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THE STATUS OF MARRIED WOMEN UNDER THE LEGAL SYSTEM OF SPAIN

*Lucy A. Sponsler**

INTRODUCTION

Few people will be surprised to learn that the legal rights of women in Spain were, until recently, extremely restricted. The Roman, Visigothic, Jewish, Arabic and Catholic influences during Spain's long history had combined to make the Spanish woman one of the most subordinated in all of Europe. The object of the present study is to examine the status of Spanish women, both single and married, in the past versions of the *Civil Code* of Spain (first promulgated in 1889) as well as in the light of the most recent legal changes. Rather than a detailed examination of all of Spanish law dealing with women, the emphasis will be placed on those major areas in the Spanish codes which have long been restrictive and which lately have undergone broad revisions. These areas include marriage, divorce, wills and inheritance, guardianship, adoption and remarriage.

Prior to fairly recent moves in the direction of women's rights, the only important legal changes in this area during the twentieth century in Spain came in the 1930s. In a number of Western European countries during this period there was a movement in the direction of equalizing the rights of the sexes.[1] This was the era of Spain's Second Republic, which immediately preceded her Civil War and the rise of Generalissimo Franco. In the early 1930s the Constitution of the new Spanish Republic gave extensive rights to women. It also provided, among other things, for civil marriage and divorce.[2] These provisions, however, were eliminated in 1938 during the post-Civil War period.

Under the influence of changes throughout Western Europe, Latin America and parts of Asia, serious reforms were begun in the area of Spanish women's rights with the Law of April 24, 1958. Even with these important revisions, the *Civil Code* maintained the wifely duty of obedience and the need for the husband's permission in the event that she wished to act on her own. The *"ancien régime"* continued to exist on the basis that marriage was a special case in which, because of the exigencies of marital unity and the need to better achieve its

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1. I J. M. MANRESA Y NAVARRO, COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL 412 (7th ed. 1956) [hereinafter cited as I MANRESA Y NAVARRO].

2. The significant provisions were added by way of amendments in 1932. *Id.* at 516.

moral and social ends, religion and history had given the directing power to the husband.[3]

In the past two decades life for Spanish women has changed dramatically. Unmarried young women are migrating to the cities to work or study, living in apartments with other girls rather than following the traditional pattern of remaining in their hometowns with their own families. Women are entering professions populated primarily by men. Medicine, now almost completely socialized, is less attractive to men than formerly, since other fields are more lucrative. Now approximately 40% of Spanish medical students are women. Research positions, also not well paid, are being filled by women, as men dominate engineering, a field which is more profitable. Many women still become secretaries, for they can earn money quickly in this way and provide a nest egg for marriage. Nonetheless, more and more women are attending universities. A special group of universities, called the *Universidades laborales*, is maintained by workers' unions whose members' children attend free of charge. Previously in these schools the sexes had been separated, but now the universities are coeducational with more and more scholarships for women.

Influenced by changes in women's status elsewhere in the world, as well as by new trends in the lives of women within their own country, a number of Spanish female attorneys and women active in politics became dissatisfied enough with the submissive legal position of women in Spain, particularly that of wives, to move for major legal changes in the early 1970s. Originally they had hoped to work out an entirely new series of laws regarding marriage, beginning with a new *Ley de Bases*, or fundamental law, which would have changed totally the rights of partners within a marriage. They were faced, however, with the preamble to the civil code changes made in 1958 which declared wives to be still subject to their husbands' authority: "Because of the demand of matrimonial unity there exists a power of direction which nature, religion and history attribute to the husband."[4] Although the 1958 changes had improved the status of women, granting them the capacity to witness wills and to be guardians, while also giving them equal rights and responsibilities with men in matters concerning judicial separation, the economic regime of mar-

3. J. L. LACRUZ BERDEJO, EL NUEVO DERECHO CIVIL DE LA MUJER CASADA 13-14 (1975) [hereinafter cited as LUCRUZ BERDEJO].

4. J. CORTEZO, LA SITUACIÓN JURÍDICA DE LA MUJER CASADA (1975) [hereinafter cited as CORTEZO]. The Spanish wording of this provision is: "*Por exigencia de la unidad matrimonial, existe una potestad de dirección, que la naturaleza, la religión y la historia atribuyen al marido.*" For this and all subsequent quotations from the Spanish, the English translations appearing in the text of this article will be those of the author and the original Spanish will be found in the footnotes.

riage was still as it had been; husbands had administrative control of the community property.[5]

The Spanish government, led by Generalissimo Franco in the early 1970s, did not wish for such a major action as a new basic law. It did consent, however, to forming a Commission charged with revising, article by article, the portions of the *Civil Code* dealing with marriage. Four women were among those appointed to the Commission, the first time women have ever been included in such a body in Spain. The Commission began its work in 1972, and the first results of its labor were promulgated in the Law of May 2, 1975, during the International Women's Year. Aiming at homogeneity with Western Europe, the Commission members rewrote articles of the *Civil Code* and the *Commercial Code* in an attempt to make a wife's rights equal to those of her husband and to alter her obligation to obey and frequently seek his permission to act. In much of its work the Commission was able to rely on local laws called *fueros*,[6] for their laws were often more favorable to women than those of the *Code Napoleon*, which served as a basis for much of the *Civil Code* of Spain.

The primary changes of 1975 relate to women and marriage in the areas of nationality, capacity and matrimonial regime. Two areas of the husband's superiority, that is, his administration of the community property and his authority over the children, were modified while still retaining male dominance. In 1981 other changes in these areas further equalized the sexes. Some people, of course, believe the Commission has gone too far, equalizing husband and wife when differences, they feel, are justified. Some women are not well enough educated to understand the change or simply do not care. Single women in Spain are relatively unaffected by the revisions, since in many ways they already had the same rights as men in terms of freedom of action regarding property.

MARRIAGE

As early as the medieval *Siete Partidas*[7] there was an awareness that the rights and obligations of a husband and wife were not equal

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5. *Id.* at 54.

6. FUERO DE ARAGÓN; FUERO DE CATALUÑA; FUERO DE NAVARRA; FUERO DE BALEARES.

7. The *Siete Partidas* is a thirteenth-century code which followed Roman jurisprudence. It is a series of seven books sponsored by an enlightened monarch, Alfonso X the Wise, whose court was a center for scientific and literary studies. Alfonso brought learned Hebrew, Arabic and Christian scholars to his court for the purpose of continuing the diffusion of oriental knowledge through the Western world. This was done chiefly by translating works from the languages of the scholars' specialties into Spanish. The *Partidas*, resulting from Alfonso's desire to unify his realm under one common body of laws, was also influenced by the medieval worship of the Virgin

in Spain. King Alfonso X the Wise and his legal experts apparently felt it necessary to justify the situation, for they explain that, after all, marriage is called matrimony and not patrimony. (Part. IV, Tit. II, Law II). The reason given for this "honor" to women is that a wife has to do much more for the children than does her husband, giving birth and then spending years raising them. Child-bearing was the goal of marriage and hence the term matrimony, emphasizing the mother's role in this objective. To a great extent in Spain the goal of marriage remains the same today. This no doubt explains why it was the husband who always had responsibility for the business and financial aspects of the marriage. If a wife had charge of the house and the children, of prime importance in marriage, why should she be burdened with other things as well?

Reaching the Altar

In examining the status of married women in the *Partidas* as well as in other early Spanish codes one notices a number of unusual regulations, many of which have been subsequently eliminated, but a number of which have been continued today in strikingly similar form.

The first regulations concern the matter of getting to the altar. The Visigothic *Fuero Juzgo* (654 A.D.)[8] provided that a son could marry against the advice of his parents or relatives but that if a daughter should do so, the couple would be put under the control of a parent (Bk. III, Tit. I, Law II). As will be seen, this extra control over a daughter has continued well into the twentieth century under the rubric of protection.

The *Fuero Juzgo* also specified that an older woman should not marry a younger man, for their children could not grow in peace "if born in discord" (Bk. III, Tit. I, Law IV). Nature had it, according to the Visigothic legislators, that men should have power over women,

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Mary, and is generally considered to have liberalized and improved upon the legal rights of women. However, it did not truly liberate wives from their husbands' authority, as shall be seen throughout this article. *See* III CÓDIGOS ESPAÑOLES (A. de San Martín ed. 1872); LAS SIETE PARTIDAS (1256-1265).

