THE SOURCES OF CIVIL ORDER ACCORDING TO THE LOUISIANA CIVIL CODE

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Exegesis is the art of allowing a document to speak for itself. In this essay the Louisiana Revised Civil Code of 1870 and its predecessors, the Civil Code of 1825 and the Digest of the Civil Laws of 1808,[1] will be allowed to do that on the subject of the formal and substantive sources of the principles and rules of civil order. Words, however, must be understood in the sense in which their writers used them and therefore references to sources outside these documents will be made for enlightenment as to their probable meanings in the Digest and Civil Codes.

THE SOURCES OF ORDER ACCORDING TO THE REVISED CIVIL CODE'S PRELIMINARY TITLE

The exegesis will begin with an examination of what appear to be the most relevant portions of the Preliminary Title of the Revised Civil Code:

> PRELIMINARY TITLE: OF THE GENERAL DEFINITIONS OF LAW AND THE PROMULGATION OF THE LAWS
>
> CHAPTER 1—OF LAW
>
> Art. 1. Law is a solemn expression of legislative will.
>
> . . . .
>
> Art. 3. Customs result from a long series of acts, constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent.
>
> . . . .
>
> CHAPTER 3—OF THE EFFECTS OF LAWS
>
> . . . .
>
> Art. 11, paragraph 1. Individuals cannot by their conventions, derogate from the force of laws made for the preservation of public order or good morals.
>
> . . . .
>
> CHAPTER 4—OF THE APPLICATION AND CONSTRUCTION OF LAWS
>
> . . . .
>
> Art. 21. In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent.[2]

Preliminary Observations

A simple inspection of the passages above permits several tentative observations. First, "law" as used in article 1 means legislation; nothing else is "a solemn expression of legislative will." Second, "law" as used in the caption of Chapter 1 must include both legislation and custom, for both are topics of the chapter; thus the Revised Code of 1870 cannot be regarded as expressing legislative positivism, or, in other words, as limiting "law" to legislation. Third, convention is a source of civil order that takes precedence over "laws" other than those "made for the preservation of public order or good morals"; whether convention has its force through law or from another source of order, however, does not appear immediately. Fourth, "equity" as defined in article 21 is a norm of order not included within the term "law" as used in the caption of Chapter 1, where it signifies legislation and custom only. Fifth, the terms "express law" and "positive law" in article 21 each must refer to both legislation and custom; to restrict the meaning of either to legislation only would be inconsistent with the inclusion of custom in Chapter 1, on "law." Sixth, if "express law" and "positive law" include custom, then "usage" in article 21 must not be the equivalent of custom, for under that article the judge may resort to "usages" only in the absence or silence of "express" or "positive" "law." It

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The author wishes to acknowledge his elation over being asked to contribute to this issue of the Tulane Law Review prepared in honor of Professor Mitchell Franklin, especially inasmuch as he and Professor Franklin, while sharing common interests in the history, science, and philosophical bases of civil law, particularly that of Louisiana, have entertained and do entertain widely divergent views on aspects of these subjects. In spite of these differences of opinion, the author has appreciated Professor Franklin's vast erudition and meticulous scholarship and Professor Franklin in turn has shown the utmost interest in and understanding of the author's efforts even from the time he was a law student in a university other than that in which Professor Franklin was then teaching.

1. A Digest of the Civil Laws now in force in the Territory of Orleans (1808) [hereinafter cited as Digest of 1808]. Louisiana became one of the United States in 1812.

2. La. Civ. Code arts. 1, 3, 11, 21.

is not apparent immediately, however, whether "law" as used in the caption of the Preliminary Title is synonymous with "law" as used in the caption of Chapter 1 (to mean legislation and custom), or has a broader meaning inclusive as well of the two other sources of civil order mentioned in the Preliminary Title, convention (article 11) and equity (article 21); but the inadequacy of the caption of the Preliminary Title to cover all the subject matter of the Title, in the event the term "law" found there does not include convention and equity, suggests that it must do so. Nor is it apparent whether article 3 sanctions customs *secundum* and *contra legem* as well as custom *praeter legem*. Finally, noticeably absent is any reference to judicial precedent.

Implications of the Preliminary Titles of the Digest of 1808 and Civil Code of 1825

Some confirmation and clarification of these preliminary observations can be gleaned from an examination of the English and French texts of the corresponding provisions of the Digest of 1808 and those of the Civil Code of 1825, construed in the light of the report of the redactors of the latter to the legislature in 1823[3] and their remarks in the *Projet* of the Civil Code of 1825[4] itself.

One noticeable fact is that whereas the caption to Chapter 1 in the English text of the Civil Code of 1825 is "Of Law," just as it appears in the Revised Civil Code of 1870, in the French texts of both the Digest of 1808 and the Civil Code of 1825 it is "*De la Loi et des Coutumes,*" and in the English text of the Digest of 1808 it is "Of Law and Customs." The last phrase is a fair translation of the French if "law" is understood to mean legislation, a meaning that conforms to article 1's definition of *"loi"* as the solemn expression (*déclaration*) of legislative will. Why the English version of the caption of Chapter 1 in the Civil Code of 1825 reads simply "Of Law" may be inferred from the redactors' comments in the *Projet* and the subsequent action of the legislature.

3. E. Livingston, L. Moreau Lislet & P. Derbigny, Preliminary Report of the Code Commissioners dated February 13, 1823, *reprinted in* 1 La. Legal Archives lxxv-xcv (1937).

4. Additions and Amendments to the Civil Code of the State of Louisiana, Proposed in Obedience to the Resolution of the Legislature, of the 14th of March, 1822 (1823), *reprinted in* 1 La. Legal Archives (1937) [known popularly and hereinafter cited as *Projet* of the Civil Code of 1825].

The redactors had proposed that article 3, on custom, not be included in the Civil Code of 1825 for the reason that it would be inconsistent to recognize custom in a jurisdiction in which "all" the laws were written.[5] The redactors, then, had intended the formal source of positive law to be limited to legislation and therefore probably had eliminated the words "and customs" and "*et des coutumes*" from the captions of Chapter 1 in English and French texts of the *Projet* submitted to the legislature. The legislature, however, rejected the proposal, included article 3 in the Civil Code of 1825, and, probably working with only the French text of the *Projet,* reinserted the words "*et des Coutumes*" there, but neglected to reinsert the words "and customs" in the English text. No doubt this was an oversight. Those who prepared the Revised Civil Code of 1870 must have worked only from the English text of the Civil Code of 1825 and, doing so, failed to note the error made in 1825. Yet this second oversight causes no harm, and indeed serves to supply the deficiency of the 1825 English text if the word "law" in the caption of Chapter 1 is deemed to refer to both legislation and custom.

