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Agustín Parise

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BOOK REVIEW

DAN E. STIGALL, *THE SANTILLANA CODES: THE CIVIL
CODES OF TUNISIA, MOROCCO, AND MAURITANIA*
(Lexington Books 2017)

Reviewed by Agustín Parise*

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Codification develops within social and legal contexts, and is accompanied by a circulation of legal ideas that links jurisdictions within and across continents.¹ Dan E. Stigall confirms this statement in *The Santillana Codes: The Civil Codes of Tunisia, Morocco, and Mauritania*. His study focuses on the draft of a civil and commercial code for Tunisia elaborated under the leading role of David Santillana (1855-1931) at the end of the nineteenth century. The work led by Santillana offered an early “attempt at a comprehensive fusion of modern civil law (based on European law) with Islamic law.”² The text by Santillana dealt with the law of obligations and contracts. Upon revision, the text was adopted by Tunisia, while also being used for the codification effort in Morocco and Mauritania. Those three texts are what Stigall refers to as the Santillana Codes, and are still the law in those three jurisdictions.

Law is a social science that is subject to mutation. The actors who trigger those changes—such as Santillana—are often identifiable. Stigall, who previously explored codification endeavors,³ joins

* Associate Professor, Faculty of Law, Maastricht University (The Netherlands); LLB, LLD, Universidad de Buenos Aires (Argentina); LLM, Louisiana State University (USA); PhD, Maastricht University.

1. For the Americas, see AGUSTÍN PARISE, *OWNERSHIP PARADIGMS IN AMERICAN CIVIL LAW JURISDICTIONS: MANIFESTATIONS OF THE SHIFTS IN THE LEGISLATION OF LOUISIANA, CHILE, AND ARGENTINA (16TH-20TH CENTURIES)* 182 (Brill Nijhoff 2017).

2. DAN E. STIGALL, *THE SANTILLANA CODES: THE CIVIL CODES OF TUNISIA, MOROCCO, AND MAURITANIA* xvi (Lexington Books 2017).

3. See Dan E. Stigall, *The Civil Codes of Libya and Syria: Hybridity, Durability, and Post-Revolution Viability in the Aftermath of the Arab Spring*, 28

the efforts that are being undertaken by several scholars and research institutes to reconstruct the activities of the main actors behind those changes. These efforts help attain a legal and cultural repository for future studies since they also develop valuable contexts.⁴

This review presents the book as a triptych. The first panel consists of the first two chapters. These chapters offer an overview of the two main building blocks of the Santillana Codes, and enable the book to stand alone, serving as an introduction for readers that might have no prior knowledge of civil or Islamic law. The second panel consists of chapters three and four. In this panel, the context for the gestation of the codes is presented together with the sources to be used when interpreting the codes. The third panel consists of chapters five and six. Here, Stigall addresses substantive aspects of the codes, offering at times an exegetical approach to obligations and contracts as presented in the Santillana Codes.

The first chapter, entitled *Civil Law and Civil Codes*, offers a very brief overview of the first building block of the Santillana Codes. Stigall focuses there on the Roman law that found a place in the nineteenth-century codification endeavors. The author, however, neglects the necessary attention to canon law, one of the main elements of *Ius commune*. This non-secular aspect of the continental system is important and enriching when exploring the blending of civil law and Islamic law, as proposed by Santillana. Finally, it should be noted that in this chapter and in other parts of the book, Stigall relies heavily on the Louisiana experience, sometimes neglecting other influential civil law experiences, when elaborating on civil law elements. The recurrent references to Louisiana may be explained by his familiarity with that jurisdiction and the fact that

EMORY INT'L L. REV. 283 (2014); and Dan E. Stigall, *Law and the Lodestar: Tunisian Civil Law and the Task of Ordering Plurality in the Aftermath of the Jasmine Revolution*, 7 J. CIV. L. STUD. 1 (2014).

4. See, e.g., Agustín Parise, *Comparative European Experiences in Legal History and Constitutional Law (19th–20th Centuries)*, 18 HISTORIA CONSTITUCIONAL 411 (2017).

Louisiana provides a mixed environment where the civil law is able to coexist with another system.

The second chapter, entitled *Islamic Law*, offers an overview of the second building block of the Santillana Codes. Here, Stigall presents fundamental aspects of Islamic law: aspects that will be valuable when referring to the content of the codes in the third panel of the triptych. Islamic law, as described by Stigall, is not ossified and “has always been surrounded by a vibrant intellectualism which continues to shape it and permit it to evolve.”⁵ The explanation of paramount concepts (e.g., *qanun*, “the law that the institutions of the state will apply and enforce”)⁶ and of the different schools (e.g., *Maliki*, which prevails in the three jurisdictions)⁷ is followed by an elaboration of the plurality of Islamic law and the tenets of contract law, with attention to, for example, the *riba* and *gharar*. This chapter adopts a pedagogical approach—which due to simplifications—will be welcomed by readers unfamiliar with Islamic law.

