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David Santillana and the expansion of civil law in Tunisia and Morocco

Evolution distinguishing mankind makes evidence of all changes that affect societies, especially as regards specific fields as economy, politics and instruction. In the sphere of choosing an organizational model, man plays a commutative role: he is the engine and the instrument of the evolution thanks to his innovative reasoning; simultaneously, he is overwhelmed by the changes even if he is not directly implicated in this process.

The individual has successively experienced the fact of starting and restarting for the aim to build and innovate, sometimes for the reason of profit and domination, at other times for improving his power or for a completely different reasons. Law as conceived in its positivist dimension and the main instrument of all changes, itself is subjected to the principle of innovation and empowerment. Traditionally, it is said that legal systems tends to meet the common needs in a given community, or the needs of a group or a minority in a society.

The mechanisms ensuring the transition from one phase to another are traditionally conducted by an efficient idea publicly and officially supported. In our époque, the global order is provides and transplants a new regulation concept and instruments (deregulation) – a dimension in which religious values, ethics, culture and other popular standards express their defiance against the global organizational model and its neo-liberal acculturation. For political entities this transformation is identified as a challenge to sovereignty, whereas for individual consciousness – the question is very sensitive, its connotation being directly related to the identity and to sacred legacy rejecting all negotiation.

In the Muslim countries, the perception of law differs from the established context in the Occident that presents the evolution of the legal system as a consequence of the development of ideas in the so-called "civilized societies". Beyond this traditional remark, the modern aspect of law in Muslim countries is summed up in a certain conciliation between the European codifications, religious customary and local custom practices.[1] This approach used to depict the

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[1] F. Castro, *Sistema sciaraitico, siyāsa šar'iyya e modelli normativi europei nel processo di formazione degli ordinamenti giuridici dei paesi del Vicino Oriente, e neI mondo islamico tra integrazione e acculturazione*, Roma 1981, pp. 165-182.

normative disciplines of these societies, however, it led to a kind of blindness obscuring the differences in order to impose the European legal model. It introduced new analytical categories, such as family law, penal code and public and private law hitherto unknown to Islamic jurists.[2] In Egypt and Tunisia, two legal systems that deeply influenced the rest of the Arab-Muslim countries have always been in contrast with the local systems and social imperatives. To facilitate this transplantation "modernization", jurists exploited the generality and similarities between local standards and the general principles of positivist law. Thus, the result is exceptional since it gives the impression that the introduced legislation is inspired partly or wholly from the *sharia* and Islamic legal practices. Therefore, it is intended to clarify in this analysis that the use of *Maghreb legal school,* as it is evident from the second part of the title, refers directly to the phase successive to the introduction of modernized codification – a trend officially sustained after the independence of the Maghreb countries and introduced in the teaching programs in the universities and high schools. So if before the talk was about *Maliki Madhab*, as reference to prevailing legal school in the region, actually, jurists use the expression of *Maghreb legal model* or the *Maghreb legal school*, as reference to the evolving modernized legal reasoning. It is a new dimension, where the term *Qanun* that means law, replaced the term *Shar'* or *Sharia*, and where new analytical categories were created, such as "personal status", "penal law", "public and private laws", hitherto unknown to Islamic jurists.

Decline of the Ottoman Empire and the initiation of new organizational model *Tanzimat*[3]

The decline of the Ottoman Empire forced the Ottoman leadrs and Arab-Muslim countries to adopt a new organizational issue that started in 1839.[4] This evolution in the Ottomans' legislative history is known as the era of *Tanzimat*. The Empire, weakened greatly under the strong pressure of the European powers imposing reforms modeled on the European order. This transformation profoundly affected Ottoman institutions and society and led to the enactment of the first Ottoman Constitution in 1876.[5] Prior to that constitutional phase the commercial code (1850) and the Penal one (1858) were adopted, both

[2] L. Buskens, B. Dupret, *L'invention du droit musulman : Genèse et diffusion du positivisme juridique dans le contexte normatif islamique*, L'Orient crée par l'Orient, Karthala, 2012, pp. 71-92.