Some clarification of the intended meaning of the term "law" in the Preliminary Title's caption may be gleaned from the Digest of 1808 and the Civil Code of 1825. The French text in each read "*Des Définitions Générales du Droit*" and the English texts each rather clumsily translated "*droit*" as "rights." In the Revised Civil Code of 1870 the word "law" was substituted for "rights." There is, of course, no English term corresponding precisely to "*droit*" and frequently this term is rendered as "law." It may be assumed that the redactors of the Revised Civil Code of 1870 understood that "rights" was not a good translation of "*droit*" and sought to correct the error. Thus "law" as used there probably was intended to have the same meaning as "*droit*" in the French texts of the Digest of 1808 and the Civil Code of 1825.

The exegesis, however, has been pushed as far as the texts of the Preliminary Title will allow without some reference to the formal and substantive sources of the Digest of 1808 and of the

5. *Projet* of the Civil Code of 1825, *supra* note 4, art. 3, *reprinted in* 1 La. Legal Archives 1.

Civil Codes of 1825 and 1870.

The Relevance of the 1800 Projet *of the French* Code Civil

There can be no doubt that the redactors of the Digest of 1808, the first Louisiana legislation to contain articles 1, 3, and 21, modeled these articles at least in part on corresponding provisions of the 1800 *Projet* of the French *Code civil*.[6] The redactors, indeed, used the French *Projet* of 1800 and the French *Code civil* of 1804[7] itself as models both for the organization of the Digest of 1808 and for sources of language that, in their judgment, expressed the Spanish and Roman laws they had been ordered by the legislature to use as its base.[8] The French *Code civil* has no articles similar to articles 1, 3, and 21 of the Louisiana Digest and Civil Codes and could not have provided models for them. The *Projet* of 1800, however, contained a Preliminary Book, captioned "*Du Droit et des Lois*," various articles of which most certainly served as the models for many articles in the Preliminary Title of the Louisiana Digest and Civil Codes. Presently relevant portions of the French *Projet's* Preliminary Book, entitled "Of *Droit* and the *Lois*," appear below, translated

6. *Projet de L'An VIII* [*Projet* of 1800], *reprinted in* 2 Fenet, Recueil Complet des Travaux Préparatoires du Code Civil 3-413 (1827) (reprint 1968). The *Projet* of 1800 is also known as *Projet* de 1800 and *Projet du Gouvernement*.

7. Code civil [C. civ.] (Fr. 1804), also named Code Napoléon in French imperial periods.

8. *See* Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 Tul. L. Rev. 603 (1972), replying to Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 Tul. L. Rev. 4 (1971). *See also* Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 Tul. L. Rev. 628 (1972); Franklin, *Some Considerations on the Existential Force of Roman Law in the Early History of the United States*, 22 Buffalo L. Rev. 69 (1972); and Sweeney, *Tournament of Scholars over the Sources of the Civil Code of 1808*, 46 Tul. L. Rev. 585 (1972). Professor Batiza seemed to have altered his initial position. *See Preface* to R. Batiza, Sources Which Had a Substantial or Partial Influence on Provisions of the Louisiana Civil Code of 1808: The Original Texts (private printing 1974). Later, however, he denied having done so. *See* Batiza, *The Actual Sources of the Marriage Contract Provisions of the Louisiana Civil Code of 1808: The Textual Evidence*, 54 Tul. L. Rev. 77, 82-83 (1979).

The Orleans Territorial legislature commissioned the Digest by Resolution of June 7, 1806, 1806 La. Acts, at 214. Therein the commissioners are directed to make the "civil law" in force the *"base"* (French text) or "ground" (English text) of the "code" to be prepared by them. Shortly before, in May 1806, the Orleans legislature had passed an Act declaring the civil laws in force to be "1. The Roman Civil Code, as being the foundation of the Spanish law . . . [and] 2. The Spanish law . . . ." This Act was vetoed by Governor W.C.C. Claiborne (for reasons not relevant here) but it cannot be denied that it expressed the view of the Orleans legislature on the "civil law" in force. The original of this Act is among the Orleans Territorial Papers in the National Archives.

by the author except for key words whose meaning must be ascertained:

> TITLE I.
>
> *General Definitions.*
>
> Article 1. There exists a universal and immutable *droit*, the source of all positive *lois*: it is nothing other than natural reason in so far as it governs all men.
>
> 2. Every people [nation] recognizes an external *droit* applicable to all men and an internal *droit* applicable to itself.
>
> 3. The external *droit*, or *droit* of peoples [nations], is the sum of all rules observed by the many nations among themselves.
>
> Some of these rules are founded solely on the principles of general equity; others are fixed by received usages or by treaties.
>
> 4. The interior or particular *droit* of each people [nation] consists partly of the universal *droit*, partly of *lois* peculiar to them, and partly of customs or usages, the supplement to the *lois*.
>
> 5. Custom results from a long series of acts constantly repeated that have acquired the force of a tacit and common convention.
>
> 6. *Loi*, among all peoples [in all nations] is a solemn declaration of legislative *pouvoir* . . . .
>
> . . . .
>
> TITLE V.
>
> *Of the Application and Interpretation of the Lois.*
>
> . . . .
>
> 11. In civil cases, the judge, in the absence of *loi précise*, is a minister of equity. Equity is the recourse to the natural *loi*, or to usages received in the silence of the positive *loi*.[9]

9. The original text is as follows:

> TITRE I
>
> *Définitions générales.*
>
> Article I. Il existe un droit universel et immuable, source de toutes les lois positives: il n'est que la raison naturelle, en tant qu'elle gouverne tous les hommes.
>
> 2. Tout peuple reconnait un droit extérieur ou des gens, et il a un droit intérieur qui lui est propre.
>
> 5. Le droit extérieur ou des gens, est la réunion des règles qui sont observées par les diverses nations, les unes envers les autres.
>
> Dans le nombre de ces règles, les unes sont uniquement fondées sur les principes de l'équité générale; les autres sont fixées par des usages reçus ou par des traités.

In the French *Projet* of 1800, then, "*droit*" has several connotations. First, there is the philosophical sense of the dictates of natural reason (universal *droit*). Second, there is the sense of the sum of norms applicable among nations (exterior *droit*) and that of the sum of norms applicable within a nation (interior *droit*). In each of the latter instances of *droit*, the norms are partially those of philosophically discovered order (principles of general equity; universal *droit*) and partially those of the positive order (received usages and treaties in the case of exterior *droit*; *lois* and "customs or usages" in the case of interior *droit*). Thus it could be that "*droit*" as used in the Preliminary Title of the Digest of 1808 and the Civil Code of 1825, "rights" as used in the captions of the Preliminary Titles of the Digest of 1808 and Civil Code of 1825, and "law" as used in the same caption in the Revised Civil Code of 1870, all include both the philosophical and positive sources of the norms of order in Louisiana; that is to say, *droit* includes "natural law and reason" as mentioned in article 21 as well as legislation and custom, and is not limited to legislation and custom only. On the other hand, whereas "*loi*" as used in the captions of Chapter 1 of the Preliminary Title in the French text of the Digest of 1808 and that of the Civil Code of 1825 and "law" in the caption used in the English text of the Digest of 1808 refer to legislation alone, "law" as used in the captions of Chapter 1 of the Preliminary Title in the English text of the Civil Code of 1825 and in the Revised Civil Code of 1870 must include custom as well as legislation.