The third chapter, entitled *The Genesis of the Santillana Codes*, aims to unveil the context in which the codes were elaborated and the path towards their adoption. The author initially offers a brief entry overview for each of the three jurisdictions, pointing to, amongst other influences, the presence of Islam in that part of the Maghreb. Here the attention is devoted to the *‘ulama* (i.e., scholars of Islamic law) and the role mosques play in the development of legal science. The three jurisdictions had centers of learning, and Stigall focusses on a number of actors (e.g., Mahammad Bayram) and their interaction with Santillana, who contributed to the gestation of the codes. The chapter then addresses another important context for the codes, the fact that Santillana was a Sephardic Jew, member of one of the many families who had moved from Iberia to North Africa. Halfway through the book, readers finally encounter a necessary biography of Santillana, who was born in Tunisia and

5. STIGALL, *supra* note 2, at 12.

6. *Id.* at 19.

7. *Id.* at 22.

received education in his home country, England, and Italy. Santillana was born into a “cosmopolitan family with considerable political influence.”⁸ The chapter then delves into the codification process in Tunisia, and the leading role of Santillana in the codifying commission established in 1896. That team produced a *Projet préliminaire* (1897) and an *Avant-Projet* (1899) that was revised by a commission of Tunisian scholars.⁹ The text was shaped by the work of different actors and resulted in a combination of civil law and Islamic law elements. That text was later used when codifying in Morocco and Mauritania.

The fourth chapter, entitled *The Sources of Law*, deals with the sources “which may be called upon in interpreting the code’s provisions.”¹⁰ The author first deals with the Tunisian code and then points to the differences presented by its two counterparts in Morocco and Mauritania. Custom, according to Stigall, played a paramount role in the draft of Santillana, because custom in Islamic law was a convention that enabled the creation and modification of law. The ideas on custom, as presented in the draft, were deemed innovative and opened the door to solving problems by looking beyond the articles of the code. Santillana profited from civil law (e.g., Italian Civil Code, 1865) and Islamic law (e.g., writings by Ibn Nadjim) alike. His approach reaffirms the idea that, when referring to codification, to choose correctly is to create,¹¹ and that drafters use the knowledge that humanity has treasured.¹² Islamic law also played a role as a source of law. In Tunisia references to Islamic law were

8. *Id.* at 58.

9. See DAVID SANTILLANA, PROJET PRÉLIMINAIRE DE CODE CIVIL ET COMMERCIAL SOUMIS À LA COMMISSION DE CODIFICATION DES LOIS TUNISIENNES (1897) and DAVID SANTILLANA, CODE CIVIL ET COMMERCIAL TUNISIEN. AVANT-PROJET DISCUTÉ ET ADOPTÉ AU RAPPORT DE M. D. SANTILLANA (1899) as cited in Florence Renucci, *David Santillana, acteur et penseur des droits musulman et européen*, 2015/1 N° 7 MONDE(S) 236 (2015).

10. STIGALL, *supra* note 2, at 80.

11. JOSÉ OLEGARIO MACHADO, 1 EXPOSICIÓN Y COMENTARIO DEL CÓDIGO CIVIL ARGENTINO XVI (Félix Lajouane ed. 1898).

12. ALFREDO COLMO, TÉCNICA LEGISLATIVA DEL CÓDIGO CIVIL ARGENTINO 350 (2d ed., Abeledo-Perrot 1961).

discouraged, while in Morocco the judiciary was more permissive of its use. Finally, in Mauritania, lacunae could be filled by recurring to the Malikite rite of Islamic law. Each code responded to a different society.

