LEGAL CULTURE AND LEGAL TRANSPLANTS IN THE PRIVATE LAW OF TEXAS AND LOUISIANA: THE COMMUNITY PROPERTY REGIME AND FORCED HEIRSHIP

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LEGAL HISTORY AND ETHNOLOGY: LEGAL CULTURE AND LEGAL TRANSPLANT

The use, side by side, of the two concepts of 'legal culture' and 'legal transplant' in one and the same title, leads to the assumption that these concepts share a common core. The shared adjective, 'legal,' is the reason for this assumption. Yet, both concepts have engendered an abundance of literature tainted with controversies, criticisms, replies and counter-replies among scholars. It is certainly not the purpose of this national report to bear judgment on the different scholarly views and opinions expressed across a wide spectrum or to take side with either line of thought. Rather than add to the "scholarly mill", we will stand back and merely present here a few excerpts taken from the works of sociologists, anthropologists, legal scholars...to 'test' the essence, wisdom and realism of these excerpts against the destiny of two legal institutions of private law: the matrimonial regime of the community property, on the one hand, and succession, or inheritance, on the other, within the political, social, human, philosophical, and linguistic contexts of the states of Texas and Louisiana. We hope, thereby, to address many of the profound and pertinent questions asked by the general reporter.

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1. *Culture and legal culture*

"...what is a 'legal culture', and what is the concept supposed to do for us?... Legal culture, ...refers to ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds. Like 'public opinion'...legal culture refers to measurable phenomena; indeed, it is an umbrella term to cover a range of measurable phenomena.[...] legal culture is an essential intervening variable in the process of producing legal stasis or change".[1]

"[...] the concept of culture-and perhaps legal culture-remains useful as a way of referring to clusters of social phenomena (patterns of thought and belief, patterns of action or interaction, characteristic institutions) coexisting in certain social environments, where the exact relationships existing among elements in the cluster are not clear or are not of concern. Culture is a convenient concept with which to refer provisionally to a general environment of social practices, traditions, understandings and values in which the law exists. Legal culture [may be considered as] a means of characterizing in extremely broad and, perhaps, more or less impressionistic terms large aggregates of distinct elements... To isolate 'the legal' requires an analysis of culture into its components and a specification theoretically of the relation of elements. But this is precisely what the use of the idea of culture as an aggregate seeks to bypass-or, at least, seems to justify bypassing...".[2]

"Civilization and culture both refer to the overall way of life of a people, and a civilization is a culture writ large. They both involve the 'values, norms, institutions, and modes of thinking to which successive generations in a given society have attached primary importance'".[3]

"In the language of the anthropologist, the word 'culture' does not mean only the totality of everyman's knowledge; it is also the totality of the values, traditions, customs, beliefs and ways of thinking which characterize every human community...The anthropologist teaches the jurist how to build a reasonable and realistic system of sources. More surprisingly, it teaches the jurist how to create a theory of the fact which is subjected to judgment".[4]

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1 Friedman, Lawrence M., "The Concept of Legal Culture: A Reply", *Comparing Legal Cultures*, Dartmouth Publishing 1997, p. 34.
2 Cotterrell, Roger, "The Concept of Legal Culture: a Reply", note 1, p. 27.
3 Huntington, Samuel P., The Clash of Civilizations and the Remaking of World Order, Simon and Schuster, 2003, p. 41.
4 Sacco, Rodolfo, Anthropologie Juridique, Apport À une Macro-Histoire du Droit, Alain A. Levasseur (trans.), Dalloz, 2008, pp. 3, 13.

"There exists a necessary harmony between legal facts and the facts of culture...Culture has an impact on the law...".[5]

"Law is not given to be observed in some kind of 'source'. It is to be found, in every case, in the dialogue that occurs between all the sources and all available points of reference... Law is a constant dialogue between human nature, technical, economic and historical conditions of life in a society, legal dispositions and court decisions. The order that spontaneously emerges out of it is the law".[6]

2. *Legal transplant*

"The literature on legal transplants abounds with terminological distinctions... By itself, this terminological fragmentation suggests that identifying what a transplant is can be a tricky matter... It is virtually impossible to make sense of legal transplants without inquiring what legal change implies in empirical terms, i.e., in terms of empirical analysis of the social acts involved in the actuation of transplants by individuals...Transplants bring into contact bodies of law which are based on different assumptions, if not even on different ontologies. This by itself casts doubt on the absolute validity of the normative systems that come into contact...".[7]

"[...]legal transplants-the moving of a rule or a system of law from one country to another, or from one people to another-have been common since the earliest recorded history...[Roscoe Pound wrote]: 'History of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law'...The fact is, I believe, that even in theory there is no simple correlation between a society and its law[...] for a legal rule or institution to come into being, to be borrowed, to be changed, or to disappear, an official act must intervene...Only legislation can make radical changes, because reliance on authority is an almost necessary ingredient in subordinate lawmaking, yet to a great extent legislatures neglect private law".[8]

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[5] Lévy-Bruhl, Henri, Sociologie du droit, Que sais-je, Alain A. Levasseur (trans.), Presses Universitaires de France, 1981, p. 83.

[6] Atias, Christian, EpistÉmologie du droit, Que sais-je, Alain A. Levasseur (trans.), Presses Universitaires de France, 1994, pp. 122, 131 and 132.

[7] Graziadei, Michele, "Legal Transplants and the Frontiers of Legal Knowledge", *Theoretical Inquiries in Law*, vol. 10, num. 2, Article 15, July 2009, pp. 731, 734, 741. See the abundant literature on legal transplants cited in this article, particularly in footnotes 2 to 10.

[8] Watson, Alan, *Legal Transplants: An Approach to Comparative Law*, University of Georgia Press, 1993 (1975), pp. 21, 22, 108.

I. TEXAS AND LOUISIANA: HISTORICAL CONTEXT

The two neighboring states of Texas and Louisiana have had, for many decades, the same political history shaped by two major foreign powers of the time, France and Spain. As a result, much of the centuries old cultural heritage of these two Nations has inspired and nourished, for many decades in the case of Texas and still today in the case of Louisiana, very unique legal cultures which, besides other ties, fashion and feed a close understanding between these two states of the United States. These legal cultures are still, in this century, living illustrations, more or less pronounced over the decades, of their sources and foundations which can be traced to the philosophies, ideologies, religions, sociological models and languages of the civil law systems of the two sovereign powers that held sway, at one time or another, over these two states.

After a brief, but necessary, political history of the States of Texas and Louisiana, we will outline the major events which helped bring the civil law systems to these two former "territories" and look into the subsequent divergent paths which led Texas to join, to a very large extent, the forty nine other jurisdictions living under the common law system, whereas Louisiana, on the eastern side of the Sabine River, forged her way ahead and alone into preserving its unique legal heritage it had acquired from France and Spain under the form of a civil Code.

1. *Texas: Political History*

In 1519, after exploring the southern part of the new continent on the coast on the Gulf of Mexico, Alonso Alvarez de Pineda claimed what is now the state of Texas for the Spanish Crown. However, the first true settlement by a foreign nation did not occur until almost a century later when Robert Cavelier Sieur de la Salle established a French colony in Fort Saint Louis near Matagorda Bay. In order to counter the 'mistaken' presence of France on 'its' territory,[9] Spain sent a few missions but they withdrew by the year 1691. Considering the always threatening presence of France in the neighboring territory of Louisiana and France's possible ambitions over its province of Texas, Spain eventually established a series of villages and missions in the province. After Mexico gained its independence from Spain in 1821, the territory of Texas became a part of "Mexico", now a country. When Mexico attempted to impose a centralized form of government on the territory, settlers supporting a federalist form of government revolted in 1835 and on March 2, 1836 Texas declared itself a Republic and an independent country. However, the Mexican President, Antonio Lopez de Santa Anna,

[9] Robert Cavelier Sieur de la Salle thought he had discovered the mouth of the Mississippi river and had claimed the territory for France (see below 2. Louisiana: Political History).