Les premières forment le droit des gens naturel; les secondes, le droit des gens positif.

4. Le droit intérieur ou particulier de chaque peuple se compose en partie du droit universel, en partie des lois qui lui sont propres, et en partie de ses coutumes ou usages, qui sont le supplément des lois.

5. La coutume résulte d'une longue site d'actes constamment répétés, qui ont acquis la force d'une convention tacite et commune.

6. La loi, chez tous les peuples est une déclaration solennelle du pouvoir législatif sur un objet de régime intérieur et d'intérêt commun.

. . . .

TITRE V.

De l'application et de l'interprétation des lois.

. . . .

11. Dans les matières civiles, le juge, à défaut de loi précise, est un ministre d'équité. L'équité est le retour à la loi naturelle, ou aux usages reçus dans le silence de la loi positive.

Projet of 1800, Livre Prélim, Tit. I, Arts. 1-6 & Tit. V, Art. 11, *reprinted in* Fenet, *supra* note 6, at 3-4, 6-7.

From the provisions of the French *Projet* of 1800, moreover, it may be argued that the force of custom under the *Projet* differs from that under the Digest and Codes in Louisiana. Article 5 of the French *Projet* of 1800 seems to equate custom and usage. The "or" in "customs or usages" is not disjunctive. This construction would be consistent with the French Revolution's limitation of the positive order to legislation if for no other reason than to render it difficult for a judge to make law by finding the existence of a custom. It is consistent, too, with the *Projet's* definition of custom, which does not distinguish usage. Thus in article 11 of the French *Projet*, "usages received in the silence of the positive *loi*" should be construed to include customs. In article 21 of the Louisiana Digest and Codes, however, to construe "usages" as inclusive of customs would be inconsistent with the manner in which legislation and custom seem to have been set apart, without mention of usages, in Chapter 1 of the Preliminary Title. This construction would be especially inconsistent with the concept of custom as positive law implicit in Chapter 1 since its caption was reduced to the phrase "Of Law," a matter noted earlier in this article.[10]

The Significance of Domat

Domat's *Les Lois Civiles dans leur Ordre Naturel*[11] is of possible relevance to an understanding of the terms used in the Digest of 1808 and the Civil Codes of 1825 and 1870. Domat's work is said to have been the principal inspiration for the Preliminary Book of the French *Projet* of 1800,[12] which in turn served as something of a model for the Preliminary Title of the Louisiana Digest and Civil Codes. In addition, it is Domat whose work is cited by Louis Moreau Lislet, one of the redactors of the Digest of 1808 and of the Civil Code of 1825, as a convenient synthesis of Roman law whenever he wishes to indicate the Roman sources of the substance of articles of the Digest.[13] The

10. *See* text following note 4 *supra*.

11. J. Domat, Les Lois Civiles dans leur Ordre Naturel (1689-1697), *reprinted in* 1 Oeuvres Complètes de J. Domat (J. Rémy ed. Paris 1835).

12. A. Arnaud, Essai d'Analyse Structurale du Code Civil Français 25 (1973).

13. *See* the first page of the *Avant-Propos* in L. Moreau Lislet, *Loix de L'Etat de la Louisiane avec des notes qui referent aux Loix civiles et Espagnoles qui y ont rapport* (1814), on interleaves in the de la Vergne Volume of the Digest of the Civil Laws Now in Force in the Territory of Orleans (1808) (reprint 1968). The notes contained in the de la Vergne Volume are believed to be those of Moreau Lislet.

meanings Domat gave to *droit, loi,* custom, and usage, therefore, may be reflected in the Louisiana Digest and Civil Codes.

Domat uses *droit* to refer to right order, whether natural or posited. Thus in Domat *droit naturel* signifies natural right order, or right order according to nature, for which natural equity is used as a synonym.[14] Similarly, *droit arbitraire* or *positif* is right order according to human specification that does not offend natural equity or *droit naturel.*[15] The rules of the *droit naturel,* or natural equity, are discoverable from nature through reason or philosophy.[16] The rules of the *droit positif* are specified through legislation and custom.[17] These rules, whether of the *droit naturel* or of the *droit positif,* he labels either *lois* or *regles,* using the terms interchangeably.[18] Thus it appears that the conclusions reached previously with regard to the meanings of *droit* and *loi* in the French texts of the Louisiana Digest of 1808 and of the Civil Code of 1825 are supported by Domat's meanings of these terms. Accordingly, "rights" and "law" in the English texts of the captions of the Preliminary Titles of the Digest of 1808 and of the Civil Codes of 1825 and 1870, as translations of *"droit,"* may be understood to refer both to right order according to nature (or natural reason, or right order according to reason or philosophy, or equity) and also to right order according to positive law (or legislation and custom). Yet in the captions of Chapter 1 of the Preliminary Title in the English text of the Civil Code of 1825 and in the Revised Civil Code of 1870, it remains necessary to regard "law" as referring to legislation and custom, for both are subjects of the chapter.

In addition, Domat may lend support to another conclusion already reached tentatively, that "express law" as used in article 21 refers to legislation and custom. The word "express," indeed, may itself be evidence that the redactors of the Digest of 1808

14. Domat, *supra* note 11, Liv. Prélim., Tit. I, § I, no. II, *reprinted in* Rémy, *supra* note 11, at 77.

15. Domat, *supra* note 11, Liv. Prélim., Tit. I, § I, no. IV, *reprinted in* Rémy, *supra* note 11, at 77.

16. Domat, *supra* note 11, Liv. Prélim., Tit. I, § I, no. III, *reprinted in* Rémy, *supra* note 11, at 77.

17. Domat, *supra* note 11, Liv. Prélim., Tit. I, § I, nos. X, XVII, *reprinted in* Rémy, *supra* note 11, at 80, 82.

18. Domat, *supra* note 11, Liv. Prélim., Tit. I, § I, pr., *reprinted in* Rémy, *supra* note 11, at 75-76.

referred to Domat as well as to the French *Projet* of 1800 in drafting article 21. The corresponding provisions of the French *Projet*[19] and of the French texts of the Digest of 1808 and the Civil Code of 1825[20] direct the judge to decide equitably in the absence of *"loi précise."* Domat's corresponding passage, on the other hand, refers the judge to equity in cases not regulated by any *"loi expresse ou écrite,"* or "express or written law." Thus both Domat and article 21 use "express law," but the French texts of the Louisiana legislation and the French *Projet* did not. Lest the phrase *"loi expresse ou écrite"* be taken to refer to legislation only, however, it is necessary to recall that Domat spoke of both custom and legislation as *"loi"* and considered custom as binding as *"loi."*[21] It is improbable, therefore, that Domat would have meant to refer a judge to equity if custom provided the solution. All the more reason, then, to construe "express law" in article 21 to encompass both legislation and custom.

