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The French société anonyme is comparable, if not the equivalent of, to the American corporation or the English company. Mr. Supino here discusses the development of and limitations on the power of shareholders of a société anonyme to amend articles of incorporation, remove directors, and to perform a function not performed by shareholders of American corporations: allocate profits. Mr. Supino concludes that French courts are forced to "legislate interstitially" in this area in the application of the codes, but that the need for French courts to exercise this quasi-legislative functions should be recognized by both the courts and commentators.

In France, as in the United States, the corporation as an important social and economic institution is a product of the nineteenth century. It comes as no surprise, therefore, to find that historically the bias of French corporation law has been to regard the corporation as the outgrowth of private agreement rather than as a creature of the state.[1] The present tendency of French law, however, is running contrary to this historical bias. To some extent it has come to be recognized that private agreement has, in the context of present needs, distinct limitations both as a method of investor protection and as a method of properly accommodating all the economic and social interests at stake. But this recognition—or shift in values—has only imperfectly been assimilated into the law. French corporation law, which is primarily statutory, has seen no comprehensive statutory revision in almost a century; and while literally dozens of amendments have been engrafted on to the basic corporate legislation of 1867, they are for the most part *ad hoc* legislative resolutions of particular problems which betray no underlying unity of design and which have

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1. The notion of the *société anonyme* as a creature of private agreement is particularly evident in the reports, debates and the like dealing with the enactment of the basic corporate statute, the Law of July 24, 1867. Much of this material is reprinted in TRIPIER, COMMENTAIRE DE LA LOI DU 24 JULIET 1867 SUR LES SOCIETIÉS (1867); see particularly, *Premier Exposé des Motifs d'un Project de Loi Sur les Sociétés, in* 1 TRIPIER, *op. cit. supra* at 9-12, and *Premier Rapport Fait à la Séance du 3 Mai 1867 au Nom de la Commission Chargée d'Examiner le Project de Loi Sur les Sociétés, in 1* TRIPIER, *op. cit. supra* at 89, 94-97. This is not to imply, however, that the corporation was not known or used in France or in the common law countries prior to the nineteenth century. The corporation was hoth a known and used form serving, however, quite different social and economic ends than it came to serve during the nineteenth century. See note 13 *infra*; CARSWELL, THE SOUTH SEA BUBBLE (1961); 1 BLACKSTONE, COMMENTARIES 467-85. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 517 (1819), seems to be the expression of a transitional view.

broken the unity of the old legislation.[2] The result is that the law is Janus faced, and the theories which the law embodies are not wholly in accord with social and economic needs.

In this necessary process of assimilating new insights into the law the French courts have a potentially important role. It is true that the courts are said to exercise only a very limited law making power: they are required to decide cases in terms of law,[3] which means statutory law.[4] Yet no statute can be so well drafted as to be comprehensive, and gaps inevitably appear. Faced with the need both to create law and to avoid the charge of usurping legislative power, the courts have had resort to the "spirit of the code" in order to resolve disputes on which the legislature has not passed. But such a rationalization becomes unacceptable when the code is shown to have no unity of design, and when the "spirit," insofar as it is existent, would dictate an inexpedient result. Thus there is born the attempt, particularly on the part of the commentators, to construct conceptual theories that will harmonize the seemingly discordant pattern of the law and will allow the courts to produce or justify what is felt to be an acceptable result.

It is the purpose of this essay to study one small facet of this process of adaptation and change; to attempt to achieve some understanding of the French law governing the relation of the shareholders to the *société anonyme*, the French analogue of the corporation.[5] However, it has not been thought possible or appropriate to present a *catalogue raisonée* of shareholder powers.[6] Rather, the inquiry has been limited to a more detailed analysis of three specific powers: the power to amend the articles of incorporation, to allocate profits, and to remove directors. But prior to the analysis of the substantive law itself, the conceptual justifications that have been advanced to account for those powers are discussed in their historical setting; and through-

2. The basic corporate statute is the Law of July 24, 1867, CODE DE COMMERCE art. 46 (59th ed. Dalloz 1963). Innumerable amendments to this law have been made since its passage in 1867. For a list of the amendments see 4 ESCARRA, TRAITE THEORIQUE ET PRATIQUE DE DROIT COMMERCIAL 515-18 (1959).

3. CODE CIVIL art. 5 (61st ed. Dalloz 1962). *Cf.* CODE CIVIL art. 1 (5th ed. Rossel 1962) (Swiss).

4. DAVID & DE VRIES, THE FRENCH LEGAL SYSTEM 83 (1958).

5. It should be pointed out that while the term "corporation" is used interchangeably with *société anonyme* throughout this paper, in no sense is a legal equivalence between the corporation and the *société anonyme* implied. The term corporation is used merely because it is less awkward than the perhaps preferable translation of *société anonyme* as "stock company." *But see*, Conard, *Forming a Subsidiary in the European Common Market*, 59 MICH. L. REV. 1, 8-9 (1960).

6. This has been attempted elsewhere, see CHURCH, BUSINESS ASSOCIATIONS UNDER FRENCH LAW 437-73 (1960). See also MOREAU & BRESSAC, FRENCH CORPORATIONS (1956); Becker, *The Société Anonyme and the Société à Responsabilité Limitée in France*, 38 N.Y.U.L. REV. 835 (1963).

out the function and importance of these concepts[7] and the role of the courts in the formulation and adaptation of the law will be examined, as they have an important bearing on the interpretation to be given to law itself.

I. Concepts of the Corporation and of Shareholder Powers

A. *The Contractual Theory*

The classical concept of the *société anonyme* is that it is the creature of a contract entered into by the shareholders.[8] This concept is said to find its roots in Roman law,[9] and more recently in title 9, article 1832 of the Civil Code,[10] which defines an association as a contract by which the contracting parties pool their assets with a view to sharing the resulting profits. However, article 1873 of the Civil Code[11] specifies that the provisions of title 9, and article 1823 among them, shall apply to business associations only to the extent that they are not in conflict with the statutes and usages governing commercial activity. Therefore the contractual definition of an association contained in the Civil Code applies to the *société anonyme* only to the extent that it is not inconsistent with the specific provisions of the Commercial Code governing its creation and conduct.

The characterization given the *société anonyme* (there is no formal definition) in the now current provisions of the Commercial Code is at best ambiguous.[12] Further, the *société anonyme* did not appear in the Code full grown. In the period between its appearance in the first Commercial Code of 1807 and its formalization in the Law of July 24, 1867 there was a considerable period of growth and change.

7. For a discussion of the role of theory in the formation and interpretation of law, see David, Le Droit Francais 67-72 (1960); David & De Vries, The French Legal System 81-85 (1958); Ripert, Les Forces Creatrices du Droit §§ 125, 134-35, 146 (1955); Lewy, *Codification, Adaptability and Experience,* in Essays on French Law 1, 7-13 (1958); *Cf.* Julliot De La Morandière, *The Draft of a New French Civil Code: The Role of the Judge,* 69 Harv. L. Rev. 1264 (1956); Pound, *The French Civil Code and the Spirit of Nineteenth Century Law,* 35 B.U.L. Rev. 77 (1955).

8. For discussions of the "contractual" theory see *e.g.,* Granger, La Nature Juridique des Rapports Entre Actionnaires Charces du Controle dans les Societes Apportees aux Status des Socities et de Ses Consequences Fiscales (1912); Roujou de Bouree, Essai Sur L'Acte Juridique Collectif 53-55 (1961); Ripert, Aspects Juridiques du Capitalism Moderne 90-92 (2d ed. 1951) [hereinafter cited as Ripert, Aspects]; Canizares, *The Rights of Shareholders,* 2 Int'l & Comp. L.Q. 564, 574-78 (1953).

9. 1 Ripert, Traite Elementaire de Droit Commercial § 661 (5th ed. 1963) [hereinafter cited as Ripert, Traite].

10. Code Civil art. 1832 (61st ed. Dalloz 1962).

11. Code Civil art. 1873 (61st ed. Dalloz 1962).

12. As will be developed more fully later, this ambiguity is the result of legislation amending the Law of July 24, 1867 in a manner inconsistent with its "contractual" spirit. See pp. 720-22 *infra.*

And it is by reference to the changes that took place during this period that the full implications of the contractual theory, of which the Law of July 24, 1867 is an embodiment, may best be understood.

B. *The Emergence of the Contractual Theory: The Historical Background of the Law of July 24, 1867*

While business associations whose members enjoyed limited liability, and whose interests in the venture were evidenced by transferable shares, probably existed in France as far back as the seventeenth century,[13] the *société anonyme* first received express legal sanction in title III of the Commercial Code of 1807.[14] This law recognized four forms of business associations: the *société en nom collectif,* or simple partnership; the *société en commandite,* or limited partnership; the *société en commandite par actions,* or limited stock partnership; and the *société anonyme* or corporation.[15] While for the most part the Commercial Code of 1807 was merely declaratory of prior law and custom,[16] it did introduce one significant modification: namely, it permitted the incorporation of the limited stock partnership (*société en commandite par actions*) as a private or contractual matter, dispensing with the previously required grant of the sovereign or the legislature.[17] While governmental authorization was still required in order to establish a *société anonyme,*[18] the Commercial Code delegated this power to grant charters to the *Conseil d'Etat,*[19] the highest administrative court in France, permitting that body to specify the terms and conditions under which corporate charters would be granted.[20] This delegation of legislative power together with the specification by the delagee of the terms and conditions of the grant may be regarded as the first step toward the recognition of the contractual nature of the *société anonyme,* since one step had been taken away from absolute discretion over such grants.

The half century succeeding the enactment of the Commercial

13. LESCOEUR, ESSAI HISTORIQUE ET CRITIQUE SUR LA LEGISLATION DES SOCIETES COMMERCIALES EN FRANCE ET A L'ETRANGER 12 (1877); *cf.* 1 TRIPIER, *op. cit. supra* note 1, at 33.

14. CODE DE COMMERCE art. 19 (Official ed. 1807).

15. CODE DE COMMERCE arts. 19, 38. (Official ed. 1807). Strictly speaking a fifth form of business association, the *association en participation* was also recognized by the Code. CODE DE COMMERCE art. 47 (Official ed. 1807). However, this form stands apart from the other four types of associations and it appears to be little used. See generally 1 RIPERT, TRAITE §§ 860-75.

16. 1 COPPER-ROYER, TRAITE DES SOCIETES 295 (1938); LESCOEUR, *op. cit. supra* note 13, at 7; RIPERT, ASPECTS 16.

17. CODE DE COMMERCE arts. 38, 39 (Official ed. 1807).

18. CODE DE COMMERCE art. 37 (Official ed. 1807).

19. 1 RIPERT, TRAITE § 975.

20. *Ibid.*

Code of 1807 saw little use of the *société anonyme*.[21] Several reasons are apparent for this neglect. First of all the legal nature of the corporate form seems to have been imperfectly understood. The corporation as a grant of sovereign power was in the eighteenth century a concept of public law,[22] and only gradually did it assimilate itself into private law thinking. Moreover, the lack of articulation in the 1807 Code probably did little to inspire its use. More important, however, was the fact that governmental authorization was retained as a condition precedent to the use of the corporate form, and the charter provisions, which were predetermined by the *Conseil d'Etat*, were restrictive in nature.[23] In addition, the authorization once granted could be withdrawn at any time.[24] Finally, even if this severe regulation and uncertainty was not objectionable, it was extremely difficult for the more modest ventures to obtain the requisite authorization.[25]

On the other hand it was clear that the *société anonyme* was a vehicle ideally suited to the industrial expansion taking place during the first half of the nineteenth century.[26] The simple partnerships were not able to raise the large capital required for complex industrial operations. Moreover, the absence of limitation on the liability of the partners[27] made this form extremely hazardous, especially in an era of rapid industrial expansion and movement into new and untried areas of commercial activity. While the limited stock partnership (*société en commandite par actions*) obviated many of the difficulties inherent in the simple partnership, and had the notable advantage over the *société anonyme* in that it could be incorporated without prior governmental permission, it too had defects that stemmed from its essentially hybrid form.[28] The limited partners, for example, were prohibited from taking an active part in the management of the business,[29] and failure to observe this restriction resulted in the imposition of unlimited liability.[30] Thus the limited partners were reduced to a passive status not much above that of a creditor,

21. RIPERT, ASPECTS 60.
22. 1 RIPERT, TRAITE § 972.
23. RIPERT, ASPECTS 59-60.
24. LESCOEUR, *op. cit. supra* note 13, at 29; RIPERT, ASPECTS 59-60.
25. 1 RIPERT, TRAITE § 975.
26. See legislative hearings on the Commercial Code of 1807, 1 September 1807, discussing the regulation of the *société anonyme* in RODMAN, THE COMMERCIAL CODE OF FRANCE 3, 13 (1814); BAUDOUIN-BUGNET & GOZARD, LA DIRECTION DES SOCIETES PAR ACTIONS EN FRANCE ET EN ALLEMAGNE 7-8 (1941); LESCOEUR, *op. cit. supra* note 13, at 28.
27. CODE DE COMMERCE art. 22 (Official ed. 1807).
28. LESCOEUR, *op. cit. supra* note 13, at 5.
29. CODE DE COMMERCE art. 27 (Official ed. 1807).
30. CODE DE COMMERCE art. 28 (Official ed. 1807).

with no power of supervision over the use of their invested capital.[31] Further, if there was only one unlimited partner, as a prudent desire to limit liability might dictate, his death or disability would disrupt the enterprise.[32] Finally, while the *commandite* by its very nature is a suitable vehicle for the exploitation of a particular talent, it is not suited to an enterprise that requires an extensive managerial hierarchy as is true of most large commercial ventures.[33]

In the attempt to gain the best of both worlds, that is, the benefits of the *commandite* without its above enumerated drawbacks, and the advantages of the *société anonyme* without its prerequisite of governmental authorization and subsequent supervision, a form of *commandite* came into use which, while adhering on the surface to the legal form of the *commandite* was in reality a *société anonyme*.[34]

The key to this legerdemain was the issuance of the stock of the limited stock partnership in bearer form. By this device there was no way of knowing who the limited partners were, and hence no way of enforcing the prohibition on their taking an active part in the management of the association.[35] Further, the hazard of unlimited liability for the general partner could be effectively eliminated by the simple expedient of using a straw man obedient to the will of the shareholders.[36] By using these rather obvious means, the limited stock partnership having all the attributes of a *société anonyme* was freely creatable by a simple private contract. Despite the patent transparency of this scheme it was validated by the courts.[37]

In the absence of effective regulation, this separation of responsibility from power inevitably led to abuses. The twenty years from 1830 to 1850 have been characterized as the period of the "*fiévre des commandites*" in France.[38] Various schemes to check these abuses were devised, notably the Law of July 17-23, 1856. But this law, as its proposed predecessors, was an essentially stop-gap measure. And behind all the abuses lay the rather simple economic fact that there was a pressing need for a flexible instrument of industrial expansion encumbered with a minimum of governmental regulation.

