



Creating a System

*An overview
of the Spanish
origins of
Texas law.*

WRITTEN BY JASON BOATRIGHT

Texas law is unique. It uses the common law of England as a rule of decision in court, but it was a jurisdiction of the civil law of Spain, France, and Mexico for over 300 years and it retains many elements of those laws today. Among the areas of substantive law that descend from the long era of Spanish rule in Texas are family law and water law.¹ Additionally, many Texas land titles are interpreted according to Spanish and Mexican laws that were in effect when the land was first transferred, claimed, or used in Texas.² But perhaps the most important survival from Spanish times is Texas legal procedure, because it governs the way that disputes over the substantive areas of law are resolved.³

In early Anglo-American law, there were two legal systems, one called law and the other called equity. The Spanish legal system, however, was unitary. Texas adopted the Spanish system, retaining one court system for both legal and equitable questions. Texas was the first jurisdiction in the English-speaking world to adopt the unitary system.⁴

Spanish legal procedure was instituted in Texas by long practice. Spain began surveying the Texas coast with Alonso Álvarez de Pineda's expedition in 1519, which was within living memory of the Moorish presence in Iberia.⁵ When settlements were established in Texas over 200 years later, Spanish law required that alcalde courts be established for the new settlers.⁶ These courts were descended from the Arab al-qadi courts of medieval Spain.⁷

The first alcaldes in Texas were selected in 1731 at San Fernando, which is present-day San Antonio.⁸ The town was governed by a cabildo, or city council, the members of which were appointed by order of the crown.⁹ Only immigrants from the Canary Islands served in San Fernando's first cabildo. Known as Isleños, these residents were members of 15 families.¹⁰ In this way, the al-qadi of Arab Spain became the alcalde of Isleño San Fernando.

These ancient judicial offices, in turn, have left their mark on the judiciary of modern Texas. The Texas county judge shares several characteristics with the Spanish and Mexican *alcalde*, including the dual possession of both executive and judicial powers.¹¹ And the Texas district judge is a direct descendant of the *alcalde*, presiding over courts that had essentially the same jurisdiction as the Spanish and Mexican judicial officer did.¹²

Among the practices that the *alcaldes* of Spain passed on to today's Texas judges is a simplified petition-and-answer system of pleading, as well as independent executors in probate.¹³ Another element of Spanish procedural law that has survived in Texas today is the rule that a person must be sued where he or she lives, rather than where the dispute arose.¹⁴

Many of these Spanish rules came to Texas through a series of royal decrees collected in the 13th century. Known today as the *Siete Partidas*, the seven-volume legal code combined passages from Aristotle, St. Thomas Aquinas, Justinian's *Corpus iuris civilis*, and other philosophical, theological, and legal sources.¹⁵ William Barret Travis frequently used copies of the *Partidas* and similar Spanish legal collections when he practiced law in Mexican Texas,¹⁶ and early Texas Supreme Court opinions are replete with references to the work.¹⁷ One of the most important areas of Texas law that was governed by the *Partidas* was Texas family law.¹⁸ For example, adoption was a common feature of Spanish law under the *Partidas* and one that Texas retained after independence.¹⁹

But the *Partidas* were not the only sources of Spanish law in Texas. Until the 13th century, the land that comprises modern Spain was governed by many different local laws called *fueros*.²⁰ In 1241, to try to unify the law of the Iberian Peninsula, King Ferdinand III, of Leon and Castile, ordered that the *Fuero Juzgo*, or Visigothic Code, which had been promulgated in 654, be translated into Castilian.²¹

This code is exactly what it sounds like: the laws of the Goths, a Germanic people that had conquered Spain in the middle of the first millennium. And through the Visigothic Code, the Goths gave Spain—and Texas—the concept of community property.²² In most English-speaking jurisdictions, the husband and wife were one and, as William Blackstone put it, “the husband was the one.”²³ In Texas, however, women could share equally in the property of the married couple.

Texas land and water law are also descendants of Spain. Millions of acres of land in Texas were granted under the laws of Spain, and the terms of the grants govern how the land is used today. For example, under Spanish law, title to land along the seashore extends to the mean highest tide. This is different from the rule under English law, which provides that title extends merely to the mean high tide. If title to land was granted before 1840, while the civil law of Spain and Mexico was still in effect in Texas, the landowner would own less property than if the title to the land was granted after 1840, when the English common law was received in Texas.²⁴