The Spanish Law's Terms

The Louisiana legislature in 1817 commissioned Louis Moreau Lislet and Henry Carleton to translate so much of *Las Siete Partidas*[22] as was in force in Louisiana.[23] The Digest of 1808 was to reflect the civil laws in force at that time[24] and these must have included the *Partidas.*[25] It should be proper, therefore, to consider whether articles 1, 3, and 21 reflect what is to be found in the *Partidas* on the same subjects.

First, there can be no doubt that *Las Siete Partidas* recognized customs *secundum* and *contra legem* as well as mere customs *praeter legem.* The relevant passages of *Partida* 1, Title 2, as they appear in the Moreau and Carleton translation, are as follows:

19. *See Projet* of 1800, Liv. Prélim., Tit. V, Art. 11, *reprinted in* Fenet, *supra* note 6, at 7, *quoted at* note 9, *supra.*

20. The French texts of the Digest of 1808 and of the Civil Code of 1825 are the same: *"Le juge, à défaut de loi précise, est oblige. . . ."* *Compare* Digest of 1808, *supra* note 1, at 7 *with* La. Civ. Code art. 21 (1825).

21. Domat, *supra* note 11, Liv. Prélim., Tit. I, § I, nos. 10, 11, *reprinted in* Rémy, *supra* note 11, at 80.

22. *Las Siete Partidas* were drafted in 1256-1263 and were promulgated in 1348.

23. 1819 La. Acts, at 44.

24. *See* note 8 *supra.*

25. The Act of May, 1806, mentioned in note 8 *supra,* referred to *Las Siete Partidas* as part of the Spanish law in force.

> Law 4. Custom (*Costumbre*) is an unwritten law [*derecho o fuero que non es escrito*, more properly translated "unwritten rule of right order or privilege"] established by usage during a long space of time . . . .
>
> . . . .
>
> Law 6. The force of custom is very great, when founded in reason, as we have above said. For when disputes arise about matters upon which there is no written law [*ley escrita*], they can be decided by custom; and in that respect custom has the force of law [*ha fuerza de ley*]. Custom may also serve to explain the law, when doubt arises upon its construction; for then it is to be understood in the same manner in which it had been usually before understood and enforced. Custom may even have the effect to repeal anterior laws, when the sovereign has permitted it to be observed against the provisions of those laws, during the time above prescribed, or longer . . . .[26]

Indeed, both a marginal note in what appears to be Moreau Lislet's hand, in a copy of the Digest bearing his name now found in the Middleton Library of Louisiana State University,[27] and Moreau Lislet's source note in the *de la Vergne Volume*[28] confirm that Moreau Lislet thought of *Partida* 1, Title 2, Law 4 as the substantive source of article 3 on custom. There is no reference in Moreau Lislet's notes to *Partida* 1, Title 2, Law 6, acknowledging the force of customs *secundum legem* and *contra legem*, but this in itself is not overly significant. The Digest of 1808 was simply a digest of the civil laws in force; it was neither a complete compendium nor a full restatement of those laws.[29] Moreau Lislet and Carleton, at least, must have thought of customs *secundum legem* and *contra legem* as possible in Louisiana and there is nothing to indicate a general understanding to the contrary.[30]

26. 1 The Laws of *Las Siete Partidas* Which are Still in Force in the State of Louisiana, Partida 1, Tit. 2, Laws 4, 6, at 13, 14 (L. Moreau Lislet & H. Carleton trans. 1820) [hereinafter cited as The Laws of *Las Siete Partidas*].

27. *See* Pascal, *A Recent Discovery: A Copy of the "Digest of the Civil Laws" of 1808 with Marginal Source References in Moreau Lislet's Hand*, 26 La. L. Rev. 25 (1965).

28. Digest of 1808, *supra* note 1, at 3 (source note opposite French language text of article 3).

29. *See* Pascal, *Sources of the Digest of 1808*, *supra* note 8, at 606.

30. The Laws of *Las Siete Partidas*, *supra* note 26, Partida 1, Tit. 2, Law 6, at 14, states that custom may supersede legislation "when the sovereign has permitted it to be observed against the provisions of those laws, during the time above prescribed, or longer . . . ." Domat, on the other hand, notes that sovereign approval is not required "when it is the people who have authority, as in republics." Domat, *supra* note 11, Liv. Prélim., Tit. I, § I, no. XI, *reprinted in* Rémy, *supra* note 11, at 80 (author's trans.).

The Spanish law, too, lends credence to the distinction between custom and usage. Whereas custom has the force of law, usage is mere practice.[31] In the words of the commentary of Gregorio Lopez, "use differs in this way from custom, that whereas usage is fact, custom is *jus*."[32] Whatever the identification of custom and usage in the French *Projet* of 1800, then, the meaning of "usage" in article 21 must exclude custom, for Spanish law, not French law, prevailed in Louisiana and the redactors of the article and the Louisiana legislature must have intended to reflect the Spanish law.

It may be certain, too, that *Las Siete Partidas*, in *Partida* 1, Title 1, employs the Spanish *derecho* to refer to right order in both the moral and legal senses of the term. In Law 1 it is noted that the laws (*leyes*), or specifications of order, are established "to enable men to live well and regularly according to the pleasure of God"[33] and to help them live with one another "*en derecho, é en justicia*"[34] (in right order and justice), and that *Partida* 1 will be devoted to the laws on religious belief according to the Church, and *Partidas* 2—7 to the laws on the governance of peoples. Thereafter Law 2 translates *jus naturale* as *derecho natural*, the order observable among all animals,[35] and *jus gentium* as *derecho comunal de todos las gentes*, the order, founded on reason, applicable only to men,[36] and indicates that both are among the bases of the *leyes*, or positive norms of order.[37] Then,

31. "Usage (*Uso*) is that which arises from certain things which men say, and do, and practise, uninterruptedly, for a great length of time, without any hindrance whatever." The Laws of *Las Siete Partidas*, *supra* note 26, Partida I, Tit. 2, Law 1, at 12.

32. "*Differt ergo usus a consuetudine, ut hic, quia usus sonat factum, consuetudo jus.*" G. Lopez, gloss to Partida I, Tit. 2, pr., in 2 Los Códigos Españoles 20 (1848).

33. *Las Siete Partidas*, Partida I, Tit. 1, Law 1, at 1 (S. Scott trans. 1931) [hereinafter cited as the Scott translation of *Las Siete Partidas*]. The Moreau Lislet and Carleton translation is "that men may learn to live uprightly, according to the will of God . . . ." The Laws of *Las Siete Partida*, *supra* note 26, Partida 1, Tit. 1, Law 1, at 3.

34. Las Siete Partidas, Primera Partida, Tit. I, Ley I.

35. "Jus naturale *en latin, tanto quiere decir en romance, como derecho natural, que han en si los homes naturalmente, é oun las otras animalias, que han sentido.*" *Id.* Ley II.