[3] The word *Tanzimat* is the plural of *Tanzim*, which means "reorganization". It was about the most important reforms introduced into the Ottomans' legal system during the history of the Empire. These reforms were promulgated between 1839 and 1876, under the reigns of the Sultans Abdul-mecid I and Abdul-aziz. Among the aims of that change was the modernization of Ottomans' theocratic legal model and its conversion to a secular order according to European interests and exigencies. The Islamic legislation and jurisprudence were replaced by newly-established state courts.

[4] C. Scattone, *La modernizzazione del diritto Musulmano: dinamiche e prospettive*, Annali della faculta di giurisprudenza, Universita di Taranto, Anno I, volume II, Taranto 2008, pp. 359-365.

[5] N. Berkes, "*The Development of Secularism in Turkey*", Routledge , UK 1998, pp. 142-146.

being copied on the Napoleonic Codes.[6] Between 1869 and 1876, the *Mağalla* was elaborated, which was the first attempt to codify the modernized *Sharia* in the history of the Islamic world.[7] In this way the Ottoman state was remodeled under the slogan of unifying the law and justice and achieving equality of all Ottomans regardless of their religious and ethnic affiliation.[8]

Extension of the new legal organizational model over the Arab-Muslim countries

The expression *al-shar'* or Islamic law was usually attributed, sometimes incorrectly, to different meanings: in a first sense, it reflects the literal translation of the Arabic word *fiqh*, indicating the regulation of a believer, his activities and responsibilities towards himself, towards God and towards others. In a second sense, it is used to identify the *fiqh* reflecting only the legal connotations according to the Western criteria, adding some of the matters concerning *al-Siyyasa al-shariyyah* (Public Law Matters). In a third sense, *al-shar'* can be traced back to the colonial period to indicate to the law applicable among Muslims in a given region. Following the former tradition, population who do not differentiate between the positivist organization and that provided by sharia used the term *Shar'* to intend the legal system into force. Beyond the idiom used to refer to the legal disposition applied in the Arab-Muslim countries, the concrete transformation undergoing in this legal system can be summarized in the following facts: firstly, it meant introduction of European positivist legal reasoning of the nineteenth century, which was exalted by the prestige of the Napoleonic codification and supported by the pressure of colonization. Secondly, a weak reaction of the Islamic legal tradition to this progressive acculturation allowed the realization of deep reforms conducted by European and secular Muslim jurists formed in European universities.[9] Unanimously, the initiative modernizing legal systems in Arab-Muslim countries formally was the masterpiece of two known jurists who guided the codification movement: Abdul Razzaq al Sanhouri, an Egyptian jurist, whose model was extended over the rest of the Middle-East and David Santillana, in the Maghreb.[10]

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[6] M. Alharrak, *Le phénomène d'appropriation des droits étrangers par les pays arabes : réussite ou échec* ? - mars 2014 http://iedja.org/294/.

[7] G. M. Picenelli, *Diritto musulmano e diritti dei paesi islamici: tra orientalismo e comparazione giuridica*, IURA Orientalia I/1 .Roma 2005, pp. 131-143.

[8] This important evolution was concretized in the *Gülhane* edict, the imperial decree that was the first major reform in the *Tanzimat* reforms under the government of Sultan Abdulmecid and a crucial event in the movement towards secularization. This decree abolished tax farming. It also created a bureaucratic system of taxation with salaried tax collectors. However, the most significant clause of the *Gülhane* decree was the one enforcing the rule of law for all subjects, including non-Muslims, by guaranteeing the right to life and property for all. Mustafa Reşid Pasha, was the principal architect of the Edict of *Gülhane* as the process of reorganization, proclaimed on 3 November 1839.

[9] G.M. Picenelli, "*Diritto musulmano e diritti dei paesi islamici: tra orientalismo e comparazione giuridica"*, IURA Orientalia I/1 (2005), Roma 2005, pp. 131-143.

