Codifications in the Western Legal Tradition[1]

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What is a "Code"?

This will be a general elaboration on the role of the Codification of Law in the Civil Law tradition and with respect to the system of the *ius commune* previously existing in continental Europe.
To some extent, it is also intended to be a provocation, and a suggestion for "unorthodox" reflections on present legal reality.

The new ideology of the legal system that came out of the Enlightenment era, the Montesquieu theory of the separation of powers and the French Revolution worked at first as the ideological grounds of the *droit intermediaire* and were consolidated eventually in the Napoleonic conception of the legal system: the State, and its Codes and statutes, were the ultimate source of all laws; the scholars could teach the laws of the State, and the courts were there to enforce them declaring their applicability to real cases, behaving as *la bouche de la loi*.
This concept of codification – we may call it modern, or Napoleonic, if you like – is still fundamental in the current ideology of the legal system on the European continent.
As a consequence of the Napoleonic idea of codification, for instance, many modern books of legal history and comparative law

[1] Based on my presentation at the International Symposium held in Haifa, Israel, on 30 may-1 June 2004, for the 200 years of the *Code Napoléon*.

concur to define the Code Napoleon as the "first" code in the modern sense – excluding, for instance, the German codifications of the XVIII century from the club of the European "codes".
The ALR of 1794 as well as the Bavarian Code of 1754 were major achievements, covering wide areas of the law, but they still were pieces of legislation that worked within the framework of the *ius commune*. For this reason, even nowadays many legal scholars considered them as Codes "not in the modern technical sense".
This shows clearly how the modern, Napoleonic idea of codification influenced so much the modern legal thought on the European continent as to have different types of codifications of the law excluded from the very concept of code "in a technical sense".

The modern, Napoleonic concept of code is based, essentially, on:

a. general consolidation of legal principles and rules in one text;
b. its legislative sanction by a political authority;
c. the assumed comprehensive nature of such a text, capable of providing all answers to the needs of reality within the jurisdiction of the sanctioning authority;
d. the legal prohibition of looking elsewhere for answers or solutions.

This represents most obviously a new concept of the legal system, whereas in the previous centuries the Laws enacted by the States or by Kings, Princes, were fully immerged in a legal system of a doctrinal, transnational nature, developed on the Continent by scholars and high courts.
In that medieval legal system the law issued by the territorial, political authority (*ius proprium*) could only be considered as "special" law, against a legal landscape of "general" *ius commune* which was considered to be somehow immanent in the reality of the legal world and of life.

The codifications of Europe after 1804 brought along, in general, the abrogation – always theorised, and sometimes clearly expressed in a black-letter rule – of the preexisting law; and the formal mortification of the importance of scholars, judges, cases and case law in the development of the system.

This fundamental turn in continental legal ideology has been accepted by the scholars and the courts, and is still influencing the *civil law* world.

Comparative law studies have for decades been focused on the differences between *civil* an *common law* systems, stressing the existence of codes as the main feature of the civil law family, or model – disregarding the fact that *civil law* did exist long before the codification phenomenon, as well as the fact that it kept on existing codeless, to date, in some jurisdictions.

Of course it could be objected that *civil law*, by definition and/or by its very nature, *is* exactly the model of legal system that is *necessarily* based on a codification, in the Napoleonic sense; and it could be considered that the preceding continental legal system of the *ius commune* represented a completely different model. In this case, we are forced to consider the model of code-based continental law as a sharp, abrupt "deviation", as one scholar put it[2], of continental legal systems from their previous path of smoother, continuous evolution.

Scholars tended for decades to enforce this construction, which has been and still is a fundamental ideological, political feature of the European codified legal tradition, somehow accepting a reduction in their previous role and importance.

Most of XIX and XX century civil law scholars had "forgotten" the previous many centuries in which their role within the system was paramount; they overlooked and marginalized codeless *civil law* realities, as well as "unorthodox" outcomes which appeared now

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[2] J.H.MERRYMAN, "*The French Deviation*", in *Scritti in Onore di Rodolfo Sacco*, Milano, 1995; the title of the article is, in turn, a quotation from P.DAWSON, *The Oracles of Law*, 1968, Ch.IV.

and then in different parts of the civil law world challenging the basic Napoleonic dogma.
It is my submission that a different, pre-modern as well as post-modern, concept of codification, as worked out from the observation of present reality with a comparative and critical approach, would better describe the essence of civil law tradition – and of the western legal tradition considered as a whole, overcoming the traditional opposition between the *civil law* and the *common law* traditions[3].

This view might be supported by current comparative law studies[4]:
- legal-historical studies give nowadays a clearer picture, at the macro level of the *civil law* tradition, of the continental system who originated many centuries ago, and developed before the Napoleonic codification following patterns well different from the "deviant" path taken two hundred years ago.
- developments in both the *civil law* and the *common law* world indicate a convergence of the two traditions towards each other.
- *civil law* experiences that have departed in a lesser way (Latin America) or have almost not departed/"deviated" (South Africa, Scandinavia maybe - San Marino and Andorra one may add for the sake of completeness) also represent a model closer to the original path of *civil law* tradition, as developed in the era of *ius commune*.