36. *Otrosi* jus gentium *en latin, tanto quiere decir, como derecho comunal de todos las gentes, el qual conviene à los homes, é no à las otras animalias. E este fue hallado con razon, é otrosi por fuerza . . . .*" *Id.*

37. "[*E*] *destas dos maneras de derecho . . . é ayuntamos todas las leyes deste*

in Law 6, it is indicated that the (actual) laws (*leyes*) in the *Partidas* (presumably those pertaining to secular government) are based on two repositories of wisdom, the words of the saints relating to the spiritual good, and the words of wise men relating to the manner in which worldly acts may be performed well and according to reason.[38] Right order for men, or *derecho*, then, according to the *Partidas*, has its norms in religious doctrine as well as reason or philosophy, and the *leyes* articulate or specify *derecho*. (Here again, the uses of *derecho* and *leyes* correspond to a much later usage, that of Portalis in his preliminary discourse on the French *Projet* of 1800: "Legislation is, or should be, nothing more than the *droit* reduced to positive rules or particular precepts.")[39] It could not be expected in 1808, in a country in which the idea of an established church had been excluded, that the norms of order would include Church teachings as well as philosophical judgments. There should be no doubt, however, that *derecho* as used in the *Partidas* was understood to include the non-legal norms of order that were considered the bases of positive law. The meaning of "*droit*" and "rights" and "law" as used in the Preliminary Titles of the Digest of 1808 and of the Civil Codes of 1825 and 1870 and as heretofore expounded, therefore, remain valid.

The Content of Equity under Article 21

Equity, according to article 21, is "an appeal . . . to natural law and reason, or to received usages, where positive law is silent."[40] Is there a distinction to be made between "natural law" and "reason," or are the terms used synonymously? And, though it has been established that "usages" does not include customs, can anything be added to clarify what was meant by a resort to "usages"?

"Natural law and reason" is an exact translation of "*la loi naturelle et la raison*" in the French texts of the Digest of 1808

nuestro libro . . . ." Id.

38. *"Tomadas fuéron estas leyes de dos cosas: la una, de las palabras de los Santos, que fablâron espiritualmente lo que conviene à bondad del home, é salvamiento de su alma. La otra, de los dichos de los Sabios que mostráron las cosas naturalmente: que es para ordenar los fechos del mundo, de como se fagan bien, é con razon." Id.* Ley VII.

39. *"Les lois son ou ne doivent être que le droit reduit en régles positives, en prècipes particuliers."* Fenet, *supra* note 6, at 476.

40. La. Civ. Code art. 21.

and Civil Code of 1825. The phrase appears to be uniquely that of the Louisiana legislation, for if it has any precise antecedent, the writer has not discovered it. The French *Projet* of 1800 uses simply "*la loi naturelle*"[41] and Domat "*les principes naturelles de l'équité.*"[42] If "*loi naturelle*" and "*raison*" were to be considered the equivalent of *jus naturale* and *jus gentium* as used in Justinian's Institutes,[43] or of *derecho natural* and *derecho comunal de todos las gentes* as used in *Las Siete Partidas*,[44] to mean the rules of order observed in non-rational animals and the rules of order "natural reason has established among all peoples," then the answer would be that the terms are synonymous. But there is some difficulty in accepting such meanings for language used in 1808, a time in which men not only used *droit naturel* to refer to reason as the source of norms of action, but believed they had achieved the specification of the *droit naturel* in terms of *lois naturelles* or, collectively, a *loi naturelle*.[45] Thus Professor Mitchell Franklin in 1935 could suggest rightly that article 21 regards natural law as "definitive,"[46] or not subject to

41. *Projet* of 1800, Liv. Prélim., Tit. V, Art. 11, *reprinted in* Fenet, *supra* note 6, at 7, *quoted at* note 9 *supra*.

42. Domat, *supra* note 9, Liv. Prélim., Tit. I, § I, no. XXIII, *reprinted in* Rémy, *supra* note 11, at 83: *"S'il pouvait arriver quelque cas qui ne fût réglé par aucune loi expresse ou écrite, il aurait pour loi les principles naturels de l'équité, qui est la loi universelle qui s'éntend à tout."*

43. Institutes 1.2. pr., 2.

44. Las Siete Partidas, Primera Partida, Tit. I, Ley II, VI, *quoted in part at* notes 35-38 *supra*.

45. Michel Villey, La formation de la pensée juridique moderne (1975), in discussing the works of Francisco de Vitoria (*id.* 358-63) and Francisco Suarez (*id.* 379-95) notes that de Vitoria began the process, continued by Suarez, of transforming *jus (derecho, droit)* from a dynamic art in search of just order into a set of norms with juridical import, a process dependent in part on the acceptance of voluntaristic notions of law, such as those found in Occam, in the place of ontological foundations as found in St. Thomas Aquinas. In short, *jus* became *lex*. Thus Suarez's major treatise itself was entitled *De legibus et Deo legislatore* rather than, say, *De jure et de justicia*. According to Villey, this new concept of *jus (derecho, droit)* came to be reflected by even the philosophers in Reformation countries, for they were less influenced in matters of law by theological developments than they were by the general cultural tradition. Thus "*loi naturelle*" or "natural law" in article 21 of the Louisiana Digest of 1808 and Civil Codes of 1825 and 1870 could very well have been intended to indicate a body of specified norms of order, philosophically ascertained, and the addition of "reason" may have been intended as a directive to philosophical effort in the absence of norms already deemed part of the specified "natural law". Of course, this is speculation rather than proof.

46. Franklin, *Equity in Louisiana: The Role of Article 21*, 9 Tul. L. Rev. 485, 495 (1935). Professor Franklin, *inter alia*, distinguishes sharply Roman praetorian or bonitary equity, English Chancery equity, and the equity of article 21 of the Louisiana Civil Code. The first two could supersede the positive "legal" norms; the second can only sup-

other specifications for other conditions of life. Perhaps, however, the very fact that article 21 uses the two terms, "natural law" and "reason," serves to indicate a recognition of both a specified "natural law" and an unspecified "*droit naturel*" referred to simply as "reason," the latter to be invoked in the absence of the former.[47]

Equity, however, is defined in article 21 not simply as a return to "natural law and reason," but a return to either those sources "or received usages." The "or" is disjunctive. "Received usages," then, are as much a source of equity as "natural law and reason." What is the nature of these "received usages"?

In considering this question, it may be well to ask whether the words "an appeal . . . to natural law and reason, or received usages, when the positive law is silent," accurately convey the full meaning of the French language texts of which they are a translation. The French texts of the Digest of 1808 and Civil Code of 1825 read: "*[I]l faut recourir à la loi naturel et à la raison, ou aux usages reçus, dans le silence de la loi primitive [viz., positive].*"[48] If the comma after "*reçus*" is there properly, then the English language texts of the Louisiana Digest and Civil Codes are correct. In that case the clause "where the positive law is silent" modifies both "natural law and reason" and "received usages." That rendition of article 21, however, renders the modifying clause purely repetitious of a portion of the preceding sentence in article 21 that directs the judge to decide according to equity "where there is no express law." On the other hand, if the comma is deleted, the modifying clause applies only to "received usages" (which then should have been rendered as "usages received"), not also to "natural law and equity," and ceases to be repetitious. In the French *Projet* of 1800, the article which seems to have served as the model for article 21 reads

plement the law, but in so doing it provides for completeness of the norms of civil order.

