Integration Through Law

Europe and the American Federal Experience

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Europe and the American Federal Experience

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Mauro Cappelletti · Monica Seccombe · Joseph Weiler

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A Political, Legal and Economic Overview

edited by

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Foreword to the Florence Integration Project Series

The Florence Integration Project can certainly be characterized as a highly pluralistic research endeavor, not only because its enquiry into what we consider to be one of the most important phenomena in contemporary legal evolution is the product of the efforts of close to forty contributors from many countries in three continents, with almost every contribution being, in its turn, the joint product of a team, but also because pluralism of ideas and approaches has been, more than accepted, encouraged and praised. Thus, next to authors whose vision of the role and scope of the European Community, and generally of integration, federalism and transnationalism, tends to be primarily norm-oriented, there are others who have greater confidence in a more spontaneous, decentralized, indirect development, based more on non-legal incentives and self-imposed codes of conduct than on federal or Community "legislation"; next to those who have a center-oriented vision of the federal government, there are others who tend to see the federal role as merely the exception vis-à-vis the role of local and member state governments; next to those who would prefer "dual federalism," in which most powers and competences tend to be divided neatly between federal and local governments, are juxtaposed others who prefer a more pregnant and flexible type of "cooperative federalism," in which most powers and competences are treated as, in principle, concurrent, *i.e.,* shared by the various levels of government, on the assumption that only an empirical approach can, for instance, indicate whether a particular topic or area in a given time and place is more properly regulated centrally or peripherally.[1] And yet, almost as an exercise in intellectual federalism, all through the project there was an effort of coordination aimed at making of an inherently and proudly pluralistic product, a coherent research effort united in its most basic vision and rationales. It is the primary purpose of this *Foreword* to outline such vision and rationales, leaving to the following *Introduction* a more elaborated survey of the Project and the analysis of its central organization, themes, and ideas.

Let me start by saying that the project stems from one simple belief – a "working hypothesis," if one prefers, but one which has been borne out by

[1] At the conference of all participants in the Integration Project which was held at the European University Institute in December, 1981, to discuss jointly the draft contributions to the Project, US federalism was characterized as "cooperative" and contrasted with a European (EC) brand of "dual federalism." This, of course, was merely intended to be a rough approximation, yet one rooted in a real fact – the difficulty for Europeans, due to a history of centralized national governments (not, however, an ancient history, *see infra* notes 17–25 and accompanying text), to "think federal" in the fullest significance of the word.

a wealth of comparative and historical research on a number of topics.[2] It is the belief that in our era of unprecedented, tremendously accelerated movement and change, a degree of *convergence* in at least some aspects of human behavior basic to social life is a *sine qua non* for productive and peaceful coexistence of peoples, indeed for their very survival. Static, isolated societies can certainly survive, even flourish, in divergence. Languages, dialects, mores, religions, ideologies, social norms and structures are – in static eras – like monads existing in a (more or less) splendid isolation; each monad's diversities can not only persist but even increase with no unbearable societal costs. From the very initial drafting of the Project outline, however, it was our submission that this can no longer be true in an era in which transformations are occurring at a rate immensely more rapid than in any previous period of human history. As described by a leading sociologist and social psychologist,

> [c]hange has been ubiquitous in history, but the speed of change throughout most of human experience was so slow that large parts of humanity had no basis for sensing it. By contrast, the modern era is not only one of rapid change, but of extraordinary acceleration in the rate of change. In this century the world's population has grown at a rate 1,000 times more rapid than that prevailing through most of human habitation of the earth. In speed of movement in ordinary travel a few generations saw us shift from 6 miles to 60, to 600 m.p.h., and this was actually one of the less dramatic accelerations. In concentration of destructive power we made a giant leap from the largest bombs of World War II, boastfully called blockbusters, to the atom bomb which could bust a city, and then to the hydrogen bomb capable of destroying a whole region. Less grim and more promising for mankind are the accelerations in our ability to carry and move information, in which our capacity doubles every year, so that we can now put up to 100 thousand transistors on a single thumb-nail sized silicon chip, and a chip which will include almost half a million transistors is being developed.[3]

Divergence in basic human approaches, if it moved at the rate in which transformations occur in our era, would quickly result in chaos. Diversities would grow and expand in all directions at such a speed as to look like the fragmented particles of an exploding universe, making societies unmanageable and coexistence impossible; the "beauty" of diversity would be largely overcome by its tremendous dangers and costs.

