THE CATALAN LAW OF SUCCESSIONS ON THE EVE OF CODIFICATION

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ARTICLE

> Sir, but does the family exist? I believe not in a society where the assets are divided when the father or the mother dies, and where each of the members of the family is then told to go his own way. The family is reduced, in that case, to a temporary and fortuitous association that death soon divides. Our legislation has not only destroyed households and inheritances, but it has also interrupted the perpetuity of families and traditions: I see only ruins around me.**
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> With admiration I see that publicists, both old and modern, have not given successions laws more importance than human matters. These laws, though, pertain to civil order; however, they should be at the forefront of all political institutions.***

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** Unknown French writer and reproduced by Joaquin Cadafalch, *Testamentary freedom. Recompilation of various writings about the family,* Barcelona, 1859

*** Alexis de Tocqueville, *Democracy in America,* volume I, chapter 3.

I. The controversy in the system of the law of successions

The Project of the Civil Code of 1851 appeared in the order of successions law as a very different alternative to the Catalan tradition and, more generally, as an alternative to a set of regional legal systems characterised by the principle of testamentary freedom.[1] In an attempt to make clear what the basis of the conflict was from a quantitative point of view, Pedro Nolasco Vives Cebriá made the following calculations[2]:

> If we compare Castilian legislation with regional legislation; assuming that there are provinces where the father can dispose of everything, and that in Catalonia the father has free disposition of 75% of everything, and that in Castile the father only has free disposition of a fifth of everything, then the average would be 65%. The commission, therefore, by conceding to the father only one third, or in other words 33%, has conceded 22% less than the average conceded by modern legislations, and 32% less than the average of regional legislation and the legislation of the kingdom.
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> Why are the fathers of the kingdom treated like this? Is it by chance that the fathers here are unloving and unnatural? Frankly, it seems impossible that the commission has haggled so much with the empowerment of the fathers, when there is only one son.

Furthermore, if we compare the proposal of the 1851 Project with what other European codes of that time established, then its content proves even more radical.

According to articles 913 of the French code and 961 of the Dutch code, the children's and descendant's forced share was half of the estate if there was one child, two-thirds if there were two, and three-quarters if there were three or more children. According to articles 829 of the Napolitan Code and 765 of the Austrian code the forced share was half of all the estate regardless of the number of children. According to article 1480 of the Louisiana Code, the forced share was a third if there was one child, half if there were two and two-thirds if there were three or more. According to article 719 of the Sardinian code, the forced share was one third if there

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[1] A study of the different regional systems was carried out at that time by Carlos Fages de Perramón: 'On succession due to death; fundament of the capacity to make a will; a comparative study of the successions systems in force in the different provinces of Spain and a critical judgement of each of them,' *Revista General de Legislación y Jurisprudencia,* no. 40 (1872), pp. 343-363.

[2] Pedro Nolasco Vives i Cebriá: 'Observations on some articles of the Project of the Civil Code of Spain about the portion of the forced share and the way of paying it', Barcelona, 1862. The brief treatise was incorporated in the second edition of *Traducción al castellano de los Usatges y demás Derechos de Cataluña,* Barcelona, 1861-1867, volume II, p. 274.

were one or two children and half if there were more than two. In the Bavarian code (article 5, chapter 3, book 3) the forced share was a third in the case of up to four children and half if there were five or more. Finally, article 392, section 2, part 2 of the Prussian code established a forced share of a third for up to two children, half for three or four children and two thirds for five or more children.

Article 642 of the Project of 1851 established a much stricter and more encompassing forced share than that contained in any of the aforementioned European codes: The forced share in the case of only one child was two-thirds of the inheritance, and where there were two or more children the forced share was four-fifths of the assets, or in other words 80%.

II. The political implications of the succession system of forced share inheritance

Certainly, there were political issues hidden in the controversy, such as the one that alluded to the fact that the testamentary freedom requested could be a procedure through which certain aristocrats would attempt to maintain the entailments and majorats repealed by the liberal legislation of the beginning of the century.[3] The term used was *grafted feudalism*, and certain sectors sought to perpetuate this arrangement through the options that a succession system allowed for.[4]

Its aristocratic origins explain why in Catalonia some liberal circles, paradoxically, formulated legal arguments against testamentary freedom.[5] This paradox – liberals arguing against a legal manifestation of freedom - was barely perceptible in other parts of the state, but was characteristic of Catalonia. The fact was that the testamentary freedom they were hoping to gain could serve to maintain the old aristocracy's pre-eminent position within the new constitutional order. García Goyena said as much:[6]

> Furthermore, there is a political reason and special circumstances why we should fear the abuses of absolute freedom, both in Castile and in

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[3] Bartolomé Clavero develops these aspects in depth: *Contemporary doctrinal formation of the Catalan law of successions: the primogeniture of freedom* in La reforma de la Compilació: el sistema successori. III Jornades de Dret català a Tossa, pág. 9-38 (1985).

[4] Joaquim Casanovas i Ferrán, *Cuestión sobre los derechos de herencia en el Principado de Cataluña* (1869).

[5] Francisco de Paula Vidal, *Las legítimas de Cataluña. Memoria presentada al Gobierno de S.M. contra la costumbre catalana relativa a las sucesiones testamentarias* (1855). Francisco de Pou, *Memoria sobre la conveniencia y utilidad de la sucesión forzosa en la forma que se establece en el Proyecto de Código civil español* (1857).

[6] Florencio García-Goyena, *Concordancias, motivos y comentarios del Código civil español,*vol. II, 332, (1852).

> the regional provinces. The majorats have recently been abolished and the frustrated vanity that this has caused will look for satisfaction in absolute freedom, sacrificing blood ties and the demands of order or public law.

Within this framework, some of the more nostalgic sectors of the Old Regime refuted these accusations as best they could, defending their position by putting forward justifications for an absolute property law that must be respected regardless of the use that could be made of it by rightful property owners. And so the 'heirs' tried to find their place within contemporary society[7] and in so doing, paradoxically, they ended up defending the same principles as the liberals, albeit from very different perspectives.

Certain historiography has made much of the political logic of this debate, making perhaps too little of the fact that this controversy explained a matter of private law.[8] These authors affirm that the Spanish constitutional order of the nineteenth century, defined as it was by modernism, was a paradoxical political system in that it at once incorporated and reconciled elements of the Old Regime and political liberalism. From this starting point, they tried to make sense of other paradoxes, such as the fact that it was the Spanish governments that were implementing a Civil Code that put in place the system of strict forced shares as a way of making the preservation of forced heirship inviable, while at the same time this very Code anticipated Appendixes that ensured the survival and safeguarding of regional legal institutions, amongst which was the principle of testamentary freedom, with the predictable political consequences regarding the continuance of regional entailment structures (forced heirship).

Irrespective of whether or not the moderate governments consciously adopted this strategy, what was certain was that certain sectors of society tried to make understood the need to maintain a free successions system that emanated from the political principles of modernism.

> The institution of the senators by right arises from the need for this class, which must exist in all well-organised monarchies between the king and the peoples, to be one of the elements of legislative power and to intervene in the creation of laws, whether this intervention is born of royal favour or of popular vote; having said that, can this class exist with our hereditary system? Of course not: the need for testamentary

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[7] Raimon Roig i Rey, *On the freedom of parents to share out their property between their children*, Revista General de Legislación y Jurisprudencia, pág. 419-428 (1859).

[8] Bartolomé Clavero, El Código y el fuero. De la cuestión regional en la España contemporánea, pág. 8-9 (1982). Also, Clavero, supra n. 3, pág. 16.

> liberty is imposed, which must apply to all citizens as civil liberty demands.[9]

These claims, amongst others, did not fall on deaf ears. During the last third of the nineteenth century the social structures that were most closely linked to landed property affirmed that of the political process of the disentitlement of properties in general 'too much has been made in recent times'. This statement was made by none other than Cirilo Álvarez, President of the Supreme Court, in his inaugural speech of the legal year of 1877. With the Restoration already underway, the social sectors whose interests lay in real estate property had, in some regions, a particular aversion to a strict system of forced shares which would even be described as pure communism.[10]

The traditional interpretation of the eighteenth century controversy between the Civil Code and the regional legislations is, that it ended in stalemate, in that the planned Appendixes were put off indefinitely, which meant the continuance of all the different historical legislations of the state. However, considering these facts and the political nature of the governments of the Restoration, perhaps it was not as much a case of 'stalemate' as an agreement which, while not overtly expressed, was perfectly well understood. As Gumersindo de Azcárate said after the repeal of the eigniorial regime**:**

> [T]wo principles could be affirmed after the destruction of the entailments (feudal bonds): testamentary freedom and forced shares; the revolution has maintained the latter almost everywhere, not taking it away from the co-ownership of the family as happened before, and with good reason, because they found it already done. To go from entailments straight to testamentary freedom would have been too brusque a transition; also for fear that use would be made of this law that would bring about some of the inconveniences characteristic of the entailments, as has happened and continues to happen in Great Britain, and really for a purely utilitarian reason; for fear that testators would abuse this law, or because of mistrust.[11]

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[9] José de Liñán i Eguizábal, Libertad de testar, pág. 75-77 (1883). Also, cfr. José García Barzanallana, in his speech in response to Juan de la Concha Castañeda: "Is it necessary, in order to make uniform our legislation, to strengthen paternal power, to improve the organization of the family and even make stronger property law, to admit and make our laws have the principle of testamentary freedom?", in Discursos de Recepción en la Real Academia de Ciencias Morales y Políticas, II, 1875-1881 (1884) (García Barzanallana's speech, pág. 457-477; Juan de la Concha's speech, pág. 425-456).

[10] For example, Hermenejildo Rojas de la Vega, *Medios para movilizar la propiedad inmue- ble: sus fundamentos y sus consecuencias económico-jurídicas,* pág. 14, 35-41 (1892), and Joaquin Cadafalch i Buguñá: *¿Conviene uniformar la legislación de las diversas provincias de España sobre la sucesión hereditaria y los derechos del cónyuge sobreviviente?,* pág. 67 (1863).

[11] Gumersindo de Azcárate, *Ensayo sobre la historia del derecho de propiedad y su estado actual en Europa,* pág. 283-284, 378-379 (1883).

The Code's strict system of forced shares was a tool of transition designed to smooth the way to testamentary freedom, to make the transition from entailments less abrupt by taking advantage of the tradition of forced shares wherever it was already the norm. In places where testamentary freedom was already the usual practice, and irrespective of the risk that it would be used abusively, political - and perhaps legislative - convenience managed not to modify the principle which, in any case, the entire process was aiming towards.

