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Preliminary Draft of the ALI Transnational Rules of Civil Procedure

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Preliminary Draft of the ALI Transnational Rules of Civil Procedure

GEOFFREY C. HAZARD, JR.[†]

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I. INTRODUCTION

It is gratifying that the *Texas International Law Journal* has published Preliminary Draft No. 1 of the American Law Institute project on Transnational Rules of Civil Procedure, together with commentaries by civil procedure experts from various parts of the world. This symposium continues a discussion of a legal problem that must be confronted in the years ahead, namely that of international “harmonization” of the rules governing judicial resolution of civil disputes, particularly those arising from international trade and finance.

This essay describes the genesis of the Transnational Rules project, the present stage of the drafting and deliberation process, and some of the basic problems that must be addressed in such a set of rules. In addressing these matters, I refer to “we.” That term includes my colleague and co-reporter, Professor Michele Taruffo of the University of Pavia, Italy. More generally, the term “we” includes the American Law Institute, which has approved the project and is sponsoring its pursuit. Still more generally, the term includes the national and international advisers to that project and all those concerned with the international legal order—lawyers, judges, and legal academicians—who recognize the importance of the law of procedure in the agenda of harmonization of legal systems.

II. GENESIS OF THE PROJECT

The immediate initiative for the ALI project in Transnational Rules of Civil Procedure was a professional collaboration between Professor Taruffo and me that has now continued for more than a decade. At the inception of our collaboration Professor Taruffo had already

[†] Director, American Law Institute; Trustee Professor of Law, University of Pennsylvania. I express appreciation to Dr. Antonio Gidi for assistance in the project and in preparation of this article.

become recognized as a leading thinker and author in the field of comparative civil procedure.¹ Professor Taruffo was a student and professional protégé of Professor Vittorio Dente, his predecessor in the Chair of Comparative Civil Procedure at the University of Pavia and a pioneer in the field of comparative procedural law. He has also done important scholarship in comparative jurisprudence.² I had broad experience in U.S. civil procedure and related subjects,³ but limited acquaintance with foreign law. However, at Yale and other domestic law schools I had worked with several foreign students engaged in LL.M. and other graduate legal studies, and I have taught Comparative Civil Procedure at the University of Pennsylvania Law School.

The collaboration with Professor Taruffo began with my giving lectures in Pavia (in English) concerning certain fundamental legal concepts in U.S. civil procedure that we thought would be of interest in comparative analysis. A number of these lectures have been translated and published in Italian journals.⁴ The collaboration has continued with Professor Taruffo's visits to this country at Yale, Cornell, and Pennsylvania. It culminated in a book we wrote together on American civil procedure, which was published in Italian for a European audience, in English in this country (slightly revised), and in Japanese.⁵ These endeavors have been deeply interesting in themselves and have led us to think that perhaps there was more in common among procedural systems than had been generally supposed.

In this connection it is relevant to observe that both Professor Taruffo and I are strongly appreciative of law practice as well as legal theory. Both he and I, for example, practice law on the side as well as carrying forward our academic pursuits. We also noticed, what is an obvious fact, that law practitioners all over the world are handling international civil legal disputes. To be sure, these disputes are now adjudicated in national

1. MICHELE TARUFFO, *STUDI SULLA RILEVANZA DELLE PROVE* (1970); MICHELE TARUFFO, *LA MOTIVAZIONE DELLA SENTENZA CIVILE* (1975); MICHELE TARUFFO, *IL PROCESSO CIVILE ADVERSARY NELL'ESPERIENZA AMERICANA* (1979); MICHELE TARUFFO, *LA GIUSTIZIA CIVILE IN ITALIA DAL '700 A OGGI* (1980); MICHELE TARUFFO, *IL VERTICE AMBIGUO: SAGGI SULLA CASSAZIONE CIVILE* (1991); MICHELE TARUFFO, *LA PROVA DEI FATTI GIURIDICI: NOZIONE GENERALI* (1992); MICHELE TARUFFO & S. BRAVO, *LE RIFORME DELLA GIUSTIZIA CIVILE* (1993); LUIGI PAOLO COMOGLIO ET AL., *LEZIONI SUL PROCESSO CIVILE* (1995); FEDERICO CARPI ET AL., *COMMENTARIO BREVE AL CODICE DI PROCEDURA CIVILE* (3a ed. 1994); Michele Taruffo, *I limiti soggettivi del giudicato e le "class actions,"* 24 RIVISTA DI DIRITTO PROCESUALE [RIV. DIR. PROC.] 609 (1969); Michele Taruffo, *"Collateral estoppel" e giudicato sulle questioni (I)*, 26 RIV. DIR. PROC. 651 (1971); Michele Taruffo, *"Collateral estoppel" e giudicato sulle questioni (II)*, 27 RIV. DIR. PROC. 272 (1972); Michele Taruffo, *Le prove scientifiche nella recente esperienza statunitense*, 50 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE [RIV. TRIM. DIR. PROC. CIV.] 219 (1996).