himself led an army to defeat the rebellion. The Mexican army overwhelmed the Texan garrison at Fort Alamo but on April 21, 1836, Texas general Sam Houston defeated the Mexican army at the battle of San Jacinto capturing Antonio Lopez de Santa Anna himself. The treaties of Velasco signed by Santa Anna ended the war with Mexico although the treaties had not been ratified by the Mexican Congress. In 1845 Texas became the 28th state of the United States. However, Mexico had not given up its claim on Texas and in the month of April 1846 a contingent of Mexican soldiers attacked a U.S. military unit. The Mexican-American war had begun. It did not last very long as the U.S. troops under General Zachary Taylor defeated the Mexican army in May 1846 at Palo Alto and Resaca de la Palma. The treaty of Guadalupe Hidalgo on Feb.1848 ended the war. Texas seceded from the United States in 1861 until the civil war ended in 1865.[10]

2. *Louisiana: Political History*

The year 1682 marks the beginning of the French presence on the territory that would eventually become, in part, Louisiana. The same Robert Cavelier Sieur de la Salle who established a French colony in Texas, did claim the huge territory stretching from the Great Lakes to the Gulf of Mexico for the French King. The first true French settlement dates back to the year 1699. Whereas the French crown had control of the political structure and administration of the province, an Edict of September 1712 transferred all operations of trade and commerce to a merchant by the name of Antoine Crozat. In 1717, Crozat was succeeded by the Company of the West Indies, which in turn surrendered all commercial and business affairs to the French crown itself in 1731. In November 1762, by the treaty of Fontainebleau, the French king transferred the territory to his cousin, the king of Spain. This transfer was confirmed a year later, in 1763, by the treaty of Paris. The French local population of the transferred territory became very upset at the news of the transfer and rebelled against the Spanish Crown to the point of expelling, by force, the Spanish governor. In 1769, the reaction of Spain was forceful, harsh and effective. The new military commander, O'Reilly, took control of the colony and established the Spanish form of government in all matters: military, administrative, financial and, as we shall see, judicial and legal. After almost forty years of Spanish rule, by the treaty of San Ildephonso of October 1800, Spain retroceded the territory to France but only for a very short time. Napoléon had been negotiating, in

[10] Chipman, David, *Spanish Texas 1519-1821*, University of Texas Press, 1992; Hardin, Stephen, *Texian Iliad*, University of Texas Press, 1994; Manchaca, Martha, *Recovering History, Constructing Race: The Indian, Black, and White Roots Of Mexican Americans*, University of Texas Press, 2001; Vazquez, Josefina Zoraida, "The Colonization and Loss of Texas: A Mexican Perspective", in Rodriguez O. *et al*., *Myths, Misdeeds, and Misunderstandings: The Roots of Conflict in U. S.–Mexican Relations (Scholarly Resources Inc. 1997);* Weber, David, The Spanish Frontier in North America (Yale University Press 1992).

the meantime, the "sale" of Louisiana to the United States and the official transfer from France to the United States took place with the Treaty of Paris of April 1803. Louisiana became a state of the Union in the month of April 1812.

3. *Texas and Louisiana: Legal History*

The States of Texas and Louisiana having been governed in the course of their history by the same two European sovereign powers, their legal histories have had much in common until the beginning of the 19th century. This commonality of the two legal systems lies essentially in the many identical sources of law then enforced by Spain. Sometime into the 19th century, Texas and Louisiana parted ways under the influence and pressure of different internal cultural forces identified mainly with the country or countries of origin and of migration of their own population and the language spoken by the majority of their respective population.

A. *Spanish sources of law in Texas*

There were many different compilations of the laws of the kingdom of Castille, often inappropriately referred to as 'Spanish law', which were implemented in the colonies of the kingdom. Among the most important, by their content and their form, were Las Siete Partidas and the Recopilación de las Leyes de Indias[11]. As we shall see below they had much of an impact on the private law of both Texas and Louisiana.

Las Siete Partidas were compiled in the 13th century but not promulgated until 1348. Much Roman law and many concepts of canon law were incorporated in Las Siete Partidas. In 1530, many sections of the Partidas became the law of the colonies through their insertion into the *Recopilación de las Leyes de Indias* or the laws of the Indies. Since Spanish law

[11] On the Recopilación de las Indias, Sherman has written: "The Recopilacion de las Indias is the primary source of Spanish-America colonial law. But if the far-seeing wisdom of the Recopilacion with its wealth of details had not anticipated any possible case that might arise, then it was provided in the law of the Indies themselves that the laws of Castile should be observed. The order in which these should be employed was as follows: (1) the latest laws enacted for the colonies; (2) the Neuva Recopilación; (3) the laws of Toro; (4) the royal ordinances of Castile; (5) the Ordenamiento of Alcalá; (6) the Fuero Juzgo; (7) the Siete Partidas; (8) the Consulado del Mar and the Ordinances of Burgos until the Ordinances of Bilboa were promulgated in 1737, thereafter those of Bilboa. Thus the Castillian law became the fundamental law of the Spanish possessions in America, but the condition of the colonies was not always the same as that of the mother country; hence by the Laws of the Indies it was provided that no Spanish law should be binding in America unless made applicable to the colonies by an order of the Council of the Indies. As a result not every Spanish law was extended to America; while some laws not in force at home were enacted specially for the colonies." Henry P. Dart**,** *The Colonial Legal Systems of Arkansas, Louisiana and Texas*, 12 A.B.A. 645, (1926).

was the law of the land still in the 1830s and 1840s, it is rather common to find decisions of Texas courts which build their legal reasoning on such Spanish sources. In the case of *Scott and Solomon vs. Maynard et uxor*,[12] the court stated that "the question next in order is as to the validity of a verbal sale under the laws of Spain. In the 5th *Partida*, tit.5, law 6, it is said that sale and purchase may be affected in two ways, etc." The court went on to cite two Louisiana cases to the effect that "by the Spanish laws, parol evidence was admissible to establish the alienation or acquisition of immovable property...". Likewise, in the case of *Garret vs. Nash*,[13] the Supreme Court of Texas inquired whether in the case of

> *The impoverishment of the widow, she was entitled to the fourth part of her deceased husband's estate, notwithstanding her re-marriage within the period of twelve months after his death," the court went on to state that "in Parta.,6, tit.13, law 7, it is declared that men are sometimes content to marry women who are poor and without a dowry;....to support the position assumed by the appellant, reference is made to the 3d Partida, title 11, law 3, and to a passage in the works of Febrero...".*

> *In 1836 the new republic adopted a constitution [which] bore a strong resemblance to that of the United States...Many of its clauses reflect the two concepts that permeate the body of Texas law-dependence on the common law, plus a recognition that in some respects the Spanish system is to be preferred...Accordingly, in 1840 an act was passed marking the reception of the common law, but excepting from its coverage all land grants, mineral rights, and marital-property concepts. In these areas...the civil law prevailed...; the constitution of 1869 was superseded in 1876 by the present one...*[14]

> *The Constitution of 1845 was drawn on the...common law concept [of a legal order under which the Anglo-Americans could live...]. The civil law of Spain, with its mass of legislation and codification and its body of abstract principles, was not to come within the cultural knowledge of the Anglo-American colonists to any extent. Their own deep-rooted convictions of the traditions of the common law were to emerge.*[15]

B. *French and Spanish sources of law in Louisiana*

The most reliable account on the French and Spanish sources of the Louisiana civil law system has been written by one of the three drafters of the Louisiana civil Code of 1825, Louis Casimir Moreau Lislet, who had also

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[12] *Dallum* 548, 551 (Tex. Sup. Ct. 1843).
[13] *Dallum* 497, 498 (Tex. Sup. Ct. 1843).
[14] MARIAN BONER, A REFERENCE GUIDE TO TEXAS LAW & LEGAL HISTORY 9-10 (University of Texas Press, 1976).
[15] Clody, Frances Spears. *Facets of Texas Legal History*, 52 SMU L. Rev. 1653, 1665, (Fall 1999).

been the principal drafter of the first Louisiana Civil Code of 1808[16]. In the "Translator's Preface" of "The Laws of *Las Siete Partidas* which are still in force in the state of Louisiana", Moreau Lislet and Henry Carleton, wrote the following:

> *...how it happened, that the laws of Spain, are still in force in Louisiana, since its transfer to the United States of America.*
>
> *The customs of Paris and the ordinance of the kingdom, were observed in Louisiana while it remained under the dominion of France...Justice was administered by a Supreme Tribunal composed of several judges, called the Superior Council (Le Conseil Supérieur) and one attorney general. This state of things, existed until the month of August 1769, when count O'Reilly took possession of that country in the name of the king of Spain...O'Reilly issued a proclamation, changing the form of the government of Louisiana, abolishing the authority of the French laws, and substituting those of Spain in their stead...From the time of its promulgation until now, the French laws ceased to have any authority in this country, and all controversies were tried and decided conformably to the Spanish laws...The return of Louisiana under the dominion of France, and its transfer to the United States did not for a moment, weaken the Spanish laws in that province. The French, during the short continuation of their power, from the 30th November to the 20th December 1803, made no alteration in the jurisprudence of the country; and the government of the United States left the task of legislation to the people of Louisiana themselves...*[17]

