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The Louisiana Civil Code: A Vademecum

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A careful and reflective reading of the excerpts of legal documents given immediately below is necessary for understanding why we have chosen to give such a title to this Article.

EXCERPTS

TWELVE TABLES: LAW II	LOUISIANA CIVIL CODE ART. 2315(A)
If you cause any unlawful damage . . . accidentally and unintentionally, you must make good the loss, either by tendering what has caused it, or by payment.[1]	Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.[2]
GAIUS: SECOND COMMENTARY	LOUISIANA CIVIL CODE ARTICLES
(10) Things subject to human right are either public or private.[3]	**Art. 448. Division of things** Things are divided into common, public, and private; corporeals and incorporeals; and movables and immovables.[4]
(11) Things which are public are considered to be the property of no individual, for they are held to belong to the people at large; things which are private are the property of individuals.[5]	**Art. 453. Private things** Private things are owned by individuals, other private persons, and by the state or its political subdivisions in their capacity as private persons.[6]

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1. 1 JUSTINIAN I, *Table VII. Concerning Crimes, Law II*, *reprinted in* THE CIVIL LAW (R.P. Pryne ed., The Great Library Collection 2015).
2. LA. CIV. CODE art. 2315(A) (2021).
3. G. INST. 2.10.
4. LA. CIV. CODE art. 448 (2021).
5. G. INST. 2.11.
6. LA. CIV. CODE art. 453 (2021).

(12) Moreover, some things are corporeal and others are incorporeal.[7]	**Art. 461. Corporeals and incorporeals** Corporeals are things that have a body, whether animate or inanimate, and can be felt or touched. Incorporeals are things that have no body, but are comprehended by understanding, such as the rights of inheritance, servitudes, obligations, and right of intellectual property.[8]
(13) Corporeal things are those that can be touched, as, for instance . . . clothing, gold . . . and innumerable other objects.[9]	**Art. 471. Corporeal movables** Corporeal movables are things, whether animate or inanimate, that normally move or can be moved from one place to another.[10]
(14) Incorporeal things are such as are not tangible, and are those consisting merely of rights, as, for instance, inheritances. . . .[11]	**Art. 475. Things not immovable** All things, corporeal or incorporeal, that the law does not consider as immovables, are movables.[12]

What do these texts, presented side by side and from very different centuries, have in common? Obviously, one could point out that their subject matters are either "things" or "liability," to use some very broad vernacular or common terms. One could also point out that they are short, concise in their statements, and worded in general terms. The common feature herein singled out and made the general background of this Article is the style in which these statements—whether from the XII Tables, Gaius' Commentary, or the Louisiana Civil Code—are couched. It is a style loaded with legal implications that we attempt to identify and explain

7. G. INST. 2.12.
8. LA. CIV. CODE art. 461 (2021).
9. G. INST. 2.13.
10. LA. CIV. CODE art. 471 (2021).
11. G. INST. 2.14
12. LA. CIV. CODE art. 475 (2021).

in Part I. In Part II, we will look, with some detail, into an important implication that will be referred to as "legal characterization" or "legal qualification." We will attempt, as far as possible, to illustrate the relevance of the implication of legal characterization: first, by making a scrupulous analysis of one Civil Code article and some court decisions; second, by explaining why we consider the Code article in question to be either well written or poorly written and the court decisions either "good" or "bad" examples of the use of legal characterization as a civilian method of reasoning.

I: THE ROMANISTIC STYLE: FEATURES

The texts that open this Article are, indeed, from different time periods. Law II was a part of Table VII Concerning Crimes of the Laws of the XII Tables of 450 B.C.E.[13] It is interesting and, we dare say, surprising to find so much resemblance between the legal statement of Law II and article 2315(A) of the Louisiana Civil Code of 2021 C.E.[14] Likewise, the provisions of the "Second Commentary" were the creation of the great Roman jurist Gaius, who lived in the second century A.D.[15] Again, the resemblance of these provisions from the second century A.D. with the articles of the Louisiana Civil Code listed above is quite amazing. Can this resemblance be explained? How can these provisions, as well as Law II of Table VII, have survived through so many centuries without having truly "aged"? How is it conceivable that centuries could have gone by without eroding the substantive law of the old texts? Is it possible that there was some "osmosis" between the "substantive law" (of things and liability) and a certain style of writing down the law, a style that we find to be common in the civil law systems that inherited the *jus civile* (*jus* and not *lex*) of Roman law? This style cannot be labeled or identified as the "civil law style" from *jus civile* because the *jus civile* was the system of law applicable to the Roman citizens[16] in contrast with the *jus gentium* applicable to the foreigners.[17] This style can, however, be referred to and called the "Romanistic style" because it finds its source and its original features in the style of these texts dating back to the days of the great jurists whose writings were incorporated in the Digest of Justinian.

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13. JUSTINIAN I, *supra* note 1.
14. LA. CIV. CODE art. 2315(A) (2021).
15. Around 130 to 180 A.D.
16. *Civis* meaning citizen.
17. Hence the two praetors, *praetor urbanus* and *praetor peregrinus*. *See* PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 8–18 (Cambridge Univ. Press 1999); J.M. KELLY, ROMAN LITIGATION 85–101 (Oxford Univ. Press 1966).

Some original features of the Romanistic style that are still found today in the codifying technique of civil law jurisdictions can be gathered under the following headings: (a) drafting style; (b) general statements; (c) very few definitions; (d) simple and accessible language; (e) institutions.

A. Drafting Style

For numerous reasons—including the limited availability of scholarly resources; the rudimentary technical tools available to engrave, incise, and impress; the scarcity of means of diffusion and access to knowledge; and the division and separation of social classes—the visible and accessible version of the law "for the few," which was under the form of signs, symbols, letters, and words, had to be made in as concise and simple a form as possible so as to be comprehensible to the "many." So for example, under the broad and generic words "damage"[18] (Law II Table VII) and "corporeal and incorporeal"[19] things (Gaius, Second Commentary), it was possible to subsume that all sorts of "corporeal things" known, and even unknown at the time of the drafting of the law, would fall under the intentionally broad adjectives "corporeal" or "incorporeal." A listing of such things would be unwise and therefore, unnecessary.

This Romanistic style is now the style of modern civil codes, such as the Louisiana Civil Code. As we wrote elsewhere, "[O]ne cannot but be struck by the bluntness, rigidity, abstractness and coldness of the style of the code articles."[20] This style is used purposefully in a code, the language of which warrants its adaptability and pliability. As Portalis wrote: "The law which has neither eyes nor ears, should be able to be modified where equity requires it, following the circumstances and the inconveniences it creates in particular cases."[21] As heir of the Romanistic style of drafting today,

> [t]he legislative style must, by its clarity and brevity, express

18. JUSTINIAN I, *supra* note 1.

19. G. INST. 2.13, 2.14.

20. Alain Levasseur, *On the Structure of a Civil Code*, 64 TUL. L. REV. 693, 697 (1970) [hereinafter Levasseur, *On the Structure of a Civil Code*] (translating 9 PAR P. A. FENET, RECUEIL COMPLET DES TRAVAUX PREPARATOIRES SUR LE CODE CIVIL 33 (1827)).

21. *Id.* at 698 n.20. For more information on Portalis, see Alain A. Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762, 773 (1969) [hereinafter Levasseur, *Code Napoleon*].

> norms adapted to the goals, needs and implementation of the law, by making them as accessible despite the requirements of the legal technique. Thus, the legislative style and the quality of a code, like any other normative text, presupposes a certain terminology and phraseology. . . . A terminology must be, above all, precise and exact. . . . The expression of the rules of law is generally direct and impersonal. . . .[22]

As a logical implication, this Romanistic and civil law style of drafting casts the courts and jurists as the indispensable "interpreters" of the legislator, making the law relevant and appropriate in particular instances. Thereby, the courts, with the assistance of the jurists, become, in a sense, the artisans of the will of the legislator by crafting the proper legal characterization from the materials and the facts.[23]

B. Definitions

The language of the civil code is meant to support its adaptability or pliability so that the code, being "the fruit of the passage of time,"[24] will cover "a multiplicity of particular issues and . . . make an art of reason itself."[25] This is one important reason why a civil code contains very few definitions. Remembering the well-known warning of the Digest of Justinian that "*omnis definitio in jure periculosa*,"[26] the drafters of the French Code Civil did their best with the difficult task of avoiding the inclusion of too many definitions. In the words of Portalis, "[T]he general definitions for the most part include only vague and abstract expressions, whose meaning is often more difficult to determine than the meaning of the thing itself that is defined. . . . All that is definition, teaching, doctrine, belongs to the domain of science."[27] Definitions must, for their purpose

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22. Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1087–88 (1988).