To be sure, an objection could be made to the explosion metaphor. Change in human attitudes and behavior, one might say, has not been moving at the same speed as change in the material environment – in technologies, in production and movement of factors, in growth and transfer of populations. And indeed, it might be true that "genetically" the man of today is not different from that of many thousands of years ago, or that the power of the human mind is

[2] Illustrations of converging trends in contemporary legal systems can be found in many areas of both public and private law. *See, e.g.*, the volume NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE, referred to *infra* note 31 and accompanying text.

[3] Alex Inkeles, *Social Psychology in an Era of Transformation*, 46 SOCIAL PSYCHOLOGY Q. 56 (1983).

no "greater" today than at the time of, say, Bracton, Cicero, or Socrates. But this is not the point. The point is that profound changes in the environment inevitably bring about equally profound changes in habits and needs, instincts and expectations;[4] and that, while dramatic diversities in other eras were able to cause, at times, even disastrous and devastating but never ultimate tensions, conflicts and wars, the "crusades" of our century have brought about ravages and destructions which have been incomparably more unbearable than those of any other time – and those of tomorrow might bring about the very end of human kind. Differences in technologies and tools and, more generally, in the material environment, economic and otherwise, are no longer merely differences in quantity, such as the degree of industrialization or the amount of production and consumption; rather, they have become of the essence in behavioral attitudes. And the potential conflict of tomorrow is of a totally different kind than that of yesterday.

Fortunately – and this might be seen as yet another belief or working hypothesis which, in my opinion at least, lies at the roots of this Project – inherent in human nature is a fundamental wisdom. This wisdom, which ultimately coincides with the instinct of survival, includes a natural tendency toward assimilation through interchange. The growth of population and movement of peoples and information has been bringing about an unprecedented rate of interchange. Conflicting attitudes tend, then, to be attenuated. Whereas litigation and war are the main models for conflict resolution among "aliens," compromise and conciliation, say anthropologists and sociologists, is the prevailing conflict resolution model among those who are forced to live together in

[4] In a paper first published in 1930 and collected in his celebrated *Essays in Persuasion*, J.M. Keynes, after having observed that "from the earliest times of which we have record... down to the beginning of the eighteenth century, there was no very great change in the standard of life of the average man living in the civilised centers of the earth," and having noted that this situation of relative stability no longer existed during the last two centuries, prophesied a time, "not so very remote," when "the greatest change which has ever occurred in the material environment of life for human beings in the aggregate" would happen, with "ever larger and larger classes and groups of people" no longer having "problems of economic necessity." But he also asked himself: "Will this be a benefit?" And his answer was that, "If one believes at all in the real values of life, the prospect at least opens up the possibility of benefit. *Yet I think with dread of the readjustment of the habits and instincts of the ordinary man, bred into him for countless generations, which he may be asked to discard within a few decades*" (italics added). J.M. Keynes, *Economic Possibilities for Our Grandchildren*, in Essays in Persuasion, 9 The Collected Writings of John Maynard Keynes 321–32, 322, 327, 331 (Cambridge, MacMillan, St. Martin's Press for the Royal Economic Society, 1972). A similar answer comes from the social psychologist. After having described some of the most profound changes in the material environment in our epoch, Inkeles asks himself: "Can all this be happening without some profound transformation in the human psyche?" The reply is obvious enough. Inkeles, *supra* note 3, at 58.

lasting interrelationship.[5] If the forces which impose relationship and interchange are stronger and more lasting than those which produce division, as they tend to be in a shrinking world, then individuals and peoples will eventually know each other better: they will learn from each other, and will, in the proper ethimological meaning of the word, *assimilate*. Historians tell us that this is what resulted from the mixing up of, for instance, "Romans" and "Barbarians"[6] during the Dark Ages[7] – and the end result was that magnificent revival of civilization after the year 1,000 A.D. which brought about the genius of the Romanesque and Gothic and later the Renaissance styles, and the splendors of Florence and Venice, of Aix and Avignon, of Augsburg and Cologne and many of the other cities which still today make the beauty and glory of Western Europe.