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[3] See my *Convergence of Civil Law and Common Law Models of Legal System*, in *Boletím da Faculdade de Direito da Universidade de Macau*, 14 (2002), 87 ff. ones.

[4] The literature on the phenomenon of convergence is considerable; I will refrain from extensive references, considering this presentation as a reflection on a phenomenon which is already well-known to the comparative lawyers' comunity. My paper on *Convergence*, mentioned in the previous footnote, gives some additional details on those studies, and maybe could be read before proceeding with this reading, which in a way is a development of the former. Some key parts of *Convergence*, anyway, have been incorporated in this paper, in the hope of making it less exoteric and more understandable.

- studies on "a new European *ius commune*" and recent developments of Western civil law, also indicate a new scholarly interest in a legal model featuring a supranational or transnational doctrinal factor, or legal formant, at work along with the different national rules of legislative origin.
- also, of course, not-so-recent experiments of co-existence between the two historical western models, commonly related to as "mixed jurisdictions", give interesting insights on how the *ius commune* model may work in present times.

1. "convergence"

The attitude of comparative lawyers with respect to the *civil law vs common law* issues and research for long time focused on the differences between the models, thus overlooking the remarkable similarities, and *ante litteram* convergences, between the *common law* and the *ius commune* models.
Research conducted during the second half of the twentieth century by Gino Gorla[5] demonstrates that, in addition to the circulation of legal doctrines due to scholarly writings, doctrines and case law also circulated among the several supreme courts of many different States of pre-unity Italy and Europe; and that precedent decisions of the supreme courts of different States, applying the *ius commune* as well as the local municipal laws, were *de facto* considered in other jurisdictions' courts not differently from how case law is still considered in *common law* countries tradition.
In practice, Gorla discovered that the *convergence* was already there, at the dawn of modern age, at least with respect to the dynamics of development of the legal system.
It is certain that the two main western legal traditions have some very noticeable diversities, due to their different historical

[5] See, for instance, his several essays collected in G.GORLA, *Diritto Comparato e Diritto Comune Europeo*, Milan, 1981, especially from chapter 20 on (pages 540 and following ones).

development. Yet, some fundamental features related to the way law is created, developed and administered in the developments of the two traditions are becoming increasingly similar.

In addition to old attempts to codify English Common Law at the beginning of the XIX century, we can nowadays recognize some features of the Civil Law model seeping into the Common Law system. England itself is nowadays a country with a very busy parliament, and thousands of legislative acts in force, covering all aspects of life. Moreover, a progressively increasing penetration of some continental legal models is evident in English legislation, with the final result of legislative acts becoming more general, wide and abstract in contents.

An example of this trend is set by the entry into force in England of the Human Rights Act of 1998, enacted due to the United Kingdom's obligation under the European Union Treaties, with the effect of directly enforcing in England the European Convention on Human Rights signed in Rome in 1950. The English courts will have to apply it as the general law in the subject matter, thus having to deal with abstract and general provisions and having to develop and construe them with a different attitude, compared to their traditional way of interpreting statutes.

Another recent and important development in this convergence of the English legal system towards continental models is represented by the English new Civil Procedure Rules of 1998, which replaced the old *common law* procedure. The Parliament eventually adopted a model of civil trial clearly belonging to the *civil law* tradition, moving away from a most typical *common law* feature and shifting towards the continental approach, making the court responsible for the management of the case instead of the parties; basically charging the court with the functions of the continental *juge d'instruction* (*juiz instrutor, giudice istruttore*).

Conversely, the Italian reform of criminal procedure of 1988, by introducing a process based on the adversary model, transplanted

one of the most distinctive *common law* features into that *civil law* jurisdiction.

In the United States of America, even clearer is the distance of the system from the classic model constituted by the historical English *common law* system: fundamental features of the *common law* system are of course present in the US legal system, as it can be said of the *stare decisis* principle; yet, it is undisputable that that system, today, is also characterized by elements that (also) belong to the *civil law* model and traditions.

These elements are not few and not unimportant: we think of course of the existence of a written Constitution, with general and wide precepts, much similar to many continental Constitutions, with a considerable amount of case law developing the constitutional law based on that all-important, yet very short, simple and abstract legislative document. We also have to consider the existence in the U.S. of three different levels of written legislation, covering, at the different constitutional, federal and state levels, all areas of law, with a huge mass of legislative acts to be applied by the courts, made of general and abstract rules.

Also part of the US legal system are the Civil Codes of dozens of States of the Union, in addition to the traditional example of Louisiana, including important ones like California. These codes are “normal” civil codes in appearance and contents, even if they are considered more declaratory in character than generally innovative of the law, as it happens in civil law countries: this means that they have no more authority or binding force than precedents, and have in several instances been superseded by contrary judicial decisions, which then became binding case law.

