Ius Comparatum – Global Studies in Comparative Law

Katharina Boele-Woelki
Diego P. Fernández Arroyo *Editors*

Current Issues of Comparative Law – Questions actuelles de droit comparé

General Contributions of 2018 Fukuoka Congress – Contributions générales du Congrès de Fukuoka 2018

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Ius Comparatum – Global Studies in Comparative Law

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As globalization proceeds, the significance of the comparative approach in legal scholarship increases. The IACL / AIDC with almost 800 members is the major universal organization promoting comparative research in law and organizing congresses with hundreds of participants in all parts of the world. The results of those congresses should be disseminated and be available for legal scholars in a single book series which would make both the Academy and its contribution to comparative law more visible. The series aims to publish the scholarship emerging from the congresses of IACL / AIDC, including: 1. of the General Congresses of Comparative Law, which take place every 4 years (Brisbane 2002; Utrecht 2006, Washington 2010, Vienna 2014, Fukuoka 2018 etc.) and which generate (a) one volume of General Reports edited by the local organizers of the Congress; (b) up to 30 volumes of selected thematic reports dealing with the topics of the single sections of the congress and containing the General Report as well as the National Reports of that section; these volumes would be edited by the General Reporters of the respective sections; 2. the volumes containing selected contributions to the smaller (2-3 days) thematic congresses which take place between the International Congresses (Mexico 2008; Taipei 2012; Montevideo 2016 etc.); these congresses have a general theme such as "Codification" or "The Enforcement of Law" and will be edited by the local organizers of the respective Congress All publications may contain contributions in English and French, the official languages of the Academy.

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Académie internationale de droit comparé
International Academy of Comparative Law

Katharina Boele-Woelki •
Diego P. Fernández Arroyo
Editors

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Préface / Preface

Préface

Du 22 au 28 juillet 2018, l'Académie internationale de droit comparé a organisé son 20eme Congrès général à Fukuoka au Japon. Les congrès généraux de l'Académie se tiennent tous les quatre ans et abordent dans une perspective comparative une multitude de sujets qui apparaissent particulièrement pertinents dans notre société contemporaine.

Différents types d'activités ont été proposés à Fukuoka. Ces différents types d'activités ont eu lieu en parallèle, autorisant ainsi les participant(e)s à se concentrer sur leurs intérêts personnels en préparant le programme de leur choix. Le lecteur ne pourra que vérifier l'extraordinaire richesse du Congrès en consultant le programme reproduit à la fin du présent ouvrage.

Le Congrès général a incontestablement été un succès sur le plan académique. Le Bureau de l'Académie tient à remercier la centaine d'intervenant(e)s venus des quatre coins du globe venant pour

Preface

On 22 to 28 July 2018, the International Academy of Comparative Law organized its 20th General Congress in Fukuoka, Japan. The General Congresses of the Academy are held every four years and address, from a comparative perspective, a multitude of topics that appear particularly relevant in our contemporary society.

Different types of activities have been proposed in Fukuoka. These different types of activities took place in parallel, allowing the participants to focus on their personal interests by preparing the program of their choice. The reader will verify the extraordinary richness of the Congress by reading the programme which is reproduced at the end of this book.

The General Congress has undoubtedly been an academic success. The Executive Committee of the Academy would like to thank the (over) hundred speakers which came from all around

représenter près d'une quarantaine de systèmes juridiques pendant le Congrès. Avec plus de 800 participant(e)s, le Congrès a battu tous les records de participation.

the world to represent almost 40 legal systems at the Congress. With over 800 participants, the Congress broke all records of participation.

La conférence inaugurale a été délivrée par la juge en chef de la Haute Cour d'Australie Mme Susan Kiefel sur l'importance du droit comparé pour le système judiciaire des juridictions de common law.

The Inaugural Lecture was delivered by the Hon. Chief Justice of the High Court of Australia Susan Kiefel on the importance of comparative law for the judicial system of common law jurisdictions.

3 ateliers ont offert un forum académique dynamique et interactif. Des matériaux ont notamment été communiqués à l'avance afin de pouvoir préparer ces ateliers. Ce type d'activité innovante a été lancé avec succès a l'occasion du précédent Congrès thématique de Montevideo qui a eu lieu en 2016.

3 Workshops offered a dynamic and interactive academic forum. In particular, materials were provided in advance in order to prepare these workshops. This type of innovative activity was successfully launched during the previous Montevideo Thematic Congress in 2016.

4 tables rondes ont créé une remarquable interaction entre experts venus des quatre coins du globe pour discuter de thématiques très spécifiques.

4 Round Tables created a remarkable interaction between experts from around the globe to discuss very specific thematics.

29 rapports généraux ont été présentés à Fukuoka. Ces derniers ont été préparés depuis 2016 selon le schéma traditionnel de l'Académie, c.à.d. l'élaboration d'un rapport général sur la base de rapports spéciaux (adoptant une approche nationale, régionale ou institutionnelle). Chaque rapport général fera l'objet d'une publication dédiée avec les rapports nationaux correspondant. L'ensemble des rapports généraux sera par ailleurs publié dans un unique ouvrage.

29 General Reports were presented in Fukuoka. These have been prepared since 2016 according to the traditional scheme of the Academy, i.e. the preparation of a general report based on special reports (adopting a national, regional or institutional approach). Each General Report will result in a dedicated publication with the corresponding national reports. All the General Reports will furthermore be published in a unique book.

9 réunions déjeunatoires ont permis de poursuivre les réflexions sur le droit comparé dans un cadre plus informel pendant le déjeuner.

9 Luncheon Meetings allowed further reflection on comparative law in a more informal setting during lunch.

Les participant(e)s ont également pu participer à un "congrès dans le congrès" sur une thématique ciblée : la nouvelle technologie, l'économie de l'innovation et le droit.
Enfin, les participants ont également pu assister à un forum des jeunes chercheurs en droit comparé où ces derniers ont pu présenter leurs plus récents travaux de recherches.

The participants were also able to participate in a "Congress in the Congress" on a specific theme: the new technology, the economy of innovation and the law.

Finally, participants were also able to attend a Younger Scholars' Forum in comparative law where the latter were able to present their latest research.

L'assemblée générale de l'Académie qui s'est tenue à la fin du Congrès a permis le renouvellement partiel du Bureau. Le nouveau Bureau est présenté à la fin du présent ouvrage.

The General Assembly of the Academy held at the end of the Congress allowed for the partial renewal of the Executive Committee. The new Executive Committee is presented at the end of this book.

Le prochain Congrès général aura lieu en 2022 à Asuncíon au Paraguay. Nous sommes confiants que cette nouvelle activité de notre Académie presque centenaire sera aussi riche sur les plans académique et humain comme ce fut le cas à Fukuoka.

The next General Congress will be held in 2022 in Asuncíon, Paraguay. We are confident that this new activity of our nearly 100-year-old Academy will be as enriching on the academic and personal level as it was the case in Fukuoka.

Le présent ouvrage contient des contributions présentées pendant le Congrès et qui ne sont pas des rapports généraux ou spéciaux. Il s'agit d'une première pour l'Académie. Il est apparu important pour le Bureau de pouvoir avoir accès aux contributions générales offertes pendant le Congrès général et qui méritent assurément la même attention que les rapports généraux. Nous regrettons de

This book contains contributions made during the Congress that are not General or Special reports. This is a *premiere* for the Academy. It seemed important for the EC to have access to the general contributions offered during the General Congress, which certainly deserve the same attention as the General Reports. We regret that we have not been able to present more contributions in this book.

ne pas avoir pu présenter davantage de contributions dans cet ouvrage. Chaque participant(e) s'est vu offrir la possibilité de publier sur la base du volontariat. Le Bureau étudie les différentes possibilités pour systématiser la publication pour le prochain Congrès général.

Each participant was offered the opportunity to publish on a voluntary basis. The EC is considering different options to systematise such publication for the next General Congress.

Paris, France

Katharina Boele-Woelki
Diego P. Fernández Arroyo

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Part I
Leçon inaugurale / Keynote Speech

The Significance of Comparative Law to Common Law Judges: An Australian Perspective

Susan Kiefel

I thank the IACL for the honour of presenting the first paper at this General Congress.

When I was invited to give this paper it was suggested that I might consider discussing the significance of comparative law to judges. I took that to mean its significance to common law judges. Even then I would not presume to speak for judges of all common law courts. My perspective is necessarily that of judges of the High Court of Australia.

An enquiry as to the significance of comparative law to judges involves both a quantitative and qualitative question. The quantitative question may be seen to require the identification of the areas of the common law where references to comparative law materials more often occur, as well as consideration of whether this occurs very often. The qualitative question is directed to the purposes for which reference is made to comparative law materials and involves consideration of the benefits which judges might receive from that reference. This might in turn direct attention to aspects of judicial method.

Before I enter upon these enquiries it is necessary to explain a little more about the common law of Australia which is developed by the High Court and about the High Court itself.

The name of the Court may be somewhat confusing given that it is also used to describe courts lower in the hierarchy than the Supreme Court of the United Kingdom and other final appellate courts. The High Court of Australia is the final appellate and constitutional court for Australia and is equivalent to the Supreme Court of other common law countries.

It may be necessary also to dispel any idea that there is now one body of law called the common law. That was once the case, when the former colonies of the

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British Empire were required to conform to the law as declared in England, in order that the common law be uniform and harmonious. But the demand for a unified common law lessened in importance when the former colonies became States in a federated sovereign nation. Courts such as the High Court began departing from decisions of the House of Lords and gradually appeals from Australia and other common law countries to the Privy Council were abolished.

For Australia, the process of separation was completed in 1986. At this point the development of the common law of Australia was, for the first time, placed in the hands of the High Court. It was observed by some judges of the Court at that time that decisions of other common law courts were now "useful only to the degree of the persuasiveness of their reasoning".[1]

Professor Birke Häcker[2] makes the interesting observation that "the picture of the common law world today *in some respects* resembles that of continental Europe round about the late 17th or early 18th century" and raises the question whether common law jurisdictions might learn lessons of coherence from the history of the Ius Commune. This is a topic for another day.

It might be said though that given the analysis which is undertaken of decisions of other common law courts, the current approach of High Court judges is, to an extent, comparative. But for the purposes of my discussion I shall not refer to decisions of other common law courts as comparative law materials. I shall restrict the meaning of that term to those materials which explain how European and the civil law are applied.

Because the High Court is autonomous its judges may choose to consult European law and the civil law. When they do so, it would usually be through the medium of comparative law texts. It must, however, be acknowledged that judges do not do so regularly, although they have done so more often in recent times, perhaps as a response to the new role of the judges in developing an Australian common law. There are a number of factors which inhibit the use of comparative law materials. I will refer to them at the conclusion of my discussion.

There are not many areas of the Australian common law where resort is had to comparative law materials. That there are limits to the areas in which the method of comparison is possible is evident from the content of comparative law texts. That said, the areas in which it has been used in Australia are very limited. I do not intend to suggest that it could not be used more widely.

The principal areas in which High Court judges have made use of comparative law materials in the last 25 years or so have been competition law and tort law. There are other areas of European law and of the civil law which other common law courts have adopted but which the Australian High Court has not, or in respect of which it has not yet had the opportunity to state the course it will take.

Despite the substantial debate in Europe and elsewhere concerning the requirement of good faith in contractual performance as an international standard, there has

[1] *Cook v Cook* (1986) 162 CLR 376 at 390; [1986] HCA 73.

[2] Häcker (2015), pp. 430, 445.

been much less debate about it in Australia and the issue has not reached the High Court for final determination. That is despite some intermediate appellate courts proceeding upon the basis that some form of that requirement applies in Australian law.