Convergence, then, seems to be a fundamental and vital exigency of our epoch. But convergence does not necessarily mean dull or indeed oppressive uniformization and centralization. If a basic need for convergence was the first working hypothesis of the project, its conceptualization through the project has been attempted in what we have called the "twin ideas" of *integration* and of *pluralistic, participatory federalism*. These concepts are amply analyzed in the *Introduction* and in other Project studies and will not be discussed here, except to emphasize the two assumptions which have been shared, I think, although with a great variety in degree, by those who have participated in this large research adventure. The first assumption is that integration can and indeed shall be seen not as an absolute or a *per se* value and aim, but as a flexible, *instrumental* value and aim, an approach in which the "beauty" of diversity maintains its place and value any time it is not dangerously divisive. And the second assumption is that the brand of "federalism" which can be envisaged for Europe is the exact opposite to a unitary, centralized system of government; it is a system in which power is shared by local and central "sovereignties," and the – limited – central sovereignty is but the "participatory" combination of the local ones.

Needless to say, "integration" and "participatory federalism" would represent a remarkable evolution in a continent which, at least over the last couple of centuries or more, has been characterized by a process of absolutization of the nation-state, both vis-à-vis higher governmental entities – with the rejection of the idea of the state being the constituent unit of a larger com-

[5] *See, e.g.*, Nader & Shugart, *Old Solutions for Old Problems*, in No Access to Law. Alternatives to the American Judicial System 76–77 *et passim* (Laura Nader ed., New York, Academic Press, 1980).

[6] It might be worth a reminder that the original meaning of the Greek word *bárbaros*, and the Latin word *barbarus*, was: foreign, non-Hellenic, non-Roman.

[7] *See generally, e.g.*, H. Pirenne, Une Histoire de l'Europe des invasions au XVI[e] siècle (8th ed., Paris, Alcan, 1936); *id.*, Mahomet et Charlemagne (10th ed., Paris/Brussels, Alcan/Nouvelle Société d'Editions, 1937); and more specifically on the inter-penetration of Germanic and Roman elements and the "encounter of two civilizations," 1 F. Calasso, Medio Evo del diritto 105–37 (Milan, Giuffrè, 1954).

munity of peoples[8] – and within the governmental structure of the state itself. Notwithstanding theories and proclamations to the contrary, "separation of powers," in its pregnant meaning that every governmental power shall be limited and controlled – "checked and balanced" – was thus lost both horizontally and vertically. It was lost horizontally, as is evidenced, first, by the fact that it took one full century following the French Revolution before it became institutionally accepted in France, Germany, Italy, etc., that executive power was not in fact absolute but subject to review by a body or bodies independent of the executive and, more generally, of the "political branch"; and second, by the fact that it took almost another century before a growing number of European nations gave up the concept of the absolute character of the legislative power and accepted the subjection of such power to the control of yet another kind of independent reviewer – constitutional courts and the like – called upon to enforce a law superior to the will of the national legislator – hence in some way, potentially at least, a supranational law.[9] "Separation of powers" was lost vertically as well, because the absolutization of the state as the only source of law and sole keeper of public order had an internal, in addition to an external, significance. It meant virtual denial of any meaningful local governmental autonomy and destruction of "*corps intermediaires*"[10] – a phenomenon which so deeply differentiated Tocqueville's France vis-à-vis America[11] – at

[8] *But see*, on the more ancient heritage of Europe, *infra* notes 18–25 and accompanying text.

[9] *See, e.g.*, COURS CONSTITUTIONNELLES EUROPÉENNES ET DROITS FONDAMENTAUX (L. Favoreau ed., Paris/Aix-en-Provence, Economica/Presses Universitaires d'Aix-Marseille, 1982).

[10] "With eighteenth century Enlightenment the individualizing view of society began to be preponderant. In the French Revolution the new ideology became official.... The state was now clearly conceived to be composed of individual citizens. The intermediate groups of manor, guild, estate, province were swept away." Rheinstein, *The Family and the Law*, in 4 INT'L ENC. COMP. L. ch. 1, at 3, 13. This tradition has not entirely disappeared in Continental Europe. Even today, according to a noted public law authority, "French law looks with mistrust at the groups: the old execration by Rousseau vis-à-vis the intermediate societies – which disrupt the relationship between the Sovereign and the citizens and impede the formation of the *volonté générale* – joins with the fear by the state of seeing the groups compete with its activities and create new feudalities." De Soto, *L'individualisme dans la jurisprudence du Conseil d'Etat*, in 2 MÉLANGES OFFERTS À MARCEL WALINE: LE JUGE ET LE DROIT PUBLIC 759, 771 (Paris, Librairie Générale de Droit et de Jurisprudence, 1974).