8. The *Fuero Juzgo* or *Liber Judiciorum*, considered the masterpiece of Visigothic law, was promulgated in 654 A.D. Written in Latin, it evolved during the reigns of four Visigothic monarchs before reaching its final form. It is a blend of Roman and Germanic law with the Roman elements particularly noticeable in the areas of inheritance and contracts. The code has a well-developed sense of justice, but with some harshness and cruelty in law enforcement and treatment of slaves. On the other hand, there is much enlightenment, particularly in the treatment of the poor, considering the fact that the code is a product of the Dark Ages. *See* I CÓDIGOS ESPAÑOLES (A. de San Martín ed. 1872); FUERO JUZGO (654). For additional background information, *see* E. N. VAN KLEFFENS, HISPANIC LAW UNTIL THE END OF THE MIDDLE AGES 74-77 (1968) [hereinafter cited as VAN KLEFFENS].

so that matching an older woman and younger man was "against nature." No subsequent mention of this regulation is to be found in later Spanish codes.

Indeed, the *Partidas* seems to make a conscious effort to treat women respectfully. It protects daughters from having their parents arrange a marriage for them without their presence or consent (Part. IV, Tit. I, Law X). However, since engagements could be made when a son or daughter reached the age of seven (Part. IV, Tit. I, Law VI), it is doubtful that a girl of that age would have had the experience necessary to take advantage of her legal right to object.

The custom of arranged marriages eventually gave way to the need for parental permission to marry.[9] Until 1958 a child of age had to wait three months before marrying if he or she was denied parental permission (Art. 47). Since then only the authorization of a local judge has been required for the marriage to proceed. However, if a couple marry without permission, the economic regime to be followed is a separation of property with no dowry being required (Art. 50). José María Manresa y Navarro, a principal commentator on the *Civil Code* in the 1950s, indicates that this regulation stems from a desire to protect the family property of the girl from mistakes of a "passionate nature." Since society viewed women as more passionate than men, more impressionable and less thoughtful, a girl might become blindly infatuated with an able seducer.[10] If the system of community property is not followed, the property of both families is protected.

Another restriction indirectly related to marriage and aimed solely at women was in effect until 1972. According to article 321 of the *Civil Code*, a daughter reached her majority at the age of twenty-one but was not allowed to leave her parents' home without their permission except to marry, to enter an order or to avoid mistreatment. A son, on the other hand, was under no such restrictions. As of July 22, 1972 this portion of article 321 has been stricken. Additionally, as of November 16, 1978 majority is now reached at age eighteen (Art. 320).

Several further situations impeding marriage were devised in the early codes and have been continued in similar form up to the present. In the *Fuero Juzgo* most of these dealt solely with women; among them were prohibitions on marrying again before one's first husband was buried and on marrying before the passage of a year of mourning (Bk. II, Tit. II, Laws VI, I). A one-year prohibition on the remarriage of a widow was retained in the *Partidas* (Part. VII, Tit. VI, Law

9. CÓDIGO CIVIL arts. 45-50 (1980). The full text of superseded articles referred to throughout this work can be found in the 1978 edition of the *Código civil*.

10. I MANRESA Y NAVARRO, *supra* n. 1, at 419.

III), and the reasons were clearly spelled out. First, permission to remarry would provide the motivation for a wife to do away with her husband. (This same woman, who at other points in the *Code* is viewed as helpless and weak, is now suspected of conniving to murder.) Secondly, there would be a problem of determining the father of a child who might be born subsequently. For these reasons it was illegal for any man to make a widow his heiress if she married before the year of mourning was up (Part. VI, Tit. III, Law V). It is clear that, regarding the determination of paternity, women are singled out in this provision solely because only they can bear children. However, it seems justified to question why a man would not have been suspect in similar circumstances if he should marry before a year of mourning was over.

The *Ordenanzas Reales* (1485)[11] annulled this restriction on remarriage, but it reappeared in the *Code* of 1888,[12] and is continued in the present *Code*. Article 45 prevents a widow from marrying until 300 days after the death of her husband or until after she gives birth, if pregnant.

One further impediment to marriage first appears in the *Partidas*. Among those not permitted to marry was any man castrated or lacking "some members necessary for engendering."[13] By way of explanation, a subsequent article states that such a man "would not be capable of fulfilling his carnal obligation to his wife."[14] Here is further evidence that children were the goal of marriage, since marriage is forbidden when it is clear that no children can be conceived. The fact that a single woman might wish to marry such a man, or indeed that a widow with children might want to do so, is ignored. The goal of having children still affects today's similar law. Article 83 of the *Civil Code* forbids the impotent from marrying despite the desires of the partner involved. Of course one would doubt that there is much vigorous enforcement of that provision.

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11. The *Ordenanzas Reales*, also called the *Ordenamiento Real*, came into being during the reign of Ferdinand and Isabella as an eight-volume collection of existing laws which it was felt were worth keeping in force. A confused, contradictory series of overlapping laws had been produced by the successors of Alfonso X the Wise, and the *Ordenanzas Reales* were compiled to "separate the chaff from the grain." *See* VAN KLEFFENS, *supra* n. 7, at 230-31.

12. I MANRESA Y NAVARRO, *supra* n. 1, at 424.

13. LAS SIETE PARTIDAS Bk. IV, Tit. II, L. VI: "*Que le menguassen acquellos miembros que son menester para engendrar.*"

14. LAS SIETE PARTIDAS Bk. IV, Tit. VIII, L. IV: "*Non podria complir a su muger el debdo carnal.*"

Rights of Marriage Partners

It is primarily articles 57-65 of the Spanish *Civil Code* which deal with the rights of marriage partners. In May of 1975 major changes in these and several other articles were enacted by the *Cortes* (parliament) in Madrid. The main thrust of the new legislation is to assure that marriage does not unnecessarily restrict the actions of either partner. To appreciate the importance of this goal one must be aware of the legal limitations on a wife contained in these articles of the *Code* prior to the 1975 changes.

In general, the duty of a husband was to protect, and that of his wife was to obey. Women were considered the weaker sex, needing protection from their own passions and poor judgment. A Spanish wife had to change her nationality to that of her husband if she married a foreigner, and in any case she had to follow her husband and live where he did, whether he was a foreigner or not. Only if he moved abroad did she have judicial recourse. Without her husband's permission a wife could not acquire property, sell it or make a contract and, since he was her representative, she had to have his permission to appear in court except to defend herself in a criminal case or to bring proceedings against him (Art. 60, prior to 1975). Women were not permitted to be guardians nor to witness wills except in cases of epidemic (Art. 237, prior to 1958). They were classed with minors, the blind, deaf mutes and the insane in being prevented from serving as witnesses (Arts. 681, 701, prior to 1958) and they were also preventd from making gifts or contributions, because only those who could contract and dispose freely of their property could do so (Art. 624, prior to 1975). Without their husbands' permission wives could not contract or dispose freely of their property. Indeed, the *Code* specifically listed only two things that a wife could do without her husband's permission: (1) make a will and (2) exercise the rights and fulfill the duties which fell to her with respect to the children she might have had by another man and with respect to the property of these children (Art. 63, prior to 1975).

One should not conclude that these restrictions were in existence solely because it was believed that women were incapable of managing in the world. After all, single women were given great freedom in the areas where married women were so restricted.[15] Surely it was not felt that marriage immediately weakened a woman's faculties. The explanation lies in the duty of the husband to protect his wife (he could, after all, be held responsible for her errors, while she was not

15. I MANRESA Y NAVARRO, *supra* n. 1, at 487.

obliged for his debts when mistakes were made) and in his duty to protect the interests of the marriage from the consequences of a wife's inexperience.[16] Of course, part of the reason for her inexperience was simply lack of opportunity. It was not deemed necessary to have similar protection for single women!