23. *See infra* Section I.C.

24. Jean-Étienne-Marie Portalis, Preliminary discourse on the projet of Civil Code (1800) (trans. M. Shael Herman), *in* Levasseur, *Code Napoleon*, supra note 21, at 773.

25. *Id.* at 769.

26. DIG. 50.17.202 (Ulpian, Ad Edictum 18). "The Roman lawyers were not fond of tying themselves down to abstract definitions." REINHARD ZIMMERMAN, THE LAW OF OBLIGATIONS, ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 666 (Clarendon Press 1990).

27. Levasseur, *On the Structure of a Civil Code*, *supra* note 20, at 698 (translating FENET, *supra* note 20, at 42). For example, the word "custody" in Louisiana Civil Code article 2317 or in article 131 is nowhere defined, yet it is

and essence, be descriptive and exclusive[28] so as to restrict and confine as much as possible the interpretative power of a court, the latter being placed, in a sense, in a straitjacket.[29] When codifying, the civil law legislator is aware that "positive laws can never entirely replace the use of natural reason in the affairs of life" and that a

> host of things is thus necessarily left to the province of custom, the discussion of learned men and the decisions of judges. The role of legislation is to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details of questions which may arise in particular instances. It is for the judge and the jurist, imbued with the general spirit of the laws, to direct their application.[30]

The blunt, cold, impersonal Romanistic civil law style of drafting requires, for its application and interpretation, the necessary and indispensable contribution that judges and jurists bring to the adaptability and pliability of a civil code. Codified law's

> only purpose [is] to lay down the basic principles of law from which practical applications can then logically be derived. Being abstract and general, it is able to include all cases within its scope without explicitly solving each one, thus leaving sufficient room for a large amount of judicial creativity.[31]

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very commonly used and has been given a more and more extensive meaning over time, such as physical, intellectual, legal, etc.

28. The following definitions are examples from UCC I:

> (2) "Aggrieved party" means a party entitled to pursue a remedy
> (11) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.
> (20) "Good faith," except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

U.C.C. § 1-201 (AM. L. INST. & UNIF. L. COMM'N 1977).

29. For an example of a narrow definition, see "lesion" in LA. CIV. CODE art. 2589 (2021).

30. Portalis, *supra* note 24, at 769.

31. LAW REFORM COMM'N OF CAN., TOWARDS A CODIFICATION OF CANADIAN CRIMINAL LAW § 1.49 (1976).

C. Role of the Courts and Jurists

In a codified system of law, like Louisiana's, it is most important for judges and jurists to remember that it is up to them, "imbued with the general spirit of the laws, to direct their application."[32] In the words of Portalis:

> There is a science for lawmakers, as there is for judges. . . . The legislator's science consists in finding in each subject the principles most favorable to the common good; the judge's science is to put these principles into effect, to diversify them, and to extend them, by means of wise and reasoned application, to private causes. . . .[33]

In the words of the Law Reform Commission of Canada,

> The Code should contain guiding principles for both judges and lawyers. . . . It should reflect the positive law in a series of clear, simple rules deliberately shorn of countless details. . . . [C]odification must not be considered as a vote of non-confidence in the courts or as something that will suppress their creativity to the point of reducing them to "judging machines." . . . As paradoxical as it may seem, in practice a code leaves judges more freedom and discretion than they have under the binding authority of precedent.[34]

One can assert that the Romanistic civil law style of drafting legislation in the form of codes is meant to bring judges "alongside of the temple of enacted laws and under the legislator's supervision" in such a way that a "repository of maxims, decisions and doctrinal writings" is created, "which steadily grows as all acquired knowledge is added to it, and which has always been regarded as the true supplement of legislation."[35] Portalis's masterful and unparalleled understanding of the benefits and purposes of the Romanistic style of drafting legislation found an echo almost 100 years later in these words from A. Esmein:

> [I]t is not a dead legislation which the pages of the Civil Code contain. It is a living law, which has already lived a long time, and which, I hope, is called to live a long time yet. . . . The nineteenth

32. Portalis, *supra* note 24, at 769.
33. Portalis, *supra* note 24, at 772.
34. LAW REFORM COMM'N OF CAN., *supra* note 30, at §§ 1.44–45.
35. Portalis, *supra* note 24, at 770.

> century saw in the domain of monetary interests, in social relations, so many new things that the Civil Code did not govern because it could not foresee them. Certain things that it regulated, such as movable property, changed almost completely. The written law had to adapt to the new milieu. Now, these transformations of the civil law, what noted them down and at the same time consecrated them? It is case law. Case law is the true expression of the civil law; it is the real and positive law, as long as it has not been changed.[36]

D. Interpretation: Methods[37]

"Interpretation by way of doctrine consists in grasping the true sense of the laws, applying them in a discerning fashion, and supplementing them in those cases which the laws have not provided for. Without this kind of interpretation could we think of fulfilling the judge's function?"[38]

> Interpretation in civil law has traditionally been less centric and more open to arguments based on extrinsic elements such as the Codifiers' Report or the writings of legal scholars; there is no reliance on restrictive principles of interpretation. The strict interpretation of provisions is limited to provisions of exception, which in some ways confirms the principle that general law can be extended to situations not formally envisaged in the text . . . . Legislative drafting techniques necessarily have an important influence on interpretation. Clearly, the Code is not drafted in typical statutory text. A text plainly and concisely setting forth certain general principles does not easily lend itself to a purely grammatical method of legislative interpretation. Other methods (contextual, purposive, historical) tend to be more appropriate.[39]

In civil law jurisdictions, all methods of interpretation of statutory law, such as civil codes, are grounded on two fundamental premises. The first premise is that statutory law ranks as the primary source of law, as is

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36. M.S. Herman & A. Esmein, *Excerpts from a Discourse on the Code Napoleon by Portalis*, 18 LOY. L. REV. 23, 28–33 (1971).

37. On Interpretation and Methods, see ALAIN LEVASSEUR, DECIPHERING A CIVIL CODE: SOURCES OF LAW AND METHODS OF INTERPRETATION 71–150 (2015) [hereinafter LEVASSEUR, DECIPHERING A CIVIL CODE].

38. Portalis, *supra* note 24, at 771.

39. PIERRE-ANDRÉ CÔTÉ, THE INTERPRETATION OF LEGISLATION IN CANADA 30–32 (4th ed. 2011); *see* LEVASSEUR, DECIPHERING A CIVIL CODE, *supra* note 36, at 71–150.

clearly stated in Louisiana Civil Code articles 1 and 2.[40] It follows that the first and primary responsibility incumbent upon a judge is to identify the legislation, statutes, or Code articles that is or are the most likely to apply to the facts of the case under consideration. In this process, the judge will be called upon to give a proper and single legal characterization to the facts.[41] The second premise flows logically from the first, and it is that in some instances, a Louisiana judge will have to "examine the spirit of the law when the letter kills,"[42] as the judge is directed to do by articles 9 and 10 of the Louisiana Civil Code.[43]

Indeed, beyond "the law as written,"[44] "the language of the law,"[45] "the words of a law"[46]—in other words, beyond the letter of the law—the judge must also inquire into the legislative intent or spirit of the law. In the words of Gény:

> We have witnessed the formation of a more delicate and more flexible method, better harmonized with life, which is a rational method in the proper sense, not a purely syllogistic method of reasoning. It is rational because it requests not the fabrication of syllogisms, but the discovery of solutions which are harmonious with equity and practical necessities while still being within the scope of a broad, flexible construction of statutory texts. . . . There are . . . additional and long recognized methods of interpretation that provide the interpreter with the means of looking forward, of projecting the text of a statute or of a code article into the future; one is encouraged to look "through the Civil Code but beyond the Civil Code."[47]

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40. "The sources of law are legislation and custom." LA. CIV. CODE art. 1 (2021). "Legislation is a solemn expression of legislative will." *Id.* art. 2.