[11] "In no country in the world has the principle of association been more successfully used, or applied to a greater multitude of objects, than in America.... In aristocratic nations, the body of the nobles and the wealthy are in themselves natural associations, which check the abuses of power. In countries where such associations do not exist, if private individuals cannot create an artificial and temporary substitute for them, I can see no permanent protection against the most galling tyranny; and a great people may be oppressed with impunity by a small faction, or by a single individual." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA ch. 11, at 71, 74 (H. Reeve transl., New York, Washington Square Press, 1972). "Whenever, at the head of some new

the same time that it meant rejection of the idea of a transnational *communitas gentium*.

Integration within the scheme of pluralistic, participatory federalism means, then, a radical departure from these absolutizations of the state, both external and internal. It does not mean, however, an abrupt departure, or a departure which is merely theorized, almost in an exercise in futile wishful thinking, by the Project with no roots in the reality of Europe. On the contrary, the process has already been going on for many years, as is witnessed on the one hand by the history of *justice administrative* all through the nineteenth century and *justice constitutionnelle* during this century, and on the other hand by the emergence of two parallel trends, *transnationalism* – as illustrated by such organizations as the Council of Europe with its major product, the European Convention of Human Rights and the machinery for its implementation, and by the European Community which is the focus of the present Project – and *regionalism*, evidenced by well-known developments in the post-World War II constitutional structure of such countries as the Federal Republic of Germany, Italy, Belgium and even France and Great Britain.[12]

Whereas integration, both as a process and a result, provides the context – the coordinating overarching element which distinguishes pluralism from divisive separation and which makes of pluralism a force, not a weakness – participatory federalism is the safeguarding element, the guarantee against oppressive unchecked centralization which was, unfortunately, the recurring danger in the history of the European nation-states. Thus the "twin concepts," integration and participatory federalism, provide the realistic working philosophy for what has become *a study in democracy* – for this is, in the final analysis, what the Florence Integration Project has, not surprisingly, turned out to be.[13]

undertaking, you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.... Amongst democratic nations,... all the citizens are independent and feeble; they can do hardly anything by themselves, and none of them can oblige his fellow-men to lend him their assistance. They all, therefore, become powerless, if they do not learn voluntarily to help each other. If men living in democratic countries had no right and no inclination to associate ..., their independence would be in great jeopardy ... [and] civilization itself would be endangered." *Id.*, ch. 30, at 181, 182. Tocqueville's prophecy was borne out by Europe's sad experiences through more than one hundred years after he wrote his celebrated book; his lesson has been clearly one of, in our terminology, pluralistic participatory federalism.

[12] *See, e.g.*, CENTRE-PERIPHERY RELATIONS IN WESTERN EUROPE (Y. Mény & V. Wright eds., London, Allen & Unwin, 1984); DIX ANS DE RÉGIONALISATION EN EUROPE (Y. Mény ed., Paris, Cujas, 1982); MOBILIZATION CENTER-PERIPHERY STRUCTURES AND NATION-BUILDING – A VOLUME IN COMMEMORATION OF STEIN ROKKAN (P. Torsvik ed., Bergen, Universitetsforlaget, 1981); BUILDING STATES AND NATIONS (S.N. Eisenstadt & S. Rokkan eds., Beverly Hills, Sage, 1973); Flora, *Il macro-modello dello sviluppo politico europeo di S. Rokkan*, 10 RIV. ITAL. SCI. POLITICA 369 (1980).

[13] I happened to make an analogous statement about the previous Florentine project on Acess-to-Justice, on which *see infra* note 29 and accompanying text. *See Foreword*

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A few words will now be dedicated to the scope of the comparative analysis which pervades the Project. This, too, is a theme extensively discussed in the *Introduction*, but some considerations of a more general character might be in order here concerning the relevance of the American federal experience to us in Europe. For, over the last few years my associates and I were repeatedly confronted with the following questions: How can a two century-old history in American federalism provide any useful lesson to Europeans? How can we pretend to compare that hybrid, relatively recent combination of much "intergovernmentalism" and little "transnationalism" – the European Community – with a strong and well-established federal system, almost unlimited in its reach and substantive jurisdiction – the "enumerated powers" principle of the American Constitution having long lost much of its original significance as a tool for the delimitation of federal power? Are there any meaningful problems which can be shared in common by two so radically different systems? Indeed, how can a federal system, whose budget in 1982 was about 720 billion dollars, be compared with the Community system, whose budget in the same year was about the equivalent of 23 billion dollars?[14] And, what about the fundamental diversities in Europe, linguistic, cultural, legal and, not least, economic? What about our most varied and often so proud national traditions and nationalistic feelings? Are not the terms of reference totally incomparable?