A principle of unjust or unjustified enrichment, well known to German law and adopted in part by courts of the United Kingdom, has not found favour with the High Court. It does not recognise it as a free standing principle and prefers to see it as a concept which may explain why restitution is ordered in particular cases.[3]

The possibilities for consideration of European Union law and the civil law concerning intellectual property, particularly patent law, seem limited. Nevertheless, European laws have been referred to in copyright cases[4] and the perspective of some civil law courts has been noted in a patent case.[5]

It is well known that constitutional courts look to each other's statements of constitutional principle and to methods and standards of review respecting legislation. Some Australian constitutional cases concerning whether legislation contravenes the constitutionally guaranteed freedom of trade across borders utilised a test of reasonable necessity,[6] that aspect of proportionality analysis often applied by the European Court of Justice. More recently, a majority of the High Court[7] adapted and adopted the three tests of proportionality in cases involving legislation which restricts the freedom of communication about matters of politics and government, which is regarded as implied in the Australian Constitution. They did so to test for the boundaries of legislative power but did not adopt it as a freestanding principle protective of rights. Previous judgments of the Court had traced the historical origins of proportionality analysis and its traditional method of operation through comparative law materials.[8]

I return now to the areas of the law in which the High Court and its judges do resort to comparative law materials.

The High Court could hardly ignore decisions of European courts regarding European competition law, since the economic principles upon which the Treaty of Rome was based were used in drafting Australian competition legislation.[9] Consequently, decisions of the European Court of Justice have been utilised by

[3] *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 299 [85]-[86]; [2009] HCA 44; *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 253 CLR 560 at 594–595 [73]; [2014] HCA 14.

[4] *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 at 504 [135]-[139]; [2009] HCA 14.

[5] *Northern Territory v Collins* (2008) 235 CLR 619 at 653 [143]; [2008] HCA 49.

[6] *Cole v Whitfield* (1988) 165 CLR 360; [1988] HCA 18; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; [2008] HCA 11.

[7] *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34; see also *Brown v Tasmania* (2017) 91 ALJR 1089; 349 ALR 398; [2017] HCA 43.

[8] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 139–142 [456]-[466]; [2010] HCA 46.

[9] Australia, House of Representatives, *Trade Practices Revision Bill* 1986, Explanatory Memorandum at 13.

the High Court in cases involving abuse of market power[10] and are used by lower courts which more regularly administer competition law.

The principal use made of comparative law materials by some High Court judges is in the area of tort law or delict. This is understandable. As Professor Wagner has said, that branch of the law is "particularly amenable to comparativist endeavour as the patterns of cases are almost identical across different societies".[11] Further, it is in the area of tort law that novel questions seem more often to arise. Moreover, the degree of difficulty which attends these cases and the divergence of opinion which sometimes emerges as between common law courts may suggest to a judge that she or he should extend the areas of her or his usual researches.

The use by some judges of the High Court of the civil law in this area is best explained by a few examples of cases dealt with in recent times. They may serve to show how comparative law materials are used by the judges and inform the larger question of why they do so.

The first case[12] was concerned with whether police officers were under an obligation to "rescue" a person who had been observed in circumstances which might suggest he was contemplating taking his own life. The person appeared rational and assured the police officers that he had changed his mind. He took his life later the same day and his wife sued the State for breach of duty. The Court did not allow the claim.

Although the ultimate decision turned largely upon whether the statute under which the police were acting created a duty, the differences of approach of some civil law systems and the common law to this question were observed and compared. Historically, the common law had never imposed an obligation to rescue others. The reason for this difference was sought and found in the common law's reluctance to interfere with the autonomy of the individual.

In the second case[13] the Court rejected a claim for damages for the loss of a chance of a better medical outcome. The plaintiff had presented at a hospital with symptoms which masked an underlying brain tumour. The surgeon was found negligent in not ordering further investigations when the plaintiff developed further symptoms. Had he done so, treatment could have been administered at an earlier time. However, the plaintiff could not establish that earlier treatment would have avoided or mitigated the severe brain damage that she eventually suffered. She could show only that there was a *chance* that it might have done so.

This was the first time that such a claim had been raised in the High Court. Opinion as to whether the loss of a chance of this kind is compensable was divided in both common law and civil law jurisdictions. The case raised a number of discrete issues. The first was whether loss of a chance of this kind could itself be regarded as

[10] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 189; [1989] HCA 6.

[11] Wagner (2006), p. 1004.

[12] *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215; [2009] HCA 15.

[13] *Tabet v Gett* (2010) 240 CLR 537; [2010] HCA 12.

damage. The claimant relied upon French law, but it was considered that French law had a wider and different view of what constituted damage than the Australian common law. The law of Germany and certain other countries, which seemed to require damage to have a value, most closely accorded with the Australian position.

The plaintiff also argued that the loss of a chance might be viewed as independent of the physical injury and therefore a separate head of damage. The judgment here drew upon both Canadian and German commentators who suggested that to view it in this way would require compensation even if no actual injury was suffered.

The other issue was the standard of proof required by Australian common law. For the plaintiff's case to succeed it needed to be lowered to a possibility as distinct from a probability that she would not have suffered brain damage, or not as severely as she did. The common law usually requires proof on the balance of probabilities. Consideration was given to how the Australian standard of proof was already low compared with what is applied by some civil law courts where it is used as a method of controlling or limiting claims.

A comparative approach to pure economic loss in tort law has been undertaken on two occasions by High Court judges.[14] It was observed in the first case that in this area German law displays an ideological affinity with the common law. In Germany, it is said that the rule against recovery of economic loss is a guarantee of freedom in the market and that a similar imperative, that of encouraging competitive conduct, underlies the policy of the law. In the second case, the other avenues for relief which German law allows were noted. It was observed that the duty owed to a third party under German contract law might bear some similarity to how duty of care is approached at common law.

Two further decisions may also be mentioned. In one, a surgeon negligently failed to warn of the continued risk of conception after carrying out a sterilisation procedure and was held liable to the parents for the cost of raising and maintaining a child born after the procedure.[15] In the course of the judgment, reference was made to the different approaches to recovery in such cases taken by the courts in England, France and Germany. Regard was had to the different arguments which had been raised in other jurisdictions[16] and to themes which might be seen to run through many of the judgments,[17] including moral judgments. But in the end result, the majority decided that the benefits gained from the birth of a child by the parents are not legally relevant to the question of damage.

The other involved a claim by a child born with congenital defects because the child's mother had been exposed to the rubella virus during her pregnancy. Her treating doctor had not identified the symptoms and as a result, it was argued, the

[14] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 249–250 [187]-[188]; [1999] HCA 36; *Barclay v Penberthy* (2012) 246 CLR 258 at 317–320 [165]-[171]; [2012] HCA 40.

[15] *Cattanach v Melchior* (2003) 215 CLR 1; [2003] HCA 38.

[16] Ibid at 21–22 (Gleeson CJ), 32–33, 36, 39 (McHugh and Gummow JJ), 46–51 (Kirby J), 70 (Hayne J), 101–103 (Callinan J), 113–114 (Heydon J).

[17] Ibid at 52, 101.

mother did not have the pregnancy terminated, which she would have done.[18] The Court turned to the decisions of three common law courts where the difficulties in attributing loss to a disabled child on the basis that the child had been born were analysed and the claim disallowed.[19] It noted also that the German Supreme Court had rejected such a claim.[20] It was observed that the Supreme Court of Israel had upheld such a claim, but in doing so had to employ the legal fiction of a "life as a healthy child".[21] Although French law allowed a claim of this kind, it was thought that this was on the basis of a claim being in contract rather than in tort.[22]

Consideration may then be given to what might be seen as the purpose for these comparative law references.

Generally speaking, High Court judges would not apply the civil law directly in tort law. It would not be expected that it would furnish a solution, in whole or in part, which would cohere with Australian tort law and precedent. It will be observed from the cases mentioned that it is either the conclusion reached by civil law courts which is of interest to Australian judges or it is a discrete aspect or aspects of the civil law which is the focus of comparison.

In the sterilisation case and the wrongful life case the Australian judges were interested to see whether other courts had refused or allowed claims of those kinds. It might be expected that the judges would survey other courts more widely not the least because there were moral overtones to the cases. A survey of the preponderance of opinion of judges elsewhere might also serve to confirm the provisional view of a judge. It was observed in the sterilisation case[23] that the fact that so many judges in different jurisdictions had rejected a claim of that kind, albeit they had expressed their reasons in different terms, was not a matter lightly to be disregarded. In a case of a novel kind such a survey might promote confidence in the outcome, not only in the judge but also the parties and readers of the judgment.

Where a judge is inclined to depart from what other courts have concluded, further analysis will usually be necessary. In the wrongful life case the reasons why some courts allowed the claim were examined. The reasons were either not acceptable or not consistent with the approach of the common law. Likewise in the loss of chance case, the claimant's reliance on French law was considered to be misguided because that law took a different view of damage which could not be adapted to the common law. The fact that other legal systems required that damage be capable of being valued offered some support for the approach taken by Australian law.

The loss of chance case provides a good example of discrete aspects of the civil law being compared with each other and with the common law: whether loss of a

[18] *Harriton v Stephens* (2006) 226 CLR 52; [2006] HCA 15.

[19] Ibid at 119–121.

[20] Ibid at 122.

[21] Ibid at 121.

[22] Ibid at 122.

[23] *Cattanach v Melchior* (2003) 215 CLR 1 at 107.

chance can qualify as damage; whether it can be viewed as separate damage; and how standards of proof appear to be used in different jurisdictions. The principal purpose of the comparisons made was to identify differences which explained why the allowance of claims by some civil courts was not relevant to the Australian common law.

It is the approach taken in the rescue case which I think serves best to identify a more fundamental reason why Australian judges might look not only to the conclusions reached by other courts but also attempt to compare key aspects of the reasoning it must undertake towards its solution. The reason is that the process of comparison, and the analysis of differences necessary to it, brings one's own law more sharply into focus.

In the rescue case the rule of our common law, that there was no duty of care, was challenged. That necessitated a consideration of why some civil law systems considered that there was such a duty, albeit to differing degrees. The reason was found in social values which informed a policy of the law or a legal rule: the common law was more individualistic, civil law more socially impregnated.[24] The process of comparison resulted in the identification of the basis for the common law rule. Likewise in the pure economic loss cases a policy of competition was seen as informing both German law and the common law.

It has been said[25] that there is no such thing as comparative law, only a method or methods useful in particular to look more closely at one's own law. From a judge's perspective the process of comparison, the recognition of differences and why they exist serves to illuminate our common law and to assist in identifying the basal reasons for its rules. It may be inferred from many of the references in the cases discussed to comparative law materials that the judges were seeking to do just this. So understood, it forms part of the judicial method, the purpose of which is to deepen one's understanding of our laws in order to answer a novel and difficult question.

If reference to comparative law materials is useful to decision-making, at least in some novel cases, what inhibits Australian judges from resorting to them more often; or in the case of some judges, at all?

There are a number of factors which affect the extent to which European and civil law materials are used in Australian courts. Principal amongst them is that, generally speaking, Australian lawyers do not have a background in comparative law and its methods. This is largely because of their education. Whilst the first comparative law course was offered in Australia in 1948,[26] a comprehensive course such as that initially taught is rarely now offered. The subjects that are offered tend to be of a much narrower focus and are not compulsory. The reasons why Australian law schools do not encourage the study of comparative law may be many. They may

[24] *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at 248 [88], referring to Markesinis and Unberath (2002), p. 90.