41. *See infra* Part III.

42. Portalis, *supra* note 24, at 772.

43. "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." LA. CIV. CODE art. 9 (2021). "When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law." *Id.* art. 10.

44. *Id.* art. 9.

45. *Id.* art. 10.

46. *Id.* art. 11.

47. FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF LXXVI (Raymond Saleilles trans., 1919). In the Preface to Gény's work, Raymond Saleilles wrote:

The use by civil law judges and jurists of such "extrinsic" methods of interpretation and reasoning to give life to the written law of code articles led Roscoe Pound to write:

> The civilian is at his best in interpreting, developing, and applying written texts . . . . In contrast the common-law lawyer is at his worst when confronted with a legislative text. His technique is one of developing and applying judicial experience. It is a technique of finding the grounds of decision in the reported cases. It is a technique of shaping and reshaping principles drawn from recorded judicial decisions. Hence while to the civilian the oracles of the law are academic teachers, the books of authority are codes, and the text books are commentaries upon codes, to the common-law lawyer the oracles are not teachers but judges, the books of authority are reports of adjudicated cases.[48]

For a civil law judge or jurist, "[a]ll our methods of interpretation are grounded, basically, on the same conception: that law is 'will,' 'human and reasonable will,' which enables the interpreter always to find the law through his own will, since men always find a way to get along."[49] The rational and legitimate purpose of using such extrinsic methods of interpretation is to keep the existing code articles alive by relying upon techniques or methods of reasoning based on principles of equity, justice, and reason,[50] which are, by nature, infinite and fertile in application.[51]

> I could not end with better words than those inspired by an analogous phrase of Ihering, which is the focal point of the whole book of Mr. Gény: "Through the Civil Code, but beyond the Civil Code." Perhaps I would be among those who should gladly reverse the order of these terms and say "beyond the Civil Code but through it."

48. Roscoe Pound, *What Is the Common Law?*, 4 U. CHI. L. REV. 176, 187 (1937); *see also* Alain Levasseur, *Portalis and Pound: A Debate on "Codificatio*n,*"* 81 LA. L. REV. 1113 (2021).

49. J. CARBONNIER, DROIT CIVIL 250–51 (22nd ed. 1994); *see* LEVASSEUR, DECIPHERING A CIVIL CODE, *supra* note 37, at 105.

50. *See* LA. CIV. CODE art. 4 (2021): "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages."

51. On Techniques and Methods of Reasoning, see LEVASSEUR, DECIPHERING A CIVIL CODE, *supra* note 37, at 69–149.

E. Civil Code Institutions and Concepts

The Romanistic style and its inherent features described above would be difficult to explain and justify if it were not for the intricate structure of a civil code, which is tailor-made to allow judges and jurists to fulfill their role as secondary and persuasive sources of law.[52] The structure of the Louisiana Civil Code is based on two main pillars. First, legal concepts or legal institutions, which make up the internal structure of the Code, contribute to the Code's cohesiveness through the interdependence that exists, at different levels, between these institutions. Second, the intellectual process of legal characterization confines the judge and the jurist to follow a logical, rational, almost mathematical reasoning of transposing or translating factual situations into a legal concept or legal institution, also referred to as a legal category.[53]

Because of the material (the Civil Code) and the tools (methods of reasoning) made available to them, civil law judges should, after making a few necessary curves along the roads leading to their decisions, eventually fit, without too many bumps, the factual situations they started from into the proper legal institution or legal category predesigned and waiting to provide the legal regime for those factual situations. The contract of sale, for example, is an institution or legal category that is identified by a single word. This institution is also a sub-institution within the larger institution of "contract." A "third-party beneficiary" is a legal institution that can be classified as a sub-institution of the broader institution that is "object" of contracts. A "matrimonial regime" is a sub-institution of "contract," and the "community of acquêts and gains" is, itself, a sub-institution of a matrimonial regime.

This short and simple list of some institutions and sub-institutions illustrates a few of the steps a judge must take in his reasoning. For example, before focusing on what may appear to be a matrimonial regime of separation of property and writing an opinion exclusively based on the sub-institution of a matrimonial regime, the judge should look into the higher and encompassing institution of contract or conventional obligation to make sure that the requirements for a valid contract have been met; only then should the judge look into the specific requirements for the formation of a matrimonial contract of separation of property. Before siding almost instinctively with a plaintiff who argues that the thing he bought has a redhibitory defect and that therefore, that the plaintiff is entitled to an

52. On Sources of Law, *see* LEVASSEUR, DECIPHERING A CIVIL CODE, *supra* note 37, at 9–42.

53. *See infra* Part II.

action in redhibition, a sub-institution of the contract of sale, the judge should first place the contract of sale into the even broader institution of contract to determine whether or not the "buyer's rights are governed by the general rules of conventional obligations."[54] In other words, there could have been an error regarding the "ordinary fitness of the thing" in the formation of the broader institution of contract that would justify the nullity of the contract. Since the general legal regime of a contract includes the lesser institution of the nominate contract, such as a sale, the failure of a contract to exist carries with it the impossibility of having a contract of sale.

The above-described interdependence between a general institution and its sub-institutions is not the only one to exist in the Civil Code. There exists also a higher interdependence at the level of the institutions themselves that are spread all throughout the Civil Code. For example, "Donations inter vivos"[55] are located early in Book 3, Title 2, Chapter 5 under the broader institution "Donations" (Title 2), but because a "donation inter vivos is a contract,"[56] the even broader institution of "Conventional Obligations or Contracts"[57] will also control the legal regime of a "donation inter vivos" as a sub-institution. There is also an interdependence between "Contractual Capacity and Exceptions"[58] as a sub-institution under "Conventional Obligations or Contracts" and the broad institution of "Persons"[59] and within that broad institution, with the sub-institution of "Natural and Juridical Persons."[60]

This interdependence between institutions and sub-institutions was intentionally created by the drafters of the Civil Code. For that reason, the Civil Code has been described as a "well ordered monument, whose design and outlooks have a meaning. Beyond this apparent arrangement, there exists implicit and changing coordinations, a deep life, hidden feelings and conceptions which are the true cement of the legal provisions."[61]

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54. LA. CIV. CODE art. 2524 (2021).
55. *Id*. arts. 1523–1567.
56. *Id.* art. 1458.
57. *Id.* bk. 3, tit. 4.
58. *Id.* bk. 3, tit. 4, ch. 2.
59. *Id.* bk. 1.
60. *Id.* bk. 1, tit. 1.
61. J. Ray, ESSAI SUR LA STRUCTURE LOGIQUE DU CODE CIVIL FRANÇAIS (1926); *see also* Levasseur, *On the Structure of a Civil Code*, *supra* note 20, at 703.

II. LEGAL CHARACTERIZATION[62]

There is a cause-and-effect relationship between the institutions as they exist in the Civil Code and the legal characterization and qualification of the facts as reported by the parties to a case. The intellectual mechanism that is used to establish an objective and logical relationship between a set of facts and the institution that best fits them is a reasoning process that relies on an array of methods of interpretation.[63] It is the main responsibility and duty of the courts to properly make use of these methods of interpretation as the necessary tools for deciphering a civil code in the process of legal characterization[64].

To legally characterize or qualify a set of facts is to essentially move the facts into their fitting legal category or institution by giving them their most suitable legal identification or characterization. One can look back at some courts' decisions that for some reason, failed to properly assign to the facts their most logical legal characterization in relying, implicitly and in a meandering way, on *equity* at the expense of the *law*, as in "contracts have the effect of law for the parties. . . ."[65] Confronted with court decisions not solidly built on proper legal grounds, doctrine should fulfill its role as "oracle[] of the law"[66] and step in between the integrity, purity, and reliability of the law and the necessarily pragmatic and human nature of the task of judges and lawyers. Errors in legal characterization should be identified and exposed for the benefit of *all* since the Code or "legislation is a solemn expression of legislative will,"[67] whereas cases are only persuasive sources of law—just as doctrine is—in the Louisiana civil law system.[68]

Like a medical doctor who makes a diagnosis based on a variety of symptoms presented by a patient, the lawyer or judge can make use of

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62. This Part on "legal characterization" is based on the following works: (1) mainly, JEAN-LOUIS BERGEL, *Classifications Juridiques et Qualification des Faits*, *in* METHODOLGIE JURIDIQUE 105–42 (PUF 2018); (2) partially, PHILIPPE JESTAZ, LE DROIT, DALLOZ 117–18 (Mème éd. 2021).