Anyway, these codes exist, and the American lawyers are getting used to deal with them, as increases their attitude towards legal reasoning based on general and abstract rules.

Another peculiar feature of the US legal system, which makes it somewhat distant from the historical English model, is the

traditional importance of the Faculties of Law, and their core role in both developing a doctrinal, "non-statual", so to speak, US national law, and in developing academic doctrines, legal research and scholarly writing very influential – far more than in England – in the legal system. American faculties, in competition among them, concerned with enabling their graduates to practice anywhere in the U.S. in order to avoid being characterized as "localized" institutions, and to be able to attract the best students nationwide, have developed a very peculiar method for teaching the U.S. law, which is taught, with respect to non-constitutional, non-federal – related areas of law, as just one "national" law, instead of being referred to any of the different State laws.

This "national" law is basically a system of principles and rules, more or less general, valid for all or in the majority of the different U.S. State jurisdictions, which is extrapolated by the 51 different jurisdictions and which cannot avoid being characterized by some degree of abstraction. Against these "national" principles the different State laws and rules are then confronted, to see how they fit in the more general picture, or how they are at odds with it – it is easy to see some analogy with the relation that existed in the European *ius commune* vs. *ius proprium* dichotomy, in the middle ages and early modern era.

U.S. legal scholars do develop, more and more, in addition to general legal principles, specific doctrines for many areas of the law, as it is evident, for instance, with the existence of the *Restatements of Law*. These are doctrinal expositions of rules, systemized in a coherent and organic fashion, as extrapolated from case law; they have been compiled since as early as the first half of the twentieth century by the American Law Institute, a private institution of scholars. The *Restatements* are somewhat similar to "codes" of the different subjects they deal with (there are *Restatements* on Contracts, Torts, Trust, Agency, Conflicts of Law, Property, Judgment, Foreign Relations; some of them have been revised and published in more recent times, and are known as *the*

2nd Restatement on Contracts, *on Agency*, and so on); they are widely used in practice, for study and reference as well as invoked in the courts by the lawyers and mentioned in judicial decisions.
The legal system of the U.S. is more and more described by comparative legal scholars as a system that, notwithstanding the fact of having been originated in the *common law* tradition, has shifted towards a *mixed model*, between the two classical ones of *common law* and *civil law*[6].
It is finally to be pointed out that a high degree of "statutorisation", with statutes covering wider and wider areas and written rules of law becoming increasingly wide in scope, general and abstract in their formulation, is clearly visible in all *common law* tradition countries, like, say, Canada, New Zealand or Australia[7].

On the other side, in *civil law* tradition countries, increased importance is laid upon the study of case law, even in the academic speculation, with an attention to the decision of the courts which is today no smaller than it is in any *common law* country. Studies, books and journals flourished in relation with case law, and academic teaching has moved from the traditional usage of doctrinal handbooks and monographs to the additional usage of case law materials.
In the recent developments of *civil law*, the example set by the recent Dutch Civil Code of 1992 cannot pass unnoticed: this code is characterized by "open" rules, implying "open-ended" solutions, for further developments of the law by the activity of the Courts.
Remarkable is the absence in it of a preset hierarchy of the different sources of law (written legislation, customs, equitable solutions). Art. 6.2 of the Dutch Civil Code of 1992 provides that the principle

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[6] See, for instance, A.T. von MEHREN, *Law in the United States: a General Comparative View,* Deventer/Boston, 1988; Id., *The U.S. Legal System: Between the Common Law and Civil Law Legal Traditions*, Rome, 2000.
[7] Examples on the Australian trend can be found in P.FINN, *The Common Law in the World: the Australian Experience*, Rome, 2001.

of good faith may in some cases modify and extinguish legal obligations, whenever under the circumstances of the case an applicable legal rule would lead to an unreasonable result with respect to a good faith approach to the case.
This principle is also stated, if as an exceptional provision, in relation to contractual obligations (art. 6.248), where in some cases the courts may disregard a solution provided by the law in favour of one which looks more reasonable and fair – a possibility which had already been allowed by the Dutch Supreme Court as far back as 1972, and an occurrence which *de facto* has always been found in many, if not all, civil law countries; still, it has never been considered as a feature of the *civil law* model, nor has it been explained as a physiological response of the system to cases where the statutory provision is unsatisfactory.
This intriguing approach to the system and hierarchy of sources, is in fact exactly opposite to the Napoleonic one, based on the perfection of the codified system of rules, based on the assumed function of the court as *la bouche de la loi* and on the prohibition for the courts to go beyond or against it.
The new Dutch approach represents an opening (or a recognition?) to the law-making function of case law, well known in the *common law* tradition as well as in the later continental *ius commune* experience, seldom recognized in the post-Napoleonic *civil law* environment.
The sources system has admittedly been re-opened.