[25] Kahn-Freund (1966), p. 41.

[26] Friedmann (1947–51), p. 274.

include the fact that those teaching are largely the result of the same system and that it is regarded as a subject of academic interest rather than of practical benefit.

A judge's legal researcher will therefore not be trained in the method and will not be familiar with available texts. Except in choice of law cases, foreign law will almost never be referred to by the parties' lawyers, let alone proved as foreign law by experts. Unless a judge is convinced of the value of the research, she or he is not likely to put the parties in the litigation to the expense of undertaking it. The result for judges is that in novel cases, where comparative law materials might be useful, the judge will have to undertake this research herself or himself. Research of this kind is time-consuming and judges do not have a lot of spare time.

Another factor is that some judges feel that they must have a complete grasp of the law of another country before they can comment on any aspect of it. There is a fear, understandable to an extent, of error. These concerns may be unjustified and based upon a misconception of the respective roles of judges and of comparative lawyers. Common law appellate judges regularly familiarise themselves with areas of law with which they are unfamiliar. In that process they learn to discern pre-eminent scholars. They appreciate the need to cross-reference between commentators to ensure that an opinion is generally accepted. The use of comparative law materials for the purposes I have outlined above does not require a judge to write an opinion on how a civil law court is likely to apply the civil law in a hypothetical, undetermined case. Rather, access will be had to discrete aspects of the civil law as explained by comparative law scholars by reference to such decisions or how the civil law may be understood to approach such questions.

Comparative lawyers could assist in encouraging its use. With this in mind, some years ago I arranged for a professor of comparative law to speak to the High Court Justices over lunch. Predictably, one of my colleagues who is not disposed to the use of foreign law materials, asked the Professor: was he not concerned about not fully understanding the system he was looking at when making any observation about its operation? The professor answered simply, "yes". Perhaps he might more helpfully have explained that: "that is because I need to have that breadth of knowledge to write what I do: from a judge's perspective you can avail yourself of good comparative law texts. The research has been done for you by people like me".

Which brings me to comparative law texts. It must be acknowledged that, understandably, they are not always written with judges in mind. Common law judges are likely to prefer to gain an understanding from them about how European and civil law courts have dealt or may be expected to deal with the issue in question, in a concrete way, rather than read opinions, which might be contestable, about how a Code should work in theory.

In conclusion, the answer to the question whether a comparative law method is significant to Australian judges is: to some judges, occasionally, and mostly in novel cases. When applied it can be useful to confirm an opinion as one held by many courts. But its real benefit lies in illuminating our own law.

My interest in comparative law may explain why I have on occasions in the past been guilty of making aspirational statements about its future use in Australia. I

continue to have hope. Much will depend upon legal education and of course upon professors of comparative law offering more encouragement about its use.

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Part II
Tables-rondes / Round-Tables

Les injonctions contradictoires en matière migratoire

Laurence Burgorgue-Larsen

De dangereux paradoxes sont, plus que jamais, au cœur de la « crise migratoire » [1] que connaît le continent européen. Ils rendent particulièrement complexe le paysage juridique et politique en la matière. Ce « drame migratoire » – comme il conviendrait

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[1]Parler rapidement, pour des commodités langagières, de « crise migratoire », c'est user d'un euphémisme prompt à estomper l'insupportable. L'insupportable, c'est le cimetière qu'est devenu la Méditerranée depuis 25 ans : près de 25.000 êtres humains y ont en effet perdu la vie (Basilien-Gainche (2017), p. 598) ; l'insupportable, ce sont les camps de rétention, les fameux « hot spots » situés en des endroits stratégiques de l'Union et qui retiennent dans des conditions de vie inhumaines les plus vulnérables, ces migrants ayant fui tantôt les conflits, tantôt la misère, et qui représentent ce que l'on appelle dans un langage aseptisé, des « flux mixtes » (Wihtol de Wenden (2017), pp. 191–197, spec. p. 192). Il s'agit de flux de personnes qui réunissent tantôt des demandeurs d'asile, susceptibles d'obtenir le statut de réfugié, tantôt les migrants économiques. On sait que ces derniers, devant les restrictions posées à l'immigration légale, décident en désespoir de cause, d'opter pour la voie de l'illégalité pour entrer sur le territoire européen, risquant leur intégrité physique sur les routes de l'exil, notamment s'ils passent par la Libye, véritable enfer sur terre où l'esclavage a *repris* ses droits. Il s'agit en effet d'un recommencement dans la mesure où les tribus arabo-musulmanes ont maintenu en esclavage, pendant près de 12 siècles, les noirs sub-sahariens. Pour une présentation magistrale de cette histoire trop méconnue, on se reportera avec intérêt à l'ouvrage de l'anthropologue Tidiane N'DIAYE, (Voir N'Diaye (2017)).

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mieux de le nommer[2] – est en effet au cœur d'injonctions contradictoires qui obstruent la construction réfléchie, à long terme, d'une politique migratoire constructive. Elles sont, en germe, à la base de ce que pourrait être une véritable désintégration européenne, pour ne pas dire une dislocation du projet intégratif lancé il y a plus de 60 ans par des visionnaires réalistes. Or, cette funeste perspective ne doit pas être prise à la légère quand on sait que le Monde est aux prises avec des logiques disruptives depuis la chute de l'Union soviétique en 1991, c'est-à-dire depuis un peu moins de trente ans[3] ; quand on sait que la « déconsolidation » de la démocratie – pour reprendre une expression lancée outre-Atlantique[4] – est à l'œuvre un peu partout sur la planète et notamment en Europe. Si les démocraties établies peuvent se déconsolider, se disloquer, se déliter, il en est *a fortiori* de même pour l'Union européenne : elle peut se désintégrer et le *Brexit* en est un des signes les plus flagrants. Le problème est qu'aujourd'hui, de vision, il n'est plus question. Le court-terme a depuis longtemps intégré les cénacles politiques, nationaux et européens. L'approche migratoire le démontre à l'envi : elle n'est faite que de réactions et non d'anticipation ; elle répond plus à l'émotion qu'à la raison[5]. Or, le réalisme ou le pragmatisme sans vision, c'est la destruction. Pis, une *Real Politik* basée sur la peur, et l'instrumentalisation de cette peur, est le prélude d'une catastrophe, au sens où l'entend l'historien français Pascal Ory[6]. C'est ce à quoi nous assistons aujourd'hui et seul un sursaut inouï permettrait de juguler l'inévitable : la perte de sens (et donc de légitimité) de la construction européenne qui pourrait à plus ou moins long terme participer de sa déflagration.

Les injonctions contradictoires du « drame migratoire » sont en effet très nombreuses et d'inégale intensité et ou portée.

La plus évidente d'entre elle, celle qui est le germe fondamental (pour ne pas dire existentiel) de la dislocation, concerne les valeurs proclamées et affichées dans le droit primaire de l'Union d'un côté – autrement dit, c'est *l'injonction du droit saisie par les valeurs* – et leur négation pour ne pas dire leur reniement dans la pratique de l'autre (une pratique née du droit dérivé) ; autrement dit, ici, c'est *l'injonction de la sécurité saisie par la politique* (c'est l'injonction de l' « Europe forteresse » pour reprendre un terme qui était déjà apparue dans la rhétorique européenne dès les années 1990). (I).

A cette rupture politique radicale de l'Union avec ses valeurs (au centre desquelles se trouve la solidarité) – *Solidarité versus Sécurité* – s'ajoutent, se superposent, s'entremêlent, une infinie variété d'autres types de ruptures qui ne

[2]Car ce dont il s'agit avant tout, c'est de la mort ou de la détention (dans des conditions indignes) de personnes qui désirent vivre *Ailleurs* que dans leur pays. Vouloir l'éradiquer ou la « contenir » est, *in se,* irréaliste puisque la migration, comme telle, est un phénomène naturel pour ne pas consubstantiel à l'activité humaine.

[3]Bujon et Baille (2017), pp. 86–97.

[4]Stefan Foa et Mounk (2017), pp. 5–15.

[5]C'est en outre une question qui dure. Voir les travaux publiés en la matière, dès 2010, *ad.ex.* Millet-Devalle (2010). Pour une thèse de référence sur ces questions, v. Pascouau (2011).

[6]Ory (2017).

participent pas à penser, efficacement, ce qui devrait être une politique commune basée sur un bon sens humaniste allié à une dose de réalisme économique et démographique (II).

Ce kaléidoscope des ruptures laisse à voir l'hétérogénéité et non pas le commun ; le repli sur soi national (pour ne pas dire nationaliste) et non le sentiment d'appartenance à un ensemble commun, seule condition de l'adhésion au projet intégratif. Le danger de la désintégration, pour ne pas dire de la déflagration, ne doit donc pas être pris à la légère.

1 L'injonction contradictoire existentielle

L'injonction contradictoire existentielle, qui traverse toute la politique migratoire, est celle qui oppose la solidarité à la sécurité. Si la solidarité est clamée depuis les origines de la construction communautaire, si elle parcourt les textes telle une devise hautement symbolique (1.1), elle est largement niée, pour ne pas dire reniée, dans la pratique (1.2). La sécurité de l'Union l'emporte, dans les faits, sur la solidarité qu'elle doit pourtant incarner et mettre en œuvre selon le droit primaire.

1.1 La solidarité clamée

La solidarité[7] irrigue le projet intégratif [8]. On la débusque dans le courant du XXème siècle dans deux discours majeurs prononcés à 21 ans d'intervalles : celui d'Aristide Briand en 1929 et celui de Robert Schuman en 1950.

L'idée européenne apparaît, pendant l'entre-deux guerre, afin de créer un système institutionnel où les peuples européens seraient liés « par une sorte de lien fédéral » ; les peuples devaient pouvoir à tout instant entrer en contact entre eux notamment pour établir «un lien de solidarité qui leur permette de faire face, au moment voulu, à des circonstances graves, si elles venaient à naître »[9]. Cette formule est celle du discours du 5 septembre 1929 d'Aristide Briand prononcé à la tribune de la Société

[7]La solidarité – qui fut longtemps l'apanage des politiques et des sociologues (de Léon Bourgeois à Emile Durkheim) a fait une irruption dans le droit – notamment français – grâce à des auteurs comme Léon Duguit ou encore le doyen Hauriou au début du siècle dernier. Plus près de nous, des auteurs comme Michel Borgetto et Robert Lafore ont revisité la doctrine dite « solidariste », Lafore (2009), p. 47.

[8]Espagno-Abadie (2017), p. 607.

[9]« Je pense qu'entre des peuples qui sont géographiquement groupés comme les peuples d'Europe, il doit exister *une sorte de lien fédéral* ; ces peuples doivent avoir à tout instant la possibilité d'entrer en contact, de discuter leurs intérêts, de prendre des résolutions communes, *d'établir entre eux un lien de solidarité* qui leur permette de faire face, au moment voulu, à des circonstances graves, si elles venaient à naître. »

des Nations (SDN). Quant à Robert Schuman, ce sont les « réalisations concrètes créant une solidarité de fait » qui irrigua sa déclaration du 9 mai 1950, devant mener à terme à des « solidarités de production »[10]. Si ces formules démontrent sans nul doute que la solidarité fut au cœur du projet intégratif, elle ne l'a évidemment pas été de la même manière. Robert Schuman, un des nombreux idéalistes pragmatiques d'après-guerre, pensa en termes de fonctionnalité, *i.e.*, de rapprochement des économies. Aristide Briand quant à lui pensa en termes politiques en imaginant ce qui pourrait être les premières fondations d'une fédération. Le lien fédéral induisait le lien politique.

