy Series" and was taken from Gény's essay *La technique législative dans la codification civile moderne*, in 2 LIVRE DU CENTENAIRE DU CODE CIVIL FRANCAIS 994 (1904).

43. See J. DAINOW, CIVIL CODE REVISION STYLE AND DRAFTING MANUAL (La. St. L. Inst. rev. 1978).

derogate from the force of laws made for the preservation of public order and good morals." The second paragraph of Louisiana Civil Code article 11 has no French counterpart and was added in 1825 "due to excess caution."⁴⁴

In view of the great similarity of the two codes in spirit and terminology, it seems that if any consistent method were followed in indicating the difference between imperative and suppletive texts, that method should be identical in both codes.⁴⁵

There are many indications pointing to the use of a rigorous technique on the part of the redactors of the *Code civil* in differentiating between imperative and suppletive texts. The imperative or suppletive character of the French Civil Code provisions, it was said, turned on the structure of the formulae. The presence in the formulae of a prohibition (*ne peut* or its equivalent) or of the future verb (replacing the imperative) would invariably indicate the imperative or mandatory nature of the text, while the use of the present indicative or any other verb form, not coupled with a negative, would signal a suppletive text. This conclusion is reinforced by a passage from the discussions before the French General Assembly during the deliberations preliminary to the adoption of Code Napoleon:

The *Conseil d'etat* has ordered that in the redaction of the Code, the future must always be employed. Why? Because in French the future replaces the imperative, and consequently lends itself well to the redaction of laws which are made to command or prohibit

It is only within the last few years that the redactors of our laws have adopted the present indicative, which undoubtedly appears to them more solemn, shorter, more elegant; but which is really not very exact. The law ought not to say: this thing is, when it is not—when the very law has for its object to order that such a thing shall be henceforth and for the future. There is certainly a distinction to make, and the *projet* of the law which we are discussing offers an example of it. Some of its articles are imperative; and those are all composed in the future. The others are in the present tense, because they are only enunciative, and because they only have to declare principles already known; to express rules of right or of morals.⁴⁶

44. A. YIANNPOULOS, *supra* note 3, at 74.

45. See Morrison, *supra* note 15, at 550.

46. See 6 P. FENET, RECUEIL COMPLET DES TRAVAUX PREPARATOIRES DU CODE CIVIL 52, 55 (1827).

The early French commentators adopted this criterion in interpreting the French Code, and the jurisprudence also applied it in the decision of cases coming within imperative or mandatory texts.⁴⁷ At the beginning of the nineteenth century, a French Court of Appeals held that under article 228 of the Code Napoleon, the second marriage of a woman who re-married before the expiration of the ten-month period subsequent to the dissolution of her former marriage was null because of the *ne peut* contained in the text of the article.⁴⁸

A closer examination of the texts, however, casts doubt on whether as a matter of fact the redactors actually employed the rigorous and methodical technique imputed to them by the early commentators and suggested by the statement of the redactors or the *Conseil d'etat*. There are certain articles which absolutely deny the existence of any rigorous technique on the part of the drafters. As indicated, early French doctrine and jurisprudence declared as void those marriages coming within the terms of article 228 of the Code Napoleon, for it was said that the insertion of the *ne peut* indicated that those marriages were celebrated in contravention of an imperative law. Yet, the section of the French Civil Code referring to the nullity of marriages⁴⁹ does not set this out as a cause of nullity, and the penalty seemed unreasonably harsh in view of the purely temporary and cautionary nature of the prohibition. Thus, the *Cour de Cassation* departed from the doctrine and prior decisions, holding that "it is *not enough* that a provision of the Civil Code be couched in prohibitive terms for its violation to carry with it nullity"⁵⁰

Modern French doctrine has recognized that the Code Napoleon did not employ so methodical, rigorous, and precise a classification between imperative and suppletive texts as formerly imputed to it.⁵¹ It will be seen that because of the changeable nature of notions such

47. 1 C. DELVINCOURT, INSTITUTES DE DROIT CIVIL FRANCAIS 291 (2d ed. 1879); 11 P. MERLIN, REPERTOIRE UNIVERSAL ET RAISONNE DE JURISPRUDENCE, V. ^oNULLITE 642 (1827); 1 J. PROUDHON, COURS DE DROIT FRANCAIS 231 (1803).