In Catalonia, at any rate, they knew how to resolve the paradoxical confluence of testamentary freedom and the institution of the *heir*. *Testamentary freedom and the institution of the heir*[12] were made perfectly compatible through considering that this *freedom*, which was a fundamental principle of Catalan law, was given meaning through the customary practice of the *heir*, a customary practice which was defended as long as it continued to be a living custom, given that if it became law - so it was said - it would end up being abolished and society would regress to the obsolete and anachronous practice of the majorats.[13]

However, the fact that in Catalonia there were also many in favour of establishing a strict system of forced shares must be pointed out.[14] This was made manifest by a *representation in the Cortes which aimed to make the future of Catalonia better and repair the damage being caused there by the law that governs testamentary successions*.[15] D. Francisco de Paula Vidal's report entitled *Report presented to the government of his Majesty the King against the Catalan custom of testamentary successions*[16] is another example. Authorisation was even requested to set up a society that they hoped to name *Direction of seconds with the aim of fomenting, both orally or written, the publication of the Civil Code.*[17]

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[12] Agustí Trilla i Alcover's study by the same title, published in Barcelona in 1886.

[13] The Royal Order of 12th June 1851, which published the Project of the Civil Code, asked institutions, corporations and tribunals to contribute their observations on the Project. In the Ministry of Justice, Archive of the General Commission for Codification, files of Organization, no. 5, 'Communications between the Government and the Commission', 1849-1869, document no. 117, is found the Índice de los Tribunales, Corporaciones científicas, Prelados, funcionarios públicos y personas particulares cuyas observaciones sobre el proyecto del Código civil se remiten á la Comisión de Códigos con la Real Orden de 19 de octubre de 1853. Salvador Coderch was the first to advise us about this batch of reports (La Compilación y su historia. Estudios sobre la codificación y la interpretación de las leyes, Barcelona, 1985). The set of arguments of the 'Statements' and 'Observations' about the project made from Catalonia regarding the question of testamentary freedom – always in defence of it – are outlined in: La Compilación, pp. 96-101.

[14] Coderch provides details in this regard: La Compilación, pp. 89-90.

[15] Barcelona, 1858.

[16] Barcelona, 1855. This sector managed to make their voice heard in the prestigious and influential Revista General de Legislación y Jurisprudencia, núm. XVI (1860), where an article by Francisco Pou entitled 'On forced succession' was published.

[17] Cfr. Coderch: La Compilación y su historia, p. 129, note 289.

III. The system of forced shares and the traditional concept of the family

Independently, however, of the political arguments and enduring economic conflict surrounding this matter (which to some degree explains the acridity of the opposition to codification mounted in Catalonia), what is certain is that within successions law the codification project of 1851 constituted a threat to the traditional idea of the Catalan family.

The opposition to this aspect of the Project of 1851 was not merely a movement of landlords, nostalgic aristocrats and the jurists in their service; it encompassed all of traditional Catalan society, irrespective of social class and economic status. This is why friction over this matter was experienced so intensely by the society of the time, making it much more than simply the legal manifestation of a conflict of economic and political interests. The fact is that they were basically referring to the new family model of contemporary Spanish society.[18]

An example of the intensity of this debate, which went far beyond narrow legal circles, is provided by the sixteen newspaper articles that Reinals Rabassa published in the *Diario de Barcelona* between June and November 1852[19], which were almost exclusively dedicated to defending the traditional succession system in Catalonia against the Castilian system of forced shares that the Civil Code Project of 1851 sought to impose.

Another example of the heatedness of the conflict is provided in the fact that controversy over civil codification in Spain was one of the matters debated at the Conference of Spanish Attorneys-at-law in 1863.[20] It is easy to understand the proliferation of leaflets with titles like *Down with forced shares. Up with testamentary freedom* on the one hand, and *No more heirs or heiresses*[21], on the other. In the words of Joaquín Costa:

> [T]his was always an exceptionally important question, and today more than ever, because in this matter, serious social problems that deeply agitate European opinion and rock the very foundations of the social order are resolved or become linked with it – and not remotely, but in an immediate and direct way.[22]

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[18] Segismundo Moret y Luis Silvela, *La familia foral y la familia castellana* (1863).

[19] Published on 17th and 28th June, 9th and 20th July, 5th 17th and 27th August, 24th and 25th September, 8th, 16th and 22nd October, 9th, 19th and 23rd November.

[20] Francisco de Permanyer, The summary of his conclusions in *Revista General de Legislación y Jurisprudencia,* no. 23, pág. 285-287 (1863). Also, Joaquín Costa highlighted that in the Congress of Attorneys-at-law of Zaragoza, "more sessions were given over to the matter of property succession than any other matter". Joaquín Costa, *Testamentary freedom and forced shares*, Revista General de Legislación y Jurisprudencia, pág. 422 (1882).

[21] The first, published in 1873 in Madrid, is signed by León Bonel. The second is attributed to Andrés Guiamet.

[22] Costa, *supra* n. 20, pág. 423.

For Catalan traditionalism the family was considered to be the basic institution of the social order. In the second of his sixteen well-known articles published in the *Diario de Barcelona* under the generic title 'The Civil Code under Project,' Reinals Rabassa affirmed that; 'domestic power must always be the opposite of public power; and how much this is weakened by the limits that a free government imposes on it *so the authority of the Civil Code under Project must be left open and absolute.'* The fourth article of the same series of newspaper articles began with the following quotation from Savigny: 'the seed of the State is contained within the family, and the constitutive elements of the State once it is formed are families, not individuals.[23]

Catalan traditionalist thought upholds that society is not composed of isolated individuals, but is structured into *organisms*, into corporations and structures that organize human beings around ideas and principles. As Reinals Rabassa said:

> So first of all, the corporation, the idea, the society must exist: if not, the meeting of individuals degenerates, given that this cannot exist without these circumstances, nor even instantaneously in rebellion, and so this coming together is like those storm clouds that are dispersed by the wind.

And if one of these organisms that make up society is fundamental and essential in any civilized social order it is the *family organism*, given that 'the principle according to which each household lives will create a moral atmosphere that the father cannot shy away from, and this will found entities, whose existence cannot in any way be denied'.[24]

Obviously, the family they were referring to, was the traditional Catalan family; a patriarchal-style family where the father assumed full responsibility for all marital duties[25] as well as parental power[26], thus making him the symbol of and guide for the family unit.

The patriarchal nature of traditional Catalan law was illustrated very meaningfully by the legal system of the *peculiums*. The First Constitution *For minors under 25 years old* established the need for paternal consent for unmarried sons to enter

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[23] Reinals y Rabassa, *The Civil Code under Project*. Articles II and IV, Diario de Barce- lona (28th of June 1852 and 20th of July 1852).

[24] *Id*. 22nd of October 1852.

[25] Joan Pere Fontanella, *De pactis nuctialibus sive capitulis matrimonialibus tractatus etc,* Gerona, 1638, clause 6, annotation 1st, part I, no. 63; clause. 6, annotation 2.ª, part III, no. 8. Tomás Mieres: *Apparatus super Constitutionibus Curiarum generalium Cathaloniae,* Barcelona, 1533, collation 4, ch. 12, no. 11.

[26] Lluis de Peguera, *Decissiones aureae in actu practico frecuentes ex variis Sacri Regii Concilii Cathaloniae conclussionibus collectae*, ch. 97, 3-5 (1605). Fontanella, *id* n. 25. Tomás Mieres, *id* n. 25, collation 9th, ch. 12, no. 29. Jaume Cáncer, *Variarum resolutionum juris caesarei, Pontificii et municipalis Principatus Cathaloniae*, part III, ch. 1, no. 214, pág. 1594-1598.

into contractual relations, which was an especially burdensome tutelage for sons who lived by their own means and in their own home. The problem was that traditional Catalan family law did not consider being over the age of majority to be a criterion for emancipation: in general, the only way to achieve full capacity to act was to form one's own family through marriage. The only one fully equipped to take on this capacity, therefore, was the father of the family.

This concept of family was an argument common to that European liberalism that looked upon the excesses of the Jacobines and the extreme ideas of the French Revolution in general with great fear. The author Fréderic Le Play, whose work was well-known in Catalonia in the middle of the nineteenth century,[27] is a good example;

> As societies move forward on the road to freedom, only religion and paternal authority exercise the pressure that was previously conferred on the sovereign. But this social transformation, if at its core the principle of authority is not weakened, ensures enormously increased well-being for the individual, given that the means of repression founded in the law or in public power are substituted by those that are born of conscience and natural affections.

Civil equality, in accordance with the same principles, must be restricted within the family in proportion to its advancement within the State. It was not, therefore, a question of maintaining the entailments or the aristocratic structures characteristic of the Old Regime in an age of full constitutional legal order. It was an attempt – and this is the important point – *to maintain and protect some social structures that guaranteed the survival of certain traditional values that were perfectly compatible with the liberal order.*

The most immediate consequence of the imposition of political liberalism was to greatly weaken political power. But, in the opinion of traditional liberal circles, defeat of the old Leviathan of the Old Regime had to be compensated for through the safeguarding of social structures that would ensure the teaching of respect for authority and a work ethic. And the family was especially called upon to perform this function. In the words, once again, of Le Play:[28]

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[27] Especially his work, *Les Ouvriers européens: études sur les travaux, la vie domestique et la condition morale des populations ouvrières de l'Europe d'après les faits observés de 1829 a 1879,* published in 1855, and very much cited by Catalan jurists at the time when testamentary freedom was being defended in Catalonia. One jurist in particular, Joaquín de Cadafalch, published various extracts from this book and press articles of Le Play in a leaflet entitled, *Necesidad de la libertad de testar. Recopilación de varios escritos e ideas sobre la materia,* Barcelona, 1859. We will take the Le Play's citations from this leaflet, particularly the following one, which comes from an article by this author published in the newspaper *La Patrie,* in May 1858. In the recompilation of Cadafalch, pp. 27-28.

[28] *Id,* pág. 32.

> The revolutionary school has principally inclined, whenever possible, to disregard the family and always put the State face to face with the individual, which is why it is moving further and further away from European tradition where, in line with the revolutionary school's ideas and inspirations, the Municipality and the State are considered to be like a set of families, and all intervention in the affairs of these natural corporations - except in some cases of absolute necessity - is considered to be inappropriate . . . . So whilst in the East and the North, for example, families are their own judges without any outside intervention, neither from their offspring, their ill nor their old, we see in our country that every day religious and philanthropic organizations are created to assist the family in different ways as a result of their lack of resources.

Certainly, for Frédéric Le Play the root of the problem was perfectly clear:

> One of the main concerns of the family regarding the private customs of inheritance law is that they are applied blindly by the law and public agents instead of being regulated by the father who better understands what is good for his offspring, for the family and the laws of love.

The forced share system deprived the father of the family of his right to dispose of the family estate *mortis causa* and instead the law obligated him to divide his assets, which in effect made him a mere beneficial owner of his property, granting his descendants a right to his patrimony which weakened his authority and, therefore, his capacity to instruct and teach. Looked at from this angle, the right to forced shares was understood to be the legal imposition of the dismantling of the family order because it obligated the division of the family patrimony upon the death of the father of the family, with the ensuing dispersion of its members.