In attempting to give a preliminary answer to these questions, let me quote from the diary of a celebrated man, who thus expressed his momentary despair in a grand effort to inspire an integration movement. He said, "Tedious, indeed, is our Business. Slow, as Snails. Fifty Gentlemen meeting together, all Strangers, are not acquainted with Each other's Language, Ideas, Views, Designs. They are... jealous of each other – fearful, timid, skittish."[15] I happened to invite my students, both in Florence and at Stanford, to guess the identity of the author of these short phrases. Most of the answers indicated one or another of the "Fathers" of the European Communities, perhaps Jean Monnet or Robert Schuman. The author, however, was not a European; he was an American, one of the "Fathers" of the American union. It was John Adams who bared his soul writing those phrases in his diary on 25 September 1777 – and the "Fifty Gentlemen meeting together" like "Strangers" in "Language, Ideas, Views, and Designs," were the Delegates to Congress who were assembled to try to form a new Nation, a Union of States.

If Europe is, admittedly, much unlike the U.S.A., it is however a matter of fact that diversity was extremely profound even in America in the formative

to the Access-to-Justice Project Series, in 1 ACCESS TO JUSTICE, *infra* note 29, at vii. This recurrence should surprise no-one; for, as I will elaborate in a moment, both Projects reflect connected aspects of a major trend in law and justice in the modern democratic societies.

[14] Both figures are taken from THE EUROPA YEARBOOK 1983, vol. 1 at 202 (EC); vol. 2 at 1677 (US).

[15] LETTERS OF DELEGATES TO CONGRESS 1774–1789 (Washington, U.S. Gov't Printing Off., 1978), *reprinted in* International Herald Tribune, 24 May 1978.

era of that Union – and not only in the formative era. Far from having been an uninterrupted, continuous process of integration, the two century-old history of the U.S.A., which of course includes a War of Secession, has been a continuous shifting from centralization to decentralization and vice versa – with a renewed emphasis in most recent years on a return to decentralization. Indeed, the cardinal feature of American federalism, as it emerges from the Project studies, is the fact that integration has never come to be identified with plain uniformity and centralization: it has always meant a *sharing of powers* among central and local governments as a fundamental element of a participatory, democratic system of checks and balances, both vertically and horizontally.

This is not to say that the American experience, indeed the American federalistic principles and structures, are necessarily the example to follow. A few years ago the political scientist George Codding wrote that "the early post-Second World War federalists [in Europe] were under the impression that all that was required was simply a structural change... following the pattern set by the thirteen American colonies."[16] I submit that no-one is so unsophisticated today. And yet, the relevance of the American experience cannot be denied. Apart from the obvious fact that comparative analysis is not limited to similarities and convergences but can very usefully extend to differences and divergences, and their *raisons d'être*; and apart also from the fact that comparison is not meant exclusively as a search for models to follow, but also for pitfalls and shortcomings to avoid; I do think that there is a clear "comparability" – even in the narrow sense of "similarity" – between America and Western Europe. This comparability has numerous bases and justifications, many of which are being analyzed in this and the following Project volumes. I would like to touch here briefly upon only one of these bases, which is rooted in the historical heritage of Europe – a domain which, most unfortunately, could not be dealt with in the Project.[17]

The political and legal history of Europe, not unlike that of the U.S.A., has itself been a continuing history of processes of integration and disintegration, of unification and division. Processes of legal integration were very much at work, in particular, during the XI–XVI centuries A.D., the era of the great revival and growth of a *jus commune*, a *gemeines Recht* or common law of Europe, consisting principally of the "revived" Roman law of the *Corpus Juris*

[16] Codding, *Federalism: The Conceptual Setting*, in INTERNATIONAL ORGANIZATION. A CONCEPTUAL APPROACH 326, 340 (P. Taylor & A.J.R. Groom eds., London/New York, Nichols, 1978).