48. S.2.2.141, COUR D'APPEL DE TREVES, April 30, 1806. Article 228 of the Code Napoleon read (before the amendments of 1919, 1928, and 1975): "La femme *ne peut* contracter un nouveau mariage qu'après dix mois révolus depuis la dissolution du mariage precedent." (Emphasis added.) See LA. CIV. CODE art. 137 (repealed by 1970 La. Acts, No. 108). It should be noted that the French Court of Appeals looked upon the negative command [*ne peut*] of the statute in order to determine its imperative character. As stated before, this would be a "prohibitive" law but not necessarily an "imperative" one.

49. FRENCH CIV. CODE arts. 180-202; LA. CIV. CODE arts. 110-18.

50. Verchère c. héritiers Verchère, S.3.1.415, October 29, 1811.

51. See A. ANGELESCO, LA TECHNIQUE LÉGISLATIVE EN MATIÈRE DE CODIFICATION CIVILE. ETUDE DE DROIT COMPARÉ 583 (1930); B. STARCK, *supra* note 6, at 23.

as "good morals" or "public order," this classification has been left to judicial discretion and doctrine.⁵²

THE LOUISIANA CIVIL CODE

With regard to the legislative technique employed by the Louisiana Civil Code, it seems very unlikely that the Louisiana redactors introduced any substantial variation from the French model. It is true that the question whether the redactors of the 1808 Code adopted French or Spanish substantive law has been debated hotly.⁵³ But, beyond the scope of this well-known dispute is the great similarity of the French and Louisiana Codes in spirit and terminology, and the fact that they were both drafted in the same language and were drawn up, at least in part, under the same juridical influences.

It appears, then, according to early French doctrine and jurisprudence, that the imperative or suppletive character of the texts of the Louisiana Civil Code would turn on the structure of the formulae, especially if it is borne in mind that the Louisiana Codes of 1808 and 1825 were first written in French and then translated into English. In this connection, it is important to notice that the "shall" form of the verb, which is also employed as the imperative in English when used with the third person, has been used thoroughly in translation, even though it is not the natural translation of the French third person future.⁵⁴

Early Louisiana cases have applied this hermeneutical technique in the decision of cases involving the application of imperative norms. Thus, a Louisiana court held that a clause in a marriage contract providing for the donation of immovable property "on the express condition that should she . . . in any manner or form be separated from him as her husband" the property should revert to the husband was void when it was sought to be enforced after the wife obtained a divorce on the ground of her husband's adultery. Emphasizing the presence of the future verb in article 152 of the Code of 1825 (article 156 of 1870),⁵⁵ the court held that such an article "is a law eminently

52. See F. GÉNY, *supra* note 23, § 175, at 424.

53. See Batiza, *supra* note 11; Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972); Sweeney, *Tournament of Scholars Over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585 (1972); Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628 (1972).

54. See Morrison, *supra* note 17, at 552.

55. LA. CIV. CODE art. 156: "In case of separation . . . the party against whom it shall have been pronounced, *shall lose* all the advantages or donations, the other party may have conferred by the marriage contract . . . and the party at whose instance the separation has been obtained, *shall preserve* all those to which such party would have been entitled . . ." (Emphasis added.)

conducive to public order and good morals, and would be null according to article 11 of the Code."⁵⁶ Likewise, a Louisiana court decided that under article 134 of the Louisiana Code of 1825 (article 137 of 1870),⁵⁷ the second marriage of a woman who remarried before the expiration of the ten-month period subsequent to the dissolution of her former marriage was null because of the "shall not" contained in the formula. The court said: "So long as the legislature think proper to continue in force these prohibitory laws . . . it is the duty of courts to see that those protecting laws shall not be violated, either directly or indirectly."⁵⁸

Interestingly enough, subsequent decisions overruled this jurisprudence; it became settled law that marriages entered in violation of article 137 were not null, despite the use of the "shall" form of the verb.⁵⁹ In a similar way, the Louisiana jurisprudence established that although article 161⁶⁰ is a prohibitory law and even expressly nullifies the subsequent marriage between the adulterers, unless the petition specifically mentions the person with whom the adultery is charged to have been committed, the nullity does not apply.⁶¹

Louisiana courts have found it necessary to take liberties in the interpretation of legislative texts that are couched in a clear imperative language. This may be illustrated by the interpretation placed upon article 1533 of the Louisiana Civil Code of 1825 (article 1546 of 1870). Article 1533 provided:

A donation made to a minor under the age of puberty *must* be accepted by his tutor. A minor, arrived at the age of puberty,

56. *Ledoux v. Her Husband*, 10 La. Ann. 663 (1855).

