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The Struggle for European Private Law: A Critique of Codification

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BOOK REVIEW

LEONE NIGLIA, *THE STRUGGLE FOR EUROPEAN PRIVATE LAW:
A CRITIQUE OF CODIFICATION*
(Hart Publishing Ltd., Oxford 2015)

Reviewed by Agustín Parise*

The path towards a harmonized private law in Europe is being signposted. Copious literature has developed on the different signposts, and Leone Niglia offers an innovative approach to a number of these in *The Struggle for European Private Law*. His approach focuses on the codification phenomenon. He attends mainly what he refers to as the “European code-texts,”¹ which consist of the Draft Common Frame of Reference (DCFR) and its “synthetic version,”² the Common European Sales Law (CESL); these can be considered the two most recent signposts in that path. The CESL, however, was put on hold in December 2014 when the European Commission presented the Work Programme 2015 and withdrew the CESL, even when it had attained a favorable first reading before the European Parliament.

The book offers a critique of the conventional understanding of codification. Codification finds its origins in Europe, where it developed significantly during the eighteenth and nineteenth centuries. Codification advocated for a new presentation and form of laws which would replace existing provisions, while grouping different areas in an organic, systematic, clear, accurate and complete way.³

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1. LEONE NIGLIA, *THE STRUGGLE FOR EUROPEAN PRIVATE LAW: A CRITIQUE OF CODIFICATION* 5 (HART PUBLISHING LTD. 2015).

2. *Id.* at 5.

3. 1 LUIS DIEZ-PICAZO & ANTONIO GULLON, *SISTEMA DE DERECHO CIVIL* 51 (1982); 1 ARTURO ALESSANDRI RODRIGUEZ & MANUEL SOMARRIVA UNDURRAGA, *CURSO DE DERECHO CIVIL* 49 (1945); and Genaro R. Carrio, *Judge Made Law Under a Civil Code*, 41 *LA. L. REV.* 993, 993 (1981).

In addition, codification suggested the laying out of a plan with terminology and phraseology.⁴ Codification continued to evolve worldwide during the twentieth and twenty-first centuries. Jurisdictions continued to amend and replace the texts of their codes, adapting them to their particular societies. In Europe, a new challenge currently goes beyond the adaptation to changes in a particular society; rather, the challenge focuses on adaptation to the changes in the European Union as a whole. The current exploration of harmonization in Europe aims for a private law that is able to bridge national and regional scopes.⁵

In the *Prologue*, Niglia conveys the idea that the legislature is regarded as the engine behind modern codification. Codes are considered as the statutes *par excellence*. However, his book refers to two main components behind the codification phenomenon: legislation (*thesis*) and scholars and judges (*nomos*); in other words, statute and jurisprudence. Both components shape the codification phenomenon. Niglia, therefore, advocates for an invitation to look at the “surrounding community of interpreters.”⁶ The book attends the interplay of those interpreters, since their role helps explain the success or failure of some of the signposts on the path towards a harmonized private law in Europe. As explained in the *Prologue*, his book is divided into four chapters. The first deals with the top-down perspective of how the proposed European code-texts were shaped in the context of the European Union legislative process. The remaining three chapters offer a bottom-up perspective from the viewpoint of the different interpreters.

The first chapter, entitled *Code*, offers an overview of the path towards a harmonized private law in Europe since the late 1980s.

4. Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1084-85 (1988).

5. Agustín Parise, *Civil Law Codification in Latin America: Understanding First and Second Generation Codes*, in TRADITION, CODIFICATION AND UNIFICATION 183 (J.M. Milo, J.H.A. Lokin, & J.M. Smits eds., Intersentia Ltd., 2014).