2. MICHELE TARUFFO, *GIURISPRUDENZA*, Enc. sc. Soc. treccani, IV, 348; Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis*, in *INTERPRETING STATUTES: A COMPARATIVE STUDY* 461 (D. Neil MacCormick & Robert S. Summers eds., 1991); Michele Taruffo & Massimo La Terre, *Precedent in Italy*, in *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* 141 (D. Neil MacCormick & Robert S. Summers eds., 1997).

3. GEOFFREY C. HAZARD, JR. ET AL., *CASES AND MATERIALS ON PLEADING AND PROCEDURE, STATE AND FEDERAL* (7th ed. 1994); FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* (4th ed. 1992); GEOFFREY C. HAZARD, JR. & W. HODES, *THE LAW OF LAWYERING* (2d ed. 1990); AMERICAN LAW INSTITUTE, *RESTATEMENT (SECOND) OF JUDGMENTS* (1982).

4. Geoffrey C. Hazard, Jr., *Per un approccio manageriale al problema dei ritardi nell'amministrazione della giustizia*, 43 RIV. TRIM. DIR. PROC. CIV. 961, 961-74 (1989); Geoffrey C. Hazard, Jr., *Azioni di responsabilità verso gli amministratori di società commerciali nel diritto statunitense*, RIVISTA SOCIETÀ [RIV. SOCIETÀ] 441 (1994); Geoffrey C. Hazard, Jr. et al., *Perché agli avvocati dovrebbe essere consentito l'uso della pubblicità*, 32 RIVISTA DI DIRITTO CIVILE [RIV. DIR. CIV.] 277 (1986).

5. GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, *AMERICAN CIVIL PROCEDURE: AN INTRODUCTION* (1993); GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, *LA GIUSTIZIA CIVILE NEGLI STATI UNITI* (1993); GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, *INTRODUCTION TO AMERICAN CIVIL PROCEDURE* (translated by Makito Tanabe with the supervision of Professor Yasuhei Taniguchi) (1997).

courts according to local national procedures with all their local differences. Moreover, disputes arising from international transactions are increasingly adjudicated in arbitration according to procedures having general similarity.⁶ However, representing clients in international legal disputes requires that practitioners conducting the litigation be able to explain procedural problems in terms intelligible at least to the lawyers representing those clients back home. This in turn implies that, at some level of specificity, matters of procedure therefore were more or less mutually intelligible. In addition, we both had the suspicion that legal scholarship, in its natural and necessary orientation, emphasizes differences—often subtle ones—rather than commonalities among procedural systems. These observations led us to the conviction that a project for transnational civil procedure was feasible as a matter of basic concepts, even if it might be very difficult as a matter of expression among different legal and cultural backgrounds and even more difficult as a matter of eventual implementation.

Another inspiration was the Model Code of Civil Procedure for Iberoamerica.⁷ The success of that project is reflected not only in the fact that Uruguay adopted it as the national code of civil procedure, but also that some other countries adopted or are considering adoption of some provisions from that Model Code.⁸

Another source of inspiration was the project for approximation of procedural law within the European Community, which had proceeded under the direction of Professor Storme of Belgium.⁹ The report of this project is becoming a standard reference in the comparative study of civil procedure. Professor Taruffo and I, in a further revision, plan to adopt a number of the formulations in that project, notwithstanding that it was based in a somewhat limited sphere—the laws of only the twelve members of the European Community—whereas ours contemplates application worldwide. At the level of general principle, in any event, there is strong encouragement in Professor Storme's reflection upon his project:

In the debates on the unification of procedural law, the same question always arises: Continental v. Common Law? Not only do I find, when it comes down to the "nitty-gritty," that the distinction between the two legal families is less than is believed, but also, as my experience in our working-group showed, that in the final analysis the differences are more of a formal and/or terminological nature.¹⁰

6. The problem with arbitration procedure in international disputes is itself worthy of further attention. The international conventions and contract provisions for arbitration in international legal disputes primarily address jurisdiction, arbitral authority, and recognition of arbitral awards. Generally, these provisions leave to the arbitrator the question of procedural detail. Understandably, the result is that arbitration procedure tends to be determined by the nationality of the arbitrators, particularly the neutral arbitrator in a multi-person panel. The ALI Transnational Rules project accordingly has a parallel project on rules of procedure in international arbitration. See AMERICAN LAW INSTITUTE, *Transnational Rules for Arbitration*, Preliminary Draft No. 1A (Apr. 1, 1998) (unpublished ALI document, on file with the *Texas International Law Journal*).

7. *Anteproyecto del Código Procesal Civil Modelo para Iberoamerica*, 52 REVISTA DE PROCESO [REV. PROC.] 134, reprinted in UN CODICE TIPO DI PROCEDURA CIVILE PER L'AMERICA LATINA 517-609 (1990).

8. Cf. E. Vescovi, *Nuevas Tendencias del Derecho Procesal Civil, con Especial Referencia al Proceso latino-Americano*, 79 REV. PROC. 20 (1995).

9. APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION (Marcel Storme ed., 1994). Professor Marcel Storme is currently the president of the International Association of Procedural Law.

10. *Id.* at 55.

In this connection I must report observations that Professor Taruffo and I have made from the perspective we have assumed in undertaking the Transnational Rules project. As we have labored to establish mutual comprehension, we have repeatedly encountered two phenomena. First, there is no single civil-law model of civil procedure, nor any single common-law model. For example, the German and English systems (one being a civil-law system and the other a common-law one) have conspicuous resemblances to each other that contrast with differences of both from the French and Italian systems. Second, and correlatively, all systems have basic similarities, for example, in the need for both pleadings and proof-taking and for an appropriate balance between the roles of judges and advocates. In this connection it should be observed that the distinction between the "adversary" system (common law) and the "inquisitorial" system (civil law) is generally exaggerated and misleading. Indeed, in certain respects the role of advocates in some civil-law systems is far more "adversarial" than in common-law systems. Litigation in common-law systems is primarily propelled by the activity of advocates, which in turn requires their cooperation, however intense the friction may be through which cooperation is effected. In contrast, in most civil-law systems the litigation is propelled by activity of the judge after the pleading stage. In such systems cooperation between advocates along the lines of common-law procedure is simply unnecessary and therefore is uncommon.

Still another moving force in undertaking our project was the positive development in another ALI project, the Transnational Insolvency Project under the direction of Professor Jay Westbrook of The University of Texas.¹¹ Professor Taruffo and I were well aware of the complexities of harmonizing the law of insolvency. If harmonization in the complicated and culturally sensitive subject of bankruptcy could be achieved, we imagined that it could also be done in the law of civil procedure.

Finally, we were inspired by more general calls for harmonization or unification of law across international boundaries. Nevertheless, Professor Taruffo and I are fully aware of the difficulties involved in this endeavor. Many of the difficulties are presented in the thoughtful papers contributed to this symposium, and there are others as well. The procedural system that is most aberrant—*i.e.*, most distinctive compared with the civil procedure systems of modern nations in general—is the system that applies in U.S. trial courts of general jurisdiction. For this reason, the problem of harmonization of civil procedure can be considered to be primarily a U.S. problem. The task is to devise procedural rules acceptable in this country, for some types of international litigation, that will be substantially compatible with the procedural systems of most of the rest of the world.