57. Article 134 of the Louisiana Civil Code of 1825 is the counterpart of article 228 of the Code Napoleon. It became article 137 of the Code of 1870 (repealed by 1970 La. Acts, No. 108), which read: "The wife *shall not* be at liberty to contract another marriage, until ten months after the dissolution of her preceding marriage." (Emphasis added.)

58. *Gasquet v. Dimitry*, 9 La. 592, 601 (1836). Compare the rationale of the *Cour de Cassation* while dealing with a similar problem arising under article 228 of the French Civil Code. See text at note 50, *supra*. Here again, the court spoke of "prohibitory" laws and not of "imperative" laws, so that the nullity of the second marriage was not grounded on present article 11 of the Louisiana Civil Code but on article 12, which establishes the implicit nullity of a juridical act contravening a prohibitory law.

59. See *State v. Stevenson*, 115 La. 777, 40 So. 44 (1906); *Succession of Benton*, 106 La. 494, 31 So. 123 (1901).

60. Article 161 was repealed by Act 625 of 1972.

61. See *Rhodes v. Miller*, 189 La. 288, 179 So. 430 (1938); *Succession of Hernandez*, 46 La. Ann. 962 (1894). LA. CIV. CODE art. 161 (repealed by 1972 La. Acts, No. 625) read: "In case of divorce, on account of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy, and under the penalty of nullity of the new marriage."

but not emancipated, *must* accept it under the authorization or with the concurrence of his curator.⁶²

A Louisiana court held that the acceptance of a donation by a minor arrived at the age of puberty was valid without the authorization or concurrence of his curator, as "this clause is not prohibitory so as to impart a nullity, if contravened, nor is the pain of nullity expressly declared."⁶³ In this article *devra* was translated as "must," and one can hardly imagine a stronger imperative than a "must" phrase.⁶⁴ Yet the court did not confine its task to a mere grammatical interpretation of the text.

It can be concluded then that the Louisiana Civil Code did not employ a rigorous legislative technique in order to determine the imperative or suppletive character of its texts. Assuming, arguendo, that the Code adopted a criterion based on the structure of the formulae, it has not been followed invariably nor can it be erected as a safe guide in the interpretation of the Code.

THE GERMAN CIVIL CODE

The preliminary draft of the *Bürgerliches Gesetzbuch* (B.G.B.) elaborated a complicated and intricate technical mechanism for differentiating between imperative and suppletive texts. German draftsmen were obsessed with being complete,⁶⁵ and a part of this thorough regulation of juridical life is reflected in the system of stereotyped, practically invariable formulae devised by the first committee for the redaction of the B.G.B. to differentiate imperative and suppletive texts.⁶⁶

According to the method followed by the preliminary draft, imperative texts were designated by the use of the modals *müssen* (third person singular *muss*) and *können nicht* (third person singular *kann*). The force of those terms would indicate the absolute value of the Code article, based on considerations of public order or good morals from which individuals do not have the power to derogate.⁶⁷ On the other hand, suppletive texts were indicated by the use of the modal *sollen* (third person singular *soll*) or by the use of the present indicative. A close examination of the texts of the B.G.B., however,

62. (Emphasis added.) Article 1533 of the Code of 1825 was altered in the Code of 1870. See LA. CIV. CODE art. 1546. The second paragraph was amended by Act 44 of 1966.