By the Act of March 26, 1804, the U.S. Congress provided that

> *The laws in force in the said territory (of Orleans), at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force, until altered, modified, or repealed by the legislature." Subsequently, the Territory of Orleans Legislative Council adopted an Act, in May 1806, "declaring...that the laws which remain in force,...are the laws and authorities following, to wit: 1. The roman Civil code, as being the foundation of the spanish law, by which this country was governed before its cession to France and to the United States...; 2. The Spanish law, consisting of the books of the recopilation de Castilla and autos acordados...; the seven parts or partidas of the king Don Alphonse the learned,...; the (fueroreal)...; the recopilation de Indias...the laws of Toro....; the whole aided by the authority of the reputable commentators admitted in the courts of Justice...*[18]

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[16] The second drafter of the 1808 Civil Code was James Brown; the other two drafters of the Civil Code of 1825 were Pierre Derbigny and Edward Livingston.

[17] The Laws of *Las Siete Partidas* which are still in force in the State of Louisiana, translated by L. Moreau Lislet and Henry Carleton, Counsellors at Law, vol.1, New Orleans, 1820.

[18] Levasseur, Alain and Lislet, Moreau, *The Man Behind The Digest of 1808*, Claitor's Publishing Division, 2008, pp. 48, 54-56.

One will have noticed the close resemblance, not to say the glaring identity in the Spanish sources of the legal systems of Texas and Louisiana up to the 1800s. Thereafter, Louisiana will continue on its own path in preserving its legal heritage and formalizing it in adopting civil Codes. Still, we can find in some legal institutions of the legal systems of Texas and Louisiana many common traces of their "civil law" legal heritage.

We have selected to look at the status of women, as spouses, in the family and the legal regimes of successions as institutions which most likely reflect the incorporation of endogenous cultural traits or ideologies or legal mechanisms identifiable with one active and radiating societal group as they are transplanted into a passive and recipient societal group.[19]

II. STATUS OF WOMEN AS "WIVES"

Before focusing on the laws of Texas and Louisiana in their formative period, it is appropriate to refer to the status of women as spouses in the common law jurisdictions also at the time of the framing of their legal systems in 'early America'.

1. *Family Property rights in New England in Early America*

In *Women and the Law of Property in Early America*, Marylynn Salmon undertook to study *the property rights of early American women*. She points out that such a topic *had little to do with either women or the law of property*,[20] but much more with explaining *the remarkable diversity in colonial laws. No two colonies (and later, states) came to precisely the same conclusions about how to manage property under the law*.

> *The settlers of New England came to America determined to create a society shaped by the teachings of their faith. The law played an important role in assisting them to build their New World utopia... It is not surprising...to find Puritan lawmakers in Connecticut and Massachusetts developing rules on family property that agreed with their ideological concerns....*
>
> *New Englanders gave male heads of household more control over family property, including what wives inherited or earned, than was common elsewhere...*
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> *Connecticut and Massachusetts changed standard English common law rules adopted in the other colonies. Puritan lawmakers worked under a set of assumptions*

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[19] Salmon, Marylynn, *Women and the Law of Property in Early America*, The University of North Carolina Press, 1986.
[20] SALMON, *supra* note 19, at 3, 6-9.

that differed from those of other Englishmen, and they did not offer married women the usual protections for their estates...

[T]he Puritans emphasized a hierarchy of relationships among all members of society. Within seventeenth-century English families the father and husband wielded absolute authority. A wife, like her children, owed the family head obedience in religious and secular matters. Unlike their contemporaries, however, Puritans possessed the conviction to act according to their beliefs...

The rejection of English rules created to grant women independent rights within the family was a logical step to seventeenth-century Puritans. Not only did requiring a wife's signature on a land deed and a private examination complicate the law....it also contradicted a central tenet of Puritanism: the wife's submission to her husband's will. An obedient and dutiful wife did not need to express her public approval of a conveyance arranged by her spouse...Good Puritan women trusted their husbands, and later their sons, to take care of them...

Under the common law the widow received her dower share before creditors could make their claims on the estate, but in William Penn's colony...lands were made liable for a man's debts. Indigent widows became dependent on children, other relatives...[21]

2. *Family Property Rights in the Southwestern States*

It...seems reasonably clear that Spanish law has left a permanent imprint on the matrimonial property law of the Southwestern and Western States, but its influence there has otherwise been temporary and is currently rather insignificant...It might be asked why Spanish family law has had more staying power than Spanish civil law generally. Second, ..., there might be speculation as to the reasons for the tenacity of Spanish matrimonial property law as opposed to that of Spanish family law generally....The 'general part' of the civil law could not, in the nature of things, survive the wholesale reception of the common law. The Spanish law of real property in what is now Anglophonic North America was primarily and almost exclusively a public law system of land allocation by the sovereign rather than a private law system regulating land transfers between individuals....The "family wealth"...presents a different picture. The acquisition, improvement, and familial transmission of land was the basic aim of Anglo-Saxon settlement in Spanish and Mexican North America. The ganancial system of matrimonial property was readily accepted by the settlers as best designed for local conditions, and it has survived because, with appropriate modifications, it is even today demonstrably superior to

[21] *Ibidem*, p. 9.

> *any other. Forced heirship, however, rapidly succumbed to the individualistic spirit of Anglo-American law.*[22]

These excerpts stress that communities may have the same origin, Europe and England more specifically, and yet, because of the lesser or stronger influence of some component parts or others of the same endogenous culture, these communities end up adopting divergent legal solutions to the same legal issue particularly as regards the rights of wives on the property of the marriage. In this respect, the references below will illustrate the existence, at one time, of a clear divide between the colonies or states of the northern part of the United States and the *southern law* of the states of Texas and Louisiana. We will observe that over the decades the rights of a wife on the property of the marriage will become equal to those of a husband as justified by moral and human values, as well as by sociological and economic considerations. These values and considerations will merge into constitutional principles and give the latter an *aggressive* destiny. These principles of individualism, autonomy, equality, liberty... will foster major, as well as rapid, changes in all relationships between human beings and very specifically within the realm of the family where they will transform the economic and financial relationship between spouses and the rights of children to claim a share in the succession of their parents.[23]

3. *Property rights of 'wives' in Texas: community property*

> *Spanish marital property law differentiated ownership from control. Though husband and wife owned the community property together, the husband alone disposed of it...He managed the community property and could transfer the property in his name only...A wife had control of the community property provided her husband consented. Her debts did not bind the community...The husband's control of the community property was virtually exclusive...If after the death of her husband...she conducted her life with propriety, she acquired complete and absolute control of her share of the estate and could do what she wanted with it without regard to the rights of her children...As owner of half the community, she was liable for debts incurred for the property. The law presumed that the husband's control was for the benefit of both...A husband's control of the family property extended to segments of his wife's property...When the marriage ended, the dower returned to the wife or went to her heirs...In recognizing married women as property owners, the Spanish law sharply differed from the common law. Unlike the English common law, the Spanish law offered married women a distinct legal identity...Some scholars suggested that those states that adhered to the principles of community*

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[22] Baade, Hans W., "The Form of Marriage in Spanish North America", *Cornell L. Rev.*, num. 61, 1975, pp. 3 and 4. See also, Dart, Henry P., "Marriage Contracts of French Colonial Louisiana", *Louisiana Historical Quarterly*, num. 17, 1934, pp. 229-241.