For a certain sector of moderate liberals (liberals who were totally loyal to the constitutional order) the only way to keep family structures alive - along with the family's patrimonial force, its capacity to protect its members and its capacity to preserve the traditions of which they were custodians – was to establish a succession system that was able to preserve the set of principles, feelings and patrimony of each household through the system of substitution: the father, upon his death, was substituted in all of his powers by one of his sons so that the family endured through primogeniture. In the words of Reinals Rabassa: "the idea is to preserve the traditions, the sentiments, the morality of the family, which the household *jacens,* carried out morally and materially through the mother and the heir, in the same way as when the head of the family was alive."[29] This author wrote some very enlightening pieces about this idea:

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[29] Reinals y Rabassa, *supra* n. 24.

> The institution of the heirs in Catalonia does not originate in the man, but from a group, the family is still a cohesive group, the work and the force, the house and the ties that unite it; it is that enmeshment that has within it the feelings and Christian principles, the principles that affirm, the feelings that resign. The power must have within it the worker, the father and another power: even though one must have prudence and necessity, perhaps one must also have pride and look at oneself, with tearful eyes. This is the origin of a generation of intrepid businessmen, of hard-working farmers, brought up to understand privation and respect for authority: independent thanks to work and social thanks to upbringing, ferocious by nature and docile thanks to the submissive habits they learned within the family. One of the sons will join the father in governing the family, he will be the first to share with him his work and the task of sustaining the family: here you have the spirit of the institution of the heirs in Catalonia. Like in Rome inheritance is not the sum of persons or of values, but an empty place, everything is morality, if in this way the notion of Roman inheritance can be understood . . . ; this all-consuming morality is a power by nature, and the direction of this work must come from a single intelligence whose forces converge at the same rational and social point; it is a single duty, indivisible. Both of these things weigh on what is known as the heir. This is why there is just one heir in Catalonia.[30]

Article 642 of the Civil Code Project of 1851, in that it obligated the division of eighty percent of the family patrimony between the legitimate heirs, was a serious assault on this concept of family and its survival system.[31] The Catalan social and economic concept of family required a corresponding legal concept of inheritance in which the Catalan system of forced heirs certainly had no place.

In Catalonia "the word inheritance does not have, as the masses believe, a limited meaning, but a very varied and extensive one: it refers to material and moral things," it is the whole which Roman law called *universum ius:*

> Inheritance is not only the idea of enjoyment, but is also that of responsibility and duty. If after the death of a person, of a debtor, or of a friend, one only sees a house, a piece of land, a factory, some capital, etc., without doubt one must think that he does not understand the

[30] Reinals y Rabassa, *supra* n. 23, 5th of October 1852.

[31] The article, more specifically, said: "The forced share of the children and the descendants shall be four fifths of the estate. Where there is only one child it will be two thirds. The forced share of the parents and ancestors will be two thirds, where there are two or more; and half if there is only one."

> meaning of the word inheritance; he is a soul dominated by leisure. With inheritance there come obligations, and one can be summons by the courts to fulfill these; but there are also some inheritances and obligations which pertain to the moral order and depend on the good conscience of the named successor. Amongst this type of obligations are those that the deceased could not know or foresee, for example, the help that must be given to a mother, a sibling, one to whom you are in debt, a friend, help that the deceased would have given: also amongst this type of obligations is the conservation of the good traditions of the family. It is difficult to find a family, from whatever social class, that hasn't got an object to attend to or a memory to guard. All of these things that we mention and many other things that we could mention can be deduced from the word inheritance. Together they form a compact and homogeneous unit, which cannot be transmitted or preserved when the law foresees an imprudent and exaggerated division. Only the man who knows his own circumstances is in a position to determine the most advantageous destiny of the concept of inheritance: not the blind and monotonous will of the law.[32]

The conflict between the principle of testamentary freedom and the right to the succession system of forced shares implied, therefore, much more than a mere loose end in the process of transition from the Old Regime to the constitutional order. It was not simply a manifestation of the process of disentitlement of real estate property; this conflict was also about what form political liberalism would take in the future because it contemplated the two alternatives of an individualist or an organic state.

IV. Roman and Castilian legal traditions

The controversial article 642 of the Project of the Civil Code of 1851 was in line with the historical tradition of the strict Castilian forced heir system, which originated from the *Liber Iudiciorum,* or more specifically from the first law of title V of book IV of the *Fuero Juzgo* (Roman law). There, the motive for reforming the regulations of Roman law on this matter was established as:

> [S]ome live stupidly, and dispose of their things badly, and they give them to strangers, and they wrongly deprive their children and grandchildren, those who cannot make the most of the village, those that are usually excused from their work by their parents. So that the

[32] Cadafalch y Buguñá, *supra* n. 10, pág. 69-70.

> village is not deprived of what is shouldn't lose, the parents must not be without compassion for their children and their grandchildren: therefore, we will transform the old law.

This "old law", which the *Fuero Juzgo* revoked, was made up of a set of regulations which were "generally considered to form an intricate labyrinth."[33] Schematically, we can affirm that up until the time of the Empire Roman the law granted citizens total testamentary freedom. It wasn't until towards the end of the Republic that people who did not take their offspring and next of kin (the people who would have been called in the case of a death *ab intestato*) into account in their will, were seen in a negative light, which meant that this excluded heirs could lodge a complaint with the *Centunvirus,* a kind of Grand Jury that dealt with matters related to property and inheritance.

The jurisprudence that the *Centunvirus* established was: starting from the assumption that a healthy spirit would never disinherit a child or the next of kin without good reason, they considered wills that did so to be *inofficiosum,* meaning that they were treated as if they were written in moments of insanity. Where the next of kin was not disinherited but was simply left a smaller part of the inheritance than he would have been entitled to *ab intestato,* then only the *querela inofficiosi testamenti* was admitted and then only where the claimant would have received less than a quarter of what he was legally entitled to.

The *querela inofficiosum testamenti* marked an important change from the existing legal tradition in that it meant that perfectly valid wills were annulled for extra-regulatory reasons of a moral nature. In fact, this *querela* was not considered *actio*, but *accusatio,* given that it implied either the recognition that the claimant deserved to be disinherited, or the recognition of the bad name of the testator and the heirs named by him as beneficiaries. In any case, the important point is that for this procedure a part of the inheritance, a quarter of it to be precise, remained inseverable from certain next of kin of the testator, those that would have been his successors had he died intestate.

The valuation of a quarter of the total inheritance came from the *Falcidia* law of 714[34], which limited the capacity to bequeath to a maximum of three quarters of the total estate, thus guaranteeing the heirs at least a quarter of the inheritance. This limit on bequests also extended to trusts, donations due to death and to those between husband and wife[35]; from here, through the aforementioned jurisprudence, a quarter became the original portion of the forced share (the *quarta Falcidia*).

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[33] I take this citation from a book that was very well-known among students of Catalan law in the second half of the XIX century. Carlos Maynz, *Curso de Derecho Romano, precedido de una introducción que contiene la Historia de la Legislación y de las Instituciones políticas de Roma,* vol. III, pág. 403 (1892).

[34] *Id*.

[35] *Id.* pág. 652-653.

We know that the *querela inofficiosum testamenti* was admitted for descendants without restrictions, but this was not the case with more distant relatives whom Ulpiano warned: *Cognati enim proprii, qui sunt ultra fratrem, melius facerent, si se sumtibus inanibus non vexarent, quum obtinere spem non haberent.*[36] From the time of Constantino onwards only blood brothers and sisters were accepted as more distant relatives and only in the case where the person named could be considered to be shameful (*persona turpis*), thus determining the "forced heirs."[37]

Justiniano reformed various aspects of this practice, some of which we would like to mention here. First, through the 537 Constitution (Novella 18) he modified the portion of the forced share: for up to four offspring the forced share was a third, and if there were more than four offspring the forced share was half of the patrimony of the deceased. Then in 542 he promulgated Novella 515, which left the situation as follows: Firstly, it was obligatory to name one's immediate descendants as heirs, while establishing fourteen reasons why a father could, as an exception, disinherit a child. He had to, however, leave them at least the legally established forced share (the same obligations were established for the descendants in relation to their direct ascendants).

The first law of title V of book IV of the *Fuero Juzgo*, which stated that "Neither offspring nor grandchildren must be disinherited", could not be said to constitute an attack on Roman-Justinian tradition; it was though, if only technically, an attack on previous Roman tradition whereby the will that disinherited a direct descendant was considered to be legally correct, even though the previously mentioned *accusatio* was set up to revoke this assumption.

The break with Roman law, therefore, was more technical than substantive given that, as we have just seen, testamentary freedom in Roman law was a formal freedom such that technically the will was not questioned because it disinherited the next of kin, event though there were effective ways to ensure that these next of kin could inherit a large part of the inheritance.

The *Fuero Juzgo* imposed the naming of direct descendants as heirs (the father cannot disinherit his children nor his grandchildren for a small offence; but he can wound and punish them while they are in his power) except where there were specific reasons not to do so (but if the son or the daughter, the grandson or the granddaughter did something terribly wrong or brought great dishonor to their father or their mother). It also increased the portion of the inheritance tied to the forced heirs to eighty percent, leaving only a fifth of the deceased's patrimony to be freely disposed of (if he wants to give to the church or other places, he can give the fifth).

This election of such large forced shares became traditional in Castilian law: It passed from the *Fuero Juzgo* to the first law, title V, book IV of the *Fuero Real*; it

[36] *Digesto,* V, II, 1st.

[37] Maynz, *supra* n. 33, pág. 408.

was maintained through law 28 of *Toro*; it was recompiled and became the eighth law, title XX, book X of the Ninth Recompilation and from here it passed into article 642 of the Civil Code Project of 1851.[38]

Florencio García Goyena was the speaker of the General Codification Commission responsible for all matters related to inheritance. His *Concordances* on this matter, therefore, are most relevant. First of all, he recognized that if a comparative study on the proportion of the forced share were to be carried out between the Castilian tradition and the regional and general European traditions, the fact that their forced share was 'much less than our current portion' would be irrefutable; 'and, therefore, they fortify paternal authority."[39]

This presumed weakening of paternal authority, however, was overcome by "the ingenious *mejora* of the third, which goes back to the *Fuero Juzgo* and has no original not copy, at least that I know of, either in the old Codes or the new."[40] And, in effect, the procedure of the *mejora*, which was already stipulated in the *Fuero Juzgo*, enabled the father of the family to "better" the forced share of one of his legitimate heirs by up to a third, thus giving the father the chance to reward or punish the behaviour of his children through his patrimony. The project of 1851 perfected the tradition, which did not contemplate the case of the only child (where the father could not impose his authority by means of the *mejora).* García Goyena explains that in this case, the *mejora* "has been substituted by the right to dispose of a third of all of his property to somebody outside the family; in this way, the father is stronger and the child more submissive."[41]

The *mejora* proposed by article 654 of the Project of 1851 was not the traditional one of the *Fuero Juzgo* (a third of the total amount of the forced share), but "a double portion of the forced share that corresponded to each" of the forced heirs. It was calculated therefore, through the pretense of considering that there was one forced heir more than there really were, that the deceased could share this portion out completely freely between his forced heirs. This gave rise to a situation whereby if, for example, the forced heirs were two siblings, one could potentially inherit up to double the other.