63. Duplessis v. Kennedy, 6 La. 231, 245 (1834).

64. Morrison, *supra* note 17, at 555.

65. F. GÉNY, *supra* note 23, § 212, at 535.

66. See R. SALEILLES, *Introduction à l'étude du droit civil allemand*, in 1 MELANGES DE DROIT COMPARÉ 28 (1904).

67. See C. WANG, THE GERMAN CIVIL CODE xxii (1907).

casts doubt as to whether its scientific codifiers consistently followed this methodical technique. There are many articles in the B.G.B. wherein the redactors included the phrases "unless there is a contrary agreement," "in the absence of contrary agreement," *etc.*, even though the "imperative" modals *können nicht* or *müssen* were included in their texts. It is true that the character of the provision can be determined from the spirit and context of the rule, but it is equally arguable that by breaking the consistency of the criterion, the *argumentum a contrario* can be applied to make imperative every text which does not carry the "unless" clause.

German doctrine has pointed out the difficulty in limiting with accuracy the realm of imperative and suppletive laws, thus conceding the failure of the first committee for the redaction of the B.G.B. in attempting to devise a rigorous method to identify both kinds of texts.⁶⁸ It was perhaps for this reason that the commission for revision of the preliminary draft of the German Civil Code stated in the *exposé des motifs* that "the Civil Code has abandoned any attempt to specify all the imperative norms it contains."⁶⁹

THE SWISS CIVIL CODE

While the German codification boasts of its completeness and the extent to which the discretion of the judge is restrained by legal texts, the Swiss Code prides itself on its equally studied incompleteness, leaving the details to be worked out by jurisprudence and doctrine in accordance with the dynamic social conscience.⁷⁰

Thus, the Swiss Civil Code, while recognizing the difference between imperative and suppletive laws, attempts no rigorous and detailed technical classification of the texts. The redactor stated in the *exposé des motifs* that he "reserves some latitude in failing to mark, by a choice between different formulae, more or less synonymous, for example between the auxiliary verb 'should' [*soll, doit*] and the future tense, an express distinction between prescriptions of imperative law and those of suppletive law."⁷¹ The draftsman furnished the following reasons:

It would scarcely be advantageous for the legislator to take away, in this matter, all liberty of interpretation from the juris-

68. A. ANGELESCO, *supra* note 51, at 585: "The experience of the German legislator sufficiently proves that the lawmaker cannot establish accurately, by the structure of the formulae, the distinction between suppletive laws and the others."

69. 1 B.G.B. *Exposé des motifs* 17 (1896).

70. See F. GÉNY, *supra* note 23, at 509.

71. See E. HUBER, EXPOSÉ DES MOTIFS DE L'AVANT-PROJET DU CODE CIVIL SUISSE 14 (1902).

prudence. It would be an error to formulate the law in such a fashion that it would be impossible for the tribunals to follow the evolution of ideas without a revision of the legislative text . . . *When the legislator intends to place an absolute, imperative value on a provision he ought to say so. If he does not say so, the question will be resolved in accordance with the spirit of the epoch.*⁷²

It can be concluded then, that in the Swiss Civil Code the determination of the imperative or suppletive character of the texts is largely a matter for judicial discretion, inspired by the ideals and exigencies of the period in which the texts are applied, unless their character has been indicated expressly and unmistakably in the text.⁷³

REVISION PROJECTS OF THE LOUISIANA CIVIL CODE

The Style and Drafting Manual for the Civil Code revision indicates that, at least in principle, the present tense and indicative mood should be used to facilitate readability.⁷⁴ However, while dealing specifically with the structure of the articles in connection with their imperative or suppletive character, the Manual indicates that "shall" should be used if the provision is imperative and "may" if the text is suppletive.⁷⁵

No attempt will be made to consider all of the revision projects of the Louisiana Civil Code, and physical limitations will make it impossible to give more than illustrations of just a few of the revision projects and their possibilities and limitations of legislative technique.

Obligations

The principle of autonomy of the will receives its strongest application in the field of conventional obligations. For this reason the texts of the Obligations Revision very seldom include a "notwithstanding contrary agreement" clause. In fact, the freedom of the parties has such an implicit strength that the comments and reporter's messages to the draft articles rarely mention that the parties may provide otherwise.

72. (Emphasis added.)

73. Sometimes the Swiss Civil Code establishes clauses "*sauf convention contraire*," but their use is not consistent throughout the code.