[23] U.S. CONST. amend. 19 §1;INT'L. DEC. of HUM. RTS. art. 17

property reproduced the environment that originally gave rise to those concepts. Particularly in the Western states, women toiled alongside their husbands for the benefit of the whole family and shared the fruits of the harvest. Scholars have held that certain states retained the community property system because residents who were accustomed to the civil law successfully advocated its retention…Soon after Mexico had achieved independence from Spain, Anglo-Americans began migrating to the Texas territory…The allegedly despotic government of Antonio Lopez de Santa Anna in the late 1830's further alienated Texas from Mexico. Rebellion erupted and ended with the independence of Texas in 1836…When Texas disgorged Mexican authority, what remained was a mix of cultures, each accustomed to the laws of its parent country. Anglo-Americans were accustomed to the common law, while the old French and Spanish inhabitants were familiar only with the civil law. Rather than adopt one system over the other, the young republic chose from each custom those laws that best suited its needs…As early as 1835, Texas began to build its legal system through hybridization and improvisation…On…January 16, 1836, the provisional government declared that the laws of Louisiana would control all proceedings with respect to successions, probate matters, and the like. There was, however, a proclivity to anglicize the law as much as possible…During this time Texas formulated its first marital property statute…The influence of the English common law and the French and Spanish civil law was evident. The ancestry of the act is unclear. Apparently it was a combination of sources, the origins of which remain obscure…On January 20, 1840, the Texas legislature enacted a measure which adopted the common law of England, repealed specific Mexican laws, and defined marital property rights…In constructing its marital property laws, Texas borrowed from a variety of sources. From the 1840 text, appropriation and application of the English common law and of the Spanish civil law were plain. Texas defined a wife's paraphernalia according to the English common law and simultaneously embraced the Spanish principles of community property. Conceivably, Texas reproduced parts of the laws of Louisiana and Mississippi, and drew from the laws of a number of common law states…Despite the infiltration of Anglo-Americans, the Spanish influence on marital property laws had, according to Joseph W. McKnight, "remarkable staying power." Retaining elements of those laws served vital social functions…The Texas laws, like the laws of other states, attempted to define the rights, responsibilities, and remedies of husband and wife to protect families against economic ruin…In guarding married women against negligent husbands, the Texas law partially filled a moral void. In a most fundamental way, the married women's property acts of Texas represented the collective solutions of a frontier community. Such public responses deviated from the Anglo-European tradition which held an individual responsible for his or her own calamities…The 1848 act expanded a husband's powers over his wife's property…The law declared the husband sole manager of all her separate property. The act also declared the husband sole administrator of the community property…The 1856 law intended to protect a wife's interests in the community by protecting her heirs and her creditors. Women derived better protection for their

property while widowed or dead than while married...The institution of registration laws and of the 1856 proscriptions showed that Texas lawmakers chose to protect the property of married women through public intervention rather than through private action where a married woman freely controlled her own property...McKnight interpreted the modifications in the definitions of community and separate property as responses to "a much broader knowledge of Spanish law in Texas than there had been in 1840." More likely though, the policymakers reacted to public exigencies rather than to a desire to adhere to principles of Spanish law. The motives were decidedly practical...For Texas, the Civil War and Reconstruction generated no substantive changes in the law of marital property...Undoubtedly the war and its aftermath altered informal property arrangements between husband and wife. While men were at war, women managed and controlled family estates and businesses regardless of legal proscription. Indeed, the war left many women permanent managers of family property. The formal law failed to reflect the social shift. From the close of the war through the next fifty years the law remained relatively static despite the socioeconomic changes that affected Texas during that period...Not until 1913 did a comparatively major change in marital property rights occur which inaugurated a new phase in the development of Texas marital property law. That year, married women received partial control of their separate property and control of a segment of the community property...[24]

From that period [1913] until 1967, various attempts were made to clarify the law concerning management and control. To generalize, community property was divided into two categories: special and community property. The wife managed and controlled the special community (community property derived from her income and from rents and revenues from separate property) and the husband managed and controlled the remaining or general community property...". Amendments to the Texas Family Code in 1967 and 1969 granted each spouse "the sole management, control, and disposition of his or her separate property." As regards the community property, "during marriage, each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single... The distinction between control and ownership must be kept in mind when dealing with community property. Each spouse owns a one-half interest in all community funds regardless of which spouse has management and control...As a general rule, the personal liability of the spouses and the corresponding property liability of their estates follow the rules governing spousal ownership and control rights. Each spouse is therefore personally liable for any breach of a contractual obligation or for injuries caused to others...[25]

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[24] This long excerpt is from Lazarou, Kathleen E., "Concealed Under Petticoats", *Married Women's Property and the Law of Texas 1840-1913*, Garland Publishing, Inc., 1986, pp. 47-62, 75-79, 81 and 82.

[25] Jentz, Gaylord A., *Texas Family Law*, 7th ed., University of Texas Printing Division, 1992, pp. 51-54.

Some judicial decisions will help further illustrate how the borrowings from an endogenous and long established legal culture can be fashioned and "transfused", as a whole or in part, under some "exportable format" to accommodate and provide solutions to legal issues which are identical in an importing and passive legal culture. To follow up on the doctrinal excerpts given above on the status of "wives" in the context of the family's property, we have chosen to give here extracts of a few decisions of Texas courts on the same issue to ascertain whether there were differences between the 'formal' sources of law and their 'application' by judges confronted with 'emotional, human and financial family problems'.

In the case of *Edrington vs. Mayfield* (1849) we read the following:

> *...it will be necessary to have a just perception of the quality or character of the estate which a wife under the law has in her separate property. At common law she had no separate estate. Her capacity to hold property in her own separate right and even her legal existence were merged by the coverture in that of the husband. But these principles and rules of law...are not only disregarded, but totally expunged from our code of jurisprudence...Her capacity to hold property separate and apart from her husband is as complete and perfect as that of the husband to hold in his own right separate and apart from his wife...It is true that the law has deemed it sound policy and beneficial to the interests of the wife that certain onerous restrictions should be imposed upon her ability to deal with her estate as a feme sole. But this does not affect her right to hold the property, but rather the reverse. They were designed to protect that right, and to preserve the wife from yielding to undue influences in the voluntary alienation of her property...This provision of the Constitution and the previous statute had abolished all the rules of the common law...*[26]

In *Andrew J. Yates v. Sam Houston*,[27] after it had addressed a first issue regarding the conclusive effect of a judgment of a probate court and a second

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[26] *Edrington vs. Mayfield*, 5 Tex. 363, 365-368 (1849). In the same year, in the case of *McIntyre v. Chappell*, 4 Tex.187, 198-199 (1849), we read: "…In Louisiana it is held that by the Spanish law, on the dissolution of marriage, everything holden by the husband and wife is presumed to be common property....The Supreme Court of that State have [sic] said that by the Spanish laws everything purchased during the marriage fell into the common stock of gains,..; but that to this rule there were many exceptions...".

[27] 3 Tex. 433, (1848). In 1882, in the case of *Elizabeth Routh v.W.A.Routh*, in its opinion, the court stated: "The law of our state then impresses upon the marriage relation inflexible and continuous durability, and at its formation, *ipso facto*, establishes a community of interest in all property that may be thereafter acquired by either of the matrimonial partners, except that acquired by gift, grant or descent. Under our law it may be said, as it is expressed by the Louisiana civil code, that every marriage superinduces, of right, partnership or community in all acquisitions. This conjugal partnership is not established upon the basis of equality of contribution of labor or capital by the parties to it, and it exists and is enforced under principles which recognize perfect union and equality of enjoyment of gains, and the division

issue whether Mrs. Harris was in legal contemplation the wife of John Jiams at the time of the grant of a tract of land from the government of Mexico, the Court turned to the third issue regarding whether the league of land granted under the colonization law of 1823 should be regarded as community property, and as such subject to division between the survivor and the heirs of the deceased partner of the marriage. The Court inquired: "as preliminary to an examination of [the positions of the two sides in the case], of what the community property is composed. In "El Dictionario de Legislacion" it is defined to be such as the husband and wife, or either of them, during the matrimony shall acquire by purchase, or by their labor and industry; also the profits of the separate property which each brings into the marriage, and also the profits of that which each shall acquire, by any lucrative title, during the continuance of the conjugal partnership. This definition is founded upon the laws in title 4, lib.X, Novissima Recopilacion...[T]he services of the family are always to be rendered for the benefit of the community, and not for its individual members, especially those in a subordinate relation. The law was framed to secure the migration of women as well as men. Their presence was indispensable to the domestic happiness of individuals, and to the order, welfare and continued existence and prosperity of the colony. It can not be supposed that a legislator, under the Spanish system, would intend that in a grant to be made to a family, consisting of a husband, wife and children, and this on onerous conditions, that the rights of the wife as partner in the conjugal society should be disregarded. The presumptions of law strongly favor the rights of the community, and they should have their due force where the law is not too clear to exclude their operation".[28]

4. *Property rights of "wives" in Louisiana: community property*

In its 1806 Resolution, the Legislative Council emphasized that 'every one knows...how successions are transferred, what is the power of parents over their children and the amount of property of which they can dispose to their prejudice, what are the rights which result from marriages...and the manner in which one can dispose by will...' The principles underlying the laws that govern each of these activities are shaped by the civilian concept of the 'family'. In the civil law, 'the family is the basic social group' serving as the 'basis for all groups but is the most important of them...The concept of the family and the corresponding recognition of the need to protect familial bonds lies at the heart of one of the most praised of all civilian institutions--the community property regime.[29]

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thereof, regardless of all inequalities induced by accident, misfortune, disease, idleness, or even wasteful habits of one or the other of the spouses. Such was the attribute assigned to this system by the Spanish civil law. See *Wheat v.Owens*, 15 Tex. 241."57 Tex. 589, (1882).