In his major edition and commentary on the *Civil Code* in 1956, Manresa discussed what he felt was the offensiveness to women of some of the restrictions enumerated above.[17] Although wives were given a bit more say in their husbands' actions regarding the wives' property in the early years of this century,[18] Manresa still maintained that sometimes the duty of the wife to obey her husband, to live where he lived, the fact that she was prevented from co-participation in the *patria potestad* (control over one's children) and the fact that the common property of the marriage was controlled by the husband might actually be inhumane at times. Although there were some changes regarding the rights of women in 1958, soon after the publication of Manresa's twelve-volume commentary, it was not until 1975, some twenty years later, that most of his criticisms were acted upon.

The 1975 change in article 57 symbolizes the tenor of all the other changes. While the former version specifically stated that the husband's duty was to protect the wife and the wife's to obey her husband, the new version states that husband and wife owe each other respect and mutual protection, thus eliminating the discriminatory situation in which the husband was ruler and the wife follower.[19] Additionally, a woman marrying a foreigner is now permitted to keep her Spanish citizenship (Art. 21, as of 1975). Along similar lines, a wife now has equal participation with her husband in determining their place of residence (Art. 25, as of 1975).

In the areas of a wife's right to act on her own, one which was previously negligible, several major restrictions have been lifted. Former article 60 provided that a husband was his wife's representative and that she needed his permission to appear in court. Former article 61 continued in the same vein, stating that without the husband's permission she could not acquire property by purchase or donation nor could she sell her property nor make any commitments except under the limitations established by law. Furthermore, former article

16. *Id.* at 486-87.

17. *Id.* at 488, 511-12.

18. *Id.* at 488.

19. José Luis Lacruz Berdejo, a Professor of Law at the University of Saragossa in Spain, points out that this new situation will create more problems in resolving divergences of opinion between husband and wife. What formerly was resolved by the husband will now be brought before a tribunal. LACRUZ BERDEJO, *supra* n. 3, at 13-14.

62 provided that any actions by the wife not in keeping with these legal regulations, except those relating to the family's daily consumption, would be null and void. This article even went so far as to state specifically that any purchases of jewelry, furniture or precious objects made by a wife without her husband's permission would only become valid upon his consent.

It is clear, then, that except in the case of ordinary family expenditures, such as food or clothing, a wife did not have the legal capacity to act without her husband's permission. Major changes providing equal rights for husband and wife have been made in articles 61-65. Revised article 62 states that marriage does not restrict the capacity of either marriage partner. In addition, revised article 63, which contradicts former article 60, provides that neither marriage partner can represent the other unless this right has been conferred voluntarily. Thus a wife is now free to carry out legal acts and appear in court without first securing her husband's permission. Futhermore, former article 62 has been eliminated, so that a wife's acts are not declared null and void merely because she did not get her husband's permission first. Since many actions now require the consent of one spouse before the other can act (rather than requiring only the husband's permission) revised article 65 provides that those actions carried out without such consent can be nullified at the insistence of the spouse whose consent was absent.

A word is necessary here on the matter of permission and consent. The new changes have totally omitted the words *husband's permission* in favor of the term *consent* with respect to the spouse who did not initiate the particular action in question. One must wonder whether or not there is any real difference between the words permission and consent.[20] Surely, "consent" is a bit softer, but the real significance of the 1975 changes lies not in a change in those words but rather in the fact that now the consent must be mutual, instead of always being secured by the wife from the husband.

A final group of 1975 changes deals with restrictions upon wives in the making of contracts and related matters. This issue did not make its appearance in Spanish law until the Renaissance. In the *Leyes de Toro* (1505)[21] one finds a provision that during marriage a woman

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20.. According to *Webster's New Collegiate Dictionary*, "permission" is equivalent to formal consent or authorization, while synonyms for "consent" are "assent" or "approval." WEBSTER'S NEW COLLEGIATE DICTIONARY (6th ed. 1951) *s.v.* "Permission," "Consent."

21. In the *Leyes de Toro* (1505) an attempt was made to eliminate the disputes constantly arising over the interpretation of the different codes in existence at that time. The *Leyes*, also compiled during the reign of Ferdinand and Isabella, is a collection of eighty-three laws rather than a complete, ordered, methodical code such as

could not make any contract without her husband's permission (Law XV), although if he refused, she could seek permission from a judge (Law XVII). Her husband could also ratify any contract made by his wife without his permission (Law LVIII). The *Novísima Recopilación* (1805)[22] carried forward the same provisions (Bk. X, Tit. I, Laws XI, XII), and only in May of 1975 was the *Código civil* changed so that married women could make a contract without anyone's permission (Art. 1263, as of 1975).

In a related area married women had been included among minors, the insane, the demented and deaf mutes, a group considered as physically or mentally lacking the normal faculties necessary for the capacity to contract. However, now that a wife can make contracts, another restriction has been lifted. She no longer needs her husband's permission to be an executrix (Art. 893, as of 1975), for under the Spanish *Code* only those granted the capacity to contract are permitted to be executors of wills.

Regarding the acceptance of an inheritance, restrictions upon wives began in the *Leyes de Toro* (Law V) and were continued through the *Novísima Recopilación* (Bk. X, Tit. XX, Law X). In these codes a wife was permitted to accept any inheritance without the permission of her husband, but she could not reject one without such permission. Apparently this slight degree of autonomy turned out to be dangerous in the opinion of the lawmakers, for in the twentieth-century version, until 1975, a wife could no longer even accept an inheritance without permission; and, if the permission should be that of a judge, then only her separate property and her share of the community would be liable in the case of succession debts (Art. 995, prior to 1975). As of 1975 the need for such permission has been omitted in this article. In the revision, if an inheritance is accepted by a married person without the benefit of inventory, and if the other spouse does not

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the *Fuero Juzgo* or the *Siete Partidas*. It did, however, fix the order of preference of the extant codes. According to Jamie Cortezo, this group of laws is considered to be particularly one-sided concerning the incapacity of married women. CORTEZO, *supra* n. 4, at 43. For further background on the *Leyes de Toro*, *see* J. ESCRICHE, DICCIONARIO RAZONADO DE LEGISLACIÓN Y JURISPRUDENCIA 1174-75 (1851) [hereinafter cited as ESCRICHE]. For the text of the *Leyes*, *see* VI CÓDIGOS ESPAÑOLES (A. de San Martín ed. 1872); LEYES DE TORO (1505).

22. Part of the continuing effort to organize Spanish law in the nineteenth century, the *Novísima Recopilación* is a twelve-volume set which includes laws successively promulgated after the *Siete Partidas* and the *Fuero Real* (Castilla's local laws, 1255) plus many laws from prior codes such as the *Fuero Juzgo*. Unfortunately, the *Novísima Recopilación* was no more successful than prior attempts in determining which laws were to be followed if a conflict arose between local and state laws. For further background, *see* ESCRICHE, *supra* n. 21, at 1418. For the text, *see* IX CÓDIGOS ESPAÑOLES (A. de San Martín ed. 1872); NOVÍSIMA RECOPILACIÓN Bk. X, Tit. I, Ls. XI, XII (1806).

agree to this, then the community property cannot be reached in the case of succession debts. Thus no distinction because of sex is made. In a related matter, formerly a married female heir who wished to ask for the partition of a succession required to receive her husband's or a judge's permission. Now either marriage partner can request the partition of an inheritance without the other's concurrence (Art. 1053, as of 1975).

Property Within Marriage: The Dowry

A long-standing tradition in Spain, the dowry consisted of the property and rights a woman brought to the marriage at the time it was contracted, as well as that which she might receive as a gift, inheritance or legacy in the nature of a dowry (Art. 1336). Provisions for a dowry go back to the *Partidas*, in which it was indicated that the dowry could be provided by the woman herself or a male relative in her name (Part. IV, Tit. XI, Law VIII). Apparently, in efforts to attract husbands, the size of the dowries began to get out of hand, for the *Novísima Recopilación* placed limits on their magnitude and also provided that the expense of a wedding should not exceed one-eighth of the dowry (Bk. X, Tit. III, Law VI). Until very recently parents were still obliged to provide a dowry (Civ. Code Arts. 1340-43 (1980)). Spain was one of the few countries in the world where this requirement persisted until the 1980s, although in fact the practice had fallen into disuse. Instead, in recent times a girl's future inheritance was considered to be her dowry, and sometimes her parents would help with the purchase of an apartment for the couple.[23] The Law of May 13, 1981 (Arts. 1336-43),[24] officially ended the dowry as a legal phenomenon in Spain.