[17] This is, admittedly, a major (for me, *the* major) lacuna of the present research project, which lacks an historical dimension other than a merely implied one. I should say, for the record, that the attempt to add the contribution of two European historians was made but failed. There are, however, two studies on the historical foundations of a "new European common law" by Helmut Coing and Gino Gorla in the volume NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE, whose place in the Florence Integration Project is described *infra* text accompanying note 31.

Justinianeum as glossed and commented upon by the authoritative scholars and the courts in those centuries of flourishing economic, cultural and legal renaissance.[18] Both aspects of legal integration were present, namely that of "normative" and that of "institutional" integration. The first aspect – normative integration – was represented by rules and principles very much similar to those of both the American federalism and Community transnationalism: that is, the principles of direct applicability and supremacy of the norms of *jus commune*, which were affirmed – in certain epochs at least – as having direct universal validity and as being superior to the local laws or *statuta*.[19] Even the prin-

[18] In addition to the *jus civile* of the Empire – mostly based on the *codification* of Emperor Justinian as glossed, molded and adapted by the Bolognese glossators and their successors in the Medieval universities, and rather casually supplemented and modified by new Imperial enactments – the other main component of *jus commune* was the *jus canonicum* of the Church. As is well-known, the *jus commune* was "received" – hence the remarkable phenomenon called "*receptio*" – in much of continental Europe during the centuries up to the Reformation. Even in the sixteenth to eighteenth centuries, a common law of Europe was much more than a mere abstraction. Years of research by Professors Gino Gorla, Helmut Coing and others, for instance, have documented the permanent circulation of ideas and the reciprocal influence of higher court decisions in Western Europe on both sides of the Channel, as well as the permanent existence of a "community of legal rules" and a "*communis opinio totius orbis*" which played a significant role in the case law of those courts until, at least, the great national codifications of the nineteenth century. It has been demonstrated, in particular, that there was a tradition of the courts to search for, and feel bound by, a "common" or "uniform opinion" of other courts, often unlimited by state borders. Moreover, a common academic training based on "European" ideas had a major role in the formation and preservation of a common legal heritage in the Middle Ages as well as in the Age of Enlightenment. In addition to the contributions by Gino Gorla and Helmut Coing in NEW PERSPECTIVES, *infra* note 31, *see, e.g.*, G. GORLA, DIRITTO COMPARATO E DIRITTO COMUNE EUROPEO, *esp.* at 511–907 (Milan, Giuffrè, 1981); *id.*, IL DIRITTO COMPARATO IN ITALIA E NEL "MONDO OCCIDENTALE" E UNA INTRODUZIONE AL DIALOGO "CIVIL LAW-COMMON LAW" (Milan, Giuffrè, 1983); H. COING, DIE URSPRÜNGLICHE EINHEIT DER EUROPÄISCHEN RECHTSWISSENSCHAFT (Wiesbaden, Steiner Verlag, 1968).

[19] As in England, where, until the Glorious Revolution in 1688 proclaimed the supremacy of the enactments of Parliament, in theory at least "common law and reason" prevailed over "repugnant" statutory law (*see especially* the celebrated Dr. Bonham's Case of 1610, 8 Coke's Reports 118a, 77 E.R. 652), so on the Continent *lex* (*civilis et canonica*), being the law of the highest universal authorities – the Empire and the Church – claimed pre-eminence vis-à-vis conflicting *statuta*. *Cf.*, *e.g.*, Di Renzo Villata, *Diritto comune e diritto locale nella cultura giuridica lombarda dell'età moderna*, in DIRITTO COMUNE E DIRITTI LOCALI NELLA STORIA DELL'EUROPA. ATTI DEL CONVEGNO DI VARENNA (12–15 GIUGNO 1979) 329 ff, *esp.* at 331–32 (citing to F. Calasso) (Milan, Giuffrè, 1980). To be sure, such pre-eminence became more and more difficult to enforce, and the opposite rule – *"lex municipii vincit legem generalem in loco"* – eventually prevailed. *See, e.g.*, 1 F. CALASSO, *supra* note 7, at 453 ff. However, even when "force" failed to implement that supremacy (*see infra* note 22) efforts were made to, at least, limit the damage. Thus the glossators denied any possibility to ex-

ciple of pre-emption was not absent.[20] As for the other aspect of integration – the institutional – it was represented by at least two political institutions[21] which affirmed themselves as frontierless, indeed as *par excellence* universal: the Catholic Church, claiming jurisdiction over "*res spirituales*," and the Holy Roman Empire, claiming jurisdiction over "temporal matters."[22]