[28] *Ibidem*, pp. 452-456.

[29] Griffith, Neely S., "When Civilian Principles Clash with the Federal Law: An Examination of the Interplay between Louisiana's Family Law and Federal Statutory and Constitutional law", *Tul. L. Rev.*, num. 76, 2001, pp. 519, 521 and 522.

The "community property" regime of the Louisiana civil law dates back to the Custom of Paris[30] and to the Spanish law "prevailing at the time...Louisiana was ceded to the United States".[31]The community property regime, or "community of acquets or gains" was known in Spanish law as *sociedad de gananciales*.[32]By reproducing a few essential articles from both the first Louisiana civil Code, the Code of 1808, and the civil Code in force today in Louisiana, one will easily identify the major changes that occurred in the legal status of a 'wife' married under the community property regime and, by contrast, the loss of the privileged status that the 'husband' had enjoyed under the first and original 'community of acquets or gains'.

Louisiana civil code of 1808, section IV, book 3, tit. 5, ch. 2, "*of the partnership or community of acquests or gains*".[33]

Art. 63. Every marriage contracted within this territory, superinduces of right, partnership or community of acquets or gains. This community or partnership of gains takes place whether there be a marriage contract between the parties or not,...

Art. 64. This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment; of the produce of the reciprocal labor and industry of both husband and wife; and of the estates which they may acquire during the marriage...

Art. 66. The husband is the head and master of the partnership or community of gains; he administers said effects; disposes of the revenues....and may sell and even give away the same without the consent and permission of his wife, because she has no sort of right in them until her husband be dead.

But if is should be proved that the husband has sold said estate or otherwise disposed of the same by fraud to injure his wife, she may have her

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30 Dart, Henry P., writes that "under art. 220 of the Custom of Paris...a marriage in Louisiana without a marriage contract established a legal community, but the Contract was necessary if other agreements were needed--agreements that would render certain the rights of the respective parties....", supra note 14, pp. 239 and 240.

31 Pugh, Nina, "Spanish Community of Gains", *La. L. Rev.*, num. 30, 1969, pp. 1 and 2.

32 *Idem*. See also "A Digest of the Civil Laws now in force in the Territory of Orleans (1808), The de la Vergne manuscript, A reprint of Moreau Lislet's Copy of..., 1968.

33 One will note the use of "or" in between "acquets or gains." Therefore, "acquets" were the same thing as "gains"; two words meaning the same thing. However, in the 2009 version of the Louisiana Civil Code the "or" has been replaced by "and": "The Legal Regime of Community of Acquets and Gains". [Articles 2334-2369.8].

action against the heirs of her husband... on her satisfactorily proving the fraud.[34]

Art. 68. The effects which compose the partnership or community of gains are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage...

Art.71. It is understood that in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

Art.72. Both the wife and her heirs, or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage by renouncing the partnership or community of gains.

Art.73. he wife who renounces, loses every sort of right to the effects of the partnership or community of gains.
But she takes back all her effects whether dotal, extra dotal, hereditary or proper.

> *In the 1800s, the Louisiana family was not only a social institution, but also "the most important unit of production in the countryside. At that time in the United States, family and marriage were directly related to social standing and economic status. Wealth was primarily in the form of land, and there was a belief that such wealth should stay within the bonds of blood... The law, as reflected in the Louisiana Digest of 1808, promoted what Professor Mary Ann Glendon has referred to as the 'family of the Civil Code', similar to that contemplated by the Code Napoléon.*[35]

> *The community property regime is based on the 'ideal of mutuality.' Unlike common law systems where the 'chattel theory' of the wife often prevailed, civilians*

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[34] Pugh, *supra* note 31, at 12. "In Spanish legal concept the spouses were deemed to have formed a partnership by their marriage, the capital of which was represented by their separate patrimonies and energies...In the words of Matienzo the partnership was based on "the fact of their undivided habit of life ordained by both natural and divine law, the fact of the mutual love between husband and wife, which should be encouraged...". Nina Pugh, note 22 supra at pp. 3 and 4. "Whereas the wife owned equally with her husband, he, as "business manager" of the partnership, actually administered the community of gains. For this reason the husband of ancient Spain and the *sociedad* were identical in the eyes of all third persons... In the Spanish concept the wife "had" (Spanish "*ayan*" from the Latin "*habere*") the *gananciales* in the sense of owning and possessing them; but she did not "hold" (Spanish "*tiene*" from the Latin "*tenere*") them. The husband, who was said "to have and to hold" the *gananciales* was empowered to act in regard to them...".

[35] Kathryn Venturatos Lorio, "The Changing Concept of Family and its Effect on Louisiana Succession Law", *La. L. Rev.*, num. 63, 2003, p. 1163.

viewed the institution of marriage as a 'civil contract' or a 'partnership' where the labor of each spouse, even the non employed spouse, is recognized and protected.[36]

The Articles of the Digest on the community property regime were carried over in the Louisiana civil Codes of 1825 and 1870 and much elaborated upon by the jurisprudence. Two cases will illustrate the 'historical' approach taken by the majority of the cases without any attempt at reading the relevant Code Articles in light of the then existing circumstances of the 19th and 20th centuries and the major achievements towards equality made by women and wives ever since the law of Spain had become the law of Louisiana.

In the 1847 case of Guice *vs*. Lawrence, the Court said that:

The laws of Louisiana have never recognized a title in the wife during marriage, to one-half of the acquets and gains. The rule of the Spanish law on that subject is laid down by Febrero with his usual precision. The ownership of the wife, says that author, is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife must not say that she has gananciales, nor is she to prevent the husband from using them, under the pretext that the law gives her one-half. But, soluto matrimonio, she becomes irrevocably the owner of one undivided half...The husband is, during marriage, real y verdadero dueno de todos, y tiene en el efecto de su dominio irrevocable. Febrero... The provisions of our Code on the same subject are the embodiment of those of the spanish law, without any change...[37]

An elaborate analysis of the civil law concept of the 'community' as a partnership was undertaken by the Louisiana Supreme Court in the case of Succession of Wiener.[38]

In Louisiana...the wife's rights in and to the community property do not rest upon the mere gratuity of her husband; they are just as great as his and are entitled to equal dignity. Unlike the wife's interest in the common law states, where joint tenancies and tenancies by the entirety abide, the wife's interest in the community property in Louisiana is more than a mere expectancy or hope...She is the half-partner and owner of all acquisitions made during the existence of the community, whether they be property or income. She has the same privilege as her husband of disposing of her interest therein by will...It is true that in weaving this harmonious commercial partnership around the intimate and sacred marital relationship, the framers of our law and its codifiers saw fit, in their wisdom, to place the husband at the head of the wife's ownership of her half thereof...The community partnership had

[36] Griffith, supra note 29, p. 523.
[37] *La. Ann.*, num. 2, 1847, p. 228.
[38] Louisiana Supreme Court, So.2d, num. 14, 1943, p. 475.

to be placed in charge of a managing partner for very expeditious and necessary reasons...And the husband was made the managing partner of the community...because he was deemed the best qualified to act..."[39]

Another lead case in this matter is the Louisiana Supreme Court case of Neva F. Chreech vs. Capitol Mack, Inc., Justice Barham, writing for the majority, conducted an extensive research in the many varied and relevant Spanish and French sources of law, and their reading, as well as interpretation, by Louisiana courts and legal scholars. The majority stated that