Il s'agit en quelque sorte d'une des premières ruptures dans la longue histoire de l'idée européenne – solidarité politique *versus* solidarité économique – qui n'a jamais été définitivement réglée.

Si la solidarité de type politique n'a pas brillé dans les textes fondateurs incarnant la logique fonctionnaliste (du Traité CECA, en passant par le Traité CEE et Euratom), elle réapparut à partir de 1992 dans la logique d'approfondissement lancée par le Traité sur l'Union européenne adopté à Maastricht, notamment à travers le lancement de la citoyenneté européenne. Aujourd'hui, elle trône à plusieurs endroits stratégiques du droit primaire, socle constitutionnel de l'Union européenne. De l'article 2, 2ème phrase du TUE (tel qu'adopté à Lisbonne), en passant par son article 3§3, au préambule de la Charte des droits fondamentaux ou encore aux articles 67§2 et 80 du TFUE, elle se veut être le porte étendard, non seulement du droit de l'Union comme tel, mais également de la philosophie politique que l'Union européenne est censée représenter et défendre, plus précisément dans le domaine de l'asile.

La lecture de l'article 2, 2ème phrase TUE démontre que la solidarité y est présentée comme une des valeurs consubstantielles aux sociétés européennes (elles-mêmes constitutives de l'Union)[11]. Quant à la Charte, la solidarité trône dès la deuxième phrase du Préambule – où elle fait figure de socle fondateur[12] – tandis qu'elle constitue également le titre du Chapitre IV consacré aux droits à finalité sociale. Si elle est censée être à la base de ce qui constitue le socle social de l'Union, mais également celui de sa cohésion territoriale[13], elle est également censée être au

[10] « L'Europe ne se fera pas d'un coup, ni dans une construction d'ensemble : elle se fera par des réalisations concrètes créant d'abord une solidarité de fait ». Elle devait déboucher sur la mise en œuvre d'une «solidarité de production » entre la France et l'Allemagne : « La solidarité de production qui sera ainsi nouée manifestera que toute guerre entre la France et l'Allemagne devient non seulement impensable, mais matériellement impossible. »

[11] Article 2 TUE : « *L'Union est fondée sur les valeurs de respect de la dignité humaine, de liberté, de démocratie, d'égalité, de l'État de droit, ainsi que de respect des droits de l'homme, y compris des droits des personnes appartenant à des minorités. Ces valeurs sont communes aux États membres dans une société caractérisée par le pluralisme, la non-discrimination, la tolérance, la justice, la solidarité et l'égalité entre les femmes et les hommes.*»

[12] 2ème phrase du Préambule de la Charte : « *Consciente de son patrimoine spirituel et moral, l'Union se fonde sur les valeurs indivisibles et universelles de dignité humaine, de liberté, d'égalité et de solidarité*».

[13] La troisième phrase de l'article 3§3 TUE se lit ainsi : « *[L'Union] promeut la cohésion économique, sociale et territoriale, et la solidarité entre les États membres*. »

cœur de la politique commune de l'asile. Ici, ce sont des dispositions phares du Titre V, chapitre 2 du TFUE, plus spécifiquement les articles 67§2 TUE[14] et 80 TFUE[15], lesquels posent en curseur principal de l'action des institutions et des Etats membres, la solidarité dans l'élaboration et la mise en œuvre de cette politique.

Cette solidarité clamée avec emphase est, dans les faits, totalement ignorée, pour ne pas dire niée voire reniée.

1.2 La solidarité reniée

La politique migratoire a connue plusieurs étapes marquantes[16] – de la phase intergouvernementale avec la Coopération Politique européenne (CPE) à celle se développant en marge des traités (avec les « accords de Schengen ») (1ère phase), en passant par sa « communautarisation » avec le Traité d'Amsterdam créant *l'Espace de liberté, sécurité, justice*[17] (2ème phase), puis sa transformation en une « politique commune d'immigration » à partir du Conseil européen de Tampere (15-16 octobre 1999) (3ème phase)[18]. A partir de ce Conseil européen et surtout à partir de celui de Séville en 2002, les quatrième et cinquième phases se sont caractérisées, tout d'abord, par une « externalisation graduelle » de la politique migratoire – en activant tous les mécanismes de la politique européenne de voisinage (PEV) afin d'exporter une partie de la gestion des frontières de l'UE avec les pays d'origine et de transit des migrants[19]; et, ensuite, par une militarisation des frontières de l'UE[20]. Ce furent les guerres en Irak et en Syrie et leur lot d'exodes sur les routes de Méditerranée orientale et centrale qui ont amené l'Union à réexaminer la Politique européenne de Voisinage. La *Stratégie de sécurité intérieure* renouvelée en 2015 pour 5 ans

[14]Il se lit ainsi : l'Union « *développe une politique commune en matière d'asile, d'immigration et de contrôle des frontières extérieures qui est fondée sur la solidarité entre États membres et qui est équitable à l'égard des ressortissants des pays tiers* ».

[15]Il se lit ainsi : « *les politiques de l'Union visées [à ce] chapitre et leur mise en œuvre sont régies par le principe de solidarité et de partage équitable de responsabilités entre les États membres, y compris sur le plan financier. Chaque fois que cela est nécessaire, les actes de l'Union adoptés en vertu [dudit chapitre] contiennent des mesures appropriées pour l'application de ce principe* »

[16]Elles sont dûment rappelées par Berramdane (2018) p. 222.

[17]Cette communautarisation a pris l'allure de la création de *l'Espace de liberté sécurité et justice* (ELSJ), réparti entre le pilier 1 et le pilier 3 et incorporant l'acquis Schengen.

[18]Il s'est fixé un objectif ambitieux de doter l'Union de « politiques communes dans les domaines de l'asile et de l'immigration, tout en tenant compte des nécessités d'exercer aux frontières extérieures un contrôle cohérent afin de stopper l'immigration clandestine ».

[19]Atak et Crepeau (2014), pp. 591–622.

[20]Comme le souligne A. BERRAMDANE, « déjà, en effet, la PEV codifiée par le traité de Lisbonne (art. 8 du Traité sur l'Union européenne - TUE), a une dimension sécuritaire. Elle fait des voisins de l'Union des gardes-frontières, des auxiliaires politiques chargés de réguler et d'atténuer la pression migratoire sur l'Union, un glacis protecteur de l'Union, le premier cercle de défense des frontières. »

(2015-2020)[21] et la *Stratégie globale pour la politique étrangère et de sécurité de l'Union européenne* de 2016[22] furent les textes permettant cette injonction militaire. Autrement dit, au-delà de l'injonction sécuritaire (consistant à sécuriser les frontières extérieures de l'Union en externalisant leur contrôle), nous assistons aujourd'hui ni plus ni moins à la confection d'une injonction militaire qui trouve, qui plus est, le renfort dans certaines dispositions du Traité de Lisbonne[23].

L'injonction de la solidarité – fondation de l'Union et curseur affiché de certaines de ses politiques, notamment celle de l'immigration et de l'asile – est mise en péril par *l'injonction de la protection sécuritaire* de l'Union, devenue le mantra européen, à l'instar de celui de nombreux Etats qui déploient exactement la même politique[24]. Or, l'injonction sécuritaire l'emporte très clairement sur celle de la solidarité. Par ce seul fait, il y a là le ferment de la dislocation de la raison d'être du projet intégratif à partir du moment où ce qui constitue une de ses valeurs premières est sacrifiée sur l'autel d'une *Real Politik* où le sentiment de peur et de rejet est cardinal.

Cette contradiction politique s'ajoute à de nombreuses autres oppositions, tout à la fois internes à l'Union et externes à celle-ci, lesquelles ne sont évidemment pas faites pour simplifier et améliorer la situation. Si elles sont qualifiées de subalternes, c'est avant tout pour signifier qu'elles découlent en réalité de l'injonction existentielle, principielle, qui est à l'œuvre dans la politique européenne de l'asile ; elles font tantôt peser la balance vers l'impératif de solidarité, tantôt vers celui de la sécurité, mais à travers d'autres notions et concepts. Ce qui, là encore, ne participe évidemment pas à construire, de manière réfléchie et positive, une politique qui prenne à bras le corps les défis auxquels le continent européen est confronté et continuera d'être confronté dans les années à venir.

Ces injonctions subalternes (*i.e* dérivées) ne sont pas toutes négatives. En effet, celles qui sont reliées, plus ou moins directement, à l'impératif de solidarité (à travers l'exigence de protection des droits des migrants par exemple), arrivent parfois à s'imposer. Le problème est que ces quelques victoires ne sont que très parcellaires et ont une portée limitée.

[21]Conseil de l'Union, *Stratégie de sécurité intérieure renouvelée pour l'Union européenne 2015-2020*, 9798/15, JAI 442, COSI 67, 10 juin 2015.

[22]Union européenne, *Vision partagée, action commune : une Europe plus forte.* Stratégie globale pour la politique étrangère et de sécurité de l'Union européenne, 2016.

[23]Berramdane (2018), p. 222 et ss.

[24]Il suffit ici de donner l'exemple de la politique sécuritaire (et, qui plus est, clairement xénophobe) de l'administration TRUMP à l'endroit des migrants en provenance d'Amérique centrale.

2 Les injonctions contradictoires subalternes

L'Union n'est pas un bloc monolithique, elle est faite d'institutions aux fonctions et légitimités différentes ; de même en leur sein, des acteurs peuvent agir de façon opposée et contradictoire ; surtout, l'Union, ce n'est pas qu'une somme d'institutions, c'est également un agrégat d'Etats qui eux-mêmes ne sont pas monolithiques ; ils sont logiquement traversés par des intérêts divergents et des logiques éparses qui se manifestent à travers l'action de différents protagonistes. Dans ce contexte, le tableau des injonctions contradictoires subalternes (qui dérivent de l'injonction existentielle) ne participe donc pas à penser la cohérence et l'effectivité dans le même temps.

Ces injonctions sont de deux types : elles sont tout d'abord internes à l'Union en ce qu'elles irriguent tout son droit dérivé (2.1), mais elles sont également externes à celle-ci, en ce qu'elles proviennent également de l'extérieur et plus particulièrement du droit conventionnel européen, tel que bâti par la Cour européenne des droits de l'homme (2.2).

2.1 Les injonctions contradictoires internes à l'Union

Le droit de l'asile est forgé tout à la fois par le législateur mais aussi le juge qui vient le préciser, pour ne pas dire le compléter et, au bout du compte, par finir de le « construire ».

C'est donc tout à la fois les injonctions contradictoires au sein de la législation (2.1.1) et au sein de la jurisprudence de la CJUE qui seront examinées plus avant (2.2.2), dont on verra qu'elles ont engendré (tout du moins pour les premières) une dislocation des responsabilités communes et donc de la confiance commune entre les Etats membres[25].

2.1.1 Les contradictions législatives

Si on a égard à la 3ème phase de l'édification de la politique migratoire européenne, celle concernant son harmonisation, les contradictions ont été nombreuses et plus ou moins dévastatrices[26].

[25] Au sein de l'Union, il y a également des organismes qui, s'ils ne participent pas à « construire » le droit migratoire en tant que tel, ont pour fonction d' « alerter » en mettant en avant les errements étatiques au sein de l'Union. A cet égard, le travail de l'Agence des droits fondamentaux de l'Union européenne (FRA) est fondamental. Voir, parmi de nombreux travaux de terrain, les rapports périodiques sur la situation des migrants au sein des Etats, *ad. ex. Periodic data collection on the migration issue in the EU*, July Highlights, 1 May–30 June 2018, 29 p.

[26] Pouly (2016), pp. 107–124.