[10] Abdul Razzaq al Sanhouri (1895-1971), Egyptian jurist. After his brilliant studies in Cairo, he spent five years in France, where he sustained two theses at the Faculty of Law in Lyon universi-

David Santillana the man and the jurist

David Santillana (1855-1931) was born in Tunisia, Ottoman Province, on 9 May, 1855. His family of distant Spanish origin was from Tuscany and was part of the Jewish community in Livorno. Moses Santillana, his father, under the protection of King of Sardinia, worked as a translator at the British Consulate in Tunis, where he became a British protected citizen and afterwards was granted the British citizenship in 1857.

David Santillana was both lawyer and specialist in Arabic world.[11] In 1871, he was appointed Secretary of the International Committee for Financial Affairs of Tunisia. Around 1880, he joined the law faculty at the University of Rome *La Sapienza*, where he got the license and the doctorate in law studies. During his residence at Rome, as a student, he obtained the Italian citizenship. He practiced as a lawyer between Italy and Tunisia, he married an Italian woman, Elena, the daughter of lawyer Edward Maggiorani, a legal adviser of the *Bey* of Tunis at that time. In 1896, he was charged by the French General Resident in Tunisia to study and codify the Tunisian legal system.[12] His work resulted in a large volume entitled *The Tunisian civil and commercial law*. He then returned to Rome, where he began teaching the Islamic legal system in the Faculty of Law of Rome University from 1913 to 1923, in fact the Higher Council of education; the assignment decision described David Santillana as an eminent expert in Islamic law.[13]

David Santillana and empowerment of Islamic law studies in Italy

After the occupation of Libya in 1911, the Italian government increased its interest in Arabic and Islamic studies for the formal aim to modernize the legislation in Libya. In cooperation with the Italian Ministry of Colonies, David Santillana translated and commented on the famous manual of Islamic ju-

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ty. In 1926, he returned to Egypt, taught law and published numerous articles. He was the expert who drafted the revised Egyptian Civil Code of 1948. He participated in writing the draft of the Iraqi and Syrian Civil Codes. His experience was extended to Jordanian code (completed and implemented in 1976, after his death), then to Libya (1954) and Kuwait, where he drafted the commercial code (implemented in 1981). Sanhuri was known for attempting to modernize *sharia* using the civil law tradition. His twelve-volume *Al-Wasīṭ fī sharḥ al-qānūn al-madanī al-jadīd* (Medium commentary on the new Civil Code - Cairo: 1952–1970), has up till now represented one of the main sources of codification in the Arabo-Islamic countries. He enjoyed considerable prestige, which he earned between 1939 and 1949, to occupy important positions in the government, including Deputy Secretary of State for Justice and Minister of Education.

[11] Delibera del Consiglio superior della pubblica istruzione del 31agosto 1912. Archivio storico della Sapienza.

[12] F. Castro, *La codificazione del diritto privato nei paesi arabi contemporanei*, Rivista di diritto civile, I parte - CEDAM- ITA, 1985, pp. 387-447.

[13] F. Renucci, "*David Santillana, acteur et penseur des droits musulman et européen*", Monde(s) 1 (N° 7) Profession, juristes internationalistes ?- Presses univ. de Rennes, 2015, pp. 25-44.
A.R. Al Bedaiwi, "*Encyclopédia of orientalists*", Dar Al-'Ilm Lil Malayin, Beirut 1993, pp. 341-344.

risprudence of the *Malki* school entitled *Mukhtasar Khalil*, whose author was Khalil Ibnu Mousa Ibnu Ishaq, the pioneer of this *Madhab* in the Maghreb and the Mashreq. In that époque, the admission of Islamic law studies at the Faculty of Law at Rome university *la Sapienza* remained in itself an unprecedented challenge, justified by a certain pragmatism due to colonial expansion.[14]

The program of the course began with a general part focused on the sources and institutions of Sharia, then followed by a more concrete part devoted to the dogmatic and practical aspects of the tradition of Islamic law with the prevalence of *Malikiyyah*, the dominant school in Tunisia and Morocco.[15] Also this course was related to analysis of the original works of Islamic law as the collection of *hadith* of the pioneer of *Hanbali* school Abū ʻAbd Allāh Muhammad ibn Ismāʻīl al-Bukhārī.[16]

Having gained experience both at the teaching and legislating, the maturity in Islamic law allowed this jurist to build a systematic reconstruction of the Sharia, introducing comparison instruments according to the political project reserved to this part of Islamic world.[17] This analytic systematization was afterwards reproduced by the majority of jurists interested in the legal model in the Maghreb. David Santillana was not only a good legal technician, but also a man of culture, an expert of the Maghreb.[18] This ability and knowledge were concretely shown in the preliminary draft of the Tunisian civil and commercial code in 1899.