63. On Methods of Reasoning and Tools of Interpretation, see LEVASSEUR, DECIPHERING A CIVIL CODE, *supra* note 37, at 83.

64. *Id.*

65. LA. CIV. CODE art. 1983 (2021); in this respect, see McKee v. Southfield Sch., 613 So. 2d 659 (La. Ct. App. 2d. Cir. 1993).

66. Pound, *supra* note 48, at 187.

67. LA. CIV. CODE art. 2 (2021).

68. *See* Willis-Knighton Med. Ctr. v. Caddo Shreveport Sales & Use Tax Comm'n, 903 So. 2d 1071 (La. 2005); Phyllis Doerr v. Mobil Oil Corp., 774 So. 2d 119, 128–29 (La. 2000); Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 79 So. 3d 246, 256 (La. 2011).

several available legal descriptions of institutions in identifying their particular component parts. In the end, lawyers and judges should come up with the most appropriate and fitting legal description of the facts by placing them in one legal category or institution or another. The law—the Civil Code in particular—provides textbook legal categories, concepts, and institutions that are framed and articulated around specific rules so that in order to categorize a certain fact pattern, the judge or lawyer's task is to identify those particular rules of law that best fit, like a garment, the dominant features of the fact pattern under consideration.

After a survey of the different existing legal categories or concepts, we will look into the *raison d'être* of the process of legal characterization and offer our conclusion on this process.

A. Legal Categories

The *Dictionary of the Civil Code* defines "categorie/category" as follows:

> 1. In a group (a *classification*), distinctive set of elements having similar characteristics; class, division. Ex. considering things in general, the categories of movables and immovables; in the classification of contracts, the categories of synallagmatic contracts and unilateral contracts; in the professions, the categories of artisans and merchants.
> 2. Also designates the fundamental notions which, appearing in the legal order or in legal thinking as a rational and systematic arrangement, are defined one relative to the other through a series of generic and specific characteristics. Ex. . . . juridical acts and juridical facts, in their respective classifications. [69]

The civilian judge or lawyer must, by the intellectual process of legal characterization, fit any and all sources of obligations under one of the two most encompassing institutions, which are either "juridical acts" or "juridical facts."[70] To do so, the judge or lawyer must first extract and gather together the essential component parts or features of a factual situation; then match or fit the selected factual component parts with their corresponding legal features or characteristics; and finally combine the identified legal features to select the proper, and hopefully the only, corresponding legal category. This process is that of "taxonomy" or "the

69. ALAIN LEVASSEUR & M. LAPORTE-LEGEAIS, DICTIONARY OF THE CIVIL CODE (2014).

70. LA. CIV. CODE art. 1757 (2021).

science of classification; laws and principles covering the classifying of objects."[71]

In law, classifications facilitate the task of the civil law jurist, judge, and lawyer in bringing some order and structure to a collection or grouping of data, elements, and component parts, which are sometimes quite varied. Classifications, in the context of a Civil Code, are therefore most instrumental and helpful in knowing, understanding, and explaining the application of the law to a reality that the law has striven to grasp and reflect as exactly as possible in its Romanistic style of drafting. Considering the extreme variety of realities, legal characterizations will also be varied. Some classifications will be broad and general, others will be narrow and specific, depending on the extent of the data or elements that can be gathered together. As a result, a general characterization or classification will include sub-classifications, and the latter may likely include sub-sub-classifications. For example, the general legal classification of "juridical acts"[72] as sources of obligations will include a sub-classification or category known as "bilateral juridical acts" or "contracts or conventional obligations," and this sub-classification will, itself, include some sub-classifications such as "synallagmatic contracts,"[73] and within that sub-classification, we will include some additional sub-classifications such as "sale," "exchange," and so forth.

Therefore, setting up a classification begins with a careful examination of the data that can be grouped together on the basis of their common features. The definition of categories is but the creation of a process of reasoning by way of induction that begins with the known data. Therefore, for each category, it is necessary to identify the major features, data, and characteristics that are common to all the fact situations brought under its identification, title, or noun, regardless of the fact that there may be some minor or secondary differences between these situations. In other words, one must first isolate the features or elements that are common to the factual situations that fall under each category and second, identify the features or elements of those categories from which they must be distinguished. For example, those "immovables"—a broad legal category to be distinguished from "movables" as the opposite broad category—said to be "by declaration," a sub-category described in Louisiana Civil Code article 467,[74] should be distinguished from another sub-category,

71. *Taxonomy*, WEBSTER'S NEW WORLD DICTIONARY (3rd College ed. 1988).

72. LA. CIV. CODE art. 1757 (2021).

73. *Id*. art. 1908.

74. *Id.* art. 467:

"components parts of tracts of land,"[75] because factually speaking, the first ones are not "permanently attached to the ground," being by nature movables and becoming immovables only by a declaration of the immovable's owner.

This process of legal characterization can require going through a whole series of characterizations or classifications. Let us take "Things" as an example.[76] A thing can be classified as a movable thing or the opposite, as an immovable thing; both of these classifications can be sub-categorized or sub-classified as corporeal or incorporeal;[77] a corporeal movable thing can be further sub-categorized or sub-classified as being governed by the legal regime of community of acquêts and gains[78] and being further sub-classified as falling in a sub-category of movables assets of a community enterprise.[79] Each of these categorizations is attached to a legal regime, but each legal regime is a derivative of a broader, classified legal regime that is, itself, a sub-classification of an even broader legal regime. If this legal process of linking one classification to another and to another is interrupted by the intrusion of a "foreign" classification, one should go back up the chain of the process to identify the broken link and reconsider what has apparently been a defective legal analysis.

It is in such a case of conflict between characterizations that the process of legal characterization proves to be not only helpful but indispensable to the proper administration of the law of the Civil Code. One may wonder, however, if this process of legal characterization, being as logical, almost mathematical, as it is, is not too rigid or inflexible so as to leave insufficient room for judicial creativity, so as to curtail the judge's discretion in his attempt to be responsive to changing social reality? Rigor of reasoning, of legal analysis, does not mean and cannot mean *rigidity or impermeability* of the legal process. As Portalis wrote:

> [H]ow can one fetter the movement of time? . . . How can one know and calculate in advance what only experience can reveal?

Immovables by declaration. The owner of an immovable may declare that machinery, appliances, and equipment owned by him and placed on the immovable, other than his private residence, for its service and improvement are deemed to be its component parts. The declaration shall be filed for registry in the conveyance records of the parish in which the immovable is located.

75. *Id*. art. 463.
76. *Id*. bk. 2: Things and the Different Modifications of Ownership.
77. *Id.* art. 461.
78. *Id*. art. 2334.
79. *Id*. art. 2350.

> Can a forecast even encompass matters that thought cannot reach? A code, however complete it may seem, is hardly finished before a thousand unexpected issues come to face the judge. For laws, once drafted, remain as they were written. Men, on the contrary, are never at rest; they are constantly active, and their unceasing activities, the effects of which are modified in many ways by circumstances, produce at each instant some new combination, some new fact, some new result. A host of things is thus necessarily left to the province of custom, the discussion of learned men, and the decision of judges.[80]

The learned men and the judges are called to step in to expand, modify, or create definitions and, "imbued with the general spirit of the laws," to resort to methods of reasoning "to direct [the] application" of the laws.[81] So jurists, lawyers, and judges are given the means to make the Civil Code absorb new relationships or things into the civil law system and to fit them as closely as possible into the existing categories and institutions, sometimes by adapting them, by correcting them, or by expanding them—by making them a little more elastic. Relying on Louisiana Civil Code article 4, judges can instill some flexibility, security, and predictability into the law.[82] The civil law system is in a position to provide, next to precise and specific rules, some flexible concepts and categories capable of incorporating the inevitable changes and creations of the "movement of time," capable of incorporating and of confronting the impossibility to "forecast [and] encompass matters that thought cannot reach."[83] "[T]he judge's science is to put [the] principles [laid down by the lawmakers] into effect, to diversify them, and to extend them, by means of wise and reasoned application, to private causes; to examine closely the spirit of the law when the letter kills."[84]

Some legal concepts or categories have been intentionally left vague and undetermined to allow their adaptation to unprovided-for legal situations. "Good faith," "Unjust enrichment," "Public order," "Good morals," "Equity," "Fault," and "Custody"[85] are all concepts that have been "juridicalized" to remain fluid and malleable enough for the courts

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80. Portalis, *supra* note 24, at 769.