The Castilian system, therefore, with the modifications incorporated by the 1851 Project, did respect the principle of the authority of the father of the family by means of the procedure of the *mejora,* which enabled him to "better" one of his offspring, a capacity which "decreases as the number of children increases, and this seems very

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[38] Tomàs de Montagut, *The inoficioso testament in the Partidas and its sources*, Anuario de Historia del Derecho Español, LXII, vol. 1, pág. 239-326 (1992).

[39] García-Goyena, *supra* n. 6, pág. 90.

[40] For some Catalan authors the "originality" of the system of the *mejoras* and the fact that it was not followed by any Code, either old or modern, was only an indication of its notorious inefficiency. Cadafalch, *supra* n. 10, pág.145.

[41] García-Goyena, *supra* n. 6, pág. 91.

equitable."[42] Although this equitableness was indisputable, the conclusion is - which is coherent with the arguments of Garcia Nagoya - that the authority of the father of the family diminished in proportion to the number of offspring he had.

But the problem that Project of 1851 posed in Catalonia was not so much that it constituted a weakening of the position of authority held by the father (a criticism which certainly could be questioned by arguing the system of the *mejora),* but that it constituted an attack on a traditional concept of family, which in Catalonia required the bulk of the family patrimony to be preserved through the figure of the heir who was conceived to be the substitute of the deceased *pater*.

The obligatory subdivision of eighty percent of the inheritance between all of the children destroyed the concept of the family as a social unit which perpetuated over time, and instead incorporated values of disintegration which were totally new for the legal system of Catalonia.

An illustrative example given by both Florencio García-Goyena and by the Catalan jurist Cadalfach Beguna clearly shows that the bottom line in the debate on the succession system of forced shares had as the essential latent element a concept of family which was understood very differently in Catalonia than in Castile. The example given was that of a family with a farmhouse valued at 15,000 duros and four children.

García-Goyena started by affirming that through the technical expedient of the *mejora* the father could maintain his position of authority in the family, and that he could do so from an even stronger position than he could from the basis of the principle of testamentary freedom; furthermore, his obligations towards his children were guaranteed through the legal imposition of the forced shares.

To test this statement, the previously described case was used as an example and the results obtained by applying the Castilian legal criteria[43] were compared with the results obtained by applying the Navarra system (which was the most strict of the regional systems in its adherence to the principle of testamentary freedom).

In García-Goyena's opinion, the situation of the one of the four offspring who received as a donation the bulk of the family patrimony was not very favorable if we bear in mind the fact that multiple responsibilities accompanied the fifteen thousand duros inherited: to maintain his mother and siblings, "pay for their studies, find his sisters marriage partners and provide them with a dowry, according to the needs of each family."[44]

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[42] *Id*, pág. 102.

[43] In any case, García-Goyena gives the example of traditional Catalan legislation, which implied the possibility of a *mejora* of up to a third of the forced share. However, as we have already mentioned, the Project of the Code allowed for the possibility of calculating the forced share in a different way that made the proportion less as the number of children increased.

[44] García-Goyena, *supra* n. 6, pág. 330.

García-Goyena also illustrated the outcome after applying the Castilian system and, apparently, the result was much more advantageous for everybody:

> I trust the testimony of my fellow neighbours to tell me if the Navarran donor, in a specific case, ends up in as beneficial a situation as the Castilian who has received the fifth and the third. This heir, with these *mejoras* and his forced share would get, without any responsibilities at all, 8,750 duros of the 15,000; and the contrast will be even greater as the number of offspring with the same capital increases, because the *mejoras* will always be 7,000 duros.[45]

Of course, the example that García-Goyena gives includes implicit circumstances which, when manifested, expose the true nature of the debate that the discussion attempted to uncover. Why is the Navarran donee burdened with the family responsibilities that were his father and beneficiaries? And did García-Goyena consider the Castilian heir to be free of all responsibility in relation to the lives and education of his siblings? As he said, this heir, with these *mejoras* and his forced share, would get 8,750 duros of the 15,000 and *no responsibilities at all.* The implicit reason, which is not openly manifested, is that the heir or the Navarran donee is the father's *substitute* whose role it is to continue his father's work, *his family,* as if the father was still in the world. In this sense, it doesn't matter if he lives (in García-Goyena's example he lives, he is a donor) or if he dies.

The situation arising from the Castilian system is radically different. First of all, universal donation is not possible and after the death of the testator, of the father of the family, the family itself and how this family sustained itself when the father was alive is also understood to have died: the patrimony is divided and even though it is possible that one of the heirs gains much more than the others through the procedure of the *mejora* (which only serves to maintain the authority of the father while he is alive), the set of family duties of a moral nature that the deceased (the father of the family) had in relation to his children is not considered to now be the concern of the favored heir (the one that receives 8,750 of the 15,000 duros), as it is understood that these moral obligations are adequately met by the general provisions of the law, by the forced share (which in this example would be in the region of 2,000 of the 15,000 duros for each of the remaining siblings).

The Catalan jurist Cadafalch Buguñà, commenting on García-Goyena's example, reproached him:

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[45] *Id.* This last affirmation of García-Goyena is true if we apply the system of the *mejoras* as stipulated in the Castilian tradition. The third of the forced share and the spare fifth of the total of the family patrimony were the same amount. This would not be the case with the system of the *mejora* of the Project of 1851. In this system, the *mejora* decreased in proportion to the number of children.

> [H]ow could it be that the Castilian with the *mejora*, with 3 siblings, receives in cash 8,750 duros of the 15,000 capital, when the Navarran, universal donee of the same amount and also with 3 siblings, will receive, according to Sr. García-Goyena, a very small net amount once he has fulfilled his duties? How and in what way do they fulfil their duties? It is known, without doubt, in the case of the Navarran donee. But how does the Castilian with the *mejora* attend to his? How precarious, then, is the situation of the three Castilian brothers compared to the sibling with the *mejora*! How much better is the situation of the three Navarran brothers in comparison to the universal donee!

He adds:

> It is easy to understand now how we always notice that in the regional provinces the word inheritance does not only mean enjoyment, but also duty: that the heir or donee must not be, nor is he considered to be, the one enriched by good luck, but is seen to be the continuation of the father, the representative of the ideas and feelings of the family.[46]

Testamentary freedom in the regional provinces was the support system from which a *permanent* family structure rose, this being the best way to guarantee that the values of some traditional ways of life that felt threatened in the tumultuous years of the middle of the nineteenth century were safeguarded. Thus, testamentary freedom was understood to be the *freedom of the father of the family to dispose of his estate and organize it beyond the event of his death.* Testamentary freedom, therefore, was based on the existence of a patriarchal legal system such as the one that existed in Catalonia. Without this, which was assumed, which was taken for granted, the fight for the principle of testamentary freedom would have made no sense.

The successions system of the 1851 Project, in that it imposed a general and legal system to protect the offspring through the system of forced shares, relieved the father of this function and enormously limited his capacity to dispose, while at the same time it set in motion, as already explained, a process of liquidation of the family patrimony and, therefore, of the family itself, which consequently disappeared as a patrimonial and social differentiated organism upon the death of the testator.

From this point of view, it is easy to understand why for the Catalan way of thinking the testamentary trials that so often took place after the death of the testator between different members of the same family were intolerable. These conflicts, which often derived from the different valuations given to the various units that comprised the family patrimony were, in the eyes of Catalans, like an allegorical dramatization

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[46] Cadafalch i Buguñà, *supra* n. 10, pág. 146-147.

of the family break-up that the new regime would bring, the symbolization of the definitive undoing of the ties between siblings and the widowed mother, which should have held the family united based on the preservation of the entire family patrimony as a single unit.

García-Goyena recognized that in the regional territories "decrees of wills are unknown, while in Castile they create conflicts and arbitral proceedings, upon the ruin of and disagreement within families."[47]. Given that, as Cadafalch Buguñà pointed out, after the death of the father of the family, any co-heir, or a mere legatee, 'an anybody who sometimes has no right, or who may only receive a tiny part of the inheritance, can provoke this type of trial.' The resulting situation, as we have said, was potentially dramatic.

> They enter by right into a family house which has just lost one of its members and there among the weeping and desolation, there is a judge, a scribe, a clerk, lawyers and other people that are said to be interested parties. It sometimes begins with an intervention that consists of collecting clothes**,** jewelry and money, and the closing and sealing of cupboards, lounging chairs and pieces of the dead man's house. This is how an inventory which lasts for days begins. Later, the value of everything had to be verified and finally there was the division of the estate with different reclamations, which lead to separate costly legal actions.[48]

This break up of the family unit that took place at the end of the life of the fathers of the family was what the safeguarding principle of testamentary freedom aimed to avoid.[49]

V. The Catalan legal tradition in matters of successions law

Between the eleventh and the fourteenth century three succession systems of forced shares were simultaneously in force in Catalonia: the Visigoth system, the Roman tradition and the Catalan system.

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[47] García-Goyena, *supra* n. 6, pág. 329.

[48] Cadafalch i Buguñà, *supra* n. 10, pág. 153. Similary, Juan de Dios Trías, *Conferencias de Derecho civil Catalán,* pág. 31, note 5.

[49] In relation to this, Cándido Nocedal, "Can private conscience and political conscience be separated? Must the current Castilian legislation in matters of testamentary successions be preserved, or would it be better that testamentary freedom be widespread throughout the Kingdom? 'Is it better for the preservation of families, for their moral order and wellbeing, the widowhood of Aragonese spouses or the Castilian institution of *parafernales* [the separate property of a married woman]", Revista General de Legislación y Jurisprudencia*,* núm. 29, pág. 272 (1866).

The Visigoth system was observed particularly in Cervera and Tarragona, whereas the Roman system prevailed in the rest of Catalonia. At the end of the thirteenth century, in 1283, Peter II inaugurated the Catalan tradition whilst at the same time reaffirming, at the request of the pre-eminent men of Barcelona, the privileges and customs of the city, one of which was: *Item quod haereditas deffuncti dividatur in quindecim partes, et quod octo partes sunt legitima*.[50]

Regarding the Visigoth tradition, the new criteria that came into force as law in Barcelona maintained the same forced share portions, but eliminated the obligatory nature of the *mejora*, making this share of the family patrimony open to *free disposition*, thus giving the testator more power of authority over his estate.

Further to this attempt to increase testamentary freedom, the Constitution passed by Alfonso II in the *Cortes* (Parliament) of Monblanch of 1333 ruled in favor of Roman legislation which, as we mentioned previously, reduced the forced share to a third in places where until then the Visigoth tradition had been applied.