The draft of the Tunisian civil and commercial code of 1899

This project known as the *Mağallatu al'Uqud wal Iltizamat* was to be developed even after the Tunisian Code of Obligations and Contracts introduced in 1906. In this *chef-oeuvre* David Santillana set out on a hard mission to reconcile two conflicting elements: on the one hand, he carried out the task of modernizing the Tunisian legal model as required by the French colonizer; on the other hand, he had to perform a compromise ensuring and maintaining a relative presence of the local legal provisions to avoid an uprising in the country if the sharia rules as practiced locally were to be excluded. In practice, David Santillana, to fulfill this charge, used the general principles of law in common in Sharia and the Romano-Germanic system such as equality, good faith to accommodate an acculturation process that was still going on despite the decolonization. This work resulted in a significant reception of the civil law tradition

[14] V.M. Donini, *Annuario di Diritto comparator e di studi legislative*, Edizioni scientifiche Italine, Napoli, 2013, pp. 387-407.

[15] V.M. Donini, *Il diritto Islamico tra shari'a e Qanun: un percorso bibliografico*, annuario di Diritto Comparato e di studi legislative, Edizione scientifiche Italiane, Napoli 2013, pp. 387-404.

[16] Ibid.

[17] M. Vogliotti , "Quelle formation juridique aujourd'hui, et pour quel juriste ? ", Rencontre du 16 juin, Paris 2015 à l'IAE, en collaboration avec la revue Esprit.

[18] F. Renucci, "*David Santillana, acteur et penseur des droits musulman et européen*", Monde(s) 1 (N° 7) Profession, juristes internationalistes ?- Presses univ. de Rennes 2015, pp. 25-44.

and French technical instruments and interpretation of the law.[19] David Santillana's masterpiece provoked a debate among jurists, which was about the reproduction of the unified codification structure, as was the case in Italy. Conversely, in France, the construction followed, introducing the separation of the civil code from the commercial one.[20] This fact, until today has been seen as an influence of the Italian doctrine of the 19th century in the new Tunisian codification, only that this separation or influence has been discontinued since the entry into force of the Commercial Code in Tunisia in 1956.

In Morocco, the course of the codification followed the French model, separating civil and commercial codes from 12 August 1912, the date of the entry into force of the modernized codification. This specificity was adopted after the independence of the both countries. In practice, law school programs, methodology and technical analyses which followed were still faithful to and remained under the influence of French law school. The status quo was further reinforced by the participation of French academics teaching law in Moroccan and Tunisian universities.[21]

David Santillana and the birth of a new *Ratio Legis* in the Maghreb

Considering the *Ratio legis* as a form of compromise, to realize a certain organizational model in a specific society, the expansion of the global legal acculturation stirs up many doubts menacing the credibility of such a presumption. The aspect of the law as a set of practical reasons, by which it is known in positivism it cannot have similarities with a system in which divine providence organizes the life of human being in detail, where the faith and submission to soothsayer outweigh the hegemony and human egocentrism.[22] It is obvious that excluding the question of the *ratio legis* did not concern the reasoning when integrating different and distinct legal model in a harmonized legal organization.[23]

For the case of the Maghreb countries, it seems that David Santillana could find a common *Ratio legis* between the *Ratio-Divina* and *Dectatem*, on the one hand, and the practical reasoning of positivism on the other. Such an assump-

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[19] H. al-Dabbagh, *Quelques aspects de l'imprégnation du droit des obligations des pays arabes par la culture juridique civiliste*, Revue de l'ERSUMA: Organes de publication, - Mars 2014, N° Spécial IDEF.