Our Court has previously held that Spanish law is the source for Civil Code Article 2403, which is of primary concern to us here...The Digest of 1808...according to Moreau Lislet's notes, lists the following sources of law...It is apparent that our Article 2403 is an almost verbatim translation of Fuero Real (1255), Book 3....The wife...owns an interest in the community but the ownership of that interest does not consist of ownership of particular assets, or of a particular one-half of the community. In the relationships between husband and wife, the husband owns one-half of the individual assets of the community in perfect ownership. Civil Code Article 491.He also had the administration (use and enjoyment) of the other one-half with power of alienation. The wife owns one-half of the individual assets of the community in imperfect ownership. Civil Code Article 492. Her ownership becomes perfect on dissolution of the community...[40]

The role, or the lack thereof, of women who would take on the legal status of "wives" when marrying under the community property regime, came under severe criticism, although justified, in the 1970s and 80s, when legislators, judges and legal scholars acknowledged and decided to confront the glaring reality of the prominent role that women contributed to the social and economic life of the state of Louisiana. Indeed,

The role of the married woman is not what it was when the Louisiana Civil Code was drafted, even in its most recent revision of 1870. Today the wife, in many families, is an important contributor to the family's income...Although she is still fighting for equal pay to her male counterpart, the importance of the working wife's contribution to her family's income is considerable...The old patriarchal view of marriage is being replaced by the view that equality in decision-making fosters healthier relationships...[T]he Louisiana system may be unconstitutional because sex-based differentiations are essential to that system as presently structured. The

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[39] *Ibidem*, pp. 480 and 481.

[40] So. 2d, La., 287, 1973, 497, 504-508*cert. den.*, So. 2d, 299, La., 1974, 802. To the contrary, see *Dixon vs. Dixon's Executors*, 4 La. 188, 1832; *United States Fidelity and Guaranty Company*, 252 La.227, 210 So.2d 328, 1968.

> *current standard of review of sex-based discrimination under the equal protection clause, as articulated in Reed v. Reed, is the reasonableness test...*[41]

In the case of Reed vs. Reed, the Supreme Court of the United States made it very clear that "the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways...The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike". [42]

A major challenge to the Louisiana 'head and master' status given the husband under the matrimonial regime of the community property came from a 1979 decision of the United States Court of Appeals for the 5th Circuit in the case of Kirchberg v. Feenstra. [43] The Court held that: "Article 2404 of the Louisiana Civil Code violates the equal protection clause of the fourteenth amendment...Article 2404...establishes a gender-based classification that is subject to fourteenth amendment analysis. The Supreme Court, in reviewing state statutes establishing gender-based classifications, has enunciated the following test:

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[41] Cynthia Shoss Wall, "Management of the Louisiana Community Property System: The Need for Reform", *Tul. L. Rev.*, num. 48, 1974, pp. 591-593.

[42] 404 U.S. 71, 75-76 (1971). In the case of *Weinberger, Secretary of Health, Education, and Welfare v. Wiesenfeld*, the Supreme Court of the United States observed that "obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support". 420 U.S.636, 645 (1975). In *Roberts, Acting Commissioner, Minnesota Department of Human Rights, vs. United States Jaycees*, the Supreme Court "recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State...[W]e have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.. In the context of reviewing state actions under the *Equal Protection Clause*, this Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." 468 U.S.609, 618-619, 625 (1984).

[43] 609 F.2d 727, 734-735 (5th Cir. 1979).

> *to withstand constitutional challenge, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives...[T]he State must proceed to show that the method it has chosen to accomplish that governmental interest or objective, i.e., the selection of the husband as the manager of the community estate in any marriage in which the parties have not made another choice, is substantially related to achieving that objective....[the] State must show why it is that article 2404 bears a closer or more substantial relationship to the objective sought to be achieved by article 2404 than would a gender-neutral method of selecting the community manager. The State has failed to make such a showing...Accordingly, we find that article 2404 is unconstitutional as a denial of the equal protection of the laws under the fourteenth amendment...*

While the above decision was pending, the Louisiana legislature modified the Code articles on the community property regime by an Act of 1979. Under the new law, "married women have been given a greater share in the management of the community of gains, they have assumed a far greater financial responsibility at the expense of certain privileges and protection formerly accorded them in regard to their property rights...The Legislature continues to tinker with the matrimonial regimes law each year in an effort to balance the interests of spouses and creditors....The grand tenor of change in the laws of Louisiana affecting women has been toward giving women more independence and making them more self-supporting...."[44]

> *As society changed in the twentieth century, so did the concept of family. As Louisiana became less agrarian, as the number of women in the work force increased dramatically, as divorce became not only possible, but a usual occurrence, the precepts of the 'family of the Civil Code' were viewed as less relevant....This changed family is not unique to Louisiana or even to the United States...The legal response to this different concept of family is observable in the changes in Louisiana succession laws that were significantly influenced by Louisiana's common law neighbors who emphasized personal autonomy in dealing with one's estate.*[45]

It is, therefore, no surprise to read in the Louisiana civil Code of today, provisions on the community of property regime that reflect the influence, not to say the pressure, of these creative forces of a sociological and economic nature but also the impact of contemporary philosophical theories combined with the binding nature of constitutional law pronouncements issued by federal courts.[46]

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[44] Nina Nichols Pugh**,** *The Evolving Role of Women in the Louisiana Law: Recent Legislative and Judicial Changes*, 42 La. L. Rev. 1571, 1586, 1596 (1982); see Robert A. Pascal, *Louisiana's 1978 Matrimonial Regimes Legislation,* 53 Tul. L. Rev.105 (1978).

[45] Lorio, *supra* note 35 at 1164-1165.

[46] Articles of the 2009 Louisiana civil Code illustrating the new concept of community property: Art. 2336. Each spouse owns a present undivided one-half interest in the community property. Nevertheless, neither the community nor things of the community may be judicially

III. SUCCESSION: WIFE-MOTHER-CHILDREN

In the law of succession, also called inheritance, the status of a spouse, a wife, and mother in particular, and children of a marriage vary greatly in the two major legal traditions that are prevalent in our modern days. It appears that the centuries old civil law institutions of 'forced heirship and reserve ' have come under questioning in recent years following major changes, not to say reversals, in the philosophical, social and political foundations which justified their existence and stressed their fundamental role in the traditional civil law concept of the family. These foundations which explained the nature of the family relationship at civil law and justified the right of succession in the descending and ascending lines have come under criticism in modern days while at the same time the Civil Code family has seen its core values being eroded. The state of Louisiana can serve as a laboratory in which these forces have been at work in the last decades bringing about 'disharmony', some would say, where the Roman law had devised a system meant to bring 'harmony' among the children and in the relationship between the children and the surviving parent.

These forces have inspired and compelled changes in the centuries old civil law institution of forced heirship. Some of these forces can be identified as the 'freedom to dispose of one's own property or the autonomy of the right to dispose by will', 'individualism' of the members of a family within the family, 'the right to control one's assets for one's own benefit'...A few words about the law of inheritance at common law will be necessary to

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partitioned prior to the termination of the regime. During the existence of the community property regime, the spouses may, without court approval, voluntarily partition the community property in whole or in part... Art. 2338. The community properly comprises: property acquired during the existence of the legal regime through the effort, skill or industry of either spouse;... Art. 2346. Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law. Art. 2347. A. The concurrence of both spouses is required for the alienation, encumbrance, or lease of community immovables, standing, cut, or fallen timber, furniture.... while located in the family home... B. The concurrence of both spouses is required to harvest community timber.
Art. 2353. When the concurrence of the spouses is required by law, the alienation, encumbrance, or lease of community property by a spouse is relatively null unless the other spouse has renounced the right to concur. Also, the alienation, encumbrance, or lease of the assets of community property enterprise by the non-manager spouse is a relative nullity.
Art. 2354. A spouse is liable for any loss or damage caused by fraud or bad faith in the management of the community property. Art. 2360. An obligation incurred by a spouse during the existence of a community property regime for the common interest of the spouses or for the interest of the other spouse is a community obligation. Art. 2369. A spouse owes an accounting to the other spouse for community property under his control at the termination of the community property regime... Art. 2369.1. After termination of the community property regime, the provisions governing co-ownership apply to former community property, unless otherwise provided... Art. 2369.2. Each spouse owns an undivided one-half interest in former community property and its fruits and products.

better stress the contrast with the civil law approach to the institution of 'forced heirship' and its erosion.