Nonetheless the dowry is an interesting phenomenon when the mechanics for its control are examined, for until 1981 the laws of the modern *Civil Code* in Spain, except for a few recent changes, did not differ markedly from those of the Middle Ages. In the *Partidas* the husband had control over the dowry and had the right to collect any income therefrom, although in case of judicial separation the dowry would have to be returned (Part. IV, Tit. XI, Law VII). A wife was protected from having her dowry wasted, for in such a case she could demand it back (Part. IV, Tit. XI, Law XXIX). This seems to have been a fairly considerate measure except for the unlikelihood that most

23. For this and much other information on Spanish laws and mores the author wishes to thank Doña Carmen Salinas, a Spanish lawyer active in the women's rights movement in Spain and a member of the Commission which proposed the 1975 revisions of the Civil Code.

24. For the text of the Law of May 13, 1981, *see* L. MARTINEZ-CALCERRADA, EL NUEVO DERECHO DE LA FAMILIA 147-86 (1981) [hereinafter cited as MARTINEZ-CALCERRADA].

women would have been aware of the dowry's mismanagement and of their right to demand its return.

Between 1975 and 1981 a husband had complete control over only a portion of his wife's dowry, for the latter was customarily divided into two parts (Civ. Code Arts. 1346-62, from 1975 to 1981). The *"estimada"* portion was handled just like the medieval dowries, for this was the part of the dowry transferred to the husband's control with the obligation that he restore its value to his wife in the case of poor management or upon dissolution of the community. During the marriage he had the right to sell or mortgage this portion of the dowry, and he was under no obligation to restore to his wife any increments in its value (Arts. 1346-49, from 1975 to 1981). The other or *"inestimada"* portion was that to which the wife retained ownership, although her husband administered this property and had the usufruct of it, normally insuring the property by bond (Arts. 1357-59, from 1975 to 1981). The husband, however, could not sell without his wife's consent, and any ultimate increment or deterioration in value went to her unless the latter was the result of poor administration (Art. 1360, from 1975 to 1981). Additionally, the husband was responsible for restoring to the wife exactly the same property upon dissolution of the community. Prior to 1975, although the *inestimada* portion of the dowry was presumably under her control, in fact a wife could not sell or mortgage this property except with her husband's permission (Art. 1361, prior to 1975). Between 1975 and 1981 she merely needed his consent for such action. If she did not alienate or encumber the property, then her husband had to put up a bond to guarantee its value. In a sense, then, from 1975 to 1981 the wife was still protected from her own poor judgment, but she did not truly have freedom of action with regard to this portion of the dowry, since her husband's consent was required for her to act. On the other hand, it is easy to understand why his consent was required, as it is he who was obliged to guarantee the value of the property.

The Law of May 13, 1981 has totally eliminated all of these distinctions between the powers of the husband and the wife (Art. 1346-61), so that both parties now have the same rights in terms of control and management of the property each brings into the marriage. In addition, marriage contracts can be made before or modified during the marriage in order to prevent any difficulties that might arise in this regard.[25]

25. *Id.* at 162-64.

The Parapherna

Until the Law of May 13, 1981, the Spanish *Civil Code* provided that a wife could separately own property not included in the dowry. This property, called *"bienes parafernales,"* which was recognized as far back as the *Partidas* (Part. IV, Tit. XI, Law XVII) and was defined as that property over which the wife retained control and administration (Civ. Code Art. 1385, prior to 1981) whether it were property owned prior to or acquired during the marriage through inheritance, donation or any means other than purchase.[26] The income for this property became part of the community and was subject to the payment of community debts. Even such property itself could be used to pay daily family expenses if the community property, the husband's separate property and the dowry were not sufficient for that purpose (Art. 1385, prior to 1981).

Two 1975 changes gave the wife more control over her property. Article 1383 was changed to state that a husband could not do anything with respect to the parapherna except under his wife's power of attorney. Previously, this article had stated that a husband could take action concerning this property with his wife's concurrence or consent, so that the new act now places the onus of responsibility for a wife's separate property on her. Furthermore, article 1387 was changed to state that a wife could dispose of her property on her own, regardless of article 61, which would otherwise restrict this action to a woman who had reached majority. Prior to 1975 article 1387 had prevented her from selling, mortgaging or litigating with respect to this property absent her husband's or the court's permission.

As of 1975, then, not only did Spanish wives have more responsibility for and freedom to act with respect to their parapherna, but they still were in an advantageous position if the community should be dissolved. Articles 1421 and 1422, which were not changed in 1975, provided that, if an inventory of the community property were taken at the time of its dissolution, the wife's dowry and parapherna were to be restored to her. Only then were the debts incurred by the community paid. The fairness of such a practice was questioned by Lacruz Berdejo,[27] for if a wife could use her property as she wished, possibly losing it in the process, why should she be entitled to its restitution, especially before the debts of the community were paid?

The Law of May 13, 1981 totally omits the concept of "parapherna," treating the separate property of husband and wife in an

26. CORTEZO, *supra* n. 4, at 189.
27. LACRUZ BERDEJO, *supra* n. 3, at 100.

identical manner. Article 1381, under this law, states that the earnings of the separate property of either spouse form part of the community property and can thus be reached to satisfy a community debt. Nonetheless, each spouse, as administrator of his or her separate property, can dispose of the income therefrom. Thus total equality of marriage partners has been provided for in the law with respect to the administration and control of their separate property.

Community Property

The community property system was studied in Spain in the late 1970s with an eye toward giving wives co-participation in its administration. Until 1981, although there were some enactments aimed at giving women more responsibility, it was still the husband who had control and administration. The community includes: (1) property purchased during the marriage and paid for out of the common treasury, whether bought for just one or for both spouses, (2) property obtained through the work or salary of either or both partners during the marriage and (3) any profits, income or interest received during the marriage via the community property or the separate property of each (Art. 1401, prior to 1981).

Before 1981 the rights of each spouse in regard to the community were set forth in articles 1401-1415 of the *Código civil.* The primary regulation was located in article 1412 which stated that the husband administered the property except in the cases stipulated by the *Code.* The wife's rights included that of disposing of her half of the property by testament,[28] claiming her half in court should she be defrauded by her husband, demanding her half if the marriage were dissolved and administering the entire community should her husband be absent or incapacitated.

Writing thirty years ago, one Spanish legal scholar praised the system of community property as fitting well the natural aptitudes of the sexes. According to Francisco Malo Segura, the husband has a better aptitude for obtaining resources for family sustenance and the wife, the ability to keep and distribute them appropriately.[29] Manresa, on the other hand, criticized the system as providing a wife no stimulus for taking an interest in the prosperity of a marriage. If she could work and contribute to the earnings of the community, was it not unjust that she could not participate in administering the fruits thereof?[30]

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28. The *Siete Partidas* even allowed the husband control over his wife's testament in certain instances. LAS SIETE PARTIDAS Bk VI, Tit. V, L. VI.

29. F. MALO SEGURA, LOS DERECHOS DE LA MUJER EN LA LEGISLACIÓN ESPAÑOLA 80 (1950).

30. IX J. M. MARESA Y NAVARRO, COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL 77 (7th ed. 1956).

Prompted, perhaps, by such criticism, there was a change in 1958 regarding the then article 1413. Prior to this change a husband could sell or bind the property of the community without his wife's consent (although he could not defraud her). In 1958 this article was changed so that, although he could still sell or encumber some of the property, he needed his wife's consent or judicial authorization to dispose of immovables or mercantile establishments. Furthermore, if he were to dispose of other community property in a situation of grave risk, his wife had the right to ask a judge for protective measures. Thus a wife had more opportunity to influence her husband's decisions regarding the community property.

In 1975 a number of further revisions in the community property law were made which attempted to put husband and wife on more equal footing in matters of marriage and judicial separation and divorce.[31] Articles 1441-1444 were particularly restrictive of wives when for some reason the administration of the community property was transferred to them. In such a situation a wife was more limited than her husband in the ability to use or dispose of the property, for she could not sell or mortgage such property without judicial permission (Art. 1444, prior to 1975). This situation was changed so that a wife administering the community would have the same freedom and responsibility of action as her husband when he exercised the administration (Art. 1442, as of 1975). She was only limited in the same manner as her husband would be; thus she needs judicial authorization to dispose of immovables or mercantile establishments (Arts. 1413, 1444, as of 1975).