74. J. DAINOW, *supra* note 43, at F-2, rule 2.

75. *Id.* at F-3, rule 5. See LA. R.S. 1:3 (1950); Lazarus, *Legislative Bill Drafting*, 1 LA. STAT. ANN. lvii, lix (West 1973).

In those rare instances in which the "unless" clause has been included in the text, its inclusion has not been fortunate. Article 1 of the section "Of Consent," for example, states in the last paragraph: "Unless otherwise specified in the offer, there need not be conformity between the manner in which the offer is made and the manner in which the acceptance is made."⁷⁶ The use of the present indicative, coupled with the principle of autonomy of the will which permeates this section of the Code, would suffice to dispense with the "unless" clause. A different problem would have been present had the paragraph read "there *shall* need not be conformity" Furthermore, the use of "shall" has been employed in texts wherein it is obvious that the provision can be altered at the parties' pleasure.⁷⁷

The future form of the verb has been used rarely throughout the Obligations Revision project; most of its provisions use the present indicative or the "may" form. This can be explained because, as stated before, the principle of autonomy of the will governs the whole area of conventional obligations.⁷⁸

Property

Laws which determine property rights and their limits and effects are too closely connected with the social organization of the community to permit derogation by private agreement. The regime of property, therefore—in contrast with the obligations regime—is governed for the most part by mandatory or imperative rules of law.⁷⁹ In accordance with the principle of *numerus clausus*, parties may not create real rights not allowed by law,⁸⁰ nor may parties take property out of commerce by declaring it inalienable.

76. LOUISIANA STATE LAW INSTITUTE, REVISION OF THE LOUISIANA CIVIL CODE OF 1870: BOOK III—OBLIGATIONS REVISION tit. IV, chapt. 2, § 2, art. 1. (S. Litvinoff rep. 1980).

77. *Id.* at chapt. 1, Section on "Performance in General," art. 9:

"In the absence of agreement or other indication of the parties' intent, performance of an obligation to give an individually determined thing shall be rendered at the place the thing was when the obligation arose. If the obligation is of any other kind the performance shall be rendered at the domicile of the obligor.

78. *Id.* at Section "Of the Object and Matter of Contracts," art. 1: "Parties are free to contract for any object that is lawful, possible, and determined or determinable."

79. A. YIANNPOULOS, *supra* note 3, at 146.

80. Article 476 of the Louisiana Civil Code includes ownership, personal and predial servitudes, and other real rights allowed by law as rights in things. After reading the text of the article, one gets the impression that the legislator has adopted the system of *numerus clausus*. However, comment (d) indicates that current French and Louisiana jurisprudences favor a system of *numerus apertus*. Furthermore, comment (a) states that the new article 476 does not change the law; therefore, the

Most of the texts of the new Book II of the Civil Code are couched in the present indicative. In spite of the fact that the majority of these provisions are designed to be imperative, the "shall" is hardly used. Here again, the Civil Code Drafting Manual's rule as to imperative and suppletive laws has not been followed strictly.

There are many superfluous "unless otherwise provided by law" but very few "notwithstanding contrary agreement" and "unless otherwise provided" clauses. The absence of the latter type of clause is easily understood if it is remembered that in this matter "public order" is the rule and "autonomy of the will" the exception.

It should be noted that the drafters have not been consistent in the use of the "unless" clauses. For instance, article 507 of the Civil Code, dealing with the consequence of accession in relation to movables, specifically provides that the following code articles are to be applied "[i]n the absence of other provisions of law or contract." On the other hand, article 469 provides that the transfer or encumbrance of an immovable includes its component parts without indicating that the parties to the transaction may provide otherwise. The lack of consistency may be explained easily. The "unless" clause (*rectius*: "in the absence" clause) in article 507 became necessary to indicate that the exceptional rule (*i.e.*, freedom of the parties) is to be applied in that particular section. On the other hand, the use of the present indicative and not of the "shall" in article 469 determines the suppletive character of the text. The problem is that there are many other provisions that, though couched in the present indicative, are not meant to be suppletive. Although the character of the provision may be determined by its spirit and context, the *argumentum a contrario* may still be raised. Be this as it may, it is obvious that the drafters did not intend to use a rigorous, precise technique aiming at classifying imperative and suppletive rules according to the structure of the formulae.

