

## Geoffrey C. Hazard, Jr.: An American in Paris\*

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It was October 27, 2000, on Philippe Fouchard's initiative, that the Departments of International Law, European Law, International Relations and Comparative Law of the University of Panthéon-Assas (Paris II) organized a workshop day with the cooperation of the American Law Institute.

The purpose of this meeting was to submit the ALI project “Transnational Rules of Civil Procedure” for examination and assessment by European—mainly French—experts. This day in Paris was only one stage in a tour around the world that would lead the promoters of the project, Geoffrey Hazard and Michele Taruffo, “*da Parigi a Mosca, da Pechino a Singapore, realizzando ore e giorni di discussione con decine di avvocati, di giudici e di professori dei vari paesi.*”<sup>1</sup>

This meeting was very challenging for the ALI project and its promoters. I have to acknowledge the promoters' even-headedness during the strenuous, almost physical, discussions about the project.<sup>2</sup>

This discussion reflected how difficult it is to reach a mutual understanding between American and French lawyers, and more generally between *common-law* and *civil-law* lawyers (to use a classical but far outdated distinction comparative studies are traditionally based on). That point was actually the central subject of the symposium organized in Toronto in 2009 by Janet Walker and Oscar Chase for the International Association of Procedural Law.<sup>3</sup> I had the

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\* AN AMERICAN IN PARIS (Metro-Goldwyn-Mayer 1951). May I be forgiven for this obvious reference to the magnificent, and unforgettable, film written by George Gershwin and directed by Vincente Minnelli. I was in Paris when I first met this cultivated, elegant, lovely man who was also a great altruist.

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1. Michele Taruffo, Obituary, *Geoffrey C. Hazard*, 72 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE [Q. REV. L. & CIV. PROC.] 131, 131–32 (2018) (translating to “from Paris to Moscow, from Beijing to Singapore, creating hours and days of discussion with dozens of lawyers, judges and professors from various countries”).

2. PHILIPPE FOUCHARD, VERS UN PROCÈS CIVIL UNIVERSEL? LES RÈGLES TRANSNATIONALES DE PROCÉDURE CIVILE DE L'AMERICAN LAW INSTITUTE [TOWARDS A UNIVERSAL CIVIL TRIAL? THE TRANSNATIONAL RULES OF CIVIL PROCEDURE OF THE AMERICAN LAW INSTITUTE] (2001) (discussing the active debate surrounding the adoption of the ALI Transnational Principles).

3. See Janet Walker & Oscar G. Chase, *Preface*, in COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES vii (Janet Walker & Oscar G. Chase eds., 2010).

pleasure of meeting Geoffrey Hazard on that occasion. The organizers of that event had asked us to end the symposium by looking to the future.<sup>4</sup>

It can be difficult to reconcile civil law and common law, especially when the systems diverge drastically (compare management of *discovery* or the jury during the trial in America versus France). This difficulty seems to center around the very notions that structure legal reasoning in the two systems. For example, a French lawyer, with Roman-law inheritance, will have a different understanding of common law and civil law. Indeed, he does not translate them but keeps them separate, because, in his mind, the French translations *droit civil* and *droit commun* refer to something very different.<sup>5</sup>

However, mutual misunderstanding is not inevitable.

Three years after the Paris symposium Geoffrey Hazard and Michele Taruffo came back to France, but this time they went to Lyon on June 12, 2003, at the invitation of Frédérique Ferrand, in order to present the April 2003 version of the project<sup>6</sup> and submit it to discussion. By that time the project had become a joint project of UNIDROIT and the American Law Institute, and it was no longer a mere set of *technical rules*, but it had also added a concise corpus of *fundamental principles* of transnational civil procedure.<sup>7</sup>

Saying that this second meeting went way better is not descriptive enough. The calming down was neither due to the very hot, fine day of June, nor to the slow digestion of Lyon's haute cuisine. Rather, it was the consensus that our colleagues eventually managed to reach after working together for months. This consensus was not the result of spontaneous adjustments that had come out as if by magic.