It is perhaps a law of life that whatever is important is respectable. And the *société en commandite par actions,* in its perverted form, which had by 1867 clearly become an important economic tool, found its respectability in the Law of July 24, 1867.

31. *Cf.* CODE DE COMMERCE art. 23 (Official ed. 1807) in which the limited partners are characterized as "mere bailors of funds."
32. *Ibid.*
33. LESCOEUR, *op. cit. supra* note 13, at 25-27.
34. LESCOEUR, *op. cit. supra* note 13, at 34.
35. *Ibid.*
36. 1 COPPER-ROYER, TRAITE DES SOCIETES 324 (1938).
37. LESCOEUR, *op. cit. supra* note 13, at 35-41.
38. RIPERT, ASPECTS 60.

The Law of July 24, 1867, which even today is the basic statute governing the formation and functioning of business associations, was a complete revision of the provisions of the Commercial Code of 1807 relating to business associations. But it is significant that while the law of 1867 was a complete *statutory* reform, in essence it did little more than codify the practice that had grown up under the 1807 Code.[39] In particular the practices that had grown up around the *société en commandite par actions* were given legislative sanction in the new regulations pertaining to the *société anonyme*. This process of legitimation was achieved in two steps. First of all the legislature passed the Law of May 24, 1863 which brought into being a new form of business association called the *société à responsibilité limitée* (SARL).[40] This law accorded to the new form of association all the attributes of the "perverted form" of the *société en commandite par actions* which had grown up under the 1807 Code, with two principal exceptions: associations incorporated under the new law were limited to a capitalization of twenty million francs or less[41] and could not have fewer than seven shareholders. The second step in this process was carried out by the Law of July 24, 1867 itself. That law adopted the provisions of the Law of May 23, 1863 almost verbatim for the *société anonyme*,[42] dropping, however, the restriction on capitalization.[43] The process was made complete by the provision that: "Henceforth *sociétés anonymes* may be formed without governmental authorization. They may, whatever the number of associates, be formed by private agreement. . . ."[44]

That this provision, which makes applicable to the *société anonyme* the contractual definition of an association embodied in Article 1832 of the Civil Code,[45] is the guiding "spirit" of the legislation may be seen from a brief review of its provisions. Of the thirty-one articles of the Law of July 24, 1867, relating directly to the *société anonyme*, seventeen relate to the process of establishing or dissolving the juridical entity. The remaining fourteen relate to the functioning of the corporation once it has been established.[46] But of these fourteen, only one[47] strictly speaking relates to the internal management of the

39. *Cf.* 1 TRIPIER, *op. cit. supra* note 1, at 35-36, 163.

40. Art. 1, Law of May 23, 1863, 12 RECUEIL GENERAL DES SENATUS-CONSULTES LOIS DECRETS ET ARRETES 433 (1863) [hereinafter cited as RECUEIL]. This is not to be confused with the modern S.A.R.L. Authorized by the law of 7 March 1925, CODE DE COMMERCE art. 46 at 85 (59th ed. Dalloz 1963).

41. Art. 3, Law of May 23, 1863, 12 RECUEIL at 435.

42. Art. 2, Law of May 23, 1863, 12 RECUEIL at 433.

43. 1 TRIPIER, *op. cit. supra* note 1, at 41.

44. Art 21, Law of July 24, 1867, CODE DE COMMERCE at 104 (Dalloz ed. 1877).

45. CODE CIVIL art. 1832 (61st ed. Dalloz 1962).

46. Law of July 24, 1867 arts. 22, 27-37, 40, 43, CODE DE COMMERCE (Dalloz ed. 1877).

47. Law of July 24, 1867, art. 22, CODE DE COMMERCE at 105 (Dalloz ed. 1877).

corporation; and thirteen are aimed essentially at shareholder protection so that the abuses connected with the *société en commandite par actions* would not continue when the essential form of the *commandite* was codified for the *société anonyme*. Thus the management, internal structure, and conduct of the *société anonyme* were left in large measure to private agreement. The contractual concept of the corporation had achieved its majority.

C. *The Institutional Theory*

In time, three principal criticisms were leveled at the contractual theory. First, it was pointed out that the theoretical status of shareholders as contracting parties did not accord with their status in fact. Ignoring the fact that the corporate form was used by the small family business as well as the large public corporation, critics of the contractual theory pointed out that the wide dispersion of stock and the absence of a common bond among the shareholders made meaningless any theory of the corporation premised on the fact that the *société anonyme* was an embodiment of shareholder agreement.[48]

Second, even apart from any question as to the factual status of the shareholders, Article 28 of the Law of July 24, 1867,[49] which granted to a mere majority of the shareholders the power to exercise shareholder prerogatives, seemed to cut deeply into the theoretical right of a dissenting minority not to be contractually bound without their consent.[50]

Finally, and perhaps most important, new corporate legislation enacted to amend and amplify the Law of July 24, 1867 seemed to fly in the face of the freedom of the contracting parties. Not only did the process of legislative intervention increase in frequency, but also the character of that legislation was totally different in that it sought to intervene in the everyday management of corporate affairs, the area that under the Law of July 24, 1867 had been left to shareholder choice.[51] This process of legislative intervention reached its peak in the Law of November 16, 1940,[52] which specified in considerable detail the internal management powers and the managerial structure of the *société anonyme* and made its provisions mandatory for all existing and future *sociétés anonymes*.

It was the increased particularism of the legislation relating to the *société anonyme* that suggested to these critics that rather than regard

48. RIPERT, ASPECTS 93-96.
49. CODE DE COMMERCE at 109 (Dalloz ed. 1877).
50. BERR, L'EXERCISE DU POUVOIR DANS LES SOCIETES COMMERCIALES 11 (1961).
51. See pp. 719-20 *supra*.
52. As amended by the Law of March 4, 1943 and July 7, 1953, CODE DE COMMERCE art. 46, at 74 (59th ed. Dalloz 1963).

the corporate form as the creature of a contract among the shareholders which embodied and expressed their collective agreement, the corporation should be regarded as an institution, or creature authorized and defined by the state, which could be brought into being by private action.[53] Although there seem to be as many versions of the institutional theory as there are commentators,[54] and most of the versions are at best ill-defined,[55] there runs through them all a common thread:

> It is known that since the end of the nineteenth century certain concepts of public law have been, to some degree, assimilated into the area of private law. This is especially true of the theory of the institution which dominates the totality of the rights of collectives . . . . It is recognized today that the substance of the legislation [relating to] corporations is the institutional theory . . . . The *société anonyme* thus becomes an institution of private law, that is, a grouping of persons coming together in their common interest—the corporate purpose—by means of a permanent organization in which, by virtue of legal regulation, each organ of the corporation has a predetermined function which may not be modified or renounced.[56]

In addition to the implicit sanctioning of the institutional theory by the legislature, it also pointed out that this theory has been adopted by the *Cour de Cassation* in *Société anonyme de Teinture et d'Impressions v. Motte,* where the court characterized the *société anonyme* as: "an association hierarchial in structure, in which the management is exercised by a board of directors elected by the annual meeting of shareholders; [and] that it does not pertain, therefore, to the annual meeting [of shareholders] to encroach upon the powers of the board in matters of administration . . . ."[57]

The institutional theory itself, however, is not without its critics.[58] It would seem that the essential question in this regard is whether, as a practical matter of defining shareholder powers when there is no direct statutory reference, it helps to call the *société anonyme* an

53. 1 RIPERT, TRAITE § 663 (5th ed. 1963). For a similar view see, 1 DEWING, THE FINANCIAL POLICY OF CORPORATIONS 8-13 (5th ed. 1953).

54. *Cf.* RIPERT, ASPECTS 96.

55. 1 RIPERT, TRAITE § 663.

56. Leblonde, *Les Pouvoirs Respectifs de l'Assemblée Générale du Conséil d'Administration, du Président-Directeur Général et du Directeur-Général Adjoint dans la Doctrine Institutionelle,* [1957] GAZETTE DE PALAIS (I) (DOCTRINE) 29 [hereinafter cited as GAZ. PAL.]. See also GRANGER, *op. cit. supra* note 8, at 53-78; 2 MOLIERAC, MANUEL DES SOCIETES § 967 (1959); 1 RENARD, LA THEORIE DE L'INSTITUTION (1938).

57. Cass. Civ. 4 Juin 1946, [1947] JURIS-CLASSEUR PERIODIQUE: *La Semaine Juridique* (II) 3518 [hereinafter cited as J.C.P.].

58. Toulemon, *Evolution des Sociétés Anonymes en France: Réformes Possibles,* [1956] REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 219, 220-21; Toulemon, *L'Avenir des Sociétés Anonymes,* [1957] REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 913, 914-15 [hereinafter cited as REV. TRIM. DR. COMM.].

"institution." If by "institution" is meant merely another conceptual label, then clearly the answer is no. The contrary is true, however, if by "institution" is meant a mode of approaching problems of shareholder power with the dual recognition that contractual freedom may not in all circumstances be the instrument best adapted to protect the shareholder, and that the aggregation that comprises a corporation may well involve interests other than those of the shareholder which should be recognized and protected. Unfortunately, this latter view infrequently prevails among French writers, and the criticism that the rubric "institution" is merely "a convenient word that dispenses with research into [the corporation's legal] composition and origin,"[59] is well taken.

It is against this background, this warring of ideas, that the statutory and decisional law pertaining to shareholder powers will be examined. The attempt will be made, ancillary to the analysis of the substantive law itself, to determine the extent to which the substantive law is merely an application of rigidly logical concepts or embodies the recognition of the social and economic forces at work.

II. SHAREHOLDER POWER TO AMEND THE ARTICLES OF INCORPORATION

A. *The Power of the Majority to Effect Amendments*

One of the most difficult problems for adherents of the now discredited contractual theory of the *société anonyme*, is the reconciling of this theory with the admitted power of fewer than all the shareholders to effect amendments to the articles of incorporation binding on the dissenting shareholders.[60] The problem, of course, lies not with the mere existence of this power, but with the notion that the articles of incorporation, as a contract among the shareholders, may be modified and even completely suspended by fewer than all the contracting parties.[61] The problem is further aggravated by the tendency of both the Commercial Code and the courts to limit in certain respects the power of even *all* the shareholders to amend certain provisions of the articles.

Article 31 of the Law of July 24, 1867, as originally promulgated, implicitly seems to recognize, under the guise of a quorum requirement, the power of the holders of a majority of the shares present or represented at an extraordinary general meeting (*assemblée générale*

59. *Ibid.*

60. French law does not recognize the distinction observed in the United States between articles of incorporation and by-laws. The function of both instruments is subsumed by the *statuts* of a *société anonyme*. I have, however, used "articles of incorporation" as the equivalent of the term *statuts*, rather than in its strict English sense.

61. BERR, *op. cit. supra* note 50, § 225; RIPERT, ASPECTS 95-96.

extraordinaire) to amend the articles of incorporation.[62] However, such a recognition of a majority power would be inconsistent with the assumed contractual basis of the *société anonyme*, unless article 31 were construed narrowly to mean merely that it provided a quorum requirement for those cases where the articles of incorporation provided for amendment, that is, for those cases where the dissenting minority had contractually agreed in advance to be bound by the decision of the majority.[63] But, as a matter of contract law such an interpretation of article 31 would be sound only if the amendment in question were previously envisaged by the shareholders, and in addition did not amount to a change so fundamental that the entire contract would be superseded.[64] Moreover, absent any express stipulation in the articles granting such a power to the majority, no amendments whatever could be made, since this narrow construction of article 31 assumes that it imposes its quorum requirements as a protection to the shareholders only in those cases where the articles

62. CODE DE COMMERCE at 110 (Dalloz ed. 1877). It should be pointed out that French law recognizes three types of forums at which the "common" shareholders may exercise their franchise; the *assemblée générale ordinaire, the assemblée générale extraordinaire,* and the *assemblée constitutif*. The power that the shareholders may collectively exercise at the *assemblée générale extraordinaire* is the power to amend the articles of incorporation. 1 RIPERT, TRAITE § 1195. On the other hand the *assemblée générale ordinaire* is itself divided into two sub-types; the *assemblée générale ordinaire* itself, that is the annual meeting, and the *assemblée générale ordinaire tenue extraordinairement,* or special meeting. 1 RIPERT, TRAITE § 1171. The powers of the shareholders at the two types of *assemblées générales ordinaires* are identical: that is, generally, they may pass on the corporation's balance sheet and income statement, declare dividends, elect directors, and take all other action (except amendment of the articles) within shareholder competence. 1 RIPERT, TRAITES § 1192. The sole distinction between the two types of *assemblées générales ordinaires* is the time when the meeting is convened, that is, whether it is the annual meeting or a special meeting. On the other hand, as between the *assemblée générale ordinaire* (whether annual or special) and the *assemblée générale extraordinaire,* in addition to the above noted difference in powers, there are differing quorum requirements. 1 RIPERT, TRAITE §§ 1181, 1199. The third type of forum is the *assemblée constitutif,* which is the shareholder meeting held just after incorporation, at which the articles of incorporation are ratified, and other necessary acts taken. The shareholder powers exereised at this meeting are not discussed in this paper, and no further mention is made of this type of meeting.

Despite the tendency of French commentators to analyze the powers exercised by shareholders collectively in terms of the forum at which the individual shareholder may exercise his franchise, this mode of analysis does not imply any overriding legal significance of the forum itself. Therefore it has been felt proper to disregard the forum during the course of the analysis adopted in this paper *except* insofar as the applicable quorum or other requirements represent a substantive modification of the power itself.