In regard to separation from bed and board, prior to 1975 only the party not at fault could ask for separation of property, whereas now either spouse may do so regardless of fault, and both parties are entitled to their shares of the property without having to prove the presence or absence of fault (Art. 1433, as of 1975). From 1958 to 1975 article 68 provided that while the separation was pending the husband retained administration of the community property, although his wife was entitled to administer her separate property (or paraphernа). Article 1436, during that same time period, did provide for one occasion on which the administration of the community property was transferred to the wife: if the civil interdiction of her husband had caused the separation. This same article gave a wife administration of the dowry and of her half of the community if her husband were absent or had caused the separation.

Changes in 1975 further advanced the rights of women in these situations. Article 68 now provides that during a separation proceeding

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31. Concerning the increase in the number of grounds for divorce made by the 1958 and 1975 legislative changes, *see* text at n. 32, *infra*.

each party is entitled to administer his or her own separate property with any prior need for the authorization or concurrence by the other spouse being rescinded automatically. The judge now determines which spouse will administer the community during the separation proceeding, rather than having this right assigned automatically to the husband.

In regard to the final separation decree, prior to 1975, article 73 did not provide for a true separation of property in all cases; various arrangments were made depending on which party was at fault. If the husband had caused the separation, he lost the administration of his wife's half of the community property, but if he were not at fault, he retained this control and the wife was entitled only to support from the community. With the 1975 change, each party, regardless of fault or sex, has control and administration of his or her portion of the community. However, until this law was further modified in 1981, as discussed later, only the party not at fault had the right to support, regardless of sex. Thus there was now true separation of property in Spain, and support depended not on sex but on fault in causing the separation. Exactly how the court was to find that only one party had been at fault and how that determination was to be made was left unclear.

One further change in 1975 regarding community property and judicial separation is of importance. Prior to that year the marital "capitulations," that is, the marriage contract regarding property had to be written out before marriage and could not be changed or modified afterwards (Arts. 1320-21, prior to 1975). In 1975 article 1320 was altered so that a marriage contract can be changed or modified at any time if the couple are of age. The effect of this change is to make judicial separation less difficult, for if the parties wish to, they can change their property arrangements so as to satisfy all relatives as well as themselves, rather than being forever bound by agreements which force the couple to stay together in order to avoid property conflicts. New property agreements cannot, of course, extinguish any previous debts, so that a husband or wife's portion of the community remains liable for debts made by the other spouse prior to the new marriage contract.

As of the 1975 changes, if a reconciliation should occur, a new marital contract can be made (Art. 1439, as of 1975). Each spouse, then, would reenter the marriage with some separate property which, prior to the separation, was part of the community, plus, perhaps, some separate property acquired during the separation. Under the new contract the husband and wife could each retain as separate whatever property they might wish, even though some of it might have been part of his or her half of the community at one time. Previously,

a reconciliation automatically meant a resumption of the former matrimonial regime (Art. 1439, prior to 1975).

The recent Law of May, 13, 1981 has reformed articles 1315-1444 covering the economic regime during marriage. Community property is dealt with in articles 1344-1434 and separation of property in articles 1435-1444. The gaps left in 1975 regarding total equalization of husband and wife in terms of privileges and obligations have now been filled. No longer does the husband have control over the community. There is now equal co-participation in its creation, administration and disposition and equal division of income and equal responsibility in case of debt. Both spouses are free to make contracts and both are expected to keep the other informed of any activities which affect the community. In regard to judicial separation the 1975 changes enumerated above have been maintained except that in regard to support there is no longer the need for the "party at fault" to support the "innocent" one. Now there is a mutual obligation to support (Art. 143). While in practice many Spanish husbands no doubt maintain greater control over the community property than do their wives, perhaps now that the laws have eliminated discrimination, married women will begin to exercise the rights they have been granted.

DIVORCE

Grounds

The concept of divorce has been recognized in Spain at least since Roman times, but although there are medieval examples of divorce and remarriage in Spanish literature,[32] under the influence of the Catholic church the word divorce very early came to mean separation of a married couple with no freedom to remarry. The *Siete Partidas*, for example, used the word *"departimiento"* (separation) as a synonym for divorce (Part. IV, Tit. X, Law I). For a long time true divorce, and thus freedom to remarry, had been permitted in only two cases in Spain. In the first case, if two non-Catholics were to marry and one converted to Catholicism and the other tried to lure the convert into leaving the Catholic faith, divorce was permitted, since a marriage of two non-Catholics was considered a contract rather than a Sacrament. The second instance was one in which two Catholics married but did not consummate their marriage before one of the spouses decided to enter a religious order. In such a situation the other spouse could remarry. Otherwise, even in cases of adultery, separation was permitted but remarriage was not.[33]

32. In the *Poem of the Cid*, for example, the hero's daughters were ill-treated by their first husbands, and after a period of accusation and restoration of honor they eventually remarried.

33. *See* VII. BIBLIOTECA JURÍDICA 658 (1927).

The grounds for separation, even in the earliest codes of Spain, have always involved some form of sexual or religious conflict. It is also generally true that in the sexual conflicts the standards for adjudging men and women have been very different until quite recently.

The *Fuero Juzgo* specified that a man could not leave his wife except for adultery, and in such a case neither one could marry again (Bk. III, Tit. VI, Law II). It is of note here that adultery on the wife's part was a ground for separation, although there is no mention of adultery on the part of the husband. The *Siete Partidas* added several grounds, for it stated that marriage could be terminated if one spouse became a Jew, Moor or heretic or committed adultery (Part. IV, Tit. II, Law VII). No sexual distinction was made. Furthermore, the same law provided that a judicial separation was obtainable if the wrong person showed up at the marriage ceremony and the marriage was a mistake. Love may be blind, but one would normally expect this blindness to be a hazard only with regard to the intended!

The *Partidas* did contain one provision for termination of the marriage which was intended to be favorable to women. If a woman was sexually "closed" and unable to have relations with her husband, and if the marriage was therefore annulled, should she then marry again and successfully have relations with her second husband, she would have to be returned to her first husband! However, before the wife was returned, her husband's "members" had to be examined to make sure they were not so large as to create a serious danger for her. This last provision was no doubt viewed as a protective device favorable to women. In actuality it is overshadowed by the rest of the act which treats the wife much like a lost bag of groceries. There is no provision for returning a man to his first wife if he was impotent with her but not with his second.

In the modern *Code* recent changes concerning "divorce" were first made in 1958. At that time the wording of all articles dealing with the subject was changed so that only the word "separation" appeared, although, as was explained above, there was no difference in meaning, since marriage still could not be terminated in Spain except in very limited situations. At the same time two changes which moved toward equalizing the sexes were made in the number of grounds for obtaining a separation. Until then the six grounds were as follows (Art. 105, prior to 1958):

1. Adultery of the wife in all cases, and that of the husband when it caused a public scandal or contempt for the wife;
2. Ill-treatment or serious injuries inflicted by one partner on the other;
3. Violence exercised by the husband on his wife to force her to change religion;

4. Attempt by the husband to prostitute his wife;
5. Effort by the husband or wife to corrupt the children or prostitute the daughters and connivence in their corruption or prostitution;
6. Condemnation of marriage partner to a life sentence.

In 1958 the third ground for divorce was change to show recognition of the fact that the sexes are equally capable of exercising violence on each other, for the law was modified to state that violence by either marriage partner in attempting to force the other partner to change religion would be grounds for separation. Furthermore, the first ground was changed to provide for separation when either marriage partner committed adultery. No longer was there a requirement that the husband's offense cause scandal. On the surface this would seem to have given the sexes equality. In reality, until 1978, the Spanish legal definition of adultery indicated otherwise.