This measure preceded Peter III's decision to modify, at the request of the councilors, the pre-eminent men and the city of Barcelona, the privileges of the municipality regarding this matter, thus reducing this portion of the family patrimony to a quarter of the estate without contemplating the possibility of the *mejora*. This was, in effect, the Catalan system of successions law, a system which came into use throughout the entire Principality by means of the Constitution passed by Phillip II in the *Cortes* of Monzón of 1585.[51]

This legal system had other defining characteristics: First, the father could name any one of his children as his heir, or even somebody outside the family, but in any case he had to respect the forced share of a quarter of his estate for his descendants. In fact, he had entirely free disposition of three quarters of the family patrimony both *inter vivos* and *mortis causa*.[52]

Second, regarding the above, the forced share could be transmitted simply by a legacy document, or any other way, without the offspring necessarily being the heirs.[53] Third, the heir could choose between claiming his forced share in money or

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[50] Vives y Cebriá, Traducción al castellano de los Usages y demás Derechos de Cataluña, vol. II, pág. 268 (1862). Despite the fact that James I promulgated a Constitution in the Cortes of Barcelona of 1231 which did not allow the allegation of "Roman or Gothic laws, rights and decrees . . . in secular causes", we know from Tomás Mieres, *supra* n. 25, collation 5th, ch. XXVIII, no. 8, that the allegation of the Gothic law was maintained in six situations, amongst which, were the hereditary forced shares.

51 CYADC-1704, I, VI, 4, 2nd. Here we use the edition of the *Constitutions y Altres Drets de Cathalunya, Compilats en virtut del capitol de Cort LXXXII, de las Corts per la S. C. y R. Majestat del rey Don Philip IV, Nostre Senyor celebradas en la ciutat de Barcelona, Any MDC- CII,* published in Barcelona in 1973. We cite through the initials CYADC, first indicating the year of the edition to distinguish this Recompilation from the previous two, then the volume, and then the indication of the book, the title and the constitution that it deals with.

[52] CYADC-1704, I, VI, 3, 1st; book. VI, title 5.

[53] *Id.* 2, 2nd.

in property.[54] Fourth, fathers were allowed to prohibit the detraction of the *cuarta trebeliánica* (the fiduciary inheritor's right to acquire a quarter of the assets of the inheritance) from the rightful heirs, but they were obliged to expressly declare this prohibition.[55] Last, while the father lived his children had no legal recourse to insist on their forced share, nor could these portions be seized or foreclosed in any way, either judicially or otherwise, as a result of any civil or criminal act committed by one of the offspring.[56]

A. El hereu

We explained previously how the principle of testamentary freedom was related to a patriarchal concept of family that had to be safeguarded and to an idea of the family as a unit that perpetuated through the substitution of the *pater* with the heir.

Two circumstances were necessary for this to be so: first, a very light system of forced shares that left the bulk of the family patrimony to unrestricted freedom of testation, a system that came about in Catalonia in the way described above; and second, a legal definition of the heir, of he who was called upon to maintain and continue the family structure of the testator. This is where the figure of the heir came into his own.

The first basic principle that informed testamentary successions in Catalonia, according to Roman legislation, which is our legislation, is that of the need for the institution of the heir. Without the institution of the heir in Catalonia -with the exception of the local legislations of Barcelona and Tortosa, as we shall see later- there is no testament and, therefore, there cannot be testamentary succession.

Joan Martí Miralles, one of the best Catalan jurists of the first half of the twentieth century who was, among other things, a member of the Commission responsible for preparing the Codification of Catalan civil law, affirmed the principle.[57] The institution of the heir "together with the principle of universality in the succession of the heir are, we could say, the basic concepts of the entire Roman succession structure" and, therefore, of the succession system of Catalonia.[58] The logical consequence of these two principles is the incompatibility of testate succession and intestate succession in Catalan successions law.[59]

However, if we turn to the *Constitutions and other Laws of Catalonia* we find no legal regulations that make the institution of the heir a requisite or that regulate it.

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[54] *Id.* 5, 2nd.

[55] *Id*. 6, 1st.

[56] *Id*. 18, 1st.

[57] Joan Martí i Miralles, *Principis del Dret Successori aplicats a fórmules d´usdefruit vidual i d´herència vitalícia,* pág. 12 (1925).

[58] *Digesto,* XXVIII, V, 1-3 and 9-12.

[59] Martí i Miralles, *supra* n. 57, pág. 28-36.

This, though, does not mean that the regulation was not being used at that time; on the contrary, during the modern era the testaments in Catalonia which did not contain the institution justified their validity by referring to a local privilege that allowed them to make a will without instituting an heir[60], thus confirming the validity of this general norm.

The legal system of the institution of the heir in Catalonia came directly from Roman law and was incorporated into Catalan law through the Reception. The notarial formulas of the Middle Ages are testament to its existence; a good example is the 1694 work of José Comes, *Viridarium artis notariatus sive tabelliorum* viretum, which for many years was the only basic study manual of the Catalan institutions.[6162] Modern Catalan doctrine clearly adopts this tradition. The work of Cancer is an example:

> Observare etiam aportet, quod ad hoc ut praedicta conseruentur … est necesse, quod in testamento sit aliquis haeres institutus: nam si in testamento nulla est institutio, nihil scriptum valet.[63]

Another example is the Decisiones of Fontanella:

> Mortua vxore duo vidit testator deficere in suo testamento, unum haeredis institutio, quae est testamenti caput (…) testamenti enim perfectio et substantia ab instituione haeredis pendet.[64]

And from here it became rooted with absolute clarity in contemporary Catalan law. This is easily corroborated by an analysis of the jurisprudence of the Supreme Court where the principle of the need for an heir is recognized, without which the will is considered to be null and void.[65] The freedom that the testator has in designating an heir,[66] the principles that affect the form and determination of the institution of the heir,[67] and the authentication of its universal nature is also evidenced here.[68]

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[60] This was the case of the sacramental testament, a privilege that was peculiar to the city of Barcelona and was later conceded to the city of Girona; in the *customs* of Tortosa a will could be made without instituting an heir: custom 2nd Rub. VI, 'on ordination of wills' Lb. VI.

[61] Published in two volumes in Girona in 1704 and 1706.

[62] Gillem M.ª de Brocà, *Historia del Derecho de Cataluña, especialmente del civil y exposición de las instituciones del Derecho civil del mismo territorio en relación con el Código civil de España y la jurisprudencia*, pág. 423 (1985).

[63] Cáncer, *supra* n. 26, ch. IV, fragment 55, pág. 87.

[64] I. P. Fontanella, *Decisiones Sacri Regii Senatus Cathaloniae*, vol. II, pág. 7-8 (1668).

[65] STS, 7th of October 1890.

[66] *Id*. 18th of October 1872.

[67] *Id*. 18th of June 1857.

[68] *Id*. 7th of April 1864.

The difference between this system and the Castilian one is unmistakable. The will in Catalonia necessarily had to resolve all matters for which the testator was responsible: in this regard, it must be said that it encouraged individuals to take decisions about all aspects of their family situation, or in other words, all of the rights and personal and patrimonial obligations that had arisen in relation to their estate.[69]

The Castilian tradition, on the other hand, did not obligate the testator to take these decisions as the institution of the universal heir was not a legal requirement, thus making testate and intestate succession compatible.[70] This responsibility that Catalan law imposed upon the testator meant that he had to be given a high degree of freedom to take decisions (at the end of the day, testamentary freedom is the great inspired principle of Catalan successions law), which needed to be counterbalanced by a laxer system of forced shares than the Spanish one.

This was in essence the main difference between the Catalan tradition and the one proposed by the Civil Code. The Catalan legal order conferred enormous importance on the will, imposing the need for the testator to take responsibility for all of his legal matters after his death. The legal system that the Code proposed allowed the will to be used for trivialities and did not force the testator to take fully conscious responsibility for their position in the world and the future, given that testate and intestate succession were compatible.

B. The conventional Catalan law of successions

The Catalan legal and political class defended their traditional testamentary freedom, maintaining that essentially they were *defending the right their society afforded them to take responsibility for their own future* without being subject to the legislative dictates of political power. As a result, a successions law of a *conventional* nature was developed in Catalonia around the institution of the *heredamientos*.

The *heredamientos* were marriage contracts that included transmission *mortis causa* of the family patrimony.[71] Unlike the will, which could be modified by the testator at any time, the *heredamientos* could not be rescinded simply on a whim of the person that had consented to them, but the consent of the two parties that had originally agreed to them was required (Sentence of the Supreme court of 28th April 1858). In any case, the testamentary forced share (which in Catalonia was a quarter

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[69] The Legal School of Cervera brought some works of the very highest quality to the institution of the heir from legal humanism: José Finestres i de Montalvo, *Prelectiones cer- varienses, sive commentarii academici ad titulum Pandectarum de liberis et postumis, cui subjurgitur diatriba De postumis heredibus instituendis vel exheredantis, et ad titulum De acquirenda vel omittenda hereditate* (1750).

[70] Cfr. article 764 of the Code of 1889, and 627 of the Project of 1851.

[71] J. de Moragas de Tavern, *L´Hereu*, 54 et seq (1888). The practice came from the *Usatges* themselves. Cfr. *Usatge 76* recognized the *heredamiento* in favor of the son that married, and *Usatge* 79 recognized the *heredamiento* granted by the son in favor of his future son.

of the patrimony of the testator) had to be respected in order, where necessary, to be able to draw up a will.

Some forced shares – those of the 1851 Project – which tied four fifths of the family patrimony to the forced heirs, threatened to impede this deeply rooted Catalan custom which, in practice, served to perpetuate the family unit through the heir.

This custom made Catalan successions law a *conventional* law, a law understood to be a product of agreements made freely not so much by individuals, *but by the family organ,* given that this was the unit they were trying to protect and which was, represented by the *paterfamilias,* in a position to take decisions.

This practice was an exception to the principle of Roman law *nulla est hereditas viventis*,[72] a *pactum de succedendo* that Roman law did not expressly prohibit. Obviously, the institution of the *heredamiento* was an attack on the Roman principle of testamentary freedom, given that once perfected it prevented all grantors from freely disposing of their estate *mortis causa* without the consent of the other.

And it was not the only institution that originated in Catalan family law of the Middle Ages from principles that were quite different from, and even contrary to, the *ius commune.* It must be remembered that the private Catalan law that came into being in that period usually turned to Roman law because of its enormous technical quality and its capacity to provide solutions, not because there was an irrational and unstoppable tendency towards the Reception. The same force with which Catalan society was able to oust the *Liber iudiciorum* and impose their own *usages,* which were more fitting to their social structures, ousted Roman law when, as was the case with the institution of the *heredamientos* or of the beneficial ownership for widows, their family social structure so required.[73]

This is clearly illustrated if we trace this practice in Catalonia to its remote origins in the *Usatges,* where it is found legally reflected. Brocà points to the *usatge* "Auctoritate et rogatu"[74] as the origin of the *heredamiento*. This text demonstrated that it was a usual practice and was understood to be a "donation" (to whom it was given) in that it transmitted "his castle or his honor or some possession" to the children or grandchildren while he was still alive. It also established the principle of the irrevocability of these agreements, given that in many cases in *mortis causa* the will of the testator could be modified. The *usatge,* however, left it clear that "d´aquí enant la sua volentat mudar no prà, si aquela donació sirà dreturera, ho nulla raó non o enbargue" (from now onwards his will cannot be changed, if that donation will last, and there is no reason to not cancel it).

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[72] *Digesto,* 18, 4, 1; 29, 2, 27.