63. PINEAU, *op. cit. supra* note 8, at 24-26; RIPERT, ASPECTS 95.

64. CODE CIVIL art. 1134 (6th ed. Dalloz 1907). This provision has remained unchanged to the present time, see CODE CIVIL art. 1134 (61st ed. Dalloz 1962); RIPERT, ASPECTS 95.

had a provision for their amendment, and is not a general grant of power to the majority.[65]

This somewhat baroque interpretation of article 31 designed to bring it into harmony with the contractual theory, although originally accepted by the courts,[66] was ultimately rejected. The reason for the rejection was merely that practical considerations made it mandatory that fewer than all the shareholders be able to make modifications in the articles to accommodate the structure and purpose of the corporation to changing conditions. But the process of rejection was not a sudden modification of the prior view. Rather it proceeded in two steps: first it was held that even if the articles did not expressly permit shareholder amendment, such amendments were permitted by article 31, provided the amendments did not modify the shareholder agreement in a fundamental respect.[67] This view, called the theory *of bases essentielles*, was adopted by the *Cour de Cassation* in *Société générales des fournitures militaires v. Perdrix*.[68] But even such an interpretation of article 31, although conceptually justifiable, was as a practical matter untenable, since it led to overrefined distinctions as to what constituted a modification fundamental in nature, and allowed to every shareholder a veto power over any amendment that fit this decisional rubric.

The second step in this process of the rejection of the contractual interpretation of article 31 was the passage of the Law of November 22, 1913.[69] This law provided, with two exceptions,[70] that an *assemblée générale extraordinaire*, properly constituted, could amend the articles of incorporation in all respects, notwithstanding anything to the contrary in the articles themselves. This statutory provision was regarded not as an amendment of article 31, but rather as merely a gloss which restored to that article the meaning intended at the time of its passage.[71]

Despite the plain meaning of the Law of November 22, 1913, its application was resisted on the ground that under Article 2 of the

65. NOIREL, LES TENDANCES MODERNES DE LA JURISPRUDENCE COMMERCIALE EN MATIERES DE SOCIETES ANONYMES 82 (1958); PINEAU, *op. cit. supra* note 8, at 24-26.

66. See, *e.g.*, Durand v. Tobouet, Cour d'Appel de Paris, July 30, 1891, [1892] JOURNAL DES SOCIETES CIVILES ET COMMERCIALES 107 [hereinafter cited as J. SOC.].

67. NOIREL, *op. cit. supra* note 64, at 83.

68. Cass. Civ., 30 May 1892, [1893] RECUEIL DALLOZ DE DOCTRINE DE JURISPRUDENCE ET DE LEGISLATION (I) 105, 115 [hereinafter cited as REC. DALLOZ]; PINEAU, *op. cit. supra* note 8, at 27-31.

69. Law of November 22, 1913, amending art. 31 of Law of July 24, 1867, CODE DE COMMERCE at 44 (25th ed. Dalloz 1928).

70. See p. 729 *infra*.

71. 1 COPPER-ROYER, TRAITE DES SOCIETES 604-05 (1938).

Civil Code,[72] it could not have retroactive effect and therefore could apply only to those *sociétés anonymes* incorporated subsequent to its passage.[73] This argument was rejected by the courts[74] on the ground that the Law of November 22, 1913 was merely a clarification of existing legislation, but the issue was not finally resolved until the passage of the Law of May 1, 1930,[75] which superseded the Law of November 22, 1913 and clearly established the power of the shareholders to amend the articles.

B. *Limitations on the Power Through the Use of Quorum and Voting Requirements*

Concurrently with the above described establishment of the power of an *assemblée générale extraordinaire* to amend the articles, there were successive legislative changes in the quorum requirement of such an *assemblée* to validly exercise this power. Article 29 of the Law of July 24, 1867[76] provided that in order to be validly constituted an *assemblée générale* must be composed of shareholders who, as an aggregate, hold stock representing no less than one fourth of the corporation's capital. However, in the case of the shareholders meeting called to amend the articles of incorporation, that is, in the case of the *assemblée générale extraordinaire*, Article 31 of the Law of July 24, 1867 increased this quorum requirement from one fourth to one half.[77]

When the Law of November 22, 1913 was passed affirming the power of the *assemblée générale extraordinaire* to amend the articles,

72. "A law applies only to the future; it has no retroactive effect." CODE CIVIL art. 2 (61st ed. Dalloz 1962).

73. See Houpin, *De La Rétroactivite de Nouvel Art. 31 de la Loi du 24 Juillet 1867*, [1914] J. Soc. 241.

74. See, *e.g.*, Société Lacarriére v. Veaudeau, Cour d'Appel de Paris, 15 January 1914, [1914] J. Soc. 255, 259. For the citation of additional cases, see 1 COOPER-ROYER, TRAITE DES SOCIETES 608 (1938).

75. Law of May 1, 1930, amending art. 31 Law of July 24, 1867, CODE DE COMMERCE 35 (42d ed. Dalloz 1946).

76. As a practical matter the determination of whether or not a quorum is present at any given meeting is made by inspecting the *feuille de présence*, an attendance list which each shareholder attending the meeting, or his proxy, is required to sign, and on which must appear the names and addresses of all shareholders together with the number of shares each holds. Art. 28, Law of July 24, 1867, as amended, Decree Law Augnst 31, 1937, CODE DE COMMERCE art. 46, at 38-39 (59th ed. Dalloz 1963). This list must be certified as correct by the *bureau de l'assemblée*, the persons who conduct the meeting, see Becker, *The Société Anonyme and the Société à Responsabilité Limitée in France*, 38 N.Y.U.L. REV. 835, 873 (1963), and must be made available at the head office of the corporation to anyone requesting to see it. Art 28, Law of July 24, 1867, as amended, Decree Law of August 31, 1937, CODE DE COMMERCE art. 46, at 38-39 (59th ed. Dalloz 1963).

77. At the *assemblées générales extraordinaires*, as at all other *assemblées générales*, a resolution was passed by a simple majority. Art. 28, Law of July 24, 1867, CODE DE COMMERCE at 109 (Dalloz ed. 1877).

both the quorum and voting requirements were raised, presumably, in order to provide some measure of protection to the dissenting minority. Thus paragraph 3 of Article 1 of the Law of November 22, 1913 provides:

> Meetings to pass amendments . . . are validly constituted and may validly deliberate only if they are composed of the number of stockholders representing not less than three-fourths of the corporation's capital. The resolution, in order to be valid, must be passed by two-thirds of the votes of the shares held by shareholders present or represented.[78]

Further, that article provides that charter provisions limiting access to shareholder meetings called to amend the articles are of no effect.[79]

However, recognizing that such a quorum may often be in fact unattainable, this law allows a second meeting to be called, if the first meeting does not achieve the requisite quorum, at which the quorum requirement is reduced to one-half. If that also fails, a third meeting may be called at which the quorum is still further reduced to one-third. However, as a measure of shareholder protection such second and third meetings with their reduced quorum requirements may be held only if certain publication requirements are met which are not required of the first meeting.

These provisions were re-enacted without substantial modification in the Law of May 1, 1930.[80]

The only further modification of the quorum requirement to date has been that made by the Law of February 25, 1953, which reduced the quorum requirement of the first meeting from two-thirds to one-half, that of the second meeting from one-half to one-third, and finally that of the third meeting from one-third to one-fourth.[81]

These gradual reductions in the quroum requirement, in conjunction with the almost minimal quorum requirements for the second and third meetings represent a further erosion of the contractual theory, and widen markedly the power of fewer than all the share-

78. Article 1, para. 3 of the Law of November 22, 1913, amending art. 31 of the Law of July 24, 1867, CODE DE COMMERCE at 44 (25th ed. Dalloz 1928).

79. This provision was subsequently amended to permit such restrictions provided that they pertained to all shares alike. 1 RIPERT, TRAITE § 1198. For the restrictions permitted in the case of any *assemblée générale ordinaire* see 1 RIPERT, TRAITE §§ 1178-79.

80. Amending art. 31, Law of July 1867, CODE DE COMMERCE at 35 (42d ed. Dalloz 1946).

81. Law of February 25, 1953, amending art. 31, Law of July 24, 1867, CODE DE COMMERCE art. 46 at 39-40 (59th ed. Dalloz 1963). The requirement noted above that the resolution to be valid must be passed by two-thirds vote has remained unchanged since the Law of November 22, 1913. See para. 6, art. 31, Law of July 24, 1867, as amended, CODE DE COMMERCE art. 46 at 40 (59th ed. Dalloz 1963); see generally, Note, [1953] REV. TRIM. DR. COMM. 438, 439-43; *but cf.* art. 28, Law of July 24, 1867, CODE DE COMMERCE art. 46, at 38 (59th ed. Dalloz 1963).

holders to amend the articles. While it is true that this trend has been, to a degree, offset by more restrictive notice provisions and an increase from one-half to two-thirds the vote required to pass an amendment, this in no way modifies the conclusion that the law in this area has been progressively moving away from a contractual analysis toward a more factual analysis of the collateral protection to be afforded the minority.

C. *Direct Limitations on the Power of the Assemblée Générale Extraordinaire*

The gradual expansion of the power of fewer than all the contracting parties to amend the articles of incorporation, examined above, represents merely one aspect of the attack on the contractual theory. Simultaneously, a second corollary of that theory was also being attacked: namely, the power of the shareholders to amend the articles of incorporation by unanimous consent.

As was noted previously, Article 31 of the Law of July 24, 1867, as originally promulgated, contained no specification as to the breadth of the shareholder power to amend the articles. If one regards the articles as a contract, then the parties, acting unanimously, may make such changes as they desire providing only that the changes are not substantively illegal. However, this theoretical power has been changed in three respects. First, there appear with increasing frequency statutory provisions regulating the internal structure of the *société anonyme* and the powers of its management.[82] Thus these provisions regulate matters formerly left to shareholder choice, and to that extent restrict the substance of the shareholder power to amend. Secondly, while in other areas shareholder power to amend is unquestioned, there is the increasing tendency to recognize the interests of third parties in such amendments and consequently to require their consent to any such changes. Thus, in effect, in these cases the power of the shareholders is reduced to that of mere initiators of change. Finally, certain provisions in the articles, although a matter of less than unanimous shareholder choice at the time of incorporation, cannot be subsequently changed except by unanimous consent.

The first limitation was an inevitable result of the increased specificity of the law respecting the division of powers within the *société anonyme*. The Law of July 24, 1867, while including considerable detail as to the procedural process of incorporation, failed to detail the powers exercised by the shareholders on one hand and the directors,

82. As was noted previously at pp. 719-20 *supra*, the Law of July 24, 1867 left the internal structure of the corporation and the extent of shareholder powers largely to the articles of incorporation.

officers and auditors on the other. One further aspect of this restrictive legislation should be noted. Since 1940, in passing legislation that made modifications in the structure of the *société anonyme*, the legislature has removed from the sole competence of the shareholders the power to amend the articles of incorporation to bring them into conformity with the new substantive law. Thus, Article 5 of the Law of November 16, 1940[83] granted to the board of directors the power to amend the articles to bring them into conformity with the substantive provisions of that law, requiring only that the shareholders should ratify the board action at their next meeting. And Article 9 of the Law of February 25, 1953[84] went one step further and, in dispensing with the ratification requirement, required only that the board notify the shareholders of the changes that had been made. Thus the power of the shareholders to amend the articles is reduced in two respects: the law not only specifies what amendments are to be made, but it also takes from the shareholders the sole competence to make the required changes.

The second limitation on the power of the shareholders to amend the articles arises from legislative recognition of the interests of third parties in such amendments. Thus Article 20 of the Decree-Law of October 30, 1935[85] provides that:

> The meeting [of holders of debt instruments] also may pass on:—(1) all proposals of the debtor corporation relative to:—(a) modifications of the form [capital structure] of the corporation;—(b) merger of the corporation with another corporation;—(c) issuance of debt obligations having a preference higher than that of the obligations held by those at the meeting.
>
> If the debtor corporation fails to secure the approval of the meeting of the holders of debt instruments to its proposals, the debtor corporation may not pass such resolutions except after having reimbursed such holders as may make demands within three months . . . .

Similarly, Article 9 of the Law of January 23, 1929[86] provides that, "In the case of all corporations having issued founders shares modifications concerning the object or form of the corporation are valid only if a meeting of the holders of founders shares, held in accordance with the provisions of article 6, shall have approved such modifications."[87]

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83. CODE DE COMMERCE art. 46, at 76 (59th ed. Dalloz 1963).
84. CODE DE COMMERCE art. 46, at 81 (59th ed. Dalloz 1963).
85. CODE DE COMMERCE art. 46, at 69 (59th ed. Dalloz 1963).
86. CODE DE COMMERCE art. 46, at 59-60 (59th ed. Dalloz 1963).
87. Broadly speaking founders' shares may be characterized as a promoter's interest, holders of which have no right to the assets of the corporation on liquidation and no right to share in corporate profits absent specific provisions in the articles to the contrary. They are a special class of "quasi securities," whose function is to allow the

The third and final restriction on the power of the shareholders to amend the articles of incorporation finds its roots in the Law of November 22, 1913.[88] As was mentioned previously,[89] article 1 of that law provides: "[N]otwithstanding anything to the contrary in the articles of incorporation, the *assemblée générale* ... may amend the articles of incorporation in all respects ...." This provision was carried forward in the Law of May 1, 1930,[90] which was passed to clarify the ambit of the Law of November 22, 1913.

The sweeping language of article 1, as has been noted, has been modified both by the tendency of the legislature to narrow the area of shareholder choice by the specification of mandatory charter provisions, and by granting the directors the power to implement them. A further specific exception to this broad language was made by the Laws of November 22, 1913 and May 1, 1930 themselves: namely, the shareholders, short of unanimity, could not validly amend the articles to effect either a change in the nationality of the corporation or an augmentation of the obligation of the shareholders.[91]

This in itself is hardly a substantial curtailment of shareholder power, and this curtailment was further reduced by the Law of February 25, 1953, as modified by Ordinance No. 59-123 of January 7, 1959,[92] which allows, with certain exceptions, an amendment of the articles passed by the "normal" two-thirds majority to effect a change in the corporation's nationality.[93]

Even prior to the Law of February 25, 1953, however, the shareholders could by amendment of the articles, change the corporate seat or *siège social*, to another location within the French Republic, since such a change did not constitute a change of the nationality.

services of promoters to be compensated without violating the legal requirement that stock only be issued for money or kind and not for services. See arts. 1, 4, 24, Law of July 24, 1867, as amended, art. 28 of the Decree of August 4, 1949, CODE DE COMMERCE art. 46, at 23, 27, 36 (59th ed. Dalloz 1963). While there is no counterpart of founders' shares in United States jurisdictions, essentially the same result has been sought and perhaps can be achieved by the judicious use of senior securities. See Herwitz, *Allocation of Stock Between Services and Capital in the Organization of a Close Corporation*, 75 HARV. L. REV. 1098 (1962). The rights of holders of founders' shares are governed by the Law of January 29, 1929, as amended, Law of February 25, 1953, CODE DE COMMERCE art. 46, at 57-61 (59th ed. Dalloz 1963). See generally 1 RIPERT, TRAITE §§ 1334-65. See Becker, *The Société Anonyme and the Société à Responsabilité Limitée in France*, 38 N.Y.U.L. REV. 835, 845, 849-50 (1963).