First, the promoters of the project perfectly understood that the scope of the transnational rules project had to be narrowed down in order to avoid the obstacles formed by the main characteristics of the U.S. legal system:

if such a project is feasible, it is not feasible if it correspond in any substantial way to characteristic U.S. procedure.

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4. See JANET WALKER, *Looking Ahead: The Future of Categories—Categories of the Future*, in COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES, *supra* note 3, at 631–33.

5. From Latin *jus commune*, "*droit commun*" stands for the set of rules which generally govern a given territory, a given population or a given situation. From Latin *jus civile*, in France and more generally in the Romano-Germanic tradition, "*droit civil*" stands for the set of rules which normally govern relationships between individuals. It covers the law ruling the rights of persons, family law (which includes non-pecuniary aspects: marriages and dissolutions of a couple, filiation; and pecuniary aspects: prenuptial agreements, wills and trusts), property law, contract law and torts. It is funny that the words *fondation pour le droit continental* are the ones ultimately chosen to translate the Civil Law Initiative, an organization which originated in France in order to promote judicial systems with Roman Germanic traditions. See FONDATION POUR LE DROIT CONTINENTAL [FOUNDATION FOR CONTINENTAL LAW], <http://www.fondation-droitcontinental.org> (last visited Apr. 16, 2019).

6. FRÉDÉRIQUE FERRAND, LA PROCÉDURE CIVILE MONDIALE MODÉLISÉE [THE MODELED GLOBAL CIVIL PROCEDURE] (2004).

7. AM. LAW INST. & UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2006) [hereinafter PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE].

We conclude that a system of procedure acceptable generally throughout the world could not require jury trial and would require much more limited discovery than is typical in the United States.<sup>8</sup>

That is why the project was ultimately limited to the resolution of transnational commercial disputes. And why the initial choice that consisted of drawing up a *corpus* of detailed *rules* had been complemented by drawing up *principles* of transnational civil procedure, whose generality leaves less room for dissent than technical rules of law.<sup>9</sup> As everyone knows, the devil is in the details.

I must also underline that pragmatic rapprochements—a word that has been used several times—generated by fundamental principles can be considered common to all legal systems, at least in the letter of their judicial standards, but not always in their actual practices.<sup>10</sup>

But these rapprochements were possible only thanks to the evolutions achieved in the past decades, whether internationally or within national legal systems.

In the international order, I am specially thinking of the emergence of a European judicial space—article 6, section 1 of the European Convention on Human Rights (ECHR),<sup>11</sup> and article 47 of the Charter of Fundamental Rights of the European Union (CFREU)<sup>12</sup> represent the most visible common denominator. With the right to a fair trial (article 6 of the ECHR) and the right to effective judicial protection (article 47 CFREU), universalization of procedural law is gradually taking place in the order of fundamental values of society. These values transcend both national borders and the borders of a trial, like, for example, ones that separate civil procedure from criminal procedure or administrative procedure.

The reform of the English rules of civil procedure, carried out at the end of last century following the report made by Lord Woolf, who confessed that by moving to the middle of the English Channel, the English civil trial had turned

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8. Geoffrey C. Hazard, Jr., et al., *Reporters' Preface to PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE*, *supra* note 7, at xxvii. It was the American exceptionalism rather than the specific features of common law that was challenged. See Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 279–80 (2002).

9. See Frédérique Ferrand, *Les 'Principes' relatifs à la procédure civile transnationale sont-ils autosuffisants?—De la nécessité ou non de les assortir de 'Règles' dans le projet ALI / Unidroit [Are the "Principles" of Transnational Civil Procedure Self-Sufficient?—Whether or not to Have "Rules" in the ALI/UNIDROIT Project]*, 6 UNIFORM L. REV. 995 (2001).

10. See Frédérique Ferrand, *Les Principes ALI/UNIDROIT de procédure civile transnationale, entre concurrence et compromis [The ALI / UNIDROIT Principles of Transnational Civil Procedure, Between Competition and Compromise]*, in LA CONCURRENCE DES SYSTÈMES JURIDIQUES [COMPETITION OF LEGAL SYSTEMS] 63 (Jean du Bois de Gaudusson & Frédérique Ferrand eds., 2008); see also Neil Andrews, *The Modern Procedural Synthesis: The American Law Institute and UNIDROIT's "Principles and Rules of Transnational Civil Procedure"*, 165 REVISTO DO PROCESSO 109 (2008).

11. Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4 1950, 213 U.N.T.S. 221.

12. Charter of Fundamental Rights of the European Union art. 10, Dec. 18, 2000, 2000 O.J. (C 364) 10.

continental, certainly helped.<sup>13</sup> This rapprochement by the English legal system with what is called Romano-Germanic legal systems of continental Europe has been determinant in the definition of the Principles of Transnational Civil Procedure, as noted by Professor Stürner in his inaugural speech in Mexico during the twelfth world conference of the International Association of Procedural Law.<sup>14</sup> Rapprochements also occurred the other way around, one example is the reform of some items of Spanish civil procedure at the beginning of the 2000s, like the rules of expertise meets with common law solutions.<sup>15</sup>

The idea first appeared during the above-mentioned meeting in Lyon when the scope of ALI/UNIDROIT principles had been raised. I suggested that these principles be considered as a starting point for the development of European principles of civil procedure. Ten years later, the idea gradually took shape with the foundation of the European Law Institute in 2011<sup>16</sup> which built upon them an ambitious project of European Rules of Civil Procedure<sup>17</sup> that is expected to be completed by 2019.<sup>18</sup>

This project was launched in the fall of 2013 during a workshop day in Vienna, Austria, where the institute has its headquarters. The minutes were published in the *Uniform Law Review*.<sup>19</sup> There one can find Geoff's preliminary

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13. See LORD WOOLF, *THE PURSUIT OF JUSTICE* 401 (Christopher Campbell-Holt ed., 2008) ("Our civil procedure is now much closer to the French. As I like to describe it, it is situated somewhere in the middle of the English channel, *au milieu de la manche*.").

14. See ROLF STÜRNER, *Procédure civile et culture juridique* [*Civil Procedure and Legal Culture*], 56 *REVUE INTERNATIONALE DE DROIT COMPARÉ* [INT'L J. COMP. L.] 797 (2004). Rolf Stürner had been in charge of preparing a feasibility study on UNIDROIT Transnational Rules of Civil Procedure based on the ALI project, and was a co-reporter with Geoffrey Hazard and Michele Taruffo for ALI/UNIDROIT project Principles and Rules of Transnational Civil Procedure. See *PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE*, *supra* note 7, at xxvii–xxviii.

15. See Francisco Ramos Méndez, *La Conception du Procès Civil hors de France: Le Cas Espagnol* [*Civil Trial Design Outside France: The Spanish Case*], in 1806–1976–2006: DE LA COMMÉMORATION D'UN CODE À L'AUTRE: 200 ANS DE PROCÉDURE CIVILE EN FRANCE [FROM COMMEMORATION OF ONE CODE TO ANOTHER: 200 YEARS OF CIVIL PROCEDURE IN FRANCE] 311 (Loïc Cadet & Guy Canivet eds., 2006). Many other such examples could be given, making it possible to understand why the project of developing European rules of civil procedure, which is currently in progress, has started.

16. *About the Eli*, EUR. L. INST., <https://www.europeanlawinstitute.eu/about-the-eli/> (last visited Apr. 16, 2019) ("[T]he European Law Institute (ELI) aims to improve the quality of European law, understood in the broadest sense. It seeks to initiate, conduct and facilitate research, to make recommendations, and to provide practical guidance in the field of European legal development.").

17. Excluding the status of individuals, family litigation and insolvency proceedings.

18. *Transnational Principles to European Rules of Civil Procedure*, EUR. L. INST., <https://www.europeanlawinstitute.eu/about-the-eli/bodies/general-assembly/default-title/transnational-principles-to-european-rules-of-civil-procedure/> (last visited Apr. 16, 2019). Various working groups that have worked on civil procedure participated in the project, including Obligations of Parties, Lawyers and Judges, Service and Due Notice of Proceedings, Provisional and Protective Measures, Access to Information and Evidence, Res Judicata and Lis Pendens, Judgments, Costs. The overarching group on *Structure* consolidated works from these working groups.