[20] R. A. B. Peccoz, *Il modello giuridico-scientifico e legislative- Italiano fuori dell'Europa,* Atti del II Congresso Nazionale della SIRD. Cultura giuridica e rapport civili, Siena 2012, pp. 37- 46.

[21] F. Renucci, *David Santillana, acteur et penseur des droits musulman et européen*, Monde(s) 1 (N° 7) Profession, juristes internationalistes ?- Presses univ. de Rennes 2015, pp. 25-44.

[22] H. al-Dabbagh, "*Quelques aspects de l'imprégnation du droit des obligations des pays arabes par la culture juridique civiliste*", Revue de l'ERSUMA: Organes de publication, Mars 2014, N° Spécial IDEF.

[23] I. F. Kamdem, *Harmonisation, unification et uniformisation. Plaidoyer pour un discours affiné sur les moyens d'intégration juridique*, Revue de droit uniforme 709, Rome 2008, pp. 620-624.

tion seems to be convincing, considering that the law is nothing else but an ordinance of reasons for a common interest, established by representatives of society, "lex est quaedam ordinatio rationis ad bonum commune ab eo qui curam communtatis habet, promulgata".[24] This idea of common interest, that unites the positivist law and the divine provisions, was the principal pillar of David Santillana's construction. It led to acceptance that the legal system of Maghreb should not be inspired by the European model to be modern, nor should it be subjected to religious and local customs to ensure citizens' faith. This evidence provided an acceptable justification to introduce the practical legal reasoning on its materialistic aspect in countries where the divine order managed the public and the private life. If this logic could convince the majority of leaders and population, it remained to solve the problem of declining and reducing the competences of local legal systems on behalf of adopted secular systems.[25] We should not forget that the new (modernized) legislation came from the colonial period, being in its majority aligned to the French model. It had been drafted in French and then translated into Arabic, then subsequently received and assimilated by society. The assimilation that constrained the Arab world to 'swallow' a system of law formulated in general and abstract rules, while the legal reasoning of Islam was based on casuistry. Also it is noted that the judicial organization and functioning of the courts, in these countries, were broadly based on the French judicial system. The order was headed by a Supreme Court and Council of State and characterized by the existence of an autonomous administrative law and courts.

The formation of jurists in the Maghreb

The codified law of the Arab countries in the Mediterranean, even if it appears as a demonstration of national identity, especially for the codes elaborated in the independence period, cannot exclude the French influence. It is about an evolution, in which foreign legal rhetoric and instruments became part of the local tradition.[26] This new systematization based on deductive reasoning and rational construction attracted the thought and the reasoning of Muslim jurists in the Maghreb. Neither popular consciousness nor that of the state opposed this process, except some protests related to the sovereignty and continuity of the political regime. To ensure the sustainability of these changes and the privileges provided by this transplanted legal reasoning, it was necessary to cultivate a sense of belonging to this system and an elite that would take charge of supporting its expansion and sustaining its *ratio legis*. To achieve this goal, local jurists and specialists were formed and trained in European universities

[24] J. F. Courtine, *Nature et empire de la loi*, en citation de la Ilae, qu.91, a. Etudes Suaréziennes, Edi. Ecole des hautes études en sciences socials- J. Vrin, FR 1999, pp. 90-95.

[25] I. F. Kamdem, *Harmonisation, unification et uniformisation. Plaidoyer pour un discours affiné sur les moyens d'intégration juridique*, Revue de droit uniforme 709, Rome 2008, pp. 620-624.