Adultery

Until their elimination in 1978, only articles 449-452 of the Spanish *Penal Code* covered the question of adultery and its consequences.[34] Article 449 defined adultery, stating that a married woman committed adultery if she had sexual relations with a man who was not her husband. Thus a married woman could be charged with adultery if she should have relations with any man, single or married, provided that he were not her husband. A man could be charged with adultery under two circumstances: (1) if he should have relations with a married woman knowing that she was married and (2) if, as a married man, he were to have continual relations with an unmarried woman in his own home or in a notorious manner outside his home. The circumstances referred to here under the second heading are called *"amancebamiento"* (concubinage). Prior to 1978, only if concubinage were the case could a *married* man be punished for his sexual behavior with an unmarried woman. Thus these definitions of adultery led to the conclusion that a married man who spent one night with an unmarried woman "of age" could be legally accused of nothing, whereas if his wife spent one night with an unmarried man she would be subject to the legal sanctions for adultery.[35]

Until the elimination of this entire section from the *Code* different standards were maintained for married women and married men. The explanation for this lies in the long-standing Hispanic attitude that the home is sacrosanct and the mother is expected to live up to her

34. For the law relating to adultery prior to 1978, *see* LEYES PENALES arts. 449-52 (1975). For the most recent penal laws, *see* CODIGO PENAL (1980).

35. The penalty was from six months and one day to six years' imprisonment. CÓDIGO PENAL art. 30, *prior to amendment in* 1978.

role as a symbol of purity and devotion. If her husband is disloyal to her, people feel sorry for her, but if she betrays him, people regard him as dishonored and ridiculous. It should be expected, therefore, that there would be a much stricter interpretation of the factors that constitute adultery on a wife's part than on a husband's. A Spanish husband's honor is, after all, one of his most precious possessions.[36]

Examples of this greater importance being placed on a husband's honor than on a wife's can be found as far back as the *Partidas* (Part. VII, Tit. XVIIII, Law I). It is there stated that a wife could not accuse her husband of committing adultery with another man's wife, but the right to accuse in such a situation was granted to the other man (the adultress' husband) as well as to anyone else. The explanation given in the *Partidas* is that an adulterer's wife is not dishonored but that the husband of the adulteress is. An additional explanation of this seemingly preferential treatment toward men is given as well. The husband of an adulterous wife is in a position of greater risk than the wife of an adulterous husband for a purely biological reason. While a husband who has an affair cannot become pregnant, his wife can and, if she does, the questions of paternity and inheritance arise. A husband who philanders runs no risk of bearing an heir to compete with his own wife and children. Such an explanation certainly clarifies, if it does not justify, the stricter definition of adultery for women.

Other sorts of regulations regarding fornication have slowly disappeared from the Spanish statutes over the centuries. In the *Partidas*, for example, there is a clear explanation of those circumstances under which a man's having a mistress was quite acceptable (Part IV, Tit. XIV, Law I). Since it was considered preferable to have one mistress rather than many, the *Code*, clearly stated that any man who was not married and not a clergyman could have one. There were, of course, certain women whom it would not be proper to choose for such a relationship (Part. IV, Tit. XIV, Laws II, III). A mistress could not be under twelve or a virgin nor could she be a slave, prostitute, barmaid, haggler or buffoon. She could, however, be an honest and well-respected widow. A man was expected to announce his choice before "good men," presumably to insure that no one else would lay claim to his selection. One does get the feeling that a man in this situation was going to market to pick out his goods from those available. Needless to say, there were no such permissions and specifications for a woman who wanted to choose goods at a similar marketplace.

36. The theme of a man's honor being dependent in large measure on the actions of his wife and daughters appears continually in Spanish literature from the *Poem of the Cid*, through the works of the Golden Age dramatists of the seventeenth century, such as Lope de Vega, and up to the twentieth-century works of Federico García Lorca.

Apparently during the Renaissance, even though the practice had been forbidden in the *Partidas*, a serious problem developed in Spain with regard to clergymen having mistresses. Beginning in the *Ordenanzas Reales* there was an attempt to discourage this practice, gently at first and then more seriously in the *Novísima Recopilación*. The *Ordenanzas Reales* merely states that all concubines of abbots and clergymen had to wear "something" of vermillion-colored cloth (Bk. VIII, Tit. XV, Law VIII). This was clearly an attempt to discourage women from taking clergymen as lovers, but it is not clear exactly how the measure was to be enforced. The *Novísima Recopilación* actually called for punishment of such mistresses (Bk. XII, Tit. XVI, Laws III-V). The first offense called for one year's exile and a fine, while the second called for the same plus one hundred lashes. Presumably a third offense was not expected. No punishment whatsoever is indicated for the clergyman.

An interesting modern note regarding adultery is the fact that the Spanish Republic in 1932 first attempted to equalize the sexes by omitting the rule that for a husband to be condemned for such an offense he had to have a well-known, scandalous, long-term affair. A one-night foray would be cause enough for his punishment just as it would for a wife.[37] Subsequently, under the Republic adultery was completely abolished as a crime, but was reinserted in the *Code* during the Franco regime.

Punishment for Adultery

In the area of punishment for adultery or concubinage there have been two trends in the Spanish codes. The earliest codes generally permitted the husband of an adulteress to mete out his own justice, while a wife's right to do the same was rarely touched on. The seventh-century *Fuero Juzgo* (Bk. III, Tit. IV, Laws IV, V), for example, states that a husband could murder both his wife and her consort, without sanctions and that a father could do the same to an adulterous daughter. The same law also allowed torture of servants if this would aid in discovering the truth about his wife's adulterous activities. Furthermore, the husband was entitled to the belongings of both his wife and her consort, regardless of whether the husband decided to murder the adulterous pair or not.

The first mention of a wife's rights in a corresponding situation occurs in the *Fuero Juzgo* as well (Bk. III, Tit. IV, Law IX). However, in each instance her rights were secondary to those of men. Only if her husband's consort were unmarried did a wife have the legal right to punish that woman. In such a situation the consort was turned

37. II BIBLIOTECA JURIDICA 622 (1927).

over to the wife so that she could avenge herself as she wished. No mention is made, however, of the wife's right to take revenge on her own husband. To understand this one must recall the fact, discussed earlier, that a wife in such a situation was not considered dishonored. Considering this, it is indeed odd that she was given any right to punish at all.

The thirteenth-century *Partidas* still gave the husband the primary right to punish the adulterous pair. It began, however, to stress the punishment of the man who had dishonored a husband and to deemphasize the sanctions against the adulterous wife. A husband could kill a man whom he found in bed with his wife, but he should put his wife in the arms of the law rather than kill her (Part. VIII, Tit. XVIII, Law XIII). Thus, the *Partidas* began to mention the second trend in punishment for adultery, which is to leave the task to the state. This *Code* gave the state the power to execute an adulterer but only to whip an adulteress in public or put her in a convent (Part. VII, Tit. XVIII, Law XV). The punishment was less severe for women than for men, although the wives did lose their dowries and property to their husbands.

The *Ordenanzas Reales* continued the trends established in the *Partidas*, while the *Leyes de Toro* (1505), some twenty years after the *Ordenanzas*, turned further in the direction of punishment by the state. Here a husband who killed his wife and her consort in *flagrante delicto* had no right either to the dowry or to the consort's property (as he had under the *Fuero Juzgo*), but if he allowed the state to handle the matter he was still entitled to such property (Law XXVIII). Interestingly enough, the *Novísima Recopilación* (1805) took a step backwards, allowing a husband to punish his wife and her consort with no mention of the state. It did provide, however, that a husband could kill both, but not just one, of them (Bk. XII, Tit. XII, Law I). One might say that, in light of this latter provision, there is a semblance of equal treatment of the sexes, but again lacking is any mention of a wife's right to punish if her husband is sexually disloyal.

A similar bias, this time in regard to inheritance, appeared in the twentieth-century *Código civil* (Art. 756, sect. 5) and remained until as recently as 1978. Among those prohibited from inheriting was a man convicted of adultery with the wife of the testator. According to Spanish mores, this adulterer had dishonored the testator, so, of course, the law would forbid such a man to benefit under the former's will. No mention was made of a parallel circumstance in which a woman might be guilty of adultery with the husband of a testatrix. The latter was not considered dishonored by her husband's adultery nor by her husband's consort, so why should the consort not be able to benefit from the wife's will?