III. THE APPROACH

Professor Taruffo and I have adopted a direct approach to devising such a system of procedural rules. We have begun by drafting a code that addresses comprehensively the problems that all procedural systems must face. These include the problems of personal jurisdiction and subject matter jurisdiction, venue, issue formulation (pleading), preliminary procedures, plenary hearing including rules of evidence, appellate review, and subsequent enforcement or attack on a judgment. It will be observed that, with reference to these problems, our Draft often refers "outward" to the rules of the national legal system in which the Rules supposedly have been adopted and are being applied. This is a matter of convenience as well as necessity. This is consistent with Kerameus's observation that

11. AMERICAN LAW INSTITUTE, Transnational Insolvency Project, International Statement of U.S. Bankruptcy Law (Tentative Draft, Apr. 15, 1997).

“international procedural unification can only be partial.”¹² The basic point, however, is that we have brought within view the full scope of procedural problems, running from jurisdiction to judgments, and not merely a subset of these problems.

This “comprehensive” approach requires confrontation of all possibilities of difference and conflict among various procedural systems. That confrontation is advantageous from an intellectual point of view and in long-term perspective. The problems of difference exist and cannot be disregarded. All projects in the harmonization of the subject of civil procedure, even those addressing aspects of limited scope, must deal with these differences.

A notable example is the intense conflict over discovery, particularly discovery of documents that ensued after The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. In retrospect it appears that there may have been inadequate appreciation in the drafting stage of the difference between the law of most countries, particularly civil law systems, and the law and practice of the United States.¹³ A similar set of issues is presented in The Hague Conference project on jurisdiction and recognition of judgments, for which Professor Kessedjian, contributor to this special issue and one of our international advisers, is the Rapporteur: How does the international legal community deal with the fact that the present rules concerning assertion of personal jurisdiction differ substantially from one legal system to another?¹⁴ The precise terms for resolving such questions are difficult and contentious. The point is that, in an endeavor at international harmonization of law, all such problems must sooner or later be addressed.

The comprehensive approach, however, is disadvantageous strategically and in the shorter term. It opens the project to a wide range of criticism on all possible grounds, a good many of which are advanced by the contributors to this symposium. The comprehensive approach also reveals how difficult it will be to obtain acceptance of the proposal, or even its serious consideration, at the law-making stage of the political process.

In drafting these Rules, we found problems of language and terminology in addition to differences in the systems of civil procedure. It is very difficult to find terminology that would be equally understood and applied by the courts in England and Brazil, in Canada and Germany. This problem was also felt in the attempt of Approximation of Judiciary Law in the European Community, which dealt with a more limited group of countries (the twelve members of the European Community). As noted by its reporter, Professor Storme, “divergent procedures conceal themselves under the same name” and “similar institutes, serving similar purposes, conceal themselves under different names.”¹⁵

These problems of system and terminology converge into problems of procedural ethos—underlying fundamental concepts concerning the very nature of the administration of justice. Differences in these fundamental concepts are related in the challenging paper written by Professor Walter and Mr. Baumgartner.¹⁶ Addressing these concepts and the manifest and subtle differences among them are a necessary ingredient of this project.

12. Konstantinos D. Kerameus, *Procedural Unification: The Need and the Limitations*, in INTERNATIONAL PERSPECTIVES ON CIVIL JUSTICE 54 (I.R. Scott ed., 1990).

13. See Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1017–20 (1998).

14. See generally CATHERINE KESSEDIAN, INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (1997). Professor Kessedjian, one of the contributors to this symposium, is the principal Rapporteur for that important project.

15. APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION, *supra* note 9, at 56.

16. Gerhard Walter & Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 33 TEX. INT'L L.J. 463 (1998).

However, concerning the issue of comprehensiveness, Professor Taruffo and I are encouraged by the example of the Federal Rules of Civil Procedure in the United States. The Rules were promulgated in 1938 after a half-century of controversy over whether a uniform set of rules for the federal courts was preferable—or even possible—in displacement of the previous regime of “conformity” of federal procedure to the procedural law of the several states.¹⁷

IV. LIMITED SCOPE

The Transnational Rules of Civil Procedure undertake comprehensiveness in terms of “horizontal” scope, as indicated above, by addressing international litigation from inception to conclusion. However, the Rules are not comprehensive in “vertical” scope—they do not apply to all types of civil controversies, but only to a limited set. The precise definition of the set for inclusion remains to be worked out. Our definition in the present draft is in terms of the identity of the parties: An international legal dispute is one in which the parties are different nationals.¹⁸ In this respect, the project is quite different from that undertaken by Professor Storme’s European harmonization project. The scope of that project included all domestic as well as international civil cases in the trial courts of general jurisdiction of the European civil-law systems.