The comparative research behind the Dutch Civil Code is also proven by its reception of institutions typically belonging to *common law* tradition (e.g., in contract law, anticipatory breach, misrepresentation and undue influence) and even to transnational uniform law (the 1964 and 1980 Conventions on the International Sales of Goods have influenced not only the discipline of sale, but the very general principles of contract law, with respect to the formation of contract and to non-performance).

The novelties are so many and such that some scholars have claimed the new Dutch legal system to have moved to a new position, between *civil law* and *common law* models[8].
To sum up, the most recent among the continental Europe civil codes and the most influential among the *common law* tradition legal systems are both being described by comparative lawyers as representatives of an intermediate, eclectic model, positioned between the two well-known historical ones; the systems of sources of rules in those two systems have become quite similar.
They could be added to the catalog of the so-called "mixed systems", which traditionally includes jurisdictions like Louisiana, Quebec, Israel, the Philippines, South Africa, and some others.
The evolution of western legal systems along converging paths will undoubtedly be facilitated by a number of factors, the first being, of course, the social and economic homogeneity of the majority of the Countries representing the two different models of legal systems.
One other very important factor will be the presence of the European Union, of which the U.K. is a member State, with its common, supranational legislature, creating rules that are binding for the States of the Union, and more and more frequently directly applicable in all the member States; with its institutions involved in the development of a European legislation (which have gone as far as having established a commission for the preparation of a European civil code); and with its judicature, issuing decisions directly enforceable in the different jurisdictions.

Finally, legal ideas and doctrines are now freely circulating and being accepted regardless of their municipal origin: scholars have expanded their horizons far beyond their national boundaries; the western legal theories are becoming more and more integrated and also, in an increasing number of cases, accepted by different jurisdictions' courts.

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[8] See, for instance, A.S. HARTKAMP, *Judicial Discretion under the New Civil Code of the Netherlands*, Rome, 1992.

Legal research in Europe and in general in western countries is busy in finding out, or laying down, common features of western legal systems, as it happens for instance with the Principles of the European Contract Law (PECL), with the Trento Project related to *the Common Core of European Private Law*, or with the joint project of the University of Maastricht and the Catholic University of Louven for the collection of European case law, very significantly named *Ius Commune Casebooks for the Common Law of Europe*[9].

On the wider, global scene, this is also what happens with the UNIDROIT Principles of International Commercial Contracts[10].

This strong intellectual affinity of the scholarly communities within all western countries brings about as a result a wide circulation of legal ideas and models, for all areas of law, regardless of their being originated in *civil* or *common law* jurisdiction. Those "transnational" doctrines circulate freely, affecting national outcomes at scholarly, legislative, case law levels.

The "convergence" trend seems to be aimed at a model of legal system grounded on the statutory law as well as on a more and more international legal science, as well as on the actual force of case law producing solutions based on law, customs, equitable considerations and doctrines developed across national boundaries – regardless to the formal absence of a *stare decisis* doctrine in *civil law* countries: the formal absence of a *stare decisis* principle in *civil law* jurisdictions, anyway, cannot be considered anymore as excluding some degree of binding force of precedents.

The very European Union legal system, after all, is characterized by all said features, appearing as expression of a mixed model between the *common law* and *civil law* traditional ones.

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[9] General editor is Prof. W. van Gerven; many prominent scholars participate to this projects, which already produced a few casebooks. See more on the project's homepage at http://www.law.kuleuven.ac.be/casebook/contract3.php.

[10] Of course those projects have different aims and methodologies. They may be considered together, though, within the context and for the purposes of this paper.

Maybe some day the result of present day "convergence" (with partial "return" of the *civil law* tradition on its original path, after the "French deviation") will be the acknowledgement of the one single tradition and of just one model of *Western* legal system, encompassing the features of both European traditions; similar to some extent to present times South African, Dutch, EU legal systems; all well representing two thousand years of but one western legal tradition[11].
"Mixed system" will maybe be used, then, to label legal experiences featuring the combined influences of newly defined major legal traditions of the world. A tentative list may include, in addition to the Western one, Chinese, Indian, Islamic legal traditions – as well as others, of course –, according to the changing geopolitical ("geo-legal", we may also say) reality.

2. Latin America

With respect to the historic similarities between the two traditions before the codification age, it is also interesting to remark, as a different hint to help seeing the *convergence*, how in Latin America there has long been a more open conception of the legal system; and how the above mentioned dogma of the comprehensivity of the codified law has never been deeply rooted there – or, at least, it did not prevail in the same overwhelming way as it happened in Europe.
There are comparative lawyers who identify a specific "family" of legal systems in the Latin American or Iberian-American area, founded precisely on this existence of a common background for all

[11] See, for instance, the classification of legal systems proposed by Ugo Mattei, who noticed how western legal tradition legal systems are similar, irrespective of their *common law* or *civil law* origin, if compared to other legal: U.MATTEI, *Verso una tripartizione non eurocentrica dei sistemi giuridici*, in *Scintillae Iuris*, studi in memoria di Gino Gorla, Milano, 1994, 775.

the municipal legal systems and on the common and unrestricted circulation of legal doctrines within all the continent's countries; all based on the common heritage of Roman law and medieval *ius commune* which, according to some, *still forms the basic layer of the legal system*, consisting of just one system of *derecho/direito común latinoamericano* – thus denying one of the axioms of modern post-codification *civil law*[12].