19. Editorial Board, *ELI-UNIDROIT First Explanatory Workshop: 'From Transnational Principles to European Rules of Civil Procedure'*, 19 *UNIFORM L. REV.* 171 (2014).

observations on the ELI/UNIDROIT project in the light of the ALI/UNIDROIT project.<sup>20</sup>

Ten years after the symposium in Lyon, it was satisfying to see the cooperation between UNIDROIT and ELI—while a binding instrument (like EU regulations or directives) was not produced, a sort of model code of civil procedure was created.<sup>21</sup> This harmonization is the horizon of a path that Europe has followed since the September 27, 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.<sup>22</sup> On this long, difficult, legal path, a scholar project emerged at the beginning of the 1990s on the possible features of a global harmonization of European civil procedures—the project of the Commission chaired by Marcel Storme, another giant in civil procedure who passed this year, three months after Geoffrey Hazard.<sup>23</sup>

During the opening conference in Vienna, Geoffrey Hazard again showed his outstanding qualities: His willingness to sharing his science, his care and dialogue, and his expert advice on how to proceed through technical and political difficulties. Geoffrey was certainly not just a technical expert in law, he was an expert of the law.<sup>24</sup>

With great logic, he wrote the following words in the Principles of Transnational Civil Procedure's foreword:

In this era of globalization, the world is marching in two directions. One path is of separation and isolationism, which war and turmoil: In such a world, this project is useless and unwelcome. The other path is increasing exchange of products and ideas among the peoples of the world; this path underscores the need for a transnational civil procedure.<sup>25</sup>

The question is to know which path today's world is following.

At the Vienna conference, I stated the following:

Here the political question behind the technical issue arises. Indeed, it is not possible to gloss over a going skepticism everywhere towards Europe, even

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20. Geoffrey C. Hazard, Jr., *Some Preliminary Observations on the Proposed ELI/UNIDROIT Civil Procedure Project in the Light of the Experience of the ALI/UNIDROIT Project*, 19 UNIFORM L. REV. 176 (2014).

21. See, e.g., EL CODIGO PROCESAL CIVIL MÓDELO PARA IBEROAMERICA [MODEL CODE OF CIVIL PROCEDURE] (IBEROAMERICAN INST. PROCEDURAL L. 1988), <http://www.iibdp.org/es/codigos-modelo.html>.

22. See Council Regulation 2016/1104, 2016 O.J. (L 183) 1 (implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships); see also Council Regulation 1215/2012, art. 39, 2012 O.J. (L 351) 14 (“A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.”).

23. RAPPROCHEMENT DU DROIT JUDICIAIRE DE L'UNION EUROPÉENNE [APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION] (Marcel Storme ed., 1996).

24. But isn't law a technique serving goals that overtake it? See Taruffo, *supra* note 1 (“Geoff era il tipico intellettuale americano di alta cultura, con una grande curiosità su una quantità di problemi, giuridici e filosofici, e cercava in ogni modo di soddisfare questa curiosità non solo leggendo molti libri, ma anche dialogando con chi in qualche modo poteva aiutarlo o conoscere altri sistemi ed altri modelli di pensiero.”).

25. Hazard et al., *supra* note 8, at xxvii–xxviii.

among scholars. This skepticism has reached an alarming proportion with the rise of a populism that everywhere denounces the European construction as the source of all current problems. We cannot bury our head in the sand. Realism must be a keyword of our work beyond the enthusiastic and stimulating pleasure of sharing an ambitious project for the legal future of Europe.<sup>26</sup>

My feeling is that the situation has not improved in that regard. The entire world, the western world included, has not been saved by the trend towards withdrawing into oneself, mistrusting the other, expanding unilateralism and enforcing un-liberalism.

I do not think this trend would get the approval of the world-oriented man that Geoffrey Hazard was. There will always be a lack of people like him. Of course, this is not a reason to give up on the brotherhood-project in an international society ruled by law. His work is a lesson about realistic yet confident perseverance.

Paris, July 14, 2018

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26. Loïc Cadiet, *The ALI-UNIDROIT Project: From Transnational Principles to European Rules of Civil Procedure*, 19 UNIFORM L. REV. 292, 294 (2014).