88. Amending art. 31, Law of July 24, 1867, CODE DE COMMERCE at 44 (25th ed. Dalloz 1928).

89. See p. 724 *supra*.

90. Amending art. 31, Law of July 24, 1867, CODE DE COMMERCE 35 (42d ed. Dalloz 1946).

91. 2 MOLIERAC, MANUEL DES SOCIETES §§ 1262-64 (1959).

92. CODE DE COMMERCE art. 46 at 39, 84 (59th ed. Dalloz 1963).

93. On the nationality of a corporation under French law, see generally Note, 74 HARV. L. REV. 1429 (1961).

The situs of the *siège social* could be a matter of shareholder concern, since French law requires both directors' and shareholders' meetings to be held there. Thus a change of the *siège* from continental France to one of the territories would in effect mean that nearly all the shareholders would be precluded from taking part in the meeting in person. Despite this fact, the Law of May 24, 1951,[94] which is still in force, permits the board of directors, with the concurrence of the French Minister of Finance, to change at will the *siège social* of the corporation.

The statutory distribution of competence to amend the articles, and the statutory grant to certain categories of interested persons to exercise limited veto power over such amendments, described above, has resulted in a legislative pattern of Byzantine complexity. It is difficult to see any theory of shareholder power emerge from this pattern; indeed it is doubtful whether its enactment over half a century was the result of anything but an attempt to deal in an *ad hoc* manner with specific problems as they arose. At any rate one thing is abundantly clear: the shareholder power to amend can no longer be rationalized on the theory of the articles as a contract. Further, since this particular shareholder power is so inclusive, potentially encompassing within it the power to make modifications and changes in so many aspects of the corporation, its curtailment must necessarily raise the question whether the contractual definition of the *société anonyme* embodied in Article 1832 of the Civil Code retains, in the face of this explicit commercial legislation, any validity whatever.

III. SHAREHOLDER POWER OVER THE DISTRIBUTION OF NET PROFITS

A. *The Scope of the Power*

Although the French Commercial Code has no specific provision according to shareholders the power to declare dividends, this power is regarded as implied in Articles 10, 27 and 36 of the Law of July 24, 1867.[95] Further, Article 1832 of the Civil Code which provides that "An association is a contract *(contrat)* by which two or more[96] persons agree to combine their resources *with a view to dividing the*

94. Amending art. 31, Law of July 24, 1867, CODE DE COMMERCE art. 46, at 40 (59th ed. Dalloz 1963).

95. CODE DE COMMERCE art. 46 (59th ed. Dalloz 1963); see, 3 ENCYCLOPEDIE JURIDIQUE: REPERTOIRE DE DROIT COMMERCIAL ET DES SOCIETES, *Dividend* § 86 (1958) [hereinafter cited as ENCYCLOPEDIE DALLOZ]; 1 RIPERT, TRAITE § 1473(1); *cf.* BERR, *op. cit. supra* note 50, § 251.

96. In the case of the *société anonyme,* however, there must be no fewer than seven shareholders. Art. 23, Law of July 24, 1867, CODE DE COMMERCE art. 46, at 36 (59th ed. Dalloz 1963).

profits which may result . . ."[97] (Emphasis and footnote added) renders any further specification superfluous.

On the other hand, it seems clear that the law does not contemplate that the shareholders themselves should determine the extent of the funds out of which the dividends may be paid.[98] Article 32 of the Law of July 24, 1867 provides that the supervisory auditors (*commissaires aux comptes*) should, at the annual meeting of the shareholders, state the reasons, if any, for not approving the accounts presented by the directors.[99] Thus, at its narrowest, this statutory power may be interpreted merely as the power to approve or disapprove of the management proposal of funds available for distribution, as distinguished from the power to initiate the proposal in the first instance and then act upon it.

But such an interpretation seems unduly restrictive. It is clear, for example, that the directors must present to the annual shareholders meeting the income statement and balance sheet of the corporation for the prior year.[100] Since a failure by the directors to do so results in severe penalties,[101] it is fairly certain that the shareholders have access to information as to the full extent of funds available for distribution as dividends. Moreover, not only are the shareholders accorded the power to declare dividends at the annual meeting, but they are also charged with the duty of apportioning the profits of the corporation as between various reserves on the one hand and as between the reserves and the dividend on the other.[102] Thus it would seem that by means of this power to allocate available funds to various existing or newly created reserves, the shareholders may to that extent lessen the funds out of which dividends may be paid. Theoretically, then, the shareholders do have a measure of control over the dividend payable, and this power extends further than mere approval or dis-

97. CODE CIVIL art. 1832 (61st ed. Dalloz 1962).

98. See generally *Copper-Royer, La Notion de Bénéfice dans le Contract de Société*, [1939] REVUE SPECIALE DE DOCTRINE ET DE JURISPRUDENCE CONCERNANT LES SOCIETES 115.

99. Art. 34, Law of July 24, 1867, amended, Decree Law of August 8, 1935, CODE DE COMMERCE art. 46, at 44 (59th ed. Dalloz 1963).

100. Art. 35, Law of July 24, 1867, as amended, Decree Law, October 30, 1935, CODE DE COMMERCE art. 46, at 44-45 (59th ed. Dalloz 1963); Dalsace, *L'Actionnaire et l'Assemblée Générale de la Société Anonyme*, [1960] REVUE DES SOCIETES 258, 263-5.

101. *Ibid.*

102. While it is clear that the annual meeting of shareholders must make the requisite apportionment of profits to the reserves required by law and the articles of incorporation, 1 RIPERT, TRAITE §§ 1456, 1463, 1473(2), there has been some dispute as to whether, absent a specific grant of power in the articles, the annual meeting of shareholders may itself establish reserves and allocate profits to them. However, it seems widely recognized that absent a direct prohibition on such action in the articles they may do so. LACOMBE, LES RESERVES DANS LES SOCIETES PAR ACTIONS 103-19 (1962); 1 RIPERT, TRAITE §§ 1466, 1467, 1469; *Autesserre, De la Licéite de la Libre Constitution des Réserves par les Sociétés*, [1960] REVUE DES SOCIETES 1.

approval of the management proposal. It is thus more accurate to characterize this shareholder power as the power to *allocate* the profits of the enterprise.[103]

However, even as thus characterized, this power is further limited. As is true of most shareholder powers, its exercise is not an individual prerogative. And as with all decisions made by the annual meeting (*assemblée générale ordinaire*), the allocation of profits and declaration of dividends is by vote of a simple majority.[104] Thus, again, the binding effect of a decision by fewer than all the shareholders is in derogation of the minority's contractual rights, a derogation required by practical considerations.[105]

B. *Restrictions on the Availability of Distributable Funds*

While it is true that the majority is the sole repository of this power, it is equally true that they do not have the sole interest in its exercise. The corporation itself, as distinct from the majority, the corporation's creditors, and the minority shareholders all have interests which may compete with those of the majority. And so to some extent, perhaps even to a significant extent, this majority power has been hedged about with statutory and judicially interpolated restrictions in recognition of the competing interests involved. And it is significant that these restrictions are not invoked under the guise of theory, but seem to be an almost frank recognition of the competing interests involved.

The most obvious of these restrictions is implicit in the mere statement of the power itself: namely, that it is the power to allocate *profits*. Since a reduction of capital requires a modification of the articles of incorporation[106] which is within the sole competence of the speeial shareholders meeting with its more stringent notice,[107] quorum and voting requirements,[108] it is clear that a mere majority at the annual meeting may not effect such a reduction under the guise of a dividend. To the extent that a dividend paid is in excess of funds legally availa-

103. That this power pertains exclusively to the shareholders was implied in Sibourd v. *Société Anonyme* Pival, Tribunal de Commerce de la Seine, 4 March 1933, [1933] GAZ. PAL. (1st Sem.) 893, where the court held that upon the declaration of the dividend by the shareholders the corporation became a debtor of the shareholders to the extent of the dividend, and that while the *assemblée genéral* could with propriety leave the actual date of its payment to the board of directors' discretion, the board could not in effect exercise a veto power over the declaration by delaying payment for an unreasonable length of time.

104. Art. 28, Law of July 24, 1867, CODE DE COMMERCE art. 46, at 38 (59th ed. Dalloz 1963).

105. Lesourd, *L'Annulation pour Abus de Droit des Délibérations d'Assemblées Générales*, [1962] REV. TRIM. DR. COMM. 1.

106. 1 RIPERT, TRAITE §§ 1499, 1532.

107. Special notice requirements are required for reductions of capital. See arts. 55, 56, 57(7), 59, Law of July 24, 1867, as amended, Decree Law of October 30, 1935, CODE DE COMMERCE art. 46, at 50-52 (59th ed. Dalloz 1963).

108. See pp. 727-30 *supra*.

ble for such purposes, the dividend is said to be fictional, and under certain conditions the shareholders are liable for its restitution.[109]

On the other hand the mere presence of net profits does not automatically legitimate the dividend declared by the annual meeting. Not only does the law specify and limit the sources of dividends, but to some extent it arrogates the allocation of these funds, or more accurately predetermines their allocation, leaving to the shareholders the mere formal compliance with its provisions. Thus Article 36 of the Law of July 24, 1867[110] provides that each year one-twentieth of the net profits of the corporation must be set aside in a reserve. However, that article also provides that such a deduction ceases to be obligatory when this required reserve has attained a size equal to one-tenth of the corporation's capital.[111]

Further, the articles of incorporation themselves may provide that the amount annually allocable to the "legal" reserve may exceed that required by article 36, or alternately may provide for other reserves even though these are not made mandatory by law. Such reserves, if established, may be modified or abolished only by an amendment to the articles of incorporation, and their requirements must be observed by the annual meeting of shareholders.[112] The allocation of profits to the reserves required by law or the articles takes precedence over the payment of dividends.

In addition to the reserves required by law and those established by the articles, the articles of incorporation may in other respects indirectly predetermine the allocation of distributable profits and thus further reduce the power of the annual meeting to make such an allocation.[113] Article 11 of the Law of March 4, 1943, as modified by the Decree of September 30, 1953,[114] permits the directors of a corporation to be paid a salary (*tantième*), the amount of which is determined by the annual meeting of the shareholders and required

109. 1 RIPERT, TRAITE § 1483. Although it seems correct to characterize a dividend as "fictional" to the extent that it impairs capital, the doctrine of fictional dividends covers a wider variety of situations than merely the extreme case of capital impairment. 1 RIPERT, TRAITE § 1482. Historically, the theory of fictional dividends seems to have developed primarily as a limitation on the power of directors to pay a dividend previously declared by the shareholders on the strength of an income statement fraudulently or incorrectly drawn up by the directors. NOIREL, *op. cit. supra* note 65, at 102-09 (1958); Note, [1950] REV. TRIM. DR. COMM. 77.

110. CODE DE COMMERCE art. 46, at 45 (59th ed. Dalloz 1963).

111. For a criticism of this requirement see LACOMBE, *op. cit. supra* note 102, at 120-30.

112. BERR, *op. cit. supra* note 50, § 255; 1 RIPERT, TRAITE § 1463. For notice requirements if the articles are amended to modify or abolish reserves that were initially established by the articles see arts. 55, 56, 57(9), 59, Law of July 24, 1867 as amended, Decree Law of October 30, 1935, CODE DE COMMERCE art. 46, at 50-52 (59th ed. Dalloz 1963).

113. 1 RIPERT, TRAITE § 1473(2).

114. CODE DE COMMERCE art. 46, at 79 (59th ed. Dalloz 1963).

by the article to be treated as an operating expense (*frais généraux*) on the corporation's income statement. As a result, to the extent that such salaries are voted, the funds available for dividends are reduced.

But article 11 also provides, as an alternative to the shareholders fixing these salaries, that they may be predetermined by the articles of incorporation. If this latter course is followed, these salaries must be established as a percentage of net profits,[115] not in any event to exceed ten per cent for all directors combined.[116] Although the *payment* of these salaries, whether or not established by the articles of incorporation, is subordinate to the payment of the dividends to shareholders,[117] the shareholders must allocate available net profits to these salaries before they declare a dividend except to the extent that the articles of incorporation specify a "fixed" dividend, or in the absence of such specification to the extent of five per cent of the capital represented by the outstanding shares.[118] Thus, while the payment of previously declared dividends always takes priority over the payment of directors' salaries, the directors' salaries, if established by the articles, have priority over the shareholder allocation of profits except to the extent of the "fixed" return on shareholder capital specified by law or the articles.

Some corporations in order to raise needed capital have resorted to the expedient of issuing shares that, in addition to a dividend, pay a fixed return in the nature of interest on the capital contribution which the shares represent.[119] Although the payment of the dividend on such stock is contingent on earnings, the "interest" is payable irrespective of profits.[120] As the interest payment is fixed by the articles of incorporation, it is not within the competence of the annual meeting of shareholders to disregard such a required charge against profits, and to that extent, as is the case with fixed salaries for directors, it is a further limitation on the power to allocate profits.

A somewhat similar limitation is presented by the issuance of so-called "founders shares." These are not shares in the normal sense

115. Article 11 defines "net profits" for the purposes of calculating director salaries, but that definition applies *only if such salaries are established by the articles.* It is interesting to note that net profits are defined by article 11, *inter alia*, as profits after allocations to earned surplus (*report à nouveau*), thus indirectly requiring the directors through the reduction of funds available for their salaries to bear part of the burden of internal financing. See 1 RIPERT, TRAITE § 1253.

116. Société Pommery et Greno v. Dalmas de Polignac, Cour d'Appel de Paris, 15 March 1958, [1959] REC. DALLOZ(j) 212.

117. Article 11, para. 8, Law of March 4, 1943, as amended, Decree of September 30, 1953, CODE DE COMMERCE art. 46, at 79 (59th ed. Dalloz 1963).

118. Article 11, para. 4, of the Law of March 4, 1943, as amended, Decree of September 30, 1953, CODE DE COMMERCE art. 46, at 79 (59th ed. Dalloz 1963).