81. *Id.*

82. *See* Loyacano v. Loyacano, 358 So. 2d 304 (La. 1978); LA. CIV. CODE art. 21 (1870).

83. Portalis, *supra* note 24, at 769.

84. *Id.* at 772; *see also Loyacano*, 358 So. 2d 304; W&T Offshore, LLC v. Texas Brine Corp., 319 So. 3d 822, 823–37 (La. 2019) (Weimer, J., dissenting).

85. *See In re* C.B., Applying for Adoption, 643 So. 2d 1251 (La. 1994).

to adapt to unforeseen circumstances. When so doing, the courts are to focus on and identify the essential features or characteristics of the facts they are presented with; they must then translate these features or characteristics into "legal features" that will lead the courts to logically and methodically aim for the legal concept, institution, or category most fitting and appropriate to govern the facts under consideration.

For example, the rigidly formulated legal principle according to which "[c]ontracts have the effect of law for the parties"[86] can be softened or attenuated in its application by bringing in the principle and legal concept of "good faith," not only in the performance of the obligation created by the contract but also, and more importantly, in the very creation of contractual obligations as is stated, in the imperative form, in Louisiana Civil Code article 1759.[87] Likewise, the contractual principles of "autonomy of the will" and "freedom of contract"[88] manifested and exercised through offer and acceptance[89] can be, and must be, softened and adapted whenever the principle laid down in article 7 should find room for application.[90] It is, therefore, the context, the surrounding circumstances that will provide the judge with necessary elements and data to enable him to identify the existence, or not, of the proper combination of legal norms leading to the appropriate legal institution or category.

In the process, a Louisiana judge will find in Louisiana Civil Code article 4 some sources of guidance in justice, reason, and equity upon which to rely when coming up with a creative understanding of a fluid concept suitable for the factual context of the case under consideration.[91] In so doing, the judge will be demonstrating his awareness that the Code could not have meant to "fetter the movement of time," could not have calculated "in advance what only experience can reveal,"[92] and that it is up to him, in relying on "the discussion of learned men,"[93] to issue a properly fitting decision. A judge, indeed, does not have free rein when

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86. LA. CIV. CODE art. 1983 (2021).

87. *Id.* art. 1759; *see* "Good Faith" in ALAIN LEVASSEUR, LOUISIANA LAW OF OBLIGATIONS IN GENERAL: A TREATISE 33 (2020); *see also id.* at 99 (the section on "Comparative Law of Contracts").

88. ALAIN LEVASSEUR, LOUISIANA LAW OF CONVENTIONAL OBLIGATIONS: A PRECIS 14 (2015).

89. LA. CIV. CODE art. 1927 (2021).

90. "Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity." *Id.* art. 7.

91. *Id.* art 4.

92. Portalis, *supra* note 24, at 769.

93. *Id.*

calling upon fluid concepts. "It is very fortunate that the judge[] need[s] to learn, to do research and closely to examine the question presented to him never permits him to forget that, while there are things within his discretion, there are none which are entirely up to his caprice or whim."[94] Thus, over time, these fluid, flexible legal concepts and institutions may lose some of their flexibility for the benefit of security and stability of the law. And yet, because of their very nature, they remain flexible and susceptible to evolving because it is "the judge's science to put these principles [most favorable to the common good] into effect, to diversify them, and to extend them by means of wise and reasoned application to private causes."[95]

B. Raison D'être *of Legal Characterization*

The *raison d'être*, or purpose, of legal characterization is to frame and formulate the legal regime of an identified legal concept or category that is the best fitting for a certain set of facts. If a "thing," a legal concept or legal category, can be characterized as, first, a movable (a sub-category) and second, as a corporeal movable, then the overall legal regime governing, for example, the modalities of delivery of corporeal movables[96] will present itself as a sort of "menu" or panoply from which one will choose the most appropriate and suitable form of delivery that the facts would require.

It is very common for a set of facts to command that the process of legal characterization be undertaken against the background of several possible legal categories at the same time. If a set of facts is characterized, first, strongly suggesting that a "civil obligation" does exist, as contrasted with the legal category of "natural obligations," that civil obligation will have to be further characterized as, for example, a "conventional obligation," a sub-category that could be contrasted with the sub-category of "delictual obligations." The sub-category of conventional obligation or contract includes some sub-categories such as "bilateral or synallagmatic contracts"[97] as contrasted with "unilateral contracts,"[98] etc. In a factual situation, the legal characterization of a "person," a legal category to be contrasted with the legal category of "things," for example, will lead to

94. *Id.* at 771.

95. *Id.* at 772.

96. *See* LA. CIV. CODE art. 2477 (2021). Although listed under "Sale," the different methods of delivery are themselves a sub-category within the broad legal category of "obligations to give."

97. *Id.* art. 1908.

98. *Id.* art. 1907.

that person falling in the sub-category of "natural persons" or in the sub-category of "juridical persons";[99] as a natural person, that person could be sub-categorized as "a capable person," as opposed to an "incapable person," and as a capable person, she could be sub-characterized as a "married person" in the broad category of "Marriage" and as having entered into the sub-category of "the community of acquêts and gains" as opposed to the sub-category of "separation of property."[100] Each legal characterization into a legal class or category will have an impact on another legal category so that, for example, following a process of elimination, the "person" concerned will eventually be classified in a certain legal category made up of compatible component parts or features from a few or several sub-legal categories. Through a process that can be varyingly extensive and intricate, a broad or general legal category or classification can be made up of legal features borrowed from a list, long or short, of legal regimes that belong to legal sub-categories. In other words, to start and stop one's legal analysis with classifying a person as "married under the community regime" is contrary to the structure and spirit of the Civil Code, which requires that one reason from the particular to the general, from the "matrimonial regime of community" to the validity of the "marriage" to the validity of the "civil contract" of marriage. One must, in a sense, establish a checklist to make sure that the legal regime of each step in the process of characterization is controlling and not defective.

To take another example, if the facts before a court appear to point to a contract of sale because it looks like there is potentially an issue of redhibition raised by the plaintiff, the court should, before focusing on the presumed existence of a sale, make sure that the requirements for a valid contract, as a broad and general category, have been met. Indeed, there may not have been a contract at all to start with, because there may have been an error as to the object or as to the cause of the contract, and hence a vice of consent in the formation of the general or generic contract. If no contract can exist, no sale, *a fortiori*, can exist, and therefore no legal regime of a sale that could have presented an issue of redhibition.[101]

C. Legal Characterizations: Concluding Remarks

The process of legal characterization is dictated by the Romanistic style of a Code, the intentional lack of definitions, the most important and indispensable methods of interpretation, as well as the intentional and

99. *Id.* art. 24.
100. *Id.* arts. 2334–2369.8, 2370–2376.
101. *See id.* arts. 2477, 2524, 2529.

necessary cooperation between the primary sources of law (legislation and custom) and the secondary or persuasive sources (jurisprudence and doctrine). Is it not illustrative of the importance of this process of legal characterization that the laws themselves are subjected to this process, which leads to a distinction between "imperative" and "suppletive" law as well as between "substantive" and "interpretative-remedial" laws?[102]

One first objective of this process of characterization is to demonstrate that many legal categories are legally compatible with one another because they are intertwined and create a coherent and rational web of cumulative relationships that is an inherent and characteristic part of the concept of codification. A second objective has been to show, conversely, that some categories or institutions are mutually exclusive and conflicting and cannot therefore lead to a good, logical, and well-grounded decision.[103] One benefit to be derived from an incompatible characterization of categories or institutions is that it helps one to reason "with the Code and through the Code," to reason inductively as well as deductively in order to find the "straight" line of one's reasoning. A second benefit is to ensure that the legal regimes of the cumulative characterizations into categories are compatible, well intertwined, so as to lead to a coherent, logical, and "strictly legal" decision.