True, this may sound like ancient history, remote past. The principles of di-

pand the application of local laws by means of analogical interpretation ("*statuta stricte sunt interpretanda*," *see, e.g.*, F. WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT 138 (2nd ed., Göttingen, Vandenhoeck & Ruprecht, 1967)) to the point that local law was defined as "*jus irregulare et anomalum*" and even "*tamquam mulum*," that is, incapable of generating further norms. *See, e.g.*, Paradisi, *Notes critiques sur le problème du droit commun*, 58 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 423, 437–38 (1980). Also, to save at least the appearances, the theory was developed that local laws were themselves made by the Emperor, who had delegated legislative power to the cities: "*videtur ipsum statutum ab imperatore factum, cum civitatibus faciendi potestatem concesserit.*" *Id.* at 438.

[20] The principal sources of "central" law, the Empire and the Church (*see infra* text accompanying note 21) were constantly in conflict, both between themselves and with local governments, to preserve for themselves exclusive jurisdiction, legislative and judicial, in certain areas. Suffice it to remember the role which the papal claim to have jurisdiction in matrimonial (and other) affairs played in the breach between the Church of England and Rome under Henry VIII.

[21] Institutional integration was also represented by the university, which in its Bolognese model had a transnational character not only in the subject taught (Justinian's *Corpus Juris Civilis*) and language (Latin) but also in composition. For instance, in 1250 students at Bologna came from seventeen nations: three *Citramontanes*, or "this side of the Alps," and fourteen *Ultramontanes*, or "the other side of the Alps." H. RASHDALL, THE UNIVERSITIES OF EUROPE 182–83 (Oxford, Clarendon Press, 1936).

[22] Needless to say, historical developments were often very ambiguous and zig-zagging. The Church, for instance, tried constantly to act more as a unitary than a federal legal order, pretended at times to be superior, not equal, to the Empire, and made continuous efforts to expand the scope of its jurisdiction and that of canon law to more and more areas, including family law, the law of successions, criminal law, even contracts, etc. Indeed, the famous forgery of the Donation of Constantine was used to affirm the Church's power even *in temporalibus*. Ultimately, of course, what really counted was *political force* – not sheer military power but a mix of many elements, including economic wealth, cultural prestige, and popular faith or superstition. Hence, at times the Church (and *jus canonicum*) was in fact superior while at other times it was subordinated to the Empire (and *jus civile*); and, at other times, neither of the two had force sufficient to impose its will and law over local, centrifugal elements. The local laws or *statuta* of the city-states flourishing in the twelfth century, for instance, had to be accepted, willy-nilly, by the Emperor after, roughly, the Treaty of Constance – "the *magna charta* of the communal liberties," as defined by 1 F. CALASSO, *supra* note 7, at 423 – which followed the debacle of Frederick I "Barbarossa" in the battle against the league of the free city-states in Legnano in 1176. Students of checks and balances and federalism might find of extraordinary interest such documents of that epoch as those defining the respective jurisdiction of the Church and the Empire, often indicating an ante-litteram system of separation of powers between, on the one hand, the two "equal" institutions (as the great Accursius said,

rect applicability and pre-eminence of *jus commune* soon became theory more than reality; and the authority of the frontierless institutions gradually faded out, to give place, eventually, to the "absolute sovereignties" of the newly emerged nation-states. Yet, it was not until the great national codifications of the 19th century, from the *Code Napoléon* in the early years of the century to the German *BGB* at the end of it, that the idea of a *jus commune* died out even in its more limited meaning as a complementary law and a *ratio scripta*, to be applied only when the local laws were either lacking, incomplete, or unclear.[23] What is most important, however, is the fact that the history of Europe has been formed and molded over many centuries by strong transnationalistic forces – norms and institutions – no less strong, perhaps, than the divisive nationalistic elements; and that such transnationalistic factors have left profound and lasting marks upon which the new integrational trends of our present epoch can still draw.[24] Indeed, the era of the nation-state has been a relatively short phase in a bi-millennial European history of encounters and fusions, no less than of clashes and separations. One needs a visionary, perhaps – but has there ever been any real historian who has not been a visionary as well? – to see the history of American federalism, both normative and institutional, as nothing less than a first chapter in the larger book of transnationalism in the West. In this vision, the formation of a new, continental, multi-state nation at the end of the 18th century can be appraised as both a relatively late chapter in the world-wide birth and growth of the modern nation-states, the chapter of a book in which France, England, Spain and other countries have a much earlier place, and also as a very early chapter in another book *still being written*, in which other multi-state, continental entities such as the European Community will also have, one can expect, a relevant place.