119. 1 RIPERT, TRAITE § 1475 (5th ed. 1963).

120. Thenard, *La Validité de la Clause d'Intérêts Fixes Payables en Cas d'absence de Bénéfices*, [1939] J. Soc. 193, 208-21.

because the holders are not vested with normal shareholders' rights and powers.[121] These shares do not represent a part of the corporation's capital, and hence they have no call on this capital upon the corporation's dissolution.[122] However, a dividend may be and usually is paid on such shares, and the amount of the dividend (expressed as a per cent of the profits) is often established by the articles of incorporation rather than being left to shareholder discretion.[123]

This rather summary catalogue of instances in which the allocation of profits is preempted by law or by the articles of incorporation indicates the significant extent to which this shareholder power, in theory sovereign, is in actuality severely eroded.[124] While it is true that the restrictions are for the most part contained in the articles of incorporation, and therefore may be removed by an *assemblée générale extraordinaire*, this is not always the case.[125] Moreover, as has previously been pointed out, modification of the articles requires more stringent notice, voting and quorum requirements,[126] and to that extent provides a greater possible opportunity for the minority to exercise control over the disposition of corporate profits, and ensures to a greater degree the protection of competing interests.

The common feature of all of these restrictions is that they are specific and direct limitations on the funds available for distribution as dividends. Thus they are less restrictions on the power itself than restrictions on that on which the power acts. Although to some extent they protect the interests of the corporation and the interests of creditors in the stability and continued health of the venture, they seem to fall significantly short of fully protecting the interests of the minority.

C. *Direct Limitations on the Power To Allocate Net Profits*

The power of the majority over the allocation of profits remaining after the various reserve requirements have been met can give rise to intense intra-shareholder conflicts. This would seem to be particularly

121. See note 87 *supra*.

122. Article 1, Law of January 23, 1929, CODE DE COMMERCE art. 46, at 57-58 (59th ed. Dalloz, 1963); *but see*, 1 RIPERT, TRAITE § 1353.

123. See Article 1, para. 2, Law of January 23, 1929, CODE DE COMMERCE art. 46, at 58 (59th ed. Dalloz 1963); *cf.* 1 RIPERT, TRAITE § 1353.

124. No limitation is placed on the degree to which the articles of incorporation may predetermine the allocation of net profits. It seems clear that the articles may arrogate this function in its entirety by stipulating the manner in which the shareholders at the annual meeting shall allocate the profits in percentage terms. *Cf.* BERR, *op. cit. supra* note 50, § 255. In this situation the annual shareholders' meeting becomes a mere rubber stamp.

125. However, as was noted previously, under certain circumstances, both creditors and holders of founders' shares may have a veto power over any such changes. See p. 728 *supra*.

126. See pp. 727-30 *supra*.

true of the closely held corporation where majority shareholders may dominate the board of directors and in addition may hold other positions in the corporation, and thus through the salaries incident to these offices provide for themselves a secure and adequate return on their investment without recourse to dividends. This conflict becomes sharper when the majority, rather than declaring dividends, prefers to realize their gain through capital appreciation and thus adheres to a financial policy of reinvesting corporate profits.[127] In extreme situations such majority power may be used to freeze out minority shareholders, because the refusal to pay dividends may depress the market price of the stock, allowing the majority to buy it up at an advantageous price.[128] But even short of such intentional machinations by the majority, a minority holder of a stock which does not have a market may in effect find himself "locked into" an investment because of the majority's decision in good faith to reinvest corporate profits.

The problem is made somewhat more acute under French law in that board domination is not a necessary requisite for carrying out such a policy, for the shareholder power to allocate profits necessarily implies the power to dispose of them other than as dividends. Thus, even though the articles of incorporation do not require that a substantial part of distributable profits be allocated to establish reserves, the majority still has the power to set up "free reserves" (*réserves libres*) and thus divert from potential distribution the amounts desired.[129] On the other hand, this is not to imply that there is not a province of legitimate use of such a power. Commentators note that since World War II there has been a marked and continuing trend toward internal corporate financing.[130] Thus the demarcation of the legitimate sphere of this power, and the availability of checks on its abuse, is a matter of intense practical concern.

One doctrine that pervades the entire area of shareholder powers, and that of commercial law in general, is the doctrine of abuse of power. The basis of this doctrine is Article 1382 of the Civil Code.[131]

127. This potential conflict is not limited to the area of shareholders, but may extend also to conflicts between shareholders on one hand and holders of founders' shares on the other, when the latter are not accorded an interest in profits as of right by the articles of incorporation. Since by definition a founders' share does not represent an interest in the corporation's assets or capital, the refusal by the shareholders to declare a dividend effeetively does away with any return on the investment represented by the founders' share. 1 RIPERT, TRAITE §§ 1355, 1467.

128. *Cf.* Note, *Freezing Out Minority Shareholders*, 74 HARV. L. REV. 1630 (1961).

129. 1 RIPERT, TRAITE §§ 1466, 1469.

130. LACOMBE, *op. cit. supra* note 102, at 1; VIGREUX, LES DROITS DES ACTIONNAIRES DANS LES SOCIÉTÉ ANONYMES 59, 77-82 (1953).

131. Article 1382 provides: "Every act whatever of a person (*homme*) causing injury to another, obliges the one by whose fault it occurred to make reparation to the one injured." CODE CIVIL art. 1382 (61st ed. Dalloz 1962).

The notion at work here is that power extends no further than its abuse:[132]

> Every prerogative, no matter how individual [its exercise] may appear, has a collective purpose to fulfill; and from the moment when it deviates from this purpose, even though unknowingly and without bad intention, it falsifies itself and can no longer hope for the protection of the law . . . .[133]

Potentially the doctrine of abuse of power represents a substantial limitation on the majority power to allocate profits. But to a large extent its scope seems to depend on the presuppositions that are brought to bear on the problem. Thus, an adherent of the contractual theory of the corporation might argue that the doctrine should be given broad scope to strike down not only exercises of majority power *inconsistent* with corporate objectives but also those that cannot be *affirmatively justified* in corporate terms. This is so because under the contractual theory lodging the power in the majority is an exception required by practical considerations of corporate welfare in derogation of the "normal" unanimity rule, and thus arguably its exercise can only be justified by reference to the reason underlying such a derogation. On the other hand, the "institutionalist" might maintain that there pertains to the majority a legitimate area for the exercise of its explicitly accorded powers which needs no justification. Provided this power is not abused in the positive sense, that is, provided it is not used as a tool to achieve an otherwise illegitimate end, its exercise requires no affirmative justification.

The arguments stated above are extreme, but they perhaps could be said to represent the polar positions of the use of the doctrine of abuse of power within the different conceptual frameworks. As applied to the issue of the power of the majority to allocate profits between dividends on one hand and "free reserves" on the other, this conceptual conflict, in a somewhat more attenuated form, is well illustrated by the litigation in *Schumann v. Anciens Etablissements Piquard*,[134] a classic example of intra-shareholder conflict.

The Anciens Etablissements Piquard, a *société anonyme*, had in 1954, sixty-eight-hundred shares of voting stock outstanding. Of this stock four-thousand-twenty-six shares, or almost sixty per cent, were held by three members of the board of directors.[135] During the eight

132. Note, [1960] REV. TRIM. DR. COMM. 99, 100.

133. Lesourd, *L'Annulation pour Abus de Droit des Délibérations d'Assemblées Générales*, [1962] REV. TRIM. DR. COMM. 1, 2 n.5.

134. Tribunal de Commerce de la Seine, May 18, 1957 (unreported), *rev'd*, Cour d'Appel de Paris, February 27, 1959, [1959] J.C.P. 11175, *rev'd*, Cass. Comm., April 18, 1961, [1961] J.C.P. 12164.

135. The statement of facts and the holding of the trial court is taken from the opinion of the Court d'Appel de Paris, [1959] J.C.P. 11175.

years prior to 1954 the corporation had paid out on the average thirteen per cent of its annual net profits as dividends, the remaining eighty-seven per cent having been plowed back into the corporation through various reserves and earned surplus (*report à nouveau*). During the same eight-year period gross income of the corporation had risen from twenty-six million francs to one-hundred-ninety-four million francs, and net income had risen almost one thousand per cent.

At the 1954 annual meeting the income statement presented to the shareholders for their approval indicated that during the prior year the corporation had realized net profits of 15,834,729 francs. At that meeting the majority, that is, the three inside stockholders, voted to apportion the entire prior year's net profits to earned surplus, and to pay out no dividend whatsoever. Eighteen minority shareholders, Schumann among them, instituted an action in the *Tribunal Commercial de la Seine* to have the majority's resolution annulled. The theory of their complaint was that the majority's action was an abuse of power and hence void.

The lower court dismissed the complaint on the ground that since the articles of incorporation sanctioned the conduct adopted by the majority, that is, expressly contemplated that net profits could be allocated by the majority to earned surplus, there could be no abuse of power. The trial court thus seemed to sidestep the issue raised by the parties, resting its decision instead on an interpretation of the articles of incorporation.

The *Cour d'Appel de Paris*,[136] however, in reversing the trial court, based its decision squarely on the contractual theory of the corporation and its corollary that the minority had a right to the payment of dividends. Invoking Article 1832 of the Civil Code,[137] the court first observed that: "[I]t is of the essence even of a contract of business association that the profits (in view of the realization and division of which the contract was concluded) should be distributed periodically . . . ."[138] After pointing out that this reinvestment of profits tended to depress the market price of the stock and thus not only to deprive the minority of dividends but also to deprive them of an opportunity of selling their stock for a fair price, the court went on to hold:

> [I]n the presence of these reserves (totaling over 40,000,000) already equal to two and one-half times the Corporation's capital, the transfer to the reserve . . . of the 15,834,729 frs. of net profits realized in 1954 is not justified either by the legitimate anticipation of needs nor by the necessity of meeting extraordinary temporary expenses; that this transfer, as most of

136. Cour d'Appel de Paris, February 28, 1959, [1959] J.C.P. 11175.
137. CODE CIVIL art. 1832 (61st ed. Dalloz 1962).
138. See note 136 *supra*.

> the previous transfers, has no other explanation and no other purpose than a desire to provide for the continuation and expansion of the business without recourse to a normal increase in capital which had become necessary; that this therefore is a violation of the agreement [*pacte sociale*] abusively commited by the majority participating in the deliberations.[139]

To the majority's argument that it was the intention of the parties that the majority should exercise this power, as evidenced by the provision in the articles of incorporation, the court summarily replied that the grant of power contained in the articles was merely declaratory of their legal rights, and that its exercise nonetheless required affirmative justification either in the nature of anticipated extraordinary expenses or unforeseen needs.[140]

On appeal to the *Cour de Cassation,*[141] the court of last resort in commercial cases,[142] the court, in reversing, alluded neither to the argument that the majority's act was expressly contemplated by the articles of incorporation, nor to the theoretical grounds on which the court of appeals' decision was premised. Rather the court merely rejected the conclusion that failure of the majority to pay a dividend in this case was an abuse of power, summarily holding that there had been no showing "that the disputed [majority] resolution was made *contrary* to the general interests of the corporation *and* for the sole purpose of favoring the majority at the expense of the minority . . . ."[143] (Emphasis added.)

In so holding the court did not make explicit the theoretical basis of its reasoning. It seems widely assumed that implicit in its decision was a rejection of the contractual theory which had been adopted by the court of appeals.[144] But the decision is not without its ambiguities. On one hand, it could be read as holding that the complainants merely failed to meet their burden of proof.[145] However, the court's formulation of the doctrine of abuse of power differs radically from that of the court of appeals, if in no other respect than in holding that the complainant bears the burden of showing the existence of the abuse. And this shift in the burden of proof is in itself significant,

139. *Ibid.*

140. *Ibid.* See also [1962] J. Soc. 194, 195. The decision of the Cour d'Appel de Paris provoked an enormous number of commentaries, see, e.g., Note, [1959] GAZ. PAL. (I) 255; Note, [1959] J.C.P. 11175; Note, [1959] REC. DALLOZ 354; Note, [1960] REV. TRIM. DR. COMM. 99. See also, Saint, *France: Stockholder Protection,* 9 AM. J. COMP. L. 693, 698-700 (1960).

141. Cass. Comm., April 18, 1961, [1961] J.C.P. 12164.

142. 1 DAVID, LE DROIT FRANCAIS 38-39 (1960).

143. Cass. Comm., 18 April 1961, [1961] J.C.P. 12164.

144. Autesserre, *Du Report a Nouveau et de l'Auto-financement des Sociétés,* [1962] REVUE DES SOCIETES 1, 12.

145. *Cf.* Note, [1962] J. Soc. 194, 195. This view seems to have been rejected, see, *e.g.,* Autesserre, *Du Report à Nouveau et de l'Auto-financement des Sociétés,* [1962] REVUE DES SOCIETES 1, 11.

for as was pointed out previously,[146] to assume presumptively that the majority did not abuse their power suggests no less than that this power is inherent to the institution that is the majority. The court of appeals, on the other hand, regarding the majority power as an exception to the rule of unanimity, required those who seek shelter behind this exception to legitimate their use of this power. On the other hand to call the result achieved by the Cour d'Appel a manifestation of a contractual analysis is somewhat ironic, for the practical effect of the decision was an intervention by the court into corporate affairs in the name of protecting minority interests. Implicit in such a result would seem to be the rejection of the contractual theory which assumes that the minority can adequately protect itself through its freedom to contract.

It is difficult to tie the decisions in *Schumann* to any conceptual theories. It may be equally difficult to see why it is necessary to so buttress any given conclusion. As one French commentator has pointed out, "the role of the courts, in each particular case, is to determine the point of equilibrium, to effect a conciliation between the corporate interests and the personal interests of shareholders . . . ."[147] Surely this is the position that Anglo-American law would take: an analysis of the interests at stake, and to effect a conciliation between them. But for the civil lawyer such a route is perhaps open to question. On one hand the courts may not refuse to decide a case because of the difficulty of the legal problem involved or the absence of law on an issue.[148] On the other hand "law" to the civil lawyer means statutory law, the provisions of the Civil and Commercial Codes. To engage in the process of weighing the interests present in the particular case, while a familiar example of interstitial legislation to the common law,[149] may for a French court be regarded as an unwarranted assumption of legislative power.[150] Thus there is arguably a need to resort to the theory underlying the law in order to justify a decision in those difficult cases not expressly covered by one or more provisions of the Commercial or Civil Codes, if one's premise is that the courts have no power to create law.