Matrimonial Regimes

The revised matrimonial regimes law under Act 709 of 1979 has been inserted at the beginning of the provisions pertaining to nominate contracts. The location appears sensible, because Act 709 regulates the *patrimonial* effects of marriage, which may be derogated from by contract, whereas the Civil Code articles which

comments seem to allow the parties to a contract to create real rights "apart and beyond" those allowed by law, whereas the text of the article seems to preclude that possibility.

appear in Chapter Five of Book One regulate the *personal* effects of marriage, which may not be altered by agreement of the parties.⁸¹

Even though the location of the articles on matrimonial regimes emphasizes the ability of the spouses to regulate their matrimonial property according to an express contract, the redactors inserted specific provisions in the introductory chapter of Title Four stating the limits of contractual freedom.⁸² That explains the rare use of "unless otherwise agreed" clauses.

It is worthwhile to point out that in certain instances the drafters have considered that some situations are of such delicacy as to warrant an express provision indicating the parties' freedom to renounce rights conferred by the law.⁸³ In this way the legislator expressly stated that the spouses' right to concur in those specific acts is of a suppletive nature.

Partnership

The new articles on partnership incorporated into the Civil Code by Act 150 of 1980 include imperative as well as suppletive provisions. Insofar as a partnership is a contract, the general rules on conventional obligations apply to the contract of partnership to the extent that those provisions can be reconciled with those pertaining to the nominate contract of partnership.⁸⁴ One may therefore assume that the parties to a partnership contract enjoy an almost unrestrained freedom to regulate their affairs in the same way as in any other contract. However, this is not so, because the contract of partnership engenders a juridical person distinct from its partners,⁸⁵ and

81. See generally Spaht & Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 LA. L. REV. 83, 86-87 (1979).

82. LA. CIV. CODE art. 2330:

Spouses may not by agreement before or during marriage, renounce or alter the marital portion or the established order of succession. Nor may the spouses limit with respect to third persons the right that one spouse alone has under the legal regime to obligate the community or to alienate, encumber, or lease community property.

83. LA. CIV. CODE art. 2348:

A spouse may expressly renounce the right to concur in the alienation, encumbrance, or lease of a community immovable or all or substantially all of a community enterprise. He also may renounce the right to participate in the management of a community enterprise. The renunciation may be irrevocable for a stated term.

84. LA. CIV. CODE art. 2802: "The contract of partnership is governed by the provisions in the Title: *Of Conventional Obligations*, in all matters that are not otherwise provided for by this Title."

85. LA. CIV. CODE art. 2801:

A partnership is a juridical person, distinct from its partners, created by a

it becomes a matter of public order that third persons be aware when they are dealing with a partner and when they are dealing with the partnership in its capacity as such. For this reason, the Advisory Committee on Partnership deemed it appropriate to enter a caveat in comment (b) to article 2802, its main purpose being to alert the interpreter that the drafters did not intend to distinguish imperative and suppletive provisions on the basis of sacramental formulae.⁸⁶

In the first place, it must be pointed out that this revision project did not resort to the "shall" and "may" as verb forms distinguishing between imperative and suppletive rules. In fact, the "shall" form of the verb hardly has been used. As stated in comment (b) to article 2802, the drafters started from the premise that "courts ultimately determine which matters involve public policy," without attempting to indicate on an article-by-article basis which norms are to be considered of public order.⁸⁷ Similarly, although the suppletive character of several texts has been signaled by an "unless the partners have agreed otherwise" clause,⁸⁸ the redactors have emphasized that the absence of such a clause does not necessarily indicate the imperative character of the provision.⁸⁹

In one isolated instance, dealing with the right of a partner to obtain information, the lawmaker underscored the mandatory nature

contract between two or more persons to combine their efforts or resources in determined proportions and to collaborate at mutual risk for their common profit or commercial benefit. Trustees and succession representatives, in their capacities as such, and unincorporated associations may be partners.