[26] S.H. Amin, *Classification of Legal Systems in Muslim Countries*, 7 Islamic and Comparative Law Quarterly, II, Ed. Indian Institute of Islamic Studies, India 1987, pp. 93-102.

or in institutions and circumstances similar to these in Europe, in particular, to the French model because of the country's colonial domination. Legal education and teaching, as always, was the main tool rooting the civil legal culture in the Arab-Islamic countries in the Mediterranean. It is a process that is still going on, including training institutions such as the higher judicial institutes (training magistrates), higher administrative schools (training administrators realizing the executive tasks in the public administrations) and high law schools and other public structures.[27] The success of this system brought about also an increasing interest in comparative law and its methodology, using technical argumentation and comparative interpretation. Besides the citations of French, German and Italian legal doctrine and scholars, it is frequent to encounter Latin terminology and references in Arabic legal analyses and writings. The influence also is evident in academic works (theses, etc.) that are realized, on a large scale, in comparison with French and European legal systems. The textbooks or several legal institutions are explained on the basis of the French doctrine. In all these large programs of training and education, in the Maghreb, the reference to David Santillana and to his *chef-d'oeuvre* is a commonly-known capital. In Moroccan universities, the work of David Santillana is established in the programs from the first year as the main source of civil law and as the first modernized codification creating the body of Moroccan civil Code.

Conclusion

The historical legacy of legal systems evolution preserves and transmits to us all changes that have been implemented in different organizational models. It describes also the value and the decisive role of many experts and jurists who assumed the principal task in this evolution. From the holistic point of view, the integration of legal systems is an old and complex process that takes its aspect depending on the space and the time according to the époque, and is indicated under several attributives such as rehabilitation, modernization, adaptation and other relevant words. Deduction that emerges is that the path to the global legal system began a long time ago. At each historical phase, some illustrated jurist assumes and leads the project of transformation and changes requested to achieve the goal established for this phase. Jean Gaudemet explained the births of law either by the intervention of non-specialists, like priests, poets, sages or the elusive figure of time, in the case of customary law, or by the scholars, practitioners and legislators.[28]

David Santillana, is one among these icons, whose role was primordial in the Maghreb legal model modernization. The evidence of the influence of Dav-

[27] H. al-Dabbagh, *Quelques aspects de l'imprégnation du droit des obligations des pays arabes par la culture juridique civiliste*, Revue de l'ERSUMA: Organes de publication, Mars 2014. N° Spécial IDEF.

[28] J. Gaudemet, *Les naissances du droit. Le temps, le pouvoir et la science au service du droit*, Cahiers de civilization médiévale, Année 1999 Volume 42 Numéro 167, pp. 287-288.

id Santillana, as a pioneer, and the French legal reasoning and teaching in the Maghreb are not subject to reviews or doubts. Thanks to his work introducing the positivist legislation, analyzing Islamic doctrine and jurisprudence, he caught the similarities between the two systems and realized an impossible challenge transplanting a new *ratio legis* different from the one preserved for centuries. This legal reasoning has been accommodated by educational issues in universities and public institutions, then sustained by technicians and experts prepared for this mission. Today Maghreb countries can boast of their legal order as one of the closest systems, and this not only to the European one but to the global model as well.

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DAVID SANTILLANA AND THE EXPANSION OF CIVIL LAW IN TUNISIA AND MOROCCO

Abstract: The evolution, in its pluralistic form, is a constant characteristic of the humankind history: in fact man has successively started discoveries and restarted experiments to improve his wealth and horizons. Law, in its positivist dimension, also is subjected to this evolutionary process. Firstly, because it is a social phenomenon; secondly, because it is a necessary instrument of organization and maintenance of order. Legal systems always tend to change and innovate to meet the needs of order in societies, either for a group or for a minority. The mechanisms and tools that ensured the transition from legal dispositions to others, were often conducted by an innovative idea whose efficiency is proven, even if theoretically, and then has been publicly and officially supported. Recent legal regulations, the so-called unified, harmonized and standardized, in turn have imposed the implementation of legal techniques and concepts to accommodate the global organizational order. These changes are heavily felt because of values and specificities that express its resistance and mistrust toward the new invasive practices, especially if they come from abroad. For states the issue is about sovereignty, whereas for individuals the question is related to the identity and the sacred that united them in a political and social model.

Keywords: EVOLUTION, LAW, INSTRUMENT, ORGANIZATION, MECHANISMS, SHARIA, MODEL, LEGAL, REGULATION, MAGHREB, SOVEREIGNTY