Whatever the theoretical position of the Cour de Cassation, it seems clear that the doctrine of abuse of power will at best be only a limited check on the majority's power to allocate profits. Not only must the

146. See pp. 736-37 *supra.*

147. Note, [1960] REV. TRIM. DR. COMM. 99, 100.

148. CODE CIVIL art. 4 (61st ed. Dalloz 1962).

149. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-15 (1960 ed.).

150. *Compare* CODE CIVIL art. 4 (61st ed. Dalloz 1962), *with* CODE CIVIL art. 1 (5th ed. Rossel 1962) (Swiss).

minority show that the majority's action was *contrary* to the general interests of the corporation but also that the purpose behind the exercise of this power was solely to favor the majority at the expense of the minority.[151] In effect this is to hold that the minority has no absolute right to corporate profits,[152] and that the majority's disposition of these profits will be struck down only if it is shown that the real purpose of the majority action was not only to exercise a prerogative, even if its exercise was capricious, but that the prerogative was used as a tool to deprive the minority of some other individual right which the law recognizes, such as the right to continue as a shareholder and not to be frozen out.[153]

IV. Shareholder Power to Remove Directors

The process of gradual erosion of shareholder powers by statutory and decisional law has not carried over into the area of the shareholder power to remove directors. The Commercial Code contains but two references to the tenure of a director of a *société anonyme.* Article 25 of the Law of July 24, 1867[154] provides that directors may be elected for a term not exceeding six years, and may be re-elected for an indefinite number of similar terms unless the articles of incorporation otherwise provide. In addition, article 25 accords the sole competence to elect directors to the *assemblée générale* of shareholders, at which shareholder action is taken by a simple majority vote.[155]

The remaining reference to director tenure is contained in Article 22 of the Law of July 24, 1867, which provides: "*Sociétés anonymes* are administered by one or more agents (*mandataires*) chosen from among the shareholders, appointed for a term certain, liable to dismissal, with or without salary."[156] This provision has remained vir-

151. See also Consort Pillier v. Société Chauvin et Arnoux, Cass. Civ., January 20, 1958, [1958] Revue des Societes 285, 288, where it was held that the majority did not abuse its power in setting up reserves in excess of those required by law, in that this was not forbidden by the Articles and that "the decision appealed had certified that the corporation was, thanks to the management of its *Président-directeur général,* in an enviable financial condition that the dividends fixed by the *assemblée général* followed a perceptible and reasonable progression . . . becoming even substantial, and that it was not shown that the *Président-directeur général* had followed a policy of forcing down [the market price] of the shares for personal ends, as the face value of the shares rose from 1000 to 50,000 franes. . . ."

152. 1 Ripert, Traite § 1221; Autesserre, *De la Licéite de la Libre Constitution des Reserves par les Sociétés,* [1960] Revue des Societes 1, 5.

153. Berr, *op. cit. supra* note 50, §§ 367-70; 1 Ripert, Traite §§ 1123, 1170, 1202, 1496.

154. Code de Commerce art. 46, at 36-37 (59th ed. Dalloz 1963).

155. Code de Commerce art. 46, at 36-37 (59th ed. Dalloz 1963).

156. Code de Commerce art. 46, at 35 (59th ed. Dalloz 1963).

tually unchanged since 1807.[157] As a result the developments that have occurred in this area are exclusively decisional.

A. *The Scope of the Power Defined Through Agency Doctrine*

Although article 22 clearly provides that directors may be removed, it does not specify on its face the grounds, if any, for which they may be removed, nor by whom this removal power may be exercised. The courts filled this apparent gap in the statute by reference to the civil law concept of agent (*mandataire*), which the draftsmen of article 22 adopted to describe the status of a director.[158]

Thus Article 2003 of the Civil Code provides that the agency may be terminated, *inter alia,* by revocation by the principal,[159] that is the shareholders who appointed him. Article 2004 stipulates that "The principal may revoke the agency whenever he wishes *(quand bon lui semble)* . . . ." Against this background, the *Cour de Cassation in* 1868, one year after the passage of article 22, categorically refused to award damages to a director who had been dismissed without cause by the shareholders prior to the expiration of his elected term, holding that "[I]n revoking the *agency* . . . without waiting for the expiration of the term which had been assigned to him, the shareholders meeting in an *assemblée général* did no more than exercise a power inherent in the very nature of the contract between them and their agent . . . ."[160] (Emphasis added.) It is to be noted that the court made no mention in its decision of articles 2003 and 2004. But the court throughout speaks of agents rather than directors, and the application of these Civil Code sections is thus implied. In short, in view of these statutory provisions no other decision was open to them.[161]

Although the courts have on the one hand accepted the agency

157. *Compare* CODE DE COMMERCE art. 31 (Official ed. 1807): "[The *société anonyme*] is administered by agents appointed for a term certain, liable to dismissal, with or without salary," *with* art. 22, Law of July 24, 1867, CODE DE COMMERCE at 105 (Dalloz ed. 1877): "*sociétés anonymes* are administered by one or more agents chosen from among the shareholders, appointed for a term certain with or without salary."

158. The process of interpretation used by the courts in this instance illustrates well the manner by which legislative gaps in the Commercial Code are filled by reference to the "common law" of the Civil Code, and serves to point up the fact that the Commercial Code in general and French corporation law in particular, are not autonomous bodies of law and cannot be construed in vacuo.

159. "The agency is terminated: by the revocation of the principal, by the renunciation of the agency by the agent, by natural or civil death, the insolvency or the deprivation [of civil rights] of either the principal or agent." CODE CIVIL art. 2003 (61st ed. Dalloz 1962).

160. Heusschen v. Société Financiére d'Egypt, Cass. Civ., July 28, 1868, [1868] Bulletin des arrets de la court de Cassation 203 (No. 136) [hereinafter cited as Bull. Cass.].

161. Autesserre, *Nature Jurisdique et Condition de Révocation des Gérants de Société et Notament de Ceux des Sociétés à Responsabilité Limitée,* [1957] REVUE DES SOCIETES 256, 257.

doctrine to clarify the extent and locus of the removal power accorded by article 22, they have on the other hand extended this power beyond that normally accorded a principal under the Civil Code. Thus while it is true that under article 2003 the principal may dismiss the agent without cause, it is likewise true that the agency agreement may in certain cases provide otherwise.[162] However, in dealing with the propriety of restrictions on the removal power in the articles, while the *Cour de Cassation* initially seemed to hesitate,[163] in *Caisse Méridionale v. Mercaillou-Lépine*[164] it held that a director dismissed without cause did not have a cause of action against the corporation for damages, notwithstanding the fact that the articles of incorporation expressly stipulated that the director could only be dismissed for serious misdeeds. The court based its holding squarely on the proposition that such clauses in derogation of the shareholder power to remove were contrary to public policy and hence void. Similarly, in *Delmas v. Paindavoine*,[165] the court held a provision in the articles of incorporation allowing liquidated damages of fifty-thousand francs to a named director should he be dismissed without cause prior to the end of his elected term contrary to public policy, and somewhat apologetically pointed out that should such a provision be allowed to stand its use could become widespread and would furnish a too simple means of evading the law. Despite criticism of this expansive interpretation of article 22,[166] the *Cour de Cassation* has adhered to its original view without any sign of deviation.[167]

It seems rather difficult to account for the expansiveness of the court's interpretation of article 22, and there is little or no discussion by commentators or by the court itself of the rationale underlying it. While initially such an interpretation may have been justified by a concern to protect shareholders against the predatory practices of directors,[168] such a concern seems somewhat misplaced in an era that recognized the widest of shareholder powers. However, today

162. 3 RIPERT & BOULANGER, TRAITE DE DROIT CIVIL §§ 2161, 2165 (1958); 1 RIPERT, TRAITE § 1266; 3 ENCYCLOPEDIE DALLOZ, *Administrateur* § 94 (1958).

163. See Heusschen v. Société Financiére d'Egypt, Cass. Civ., July 28, 1868 [1868] Bull. Cass. 203, holding that on the assumption that shareholders may limit their power to remove directors by means of a suitable provision in the articles of incorporation, such a curtailment of shareholder power may not be implied but must be expressly stated.

164. Cass. Civ., April 30, 1878 [1878] REC. DALLOZ (I) 314.

165. Cass. Civ., March 17, 1893, [1893] REC. DALLOZ (II) 309.

166. 1 RIPERT, TRAITE § 1266.

167. See, *e.g.*, Société nouvelle des Etablisscments Alfred Maguin v. Maguin, Cass. Civ., May 23, 1944, [1944] REC. DALLOZ (J) 105; 3 ENCYCLOPEDIE DALLOZ, *Administrateur* § 94 (1958).

168. See Société anonyme de blanchiment v. Kastner, Cour d'Appel de Paris, December 13, 1883, [1885] REC. DALLOZ (II) 8, 9 where it was noted that the removal power was the "safeguard of the interests of the shareholders."

when such powers are severely curtailed it may have found justification;[169] but even so the requirement of cause would seem to be a sufficiently potent weapon to check abuses, and it is not inconsistent with article 22 when it is read against the more permissive agency doctrines of the Civil Code.

Another possible rationale for the interpretation given article 22 may have been the reluctance of the courts to involve themselves in intra-corporate power struggles, or alternately that the concept of cause was not susceptible of judicial accommodation. This latter view seems unacceptable in the light of Article 24 of the Law of March 7, 1925 which provides that directors of an S.A.R.L. may be dismissed only with cause, and, a fortiori, leaves the issue of cause to the determination of the courts. Similarly in the case of the *société anonyme* itself the *commissaires aux comptes* are not freely removable, a requirement somewhat akin to cause being required.[170] Whatever may be said for the consistency of the court's position, it ignores to a great extent both the interests of the corporation in the stability of its management and the interests of the directors in the certainty of their tenure.[171]

B. *Attempts To Circumvent the Expansive Interpretation of the Removal Power*

It is indeed the interests of the corporation and its directors in stability which gave rise in the first place to the attempts to circumvent the court's expansive interpretation of article 22. In addition to provisions in the articles of incorporation directly or indirectly limiting the removal power, several other devices have been used in the attempt to modify the rigors of the court's position. Initially this was done by means of an agreement outside the articles of incorporation between one or more of the shareholders and the director, which provided that in the event of dismissal or dismissal without cause, the director would be indemnified. But consistently, the court in *Fighiera v. Minel*[172] found such an agreement, even though executed outside the ambit of the articles, to be contrary to public policy and hence void. On the other hand, in *Chalamon v. Combier*[173] the court mitigated the rigors of the *Fighiera* decision somewhat by holding that even though a court could not validate an agreement to award damages upon dismissal, it could require the directors (even absent

169. *Cf.* NOIREL, *op. cit. supra* note 65, at 82.

170. 2 MOLIERAC, MANUEL DES SOCIETES § 1175 (1959); 1 RIPERT, TRAITE § 1296.

171. See NOIREL, *op. cit. supra* note 65, at 182.

172. Cass Civ., January 10, 1881, [1881] REC. DALLOZ (I) 161.

173. Cass. (ch. Req.), June 2, 1924, [1925] J. Soc. 154.

such an agreement) who conspired out of malice to secure the removal of their colleague to pay damages to the ousted director, when he was removed in a manner that precluded him from adequately defending himself against the charges leveled at him. However, in *Société de la Manufacture moderne de lits v. Henno*,[174] the *Cour de Cassation*, although admitting that an ousted director could sue the *corporation* for damages if he could show that his removal constituted an abuse of power, denied recovery on the ground that a mere showing of intent to prejudice or compromise (*nuire*) the ousted director, absent other allegations, was insufficient in law to establish an abuse of power. While it may be true that the court in the *Henno* case treats the doctrine of abuse of power rather restrictively,[175] the decision is significant in that it is explicit in its recognition of the director's interest.

A somewhat more successful device to circumvent the expansive interpretation of article 22, has been to secure the tenure of the director by means of an independent employment contract. Thus, although the director, *qua* director may be dismissed without cause, his employment, usually as a *directeur technique*,[176] secured by contract, assures him either of a continuing salary or damages in the event that he is also dismissed in this latter capacity without cause.[177]

While it was held that there was no inherent conflict between the duties of a director and that of an employee or *directeur technique*,[178] Article 2 of the Law of November 16, 1940, as modified by the Law of March 4, 1943, provides: "No member of the board of directors, other than the president, the director receiving the delegation in the cases anticipated in paragraphs 4 and 5 below, and the director chosen as *directeur général*, may be granted the functions of management (*direction*) in the corporation." This law was interpreted by some theorists as prohibiting any director from assuming any other office within the corporation except those expressly permitted by the article,[179] and, a fortiori, prohibiting a director from assuming the

174. Cass. Comm., July 12, 1955, [1955] Bull. Cass. (pt. 3) 214.

175. NOIREL, *op. cit. supra* note 65, at 183-84.

176. "The *directeur technique* in contrast to a *directeur général* is a superior employee bound to the corporation by a contract of personal services. Normally his role is reduced to the organization and supervision of a particular department of the business (manufacture, administration, sales, public relations, etc.). Even though he is not prohibited [by law] from binding the corporation or signing contracts, this type of activity should be reduced to the greatest possible extent." 2 MOLIERAC, MANUEL DES SOCIETES § 1168 (1959).

177. BERR, *op. cit. supra* note 50, § 637; 1 RIPERT, TRAITE § 1267.

178. Société anonyme des Etablissements Victor Weibel v. Weibel, Cass. (ch. Req.), June 13, 1936, [1938] REC. DALLOZ (I) 93, 96.

179. NOIREL, *op. cit. supra* note 65 at 191-92.

position of *directeur technique*. And at least one lower court,[180] implicitly regarding the law as an embodiment of the German concept of *Führerprinzip*,[181] held that it was inconsistent for even the *directeur général* to assume at the same time any other subordinate position. Both of these interpretations were generally rejected. Thus it was held that both a director[182] and a *directeur général*[183] could simultaneously hold a position as *directeur technique* providing that the contract of personal services under which the latter position was assumed had an independent purpose (*sérieux*) and was not entered into merely to provide indemnification should he be dismissed from his position as director.[184] Moreover, the question whether such a contract had an independent purpose was one for the courts,[185] and in determining its validity the courts look behind its form to determine the intention of the contracting parties.[186]

In thus interpreting Article 2 of the Law of November 16, 1940, as modified by the Law of March 4, 1943, the courts distinguished between general management (*direction général*) which was prohibited to others than those enumerated in the law, and mere administration of a technical nature, which was regarded as outside the scope of its prohibition. Thus, if the contract sued on was interpreted by the court as not in fact being a contract of employment under which the director-employee assumed merely administrative and technical functions, but rather granted him essentially managerial powers, then the

180. Miermont v. Etablissement J.A.C. et L'Urbaine et la Seine, Cour d'Appel de Lyon, December 10, 1948, [1950] J.C.P. (II) 5457; VERNON, LE PRESIDENT-DIRECTEUR GENERAL DANS LES SOCIETES ANONYMES 55-57 (2d ed. 1958).