47. The construction of "natural law" in article 21 to mean a specified or particularized natural law receives additional support from the use in articles 1757-1759 of the term "natural obligation" to mean a specified obligation that is not enforced as a "civil" or "perfect" obligation either because it has prescribed or because the juridical act by which it was specified was defective in some way.

48. Digest of 1808, *supra* note 1, at 7; La. Civ. Code art. 21 (1825). The term "*primitive*" is assumed to have been an error. It may be possible, nevertheless, that it was used in the sense of "primary" or "basic." In any event, the reference must have been to the positive law, or legislation and custom.

"*usages reçus dans le silence de la loi positive,*" without a comma.[49] This fact, plus the repetitious nature of the modifying clause if a comma precedes it, lends credence to the conclusion that the comma's presence is a mistake and that it should be ignored. If so, a proper rendition of the English text would be, not "or received usages, where the positive law is silent," but "or usages received where the positive law is silent."

What are "usages received where the positive law is silent"? Do they include previous decisions of the courts in instances in which there was not and there is not yet any legislation or custom; or are they limited to usages or practices of the people in such instances? This article will not attempt to reach a definitive solution to this question, but some observations may be made. First, in any event, judicial usages of the kind mentioned will in fact be used in any jurisdiction whenever they are known. In that sense the question may be more theoretical than real. Second, whatever the intended meaning of article 21 on this point in the minds of the redactors and legislators of the Digest of 1808, the redactors of the Civil Code of 1825, while adamant in denying the force of binding precedent to judicial decisions based on article 21,[50] did not rule out the propriety of judicial reference to prior decisions not founded on legislation or custom as presumably correct findings on usages of the people or on the demands of "natural law and reason." Thus resort to judicial usages of the kind mentioned here seemingly may be made in later cases, though they must not be regarded as establishing rules binding on the judiciary or the people. The sources of authoritative rules are legislation and custom only.[51]

Convention as a Source of Order

In the initial analysis of the articles in the Preliminary Title of the Louisiana Civil Code it was mentioned that article 11, by

49. *Projet* of 1800, Liv. Prélim., Tit. V, Art. 11, *reprinted in* Fenet, *supra* note 6, at 7, *quoted at* note 9 *supra*.

50. Commissioner's Report of 1823, *supra* note 2, at xci-cxiii.

51. *See* Têtе, *The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent*, 48 Tul. L. Rev. 1 (1973), in which the author notes that custom may arise from popular approbation of a judicial decision and considers the extent to which judicial decisions might constitute proof of customs. *See also* Pascal, *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Law in General*, 34 La. L. Rev. 197, 198 (1974). Precedent without long popular approbation, however, never constitutes custom and has no juridical standing under the Louisiana Civil Code.

noting that individual persons "can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals,"[52] implies that convention is itself a source of order that takes precedence over laws other than those "enacted for the preservation of public order and good morals." Now it remains to be considered whether other articles of the Civil Code confirm this implication and to develop whatever other implications may be contained in them.

Of primary relevance, certainly, are articles 1760 and 2292:

> Art. 1760. Civil obligations, in relation to their origin, are of two kinds:
>
> 1. Such as are created by the operation of law.
>
> 2. Such as arise from the consent of the parties who are bound by them, which are called contracts or conventional obligations.[53]

> Art. 2292. Certain obligations are contracted without any agreement, either on the part of the person bound or of him in whose favor the obligation takes place.
>
> Some are imposed by the sole authority of the laws, others from an act done by the party obliged, or in his favor.
>
> The first are such engagements as result from tutorship, curatorship, neighborhood, common property, the acquisition of an inheritance, and other cases of a like nature.
>
> The obligations, which arise from a fact, personal to him who is bound, or relative to him, result either from quasi contracts, or from offenses and quasi-offenses.[54]

Both of these articles affirm that the sources of civil obligations are two, contracts and the "law"—a term that will have to be understood to refer to both legislation and custom, all in accordance with Chapter 1 of the Preliminary Title of the Civil Code, as explained before. It is to be noted that neither article 1760 nor article 2292 suggests, nor does any other article of the Civil Code suggest, that contract is an institution that derives its authoritative force from the positive law, though certainly the law does regulate the permissible conditions, modes, and effects of contracts. Law and contract, then, are on an equal plane. The laws on contracts and on the obligations flowing from them

52. La. Civ. Code art. 11.
53. *Id.* art. 1760.
54. *Id.* art. 2292.

merely particularize the institution of contract and its effects rather than create them. This thought is perfectly consistent with the notion that obligations and rights flowing from contracts have their binding force not because of positive law, but because the plan discoverable in creation, through the use of reason, demands their recognition. This would be true whether that plan were seen as one in which men are regarded as severally independent individuals—with license to do as they please, but well advised to arrange order with each other simply to avoid disaster and to maximize free action—as in Locke's thought; or one in which men are regarded as mutually interdependent members of a human race—who are obliged to use contract as one mode of specifying rationally the cooperation conducive to their common good—as in St. Thomas' thought.[55] Whether other provisions of the Civil Code help us decide between these basic notions, however, must be postponed while the main subject is pursued.

Article 2292 suggests that the obligations arising from the law have their source in the same reality as those arising from contract. The statement of article 2292 is that obligations other than those arising from contract have their immediate causes in one of three factors: The law alone, the lawful acts of men, or the unlawful acts of men. The principal examples of obligations arising from lawful acts are those to return whatever was received without right and to honor the unsolicited and unobliged acts of another in one's interest under appropriate circumstances.[56] The obligations arising from unlawful acts are those to repair the injury or damage caused another by fault, negligence, imprudence, or want of skill.[57] The law, in other words, recognizes that such lawful and unlawful acts themselves generate obligations and the law merely particularizes and reinforces them. But what of obligations that arise from the law alone? The examples of such obligations given by article 2292 are "such en-

55. The latter seems to accord with Domat, *supra* note 9, Liv. I, pr., *reprinted in* Rémy, *supra* note 9, at 121: "*L'usage des conventions est une suite naturelle de l'ordre de la société civile, et des liaisons que Dieu forme entre les hommes. Car comme il a rendu nécessaire, pour tous leurs besoins, l'usage réciproque de leur industrie et de leur travail, et les différens commerces des choses, c'est principalement par les conventions qu'ils s'en accommodent.*"
56. La. Civ. Code art. 2294.
57. *Id.* arts. 2315, 2316.

gagements [viz., obligations] as result from tutorship, curatorship, neighborhood, common property, the acquisition of an inheritance, and other cases of like nature."[58] The obligations that are said to arise from the law alone, therefore, are those indicated by a personal relationship, the incapacity of particular persons, a need to have regard for one's neighbors in using one's assets, the fact that two or more persons share rights to the same thing, or the necessity of fixing the manner in which the assets and liabilities of a deceased person will be distributed among the living.[59] It is not the law alone that creates these obligations. The law may particularize them, but they are demanded by the very nature of societal life.[60] The law regulates the obligations arising in such situations without being their ontological cause just as it regulates conventional obligations without being their ontological cause.