6. NIGLIA, *supra* note 1, at 3.

The author naturally focuses on the DCFR and the CESL, due to their recent stature. However, Niglia notes that such efforts target unification, rather than solely focusing on harmonization of private law in Europe. His description of the path extends from the Lando Principles to the DCFR. In that path he emphasizes that there are elements of continuity, yet there are also significant elements of discontinuity. In that first chapter, he further attends how the *Acquis Communs* of the Lando Principles were fused with the *Acquis Communautaire*. He searches for examples in a number of directives, initially the Unfair Terms Directive. The European code texts entail, according to Niglia, a move towards universalization and disciplining interpretation. That universality is somehow similar to the one irradiating from nineteenth-century codes. Yet, that universalization is questionable for Niglia, since there is a lack of transparency requirements, and it entails an inherent radicality. Furthermore, that European code text entails the emergence of an “official” legal grammar, something that was also present in nineteenth-century codification. He notes that grammaticalism may help implement policy choices that would impose from the *thesis* top-down on to the *nomos*. Niglia acknowledges that there are other forces involved, however, since the *nomos* interacts with the codes and forms a holistic movement beyond the legislature. Therefore, codification goes beyond the letter of the law, beyond what the legislature states. Accordingly, there seems to be a need to “investigate the wider private law world”⁷ to fully grasp the extent of codification. Indeed, codification shapes the way jurists study, interpret, and apply the law;⁸ but, jurists can also shape codification. Codes exist in environments that reject or accept them. There are interplays that enrich the life of each codification effort, and this shows that codification is dynamic, and it feeds on the interpretations that the different actors make.

7. NIGLIA, *supra* note 1, at 39.

8. Parise, *supra* note 5, at 184.

The second chapter, entitled *Jurisprudence*, aims to demonstrate that the codification struggle is between the legislature and *nomos*. The struggle goes beyond a European code text and the national codes, and a fundamental understanding of that struggle helps fully grasp the extent of the path towards harmonization. Niglia claims that the efforts towards a European code text aim to impose a disciplinary interpretation on the *nomos*, and this explains the move from harmonization to unification that a code would entail. Central to this chapter is the movement of the *nomos* away from the nineteenth-century code ideology, first at a national and then at a European level, mainly during the first half of the twentieth century. Niglia considers that the European code text would serve as a tool to terminate the divergent interpretation made by the *nomos*, hence imposing a disciplining interpretation. This would ultimately jeopardize the jurisprudential diversity in Europe in relation to private law matters and terminate the contingent points of authority that emerge from the structures of private law jurisprudence. Niglia then claims that, during the last half century, private law developed a pluralist and politicized nature, linked to the interaction, again, of *thesis* and *nomos*. The former plays a role mainly through special legislation and de-codification; and the latter by the constitutionalization of private law, which tends to derive into a jurisprudential de-codification. After all, *nomos* offers the required context in which *thesis* develops. This pluralism also developed beyond national borders, exceeding the domestic level and extending to the European sphere. This chapter furthermore offers insights, as other parts of the book, on codification, de-codification, and re-codification. These are three fundamental concepts used to build and fully comprehend the path towards a harmonized private law in Europe.

The third chapter, entitled *Code vs Jurisprudence*, aims to demonstrate that the European code texts, mainly represented by the CESL, denote an assault on the pluralistic structure of private law as reflected by *nomos*. As hinted before, Niglia emphasizes that the struggle is not between national codes and a European code text, but

rather, between the European code text and *nomos* (domestic and European). He claims that the codes are no longer as strong as they used to be (especially when compared with the nineteenth-century), but rather, these codes affected by de- and re-codification have given place to *nomos* (domestic and European), which is now threatened by the European code texts. Niglia illustrates his claim by addressing two main polemics. The first relates to the role and number of the principles as initially inserted in the Interim Outline Edition of the DCFR, and the second relates to the critique of the inconsistencies and defects in drafting raised by a number of German scholars, amongst others Horst Eidenmüller and Reinhard Zimmermann, to that same edition of the DCFR. Continuing with his claim, in that same chapter, Niglia indicates that the CESL would impose a barrier to the development and survival of private law *nomos*, since constitutional synthetization would be obstructed. The living constitutional values on which *nomos* developed would be threatened, subject to de-constitutionalization and finally, experience re-constitutionalization. The chapter follows with arguments put forward to explain that potential assault (now dormant) of the CESL on the pluralistic structure of private law *nomos*. Plural re-creations would be eliminated, according to Niglia, if the European code text would be implemented, since interpretation, both monistic and grammaticalist, would be circumscribed to the CESL. *Nomos* would, therefore, turn to this new European code text, leaving behind the living and diverse developments experienced in past decades. The question, thus, revolves around what actors should do when facing the potential shift in a codification that aims to “erase the existing private law.”⁹