In 1838, Mirabeau B. Lamar, the president of the Republic of Texas, addressed both houses of Congress, pleading with them to replace the laws of Spain with the

common law of England. He said, “We are the only people who have adopted a system of laws . . . written in a foreign language unknown to our people.”²⁵ This, however, is no longer true. All Texans are keenly aware of community property, even though it was written in Gothic before passing into Castilian and English. And Texas lawyers are thoroughly familiar with the simplified pleading system that came here from the courts of the Arab *al-qadi* and Spanish *alcalde*. These and other legal artifacts of imperial Spain are colossally important facts of daily life in Texas. They are Spanish, yes, but long ago became, simply, Texan. **TBJ**

NOTES

- Jean A. Stuntz, *Hers His & Theirs*, Community Property Law in Spain & Early Texas 139 (2005) (discussing the influence of Spanish and Mexican law on early Texas family law); Betty Eakle Dobkins, *The Spanish Element in Texas Water Law* 123 (1959) (discussing Spanish influence on early Texas water law).
- Hans W. Baade, *Reflections on the Reception (or Renaissance) of Civil Law in Texas*, 55 SMU L. Rev. 59, 62–63 (2002).
- Joseph W. McKnight, *The Spanish elements in modern Texas law* at 2 (1979).
- All but three states have followed Texas' lead. *Id.* at 3.
- Donald E. Chipman and Harriet Denise Joseph, *Spanish Texas 1519–1821* 24, 25 (rev. ed. 2010).
- Id.* at 51.
- Karen B. Graubart, *Learning from the Qadi: The Jurisdiction of Local Rule in the Early Colonial Andes*, 95 *Hispanic Am. Hist. Rev.* 2, 204 n.32 (2015).
- Jesús F. de la Teja, *San Antonio de Béxar: A Community on New Spain's Northern Frontier* 139–140 (2001). *Alcaldes* were first elected in Laredo in 1767. Gilbert R. Cruz, *Let There Be Towns: Spanish Municipal Origins in the American Southwest*, 1610–1810, 101 (1988) (noting the citizen election of Don Jose Martinez de Sotomayor as *alcalde ordinario*). Cf. Andrés Tijerina, *Tejanos & Texas under the Mexican Flag, 1821–1836*, 28 (2010) (providing that the *alcalde* chosen in the first Laredo election in 1768 was Don Jose Martinez de Sotomayor).
- Mattie Alice Austin, *The Municipal Government of San Fernando de Béxar, 1730–1800*, *The Quarterly of the Texas State Historical Association*, Vol. 8, No. 4 (April, 1905) at 297–298 (citing *Recopilacion*, lib. IV, tit. V, ley x).
- Id.* at 298.
- Cruver v. Tarrant Cty. Local Workforce Dev. Bd.*, 943 F.3d 265, n. 1 (2019).
- See Clarence Wharton, *Early Judicial History of Texas*, 12 *Tex. L. Rev.* 311, 323 (1934) (noting that the clerk of the district court of Brazoria issued an execution in 1837 to enforce an 1834 *alcalde* court judgment).
- McKnight, *The Spanish elements in modern Texas law* at 4 (1979).
- Id.* at 3–4 (1979).
- Manlio Bellomo, *The Common Legal Past of Europe 1000–1800*, 100 (1995, Lydia G. Cochrane, trans.).
- Peter L. Reich, *Siete Partidas in My Saddlebags: The Transmission of Hispanic Law from Antebellum Louisiana to Texas and California*, 22 *Tul. Eur. & Civ. L. Forum* 79, 81–82 (2007).
- See e.g., *Scott and Solomon v. Maynard et uxors*, No. XXXV, Dallah 548, 551 (January Term, 1843) (citing “5th Partida, tit. 5, law 6”).
- Jean A. Stuntz, *Hers His, & Theirs: Community Property Law in Spain & Early Texas* 31–44 (2005).
- McKnight, *The Spanish elements in modern Texas law* at 7 (1979).
- Joseph F. O'Callaghan, Alfonso X, *The Justinian of His Age: Law and Justice in Thirteenth-Century Castile*, 105–108 (2019). There were also separate *fueros* for noblemen and Arabs. *Id.*
- However, only Leon, Murcia, and Andalusia adopted the *Fuero Juzgo* as local law. Manlio Bellomo, *The Common Legal Past of Europe 1000–1800*, 99 (1995, Lydia G. Cochrane, trans.).
- Jean A. Stuntz, *Hers His, & Theirs*, Community Property Law in Spain & Early Texas 16 (2005).
- McKnight, *The Spanish elements in modern Texas law* at 7 (1979).
- Betty Eakin Dobkins, *The Spanish Element in Texas Water Law* 28–29 (1987).
- The Papers of Mirabeau Buonaparte Lamar*, Vol. II, 350 (1922).



JASON BOATRIGHT

is a lawyer in Dallas who researches how the common law of England and civil law of Spain influence Texas law. He is a former justice of the Dallas court of appeals and chief of the Texas attorney general's opinion division.