1. *Common law: overview of the law of inheritance or succession*

> *The history of the English law of wills since the Norman Conquest falls into three phases: fixed rights of the family; complete testamentary freedom; discretionary rights of the family. So far as personalty is concerned, in the thirteenth century the general rule was that a man could leave by will only one third of his property if his wife and children survived him; one half if either his wife or children but not both survived him; and the whole of his estate if he was survived by neither. These restrictions ceased to apply over much of the country in the fourteenth century, but the position was governed by local custom....Complete testamentary freedom as to personalty existed throughout the country from that date until the passing of the Inheritance (Family Provision) Act 1938.*
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> *...In feudal times, land represented both power and wealth, and in most places a freehold estate devolved automatically upon the heir...[E]xceptions existed in particular localities...In 1540, however, the Statute of Wills allowed all freehold land to be devised, subject to restrictions in the case of land held by military tenures...*
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> *The 1938, 1952 and 1966 Acts had certain constant features. These were that they gave to the courts a discretion, to award maintenance for certain dependants out of income...The 1975 Act keeps the fundamental notion of the court having a discretion, but in the important case of husband and wife it has moved away from the idea of providing maintenance for a dependant, to one of giving to the surviving spouse financial provision,...of an amount which is fair, whether or not that amount is required for the surviving spouse's maintenance. In other cases, however, it will be seen that the concept of providing for the maintenance of a dependant has been preserved...A child of the deceased, of any age, can make an application...*[47]
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> *The sanctity and inviolability of the parent-child bond is a fundamental concept imbedded in America's social and legal structure. An integral part of that bond has been the parental obligation to nurture, support, educate, and provide for the child, at least during the life of the parent. As sacred and fundamental as the bond may be, however, it is consistently abandoned whenever it clashes with another fundamental concept imbedded in America's social and legal structure: testamentary freedom....In America...a parent can disinherit a child without giving any reason. Until 1989, Louisiana was the only American jurisdiction to protect children of the deceased, regardless of age or need, against disinheritance by will. In July 1989,*

[47] Margrave-Jones, Clive V., Mellows: The Law of Succession, 5th ed., Butterworths, 1993, pp. 14.6, 14.7, 14.9 and 14.23.

however, even Louisiana essentially abolished these legal protections for adult children...When contrasted with the protections for children found in the laws of intestacy, this lack of protection for children whose parents have executed wills becomes even more difficult to understand. The laws of intestacy dictate how the decedent's assets are to be distributed in the absence of a will: first, among the surviving spouse and children of the decedent, then among other relatives. In these circumstances, statutes prescribe the shares of the decedent's property to which the various relatives have a recognized claim, reflecting society's sense of what should be done. The decedent's will is the mechanism that provides the decedent with the testamentary freedom to control from the grave the disposition of property amassed during life...This American indifference to the disinheritance of children, who indeed did not ask to be born, is irreconcilable with protections provided disinherited surviving spouses... [M]any American jurisdictions provide the surviving spouse with a remedy known as the elective share. In the majority of jurisdictions that have this remedy, the surviving spouse may receive as much as one-third or one-half of the estate...[the] United States jurisdictions that permit disinheritance of children have not addressed the tension between the parent-child bond and testamentary freedom, much less begun to resolve it.[48]

As far as the law of inheritance in the state of Texas is concerned,

forced heirship was in operation as a matter of course [as part of the Spanish law]. As long as it remained a Spanish settlement (1682-1827) or part of the Mexican federation (1827-1836) there was no change in this law. But with the establishment of the Republic a new phase began. In the meeting between the civil law and the adjacent common law influences, the pervasive effects of the latter seemed to spread quickly...In 1840 the great body of Spanish law was repealed, and after Texas entered the Union in 1846 the invading common law influence became stronger and more expansive...The institution of forced heirship did manage to survive for a while, but its fate was sealed and on July 24, 1856, it was finally abolished...Why forced heirship disappeared while the civil law institution of community property remained cannot be answered with certainty. However, it would appear that whereas the active part played by the wife of the pioneer was certainly in keeping with the concept of their acquisitions becoming community property, the individualistic spirit of a pioneer country was not in sympathy with restrictions on the rights of ownership.[49]

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[48] Batts**,** Deborah A., "I didn't ask to be born: the American law of disinheritance and a proposal for change to a system of protected inheritance", *Hastings L. J.*, num. 41, 1990, pp. 1197, 1198-1199, 1216.

[49] Dainow, Joseph, "The Early Sources of Forced Heirship, Its History in Texas and Louisiana", *La. L. Rev.*, num. IV, 1941, pp. 42, 56-57; see also Bailey**,** Edward W., "Intestacy in Texas: Some Doubts and Queries", *Tex. L. Rev.*, num. 32, 1954, p. 497.

2. *Louisiana law of "forced heirship": its origins, its distortions*

A. *Its Origins*

> *The doctrine of forced heirship is central to the civil law system of Louisiana...; it is the equivalent of the reserve established by the Code civil in France...The French Civil Code of 1804, French pre-Code customary law, Roman law, the Louisiana Digest of 1808, and the Spanish law in force in this state until 1808 all contribute to the intricate tapestry. The institution of forced heirship in later Roman law developed from at least three distinct concepts: Exheredatio, the Querella inofficiosi testamenti, and the Lex Falcidia...; these concepts supplemented, and finally altered, the principle of the strict ius civile of the twelve tables that allowed full freedom of testation...The Querella and Exheredatio were intended to ameliorate the position of a near relative who was not instituted in the will. The Lex Falcidia allowed the person who was instituted heir to reserve one-fourth of the estate to herself before paying any legacies that might otherwise entirely deplete the inheritance. Under Justinian, the merger of these three concepts resulted in a system of forced heirship similar in many respects to that of modern law. The testator was required to institute as heirs all those entitled upon intestacy...Justinian's modifications required that the testator institute as heirs his children and parents if they did not deserve exheredatio, but once instituted, the legitima could be left in any form whatever...*
>
> *Another source of the concept of forced heirship as it exists in the French and Louisiana Codes is the reserve of customary law...Instead of parental duty, the reserve of customary law was supposedly based on the notion of family co-ownership and the political idea that family estates should be preserved intact. Unlike Roman law, which required a testator to institute certain intestate heirs, customary law rejected the concept of the institution of heirs altogether: the reserve of customary law (four-fifths of the decedent's immovables) was beyond the power of testation; hence the forced heirs of the decedent could claim as intestate heirs, not instituted heirs...By the thirteenth century, the legitime of Roman law was adapted to the needs of northern France, where it became a subsidiary remedy if the claim of the reserve was insufficient. The transformed institution, called the legitime, came to have some of the aspects of the customary reserve...[I]t must be admitted that insofar as the legitime lost its basis as a duty of paternal love and affection, and adopted that of the customary law-the political notion that family estates must be preserved intact- it became necessary to require that the legitime be in full ownership.*
>
> *The Spanish law that prevailed in Louisiana prior to the adoption of the Digest of 1808, and subsisted until at least 1825, was quite close to Roman law in the area of forced heirship. The Spanish law retained the doctrine of the institution of heirs, and thus had no theory that the forced portion was claimed ab intestato. Like Roman law, the testator's freedom to institute heirs was restricted*

only by the requirement that he must institute his proper heirs (sui heredes) as well. Although the Digest adopted most of the formulations of the French Code, it gave to them a peculiarly Hispano-Roman cast. Unlike the French Code, article 3.2.22, page 212 of the Digest states the legitime in positive terms, negating the view that the forced heir claimed ab intestato... When the redactors of the (French) Code civil convened, they were aware of both the customary reserve and the Roman law legitime...The Louisiana Code of 1825 copied the French formulation...[it] reveals that the quality of heir at law is a prerequisite for claiming the legitime...[50]

In a forty four page and a four to three decision in the case of *Succession of Lauga*,[51] the Louisiana Supreme Court indulged in an extensive and thorough research in the history of forced heirship in Roman law, Spanish law, French law and Louisiana law. The Court dwelt also on the 'elevation of forced heirship to constitutional status' in Article IV § 16 of the 1921 Louisiana Constitution. The following excerpts, from the majority opinion, illustrate the uniqueness of this institution of forced heirship in the Louisiana civil and private law system:

Civil law systems typically protect children of all ages, and sometimes ascendants and other descendants, from disinheritance by securing to them a minimum share of their decedent's estate which cannot be defeated by mortis causa or inter vivos gratuitous donations. From its beginning in about 1700, Louisiana's forced heirship doctrine followed the basic civil law concept while modeling its particular provisions on French and Spanish sources. In 1921, forced heirship was elevated to the status of a constitutionally protected legal institution....[T]he proponents of the 1921 constitutional provision recognized the importance of preserving the legal institution of forced heirship, especially its core principle of equality of heirship, in order to further significant social and economic interests...[The] constitutional preservation of forced heirship and the principles it encompasses [were] means of ensuring several important private and public policies: equitable distribution and equality of heirship among children; lessening of disputes, will contests and other wasteful litigation; harmony and solidarity of the family; and continued preservation of the cumulation of excessively large fortunes through primogeniture and entailment...[52]

A. *Its Distortions*

In 1995, Article XII § 5 of the Louisiana Constitution was amended to require the Louisiana legislature to adopt legislation to identify those children who are twenty three years of age or younger and who are,

[50] McDonald, Thomas J. Jr., *The Forced Heir as Naked Owner: An Exegisis*, 48 Tul. L. Rev. 1209, 1209, 1213-1220 (1974).