The existence of concurring and dissenting opinions suggest that at a certain stage in the reasoning process of legal characterization, judges have followed different paths in their own legal analysis and have come up with different legal characterizations. Yet there can be only one legal solution, one decision in a case, and therefore one legal characterization must prevail. If that legal characterization is strong enough, if it is well grounded, it may be the first opinion that will turn into a *jurisprudence constante* and last for a few years until another well-grounded opinion, perhaps inspired by doctrinal writings, will signal a reversal of an established line of decisions and become the first stone on which a new *jurisprudence constante* may be built.[104] Such is the balance between the "science of the lawmaker and the judge's science" in a codified system of law where "the legislator must pay attention to case law" . . . and where "one cannot dispense with case law any more than he can dispense with legislation."[105]

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102. *See* Segura v. Frank, 630 So. 2d 714, 723 (La. 1994).

103. *See* McKee v. Southfield Sch., 613 So. 2d 659 (La. Ct. App. 2d Cir. 1993); Alain Levasseur, *Private Law: Sales*, 38 LA. L. REV. 367 (1978); *infra* Part III.

104. *See* Holland v. Buckley, 305 So. 2d 113 (La. 1974); State v. Cuchinelli, 261 So. 2d 217 (La. 1972).

105. Levasseur, *Code Napoleon*, *supra* note 21, at 772.

III. ILLUSTRATIONS

The following are illustrations of our own process of legal characterization as applied, first, to a Code article and, second, to a few cases.

A. Louisiana Civil Code Article 2007

Article 2007 states, "An obligee may demand either the stipulated damages or performance of the principal obligation, but he may not demand both unless the damages have been stipulated for mere delay."[106]

We believe, as we will explain below, that this article is a good illustration of an inconsistent and incoherent series of legal characterizations and for that reason, should be rewritten.

Where Does the Process of Legal Characterization Applied to Art. 2007 Lead Us?

1: The first and primary legal characterization is that of "Obligations in General and General Principles."[107] Of particular relevance is article 1756, specifically the word "performance": "An obligation is a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee. Performance may consist of giving, doing or not doing something."[108]

2: Also of prime relevance is article 1758(A), entitled "General effects":

> A. An obligation may give the obligee the right to:
>
> (1) Enforce the performance that the obligor is bound to render;
>
> (2) Enforce the performance by causing it to be rendered by another at the obligor's expense;
>
> (3) Recover damages for the obligor's failure to perform, or his defective or delayed performance.[109]

One should notice that under (A)(3), damages can be recovered "for the obligor's failure to perform."[110] In other words, an obligee has the right, per article 1758(A)(1), to "[e]nforce the performance that the obligor is

106. LA. CIV. CODE art. 2007 (2021).
107. *Id.* bk. III, tit. III, ch. 1.
108. *Id.* art. 1756.
109. *Id.* art. 1758(A).
110. *Id.*

bound to render."[111] Performance of his obligation by the obligor is his "primary" obligation—the performance he agreed to carry out in the contract—and the obligee may enforce that performance.

3: A sub-characterization within the general legal characterization of *Obligations in General* is that of the *Extinction of Obligations* in Chapter 6 of the same Title 3.[112] Within this sub-characterization we find a series of sub-sub-characterizations describing the different modes of extinction of obligations. Among them we find *Performance* in Section 1 of this Chapter 6.[113] Article 1854 in Section 1 *Performance* states: "Performance by the obligor extinguishes the obligation."[114] Article 1855 adds that "[p]erformance may be rendered by a third person, even against the will of the obligee, unless the obligor or the obligee has an interest in performance only by the obligor. Performance rendered by a third person effects subrogation only when so provided by law or by agreement."[115] Nowhere in articles 1854 to 1863, under the characterization of *Performance*, is the word "damages" mentioned!

4: *Obligations in General*, as a general legal characterization, includes some sub-characterizations based on the source of an obligation. In this broad characterization of *Obligations in General* we find a sub-characterization under the title of *Extinction of Obligations*, which itself includes six sub-classifications, from *Performance* to *Confusion*.[116] The sub-characterization of *Performance* within the very general characterization of *Obligations in General* is applicable to all obligations regardless of their sources. Among those sources is the sub-characterization of *Conventional Obligations or Contracts*.[117] Another sub-classification of sources of Obligations is that of *Obligations Arising Without Agreement*, which itself includes sub-characterizations such as *Management of Affairs and of Offenses and Quasi-Offenses*.[118]

Reverting back to the sub-characterization of *Contracts*: contracts is, itself, further sub-characterized or classified. Among the sub-characterizations of contracts, we can mention *Formation of Contracts*, an extensive characterization that encompasses several sub-characterizations such as *Capacity*, *Consent*, *Vices of Consent*, etc.[119] Under *Contracts*, we

111. *Id.*
112. *Id.* bk. III, tit. III, ch. 6.
113. *Id.* bk. III, tit. III, ch. 6, sec. 1.
114. *Id.* art. 1854.
115. *Id.* art. 1855.
116. *Id.* bk. III, tit. III, ch. 6.
117. *Id.* bk. III, tit. IV.
118. *Id.* bk. III, tit. V.
119. *Id.* bk. III, tit. IV, chs. 2–4.

also find another sub-characterization that bears the title of *Effects of Conventional Obligations*.[120] This latter characterization is of importance here in our analysis of Louisiana Civil Code article 2007.

5: Within the characterization of *Effects of Conventional Obligations*, which is itself under *Contracts*, we find two relevant sub-characterizations with the titles of *Damages*[121] and *Stipulated Damages*.[122] These two characterizations of *Damages* and *Stipulated Damages* should not only be analyzed within the broader characterization of *Effects of Conventional Obligations* but also within the very general characterization of *Obligations in General*, since a conventional obligation is but a kind of obligation in general identified as "conventional" because of its source. Within that broad characterization of *Obligations in General*, the characterizations of *Damages* and *Stipulated Damages* will necessarily be read in connection with *Performance* as a form of *Extinction of Obligations*. Indeed, under the all-encompassing characterization of *Obligations in General*, Louisiana Civil Code article 1758 makes it very clear that in the first place, "[a]n obligation may give the obligee the right to: (1) Enforce the performance that the obligor is bound to render" and that in second place, "[a]n obligation may give an obligee the right to . . . (3) Recover damages for the obligor's failure to perform. . . ."[123]

6: One conclusion from the discussion above is obvious and inescapable: *Performance* by an obligor of his obligation is *primary* and vests in the obligee the right to demand that his obligor perform his obligation, which is "a duty correlative and incidental to a . . . right."[124] Performance "may be enforced . . . against a successor of the obligor" when the nature of the obligation so allows[125] or only against the obligor when the "obligation is strictly personal . . . [and] can be enforced only against the obligor."[126] In addition, *Performance* and its derivative *Specific Performance* are component sub-characterizations of *Effects of*

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120. *Id.* bk. III, tit. IV, ch. 8.
121. *Id.* bk. III, tit. IV, ch. 8, sec. 4.
122. *Id.* bk. III, tit. IV, ch. 8, sec. 5.
123. *Id.* art. 1758.
124. *Id.* art. 1763.
125. *Id.* art. 1765:

> An obligation is heritable when its performance may be enforced by a successor of the obligee or against a successor of the obligor.
>
> Every obligation is deemed heritable as to all parties, except when the contrary results from the terms or from the nature of the contract.
>
> A heritable obligation is also transferable between living persons.

126. "An obligation is strictly personal when its performance can be enforced only by the obligee, or only against the obligor." *Id.* art. 1766.