In this respect it is perhaps useful to address the criticism that special rules of procedure for international transactions would introduce multiplicity—“another set of rules”—and discrimination.¹⁹ This is certainly a consideration to be taken into account. However, the ultimate premise of this criticism must be that a proper legal system should have one set of procedural rules for civil disputes. Yet the fact is that no modern legal system has a single set of procedures for adjudicating civil controversies.

To be sure, most legal systems have one basic code of civil procedure governing adjudication in their trial courts of general jurisdiction. Nevertheless, even these systems have variations or subsystems for certain types of litigation, for example litigation concerning family affairs.²⁰ Practically all legal systems also have different sets of rules for adjudications in specialized courts, for example labor courts or tribunals administering claims for social benefits. In the United States, with our federal legal system, we have long been accustomed to two coexistent legal systems, state and federal, within each of which there are several procedural subsystems. Thus, in the federal courts there are distinct Bankruptcy Rules and Admiralty Rules, to say nothing of the procedures in various administrative agencies, and there are similar multiple procedural systems in the states. Perhaps it can be said that from the viewpoint of *judges*, there is only one procedural law in typical legal systems. The typical judge, whether in a civil court or a labor court, must administer only one set of rules. From the viewpoint of the clients and their legal advisers, however, the situation is very different. The parties to legal disputes realize that their affairs have been regulated by multiple bodies of substantive law and will be adjudicated according to multiple procedural regimes. In an international transaction today, the prospect of such legal multiplicity is of course increased.

17. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1001–08 (2d ed. 1987).

18. This definition will probably be changed to refer to “habitual residence” rather than nationality, in accordance with growing usage of the former concept.

19. See generally Gary B. Born, *Critical Observations on the Draft Transnational Rules of Civil Procedure*, 33 *TEX. INT’L L.J.* 387 (1998).

20. See, e.g., §§ 606–20 *Zivilprozessordnung* [ZPO] (1994).

At all events, the ALI Transnational Rules of Civil Procedure are addressed, not to civil litigation generally, but to a limited number of controversies whose characteristic is that they arise in an international transaction. The precise definition of that limited scope is itself an important and difficult matter.

V. VIEWS OF THE PROJECT

Any such project, if it has substantial content, will attract conflicting views. Some of those views are expressed herein. Other critical views have been expressed in other forums and in the advisory meetings that are integral to ALI projects.²¹

We have already presented this project in forums across the world. In those presentations, we received contributions from scholars and practitioners from diverse backgrounds. Many of these contributions have already been incorporated in revisions we have done thus far.

Professor Taruffo and I appreciate those criticisms because they advance points and considerations that we had not considered or had not adequately considered. At the same time, we assure readers and colleagues that we have given at least preliminary consideration to most of the criticisms we have heard, and to many others whose significance may lie undetected beneath phrases in our formulations. Let me briefly review some of the principal criticisms, if only to indicate that Professor Taruffo and I have sought to listen carefully.

A first criticism is that there is no need for such a new set of rules.²² Every country has a satisfactorily established legal system with its own rules, and moreover, arbitration pursuant to agreement is ubiquitously employed.

However, it is not true that every country has a system of civil procedure that it finds satisfactory. Many countries have been or are presently engaged in revisions, some of them substantial, of their domestic rules of civil procedure. Notable examples are the extensive reforms recently adopted in the Japanese Code of Civil Procedure²³ and those proposed in the Woolf Report in England,²⁴ which are now being implemented. There are similar reform efforts underway in Italy and Spain. There are recent and pending revisions of important civil rules in this country, notably those concerning discovery and class actions.²⁵

Moreover, there is tension, if not contradiction, between the proposition that the world's present civil procedure systems are satisfactory and the proposition that arbitration is ubiquitously employed: if the national legal systems were fully satisfactory, then arbitration would not be so ubiquitous. More fundamentally, all legal systems strive to reduce the risk that the outcome of an adjudication can depend merely on the forum in which it is adjudicated. Ameliorating that risk is the very purpose of private international law, choice of law as it is also called. One way of ameliorating that risk is through rules of

21. Every ALI project involves drafting cycles including a preliminary draft reviewed by Advisers, a revision presented to the ALI Council, and a further revision presented to the Institute's annual meeting. Most ALI projects, including this one, proceed through such a drafting cycle more than once. For the Transnational Rules project, advisers have been designated from around the world and from all major legal systems.