[73] The indigenous nature of the *heredamientos*, aside from the influences that came from Roman and Germanic law, is defended in: Francisco Gas, *Successions pacts*, Revista Jurídica de Cataluña, pág. 314-323 (1953).

[74] de Brocà, *supra* n. 62, pág. 699.

Furthermore, in relation to the Visigoth law contained in the *Liber* and the forced shares mentioned in it these "donations" were considered to be made while the grantor lived as a 'betterment'; or in other words, they pertained to the part of the forced share that the father could use freely to *mejorar* the child of his choice: "in this system the father or grandfather can better his son or daughter, his grandson or granddaughter."[75]

It was during the eighteenth century that the name *heredamientos* began to appear to designate this custom. The name came from their being patrimonial transmissions that were normally passed on as an *inheritance* and which transmitted the family *heredad* **(**property).

In those times the *heredad* in question was usually larger than the portion of the *mejora*, but at that time this was not important as in the feudal world Visigoth law had been supplanted by some *usatges* that aimed to establish a succession system that kept the entire family patrimony linked to primogeniture.

Paradoxically, the growing Reception of Roman law in Catalonia during the eighteenth century also facilitated the consolidation of this institution, despite the problems inherent in harmonizing the *heredamientos* and the system of the *ius commune.*

The reason for this was that the legal configuration of this donation *mortis causa* that brought about a *mejora* changed as Visigoth successions law was being replaced by a Roman law that promoted a reduced forced share and a wide margin for free disposition that was no longer limited to the third of the *mejora.* As this evolution progressed, these donations that the usatge 'Auctoritate et rogatu' referred to did not need to be interpreted as a *mejora*, but had to be based on their own strength as a tradition that was consolidated in the *Usatges.*

Besides this practice, another custom (which like the first also went against important principles of Roman law) came to form part of the nucleus from which the *heredamientos* originated. The custom in question was that of indirectly 'bettering' a child or other descendent through the wife by means of the procedure whereby she was given some assets in a fiduciary capacity so that she could pass them on to one or more present or future offspring as she saw fit. This custom, obviously, was totally opposed to Roman law, which prohibited donations between husband and wife,[76] but as time passed it prevailed to become, along with the custom mentioned above, one of the two branches from which the institution of the *heredamiento* originated.[77]

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[75] Usatges de Barcelona. El Codi a mitjan segle XII. Establiment del text llatí i edició de la versió catalana del manuscrit del segle XIII de l´Arxiu de la Corona d´Aragó de Barcelona, Barcelona, 1984, pp. 150-153.The relationship between the heredamientos and the mejora is dealt with for the first time by Jesús Lalinde Abadía, *The problematic history of the heredamiento*, Anuario de Historia del Derecho Español, pág. 208 et seq (1961).

[76] Digesto, 24, 1, 1.

[77] Jesús Lalinde Abadía, *Catalan nuptial pacts (historical outline)*, Anuario de Historia del Derecho Español, XXXIII, pág. 205 (1963).

The thirteenth and fourteenth centuries saw the decline of Visigoth law in Catalonia as many documents testify to, beginning with the initial disposition of the *Usatges,* 'Cum dominus', and Jaume de Montjuich's annotation in the *usatge* 81, 'Iuditia curiae', where it was declared: 'As the Visigoth laws are used in few cases…'. But at the same time Roman law was also banned by James I.

It is within this historical context that the *heredamientos* found an easy and simple coupling with the Catalan legal system, despite the problems inherent in harmonizing this practice with the Roman and Visigoth traditions. We know from the documentation that Hinojosa published that in the fourteenth century in Catalonia the *heredamiento* was equated with the institution of the heir, which affected all of the current and future property of the grantor,[78] and was mentioned in the Constitutions and the "A foragitar frau".[79] The opinion of such an eminent jurist as Tomás Mieres regarding the aforementioned Constitution was that all instruments detrimental to the *heredamiento* should be considered null and void and he prohibited notaries from accepting them.[80]

The problems for this institution came later when civil law definitively became a constituent part of Catalan law.[81] The authors of the *mos italicus* in Catalonia would then face serious difficulties given that the Court itself where they carried out their work as jurists began to cause problems for institutions that did not adapt comfortably to the Roman legal system. Fontanella was a clear example of this.[82]

How the Catalan jurists of the *mos italicus* decided to adapt the tradition of the *heredamientos* to Roman law was to affirm that they were not a successions pact but a donation.[83] As a consequence, the Court of Catalonia obligated the grantor to reserve a part of his estate to be disposed of in a will.[84] Thus, the first problem of fitting

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[78] Eduardo de Hinojosa y Naveros, *El régimen señorial y la cuestión agraria en Cataluña durante la Edad Media,* pág. 153-154 (1965).

[79] CYADC-1704*,* I*,* book IV, title 30.

[80] Tomás Mieres, *supra* n. 25, collocation 6th, no. 1, 10 and 11, pág. 330.

[81] Martín I, Cortes de Barcelona de 1409, ch. 9, and Felipe III, in *Cortes* of Barcelona of 1599, ch. 40. CYADC-1704*,* I*,* I, 38, 2nd, and I, 30, 1st, respectivamente.

[82] The author refers us to the Sentences of the Royal Court of Catalonia, with information about the problems that surrounded this question. Notice that some doctors, for example, voted against the admission of a *heredamiento* because it implied a universal donation, which was prohibited by Roman law. Juan Pedro Fontanella, *Tractatus de pactis nuptialibus, sive de capitulis matrimonialibus,* t. I, clause IV, annotation IX, pars. IV, no. 41752.

[83] Juan de Socarrats, *Comentariis super Consuetud. Feud. Principatus Cathaloniae,* Lugduni, pág. 252 (1551). Also, Fontanella, *supra* n. 82.

Cáncer affirmed that these "donees" could in no way be considered to be heirs, to the point where 'donors' were recommended, independently of the *heredamiento,* to institute their heirs as donees. Cáncer, *supra* n. 26, ch. VIII, no. 68.

[84] Fontanella, *supra* n. 82, clause. IV, annotation IX, pars. IV, no. 121. If a certain asset was specified in the reserve, then its inalienability was considered. Cáncer, *id,* no. 74 and 209.

the heredamientos into the structure of the *ius commune* was resolved. However, there remained the problem of how to harmonize this institution with the Roman principle of the donation.

To begin with Roman law was opposed to making general donations of one's entire estate (from the *lex Cintia,* 204BC donations over a certain amount were prohibited), which had most certainly left its mark on the more Romanized local Catalan laws.[85]

These obstacles started to be overcome through reinterpreting the institution of the *heredamiento* based on the following key points: the *heredamiento* was to be a donation that only affected current assets and never future ones;[86] thus, the *donatio hereditatis* could be considered to be invalid in Catalan law[87] to the point that a *heredamiento* that expressly included future assets was considered to be null and void.[88]

In the case where the donor wanted to include all of his present and future assets in the *heredamiento,* the traditional impediment of Roman law – the principle of universality -was overcome by means of the same procedure as described above whereby a reserve was stipulated- a part of one's assets – that had to be disposed of in a will. Without this reserve, the *heredamiento* was presumed to include only present assets and not future ones, on the understanding that one cannot give what is not yet his.[89] On the other hand, once the reserve to be disposed of in a will was made, if the word "heredito" or "dono hereditatem" was included then the opposite was presumed, that the *heredamiento* affected all of the present and future assets of the grantor.[90]

In Fontanella's opinion,[91] this was a forced, even violent, interpretation but a necessary one because the Court of Catalonia had imposed some criteria that came from the *ius commune,* which did not allow the traditions of Catalan law to be expressed with the same measure of freedom they had enjoyed during the Early Middle Ages.

In any case, the institution of the *heredamiento* was very much affected by the difficulties encountered in adapting it to the tradition of the *ius commune,* as its necessary adjustment to the Romanistic requirements of a modern Catalan law that was dominated by jurists of the *mos italicus* lead to the blurring of the profiles

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[85] Castilian law also took up this principle in Law 69 of those of Toro.

[86] Cáncer, *supra* n. 26, pág. 130.

[87] Cáncer, *supra* n. 26, pág. 132.

[88] Fontanella, *supra* n. 64, pág.14.

[89] Digesto, XXXIV, II, 7.º Fontanella, *supra* n. 25, clause. IV, annotation 9, pars. 4th, nos. 45, 94 and 123; annotation 21, pars. II, nos. 23, 25 and 26; clause V, annotation10, part I, no. 25; clause VII, annotation 2, part I, no. 44; Cáncer*, supra* n. 26, Part I, ch. VIII, no. 130; part III, ch. VII, no. 389.

[90] Fontanella, *supra* n. 64, pág. 123.

[91] *Id*. pág. 39-43.

of the institution, creating confusion and, consequently, numerous legal proceedings.[92] The end result is expounded by Fontanella: *in its time the institution began to be infrequent.*[93]

C. The contemporary Catalan system of conventional succession

Despite the fact that the *heredamientos* fell somewhat into disuse during the Middle Ages, they made a recovery at the beginning of the contemporary period to the degree that they came to be seen, in the opinion of Guillem M de Brocà, to be "the most typical legal institution of Catalonia.".[94] Let us pause here to reflect on the validity of this point of view and to discuss the reasons for *the nineteenth century upsurge in the practice of the heredamientos.*

What is certain is that through this procedure, which managed to move beyond its feudal origins to become general practice as a succession system *mortis causa* in Catalan society, a son could be named as the heir. This took place on the event of his wedding, or previous to it, while the father reserved the beneficial ownership of his entire estate for life, which usually applied to his wife too. It was usual for the *heredamientos* to leave out part of the family patrimony to allow the father of the family to make a will in favor of his other children or to carry out any other disposition regarding his property. The *hereu* did not form a new household but continued to live in his father's house, thus leaving it quite clear that he would be the successor. Thus, the entire family worked for the one, common home which afforded all its members shelter and also guaranteed the survival of the family.

This potential explains why the *heredamiento* re-emerged at the beginning of the eighteenth century and during the first one hundred years of the contemporary period. Throughout the Early Middle Ages in Catalonia the custom of establishing a comprehensive "legislative, and in a way, programmatic order"[95] in matrimonial pacts had developed which, based in the *heredamientos,* organized all of the family's patrimonial matters. An heir was named who, through the *mortis causa* donation, committed to a set of family responsibilities such as the dowry of his sisters and financial assistance for his brothers so that they could start their own families,[96] and who was obliged to name his own children as his heirs.[97]

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[92] *Id.*

[93] *Id*. pág. 1.

[94] Brocà, *supra* n. 62, pág. 699.

[95] Lalinde, *supra* n. 77*,* pág. 223.

[96] Both this female dowry and the donations due to the heir's brothers could be included in the *heredamiento* to cover the legitimate rights of these beneficiaries, which ended any expectations of inheriting through succession.

[97] Lalinde, *supra* n. 77, pág. 221-246.