On the surface this rule seems to be more generous to women than to men, since an adulteress could still inherit from her consort's wife but an adulterer could not inherit from the husband of his consort. In actuality this law also worked against women considering the fact that a husband leaving a will could not be forced to honor a man who had dishonored him. However, a woman leaving a will could be forced to honor a woman who had committed adultery with the former's husband. In 1978 this section of article 756 was eliminated and an addition was made to article 852, stating that adultery with the spouse of the testator is considered just grounds for disinheritance. Thus men and women leaving wills are now treated equally. Neither is forced to make an adulterer or adulteress a beneficiary in his or her will.

Until recently the Spanish *Penal Code* dealt differently with a husband and wife who murdered his or her spouse in *flagarante delicto* (Art. 405). If a husband committed such a murder, he was merely exiled. If a wife murdered her husband under the same circumstances she was punished with life imprisonment. In 1971, however, this article was redrafted so that a husband received the same severe punishment as his wife would for such an act. Thus only in the past decade has a man's honor not been considered an excuse for this crime of passion.

In other cases of adultery in which no crime of passion occurs, from 1971 to 1978 the punishment for those committing the act had to be requested by the aggrieved spouse and any punishment could be meted out at the discretion of said spouse (Arts. 450-52). Previously the *Code* had mentioned only the husband in these articles. However, in 1978 those articles were totally omitted, presumably removing the whole question of adultery from the hands of the state unless a resulting murder were committed.

In 1981 divorce was legalized in Spain (Law 30 of July 7, 1981).[38] Article 86 of this law enumerates the grounds for divorce, which, put simply, are:

1. If the spouses have lived apart for at least one uninterrupted year since the request for a separation decree was made by both parties or by one party with the consent of the other and if the request for separation was made after a year of marriage;
2. If the spouses have lived apart for at least two uninterrupted

38. For the text of the new divorce law, *see* C. VÁZQUEZ IRUZUBIETA, RÉGIMEN JURÍDICO DE LA CELEBRACIÓN Y DISOLUCIÓN DEL MATRIMONIO 368-72 (1111) (wherein the relevant portions of article 86 of this law are quoted and discussed).

years when the petitioner affirms that when the separation began the other spouse was opposed to it;

3. If the spouses have lived apart for at least five uninterrupted years, no matter which spouse petitions for divorce;
4. If one spouse is convicted of making an attempt upon the life of the other or upon his or her parents or children.

A thorough analysis of the new divorce law would require an entire article in itself. Suffice it to say that now divorce (and therefore remarriage) can take place in Spain and that the grounds for divorce need not imply that one party is at fault for not fulfilling his or her marital duties.

WILLS AND INHERITANCE[39]

There existed until recently and there exist today a number of curious restrictions upon Spanish women in the area of wills and inheritance. First, although women have been permitted to make wills for some time, they were long deemed incapable of witnessing anyone else's will. The *Siete Partidas*, basing its provision on Roman law, grouped women among those persons forbidden to serve as testamentary witnesses: the insane, convicts, heretics, the deaf, the mute, slaves etc. (Part. VI, Tit. I, Law IX). Indeed, until some twenty years ago (Civ. Code Art. 701, prior to 1958) women in Spain were permitted to witness wills only in case of epidemic, when their services would no doubt be desperately needed. Finally, as of 1958 the list of those forbidden to witness wills does not include women (Art. 681).

In contrast, there is an early example of favoritism toward women in regard to inheritance rights. The *Fuero Juzgo* (Bk. II, Tit. I, Law V), the *Partidas* (Part. IV, Tit. XI, Law III), the *Leyes de Toro* (Law III) and the *Novísima Recopilación* (Bk. X, Tit. III, Law III, taken directly from Law LII of the *Leyes de Toro*) all dealt favorably with the woman whose fiancé died "after the kiss" had been given—the kiss being apparently some form of official engagement. Under the circumstances the fiancée was allowed to keep one-half of the goods or property her fiance was planning to give her upon the consummation of their marriage. On the other hand, if the woman died under the same circumstances, the fiancé was not permitted to keep any of the dowry or any gift from his fiancée if there were one, which was, instead, returned to her heirs. (The *Partidas* indicates in this law an unlikelihood that a woman would have given her fiancé a gift, since women are "greedy.") In any event, the reasoning behind this

39. An analysis of the elaborate and detailed provisions of the Spanish law of successions is not within the scope of this section. Suffice it to say that men and women are treated equally except in the areas to be discussed.

preferential treatment toward women might be that other men would consider the girl, in a sense, "used," as some men do in Spain even today, and that she would therefore find other men reluctant to propose marriage. If this were the case, the woman could then use the portion of her fiancé's property which she was allowed to keep for her own support and to attract other suitors. The *Partidas's* explanation fits this interpretation: "The fiancée gives the kiss to her betrothed, and it is not understood that she receives it from him. Also, when the fiancé receives the kiss, he has pleasure from it, and he is happy, and the fiancée remains shamed" (Part. IV, Tit. XI, Law III).[40] Thus the inheritance was deemed just recompense for her shame at having given the kiss.

Such preferential treatment for women in inheritance seems to have subsequently died out, but discriminatory provisions still remain in this area. Women's actions have been controlled by regulating their children's ability to inherit. First, in regard to illegitimate children, the *Novísima Recopilación* attempted to discourage women from becoming clerical concubines by preventing children of such concubines from inheriting anything from their fathers (Bk. X, Tit. XX, Law IV). The *Leyes do Toro* (Law IX) and the *Novísima Recopilación* (Bk. X, Tit. XX, Law V) also prevented illegitimate children from inheriting from their mother if she also had any legitimate children. In the present *Code* legally recognized illegitimate children have a right to inherit an amount equal to half of one of the shares to which each of the legitimate children is entitled (Arts. 840-41). Presumably, illegitimate children are now entitled to some inheritance so that they are not totally punished for their parents' actions. On the other hand, they are refused an equal share with the legitimate children of the family, no doubt to discourage adults from bearing such children.

Regarding inheritance, an additional method by which women's actions were influenced relates to a recently widowed woman who says she is pregnant. This situation is governed in the *Fuero Real*[41] and in the *Partidas* (Part. IV, Tit. VI, Law XVIII; Part. IV, Tit. VII, Law III) with a complicated sequence of actions prescribed to protect the deceased husband's relatives from deception by his widow. The motivating suspicion is that the widow might falsely claim pregnancy and then try to pass off another man's child as belonging to her deceased husband, for if she were successful, then this child, rather than the relatives, would stand to inherit. One reason that a false claim

40. *La desposada da el beso a su espos, e non se entiende que lo recive del. Otrosi, quando recibe el esposo el beso, ha ende plager, e es alegre, e la esposa finca enuergonçada.*

41. VII J. M. MANRESA Y NAVARRO, COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL 251 (7th ed. 1956) [hereinafter cited as VII MANRESA Y NAVARRO] (wherein the author refers to Book III, Title VI, Law 3ª of the *Fuero Real* of 1255).

of pregnancy might have been suspected is the fact that a pregnant wife did not automatically inherit from her husband, and if the wife was not pregnant the husband's relatives inherited immediately (Part VI, Tit. VI, Law XVI). With the possibility of being left without, it is not surprising that a widow might feel resentful and stoop to deception.

The actions required of a pregnant widow in the *Partidas* are particularly offensive and insulting as well as delightfully amusing. To summarize a long series of instructions very briefly, a pregnant widow was to show herself to the deceased's relatives twice a month so that they could ascertain whether or not there was really a fetus. When the birth was approaching she had to be moved into a house with plenty of lights and only one unlocked door. Three men were assigned to guard that door and no other women were permitted to enter. At the time of the birth, a contingent of up to ten women could be present, but none except the widow could be pregnant. If all relatives were then sure that no "cheating" (substitution of another man's child) had taken place, and if the baby was born alive, it would inherit from the deceased father. If the baby died without baptism, the father's relatives would inherit, and most important as a motivating force for the entire procedure, if the infant died after baptism, the mother would stand to inherit.