It is even affirmed, with considerable research undergoing to support this view, that the system could be no other one than the very same legal system which, based on the Roman law consolidated by Justinian, developed in the middle age into the historical system of the European *ius commune*, still living today in Latin America.

As we find, with respect to an entire continent belonging to the *civil law* world, that the conception of the legal system based on the codes and written laws is challenged, in favor of ideas much closer to the model of the *ius commune*, we re-discover, so to speak, more similarities between the two traditions of *civil* and *common law*.

Remembering how much closer and converging *ius commune* and *common law* have been to each other in the centuries immediately preceding the codification age, this Latin-American experiences and legal doctrines could contribute to consolidate the idea of the "French deviation", and to relativise the idea of comprehensivity of the code (already abandoned by the Dutch Civil Code of 1992) as not fundamental for the *civil law* model, in an historical perspective.

Research in Roman law and Latin American countries' Laws show some evidence that Latin American legal systems, with their civil codes, in some instances show a tendency to function like codified systems of the XVIII century – in the Prussian sense, so to speak –

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[12] See my *Diritto e Legge: analisi storico-comparativa di una relazione critica*, in *Boletím da Faculdade de Direito da Universidade de Macau*, 16 (2004). The issue has been analysed in detail with respect to Argentinean doctrines and case law in my doctoral thesis defended in 1999 in the University of Trento, *Sistema jurídico latinoamericano? Una prima verifica*.

with the code inserted in a wider legal system of doctrinal and historical origin, where the Iberian *ius commune* is the origin, and every single national system is a development in terms of *ius proprium*.
Of course, we are discussing about national legal systems where the written law covers almost every area of human activities, so that the interstices for the *ius commune* to seep in are very reduced, in number and importance. Yet, this attitude allows some very peculiar, cross-boundary solutions to problems that do not have satisfactory answers in the codified law, making recourse to foreign doctrines, to foreign case law or to the Roman-medieval legal tradition, *sometimes even against the rules of the applicable codified law*.
The latter issue is very interesting: the occurrence has always happened in many *civil law* jurisdictions, but has been marginalized and left basically unexplained by *civil law* scholars of continental Europe. Latin American courts and scholars, instead, did explain those solutions as justified on the existence of legal rules beyond the codified law – similarly to what now happens in the Netherlands by virtue of the express *recognition* (maybe a more appropriate term than the one of *provision*) made by the new Civil Code.

Modern times Latin American Civil and Roman Law scholars (there is no sharp distinction there between the two areas of studies) do research the law having in mind this attitude towards the detection of their common continental legal foundations – something that European civil lawyers only re-discovered very recently, after the decadence of the statualist dogmatism which has been dominant for almost two centuries, as indicated by the several research projects such as the one for the drafting of the PECL, or the Trento project.
Latin American scholars working in that field do work out common principles, concepts, rules, and even produce uniform normative *corpora*, in relation to different areas of the law, like civil and

criminal procedure, labor law; they are even working on a project of a common civil code for Latin America.
They have not been requested by any government or supranational body. They do not necessarily expect their "uniform codes" to be enforced any soon, or to be enforced at all.
They just seek the common core of their continental laws, and develop the common principles to produce a doctrinal continental law, which is considered *per se* to have legal value; just as the US Universities extrapolate principles and rules from the 51 statual laws, to teach but one US national law; just as scholars do with the PECL, with the Trento Project, with other European projects related to a European Civil Code. Just as, at the world level, it happens with the UNIDROIT Principles, which are a scholarly product increasingly applied and recognized as applicable rules of international trade for transnational business activities.

Those Latin American "codes" are sort of photographs of the state of the law on the continent, or a doctrinal reconstruction of what a continental common law could be.
They may be considered as a continental "soft law", as well as principles for interpretation or guidelines for legislation by national lawmakers. In one case, the model civil procedure code has been sanctioned and enforced as national law (Uruguay, 1998).
In another case, the UNIDROIT Principles of International Commercial Contracts have expressly become applicable rules to decide cases submitted to an international arbitration (art. 27 of the Panamanian law on arbitration). This besides the fact the *Principles* are largely recognized as applicable rules in international transactions and in the related arbitral awards, as deemed to represent a modern *lex mercatoria*, just for their inherent qualities, and not because of any legislative sanction in any jurisdiction.

Are these works, in any legal sense, "codes"?
Do they contain or represent, in any legal sense, "law"?