[51] *Succession of Louis Lauga, Sr.*, 624 So.2d 1156 (La. 1993). The main issue in the case was that of the constitutionality vel non of legislative amendments to civil Code Art.1493 purporting to extinguish forced heirship for persons who, at the death of their decedent, were older than 23 years of age and competent.

[52] *Ibidem*, pp. 1159 and 1160.

therefore, forced heirs. The same amendment invited the legislature to provide for the children of any age who are physically incapable or mentally disabled and, thus, cannot take care of their persons. These children were also recognized as forced heirs, regardless of their age. It was unquestionable, then, that the institution of 'forced heirship' had undergone major changes in parallel with the erosion of the institution of the 'civil law' family. This resulted both in a lesser recognition of the rights of children of the family, and greater benefits given to 'outsiders' of the family.[53]

These changes in the understanding and scope of 'forced heirship' did not settle the debate between the supporters of the freedom that should belong to anyone to dispose of his or her assets, for the benefit of the parent or not, and the defenders of forced heirship as a component part of the civil law family.

> *As with every remnant throughout history, forced heirship exists but as a mere shadow of its former self. A noble, distinguished institution that once served as legal recognition of family solidarity and members' contribution to the enterprise of intergenerational prosperity was reduced in 1996 to a proxy for support for the most vulnerable children-those younger than twenty-four or permanently incapable of caring for themselves or administering their property. Nonetheless, the remnant, a reminder of Louisiana's rich and diverse legal heritage, does remain and continues to serve the state's citizens, not only by providing support for the vulnerable children who receive their legitime but also by relieving the entire citizenry of that obligation...*

Although the stepfamily is more often referred to in popular literature as the 'blended' family, reality more closely resembles a "lumpy" family, a label coined by Maggie Gallagher in the Abolition of Marriage: How We Destroy Lasting Love....Social scientists who study stepfamilies "agree that families with a full-time stepmother do worse than families with a stepfather". There is disagreement about why stepfamilies with a full-time stepmother are more problematical:

> *...The usufruct granted to a stepparent by the law or the testator falls within the legislature's discretion to fix the amount of the legitime: but is it "inconsistent with "the new forced heirship's basic precepts? If the basic precept of the "core principle" of forced heirship for children under twenty-four is effective provision of support for needy children, the stepparent usufruct is inherently inconsistent. The usufructuary owns the civil and natural fruits of the property comprising the legitime... Without the ability of the forced heir to use the income produced from the legitime for his support because it belongs to another, the legislature exercised its*

[53] A 2003 legislative amendment to Article 1493 (Forced heirs; representation of forced heirs) elaborated on the meaning of 'permanently incapable' to make descendants who are permanently incapable of taking care of themselves forced heirs.

discretion in fixing an amount for his legitime by burdening it with a usufruct that is "inconsistent with" the basic precept of forced heirship-effective protection of support for young, vulnerable, needy children...[I]t is reasonable to conclude that the people of Louisiana assumed that such children [incapable]would be constitutionally protected from disinheritance by their parents…

Without carefully considering what statutory provisions were consistent with the core concept of the new forced heirship, the legislature failed to assure that the purpose of providing support to these vulnerable children was actually served…

Fortunately, Louisiana because of its legal heritage grounded in thousands of years of human experience and in the principles of natural law still provides a system of protected inheritance, albeit diminished in breadth. It is a legacy of which the citizens of Louisiana should be justly proud and should guard with renewed resistance from the influence of other American states, particularly considering the reasons postulated which underlie their choice not to provide a humane, just system to protect vulnerable children from their own parents.[54]

[...], *the changes in Louisiana succession law were influenced by the changes in the society it serves. One of those changes was the weakening of familial ties beyond the nuclear family of father, mother, and children, and another was the rise of dependence on the government for obligations previously undertaken by the family. Supported by the argument that Social Security benefits would be available for aging parents, the Louisiana legislature eliminated parents as forced heirs as to community property in 1979 and as to separate property in 1981.Yet, at the same time that life expectancy increased, the desire to provide for one's surviving spouse also seemed to increase. The response was to increase the disposable portion available to the surviving spouse, and to expand the usufruct of that spouse for a lifetime over property inherited by descendants of the decedent...The law in Louisiana seemed to become, not necessarily what was best for society as a whole, but what was desired by each individual testator. The choices reflecting those desires changed as the*

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[54] Shaw Spaht, Katherine, "The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What's Become of Disinherison, and the Unfinished Business of the Stepparent Usufruct", *La. L. Rev.*, num. 60, 2000, pp. 637, 637-638, 661, 664-665, 670-676. On the advantages and disadvantages of "forced heirship", see Batts, *op. cit.*, supra note 48: *Forced heirship is said to promote family bonding, stability, solidarity, harmony, and responsibility;....Forced heirship recognizes both consanguinity and dependence...; forced heirship ensures that the financial needs of the child, regardless of his age or condition are met in the first instance by the parent and not the state...Forced heirship also acknowledges the economic, family co-ownership theory, giving back to those who contributed to the accumulation of the wealth, directly and indirectly. This factor applies equally to children and surviving spouses, although the nature of the contributions of the child in the modern, nonagricultural, protective child-labor law context is different....Forced heirship is not without its critics. Forced heirship has been termed anachronistic. It is an historic, traditional, even ancient recognition of a right in children based on family...Forced heirship has been criticized for being rigid and blind to the actual circumstances of the forced lineal heirs...Forced heirship...[places] the emphasis on family, not individual need....Forced heirship ...results...[in] the direct competition of the child's protected right with that of the surviving spouse...*, pp. 1222-1226.

> *institution of marriage itself changed... The preference of a testator to determine the distribution of his estate, based on his own desires, rather than on a perceived societal ideal, came to emerge as a right of the individual...*[55]

Texas and Louisiana shared common and parallel paths until the middle of the 19th century, when abrupt changes in the orientation of their respective legal system took place, illustrating the impact that different component parts of the culture of a people can have on the legal system it wants for itself.

Texas opted, in the most part, to follow the tradition of the common law because the component parts of its own culture, superficially influenced by history, could not resist the invading impact and forceful persuasiveness of the Anglo-American culture.

Louisiana followed a very different path. The survival, in that state, of much of the private law of the civil law system is the outward manifestation of values, ideologies, beliefs...with which the people of Louisiana identified because they are an intimate part of its culture and heritage. The path followed by Louisiana is a vivid illustration of the fact that "law progresses to the extent that it more perfectly fulfills its purpose. It must ensure to a human society an order considered to be just. Every people lives under the law it gives itself, therefore the law it deserves".[56] The private law that Louisiana has given itself "flows in [its] arteries, in [its] muscles, in [its] mind.[57]

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[55] Venturatos Lorio, Kathryn, "The Changing Concept of Family and its Effect on Louisiana Succession Law", 63 La. L. Rev., num. 63, 2003, pp. 1161, 1177-1179.
[56] Ripert, Georges, *Les Forces Créatrices du Droit*, Presses Universitaires de France 1955, p. 65.
[57] Carbonnier, Jean, *Flexible Droit, Librairie Generale de Droit et de Jurisprudence*, 6th ed., 1988, p. 341.