86. LA. CIV. CODE art. 2802, comment (b):

The provisions of Chapters 1, 2, 4, 5, 6 are generally suppletive, that is, in accordance with the principle of Article 11, the Louisiana Civil Code of 1870, parties may depart from the provisions of these chapters that do not concern matters of public policy. Nevertheless, provisions such as contained . . . in Article 2813 . . . deal with matters involving the public order and should therefore be construed as mandatory rather than suppletive. In some instances provisions may not be departed from not because they are 'mandatory' but because they are 'essential' as the proper legal frame for a particular situation. Article 1764 of the Louisiana Civil Code of 1870 contemplates such 'essential' stipulations or provisions. . . . Article 2801 is an example of a provision of which no departure is possible because it is essential. The suppletive nature of a provision is at times indicated by the expression 'unless otherwise agreed' or other words to the same effect, but the absence of such wording does not necessarily indicate that the provision in question is mandatory or is not suppletive. Courts ultimately determine which matters involve public policy. It is clear that provisions concerning ownership of immovable property and protection of the interests of third parties are matters of public policy. See for example Arts. 2806, 2833 and the provisions of Chapters 3 and 7.

87. *Id.*

88. See LA. CIV. CODE arts. 2803-04, 2806, 2820, 2824, 2825, 2827, and 2834.

89. See note 61, *supra*.

of the rule by attaching the sanction of nullity to any agreement designed to preclude the partner's right to inform himself reasonably of the business activities of the partnership.⁹⁰ In most cases, the drafters' comments or the very nature of the provision will furnish sufficient guidelines to be considered by the judge in determining the character of the text.⁹¹ This has been, after all, the technique employed throughout the Louisiana Civil Code, whereby its drafters did not consider it necessary to indicate expressly on a case-by-case basis that the public order overrides individual interests.

Mortgage of Movables Used in Commercial or Industrial Activity

Although this Act has not been included in the Civil Code but in the Louisiana Revised Statutes,⁹² its provisions have been phrased pursuant to rule 5 of the Civil Code Revision Style and Drafting Manual. The Act on mortgage of movables used in commercial or industrial activity is, no doubt, a *rara avis* among other revision projects, insofar as it consistently employs the "shall" and "may" to indicate, respectively, imperative and suppletive texts. The subject matter regulated by this act concerns the real right of mortgage in certain corporeal movables, so that the "shall" form of the verb abounds. The act permits the encumbrance of certain corporeal movables, together with the encumbrance of the land or lease upon which they are located. The property so encumbered is subject to the registry and procedural rules regulating the mortgage of the immovable or lease with which the movables are encumbered. The Act allows the separate mortgaging of the movables as a chattel mortgage, but once the parties decide to follow the scheme provided by the Act, they are bound to comply with all the formal requirements imposed by the statute. The autonomy of the will plays an insignificant role in this matter, and the legal effects which follow the granting of the mortgage are imperatively applicable. The protection of

90. LA. CIV. CODE art. 2813:

A partner may inform himself of the business activities of the partnership and may consult its books and records, even if he has been excluded from management. A contrary agreement is null. He may not exercise his right in a manner that unduly interferes with the operations of the partnership or prevents other partners from exercising their rights in this regard.

91. Even though neither the *exposé des motifs* nor the comments are law, they constitute helpful guidelines to assert the *mens legislatoris*. Many of the new articles on partnership are accompanied by comments wherein the drafters indicate what has not been expressly stated in the text, namely, that the parties may provide otherwise. These comments are mere persuasive sources to be taken into account by the interpreter, and they do not preclude the judge from considering other factors which eventually may lead him to construe the statute in a different way than the legislator himself.

92. LA. R.S. 9:5367-72 (Supp. 1980).

third parties who might deal with the encumbered property is the public policy issue which has prompted the legislator to employ "shall" throughout the entire Act. This uniform technique leaves no room for doubt as to whether a text is imperative or suppletive.

It becomes apparent that of the few civil codes and revision projects considered, only this particular project methodically employed a rigorous technique for the textual distinction between imperative and suppletive texts. The small number of provisions it contains and the revision undertaken by the Semantics Committee of the Louisiana State Law Institute have contributed the desired consistency. The elegance conferred by the use of the present indicative has been sacrificed for the sake of clarity and therefore replaced by the monotony and heaviness of the words "shall" and "may."