La première génération de textes – résultant de la communautarisation de l'asile par le Traité d'Amsterdam – «a posé un ensemble de règles minimales devant s'appliquer aux Etats membres. Cette législation couvrait alors l'ensemble du spectre de la problématique de l'asile comme les conditions d'accueil, la procédure applicable à l'examen des demandes d'asile, ainsi que l'application des critères de qualification des demandes d'asile[27]. » Cette première salve législative a posé les fondations du système européen de l'asile en imposant d'une part des obligations protectrices pour les demandeurs d'asile, tout en donnant aux Etats, d'autre part et dans certains cas, la possibilité de s'en affranchir. Pour ce faire, l'Union a créé littéralement de nouveaux concepts, les uns porteurs de protection accrue, les autres particulièrement dangereux.

La *protection subsidiaire* et la *protection temporaire* ont été considérées comme des innovations passablement originales permettant, dans le premier cas, de combler certaines lacunes de la Convention de Genève de 1951[28], et dans le deuxième cas, de pouvoir être en mesure de réagir rapidement et efficacement à un afflux massif de migrants[29]. Toutefois, dans le même temps, les notions de *« pays tiers sûrs »*[30] et «

[27]Pouly (2016), p. 108.

[28]Errera (2008), pp. 347–381. Cette directive est connue sous le nom de « Directive qualification ». Elle a fait l'objet d'une refonte le 13 décembre 2011 (voir note 30). Le bénéfice de la protection subsidiaire est accordé à toute personne dont la situation ne répond pas à la définition du statut de réfugié (selon la Convention de Genève), mais pour laquelle il existe des motifs sérieux et avérés de croire qu'elle courrait dans son pays un risque réel de subir l'une des atteintes graves suivantes : la peine de mort ou une exécution; la torture ou des peines ou traitements inhumains ou dégradants; pour des civils, une menace grave et individuelle contre leur vie ou leur personne en raison d'une violence aveugle résultant d'une situation de conflit armé interne ou international.

[29]Les personnes concernées sont des ressortissants non européens qui fuient massivement leur pays ou leur région d'origine et qui ne peuvent pas y retourner : en raison notamment d'un conflit armé ou de violences, ou parce qu'ils sont victimes de violations graves et répétées des droits de l'homme (art. 2 a. de la directive). Ce dispositif exceptionnel et temporaire est autorisé par une décision du Conseil de l'Union européenne (UE), qui définit les bénéficiaires et sa date d'entrée en vigueur. Il est décidé pour une période d'un an et peut être prolongé de 2 ans maximum. Le Conseil de l'UE peut à tout moment y mettre fin si la situation dans le pays d'origine permet un retour sûr et durable des personnes déplacées.

[30]De façon synthétique, ce concept permet de renvoyer les demandeurs d'asile vers un pays tiers non membre de l'Union européenne, par lequel ils ont transité, à condition qu'il existe dans ce pays des garanties nécessaires en matière d'asile et de respect des droits de l'homme. Les Etats membres peuvent en théorie appliquer le concept de « pays tiers sûr » « si les autorités compétentes ont acquis la certitude » que les demandeurs n'ont aucune crainte d'être persécutés sur la base d'un des motifs énoncés dans la Convention de Genève de 1951 relative au statut de réfugié ; que le principe de non-refoulement est respecté conformément à la Convention de Genève ; que l'interdiction de prendre des mesures d'éloignement en cas de risque de torture, de traitements cruels, inhumains ou dégradants est respectée ; et enfin que le demandeur peut solliciter une demande de reconnaissance du statut de réfugié et en bénéficier conformément à la Convention de Genève. La réalité est beaucoup plus complexe comme la doctrine l'a très tôt démontré : voir Creach (1997) et Teitgen-Colly (2011). La Commission nationale consultative des droits de l'homme (CNCDH) a régulièrement formulé des avis sur la politique migratoire de l'UE et sa traduction en droit français. Elle émit logiquement dans ce contexte un *Avis sur le concept de 'pays tiers sûr'* (19 décembre 2017), pointant les dangers de la notion de pays tiers sûr. Un de ces dangers concerne sa « relativité

pays d'origine sûr », porteuses de subjectivité et d'instrumentalisation potentielle, non seulement n'ont pas participé à l'effectivité du système, mais ont en outre mis en place toute une série de règles procédurales diminuant considérablement les garanties des migrants.

Le système initial découlant du traité d'Amsterdam ayant été un échec, il a été décidé de le « refondre » afin de constituer un véritable *Régime d'asile européen commun* (RAEC)[31]. Quand on pense que l'objectif officiel de la Commission européenne était de mettre en place « un niveau de protection commun plus élevé et une protection plus uniforme dans l'ensemble de l'UE et garantir une plus grande solidarité[32] », on ne peut que constater, une fois encore, que l'échec fut au rendez-vous… Car « l'harmonisation à marche forcée » – se traduisant par la réduction drastique de la marge d'appréciation des Etats membres et la limitation de leur autonomie procédurale – a été négociée « sous la pression de la Commission, en l'absence total de consensus et surtout en décalage avec les pratiques et les spécificités de chacun des Etats membres ». Elle ne pouvait être que vouée à l'échec[33].

Les errements de cette réglementation se manifestèrent de façon paroxystique dans la mise en œuvre erratique du système « Dublin III »[34] où les Etats du Nord de l'Europe n'ont pas joué le jeu de la solidarité (pourtant préconisée par la

». La CNCDH mentionne à juste titre la Déclaration UE-Turquie du 18 mars 2016 laquelle, même si elle ne mentionne pas *expressis verbis* la notion, en reprend la philosophie et est appliquée à un pays (la Turquie) qui viole le principe de non refoulement tel que consacré par la Convention de Genève. Le Conseil d'Etat grec a validé la Déclaration en refusant de poser une question préjudicielle à la CJUE. On lira avec le plus grand intérêt l'analyse percutante et sainement très critique du professeur Constantin YANNAKOPOULOS, v. Yannakopoulos (2018), p. 191.

[31]Aujourd'hui, le régime d'asile commun est constitué de trois directives et de deux règlements. La directive « procédure » [Directive 2013/32/UE du Parlement européen et du Conseil du 26 juin 2013 relative à des procédures communes pour l'octroi et le retrait de la protection internationale (refonte)] ; la directive « accueil » [Directive 2013/33.UE du Parlement européen et du Conseil du 26 juin 2013 établissant des normes pour l'accueil des personnes demandant la protection internationale (refonte)] ;la directive « qualification » [Directive 2011/95/UE du Parlement européen et du Conseil du 13 décembre 2011 concernant les normes relatives aux conditions que doivent remplir les ressortissants des pays tiers ou les apatrides pour pouvoir bénéficier d'une protection internationale, à un statut uniforme pour les réfugiés et les personnes pouvant bénéficier de la protection subsidiaire, et au contenu de cette protection (refonte)] ; Le règlement (UE) n°604/2013 du Parlement européen et du Conseil du 26 juin 2013 établissant les critères et mécanismes de détermination de l'Etat membre responsable de l'examen d'une demande de protection internationale introduite dans l'un des Etats membres par un ressortissant de pays tiers ou un apatride (refonte) ; le règlement (UE) n°603/2013 du Parlement européen et du Conseil du 26 juin 2013 relatif à la création d'Eurodac pour la comparaison des empreintes digitales aux fins de l'application efficace du règlement (UE) n°604/2013].

[32]COMMISSION EUROPÉENNE, *Livre vert sur le futur régime d'asile européen commun*, COM (2007) 301 final, 6 juin 2007.

[33]Pouly (2016), p. 111 ; dans le même sens, V. Chetail (2016), pp. 584–602.

[34]Règlement (UE) n°604/2013 du Parlement européen et du Conseil du 26 juin 2013 par lequel s'établissent des critères et des mécanismes de détermination de l'Etat membre responsable d'une demande de protection internationale présentée dans un des Etats membres par un national d'un

Commission européenne) en imposant un système où non seulement l'examen des demandes d'asile, mais encore et surtout l'établissement des demandeurs d'asile, furent mis à la charge des mêmes seuls Etats, ceux du Sud – la Grèce, l'Italie mais aussi l'Espagne – en première ligne géographique de l'arrivée des migrants[35]. La solidarité invoquée fut tronquée au profit des pays du Nord. Autrement dit, au sein même de la législation européenne de l'asile, l'injonction de la solidarité a été instrumentalisée et a logiquement fini par ne plus avoir aucune espèce de valeur aux yeux des Etats membres les plus affectés par l'arrivée des migrants. La conséquence ? La mise en place de « stratégies repoussoir[36] », littéralement catastrophiques sous l'angle humanitaire allant de l'érection de murs[37] à la conclusion d'accords de réadmission avec des pays tiers, dont on sait que certains ne sont guère recommandables sous l'angle démocratique[38]

2.1.2 Les contradictions jurisprudentielles

Les contradictions dans la jurisprudence de la Cour de justice sont apparues à deux niveaux, celui de *l'interprétation* du droit de l'Union (2.1.2.1), mais également celui de l'examen de sa *validité* (2.1.2.2).

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pays tiers ou par un apatride, 29 juin 2013, JO L 180, pp. 31–59 (Règlement dit « Dublin III », refonte).

[35]Partant du principe que tous les Etats membres de l'Union accordent aux étrangers se trouvant sur leur territoire une protection des droits équivalente, le premier pays sur le territoire duquel arrive un demandeur d'asile se transforme en « l'Etat membre responsable » de l'examen de ladite demande. Or, géographiquement, ce sont les Etats du Sud qui se retrouvent, systématiquement, les Etats membres « responsables ».

[36]Pouly (2016), p. 111.

[37]En Espagne, la stratégie de « l'encagement » s'est manifestée au sein des enclaves espagnoles de Ceuta y Melilla au Maroc (il s'est agi de l'érection d'une série de triple murs afin d'empêcher les migrants de pénétrer le territoire espagnol). La même stratégie d'édification de murs barbelés s'est manifestée en Hongrie afin d'éviter que les migrants puissent, après la Grèce, passer sur ce territoire.

[38]Les accords de réadmission permettent de réacheminer vers leurs points de départ les migrants. On recense tout à la fois des accords bilatéraux (conclus entre un Etat membre et un Etat tiers), mais également des accords conclus par l'Union européenne comme telle avec des Etats tiers. 17 accords de ce type ont été conclu avec l'Albanie, l'ancienne République yougoslave de Macédoine, l'Arménie, l'Azerbaïdjan, la Bosnie-Herzégovine, le Cap-Vert, la Fédération de Russie, la Géorgie, Hong-Kong, Macao, la Moldavie, le Monténégro, le Pakistan, la Serbie, le Sri Lanka, la Turquie et l'Ukraine. On trouvera l'intégralité de ces accords sur le site *EuropeanMigrationLaw.eu.*

S'agissant du premier point – celui de l'interprétation du « Paquet asile » comme on a coutume de le nommer – la contradiction majeure est la suivante. Si la jurisprudence de la CJUE s'est avérée « plus libérale qu'attendue sur les questions de fond relatives à la protection internationale », elle a toutefois été peu protectrice des demandeurs d'asile concernant les questions de procédure[39]

La directive « accueil »[40] a donné l'occasion à la Cour de déployer une interprétation plutôt protectrice des demandeurs d'asile. Les obligations d'accueil imposées aux Etats membres ont été importantes, allant de la prise en charge de l'ensemble des demandeurs d'asile, au calcul du montant de l'allocation prévue par la réglementation européenne afin que les Etats soient en mesure d'assumer les frais d'hébergement requis pour pallier l'absence d'attribution d'un logement[41]. Toutefois, c'est sans doute concernant les conditions de reconnaissance du bénéfice de la protection internationale, que la Cour s'est avérée la plus audacieuse. Tout d'abord, elle a rendu pertinente la définition de la protection subsidiaire laquelle, compte tenu de la contradiction qu'elle comportait, était difficilement applicable.