181. See Note, [1962] REVUE DES SOCIETES 54. For the German influence on the Law of November 16, 1940, see BAUDOIN-BUGNET & GOZARD, LA DIRECTION DES SOCIETES PAR ACTION EN FRANCE ET ALLEMAGNE (1941).

182. Lalieu v. de Langre, Cass. Civ., February 9, 1950, [1950] Bull. Cass. (pt. 3) 100 (No. 145); Vve. Galaup v. X, Cour d'Appel de Paris, July 25, 1947, [1948] J.C.P. (II) 4110; Société anonyme Papeterie de La Haye Descartes v. Garlot, Cour d'Appel de Paris, November 2, 1961, [1962] GAZ. PAL. (I) 77; Tourres v. Société anonyme des Verreries de Graville, Cass. Comm., July 6, 1961, [1961] Bull. Cass. (pt. 3) 276 (No. 318); *but cf.* Allut v. Société Digonnet Tribunal de Commerce de Lyon, April 13, 1951, [1951] REC. DALLOZ (J) 678 (*directeur administratif* may not also be a director, and as the assumption of latter position by a *directeur administratif* was void his tenure in the former position was valid).

183. Société Cinema Tirage L. Maurice v. Gratioulet, Cass. Comm., February 25, 1957, [1957] J.C.P. (II) 10019; Société le Batiment v. Secade, Cour d'Appel d'Alger, 20 April 1950, [1950] REC. DALLOZ (J) 777; Note, [1962] REVUE DES SOCIETES 54-55.

184. For an exposition of the factors that are taken into account in ascertaining whether the contract in dispute has an independent purpose, see, Compagnie d'applications industrielles de recherches et d'etudes v. Venturini, Cour d'Appel de Paris June 13, 1961, [1962] REVUE DES SOCIETES 54; NOIREL, *op. cit. supra* note 65, at 196-98 (1958).

185. See note 182 *supra*.

186. Société anonyme Papeterie de La Haye Descartes v. Garlot, Cour d'Appel de Paris, November 2, 1961, [1962] GAZ. PAL. (1) 77.

contract was void because within the prohibition of article 2.[187] On the other hand, even if it was found that the contract was one under which the director-employee assumed merely administrative and technical functions, though it was now outside the prohibition of article 2, it could still be regarded as voidable if it had no independent purpose, that is, if its true purpose was merely to circumvent the possibility of his removal under Article 22 of the Law of July 24, 1867. Therefore, while recognizing the interests of the corporation in employing from day to day the technical knowledge of its directors to the greatest possible extent,[188] the courts simultaneously affirmed their intention of protecting the interests of the shareholder by assuring that no inroads were made on their removal power. Thus, at best, the courts' position provided cold comfort to those directors who saw in employment contracts an opportunity for evading the expansive interpretation which had been given Article 22 of the Law of July 24, 1867.

From the above analysis it seems abundantly clear that the paramount interest of both the statutory and decisional law relating to the removal power of shareholders is the protection of those shareholders, or more accurately, the majority. To a lesser extent, particularly in the courts' treatment of plural positions for directors, the interests of the corporation are considered—at least insofar as the corporation has an interest in the maximum utilization of the available technical talent of its directors.[189] However, the substantive law does not seem to accord any weight to the interests of the corporation in the continuity or stability of its board of directors; nor, except incidentally in the application of the rather limited doctrine of abuse of power, has the interest of the director in the security of his tenure been recognized.

C. *The Procedural Context in Which the Removal Power is Exercised*

To a limited extent, however, this imbalance in the concerns of the substantive law has been redressed by the courts' consideration of the procedural context in which this removal power is exercised by the shareholders. As was mentioned previously,[190] the forum in which the shareholders exercise this power is the *assemblée général ordinaire* or *assemblée général ordinaire tenue extraordinairement*. In order to validly pass a resolution dismissing a director, the shareholders meeting must have been properly constituted, that is, it must have been

187. See, *e.g.*, Compagnie d'applications industrielles de recherches et d'etudes v. Venturini, Cour d'Appel de Paris, June 13, 1961, [1962] REVUE DES SOCIETES 54.

188. NOIREL, *op. cit. supra* note 65, at 190.

189. But see, Note, [1962] REVUE DES SOCIETES 54, 61, where it is pointed out that article 764 of the proposed draft of the new Commercial Code prohibits without exception all employment contracts between directors and the corporation.

190. See note 62 *supra*.

convened by the proper authority,[191] and the quorum requirements specified in Article 30 of the Law of July 24, 1867, as amended by the Law of February 25, 1953, must have been met.[192] In addition, a shareholders meeting otherwise validly constituted may legally act only on those matters incorporated in its agenda (*ordre du jour*) for that meeting.[193] Finally, even though all other conditions are met in order to be valid, the resolution must have been passed by the majority vote as specified in Article 28 of the Law of July 24, 1867 or the articles of incorporation, if the latter imposes a higher requirement.[194]

This power of the board of directors over the matters to be included on the agenda of the shareholders meeting, together with the power to decide whether or not to call such a meeting (except the annual meeting) in the first instance, clearly could be used as a weapon to neutralize or at least reduce the effective exercise of the shareholders' removal power. Should the shareholders desire to remove a hostile board of directors, for example, or merely one of their number, this action could be entirely prevented by the directors' refusal to schedule such a proposal on the agenda. Similarly, even if the entire board is not hostile, a majority of the board present could block such action.[195]

The decided cases indicate that such attempts on the part of the

191. The proper convening authority is normally the board of directors. But see art. 27 of the Law of July 24, 1867, CODE DE COMMERCE art. 46, at 37 (59th ed. Dalloz 1963), which makes the annual meeting (*assemblée général ordinaire*) mandatory. See also p. 749 *infra* for the power of the *commissaires aux comptes* to call a meeting in certain circumstances.

192. Quorum requirements imposed by law may not be raised by provisions in the articles of incorporation. BERR, *op. cit. supra* note 50, § 321; 1 RIPERT, TRAITE § 1181. However, if the first *assemblée générale ordinaire* called fails to meet or achieve the statutory quorum of the number of shares representing one-fourth of the corporation's capital, a second such meeting may be called at which no quorum requirement whatever is imposed. Art. 30, Law of July 24, 1867, as amended, art. 9 of the Law of February 25, 1953, CODE DE COMMERCE art. 46 at 39 (59th ed. Dalloz 1963).

193. 1 RIPERT, TRAITE § 1190. However, certain questions, not here relevant, are exempted from this requirement.

194. In DeSaint-Genieys v. Société d'assurances l'Afrique Francaise, Cass. Civ., July 5, 1893, [1894] REC. DALLOZ (I) 41, the Cour de Cassation seems to have held that the articles of incorporation could provide a higher voting requirement than was required by law in the case of an *assemblée général* called to act upon a director's dismissal. This decision, which is not without its ambiguities, seems inconsistent with the court's expansive interpretation of article 22 of the Law of July 24, 1867, although it does not appear to have been subsequently overruled. 3 ENCYCLOPEDIA DALLOZ, *Administrateur* § 98 (1958).

195. See generally, BERR, *op. cit. supra* note 50, §§ 529-35. It is to be noted that no quorum requirements are imposed by law on the meetings of the board of directors of a *société anonyme*. 1 RIPERT, TRAITE § 1248. However, it is likely that in most cases the articles of incorporation impose such a quorum requirement. See, *e.g.*, 2 MOLIERAC, MANUEL DES SOCIETES 662 (1959), where article 26 of the "form" articles of incorporation provide for a quorum requirement for board meetings.

board of directors have been freely resorted to; and while the courts appear unwilling, or in the face of these statutory powers unable, to prevent the possibility of such abuses, they have been quick to reassert, whenever possible, the full and effective use of the shareholders' removal power.[196]

Although the power to call a shareholders meeting (except the annual meeting) is discretionary with the board of directors, Article 32 of the Law of July 24, 1867, as amended by Article 4 of the Decree-Law of August 8, 1935, gives the *commissaire aux comptes* the concurrent power to convoke such a general meeting in cases of urgency. In *Quarrá v. Société des Etablissements Fouga et Cie*,[197] it was held that dissension among the members of the board which threatened the orderly functioning of the corporation, was in itself a situation of sufficient urgency to vest the *commissaire aux comptes* with the power to call a meeting to discuss the dismissal of certain of the directors. However, the court, in so holding, was careful to point out that the possibility of harm to the corporation was coupled with a finding by the *commissaire* that the intra-corporate dissension would have prevented the board calling the normal annual meeting.

Somewhat more vexing is the question whether shareholder action dismissing a director is valid absent specification of such a resolution on the agenda of the meeting. This issue has involved two distinct lines of inquiry by the courts: first, whether such action is valid under any conditions absent such specification; and second, whether the question or resolution placed on the agenda may be said to be made with sufficient specificity to raise the issue of removal.

With respect to the first line of inquiry, two judicially interpolated exceptions have been engrafted on to the rule that the question of removal must appear on the face of the agenda of the shareholders meeting. The first of these is simply that since this notice requirement is not a matter of public policy it may be derogated from by the articles of incorporation.[198] The second and more important exception is that the question of dismissal need not be on the agenda if the dismissal is necessary "because of unforeseen incidents taking

196. NOIREL, *op. cit. supra* note 64, at 185-89. *But see* BERR, *op. cit. supra* note 50, § 636, treating the decisions in this area as an indirect attenuation of the removal power. In Société anonyme des Tubes de Solesmes v. Arbez, Cass. Civ., March 11, 1936, [1936] GAZ. PAL. (I) 838, the court said: "[I]f . . . an *assemblée général* . . . of a *société anonyme* has the sovereign power to dismiss and replace a director, it pertains, on the other hand to the courts to verify the regnlarity of the conditions in which the meeting was called and its decision. . . ."

197. Cour de Montpellier, January 29, 1937, [1939] J. Soc. 93.

198. Société anonyme des Eaux de Vals v. Combier, Cass. (ch. Req.), June 2, 1924, [1925] J. Soc. 153; Hennion v. Dunet, Cass. Civ., 15 July 1895, [1895] GAZ. PAL. (II) 368, 370 (*société en commandites par actions*). See, 2 MOLIERAC, MANUEL DES SOCIETES 669-70, for a typical form articles of incorporation expressly prohibiting the shareholders from passing on any question not proposed on the agenda.

place during the course of the meeting which demand immediate solution . . . ."[199] Thus while the rationale of the general requirement that the issue be on the agenda is said to be that fairness requires that notice be given when the dismissal of a director is contemplated,[200] an exception quite properly is made in those cases where the need for immediate dismissal does not come to the attention of the shareholders prior to the meeting and the corporation's well-being urgently demands that delay in dismissing the director be avoided.[201]

But in engrafting on to the rule this exception known as the doctrine of *incidents de seance,* it was given a rather limited application so that the basic rule of fairness would not itself be completely vitiated.[202] While it is patently clear, for example, that the shareholders may in the normal course remove a director without any cause whatever, when removal is sought without the question having previously been placed on the agenda, such removal may be achieved only if there is cause which would warrant the extraordinary action and therefore legitimate the need for the exception to the basic rule of fairness. Thus in *Mure et de Béarn v. Olry-Roederer,*[203] when the director, during the course of an annual meeting, refused to answer questions posed by a shareholder concerning his clear misuse of corporate funds which came to light during the meeting, the court first held that this action of the director during the meeting was sufficient to give the shareholders the right to consider the question whether grounds for his dismissal existed, even though this question had not been scheduled on the agenda for that meeting. The court then held that the allegations of misuse of funds, shown to be true, were sufficient cause to validate the dismissal. The *Olry-Roederer* case illustrates that while upon the director's refusal the issue of dismissal was properly before the shareholders, the ultimate question of the propriety of the dismissal turns on whether the charges leveled at the director or the malfeasance of the director revealed at the meeting[204] were sufficiently serious[205] and of such a nature[206] as to

199. Société anonymes des Tubes de Solesmes v. Arbez, Cass. Civ., March 11, 1936, [1936] GAZ. PAL. (I) 838.

200. "[T]he directors benefit from this procedural safeguard [that the issue of dismissal be on the agenda] which permits them to prepare their defense. . . ." NOIREL, *op. cit. supra* note 65, at 188 (1958); BERR, *op. cit. supra* note 50, § 532; *cf.* 2 MOLIERAC, MANUEL DES SOCIETES § 1099 (1959). There is little discussion of the rationale behind this rule. See pp. 752-53 *infra.*

201. NOIREL, *op. cit. supra* note 65, at 188.

202. *Id.* at 186-87.

203. Conr d'Appel de Paris, July 19, 1935, [193] REC. DALLOZ 561.

204. *But see,* NOIREL, *op. cit. supra* note 65, at 187 (1958).

205. Regnauld v. Bontemps, Tribunal de Commerce de la Seine, July 30, 1948, [1948] GAZ. PAL. (II) 117.

206. Jeandidier-Wagner v. Brasserie Wagner, Cour d'Appel de Besancon, November 3, 1954, [1955] J.C.P. (II) 8750. For a criticism of this requirement of "immediacy" or "urgency" see NOIREL, *op. cit. supra* note 65, at 188 (1958).

require and justify the peremptory action of the shareholders. Thus it is clear that the mere refusal of the director in *Olry-Roederer* was not the cause that warranted the dismissal. Further the refusal together with the allegations gave the shareholders the right to consider whether the allegations were true.