Conventional Obligations and fall under the control of article 1983, which stipulates that "Contracts have the effect of law . . . . [and] must be performed in good faith."[127]

7: A second conclusion is that the payment of damages is a secondary obligation on the part of the obligor in the sense that it is derived from the failure of the obligor to carry out his primary obligation to perform. Once again, this is an obvious and inescapable conclusion that can be easily drawn from Louisiana Civil Code article 1994, which provides, "An obligor is liable for the damages caused by his failure to perform a conventional obligation. A failure to perform results from nonperformance, defective performance, or delay in performance."[128] In other words, the payment of damages is a sort of coercive measure that is hanging over an obligor's head and given to the courts to administer when an obligor fails to perform his primary obligation or when his performance is defective or late.[129] Regarding stipulated damages, the conclusion is the same as the conclusion of damages. Art. 2005 is clear when it states, "Parties may stipulate the damages to be recovered in the case of nonperformance, defective performance, or delay in performance of an obligation. That stipulation gives rise to a secondary obligation for the purpose of enforcing the principal one."[130] The second paragraph of article 2005 could not be more explicit when it classifies the stipulated damages as "a secondary obligation," which has the "purpose of enforcing the principal one."[131]

Damages, in general or as stipulated in a contract, are not, therefore, a substitute for the performance of the primary or principal obligation; they are not the equivalent of the principal obligation; they are not on the same level as the primary obligation. They are only a *secondary obligation*, considered as a means of preventing an obligee who acted in good faith from suffering a loss he has sustained or may sustain and from being deprived of the profit he was entitled to make.

8: Our verdict on Louisiana Civil Code article 2007: According to this article**,** "an obligee may demand either the stipulated damages or performance. . . ."[132] This sentence is legally wrong in its wording and likely, in its intent or reason. To place the demand for stipulated damages at the beginning of the sentence is an obvious disregard of the law of *Obligations in General*, (see paragraphs 2, 3, and 6, above) in which

127. *Id.* art. 1983.
128. *Id.* art. 1994.
129. *Id*.
130. *Id.* art. 2005.
131. *Id.*
132. *Id.* art. 2007

performance is the principal or primary obligation of an obligor. "Performance" and "failure to perform" should open the sentence! Secondly, to consider stipulated damages as co-equal to performance is, again, a mischaracterization, an illegal characterization of both these institutions or concepts. Performance is a primary or principal obligation whereas stipulated damages—as being "damages" first and "stipulated" second, because of the wills of the parties to a contract—are a secondary obligation in the words of article 2005[133] and by their own nature. Thirdly, when placing stipulated damages and performance on the same level through the use of the conjunctions "either" and "or," article 2007 can be characterized as having created an "alternative obligation" under the words of Louisiana Civil Code article 1808.[134] Indeed, in an alternative obligation, both obligations are considered to be of the same relevance and importance to the parties, obligee and obligor. Both obligations are primary obligations. Therefore, if, as per the letter and substance of article 2007,[135] one obligation is labeled "stipulated damages," it cannot be an alternative to the other obligation because, per article 2005, stipulated damages are meant to be "recovered in case of nonperformance, defective performance, or delay in performance of an obligation." [136] It is therefore nonsense for an obligation to be both itself and its own recovery at the same time!

Furthermore, if the parties to the contract have not stipulated otherwise, "[w]hen an obligation is alternative, the choice of the item of performance belongs to the obligor unless it has been expressly or impliedly granted to the obligee."[137] In other words: "Obligee beware!!"

Louisiana Civil Code article 2007 must be rewritten to reflect the proper and logical coherence in the ranking and mingling of all the relevant characterizations or classifications of the many institutions and concepts involved in the background of this article. Damages are not the co-equal of performance; they are not an alternative obligation. The obligor does not have a choice between damages and performance. Is it not obvious and very meaningful that damages are not listed among the modes of *Extinction of Obligations*, a broad characterization under an even broader characterization of *Obligations in General*? Damages are listed under *Effects of Conventional Obligations*—therefore, not as mode of extinction of obligations—and as such, as resulting from "an obligor

133. *Id.* art. 2005.

134. "An obligation is alternative when an obligor is bound to render only one of two or more items of performance." *Id.* art. 1808.

135. *Id.* art. 2007.

136. *Id.* art. 2005.

137. *Id.* art. 1809.

[being] liable for the damages caused by his failure to perform a conventional obligation."[138] As a consequence of this obligor's failure to perform his obligation, damages are owed. Therefore, it is a total misunderstanding to put performance and damages on the same level. In addition, damages are measured only by the loss sustained by the obligee and the profit of which he has been deprived. "Loss and profit deprived of" are not the co-equal of the primary performance, and that is the reason why damages are called "damages," i.e., meant to "repair the damage caused" by the breach of the primary obligation.

B. A Court of Appeal Decision, McKee v. Southfield School[139]

1. Brief Summary of the Facts for Purposes of Our Analysis

The Louisiana Court of Appeal for the Second Circuit stated that McKee IV was not a party to the contracts between his father, McKee III, and the Southfield School that was to provide an education to the then minor, McKee IV.[140] The court stated also that McKee IV, while not a party to the contracts, was an interested beneficiary of the contracts and was, therefore, entitled to a direct action against Southfield School under Louisiana Civil Code article 1978.[141] The court went on to add, however, that "McKee [IV] is in no better position than would be his father to demand that Southfield further perform under the contract" (citing art. 1982), in issuing a transcript of his son's education, because his father, McKee III, had failed to pay to the school the full amount of the tuition he owed for the education of his son.[142]

McKee IV, now a person of age in his action against the school, asked the court to issue a preliminary injunction requiring the school to deliver to him, an official transcript of his academic record. Despite ruling that "McKee [IV] (son) is in no better position than would be his father to demand that Southfield further perform under the contract,"[143] the court of appeal went on, surprisingly enough, to state that "Although McKee cannot demand performance under the contract, he may do so on the basis of detrimental reliance."[144]

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138. *Id.* art. 1994.
139. McKee v. Southfield Sch., 613 So. 2d 659 (La. Ct. App. 2d Cir. 1993).
140. *Id.* at 661.
141. *Id.*
142. *Id.* at 662 (citing LA. CIV. CODE art. 1982 (1993)).
143. *Id.*
144. *Id.* (citing LA. CIV. CODE art. 1967 (1993)).

The facts as summarized are directing us to divide them into two sets of sub-facts and therefore, to analyze each one of these sub-sets under its proper legal characterization. Since three persons were involved in the case, we have to start, first, with the legal characterization of the legal status of each of these persons under Book I of the Civil Code, *Persons*.[145] This first major legal characterization will have an impact on the second major legal characterization of the relationships between these persons involved. These relationships will be determined by the legal sources of the obligations that may have been created in the makeup of these relationships.

2. First Legal Characterization: Persons

Since three persons were involved in this case, actively or passively, a legal characterization of the legal status of each one of them must open our legal analysis to determine, in the second legal characterization, the role played by each person in their "triangular" relationships.

The very first and most encompassing legal characterization made in the Civil Code is introduced in article 24: "There are two kinds of persons: natural persons and juridical persons."[146] Transposing the facts of the case into this dual legal characterization, the Southfield School would be a juridical person, while McKee III and McKee IV would be natural persons. Nothing more needs to be said about the school.

Focusing on the father and son duo, a logical sub-characterization arises under the title *Parent and Child* (Title 7, Book I).[147] Moving another step down in our legal analysis, we are given two intertwined sub-sub-characterizations of this *Parent and Child* characterization under the titles of *General Principles of Parental Authority* and *Obligations of Parents*. In the legal regime of *General Principles of Parental Authority*, we find article 222, which states: "Parental authority includes representation of the child and the right to designate a tutor for the child."[148] Article 223 adds that "[p]arental authority includes rights and obligations of physical care, supervision, protection, discipline, and instruction of the child."[149] In its wording, article 223 leads to *Obligations of Parents* as a related sub-characterization. In this sub-characterization, we can read in article 224 that "[p]arents are obligated to support, maintain, and educate their child.

145. LA. CIV. CODE bk. III, tit. IV (2021).
146. *Id.* art. 24.
147. *Id.* bk. I, tit, VII.
148. *Id.* art. 222.
149. *Id.* art. 223.

The obligation to educate a child continues after minority as provided by law."[150]

This sequence of legal characterizations leads one to say that McKee III, as father of McKee IV, had the legal obligation to educate his son and that McKee IV, as a minor child, had no legal capacity to enter into a contract with the Southfield School, a juridical person.