The fifth chapter, entitled *Obligations in General*, aims to depict the interaction of civil law and Islamic law in the fabric of the Santillana Codes. In the words of Stigall, “Santillana’s work is informed by Islamic law, which, as in a tapestry, is interwoven with European law to create a unique juridical whole.”¹³ Scholars across jurisdictions traced formal sources of their codes. On occasions, the drafters aimed to be associated to the prestige held in the original jurisdictions by the elaborations subject to transfer.¹⁴ Many times, nineteenth-century scholars worked on glossed editions of codes, in which formal sources were pinpointed. Codifiers, like builders of monuments, took hold of the best materials provided by the legal science of their time.¹⁵ The glossing of codes helped identify those materials, and provided motives and resulting concordances. Some nineteenth-century codifiers incorporated annotations to their drafts (e.g., for Europe, Florencio García Goyena in Spain;¹⁶ for the Americas, Dalmacio Vélez Sarsfield in Argentina¹⁷ and David Dudley

13. STIGALL, *supra* note 2, at 94.

14. Agustín Parise, *Libraries of Civil Codes as Mirrors of Normative Transfers from Europe to the Americas: The Experiences of Lorimier in Quebec (1871–1890) and Varela in Argentina (1873–1875)*, in ENTANGLEMENTS IN LEGAL HISTORY: CONCEPTUAL APPROACHES, GLOBAL PERSPECTIVES ON LEGAL HISTORY 315, 345 (Thomas Duve ed., epubli 2014).

15. Carlos J. Rodríguez, *La Redacción de los Códigos: Necesidad de la Indicación de la Fuente de sus Artículos*, in XVII-XVI REVISTA DEL COLEGIO DE ABOGADOS DE BUENOS AIRES 187, 189 (El Colegio 1938).

16. See, e.g., Agustín Parise, *The Place of the Louisiana Civil Code in the Hispanic Civil Codifications: The Comments to the Spanish Civil Code Project of 1851*, 68 LA. L. REV. 823 (2008).

17. See, e.g., AGUSTÍN PARISE, *HISTORIA DE LA CODIFICACIÓN CIVIL DEL ESTADO DE LUISIANA Y SU INFLUENCIA EN EL CÓDIGO CIVIL ARGENTINO* (EUDEBA 2013).

Field¹⁸ in New York; and for Asia, Gustave Boissonade de Fontarabie¹⁹ in Japan).²⁰ Santillana was no exception, since he offered glosses in his draft. His draft, for example, pointed to the Digest of Justinian and the Radd al-Muhtar of Ibn Abidin.²¹ In that context, Stigall initially looks at the interplay of systems within the articles dealing with vices of consent in the work of Santillana. Stigall claims that vices of consent are an “area of comparative overlap”²² between the systems, and hence provide multiple illustrations. He then addresses several aspects of the law of obligations, as included in the Santillana Codes. For example, Stigall deals with lesion, yet he misses an occasion to attend to the role canon law played in shaping lesion during the *Ius commune* period. Stigall shows in his exegesis that the work of Santillana was subject to revision by a mixed commission, and that the ‘*ulama* hence found a means to impact the Santillana Codes.²³

The sixth chapter, entitled *Sale and Other Nominated Contracts*, offers further examples of the blending of civil law and Islamic law within the Santillana Codes. The contract of exchange illustrates on the nuances presented by the Santillana Codes: for example, the Mauritanian legislators altered the text intended for Tunisia, addressing Islamic requirements. This chapter is also rich in illustrating the diversity of sources with which Santillana worked. His glosses included seminal texts from civil law and Islamic law, such as the French, German, Italian, and Swiss codes, while pointing likewise to the *Mejelle* and the writings of Islamic scholars. Stigall

18. See, e.g., Rodolfo Batiza, *Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code*, 60 TUL. L. REV. 799 (1986).

19. See, e.g., Olivier Moréteau, *Boissonade revisité: de la codification doctrinale à une langue juridique commune*, in DE TOUS HORIZONS, MÉLANGES XAVIER BLANC-JOUVAN 103 (Société de législation comparée 2005).

20. Ezequiel Abásolo, *Las Notas de Dalmacio Vélez Sársfield como Expresiones del “Ius Commune” en la Apoteosis de la Codificación, o de Cómo un Código Decimonónico pudo no ser la Mejor Manifestación de la “Cultura del Código,”* 26 REVISTA DE ESTUDIOS HISTÓRICO-JURÍDICOS 423 (2004).

21. STIGALL, *supra* note 2, at 97.

22. *Id.* at 98.

23. *Id.* at 107.

draws attention to vernacular agricultural partnerships and oaths, further depicting the interaction of systems.