According to the Napoleonic concept, of course they are not.
Still, the use of the term "code" (often in quotation marks or preceded by the adjective "soft") is very popular to refer to those Latin American codes, to the UNIDROIT Principles, to the PECL, and so on. The rules and principles circulating across the national boundaries are often labeled as "scholarly law"
I think it is possible to redefine these terms, "code", in order to include those *corpora*; and "law", to overcome the uneasy feelings of those many who feel compelled to use quotation marks, or to add "scholarly" or "soft" – almost as a *caveat* or a disclaimer for any liability.
Those "soft codes" are pictures at a given moment of the principles of the system(s) they represent, like any Civil Code of any continental Europe country. They may or may not receive a legislative sanction, still keeping their mentioned function.
The nature and function of a code in this sense, especially of a civil code, is then the one of a consolidation of the principles of a legal system, giving a picture of it, "freezing" its continuing development at a given moment. The immediately following moment, it will start being developed again.
A code in this sense may (or may not) receive legislative sanction, to "stabilize" the picture within the boundaries of a political entity, becoming written law; still the principles will continue immediately thereafter to be developed by scholars, courts, practitioners, as well as by the territorial legislator. Those principles circulate in different jurisdictions, as "soft law" if we like, and provide ideas and solutions, recognized by case law, arbitral decisions, business practice – even if those "soft codes" containing them are not legislatively enforced there.
It is undeniable that all codes, including those legislatively sanctioned, also perform functions other than the legislative one, inside and outside the jurisdiction of the sanctioning authority. Very

often new codes give legislative sanction to principles already introduced in the legal practice, by custom, doctrines and case law.
On the doctrinal and practical point of view, codes are influential in different places, and *with respect to this function it is legally irrelevant the nationality of the code or the fact it has been enforced somewhere – or anywhere*.
The BGB has been influential everywhere in the world, not only in Germany, or in Japan. The same can be said about the *Code Napoléon*. They have been used everywhere to provide inspiration to scholars for development of other legal systems, as well as in some case to provide specific solutions for practice.
This doctrinal function is a primary legal function of a code.
The *inherent* nature of a codification in this sense is then to describe the state of the principles, and/or to suggest the improvements needed at a given moment, within a given society.
Exception made for rules related to national specificities, many of those principles and their development are increasingly common at least to the whole western world, irrespective of the differences between the *common law* and the *civil law* traditions.
In this different perspective, *the legislative sanction is an external occurrence* for the "Code ontology": it comes to give certainty, by "stabilizing", within the territorial limits of the enforcing Authority and including locally appropriate provisions, principles which are more and more developed in a transnational context of scholarly work and case law – making transnational "soft law" hard, within the relevant jurisdiction, by legislative sanction.
The very moment the code is sanctioned, its rules and principles start being developed again by the legal community, as well as they (excluding those having a strict national character) continue to be developed even outside the sanctioning jurisdiction.

We could consider the continental western legal tradition and the several national legal systems as an old forest and its trees: each tree is different from any other; still, they belong to the same forest,

they live and develop in the same way and environment, receive nutrition from the same ground. They all look alike, unless the observation is very close and focused on details. Their branches are intertwined, and each tree contains, within its head external contour, branches and foliage from other trees.
The legislative sanction of a code is for the law like the pruning of one of those growing trees: reinforces and gives direction to something which is not originated in the gardener's scissors, to make it grow and develop with the desired shape and direction. But the very following moment the pruned tree, as well as neighbouring others, continues its growth – until next trimming comes.
It is, conversely, part of the Napoleonic concept that there is no forest, as one living thing, but just a number of shaped trees, created and modified by several gardeners, so to speak, whose external shapes and contours do not interfere with one another.

We may try, as an exercise, to reverse some of the basic current ideas about codes, in accordance to what we've discussed so far.

1) *Legislative sanction is not necessarily a part of the inherent nature of a code*; nor is completeness, which is also an added *legislative* feature, to a consolidated body of principles and rules which nowadays have more and more, as they used to have since Justinean and until the end of the XVIII century, a distinct non-national character. Legislative sanction is a local occurrence who adds statutory force and locally appropriate rules to those principles.

2) *Transnationality and a vocation for circulation are two of its inherent features – not just an irrelevant or secondary occurrence*.
The well known phenomena of legal transplants and of circulation of legal models are often referred to, to explain why national codes and legislation are "copied" in other jurisdictions.