22. See Russell J. Weintraub, *Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 413 (1998).

23. Code of Civil Procedure, in *DOING BUSINESS IN JAPAN* (MB), Statute Vol. II, Law No. 109 (1996).

24. LORD WOOLF OF BARNES, *ACCESS TO JUSTICE, FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES* (1996).

25. FED. R. CIV. P. 23, 26.

private international law, issues which Professors Dolinger and Tiburcio and Professor Weintraub address herein.²⁶ It is clear that rules of private international law are essential in a social system constituted from more than one political regime. Since our world consists of multiple political regimes, and certainly will in the future, private international law remains essential.

However, another way of ameliorating the risk of different outcomes being dependent on forum is adoption of legal rules that transcend the limits of the multiple political regimes. That is precisely the character of international law—legal rules that govern in every nation. From time immemorial, there have been rules of international law, primarily in the areas of commercial contracts and proto-admiralty law. The practical pressures for enlarging the scope of international law are increasing everywhere and every day; witness the important project of The Hague Conference on Private International Law.²⁷ The continuing need for such rules is as clear as the need for private international law. The world legal order of the past and certainly the world legal order of the future will continue to require both international law and choice of law rules which reference the local law of various states.

The difficult question, therefore, concerns the specific subject matter that might be governed by choice of law and that which ought to be governed by uniform international law. The valuable analyses by Professors Dolinger, Tiburcio, and Weintraub suggest that the present draft of the Transnational Rules does not take adequate account of the range of issues concerning which local law should apply, guided by selection criteria in the rules of private international law.²⁸

A second criticism is that, to the extent that there is need for uniformity across national borders, the need is greatest in matters of substantive law, for example in commercial law. Hence, a project for uniform rules of procedure is in any event premature.

Undoubtedly the need for international uniformity is greatest in commercial law and many centers are working diligently to meet that need. Nevertheless, there is good reason to address procedural law. Procedure makes a difference. Some would say all the difference in the world. As noted above, it is a fundamental deficiency of a world legal order that the outcome of legal disputes can be substantially different depending on the forum, notwithstanding that the same substantive law is applied. The justification for the project for Approximation of Judiciary Law in the European Community was that the lack of uniformity of procedural rules causes “distortion of free competition and alteration of the trade flow.”²⁹

Of course, legal realists recognize that a critical variable in adjudication is the mentality and competence of individual judges and that this variable is largely beyond control through legal rules. However, reduction of differences in procedural systems must be an objective of all who are seriously interested in the concept of equality before the law. That being so, and if it is accepted that procedure makes a difference, the law of procedure must be on the agenda for harmonization.

At the same time, it must be recognized that procedural law presents the most difficult challenge to efforts at world uniformity. No other body of law so deeply reflects a nation's

26. See Jacob Dolinger & Carmen Tiburcio, *The Forum Law Rule in International Litigation—Which Procedural Law Governs Proceedings to be Performed in Foreign Jurisdictions: Lex Fori or Lex Diligentiae?*, 33 TEX. INT'L L.J. 425 (1998); Weintraub, *supra* note 22.

27. CATHERINE KESSEDIAN, *supra* note 14.

28. See Dolinger & Tiburcio, *supra* note 26; Weintraub, *supra* note 22.

29. See Constantinos D. Kerameus, *supra* note 12, at 50; see also APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION, *supra* note 9, at 46, 59, and 69–70.

social and cultural traditions or is so deeply embedded in its constitutional and political structures. Concerning the law of procedure, in some sense law *is* "politics" in the comprehensive connotation of that term.³⁰ On the other hand, for those very reasons, addressing the law of procedure is a means of probing deepest presuppositions in the legal systems of the world's various regimes.