TENTATIVE APPROACH

The evaluation of different techniques poses a question: Should the legislator employ the technique of determining in detail the imperative or suppletive character of each article's text, or should the legislator be content with fixing inflexibly only those rules which, because of their connotations of public order, warrant an express declaration to that effect? The second alternative seems preferable for the following reasons.

Modern legislative technique postulates the insufficiency of codified law and recognizes that legislation is incapable of foreseeing and regulating in advance all of the complex relations of man in society. This has been acknowledged in the preface of the Style and Drafting Manual for the Civil Code Revision: "[A civil code] . . . contains general as well as specific rules, but the latter are included only to implement the general legal principles."⁹³ It recognizes that codification is essentially static and that the phenomena to which it must be applied are essentially dynamic. The task, then, of a modern codification technique becomes that of reconciling the conflicting nature of the stable legislative law and the changing social circumstances. The casuistical technique so much employed in common law jurisdictions has proved unsatisfactory when applied to a civil code, for the latter is supposed to cope with the changes of a gradual evolutionary character without being able to rely on case law to the extent that common law jurisdictions do. Thus formulated, the problem of the suppletive and imperative character of the texts should be addressed in light of the correlative impossibility (or futility) of delimiting through the structure of the formulae the imperative or suppletive character of every code article.

93. J. DAINOW, *supra* note 43, at F-1.

Attempts to define "public order" have been a complete failure.⁹⁴ Considerations of fluidity and flexibility apply with particular force to concepts as variable as "good morals" and "public policy," which are totally dependent on the social conscience of the time and place and demonstrate a continuous and progressive fluctuation. It follows that the legislator should not employ a technique which will result in making it impossible for the texts to evolve with the social conscience by binding the discretion of the judge within narrow limits, thus attempting to fix inflexibly the suppletive or imperative character value of every provision. The experience of the past is illustrative in this respect. It has been shown by the way in which French, as well as Louisiana, courts have declared the suppletive character of many provisions which attempted to place the judge on a statutory bed of Procrustes.

These reflections are not aimed at leaving the judge entirely free, since he still must be guided by article 11 of the Civil Code and the notions of public order and good morals; but these concepts receive new content from the dynamic social conscience.⁹⁵ Furthermore, the legislator is free to state expressly the legislative sanction attached to those few provisions which parties may not alter at their pleasure whenever the situation is of such delicacy as to warrant an express statement.

CONCLUSIONS

The distinction between imperative and suppletive texts based upon the structure of the formulae is useless unless applied consistently and universally. Most of the codes and revision projects that have been considered fail to provide a rigorous method of distinguishing both types of provisions.

When the legislator attempts to carry the differentiation in every article of the code, this technique brings with it a certain inescapable artificiality and forcefulness, besides inevitably raising

94. See F. GÉNY, *supra* note 23, § 175, at 423. After confessing that attempts to define *ordre public* have been a complete failure, Gény points out the cardinal importance of determining which are the legal rules inspired by a superior social interest and therefore not susceptible of free regulation. He concludes that in determining the notion of public order, the interpreter must direct his search toward sociological elements of all kinds which are the moving forces in the situations submitted for his decision. Gény states: "How else can this inquiry be conducted if not through an investigation of our moral nature, a scrutiny of the principles of our political organization, penetration of the needs of our economic order, so as to find out the superior rules which express the conditions vital for our society at the present time, and which should therefore govern the individual will?" F. GÉNY, *supra* note 23, at 424.

95. *Id.*

doubt as to almost every text: Is this the isolated instance in which the legislator made a mistake? If the text does not specifically state "unless otherwise agreed," does it mean that the provision is necessarily imperative? If the text does not include the phrase "notwithstanding a contrary agreement," does it mean that the provision is necessarily suppletive?

Imperative texts should employ, as far as possible, the "shall" form of the verb and should state expressly the legislative sanction attached (*e.g.*, "a contrary agreement is null").

Other than the preceding, no textual distinction should be made between suppletive and imperative texts; their value should be determined and their application should be made by the judge in accordance with the spirit of the epoch and the exigencies of the situation.

The drafters may nevertheless indicate in the comments the imperative or suppletive character of the provision. The comment will form an element to be considered by the judge in determining the character of the rule, but it is not to be binding upon him nor to preclude him from taking into account the contemporary social conscience while reaching his conclusion.