On the other hand, as the *Olry-Roederer* decision also indicates, the courts have not left to the shareholders the ultimate questions of whether the requirements of "cause" and "urgency" have been met in any particular situation. In affirming the propriety of such shareholder action in *Société anonyme des Tubes de Solesmes v. Arbez*,[207] the *Cour de Cassation* pointed out that the presence and sufficiency of both these requirements were not only matters for the courts, but also that they were issues of fact within the sole competence of the court of first instance and not reviewable on appeal.[208]

Finally, the shareholders must be able to show that the charges revealed or actions that took place during the course of the meeting were causally related to the dismissal. This factor of causal relation was crucial in *Jeandidier Wagner v. Brasserie Wagner*,[209] where the trial court annulled the resolution of the shareholders dismissing two directors when it was shown that the reason for the dismissal was not their alleged misconduct which was revealed during the meeting, but rather was their mere refusal to resign when requested by the majority stockholder. The court felt compelled to this conclusion because of conduct on the part of the shareholders inconsistent with their assertions that the reason for the dismissal was the directors' malfeasance, in that after the dismissal the shareholders approved the balance sheet and income statement drawn up by the directors and, in addition, passed a resolution approving of their actions in office which was in effect a shareholder ratification of their conduct during office.

The above analysis of the case law seems to suggest that while the courts have not enlarged the exception to the basic agenda requirement beyond the point necessary to accommodate the interests of the shareholders and the corporation, respectively, they have also manifested some concern with the interests of the director in defending himself when he is dismissed without prior notice, by assessing the regularity of the procedural context in which this shareholder power is exercised.[210] This they have done by allowing this defense to be presented to and passed upon by the courts when the director raises the question of the legality of the shareholder action

207. Cass. Civ., March 11, 1936, [1936] GAZ. PAL. (I) 838.

208. The fact that such decisions are not reviewable has led to some inconsistency among trial courts as to what facts satisfy these legal criteria.

209. See note 206 *supra*.

210. See note 200 *supra*.

before them. Further analysis leads one to question such a premise, and indicates that in allowing judicial review of the action of the majority of the shareholders, the concern is not with the interest of the director but rather is with the interests of the shareholders whom that director represents.

If the exception to the agenda requirement is designed to protect the director's interest, how does one reconcile that concern with its total absence when the shareholders follow the proper procedural pattern? Since the shareholders, as a primary matter, have the unqualified right to dismiss a director without cause if the proper procedure is followed, implicit in such a right is the determination that the director has no interest in his defense of which the law will take cognizance, since nothing that the director can say modifies the absolute right of the shareholders to dismiss him. And since initially when there is advance notice, that is, when the question of dismissal is put on the agenda, the director has no legally cognizable interest in his defense, how does he gain such an interest merely because such advance notice is not given?

On the other hand, the shareholders whom the dismissed director represents do have an interest in his tenure and hence in the continued representation of their interests on the board of directors. When advance notice of the impending dismissal is given by placing the issue on the agenda, this shareholder interest is protected because the shareholders whom the director represents are forewarned that they must appear at the meeting and vote against his dismissal or else forego the continued representation of their interests. But absent such a requirement of notice, no such protection is afforded. Therefore, a dismissal without notice requires cause, which, when litigated in the courts, assures the shareholders supporting the ousted director that if their interest is legitimate, if it is not detrimental to the interests of the corporation as a whole as indicated by the presence of the requisite cause, it will be protected by the director's reinstatement.

However appealing, it must be admitted that this analysis is conjectural; and we are properly admonished that "American lawyers must necessarily walk gingerly in the glades of the Civil Law."[211] The courts in dealing even with these judicially interpolated doctrines infrequently indulge in any discussion of their rationales. And what discussion is present in secondary authorities, although ambiguous, does seem to point to the contrary conclusion that the director's interest is here at stake.[212] This issue is further confused because the courts, although they may be furthering the interest of the share-

211. Conway v. Silesian-American Corp., 186 F.2d 201, 214 (2d Cir. 1950) (Clark, J.), cited in Vagts, Book Review, 75 HARV. L. REV. 1046, 1049 (1962).

212. See note 200 *supra*.

holders when they require that either the question of dismissal be put on the agenda or cause for dismissal be shown, recognize this interest only upon the institution of suit by the *director*—not by the shareholders. This of course is not in itself inconsistent with the rationale suggested if the remedy the court awards is reinstatement, since the director may be regarded as the most convenient medium to promote the shareholder interests. In addition, he may be the party best situated to lay proof of the absence of cause before the courts. Finally, as a practical matter, if the shareholders—in most cases a minority group—were regarded as the sole party at interest, their lack of cohesiveness, or even, if the individual shareholding was small, their lack of interest would, in effect, be tantamount to condoning majority abuses. On the other hand, the inconsistency becomes more apparent when the courts award damages to the ousted director in addition to ordering his reinstatement, or alternately do not reinstate at all but merely award damages.[213] In the latter situation it can be argued that no interest of the shareholders whatever is forwarded, but rather that all the shareholders are harmed by the imposition of damages on the corporation—which ultimately will reduce the shareholders' equity in the corporation. But such a conclusion may be somewhat partial. While it is true that the imposition of damages on the corporation may be a rather awkward way to achieve the desired end, at least it will have a cautionary effect, and would tend to impel the corporation or the shareholders seeking the director's dismissal to observe the agenda requirement. In short, damages may be a high price to pay for short-run control.

That the interests sought to be protected by the agenda requirement, or its alternative cause, is that of the shareholders, rather than the director whose dismissal is sought, is suggested by yet another procedural obstacle that may be raised to challenge the validity of a dismissal: namely, that the question placed on the agenda is not sufficiently specific to give fair warning of the intended action. Typical of this latter situation is *Société anonyme des Eaux de Vals v. Combier*,[214] where a director attacked his dismissal on the ground that the issue of his dismissal was not properly raised for shareholder consideration by the mention in the agenda of *"modification à apporter à la composition du conseil d'administration."* The court, in upholding the director and voiding the shareholders resolution dismissing him, was at pains to point out that not only had the agenda not been brought to the attention of the *shareholders* much before the meeting, but also that "this mention, imprecise and subject to [varying] inter-

213. *Accord*, Chalamon v. Combier, Cass. (ch. Req.), June 2, 1924, [1925] J. Soc. 154; NOREL, *op. cit. supra* note 65, at 184-85.

214. Cass. (ch. Req.) June 2, 1924, [1925] J. Soc. 153.

pretation, did not permit the *shareholders* effectively to exercise the full measure of their rights . . . ."[215] (Emphasis added.) On the other hand in *Barlette v. Société Domaine des Quatre chemins*,[216] the court, faced with an item on the agenda almost identical in wording with that in issue in the *Combier* case,[217] upheld the propriety of the dismissal. But while the court granted that the item was on its face ambiguous in that it could mean both that a director was to be dismissed or that the number of the directors was to be increased or decreased, the fact that the directors had for some time been at odds with each other, and three of the five directors had refused to attend board meetings, *all of which was common knowledge to the shareholders*, precluded it from being misleading in this case. Thus it appears that in construing the sufficiency of any item on the agenda the courts' criteria is notice to shareholders, not notice to the director.

It seems clear from the above analysis of the procedural context in which the removal power is exercised, as is the case with the extent of the substantive power itself, that the courts have been primarily, if not exclusively, concerned with the protection of shareholder interests. However, in the courts' treatment of these procedural problems the focus of these interests has, to some extent, shifted. Thus, in dealing with the reach of Article 22 of the Law of July 24, 1867, the focal point of the relevant interests was the majority of the shareholders. But once outside the ambit of that article, the courts have widened the base of their approach. Thus, for example, in construing the legality of plural positions for directors, and in formulating the doctrine of "*incidents de séance*" the resolution has been in terms of all the shareholders, that is, the continuing welfare of the corporation itself, as well as merely the interests of the majority. And to that extent the courts' formulation is in derogation of the often stated sovereign power of the majority to remove without cause. Similarly, in determining the sufficiency of any item appearing on the agenda, the courts have explicitly recognized and sought to protect the interests of minority groups and have ensured, by indirectly opening the courts to them, an alternate forum to promote their interests.

While the courts' concern has widened to include interests other than those of the majority, it is beyond doubt that no weight whatever is accorded to the director's interest in the stability of his tenure. While this, as has been pointed out,[218] is by no means compelled by

215. *Ibid.* See also NOIREL, *op. cit. supra* note 65, at 185.

216. Cour d'Appel d'Alger, March 23, 1949, [1949] REC. DALLOZ (J) 606.

217. In *Barlette*, the item on the agenda read: "*modification à apporter à la composition du conseil d'administration, sur demande d'actionnaires.*" The agenda item in the *Combier* case was identical with that in *Barlette*, with the exception of the omission of the underscored last clause.

218. See pp. 751-53 *supra*.

the revelant provisions of the Commercial Code when read against their "common law" background, it certainly is in accord with the spirit of Article 22 of the Law of 1867 which carries forward Article 31 of the 1807 Commercial Code. Such a view is no more than a logical consequence of the contractual theory of the *société anonyme* that historically was the moving spirit behind French corporation law. In short, given courts acting within rather restrictive notions of the judicial process, criticism, if there must be such, must be leveled at the Code itself and the basic policy decisions which it embodies made over a century and a half ago.

V. Conclusion

On the basis of the foregoing analysis, it must be concluded that under French law the shareholders of a *société anonyme* may exercise wide powers. Without attempting to compare in detail the powers exercised by the shartholders of a *société anonyme* with those powers exercised by shareholders of a business corporation in any given state of the United States, it is perhaps sufficient to point out that both the power to remove directors without cause and the power to allocate profits are, to a great extent, powers not granted to shareholders in most jurisdictions in the United States.[219] On the other hand, the power of the shareholders of a *société anonyme* to amend the articles of incorporation seems to be quite similar in breadth to the power exercisable by shareholders in the United States.[220]

However, it must also be concluded that French law bearing on the three shareholder powers evidences a marked trend toward narrowing their scope. Thus there is the tendency, for example, to limit shareholder power to amend the articles of incorporation, both by making a considerable number of the provisions of the articles mandatory and also by allowing a probably increasing category of interested third parties to exercise a quasi veto power over otherwise permissible amendments. Similarly, in the case of removal, there is some evidence of a narrowing of this power by judicial scrutiny of the procedural context in which it is exercised, allowing "legiti-

219. On the removal power see, *e.g.*, Campbell v. Loew's Inc., 36 Del. Ch. 563, 134 A.2d 852 (1957); N.Y. Bus. Corp. Law § 706(a); Ballantine, Corporations 433-36 (rev. ed. 1946). *But see*, 1 Model Bus. Corp. Act § 36A (optional provision) (rev. 1959). On the power to declare dividends see, *e.g.*, Del. Code Ann. tit. 8, § 170 (1953); N.Y. Bus. Corp. Law § 510(a); 1 Model Bus. Corp. Act § 40 (rev. 1959); Ballantine, Corporations 550-57 (rev. ed. 1946).

220. See, *e.g.*, Del. Code Ann. tit. 8, § 242 (1953); N.Y. Bus. Corp. Law § 801; 2 Model Bus. Corp. Act §§ 53, 54, 55; Ballantine, Corporations 643-62 (rev. ed. well be that in an economy with a chronic capital shortage, considerations of the capacity of the shareholders to defend or protect themselves in their own contract making capacity would not outweigh the need for corporations to plow back earnings. 1946).

mate" employment contracts for directors, and requiring that the issue of removal, absent special circumstances, be brought to the attention of shareholders prior to the meeting. It is only in the case of the power to allocate profits that this trend toward narrowing the power exercised by the shareholders has not manifested itself. While this may at first seem anomalous, it is perhaps in part explained by the fact that recent litigation in this area has turned largely upon the issue of the right of the majority to "plow back" corporate profits. In view of the post-war shortage of capital in France and the pressing need to rebuild industries, it is to be expected that corporate interests would be preferred over those of a dissenting minority demanding a dividend, and that the broad power of the majority would be affirmed.

Without necessarily wishing to criticize the results which are embodied in the law, two criticisms may legitimately, it is felt, be leveled at the decisional method which formulated those results. First, conspicuously absent from the decisions of the courts and the discussions of most French commentators is any recognition of the relevance of the practical rather than the theoretical distribution of power between the shareholders on one hand and various layers of the corporate administration on the other. To give an obvious example, the supposed power of the shareholders to allocate profits may be largely mythical in the case of a publicly held corporation with a broad base of shareholders and consequently a self-perpetuating board of directors. Yet neither the *Cour d'Appel* nor the *Cour de Cassation* in the *Schumann* case so much as alluded to this factor in their interpretation of the relevant law; and the statutory law that bore on this issue was passed by the legislature long before there was any recognition of the range problems that may be lumped under the heading of "corporate democracy." Thus, it seems that one extremely important component of this particular problem is, if not entirely ignored, at least not being articulated.[221]

Second, similarly absent from the decisions and the commentaries is any recognition of the fact that the resolution of corporate problems must necessarily involve an accommodation of conflicting interests; and that changing social and economic conditions require that the accommodations that have been formulated in the past be reviewed in the light of contemporary insights. It is of course true that in a civil law jurisdiction, with its almost exclusive reliance on statutory law, the prime responsibility for this process of accommodation and revision is with the legislature. But it is also true that no codification

221. This is not to say, however, that the result in *Schumann was wrong.* It may well be that in an economy with a chronic capital shortage, considerations of the capacity of the shartholders to defend or protect themselves in their own contract making capacity would not outweigh the need for corporations to plow back earnings.

can be so complete in its conception as to be self-sufficient in its application.[222] No matter how thoroughly drafted, lacunae become apparent and the courts, therefore, are forced to "legislate interstitially," whether it is called legislation or the application of the "spirit" of the codes. But if this process consists of the blind application of a conceptual scheme to a legal issue, the solutions which the courts reach may well be incapable of resolving the social and economic forces that gave rise to the problems in the first place. If, on the other hand, as is more likely, the conceptual scheme is devised to harmonize a pragmatic solution with the Codes in order to avoid being charged with usurping legislative power, something in the process is inevitably lost: the decisional process is being obscured behind uninformative and unreasoned opinions, as a result of which the rationality and predictability of the law is greatly diminished.

But it seems clear that the courts, once outside the mandatory and sometimes antiquated resolutions which the statutory law embodies, have sub silentio resorted to a decisional process involving a weighing of relevant interests. This seems particularly apparent in the areas of the removal power and the power to allocate profits, where the law has been to a large extent decisional. However, the greatest stumbling block to a truly effective exercise of such a mode of decision is the almost alarming unwillingness of the courts or the commentators to appreciate the fact that just such a process is being used. Thus, an articulate body of law relating to shareholder powers must await both a body of statutory law that recognizes to a greater extent the need for and power of the courts to exercise quasi-legislative functions, and the freedom of informed analysis of that law from its conceptual prejudices.

222. ARISTOTLE, ETHICS BK. 5, ch. 10 f. 1137(b), lines 12-28.