En effet, selon les termes de l'article 15 de la première directive dite « qualification » du 29 avril 2009, la protection subsidiaire s'appliquait lorsqu'il existait « des menaces graves et individuelles contre la vie ou la personne d'un civil en raison d'une violence aveugle en cas de conflit armé interne ou international ». Tout demandeur d'asile devait réussir à apporter la preuve d'un risque réel *individuel*, alors qu'en réalité la source de la menace n'était pas dirigée spécifiquement contre lui. Afin de neutraliser cette contradiction, la Cour a développé une interprétation *pro persona* de l'article 15. Autrement dit, « plus la violence aveugle atteint un niveau élevé, moins le demandeur a à démontrer qu'il y est personnellement exposé, et, à l'inverse, moins le niveau de violence est élevé, plus le demandeur doit établir un lien entre un risque personnel et ce contexte de violence[42]. »

Le deuxième axe tout à fait remarquable de la jurisprudence protectrice de la CJUE, concerne la précision des motifs pour lesquels une personne est fondée à se réclamer du statut de réfugié. Elle a estimé que ces motifs pouvaient se rattacher à des persécutions en lien avec les droits protégés par la Charte. Ainsi, dans l'affaire du 5 septembre 2012, elle a considéré que l'existence d'un acte de persécution pouvait résulter d'une atteinte à la manifestation extérieure de la religion, dont l'exercice est garanti par l'article 10 de la Charte. Et d'estimer qu'il appartenait aux autorités responsables de vérifier si l'exercice de cette liberté exposait la personne concernée à un risque réel d'être poursuivie ou d'être soumise à des peines ou à des traitements

[39]Pouly (2016), p. 114.

[40]Directive n° 2003/9/CE, 27 janvier 2003, relative à des normes minimales pour l'accueil des demandeurs d'asile dans les États membres (Directive « Accueil »).

[41]CJUE, 27 février 2014, *Federaal agentschap voor de opvang van asielzoekers contre Selver Saciri,* ECLI:EU:C:2014:103.

[42]CJUE, 17 février 2009, *Elgafaji*, aff. C-465/07, ECLI:EU:C:2009:94.

inhumains et dégradants[43]. Dans la même lignée, elle a aussi étendu l'application de la convention de Genève aux personnes persécutées en raison de leur orientation sexuelle en les rattachant à un groupe social au sens de l'article 1. A de la convention[44].

A ces approches *pro persona*, la Cour de justice a également dans le même temps, développé des axes jurisprudentiels bien moins libéraux en matière procédurale. Elle a développé une interprétation des plus restrictives du caractère effectif du droit au recours « en procédure accélérée »[45], tandis qu'il en est allé de même du droit d'être entendu dans le cadre des procédures de réexamen[46]. Dans la même lignée, elle a validé des législations nationales qui ne confèrent pas d'effet suspensif à un recours exercé contre des décisions consistant à ne pas poursuivre l'examen d'une demande d'asile[47] ou encore qui permettent de ne pas auditionner un demandeur d'asile lorsque les circonstances factuelles ne laissent aucun doute quant au bien-fondé de cette décision[48].

Le problème est que cette jurisprudence a conforté les Etats dans la mise en œuvre de régimes dérogatoires prévus par leur législation afin de réduire drastiquement les garanties procédurales dans le cadre des procédures nationales d'asile.

[43]CJUE, 5 septembre 2012, *RFA c. Y. et Z.*, aff. C-71/11 et C-99/11, ECLI:EU:C:2012:518.

[44]CJUE, 7 novembre 2013, *X, Y et Z,* C-199/12 et C-200/12, ECLI:EU:C:2013:720.

[45]CJUE, 23 juillet 2013, *Diouf*, C-69/10, ECLI:EU:C:2011:524.

[46]CJUE, 22 novembre 2012, *M.M.,* C-277/11, ECLI:EU:C:2012:744.

[47]CJUE, 17 décembre 2015, *Amadou Tall*, C-239/14, ECLI:EU:C:2015:824.

[48]CJUE, 26 juillet 2017, *Moussa Sacko*, C-348/16, ECLI:EU:C:2017:591.

Il est temps désormais d'aborder le deuxième élément qui traverse la jurisprudence de la Cour quand elle intervient dans le cadre de recours en annulation et qu'elle est sollicitée afin d'examiner *la validité* du droit de l'Union. Ici, ce n'est ni plus ni moins la solidarité – dont on a vu qu'elle est censée être au fondement du projet intégratif et au cœur de la politique de l'asile – qui est contestée devant le juge de l'Union par certains de ses propres Etats membres. Cette logique disruptive est particulièrement dévastatrice car l'affront fait à la valeur « solidarité » est délibéré et assumé par des Etats membres qui entendent faire primer une autre logique, celle de leurs stricts intérêts nationaux sécuritaires. Une seule affaire participe à elle seule à démontrer que l'Union est aux prises avec des approches où la désintégration est à l'œuvre : celle rendue le *6 septembre 2017*[49]. La Hongrie et la Slovaquie ont attaqué en annulation la décision du 22 septembre 2015 adoptée par le Conseil de l'Union[50] au plus fort de la « crise » migratoire ; cette décision avait pour objectif de réagir en urgence au poids démesuré que les règles européennes de l'asile (découlant du « Système Dublin III »)[51], faisaient peser sur la Grèce et l'Italie[52]

Alors que la Cour de justice rendait sa décision le 6 septembre 2017, soit deux ans après ce qui fut jugé comme le pic de la crise migratoire, elle savait que ce système mis en place en urgence n'avait pas globalement fonctionné[53] ; pis, que cela avait été

[49]CJUE, Gde Ch., 6 septembre 2017, *Hongrie et Slovaquie c/ Conseil*, aff. C- C-643/15 et C-647/15, EU:C:2017:631. Pour une analyse circonstanciée et critique de cette décision, *v.* Abrisketa Uriarte (2018), pp. 122–154.

[50]Décision (UE) du Conseil du 22 septembre 2015 par laquelle sont établies des mesures provisoires dans le domaine de la protection internationale au bénéfice de l'Italie et de la Grèce (JO L 248 du 24 septembre 2015).

[51]Règlement (UE) n°604/2013 du Parlement européen et du Conseil du 26 juin 2013 par lequel s'établissent des critères et des mécanismes de détermination de l'Etat membre responsable d'une demande de protection internationale présentée dans un des Etats membres par un national d'un pays tiers ou par un apatride, 29 juin 2013, JO L 180, pp. 31–59 (Règlement dit « Dublin III »).

[52]Lors des huit premiers mois de l'année 2015, ce sont 116.000 demandeurs d'asile et de protection internationale qui se présentèrent en Italie, tandis que la Grèce enregistrait quant à elle 211.000 demandes du même type ; c'est dans ce contexte que le Conseil décida d'adopter en urgence, de façon provisoire, une décision de relocalisation qui avait une double finalité : adopter des mesures concrètes de solidarité vis à vis des Etats membres qui sont en première ligne des afflux massifs de réfugiés et sauvegarder les droits des personnes qui nécessitent une protection internationale. Il est important ici, pour ne pas dire fondamental, de préciser que cet acte juridique de l'Union fut adopté contre les voix de la Slovaquie et de la Hongrie (qui décidèrent *in fine* de l'attaquer devant la Cour), mais également de la Pologne et de la République tchèque, autant d'Etats qui se distinguèrent pendant les négociations d'adhésion en 2004 comme faisant partie du « Groupe de Visegrád », autrement dit un groupe d'Etats qui entendaient, ensemble, aborder l'insertion dans le concert européen, comme pour mieux faire valoir leur spécificité, pour ne pas dire leur identité.

[53]Le délai posé par la décision du Conseil de 2015 pour « relocaliser » les migrants et alléger le fardeau de l'Italie et de la Grèce avait été fixé au 27 septembre 2017. Or, le 6 septembre 2017, date de l'arrêt de la Cour, la Commission européenne publiait un rapport sur le sujet qui établissait qu'à

un cuisant échec dans la mesure où la Hongrie et la Slovaquie – deux des quatre Etats du groupe de Visegrad[54] – avaient délibérément refusé toute relocalisation de personnes demandeurs d'asile et de protection internationale sur leur territoire[55]. De même, alors que la Commission avait enfin pris la mesure (à l'occasion de la crise de l'été 2015) des graves déficiences du « Système Dublin III », elle lança une réforme qui avait pour objet de pérenniser le mécanisme de « relocalisation ». Elle fut cependant enterrée lors du Conseil européen du 15 décembre 2017 les Etats du Groupe de Visegrád la rejetèrent en bloc. . .

Dans un tel contexte, il est durablement dommageable que dans l'arrêt dense et long du *6 septembre 2017*[56] – qui répondit aux 16 moyens soulevés par les Etats demandeurs – la Cour de justice n'ait pas été plus audacieuse en valorisant le principe de solidarité et, par ricochet, la Charte des droits fondamentaux. Sert-il encore à quelque chose de jouer *a minima* quand certains Etats membres ont fondamentalement décidé de ne plus jouer le jeu ? S'il ne reste plus que les principes, alors autant les défendre haut et fort. L'Avocat général Bot n'aura pas, pour sa part, démérité ; il sut trouver les mots ; il sut rappeler les « fondamentaux » et ce dès les premières lignes de ses conclusions. Tout un symbole[57].

Si l'Avocat général proclama la solidarité comme étant le « socle de la construction communautaire » (pt.19), le préambule de la Charte des droits fondamentaux lui

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la date du 4 septembre 2017, uniquement 23% des demandeurs d'asile avait été « relocalisés » (soit 27.000 personnes, 19.244 depuis la Grèce et 8.451 depuis l'Italie). Commission européenne, *Rapport de la Commission et du Parlement européen au Conseil européen et au Conseil, 15ème rapport sur la relocalisation et installation*, COM (2017) 456 final, 6 septembre 2017.

[54]L'histoire de la constitution du groupe de Visegrád (V4) et de la coopération en son sein entre ses quatre Etats constitutifs ne fut pas un long fleuve tranquille. Ce qui est sûr, c'est que ce sont deux thèmes précis qui ont participé, une fois membres de l'Union, à les souder : les questions budgétaires et la crise migratoire, v. Natanek (2017), pp. 132–140.

[55]Les statistiques concernant les Etats du « groupe des Quatre » » (i.e. du Groupe de Visegrád) sont édifiantes : la Pologne (avec 38 millions d'habitants) devait accueillir 6.182 personnes ; la Hongrie (avec 10 millions d'habitants) devait accueillir 1.294 personnes ; la République tchèque (avec 10 millions d'habitants) devait accueillir 2.691 personnes et la Slovaquie (avec une population de 5 millions d'habitants) devait quant à elle en recevoir 802. Au final, la Hongrie et la Pologne n'ont reçu aucun demandeur d'asile, alors que la Slovaquie en accueillait 16 et la République tchèque 12.

[56]Il est en effet constitué de 347 paragraphes.