The Civil Code, furthermore, assimilates law and contract by saying in article 1901 that contracts have the "effect of laws" upon the parties.[61] To understand this statement one only need recall that to the late eighteenth and early nineteenth century mind all positive law was a product of a social contract. Legislation was the contract agreed to by the representatives of the people on their behalf. The private contract differed from legislation in that it was an agreement between certain persons only, and specified order for them only, and then only with regard to certain particulars. The importance of this observation is that if legislation and contract are essentially the same, and contract has its foundation in objective reality, then legislation too must have its foundation or reason for being in objective reality—or, to use the term of article 21, in "natural law and reason."[62]

58. *Id.* art. 2292.

59. The author is of the opinion that intestate succession law is suppletive law, inasmuch as testate succession takes precedence, and therefore that intestate succession is essentially tacitly conventional (that is to say, volitional, or belonging to privately specified order). *See* note 72 *infra*.

60. Domat, *supra* note 9, Liv. I, pr., *reprinted in* Rémy, *supra* note 9, at 121, *quoted at* note 55 *supra*.

61. La. Civ. Code art. 1901(1): "Agreements legally entered into have the effect of laws on those who have formed them."

62. *Id.* art. 21. Additional confirmation of the foundation of both legal and conventional obligations on philosophically derived norms of order may be inferred from articles 1757-1759, according to which a "natural obligation" with some civil effects remains when a specified obligation is deprived of full civil effects either by a defect in the juridical act by which it was specified or by prescription. Article 1757, moreover, recognizes "merely moral" obligations, such as those to exercise charity or gratitude, even though it assigns no civil effect whatsoever to them.

Further indications of the force of conventions and their relation to positive law are discoverable from an examination of articles 1945 through 1962, on the interpretation of agreements, and articles 1963 through 1967, on the incidents of contracts supplied by "equity, usage, and law."

Article 1945 is most emphatic on the relationship of contract to law. "Legal agreements having the effects of laws upon the parties, none but the parties can abrogate or modify them,"[63] is its first sentence. But the article goes further, articulating four rules deemed to be based on that principle. The first, and that of relevance here, is that "no general or special legislative act can be so construed as to avoid or modify a legal contract previously made."[64] It might be argued that the provision is itself only legislation, and that later legislation, no matter how inconsistent, would supercede it for the particular matter. But this would be too positivistic a construction to be compatible with the notion, so evident in the Civil Code, that legislation itself is to be regarded as an articulation of what is philosophically right order. It would, moreover, and even more importantly, ignore the implication of the rule's stated premise that contract and law are *separate* sources of order and that neither may violate the other's specification once legally made. In the same spirit, article 8 states that laws may prescribe for the future, not regulate the past, and certainly may not impair the obligations of contract.[65] Where neither law nor contract has occupied the field of specified order, then, the first to do so controls for all who are subject to the law or to the contract. Though articles 8 and 1945 are not formally of constitutional force, the principles stated and implicit in them are "supereminent principles," to borrow a phrase from René David.[66]

Articles 1946 through 1962 continue the analogy of contract to law in the rules for the construction and interpretation of agreements. They parallel articles 13 through 21, on the application and construction of laws, but are in greater detail. The con-

63. *Id.* art. 1945.

64. *Id.*

65. *Id.* art. 8: "A law can prescribe only for the future. It can have no retrospective operation, nor can it impair the obligations of contracts."

66. R. David, French Law 194-207 (M. Kindred trans. 1972).

struction of words according to their usual significations, or according to the usages of professionals where they are technical; the dispelling of doubt by reference to context, to other words in the agreement, and to other contracts between the parties; the endeavor to ascertain actual intent rather than to follow a literal meaning; and the reference to "clauses in common use" to supply what has not been expressed; all these rules and others evidence the same principles as those invoked by articles 3 through 21 on the construction and application of law.

Articles 1963 through 1967 detail in remarkable clarity the similarity of law and convention as sources of rules of order and the relationship of convention to imperative and suppletive laws.[67] Article 1965 refers to "the law of the land, and that which the parties have made for themselves by their contract."[68] Just as natural law and reason and usages received in the silence of the law supply the deficiencies of legislation and custom

67. Although portions of La. Civ. Code arts. 1963-1967 will be quoted in the main text, the articles are quoted in their entirety here:

Art. 1963. When the intent of the parties is evident and lawful, neither equity nor usage can be resorted to, in order to enlarge or restrain that intent, nor can any law operate to that effect, unless it be some prohibition or other provision, which the parties had no right to modify or renounce.

Art. 1964. Equity, usage and law supply such incidents only as the parties may reasonably be supposed to have been silent upon from a knowledge that they would be supplied from one of these sources.

Art. 1965. The *equity* intended by this rule is founded in the Christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity.

Art. 1966. By the word *usage* mentioned in the preceding articles, is meant that which is generally practiced in affairs of the same nature with that which forms the subject of the contract.

House rent in some cities is generally paid by the month; in others by the quarter. In a contract for the hire of a house, without expressing when the rent was to be paid, the deficiency would be supplied by proof of the usage, but if a contrary intent appear in the contract, the usage would not contravene it.

Art. 1967. The *law*, intended by the rule before referred to, means such legislative provisions as provide for those cases in which the parties have not declared their intention. When the contracting parties have not derogated from such law, its provisions are to be followed. The laws directing a community of matrimonial gains and a warranty on sales, are examples of this kind of legislative provision [provisions], which take effect and regulate the contract when the parties make no agreement that contravene them.

68. *Id.* art. 1965.

under article 21, so under article 1964 do "equity, usage, and law" supply such incidents of a contract as parties might be presumed to have expected these sources of order to supply. Equity, under article 1965, is defined as a reference to the "religious principle" not to do unto others that which we would not wish others should do unto us and to the "moral maxim" that no one ought to enrich himself at the expense of another. Usage is what ordinarily is practiced in similar matters. And the "law" referred to by article 1964 is declared to be "such legislative provisions as provide for those cases in which the parties have not declared their intention."[69] These are the suppletive laws. And let there be no mistake about these suppletive laws. When they apply because persons have failed to contract their private schemes of order, they apply not as legally prescribed rules of order, but as tacitly contracted rules of order. This is clear enough from the examples of suppletive law application given in article 1967: "The laws directing a community of matrimonial gains and a warranty on sales, are examples of this kind of legislative provision [provisions], which take effect *and regulate the contract* when the parties make no agreement that contravene them."[70] Suppletive law, therefore, is intended to do no more than to supply *as contracted rights and obligations* the terms which the parties were willing to have the law specify for them. The laws that do not have this in-aid-of-contract character may be designated *imperative laws*, in keeping with a civilian vocabulary. Only they, in fact, are true laws. The suppletive laws are no more than contract provisions that can be displaced by other provisions agreed upon by the parties.