In this way the *heredamientos*, having shed their links the Old Regime -and despite the crisis they suffered as an institution in the modern era- found new legal meaning in the contemporary world. During this period, they evolved from the traditional structure of *matrimonial pacts* to a contractual and, therefore, *liberal* system that organized all of the family's patrimonial matters for perpetuity. As a result, for Catalans the *heredamientos* were the legal tool that allowed the traditional Catalan family to adapt to the contemporary order.[98]

And so in Catalonia from the eighteenth century onwards this institution once again gained ground as a consequence of the fact that it was well-suited to an order that was in full transition to modernity. It was a clear manifestation of either contractual freedom or of testamentary freedom, freedoms which were in fact manifestations of a property law that was starting to position itself at the center of the legal system.

The role of the jurists of the University of Cervera in relation to this matter was decisive both in terms of their publication and diffusion of the concepts which had been revised in line with the new set of needs,[99] and of their rigorous academic reworking of the legal categories.[100]

The naming of the heir could be done in different ways: a *heredamiento* could be established in favor of a son who was getting married or of a son the couple were hypothetically going to have in the future, thus reserving the right of direct determination. The wife or a relative could also be given this power, especially in cases where the testator died without having made a designation. Here the fiduciary *heredamientos* would also come into their own.

Regarding the fiduciary *heredamientos*, historical Catalan law developed another conventional successions formula, the *heredero de confianza* (the 'heir in faith'), a custom which was sanctioned by the Supreme Court itself (Sentence of 17th December 1860) and consisted of the following: if the father of the family died intestate the wife took on the role of making known the will of her deceased husband and ensuring that his wishes were fulfilled. If both husband and wife died this role fell to the nearest family members. And so, the father's criteria and the guidance he would have given when alive could be applied to update the will and in-so-doing the father's objectives were guaranteed.

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[98] A reflection on the legal principles of Catalanism, its anti-individualist character and organicist theory, where the social base is the traditional family which is structured around the figure of the father and his authority as head of the family can be found in my work 'The Catalan legal tradition', *Anuario de Historia del Derecho Español*.

[99] Poncio Cabanách y Malart, *Satisfacción a las preguntas del padre de familias deseo- so de evitar los pleytos que suelen seguirse de algunas dudas sobre el heredamiento del testamento a favor de los hijos,* (Barcelona) 1788.

[100] José Finestres i de Montalvo, *supra* n. 69.

The principle was clear: wherever possible the free will of each family as represented by the father and expressed either directly in matrimonial pacts and a will or indirectly through the closest members of the family who knew the wishes of the deceased, was to be applied before the cold legal criteria of the forced shares. *It was a clear manifestation of how Catalan traditionalism set out to make the laws and liberties of the new contemporary order lie not so much in the individual as in the social organism of the family, which became the central axis of the entire legal system.*

Logically, in the contemporary period the need for the *heredamientos* to be constituted in marital contracts[101] was expressed, as stated in the Compilation of 1960 (except for what was agreed in favor of the offspring of the married couple, which did not have to be stipulated in marital contracts). This requirement had no historical precedent, but was now imposed as a way to strengthen the family, which aimed to consolidate itself as the basic social nucleus, the unit that was custodian of the rights and freedoms of a traditional Catalan liberalism which, because it was organicist, placed the family structure before the individual.

However, there remained the matter of answering the questions raised by modern Catalan doctrine in relation to the institution, which would end in a serious jurisprudential crisis during the sixteenth and seventeenth centuries. *This was imperative if the heredamientos were to be presented as part of a Catalan legal tradition that had managed to persist without any fissures until contemporary times.* First, with this objective in mind, contemporary Catalan legal doctrine began by ignoring the existence of the crisis that the institution faced in the modern era,[102] declaring that the tradition of the *heredamiento* "preserved the customary character with which it was conceived in the times of the Reconquest", putting the institution's doctrinal crisis of the sixteenth and seventeenth centuries down to the empty consequence of the "manias" of the Catalan jurists of that time[103] who they saw as 'Romanist in excess',[104] and paying little atten-

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[101] STS, 27th December 1899.

[102] Francisco Maspons i Anglasell, in his influential work entitled *Nostre Dret Familiar segons els autors clássics y les Sentencies del Antich Suprem Tribunal de Catalunya,* Barcelona (1907), completely ignores the difficulties that the Catalan authors he continuously cites manifested in their works regarding harmonising the institution of the *heredamiento* and the moulds of Roman law. Cfr. pp. 11-17. Similarly, Antoni M. Borrell i Soler in *Dret civil vigent a Catalunya,* published by the Oficina d´Estudis Jurídics de la Mancomunitat de Catalunya, makes no reference to this matter (cfr. vol. IV, published in Barcelona, pág.170-179 (1923); neither does José Antonio Elías y Esteban de Ferrater in their well-known *Manual de Derecho civil vigente en Cataluña, o sea, Resumen ordenado de las disposiciones del derecho real posteriores al Decreto llamado de Nueva Planta y de las anteriores, así del Derecho municipal, como del canónico y romano aplicables a nuestras costumbres,* 2 vols., (Barcelona) 1842.

[103] Brocà, *supra* n. 62, pág. 699.

[104] José Pella y Forgas: *El Código civil de Cataluña. Exposición del Derecho Catalán Comparado con el Derecho Civil Español,* vol. III, pág. 40 (Barcelona 1918).

tion to the now "hypothetical" contradictions between the institution and Roman law.[105]

Contemporary legal Catalanism (the Catalan Legal School) began by preserving a concept of the *heredamiento* that was based on its hybrid nature, which placed it somewhere between the donation and the hereditary institution,[106] as evidenced by the abundant Supreme Court jurisprudence.[107]

From this starting point, the *heredamientos* became *one of the marriage contracts typical of Catalan families;* the understanding was that nuptial agreements constituted "one of the legal customs that made the greatest contribution to giving the general customs of Catalonia its unique physiognomy." More specifically, the marriage contracts stipulated "the future position of the parents, the contributions and reciprocal agreements of the spouses, the situation of the the widow and the mother, the rights of future offspring, and sometimes even –quite exaggeratedly- the rights of the siblings, to whom a universal donation was made." "*Prenuptial agreements are, therefore, the organization of the family estate*; *they are more than a contract, they are a comprehensive regime."*[108]

Some of these pacts are the so-called *heredamientos*, the institution that served to organize and preserve the family patrimony from generation to generation. Durán Bas highlighted four main objectives of the institution: First, to provide the new family that the son was forming with material means; second, to associate the son with the preservation and increment of the family patrimony; third, to safeguard the unity of the family patrimony; and fourth, "to protect the offspring that the future married couple may have against the snares that, in case of a second marriage for either of them, the person that shares the family home with the surviving spouse may set." A further objective that was usually included was to provide for the needs of the widowed spouse and to safeguard her dignified position within the family through the widow's beneficial ownership.[109]

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[105] 'But, the fact that it is a customary institution means we cannot refer to Roman law, even though there are indications that lead us to suppose that succession by means of pacts, prohibited by the old law, was valid when it was the succession from fathers to offspring, and it was also valid when the inheritance was given to somebody outside of the family by means of a will and to one's offspring through pacts as a result of a law in the Code. For this, preferably, French and northern Italian commentators must be studied, because these institutions exist in those countries, and so wherever possible they look to mould it to Roman law, even though in this they found insurmountable difficulties like that of the nullity of successions pacts and the nullity of the donation of all one's present and future assets.' *Id.* pág. 33-34.

[106] Fontanella, *supra* n. 64, pág. 545.

[107] Sentences of the Supreme Court of 10th January 1872, 10th January 1873, 25th February 1882, 7th May 1896 and 3rd February 1909.

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[109] *Id.*

The problems of harmonizing the institution and the tenets of Roman law were, at that time, quite minor matters. Cast you mind back to what was said on this matter above. In the modern age the validity of a *heredamiento* that included all of the present and future assets of the donor was questioned. Fontanella had started from the assumption that *donationem omnium bonorum presentium et futurorum, nullum est jus quod expresse prohibeat.*[110] He also maintained that this donation as an inheritance of all present and future assets was contrary to the Roman principle of not being able to pass on the inheritance through pacts or conventions on the grounds that testamentary freedom was an inalienable natural law.[111]

In an attempt to harmonize the institution of the *heredamiento* and the requirements of Roman law, the Court of Catalonia and the most eminent Catalan jurists of that time had established the criteria that if the *heredamiento* was constituted with a reserve to be disposed of in a will then it was considered not to go against the Roman principle of testamentary freedom, nor against its prohibition of universal donation.

By the nineteenth century the situation was radically different with the result that there had been a change of direction in the legal tradition with respect to this institution, which resulted in a return to its more mediaeval form. In the appeal that specifically alleged the doctrine of Joan Pere Fontanella, Lluís de Pegueram and even the more recent Vives Cebrià, the Supreme Court in a Sentence of 4th May 1859 declared that:

> [T]he current legislation in Catalonia authorizes donations inter vivos *with no limitations other than that they are not prejudicial to the forced share that the law stipulates for the donors, which in that ancient Principality is a quarter of one's estate.*[112]

Affirming, in relation to the authors named in the petition, that:

> [T]he opinions of the writers that are also supporting the appeal can only be qualified as the doctrine of the Doctors that the only Constitution, title 30, book 1 of that Principality talks about, when its uniformity and its continuous application in that territory materializes.

This statement, made in the Supreme Court in relation to Catalan legal doctrine, leaves it quite clear that the jurisprudence of the Court of Barcelona was not, in rela-

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[110] Fontanella, *supra* n. 64, pág. 10, 23-24.

[111] *Código,* II, IV, 34th; VIII, XXXIX, 4th; *Digesto,* XVII, II, F 52, no. 9.

[112] In the same vein, and with respect to the authorization of the Register of the public instrument of the *heredamiento,* the Resolution of 4th February 1917 of the General Directorate of Registers and Notaries. (Transcribed in Brocà, *supra* n. 62). Already in 1911, with regards to the requirement of a reserve to be disposed of in a will, this very General Directorate advised that "the obligation to make this reserve was not imposed." Pella i Forgas, *supra* n. 104, pág. 59.

tion to this matter, what it had been in the sixteenth and seventeenth centuries and so the allegations of the authors of that time no longer had any authority. Thus it is indisputable that there had been a rupture in the Catalan legal tradition regarding this key issue: the Supreme Court itself indicated as much in the middle of the nineteenth century.

Because the *heredamiento* was assumed to be a hereditary institution, its interpretation of the category of the *donatio omnium bonorum* had to be nuanced which, logically, constituted un título singular de adquisición and was considered to be a universal title (given that it could include both current assets, which had to be stated, and future ones, which obviously could not be), making the beneficiary not so much a donor as a *successor in omnium ius defuncti.*[113] At first, the only condition attached to this was that the *heredamiento* contained a reserve to be disposed of in a will, if not it was considered to be null and void.[114]

However, this condition would soon be considered unnecessary as much by Catalan doctrine as by its jurisprudence.[115] In the words of Pella Forgas: "Fortunately, the opinion that the reserve to be disposed of in a will is not necessary is gaining ground, leaving aside the old attitude that was supported by Roman laws that referred to the nullity of succession pacts, and also in Catalan custom".[116] The criteria was that there would be no requirement for a reserve to be disposed of in a will, simply that the *heredamiento* must not be detrimental to the forced share to which the other descendants had a right.