Important codes, such as the French one or the BGB, have been sanctioned in many and very diverse places of the world, due to their prestige and to the prominence of the national scholarly communities which have originated them.
Nowadays, a transnational scholarly community is at work, in a more and more integrated fashion. The Dutch code of 1992 is not a fruit of "domestic" Dutch legal thought, as much as the German recent reform of the BGB is not stemming from purely domestic German developments.
There is immense comparative work beyond those achievements. They circulate and are studied very widely, as a model, precisely because *they represent the state-of-the-art outcome of a legal thought which can be labeled as "western"*, if not "global".
Future civil codes of European countries, or of Europe if ever, will doubtless reproduce many of those solutions, without this meaning that the Dutch or German legislations have been "copied" by other European jurisdictions – a statement that should be considered as superficial, to say the least.
In present times western world, each national code is to a considerable extent a local variant of the evolving western, more than national, legal principles, as developed at the moment of drafting. The same principles will keep on being developed, beyond the national boundaries, and will appear, in a further "edition", in a subsequent code sanctioned elsewhere, or in a different kind of non-national codification.
It is not (anymore) the codes that contain the national law, as it was postulated in the Napoleonic approach; it is not that the national codes are "copied" elsewhere; it is not that scholarly achievements, case law and practice at the transnational level are legally irrelevant. Codified solutions reproduced are not just "copied legislation", but local formalizations – also featuring of course local rules and institutions especially in personal, family, inheritance law – of shared legal values, which belong to a wider, supranational legal tradition.

Local sanction (by statute, *loi*, *lei*), locally printed civil codes are different epiphanies of the same unwritten bulk of developing principles, which non-national codes such as the Latin-American ones, the PECL, the UNIDROIT Principles, or research projects as the Trento one, try to unearth.
It is, to give an imaginative depiction of the phenomenon, the same code, the same bulk of principles, which circulates and is continuously updated and sanctioned here and there, along with locally thought-out provisions.

3) *Law is inherently "soft"*.
In the Napoleonic concept, law consists of the interpretation of codes and statutes. As there cannot be any law outside them, there is no question about the law being "soft" or "hard", "soft" being commonly used to indicate those rules which have a non-legislative origin – often without caring to give a satisfactory explanation for the reasons of their increasing role on the legal scene, *vis-à-vis* the Napoleonic dogma.
Still, many lawyers refuse or hesitate to consider the products of a legal community (including doctrines, customs, case law, practice), *per se*, as "law". Often, they make recourse to adjectives such as "soft" or "scholarly" – uneasy in excluding any inherent value in what they do, as well as afraid to affirm that the law is not (only) stemming from legislation; just like their French predecessors were afraid, two hundred years ago, of the *guillotine*.
The different approach suggested here implies that the very law (without adjectives), besides statute construction and interpretation of codified provisions, is something self-legitimating, lying in the work of the legal communities, escaping the cages of legislative sanction.
Its origins are in scholarly work, as well as in practice, customs, equitable considerations, legislative or case-law solutions for

similar cases given in other jurisdictions[13] – as it used to be in the *ius commune* legal tradition and in the very Roman law: *ius est ars boni et aequi*, juxtaposed to the *lex*, hailing from the political authority vested with the *imperium*.

The recent Dutch code provisions, on the possibility for the court to find binding solutions beyond[14], and sometimes *against*, the written codified rule, indicate a process in which even the boundary between "hard" and "soft" law is becoming fuzzy, not to say irrelevant in the long term; especially if the Dutch model will be replicated in future national codifications.

National codes, beyond their domestic legislative function, as well as non-national codes and other similar *corpora* or projects, as well as scholarly works in general, are a substantial part of the development of present times' western legal thought.

Legal thought which represents a fundamental common ("soft"?) layer; a layer having increasing latitude and importance for the several legal systems of both *civil law* and *common law* traditions, and even producing rules which are directly applicable – and applied, indeed – irrespective of any national legislative sanction, such as the UNIDROIT Principles or the ICC Incoterms.

This looks very much, *technically speaking*, like just one *ius commune* legal order.

All those legal systems, to say the least, share a fundamental basic formant[15], if we don't want to use the term "source".

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[13] In this sense, what is statutory or case law in one jurisdiction might become law, in the sense of *ius*, *droit*, in another.

[14] As well, of course, as the not-so-recent provisions of art.1 of the Swiss civil code of 1907, entitling the court to fill the *lacunae* of the law according to customs or, if needed, "as if the court were the legislator", considering the best doctrines and case law; or art. 7 ABGB, of 1807, containing an opening to the "principles of natural law" seen by many as the *ius commune* heritage.

[15] The obvious reference is to Rodolfo Sacco's theory of legal formants. See R.Sacco, "*Legal Formants: A Dynamic Approach to Comparative Law*", in 39 *Amer.Journ.Comp.Law* (1991), pp. 1- 34 and 343-401.

This different perspective in dealing with the western legal tradition and the idea of codification of course brings about a concept of code which is quite different from the Napoleonic one, and much closer to the *ius commune* idea of the legal system.

Going back to my introductory lines, then, only feature "a." remains, amongst those indicated as characteristic of a civil code (a consolidation of legal principles).
Features "b." (legislative sanction), "c." (comprehensivity), and "d." (prohibition of looking elsewhere for solutions), not being necessary for a code to exist: the code is not necessarily "complete" and covering all aspects of legal life; it does not mark the boundaries of an autonomous, self-contained legal system; legislative sanction is an external occurrence; the doctrinal products circulate anyway, carrying their inherent legal value, irrespective of their geographical or political origin.
In their different epiphanies as legislative enactments or as doctrinal achievements – the latter as an inherent feature, the former just as a possible one – *codes are contained by legal systems, not vice-versa*.