[57]Lisons plutôt un passage significatif de celles-ci présentées le 26 juillet 2017 (ECLI:EU:C:2017:618) où il met très clairement en évidence l'enjeu de l'affaire : « *Les présents recours nous donnent l'occasion de rappeler que la solidarité figure parmi les valeurs cardinales de l'Union et se trouve même être aux fondements de celle-ci. Comment serait-il possible d'approfondir la solidarité entre les peuples d'Europe et de concevoir une union sans cesse plus étroite entre ces peuples, comme le préconise le préambule du traité UE, sans une solidarité entre les États membres lorsque l'un d'entre eux fait face à une situation d'urgence ? Nous touchons là à la quintessence de ce qui constitue à la fois la raison d'être et l'objectif du projet européen. Il convient donc d'emblée de mettre l'accent sur l'importance de la solidarité en tant que valeur fondatrice et existentielle de l'Union*.» (pts 17–18).

servit grandement pour ce faire[58]. La référence symbolique aux mots puissants de la Charte effectuée, l'Avocat général déclina la présence de la solidarité à d'autres endroits du droit de l'Union[59]. Autrement dit, alors que l'Avocat Général prit au sérieux la solidarité inscrite au sein des traités, ce ne fut pas le cas de la Cour de justice réunie en formation de grande chambre. A la volonté de l'Avocat général d'asseoir la force normative du principe de solidarité, la Cour préféra jouer une petite musique ô combien classique où elle mobilisa la marge d'appréciation du Conseil pour agir en urgence (pts 113-207) ; l'absence d'erreur manifeste dans l'adoption de la décision attaquée (pts 123, 236, 242, 245, 250, 253, 272) et le caractère exceptionnel des mesures adoptées afin de juguler les déficiences des systèmes nationaux d'asile grec et italien (pts 94, 216 et 295). . .La solidarité brilla par son absence, tandis que la Charte fit quelques apparitions *ad hoc* dans le cadre de réponses techniques aux multiples griefs invoqués par les deux Etats agissant en annulation (pts. 305[60], 325[61], 337[62], 343[63]). Bien que la Cour de justice réunie en grande chambre débouta la Slovaquie et la Hongrie en déclarant la validité de la décision attaquée, on connaît la suite de l'histoire : le manquement délibéré des Etats requérants à l'obligation de relocalisation et l'enterrement de la réforme du système de l'asile lors du Conseil européen de décembre 2017.

[58]On rappellera que son libellé permet en effet de découvrir que la solidarité fait partie des « valeurs indivisibles et universelles » sur lesquelles l'Union est fondée.

[59]De l'article 3§3 TUE relatif à la cohésion économique et sociale (où la solidarité entre générations et entre Etats membres est mentionnée) à ce qui caractérise la politique de l'Union en matière d'asile et d'immigration (Titre V, chapitre 2 TFUE, art. 67§2 TUE et 80 TFUE), ces références entendent démontrer qu'elle est également un principe directeur aux effets normatifs certains.

[60]Il se lit ainsi : « *Il convient d'ajouter que des considérations liées à l'origine ethnique des demandeurs de protection internationale ne peuvent pas être prises en compte en ce qu'elles seraient, de toute évidence, contraires au droit de l'Union et notamment à l'article 21 de la charte des droits fondamentaux de l'Union européenne.* »

[61]Il se lit ainsi : « *En outre, un droit de recours effectif doit être assuré sur le plan national, conformément à l'article 47 de la Charte, contre toute décision devant être prise par une autorité nationale dans le cadre de la procédure de relocalisation, telle que prévue à l'article 5 de la décision attaquée*. »

[62]Il se lit ainsi : « *Enfin, si une certaine marge d'appréciation est réservée aux autorités des États membres bénéficiaires lorsque ceux-ci sont appelés, en vertu de l'article 5, paragraphe 3, de la décision attaquée, à identifier les demandeurs individuels pouvant être relocalisés vers un État membre de relocalisation déterminé, une telle marge est justifiée au regard de l'objectif de cette décision qui est de soulager les régimes d'asile grec et italien d'un nombre important de demandeurs en les relocalisant, dans de brefs délais et de manière effective, vers d'autres États membres dans le respect du droit de l'Union et, en particulier, des droits fondamentaux garantis par la Charte*. »

[63]Le point 342 permet de comprendre le point 343. Le point 342 se lit ainsi : « *Or, le transfert dans le cadre d'une opération de relocalisation d'un demandeur de protection internationale d'un État membre vers un autre aux fins d'assurer un examen de sa demande dans des délais raisonnables ne saurait être considéré comme étant constitutif d'un refoulement vers un État tiers.* » Le point 343 se lit ainsi *: « Il s'agit au contraire d'une mesure de gestion de crise, prise au niveau de l'Union, visant à assurer l'exercice effectif, dans le respect de la convention de Genève, du droit fondamental d'asile, tel que consacré à l'article 18 de la Charte.* »

En plus des injonctions contradictoires internes à l'Union qui traversent tout le droit dérivé, de la législation en passant par la jurisprudence, une série d'injonctions contradictions externes à celle-ci viennent rendre plus complexe et plus délicat le traitement de la question migratoire.

2.2 Les injonctions contradictoires externes à l'Union

La jurisprudence de la Cour européenne des droits de l'homme a agi, à de multiples reprises, comme une sonnette d'alarme en mettant l'Union face à ses responsabilités internationales. Construire un système d'intégration en promouvant des concepts et procédures novateurs n'est évidemment pas remis en cause *per se* par la Cour européenne ; toutefois, elle se fait le gardien des droits élémentaires des personnes dans ce cadre. Autrement dit, devant les dérives de la législation européenne, le droit conventionnel vient, tel un contre-pouvoir, rééquilibrer la situation.

Le jeu des injonctions contradictoires s'est manifesté de deux manières. A l'injonction de l'application du principe de confiance mutuelle au sein de l'Union, s'est opposée celle de l'impératif d'assurer des conditions de vie digne de détention pour les migrants dans les pays de l'Union (2.2.1) ; à l'injonction sécuritaire de l'Union d'orchestrer des refoulements massifs de migrants, s'est opposée l'injonction du respect des garanties procédurales minimales (notamment s'agissant du droit au recours) (2.2.2).

Pour l'instant, s'agissant de ces deux injonctions contradictoires, les plus progressistes l'ont emporté grâce à l'aiguillon joué par la Cour européenne des droits de l'homme. Pour combien de temps encore ? C'est toute la question quand on sait que la propre Cour européenne est elle-même sujette à de multiples tensions internes comme à moult pressions externes.

2.2.1 Confiance mutuelle vs. conditions dignes de détention

La philosophie du « système Dublin » est basée sur le principe de confiance mutuelle. Partant du principe que tous les Etats membres de l'Union accordent aux migrants se trouvant sur leur territoire une protection des droits équivalente, le premier pays sur le territoire duquel arrive un demandeur d'asile se transforme en « l'Etat membre responsable » de l'examen de ladite demande. Or, de par la situation géographique de la Grèce ou encore de l'Italie, ces pays se sont retrouvés en première ligne pour accueillir et héberger les migrants et se retrouvèrent très vite dépassés, incapables d'assurer des conditions dignes d'accueil aux demandeurs d'asile. Les auteurs du règlement Dublin avaient toutefois prévu une dérogation mentionnée à l'article 3§2 en vertu de laquelle «chaque Etat membre peut examiner une demande d'asile qui lui est présentée par un ressortissant d'un pays tiers, même si cet examen ne lui incombe pas en vertu des critères fixés dans le présent règlement.» Ainsi, quand des Etats du Nord de l'Europe ont refusé de faire jouer

cette exception en renvoyant vers des Etats du Sud des migrants alors qu'ils savaient que leurs conditions de détention n'étaient pas conformes aux règles élémentaires de dignité, la Cour européenne a sanctionné, sans état d'âme, de telles manœuvres.

La pression exercée sur l'Union européenne par la jurisprudence conventionnelle a, ce faisant, été une injonction subalterne supplémentaire qui eut, somme toute, quelques effets positifs. Le dialogue des juges entre les deux Cours européennes fut à son comble en la matière[64]. Il suffit d'égrener les arrêts *M.S.S c. Belgique et Grèce*[65] de la Cour européenne auquel la Cour de justice répondit par l'arrêt *N.S*[66], suivi d'un autre arrêt de la Cour européenne –*Tarrakhel*[67] – pour comprendre que la jurisprudence de la Cour de Strasbourg fut un aiguillon non négligeable s'agissant de la nécessité de faire primer la protection des migrants et leurs conditions dignes de détention sur le principe de confiance mutuelle, fondement de la réglementation du « système Dublin ». Ainsi, alors que l'application dudit principe devenait attentatoire aux droits des personnes dans des pays comme la Grèce, la Cour européenne valorisa l'importance de la sauvegarde des droits élémentaires des personnes. La Cour européenne a fait comprendre au juge de l'Union, l'interprète authentique de la législation européenne, que la confiance mutuelle ne devait pas être aveugle. . .

A ce stade, une interrogation se fait jour. Cette injonction conventionnelle a-t-elle réellement participé à rendre meilleure, de façon drastique, la situation des migrants ? Si elle a pu améliorer les choses, ce n'est toutefois évidemment qu'à la marge. D'autant plus quand la propre politique de la Cour européenne est traversée par des contradictions notoires : celles inhérentes à une Cour internationale qui, face aux défiances répétées des Etats, oscille entre interprétation progressiste et *self-restraint*

[64]Sur les détails techniques de ce dialogue des juges, on se permet de renvoyer à notre chronique annuelle publiée à la *Revue du droit public*, Burgorgue-Larsen (2012), pp. 1730 et s.

[65]CEDH, Gde Ch., 21 janvier 2011, *M.S.S. c/ Belgique et Grèce.* La Grande chambre de la Cour européenne statua sur la requête d'un ressortissant afghan entré sur le territoire de l'Union par la Grèce avant de parvenir en Belgique, pays qui avait refusé d'activer la dérogation de l'article 3§2 afin de renvoyer le demandeur en Grèce. Les constats de violation dressés par la Cour dans cette affaire à l'encontre de deux Etats membres de l'Union furent un camouflet sans précédent à l'encontre de ces deux pays membres de l'Union dans la mesure où les articles 3 et 13 combinés avec les articles 2 et 3 de la Convention furent déclarés enfreints. Si l'Union européenne échappa à une condamnation en bonne et due forme – la Cour européenne écartant la jurisprudence *Bosphorus* au nom du « pouvoir d'appréciation » détenus par les Etats en vertu de l'article 3§2 du règlement Dublin – ce fut tout de même, en arrière-plan, le système commun européen de l'asile et le principe de la reconnaissance mutuelle qui fut mis en cause.

[66]CJUE, Gde Ch., 21 décembre 2011, *N.S et M.E et autres* (C-411/10 et 493/10). Le dialogue horizontal entre les deux Cours européennes fut à son zénith, puisque la Cour de justice prit en compte sans sourciller les enseignements de l'arrêt *M.S.S.* La CJUE imposa aux Etats d'activer la dérogation de l'article 3§2 du Règlement Dublin III et d'examiner « eux-mêmes» la demande d'asile quand il existe des risques sérieux et avérés de faire subir à des demandeurs d'asile des traitements inhumains et dégradants en les renvoyant vers l'Etat responsable au principal, du fait de la présence de « défaillances systémiques » en son sein (voir points 106, 107, 108).

[67]Cour EDH, gde Ch., 3 novembre 2014, *Tarakhel c. Suisse.* Pour une présentation détaillée des enjeux et des conséquences de cette affaire, v. Burgorgue-Larsen (2015), pp. 1143 et s.

judiciaire tout stratégique[68]. Cette incise est fondamentale à l'heure d'analyser le second aiguillon joué par la jurisprudence de la Cour européenne, quand il s'agit de respecter les garanties procédurales des migrants quand les Etats membres de l'Union ne désirent pas les accueillir sur leur territoire. La jurisprudence de la Cour se déroule dans un contexte très sensible : si elle ne peut sacrifier les droits des migrants, elle ne peut non plus ignorer les souveraines nations, toujours majestueuses, à l'heure de « sélectionner » les personnes habilitées à séjourner sur leur territoire. Or, et c'est toute la difficulté de la situation, l'Union européenne est confrontée à l'arrivée de « flux mixtes » de migrants, demandeurs d'asile d'un côté, migrants économiques de l'autre…Les développements qui suivent démontrent à l'envi la complexité du réel.