> There was good reason for this: independently of the fact that the heredamiento was categorized as a donation, it also served to name an heir that 'substituted' the father of the family in all of his responsibilities, so that the family persisted.[117]

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[113] Sentence of the Supreme Tribunal of 7th May 1896.

[114] Elías and de Ferrater, *supra* n. 102. Brocà, *supra* n. 62, pág. 202.

[115] Brocà himself, who in his *Instituciones del Derecho Civil catalán vigente* had declared the need for the reserve, recognized some years later in his *Historia del Derecho de Cataluña,* p. 705, that 'modern jurisprudence tends not to consider the reserve to be disposed of in a will to be a requisite for the said *heredamiento* to be valid'.

[116] Pella i Forgas, *supra* n. 104, pág. 59.

[117] '... the heir by means of the *heredamiento* is not a simple donee, but a universal successor, and continuer of the personality of his parents'. Pella i Forgas, *supra* n. 104, pág. 79. The author, despite affirming that given that the *heredamiento* is a Catalan customary institution and, therefore, possible contradictions with tradition of Roman law would not affect it, finds Catalan doctrine from the modern age and jurisprudence of the Court of Catalonia from the seventeenth century to support his opinion; specifically, he cites Tristany, *Sacri supremi regii Senatus. Cathalonie decisiones,* Barcelona, 1688, dec. 60, where it was declared that the universal donee finds himself in the position of the heir and could, therefore, exercise this role. This had been sanctioned by the Supreme Court itself in the Sentence of 6th June 1899.

This has an obvious implication: that in the will that the donor could hypothetically make in relation to the reserve contained in the *heredamiento,* a universal heir could not be named to fulfill a role that was already designated to a donee through the heredamiento. "The private heir – which is something certain and determined, as is the parents" reserve to be disposed of in a will – is a legatee.[118]

Furthermore, the assets included in the *heredamiento* were considered to be especially protected in relation to the responsibilities that would be the donee's upon also assuming the condition of the heir. More specifically, upon accepting the patrimony included in the *heredamiento* the donee that was named as the heir was not held responsible for any debts that the testator had incurred after the date that the *heredamiento* was drawn up, even if he accepted the inheritance with the benefit of an inventory.[119]

This went way beyond modern Catalan doctrine, given that if these jurists maintained this affirmation they did so on the understanding that the *heredamiento* had to establish a reserve to be disposed of in a will, so that the inheritance, a lesser amount, always remained clearly and undoubtedly differentiated from the patrimony contained in the *heredamineto*.[120]

Evidently, the contemporary form that this institution has taken in Catalonia is designed to keep all of the family patrimony**,** which is organized by a set of marriage contracts that reflect the ideal of freedom of Catalan traditionalism, tied to the family. From the position of authority that the law itself concedes to the father of the family he can organize the entire family patrimony in marital agreements and through the *heredamiento*, thus ensuring the survival of his family after his death. This is possible precisely because through this institution all of the family patrimony is protected from any harmful or burdensome act that could be brought against the nuptial agreements at a later date.[121]

This is the new profile that the institution has been given in contemporary times, and Durán Bas provides the best example of this:

> If the father donor, having constituted the *heredamiento* without this reserve, alienates the assets contained in it, the children can press for repeal against these alienations, and they can oppose, in the executions against the father, the seizure of these assets as it was for debts incurred

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[118] Pella i Forgas, *supra* n. 104, pág. 84.

[119] Brocà, *supra* n. 62, pág. 702.

[120] Cáncer, *supra* n. 26, Part 3, ch. 2, nos. 171 et seq. Fontanella, *supra* n. 64, pág. 56.

[121] As established by the Constitution 1st, title IX, book. VIII of those of Catalonia, or an abundant jurisprudence: Sentence of the Supreme Court of 27thMarch 1865, 26th December 1876, 22nd June1886.

[122] Durán i Bas, *Memoria,* pág. 98.

> after the constitution of the *heredamiento*; and they can even oppose these debts if they do not feature in the Property Register. *Fontanella does not seem to be of this opinion; but we do not agree with him, because the donation inter vivos, when it is pure, transmits without doubt the ownership of the assets, even though the donor reserves the right to the beneficial ownership.* Without explicit reference to the possibility of burdens the debts cannot be imposed, even though the h*eredamiento*, substitutions, mortgages, etc. are constituted.[122]

All of this could have led to a strict "tying up" of the properties included in the *heredamiento,* that would have been detrimental to the Catalan real estate market at a time when, in the middle of the nineteenth century, what was being sought was in fact its liberalization. The solution that the Catalan Legal School adopted was the following: It was now established*, quite contrary to the Catalan legal tradition,* that when the simple or absolute *heredamiento* did not expressly establish its universality it had to be understood to only pertain to the current assets of the testator, leaving future ones to be freely disposed of in a will.[123] In Borrell's words: "When a *heredamiento* does not stipulate the assets that it includes, it is understood to be limited to the present ones, the only ones that the donor has."[124] This presumption became more frequently used as contemporary Catalan law moved beyond the requirement of the reserve, given that this requirement left it clear that the *heredamiento* included present and future assets.[125]

In the case that the *heredamiento* was drawn up in relation to all of the assets of the testator, both present and future ones, it was said that:

> [I]t is understood that included in it are the existing assets and also those that will be acquired in the future, but with an important difference. The current assets pass without doubt into the possession of the donee; but for future assets it is understood to only apply to those that are acquired after the *heredamiento* is constituted, those that exist up to the time of death of the grantor, which is the same as saying that the donor can freely dispose of his assets inter vivos up until the very moment of his death.[126]

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[123] As we declared previously, Fontanella considered that if the opposite is not expressly stipulated and the reserve to be disposed of in a will made, then the *heredamiento* includes present and future assets.

[124] *Borrell, supra* n. 102, pág. 176.

[125] *l'heretament* that contains the reserve to be disposed of in a will is understood to be a donation of inheritance meaning that it covers present and future assets or, at least, those that the donor later acquires; otherwise, the reserve has no reason to be.' Borrell, *supra* n. 102, pág. 176.

[126] Durán, *supra* n. 122, pág. 100.

VI. The paradoxes of a conflict

We have already discussed the fact that testamentary freedom, together with the institution of the heir and the principle of the universality of succession, gave rise to a concept of family as a basic and permanent social unit wherein the heir substituted the previous father of the family in all of his legal matters. In effect, he took his place in the world.

In the middle of the nineteenth century testamentary freedom was being defended as it was seen to be the channel through which fathers could ensure that the patrimonial and spiritual order of their families endured beyond their lifetimes, giving rise to a concept of family whose values and economic and social structures persisted over time.

In this context, the successions model proposed by the Civil Code of 1851 demolished the entire structure of successions law in Catalonia, given that it was based on the subdivision of the family estate between the forced heirs which, as we talked about previously, was interpreted from the Catalan point of view as a process whereby the family was *liquidated.* In vain they will look for those who are not used to our habits, in most cases, this invasion of trials to make inventories, to value and to share what is worth more and what is worth less; in vain these terribly sad, for us impious, auctions.[127] Florencio García-Goyena recognized the advantages of this conventional successions law in Catalonia:

> One must have in front of them any one of the matrimonial contracts that are drawn up there: these are true pacts of alliance between two families: all possible scenarios are foreseen; all of the interests of the donors, donees and their siblings are taken into account: no married person there dies intestate, as it is agreed that the surviving spouse disposes of their assets, and in the absence of both of them, this task falls to the two nearest relatives on the mother's and the father's sides. This is how the links between two families are tightened . . . *and testamentary edicts, which in Castile form the patrimony built on the ruin and discord within families, are unknown there.*[128]

Furthermore, the authors of the 1851 Project were well aware of the dangers inherent in allowing the traditional entailments to persist. As Florencio García-Goyena said:

> There is no need to point out that basically it is not prohibited to change what in law is called *vulgar,* in the case where the first named

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[127] Moragas, *supra* n. 71, pág. 9.

[128] García Goyena, *supra* n. 41, pág. 328, 329.

> does not want be the heir: in this case only a first transmission of the property is verified. It is only successive transmissions or substitutions in later degrees, and when the first named enters into ownership, takes possession and enjoys the assets. Of course, perpetual substitutions, known as trusts and majorats, have been abolished and the truth is that this is not the right time to bring them back.[129]

Using as a basis the anti-entailment legislation of 1820, and in relation to the "perpetual institutions of this kind", Florencio García-Goyen affirmed that "the Section goes further, as it aims to prohibit all of them, even the reduced ones and those that are limited to a single grade or generation". The motives for this are obvious: "apart from the economic damage this would cause, meanwhile they could indirectly be made perpetual, only renewing them the last time they are named.[130]

And, unintentionally, this aim led them into conflict with regional systems like the Catalan one, which did not aim to maintain the structures of the Old Regime, but proposed a liberalist formula constructed from an organic and traditional concept of family.

Paradoxically, in time, when the transition to the constitutional order in Spain was complete, the testamentary freedom that had persisted in certain territories of the Spanish state could stop fulfilling this traditionalist function and perform a single function: that of the principle of the freedom to dispose in a liberal democratic regime. Thus, we come to a curious paradox highlighted by Segismundo Moret and Luis Silvela: a Code with tight restrictions regarding the freedom to dispose *mortis causa* was the final result of the historic process in Spain at the end of the nineteenth century. This Code co-existed with regional laws that upheld the principle of testamentary freedom: "with the legislation that still exists today on this matter in the four regional provinces, they have been able to develop the consequences of the liberal regime better perhaps than in Castile."[131]

Another paradox was that in Catalonia at a time when testamentary freedom was upheld against the Code, conventional successions law was also preserved which, in the sense that it gave rise to irrevocable pacts, restricted the freedom to make a will. In any case, this conventional Catalan successions law had no place in the Spanish Civil Code, whose article 658 established that succession *mortis causa* had to be expressed either through the law or through the will, expressly prohibiting the donation of future assets in its article 635 and the drawing up of contracts concerning future inheritance in article 1271. In this way the Spanish civil code abolished any kind of conventional succession.

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[129] *Id*. pág. 323-324.

[130] *Id*. pág. 324.

[131] Moret y Silvela, *supra* n. 18, pág. 177.

In Catalonia, the Code's regulation against the *heredamientos* was interpreted, once again, as a threat to freedom, this time to freedom of contract.[132] The apparently contradictory defense of both testamentary freedom and the legal tradition of the *heredamientos* (a unique expression for freedom of contract) in Catalonia can only be appreciated by understanding that they were not attempting to seek freedoms and rights for citizens, but for the social unit that was considered to be the fundamental organism of society in the liberal project of Catalanism: the family. So, from this point of view there was no contradiction; on the contrary, legal Catalanism's opposition to a codification process like the Spanish one, was profoundly coherent, given that on one hand it prohibited conventional succession and, on the other hand, it limited traditional Catalan testamentary freedom through a strict system of forced shares.

[132] Pella i Forgas, *supra* n. 104, pág. 48.