Civil codes, of course, are useful.
For social, economic as well as technical reasons, medieval law had become both inadequate and unmanageable at the end of the XVIII century, as demonstrated by the inception of the movement for codifications everywhere in Europe (including England, at the beginning of the XIX century). As society evolved, rationalist ideas prevailed, new legal tools of regulation and social governance were in high demand.
Codifications represented a very innovative technical solution to give manageability to the law, by offering a set of legal principles and rules which were drafted at an appropriate level of generality and abstraction: wide enough to cover almost all the areas of legal life, still precise enough to provide rules, directly or by means of interpretation, for almost every conceivable issue.

This novelty improved the certainty of outcomes, and excluded to a large extent the need for enormous collections of scholarly books to find the applicable rules for the vast majority of the cases.
This one has undoubtedly been the major innovation brought about by the codification phenomenon in *civil law* countries – a function preformed also in those *common law* jurisdictions which adopted a civil code, like many US ones. Precisely in this lays the modernity of the codification, and the great technical advantage brought about with respect to the previous legal environment.

Still, this utility of the codification could be maintained and utilized also in a *ius commune* environment, as it happened for instance in Prussia with the codification of 1794, or in present *common law* jurisdictions – where codes are basically seen as sanctioned restatements of the law, containing a consolidation of principles: codes as large statutes, neither comprehensive nor "dominant" over the legal system as a whole.
Every *common law* jurisdiction of the world, is based, "beneath" the national developments, on a fundamental layer made by the venerable rules of the English *common law*, which in many instances provided solutions when national statutory law or case law did not. Modern doctrines can also be incorporated in national systems through adjudication and case law. This happens also in "codified" *common law* jurisdictions, as there is no pretension of the legal system being contained inside the civil codes, or limited by them.
Theoretically, according to the Napoleonic dogma, similar functions could not be performed, with respect to codified *civil law* legal systems, by Roman law or continental *ius commune* or modern scholarly law. In fact, it happens, without much ado. Principles and rules of diverse origins are added to the system through case law – if, normally, with the court paying lip service to the codes, pretending to interpret some of its more broad and general

provisions; but sometimes even through an open violation of some codified rule.
A *ius commune* environment is not *per se* incompatible with codifications.
The technical "leap forward" represented by the codifications, and particularly by the righteously admired drafting of the *Code Napoléon*, could well be severed from the political-legal affirmations of the comprehensivity of the code, and of the subjugation of doctrinal law, case law to legislation – without the code losing its technical merits and utility.
Civil codes are and will probably be, in the foreseeable future, pillars of the legal system in most of *civil law* countries; but legal doctrines are clearly escaping the national bonds, as a trend towards a new European *ius commune* is becoming detectable. Just like the other, much stronger and older one, found in Latin America.
Civil codes could some day be seen, even in *civil law* countries, as very wide pieces of statutory law, in the places where they are legislatively sanctioned. On the other hand the western legal environment, in its basic philosophy, might already be seen as slowly returning to where it had been for centuries, before the French revolution and the Napoleonic conceptions on which the Code of 1804 is based.

A final question could be: what is the sense of this all?
My intention was just to provide an alternative description of the western legal tradition; a provocation, as well as a different point of view to better observe and reflect on the codification phenomenon and on the essence of the *code*, as a *civil law* tradition fundamental achievement and turning point.
I am trying to propose a pre-modern/post-modern theory, capable to explain phenomena we all can observe, which cannot be explained satisfactorily according to the modern Napoleonic doctrines underlying the *civil law* legal systems.

As a matter of fact, those doctrines and the related dogma of the statualism of the law do not explain, for instance:

- why legal outcomes everywhere do not always seem to be determined by purely national legislative standards;
- why legal doctrines are more and more becoming transnational, irrespective of the different national codifications, the latter developing according to the former instead of the other way around;
- why widely accepted foreign solutions are in some instances used to solve conflicts against the provisions of national laws;
- why transnational business issues are increasingly solved according to the *lex mercatoria*, whatever this means, with preference over the national applicable laws.
- Why, increasingly, transnational doctrinal solutions affect national legal systems without a national legislation interface.

The reconstruction I am proposing is not necessarily "true", nor can it be so, consisting of ideas, and not of the facts that through these ideas are given significance.
It is just a theory, a tool to analyse and try to explain the facts we observe, and to describe our legal envirnment in historical, critical terms. I felt this necessary as the traditional Napoleonic theory proves unsatisfactory, having been falsified – using Karl Popper's terms – by the observation of reality.
Doubt is sane, and criticizing consolidated dogmas is fruitful for the progress of knowledge, other than being a good exercise for minds.
In a western society claiming that God is dead, that contract is dead, why shouldn't even Napoleon, at some stage, start feeling unwell?