The fourth chapter, entitled *Jurisprudence vs Jurisprudence*, repeats the call of looking at codification also from the perspective of *nomos*. Niglia offers a number of historical experiences to demonstrate that the understanding of a code also depends of *nomos*. The

9. NIGLIA, *supra* note 1, at 104

support, acceptance, and rejection of *thesis* by *nomos* marks the fate of each codification endeavor. Amongst the examples offered to convey this claim, Niglia mentions—of special interest for this journal—the tendency in the legal community of the state of Louisiana to de-emphasize the Digest of 1808 after its enactment.¹⁰ The constitutionalization of private law offers another argument for the important role of *nomos*, since codes lost their place in the center of the solar system due to de-codification. De-codification has an impact on codes, and it has been said that:

the civil law tradition has long been portrayed as a solar system where everything not found in the civil code, which is the sun or central star, gravitates around it, and is inspired and interpreted on the basis of the light it sheds on the planets that revolve around it. De-codification weakens the system, and multiplies special statutes, revolving loosely like shapeless meteors.¹¹

Niglia emphasizes that codes, due to the constitutionalization of private law and de-codification, are no longer placed by *nomos* at the center of the solar system. He further states the need to be aware of the role of *nomos* in the legislative enterprises in order to fully comprehend the current understanding of codification. The European code texts are a result of the interaction of the divergent *nomos*. Identifying and understanding these *nomos* helps understand and explain the European code texts. This interaction between *thesis* and *nomos* is, according to Niglia, what ultimately places the current European code texts as clogs in a chain of codification that started more than 200 years ago. Ultimately, this chapter explores in-depth the *nomos* behind the European code texts. This exploration aims to un-

10. For more information about the resistance to the Digest of 1808 in Louisiana, see RICHARD H. KILBOURNE JR., A HISTORY OF THE LOUISIANA CIVIL CODE 62-63 (reprint of the 1987 edition, 2008); and Agustín Parise, *The Place of the Louisiana Civil Code in the Hispanic Civil Codifications: Inclusion in the Comments to the Spanish Civil Code Project of 1851*, 68 LA. L. REV. 823, 833 (2008).

11. Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103, 1110 (2009).

veil a struggle between *nomos* and *nomos*, as opposed to solely between *nomos* and *thesis*. Codification, as claimed by Niglia, results from struggles between scholars: struggles in which the decisions of the sovereign are not absent.

Niglia concludes his argumentation with an *Epilogue*. There, he highlights the value of codes as both contingent governmental tools and epistemic tools that result from the interplay of divergent *nomos*. In the *Epilogue*, he also repeats that the current European code texts are clogs in the codification chain. There, Niglia also provokes interesting lines of thought by means of two additional questions. First, should the European code texts recreate strong forms of sovereignty opposing domestic contexts that had developed through codification? Second, what would be the authority of a European code text? A final, yet not less important note, is made by Niglia, emphasizing the risk that a European code text could bring to the socialization of private law that has taken place since the early twentieth century. Neglecting the *nomos* and the constitutionalization of private law could have a negative impact on the collective, considering socialization as an achievement which offered a change in paradigm from the liberal conception.

The book walks readers through the different claims of Niglia, step-by-step, unveiling his path of argumentation. Chapters are enriched with contemporary examples (*e.g.*, European Union directives, court decisions) and examples extracted from legal history (*e.g.*, codification in Prussia and France, the Thibaut-Savigny debate). The book offers an innovative approach, while also bringing to the codification table elements from comparative law, legal history, constitutional law, and private law.

The Struggle for European Private Law succeeds in broadening the traditional view on codification. The literature in the area tends to focus on the legislative aspects of codes. Attention to the work of scholars and judges (*nomos*) is often not given the necessary attention. Further, the literature tends to overlook how the work of scholars and judges has an impact on the life of codes and the codification

phenomenon as a whole. The awareness now offered by this book offers a viewpoint that goes beyond the signposts, and such awareness could be applied to future signposts when pursuing further the harmonization of private law in Europe. Signposts are to come, and this work by Niglia should be considered when erecting new signposts. *Nomos* should not be overlooked. It is an important component in the codification phenomenon, one that should not be neglected. In the words of Niglia, his book aims to contribute to “the much needed refinement of the private law discourse towards engagement and responsibility.”¹² The mission has been accomplished.

12. NIGLIA, *supra* note 1, at vii.