In the modern *Code* the spirit of protecting the deceased's relatives remains in the form of precautions to make sure that an infant is indeed born to the widow and that it is viable. Although still somewhat insulting to the widow, the regulations have been modified and softened. A child born within 300 days after the end of a marriage is presumed legitimate unless proven not to be.[42] Article 959 provides for notifying those who are in line to inherit of the pregnancy, but article 960 leaves to the judge the decision as to what would be the appropriate measures to prevent fraud on the part of the widow. This article also protects the widow, cautioning: "The judge will take care that the measures he dictates do not attack either the modesty or the freedom of the widow."[43] Article 961 provides that others in line to inherit have the right to name a person "who will affirm the reality of the birth" but the widow has the right to reject the person chosen, in which event the choice is left to the judge. One nice touch is article 964 which provides that the pregnant widow should be supported from the inheritence for the duration of the pregnancy.

In his commentary on this subject Manresa indicates that these

42. *Id.* at 253.

43. *Cuidará el Juez de que las medidas que dicte no ataquen al pudor ni a la libertad de la viuda.*

measures are actually designed to protect the rights of the fetus.[44] If the regulations are followed, the heirs are prevented from dividing the inheritance among themselves and also from later questioning the legitimacy of the birth. Only when the pregnancy is dubious does the *Code* seem to disfavor the widow and to benefit the presumed heirs, in Manresa's opinion. So the apparently insulting precautions can be viewed from more than one side and are, in any case, directed at women simply because they happen to belong to the only sex biologically capable of having children.

Women's actions have also been regulated in the past by controls placed upon their own right to inherit. The current *Code* permits parents to disinherit a daughter or niece if she has become a prostitute (Art. 853, sect. 3a). A similar provision can be found in the *Partidas* (Part VI, Tit. VII, Law V). There the restriction was a bit more ample, for it permitted disinheritance if a daughter refused to marry the man chosen and instead became a prostitute. However, in a sense, a daughter had more leeway then, for the provision applied only if she were under twenty-five. The reasoning here was that if she had become a prostitute after twenty-five it was her father's fault for not marrying her off sooner!

GUARDIANSHIP, ADOPTION AND REMARRIAGE

The areas of guardianship and adoption in Spanish law center around the term "*patria potestad.*" In Roman times this expression referred to the control which a father exercised over his children, a control similar to that exercised by him over material things and one which permitted a father to sell or pawn a child if necessary, and even to eat it in an extreme case.

There were some interesting regulations in the medieval Spanish codes regarding a widow's right to *patria potestad*, some of which remained in the *Código civil* until very recently. The *Fuero Juzgo*, for example, stated that a widow would normally arrange the marriages of her children, but if she died or remarried (an amusing equation) this duty would be transferred to a close male relative such as an uncle (Bk. III, Tit. I, Law VIII). The implication here is that a wife might fall under the influence of her new husband and not do right by her children.

Similarly, the *Partidas* had a provision which stated that a widow must wait one year to remarry or else forfeit the gift given to her

44. VII MANRESA Y NAVARRO, *supra* n. 41, at 254.

45. II J. MANRESA Y NAVARRO, COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL 6-8 (7th ed. 1956).

by the deceased when they first married (Part. IV, Tit. XII, Law III). It must be inferred here that this rule was written to prevent a wife from murdering her husband to remarry someone else. There is no such restriction upon the remarriage of the husband. The law continued to single out women, stating that if a widow marries again even after a year of mourning she cannot be a guardian to her own children because, to paraphrase, she might consent to the death of these children to please her new husband (Part. VI, Tit. XVI, Law V). Again, as in the *Fuero Juzgo*, there exists a concern that women might mistreat their children, by failing to ward off the evil influences of their new husbands.

Such restrictions on women's authority over their own children are found until quite recently. It was only in 1958 that article 168 of the *Civil Code* was reformed. This article had stated that a widow who remarried lost the *patria potestad* over the children of her first marriage unless her deceased husband had expressly provided otherwise in his will. In the absence of such a provision the *patria potestad* passed to a family council; as of April 24, 1968, however, it was provided that: "The later nuptials of the father or mother shall not affect *patria potestad*, but the judge can emancipate the children over eighteen (over sixteen as of 1978) if they request it, with a hearing to allow the father or mother to make his or her views known."[46] This article applies to illegitimate as well as to the legitimate children.

With reference to guardianship, the restriction already mentioned in the *Partidas* (Part. VI, Tit. XVI, Law IV), whereby a widow who remarried could not be guardian to her own children, had further echoes in the *Partidas* and even in the *Civil Code* until recently. The *Partidas* stated that a woman could not be a guardian at all unless she was a mother or grandmother who renounced another marriage (Part. VI, Tit. XVI, Law IV). In this century the Civil Code stated until 1958 that women, except in cases expressly permitted by law, could not be guardians (Art. 237, sect. 7, prior to 1958). The cases expressly permitted included a grandmother who remained widowed, an unmarried sister who could be the guardian of an insane person or deaf mute and the mother of a wastrel (Arts. 211, 220, 227, prior to 1958). In addition, until 1958 a father could name a guardian for minor children but a mother who married for the second time could only name such a guardian with approval of the family council (Art. 206, prior to 1958). This council, again until 1958, was formed by members of the family as designated by the father's will, or lacking this, as designated by male relatives (Arts. 294, 295, prior to 1958).

46. Current article 168 reads: "*Las ulteriores nupcias del padre no afectarán a la patria potestad, pero el Juez podrá conceder la emancipación de los hijos mayores de 18 años, si lo pidieren, previa audiencia del padre o madre.*"

In 1958 several significant changes were made giving women equality in assuming guardianship. Article 237 no longer contains the seventh case, so that women are no longer forbidden except in special cases to be guardians. Article 206 no longer contains a paragraph specifying that a woman naming a guardian for her children had to have the approval of the family council. The composition of the family council was also changed in 1958; article 294 now indicates that, if the family council is not designated in a testament, it shall be composed of the nearest relatives, of *whatever sex*. On the other hand, the *Code* still states that in choosing among relatives of equal closeness, men will be preferred over women (Art. 295).

One humorous situation related to guardianship was noted by the Commission recently revising the *Civil Code*. As of May 1975, article 244, which had provided that those having five or more legitimate children under their control could be excused from guardianship, was changed so that those who have five or more children under their control could be excused. The commission realized that whether legitimate or not, children produce the same effect!

Adoption is another area in which women are not restricted as they once were. In the *Partidas* men were permitted to adopt if older than the child and capable of having their own, but women were permitted the same right only if they had lost a son in battle or in the king's service (Part. IV, Tit. XVI, Law ii). In such a situation women apparently were allowed to adopt as a means of substituting another child for the one lost. Nonetheless, even in this case the king's permission was required. This requirement was not aimed at restricting women's actions. Rather there was a feeling that, allowed to operate on their own, women become involved in deceit: "It could be that men might deceive women, or women men, in such a fashion that much evil would result."[47] Why adoptions by males were not restricted for the same reason is unclear. Present code articles 172-174 included no prohibition of women's right to adopt. The provision that a widow would lose the *patria potestad* over her children (adopted or not) upon remarriage but would regain it upon becoming widowed again was omitted as of 1958, so that a mother is not forced to lose this control for reasons of remarriage.

The Law of May 13, 1982, has finally done away with the preference given to a father in the control over his children during a marriage. Articles 154 and 156 of this new law provide for the joint exercise of *patria potestad* by both the father and the mother rather than through the superior authority of the father. If the parents

47. LAS SIETE PARTIDAS Bk. IV, Tit. XVI, L. II: *Podria ser, que las enganarian los omes, o ellas a ellos, de manera que nasciera ende mucho mal.*

disagree, the question can be heard by a judge and the opinion of the child (if old enough) can be taken into account as well.[48]

CONCLUSION

If previous reasons for restricting the rights and duties of married women included lack of experience, the modified laws of the Spanish *Código civil* should permit them to overcome such inexperience, a situation in effect created by the limitations upon their actions imposed for centuries by the legal system. The modifications will probably give rise to many more disputes between spouses now that women have a somewhat stronger say in decision making. The judges are probably finding their dockets much fuller nowadays. The other areas where women have been treated differently from men, such as adultery and inheritance, have been revised to treat the sexes in an identical manner, with a few distinctions remaining mainly because only women can bear children. Perhaps the next decade will see further equalization of the husband and wife in the area of property within marriage.

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48. MARTÍNEZ-CALCERRADA, *supra* n. 24, at 83.