Voluntary Unilateral Action as a Source of Order

Thus far it has been possible to demonstrate that the Louisiana Civil Code acknowledges two positive sources of order, *law* (in the sense of legislation and custom) and *contract*, or convention, both having their foundation in *droit* (in the sense of the philosophical sources of order), which *droit* itself becomes a direct source of order in the form of equity (natural law and reason as such, and received usages as evidence of specifications of natural law and reason) in the silence of the positive law. There

69. *Id.* art. 1964.

70. *Id.* art. 1967 (emphasis added).

is, however, a third major mode of specifying order creative of obligations and rights. It is unilateral voluntary action in cooperation with another.

The Louisiana Civil Code preserves the ancient Roman institution of *negotiorum gestio* or the intentional management of "another's affairs" in the interest of that other though the particular form of cooperation has not been specified by law or contract. Articles 2295 through 2300 specify the rules under which this voluntary, cooperation-oriented action may obligate the beneficiary to perform the obligations incurred by the actor (*gestor*) in the beneficiary's name, to indemnify the *gestor* in all personal engagements he has contracted, and to reimburse the *gestor* his useful and necessary expenses.[71] This is not contract. It is the creation of obligations in another without specific legal authorization and without consent. It is the creation of obligations in another by one's unilateral voluntary act. It is, therefore, properly to be considered a third source of positive order to be placed at the side of law and contract as defined previously.

An Implication of the Recognition of Negotiorum Gestio

The recognition of *negotiorum gestio* permits an observation concerning the general philosophical orientation of the Civil Code. Whatever the direct or indirect effect of individualistic eighteenth-century philosophy on particular provisions of the Civil Code, the encouragement of unsolicited and unobliged cooperation implies a recognition of a human society that is essentially ontological rather than conventional, one in which each person is a part of the whole rather than an individual in voluntary association with the others. In the last analysis, the order in

71. La. Civ. Code arts. 2295, 2299:

Art. 2295. When a man undertakes, of his own accord, to manage the affairs of another, whether the owner be acquainted with the undertaking or ignorant of it, the person assuming the agency contracts the tacit engagement to continue it and to complete it, until the owner shall be in a condition to attend to it himself; he assumes also the payment of the expenses attending the business.

He incurs all the obligations which would result from an express agency with which he might have been invested by the proprietors.

Art. 2299. Equity obliges the owner, whose business has been well managed, to comply with the engagements contracted by the manager, in his name; to indemnify the manager in all the personal engagements he has contracted; and to reimburse him all useful and necessary expenses.

the Civil Code is not simply one of publicly contracted general order (legislation and custom) and of privately contracted particular order (conventional obligations). Were it so, *negotiorum gestio* would be an incompatible institution, as it is in Anglo-American jurisdictions. Much of the plan of cooperation is specified by legislation and custom and by contract, but where this specification has not occurred, the voluntary cooperative act helps complete the scheme of order and its principle dominates the whole plan. Law and contract themselves are to be understood as modes of specifying the form of ontologically demanded cooperation, rather than as pacts for enlightened self-interest.

Observations on the Civil Code's Division into Three Books

The Civil Code is divided into a Preliminary Book on Law (*Droit*) and three Books on Persons, Things and the Different Modifications of Ownership, and the Different Modes of Acquiring [and Losing] the Ownership of Things. To what extent are the conclusions reached in this article reflected in this division?

The main observation is that Books I and II contain subject matters that are primarily of public order concern. The rules of law contained in them, accordingly, are for the most part imperative. Marriage, separation, divorce, filiation, paternal authority, tutorship, interdiction, and the curatorship of interdicts are of public order concern. Only marginal aspects of these essentially personal relationships may be open to private ordering through contract proper or other expression of volition. In a similar way, ownership and its modifications—or the varieties of interests in things—must be limited and standardized in the interest of order conducive to the common good. The laws on this subject, therefore, are usually imperative, or law *strictu sensu*, and only marginally suppletive. On the other hand, Book III is recognizable as one concerned basically with relations that may be left to private ordering by contract or other forms of voluntary acts. Even the law of intestate succession (mistakenly considered imposed by law in article 2292) is essentially suppletive law, for testamentary succession takes precedence over it.[72] Those of Book III's laws that are imperative are there to insure the integ-

72. For this reason the author considers La. Civ. Code art. 2292's classification of intestate succession rights and obligations as imposed by law to be an analytical error. *See* note 59 *supra*.

rity of volitional acts or to put an end to disputes. Thus laws on essential form or proof exist to ensure protection of actual intention, and those on prescription are there to end controversies over rights in things that are themselves subject to volitional acts. Book III, in short, is the Book relating to privately declared order. What imperative laws are in it are there largely to protect the liberty of private order.

SUMMARY

The Louisiana Civil Code, then, is neither philosophically nor legislatively positivistic. Its provisions and its organization testify to the recognition of legislation and custom (collectively "law") on the one hand, and convention and unilateral cooperative action on the other, as the grand positive sources of order. Legislation and custom reflect the presumably collective judgment of the society, applicable to all, and convention and unilateral cooperative action reflect the judgment of particular persons concerning order relevant to themselves or those for whom voluntary cooperative action is taken. All these positive sources of order, however, are to be envisioned as attempts to specify in particular the order demanded by the principles of philosophical judgment, represented in the Civil Code primarily as "natural law and reason." In the failure of order specified by legislation, custom, convention, or unilateral voluntary cooperative action, natural law and reason, or usages not custom but deemed evidence of judgments according to natural law and reason, provide the principles to be applied. Precedent as such is not a source of rules of order, but it can inspire the generation of custom through popular approbation.

The Louisiana Civil Code's organization, moreover, serves well to separate the laws on those areas of order that may not be left to private determination (those on personal relationships and permissible interests in things—Books I and II) from the laws on those areas of order that may be left to private determination (succession, contracts of various kinds, and matters relevant thereto—Book III).[73] The first group of laws, therefore, be-

73. Delict (La. Civ. Code arts. 2315-2334) and payment of a thing not due (*Id.* arts. 2301-2314) are non-conventional sources of rights and obligations also contained in Book III. It may be objected, therefore, that Book III should be envisioned as encompassing not only convention and voluntary cooperative action, but also all human acts, lawful and unlawful, that generate rights and obligations. Indeed, this analysis would be supported by article 2292, quoted in the text at note 54 *supra*. On the other hand, the writer suggests that delict and the payment of a thing not due are more properly envisioned as sources of *disorder*, not as sources of order such as convention and voluntary cooperative action. Their inclusion in Book III may be considered a matter of convenience rather than of good schematics.

ing of public order concern, are largely *imperative*. The second group, largely of private concern, are imperative only to the extent necessary to protect persons in their private determinations of order; for the rest they are *suppletive*, or presumable-intention-supplying, or essentially declarative of the order persons must be deemed to accept tacitly if they do not contract otherwise.