In more parochial terms, a justification for a project on procedure in the present time is that harmonization of procedure is so complicated and generally takes so long. Those of us in this country should recall that reform of common-law procedure took almost a century between the time that Blackstone expounded the deficiencies of the common law and adoption of the Field Code in New York and that the project culminating in the Federal Rules of Civil Procedure required another half century. The unfortunate termination of Professor Storme's admirable project for harmonization of procedure within the civil law systems of Europe is another reminder.

A third criticism is that a new set of rules will result in discrimination among litigants. More specifically, if the proposed rules or something like them were adopted in the United States, the discrimination will be adverse to smaller U.S. businesses. This is the thesis presented in the paper by Gary Born in this symposium.³¹ Again, there is force to the point, but there are also competing considerations.

Mr. Born is undoubtedly correct that some smaller businesses would be disadvantaged in specific legal controversies by the rules proposed in the draft Transnational Rules of Civil Procedure compared with the rules that ordinarily govern civil litigation in this country. He cites as advantageous to small businesses the availability of jury trial, broad discovery, and the "American" cost-rule under which the winner does not receive attorney's fees. However, it is also the case that smaller businesses would be distinctly advantaged by the proposed rules. Jury trial probably is ordinarily favorable in a contest between a small business and a large one, but not so in a contest between a small business and an individual or between businesses that are both small. Jury trial is in any event ordinarily more costly than nonjury trial, and other things being equal, a small business has less financial staying power than a big one. Broad discovery may be advantageous in some cases against big companies, but it can also be ruinously expensive for a small business. And the "American" rule concerning costs is a deterrent against a litigant who has a good claim on the merits but weaker financial resources than the opponent. It can be asked, if the present U.S. procedural regime is so balanced against big businesses, how can we explain the litigation strategy of the tobacco companies against claims of lung cancer victims?

More generally, one cannot predict with any degree of confidence the incentive effects of changes in rules of procedure, particularly a package of interacting changes such as set forth in the draft Transnational Rules. The changes may or may not relocate the fulcrum of the incentive structure for any given type of litigation. In any event, I venture to say that most observers outside the United States would think that the litigating incentive structure in the Transnational Rules, so far as it can be estimated, is "fairer" than that afforded under the prevailing U.S. version.

30. For one statement recognizing this characteristic of the law of procedure, see Geoffrey C. Hazard, Jr., *Harmonization of Procedural Law*, 44 J. CIV. PROC. 70 (1997).

31. See Born, *supra* note 19.

VI. CONCLUSION: A “FAIR” SYSTEM OF CIVIL PROCEDURE?

The fundamental issue posed by the Transnational Rules project is, in my view, whether it is possible to converse across national borders, in different languages based on different cultural traditions, about “fairness” in adjudication of civil disputes.

It is certainly possible to converse about the concept of fairness as an abstract proposition. It is possible to make comparisons of sorts between specific rules, such as the discovery rules or the rule governing litigation costs. It is much more difficult to address the concept in concrete terms for an entire procedural code. However, such a conversation is a necessary predicate for eventual harmonization of procedural systems. Conversation about procedural advantage and disadvantage is the essence of comparative law, a discipline that can be applied to procedure as well as to substantive law.

In this connection it is useful to reflect on implications of the “explosion” in constitutional law since World War II. The concept of constitutional guarantees is, in essence, legal rules that supersede the provisions of administrative regulation and legislation and that are enforceable through judicial proceedings. This concept is becoming a norm recognized worldwide. A familiar example is the European Court. Salient among constitutional guarantees is that of “due process” or freedom from “arbitrary” decisions: Call the concept simply procedural fairness. That concept must be given content in the course of the new constitutional jurisprudence. It is a historical fact of the U.S. legal experience that the technical content of our Due Process Clause has substantially derived from previously established rules of ordinary criminal and civil procedure evolved in our courts. A similar parallel development between constitutional concept and procedural code specification can be anticipated at the transnational level.

Conversation about procedural advantage and disadvantage is also part of the professional lore of every lawyer consulted about a controversy that could be adjudicated in more than one forum—whether the choice may lie between state and federal court in this country or between litigation here and litigation in another country. The range of that professional lore has necessarily expanded to become global as trade and commerce have become global. It is much appreciated that the *Texas International Law Journal* has afforded this opportunity for extending the conversation.