My conclusion is that far from being an unjustifiable attempt to compare incomparables, the quest for data and inspiration from the American experience is but a most reasonable effort to learn from a political history which is in many ways connected to our own. Incidentally, let me add that this should certainly not be a one-way exercise: in understanding American federalism, a scrutiny of European experiences, past and present, can be of great value as well. Paradoxical as it might seem, Europe's experiences with integration and federalism are much more ancient, and certainly more varied, than the American one.[25]

"nec papa in temporalibus nec imperator in spiritualibus se debeant immiscere"), and, on the other hand, between these two institutions and the "inferior" ones, *i.e.*, the local governments.

23 *See, e.g.*, René David, *The International Unification of Private Law*, 2 INT'L ENC. COMP. L. ch. 5, at §§ 36–37 *et passim*.

24 Two exceptional books shall suffice to illustrate this point: the masterpiece by PAUL KOSCHAKER, EUROPA UND DAS RÖMISCHE RECHT (4th ed., Munich, Beck, 1966), and the posthumous, unfinished work by H.F. JOLOWICZ, ROMAN FOUNDATIONS OF THE MODERN LAW (Oxford, Clarendon P., 1957).

25 In a sense, feudalism itself was a brand of federalism, with its central sovereign having overarching, yet limited powers vis-à-vis a descending hierarchy of local and, in their turn, limited sovereigns.

My colleagues in this Project and the readers of these pages will now permit me, I hope, some reflection of a more personal nature.

By way, perhaps, of an apology at the end of what I consider – with mixed feelings of relief and regret – my last effort in organized international research projects, I want to elaborate a little on what I have seen as the intellectual *raison d'être*, and indeed the moral and political justification, for embarking on such a large, years-long effort.

I shall go back to the early years of my research activities as a student in comparative law, in the wake of World War II. Not surprisingly for that time of re-birth and reconstruction, the vision which from the very beginning stimulated those activities – and which, as simple and perhaps naive as it might be, has inspired my scholarly endeavors ever since – was one of a world in which individuals, groups and peoples shall strive to understand and respect each other, to communicate and "dialogue" with each other. I saw this striving at various levels:

– the *constitutional-human rights* level, whereby serious efforts are made to assure individuals, groups and peoples a fair protection of, at least, certain fundamental rights and freedoms;

– the *social* level, evidenced by the gigantic phenomenon of the gradual emergence of more and more persons, categories and classes of people from a situation of social marginalization to one of effective "access" to the political, economic and legal systems;

– and, finally, the *transnational* level, based on the recognition that most of the emerging features of our epoch – such as the industrial, technological and mass media revolutions; the large migrations of people from the countryside, the farms and the south into the towns, the factories and the north; more recently, the further massive shift from manufacturing into services, including the servicing of automatic, computer and electronic machinery – have assumed an increasingly multinational, transnational character. Hence, the need is growing for transnational forms of government of such phenomena, lest they lead us to anarchy and conflicts.[26] Moreover, this third – transnational – level encompasses the other two, for the constitutional and the social developments just mentioned have largely transcended the borders of nation-states, thus becoming themselves essential elements of the transnational development.

Indeed, all these developments represent what I would consider the most important trend in the political and legal evolution of our epoch, at least in the West – the three major "dimensions" of law and justice in our century.[27]

[26] Here, too, I want to cite only one author who best lends authority to my words: Arnold Toynbee, Cities on the Move, *esp.* ch. X, *The Coming World-City*, at 195–247 (London, O.U.P., 1970).

[27] For some elaboration, still very preliminary, of this three-dimension trend *see* my studies *Appunti per una fenomenologia della giustizia nel XX° secolo*, in 1 Studi in Onore di Enrico Tullio Liebman 153–210 (Milan, Giuffrè, 1979); *Nieuwe Rechtsdimensies*, 25 Tijdschrift voor Sociale Wetenschappen 111–21 (1980).

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