Article 222, in its wording, brings on our legal canvass another most relevant institution or legal characterization mentioned in Book 3 under the title *Representation*, and under the broader title *Representation and Mandate*. In the words of article 2985, "A person may represent another person in legal relations as provided by law or by juridical act. This is called representation."[151] If this article was not in the Civil Code when this case was before the courts, it remains that article 222[152] was in the Code and so was the institution of *Mandate*, which was then, and still is, a contractual form of representing someone. Under Code articles 222, 223, and 224, the father was representing his son, then a minor and therefore legally incapable, in the contracts with the school. It follows that under the law, McKee IV was a party to the contracts as represented by his father, his legal representative under the law.[153]

That McKee IV was a party to the contracts with the school is further established by another institution or legal characterization of Book 3 of the Civil Code under the name of *Confirmation* in article 1842.[154] Indeed, when McKee IV brought an action against the school to demand that he be issued a transcript, he based his action on the contracts entered into in his name by his father with the school.[155] In bringing this action, McKee IV was "confirming" that he had been in a contractual relationship with Southfield School back at a time when he was legally incapable but represented by his father. Now of age, McKee IV was "confirming" that he was "curing" the potential relative nullity of the contracts on the ground of his former incapacity on account of his age.

So it is our conclusion that the court of appeal should not have stated that "McKee, while not a party to the contract. . . ."[156] McKee had been a party to the contract from day one and later, when of age, he confirmed that he had been a party to the contract from day one.

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150. *Id.* art. 224.
151. *Id.* art. 2985.
152. *Id.* art. 222.
153. *Id.* arts. 222–224.
154. *Id.* art. 1842.
155. McKee v. Southfield Sch., 613 So. 2d 659, 661 (La. Ct. App. 2d Cir. 1993).
156. *Id.* at 659.

3. Relationships Between the Parties: Legal Characterizations

1: Legal characterization of the contract. Of the four requirements for the formation of a valid contract, the requirements of cause and object are the most instrumental in the legal characterization of the contract in this case. Regarding the cause of the contract, it appears that it consisted in the father's "duty and reason" of giving an education to his son, and it was so understood by the school. Regarding the object of the contract, because it is a synallagmatic and onerous contract,[157] there are obligations on both sides of the contract, and therefore, each obligation has an object or maybe two objects.[158] One of these multiple objects will be singled out and contribute to the legal characterization of the contract.

On the father's side, the object of his obligation was to pay the tuition. Such would be an obligation on the part of the father "to give," to deliver a certain amount of money to the school. As such, this object of the father's obligation does not help much in the legal characterization of the contract since one may owe money to another for a variety of reasons or causes.

On the school's side, the main object of its obligation, and the object that the father was considering as the reason for his entering into a contract with the school, was the education he wanted his son to receive. As an object, education is an incorporeal thing and the object of an obligation "to do," to wit, provide a service.[159] Hence the legal characterization of the contract as being "hiring of industry,"[160] a special kind of "Lease."[161] Under normal circumstances, had the father paid the full amount of the tuition in due time, the school would have acknowledged having provided his son an education and having received the full tuition by issuing the father and son a transcript. Since the issuance of a transcript is the ground for McKee IV's action against Southfield School, the question is whether there was an obligation on the part of the school to issue a transcript regardless of whether the father had paid the whole tuition. Was the school bound by the contract to issue a transcript as a separate and distinct object from the education as the principal object of the contract? Was there a separate cause for the transcript? One can look at a transcript as a receipt for the length of an education provided for a certain amount of tuition paid on time. An education for the tuition would be the objects of the correlative obligations of the parties, and their performance "in good faith" an effect

157. LA. CIV. CODE arts. 1908–1909 (2021).
158. *Id.* arts. 1971–1972.
159. *Id.* arts. 1756, 1765, 1766.
160. *Id.* arts. 2745.
161. *Id.* arts. 2668.

of the contract as the law for the parties.[162] In not handing over a transcript, Southfield School was exercising its right not to consent to a unilateral modification of the contract by the father, who was relying on his partial performance of his obligation to pay the tuition and was unwilling to pay the disputed part of the amount of tuition he owed.[163] One can also look upon the father's payments in installments, consented to by the school, as suspensive terms. Under article 1990, the mere arrival of the term puts the obligor in default—the father thus being in default every time he failed to pay the requested amount of tuition.[164] Such a breach of his obligations by the father cannot be used as a ground for bringing an action to compel the obligee, Southfield School, to perform its own obligation.

It is obvious that Southfield School could not "take back" the education it had provided the son so as to enable the school to "erase the past" in issuing a "blank" transcript to the son. The transcript is, in a sense, a corporeal thing that represents an incorporeal thing, the education—or in legal terms, an accessory thing, which could not exist but for the existence of a principal thing. In application of the principle *accessorium sequitur principale* (the accessory follows the principal), since the father failed to pay the tuition for the education received by his son, the father was not entitled to receive the accessory thing of the principal thing.

2: Detrimental Reliance. Detrimental reliance, if considered as "cause" under Code article 1967,[165] would then become a required element for the formation of a contract, as are consent, object, and capacity. If the cause of a contract is unlawful or contrary to public policy, the contract cannot exist because of its nullity.[166] When cause exists at the time of the formation of a contract, it must also be in existence for as long as the contract is binding between the parties. In the *McKee* case, there was a valid contract, binding between the parties, including the son McKee IV, and the cause of the synallagmatic, onerous contract was lawful.

There is absolutely no reasonable legal argument that could be made in support of detrimental reliance as cause[167] to be used by a party to the contract as some kind of a ground of action of an "equitable nature" to undo the fundamental principle expressly stated in article 2983 that "[c]ontracts have the effects of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by

162. *Id.* art. 1983.
163. *Id.* art. 1861.
164. *Id.* art. 1990.
165. As per the title of Chapter 5: "Cause."
166. LA. CIV. CODE art. 2029 (2021).
167. *Id.* art. 1967 cmt. f.

law. . . ."[168] And it is particularly so when the party-plaintiff is an obligor who failed to perform his obligation. As Judge Victory wrote so well in his dissent: "[T]he majority has erroneously applied the doctrine of detrimental reliance to force the non-breaching party, Southfield, to *fully* perform under the contract after repeated breaches of the contract by plaintiff's father, in whose shoes he stands under the contract."[169]

3: Third Party Beneficiary. Surreptitiously and not overtly, the majority hinted at the possible existence of the institution of a third party beneficiary in the person of the son, McKee IV, when the court referred to the 1979 case of *National Safe Corp. v. Benedict and Myrick, Inc*. and in a long paragraph that follows.[170] Judge Victory put words under the majority's pen when he wrote: "Assuming, arguendo, that detrimental reliance can be applicable to a situation where the third party beneficiary is the child of the party breaching a contract. . . ."[171] Beside the fact, as explained above, that the son was actually and legally a party to the contract and therefore could not hide behind being a third party beneficiary, the legal regime of this institution would be an obstacle he could not surmount. Indeed, under Louisiana Civil Code article 1982, "[t]he promisor may raise against the beneficiary such defenses based on the contract as he may have raised against the stipulator."[172] Thus, even if McKee IV could be considered a third party beneficiary, he could not have greater rights than his father (stipulator) had to go against the school (promisor)—and the father had no rights.

4: Conclusion. For the reasons given above, the majority was wrong in affirming the trial court judgment that required Southfield School to issue a transcript to McKee IV.[173]

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168. *Id.* art. 1983.

169. McKee v. Southfield Sch., 613 So. 2d 659, 664 (La. Ct. App. 2d Cir. 1993).

170. *Id.* at 661 (citing Nat'l Safe Corp. v. Benedict and Myrick, Inc., 371 So. 2d 792 (La. 1979)).

171. *Id.* at 663.

172. LA. CIV. CODE art. 1982 (2021).

173. For two additional illustrations of wrong legal characterizations, see Alain Levasseur, *Réméré, Option, Security Contract, or What? Case of* Potts v. Spatafora, *in An About Turn,* 38 LA. L. REV. 360, 367 (1978); Alain Levasseur, *Sale of a Thing or Letting and Hiring of Industry*, 39 LA. L. REV. 705 (1979). For four very good illustrations of legal characterizations, see Segura v. Frank, 630 So. 2d 714 (La. 1994); W&T Offshore, L.L.C. v. Tex. Brine Corp., 319 So. 3d 822, 823–37 (La. 2019) (Weimer, J., dissenting); DePhillips v. Hosp. Serv. Dist. No.1 of Tangipahoa Par., No. 19-01496, 2020 WL 3867212 (La. July 9, 2020); Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n, 903 So. 2d 1071 (La. 2005).