Jurists have been, and are, familiar with the concept of borrowing ideas.²⁴ Borrowings, to succeed, must be suitable for the general and legal culture of the borrowing society,²⁵ and this is conveyed in Stigall's book. In addition, each borrowing experience has its own history that requires examination.²⁶ The study of the circulation of ideas benefits from the understanding of legal borrowings or transplants, these being fundamental elements for the circulation or flow. Legal transplants may be used as tools for assessing the relation amongst legal systems and the interplay of the influences they exert.²⁷ As Stigall shows in his book—on occasions also by means of tables of codal comparison—legal transplants assist in tracing the genetic history of legal products.²⁸ There are vernacular creations that go beyond legal borrowings, however; since jurisdictions do not limit themselves to undertaking legal borrowings, they likewise welcome intellectual challenges regarding creation and adaptation.²⁹ Borrowed products may be

24. Agustín Parise, *Legal Transplants and Codification: Exploring the North American Sources of the Civil Code of Argentina (1871)*, in 1 LEGAL CULTURE AND LEGAL TRANSPLANTS. LA CULTURE JURIDIQUE ET L'ACCULTURATION DU DROIT 71, 71 (Jorge A. Sánchez Cordero ed. 2012).

25. Louis F. Del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMP. L. – Supplement 1, 1 (2010).

26. David Nelken, *Comparatists and Transferability*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 437, 459 (Pierre Legrand & Roderick Munday eds., Cambridge U. Press 2003).

27. See generally the seminal ideas presented in ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (U. Press of Virginia 1974); see also Ada Inés Sánchez Echevarría, *Legal transplants: una propuesta metodológica para el derecho comparado*, in EZEQUIEL ABÁSULO ET AL., *LA CULTURA JURÍDICA LATINOAMERICANA Y LA CIRCULACIÓN DE IDEAS DURANTE LA PRIMERA MITAD DEL SIGLO XX: APROXIMACIONES TEÓRICAS Y ANÁLISIS DE EXPERIENCIAS* 45, 60 (Instituto de Investigaciones de Historia del Derecho 2014).

28. See the reference to “genetics” in Horst Eidenmüller et al., *The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law*, 16.3 EDIN. L. REV. 301, 307 (2012). On that occasion, and in a different context, the authors advocated for “a genetic comparison in order to trace and evaluate the development of each individual text.” *Id.*

29. Parise, *supra* note 14, at 354.

subject to criticism in the adopting jurisdiction and consequently applied after further reflection,³⁰ as the experience of Santillana illustrates. Original vernacular innovation and borrowings coexist, and ultimately produce distinctive legal products.³¹ The Santillana Codes—as depicted by Stigall—are distinctive legal products.

Stigall concludes his argumentation by placing the Santillana Codes in light of developments that are taking place in the twenty-first century. He highlights the *mixed* character of the text Santillana elaborated, which resulted from a diversity of sources, deeming it a “progressive legal model.”³² The context and the actors that triggered codification in Tunisia, Morocco, and Mauritania point to the potential for pluralism.

The book provides useful figures and tables. The former offer valuable contextual information, while the latter serve a clarifying function when comparing code provisions. Readers should note that the list of references is not in alphabetical order following surnames, since it complies with the Bluebook style guide. Further, the index omits some important entries. Finally, there are a number of typos that should be corrected in future editions.³³

The Santillana Codes: The Civil Codes of Tunisia, Morocco, and Mauritania succeeds in inviting more jurisdictions to the codification table. It likewise fills a gap in the English-language literature on the codification endeavors undertaken in the Maghreb, focusing

30. See the Mexican example provided in Thorsten Keiser, *Social conceptions of Property and Labour—Private Law in the aftermath of the Mexican Revolution and European Legal Science*, 20 RECHTSGESCHICHTE 258, 271 (2012).

31. Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 441, 474 (Mathias Reimann & Reinhard Zimmermann eds., Oxford U. Press 2008).

32. STIGALL, *supra* note 2, at 148.

33. The following typos, amongst others, may be mentioned: at xix, incorrect reference is made to Louisiana revising its civil code in 1875; at 27, wording incorrectly reads “a professor Duke University;” at 123, wording incorrectly reads “civil law sources” instead of “Islamic law sources;” at 129, wording incorrectly reads “contact of sale;” at 133, duplication of wording in quoted text; at 149, wording incorrectly reads “are critical for to the task of providing;” at 161, incorrect reference to the German Civil Code as being the *Allgemeines bürgerliches Gesetzbuch*; and at 194, wording incorrectly reads “Julius Cesar Rivera” instead of “Julio César Rivera.”

on the interplay of civil law and Islamic law. Codification—as a legal paradigm—can be fully understood only when contrast is offered amongst jurisdictions and endeavors. Comparative law is necessary to fully grasp a codification endeavor, and Stigall indeed stresses this point in his work. This book further demonstrates that codification endeavors, such as the one undertaken by Santillana, should not be considered or studied as watertight compartments. This book finally succeeds in confirming that codification was accompanied by the circulation of legal ideas that linked jurisdictions within and across continents.