2.2.2 Expulsions collectives vs. respect des garanties procédurales

La Cour européenne des droits de l'homme est confrontée à la complexité du réel migratoire[69], *i.e*. la diversité sociologique des flux de migrants. Car, aux côtés des réfugiés, il y a également les migrants économiques – le plus souvent en situation irrégulière – qui pensent et voient encore l'Europe comme l'*Eldorado* qui leur assurera une vie meilleure[70]. Or, la migration irrégulière et les trafics multiples qui l'entourent arrivent également devant le prétoire de la Cour de Strasbourg. L'affaire *Khlaifia et autres c. Italie* – qui concernait l'afflux massif en 2011 de migrants tunisiens placés dans un centre d'accueil sur l'île de Lampedusa, après leur sauvetage en mer par les garde-côtes italiens – le démontre[71]. Certains (à l'instar du seul juge dissident, le juge chypriote G. Serghides) y verront un très net recul de la jurisprudence de la Cour à l'endroit de l'article 4 du protocole n°4 (qui interdit l'expulsion collective des étrangers) et des exigences inhérentes au principe de non refoulement élevé au rang de droit coutumier. D'autres, à l'instar du Président de la Cour, G. Raimondi (qui explicite son changement de point de vue entre l'arrêt de chambre et celui de Grande chambre), considéreront qu'il y a somme toute une solution raisonnable trouvée par la Cour à l'endroit d'un pays, l'Italie, qui est en première ligne face à l'arrivée massive, comme en l'espèce, de migrants irréguliers.

[68]La littérature sur la défiance ou, plus radicalement, les contre-réactions négatives (« *backlash* ») des Etats est de plus en plus imposante. Pour une analyse en français, on renvoie à Touzé (2016). En anglais, voir, parmi moult références, Flogaitis, Zwart et Fraser (2013).

[69]Elle est même allée jusqu'à développer une sorte de politique procédurale de radiation du rôle en la matière, qui n'a pas été sans de fortes dissidences, voir CEDH, Gde Ch., 17 novembre 2016, *V.M. et autres c. Belgique*; CEDH, Gde Ch., 21 septembre 2016, *Khan c. Allemagne,* Burgorgue-Larsen (2017) pp. 157 et s.

[70]On signalera, en passant, que la jurisprudence interaméricaine en la matière est beaucoup plus protectrice que celle de la Cour européenne. Alors qu'elle est également confrontée à la complexité du réel, elle n'entend pas céder sur la nécessaire protection élémentaire des droits des migrants, et ce, quel que soit leur statut, Olea Rodriguez (2016) pp. 249–272.

[71]CEDH, Gde Ch., 15 décembre 2016, *Khlaifia et autres c. Italie,* req. n°16483/12.

L'accord bilatéral conclu entre l'Italie et la Tunisie en 2011 fut considéré comme suffisamment pertinent par la Grande chambre pour justifier non seulement l'adoption de décrets de refoulement (exonérés de l'obligation de la tenue d' « entretiens individuels »), mais également pour considérer que les recours interjetés à leur encontre n'étaient pas suspensifs au prix d'une réinterprétation toute stratégique de l'arrêt *De Souza Ribeiro* (*Khlaifia et autres,* §274, 275, 276). Il est évident qu'ici la sécurité de l'Etat italien (ou à tout le moins sa stabilité interne) face à des circonstances tout à fait exceptionnelles, ont eu raison de l'audace de la Cour qui lui préféra le réalisme.

Autre arrêt, autre politique jurisprudentielle. L'arrêt du *3 octobre 2017*, *N.D. et N. T.*[72] s'inscrit dans le double scénario où de nombreux migrants sub-sahariens soit décident de quitter des zones de conflits, soit décident d'avoir l'espoir d'une vie meilleure. Passer par le Maroc pour accéder aux enclaves espagnoles de Ceuta et Melilla – vestiges d'un empire déchu – est une option de plus en plus suivie par les migrants qui savent que la route libyenne est un enfer au sens littéral du terme puisque l'esclavage y est au rendez-vous, comme si l'histoire était un éternel recommencement[73]. Alors, quand un Malien et un Ivoirien décident de saisir la Cour en alléguant une violation par l'Espagne de plusieurs dispositions de la Convention et plus particulièrement de l'article 4 du Protocole n°4 prohibant les expulsions collectives d'étrangers[74], on retient sa plume. . .Que va décider la Cour ? Va-t-elle s'arrimer à une approche réaliste caractérisée par l'affaire *Khlaifia* – où elle avait validé l'accord passé entre les autorités italiennes et tunisiennes pour mieux refouler les arrivées massives de migrants économiques [75]– ou va-t-elle renouer avec les fondamentaux du droit international public et, dans certaines circonstances, du droit de l'Union qui imposent l'individualisation des entretiens avant toute expulsion ? C'est la deuxième option qui a été choisie par la 3ème section de la Cour. Le tour d'horizon du « droit pertinent » est impressionnant et, avant même la transcription *in extenso* des règles d'interprétation telles que posées par les articles 31 et 32 de la Convention de Vienne (pt. 35-36), comme des indications de la Commission du droit international sur les règles gouvernant les expulsions (pt. 37), c'est le droit de l'Union qui y trône de façon majestueuse[76]. Bizarrement, si cette toile de fond est

[72]CEDH, 3 octobre 2017, *N.D. et N.T. c. Espagne.*

[73]Voir la note n°1 et la référence à l'ouvrage de T. N'DIAYE.

[74]Il faut lire les passages relatifs à la description des faits pour comprendre que ces deux requérants faisaient partie d'un groupe de soixante-quinze à quatre-vingts migrants sub-sahariens qui ont plusieurs fois tenté d'escalader la succession de trois clôtures en fer qui entourent la ville de Melilla et qui ont été renvoyés de manière expéditive par la *Guardia civil* espagnole.

[75]Les autorités de ces deux pays avaient mis en place des « décrets de refoulement » les exonérant de l'obligation de la tenue d'« entretiens individuels » avant tout renvoi organisant également le caractère non-suspensif des recours interjetés à leur encontre.

[76]La nomenclature présentée commence logiquement par la présentation du droit primaire (pts 20–27) – des articles 2 (valeurs) et 6 (droits fondamentaux) TUE, en passant par les articles 18 (asile), 19 (éloignement, expulsion et extradition) et 47 (droit au juge) de la Charte des droits fondamentaux, pour arriver aux dispositions clés relatives à l'espace, de sécurité et de justice de

très présente dans la partie « en fait », elle ne réapparaît pas dans le cadre de la motivation de la Cour. L'on pressent toutefois qu'il était impossible pour elle d'en faire fi ; partant, elle mobilisa sa jurisprudence – en accord avec les règles de droit international et de l'Union qui interdit les expulsions collectives (en imposant de vérifier si les décisions d'éloignement sont prises en considération de la situation particulière des individus) et qui impose l'existence de voie de recours pour les contester[77]. La condamnation à l'unanimité de l'Espagne pour une violation de l'article 4 du Protocole n°4 seul et combiné également avec l'article 13 (droit au recours effectif) sera-t-elle confirmée ? Le gouvernement espagnol a demandé le renvoi en Grande chambre. Il reste à espérer que la composition de celle-ci ne sera pas encline à revoir à la baisse le standard conservé dans la présente espèce et soutenu par toutes les règles du droit de l'Union et qu'elle ne s'alignera pas sur la dissidence du juge russe, qui reprocha à la Cour de maintenir « ses normes élevées » dans un contexte migratoire sensible.

L'Europe développe depuis plusieurs années une politique migratoire basée sur la peur, d'où son approche sécuritaire et militaire de ses frontières ; d'où l'oubli, pour ne pas dire le reniement de la valeur « solidarité » pourtant au cœur de son A.D.N. politique[78]. Or, la peur, c'est la catastrophe. Le président Roosevelt n'affirmait-il pas, en mars 1933, que la seule chose dont nous devons avoir peur, c'est la peur elle-même[79] ?

Alors, à quand un sursaut de conscience, de rationalité empathique, afin de construire une politique européenne constructive et imaginative qui propulserait l'Union européenne dans une dynamique d'acceptation et de valorisation de l'arrivée et de l'intégration des migrants[80] ?

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l'Union (art. 67, 72) et aux politiques de l'asile et de l'immigration (art. 78) – et se poursuit par l'énumération des règles élémentaires du droit dérivé. La « directive retour » (pt. 20) et son interprétation par la Cour de justice (pt. 29) ; la « directive refonte » (pt. 30) et le règlement instituant le « code frontières Schengen » (pt. 32).

[77]La violation de l'article 4 du Protocole n° 4 a découlé de l'absence d'une procédure d'identification des requérants lors de leur expulsion tandis que la violation de l'article 13, combiné avec l'article 4 du Protocole n° 4, a résulté quant à elle de l'impossibilité, pour les requérants, de bénéficier d'une voie de recours contre leur expulsion.

[78]La solidarité n'est pas respectée à l'endroit des migrants vu comme des menaces et à l'égard desquels la logique sécuritaire et militaire a pour effet de les « criminaliser » ; la solidarité n'est pas respectée entre les Etats membres de l'Union puisque seuls quelque uns se retrouvent en première ligne d'une responsabilité qui devrait être collective ; la solidarité n'est pas élevée au rang de principe opérationnel par la Cour de justice de peur d'être taxée d'activiste ou tout simplement de peur de prendre ses responsabilités face à l'incurie du législateur de l'Union. . .

[79]« The only thing we have to fear. . .it is fear itself », cité par Riemen (2018), p. 21.

[80]Or, ce qu'il faudrait, c'est une politique rationnelle qui prenne en compte le temps long, voir l'interview de F. CREPEAU, *Rapporteur spécial des Nations Unies sur les droits de l'homme des migrants,* « Nous avons besoins d'une stratégie à long terme sur la migration ». *Cet article a été publié en juin 2017 sur le site Refugees Deeply. Il est accessible en anglais à l'adresse suivante : https://www.newsdeeply.com/refugees/community/2017/06/08/u-n-rapporteur-we-need-a-long-term-strategy-for-human-migration*. Il fut *ensuite traduit de l'anglais par Yves PASCOUAU et publié sur le site EuropeanMigrationLaw.eu.*

A quand des injonctions constructives qui prendraient acte du fait qu'en 2035, le nombre de jeunes africains en âge de travailler excédera le reste des autres jeunes dans la même situation à travers le monde[81] ?

A quand la prise de conscience du fait qu'en 2050, un être humain sur quatre, sera africain[82] ?

Les ponts entre l'Union africaine et l'Union européenne devraient être établis et pérennisés sur la base de profonds changements de paradigme, basés sur de réels partenariats égalitaires où la coopération loyale serait à l'œuvre[83]. Il est nécessaire que l'Union africaine prenne également sa part de responsabilité ; qu'elle s'engage résolument dans un développement éducationnel et économique de premier ordre, en arrêtant de détourner une bonne part de la manne financière de l'aide au développement. Les défis, ici, sont majeurs.

Ce qu'il convient de réaliser (et une fois de plus d'*accepter*), c'est qu'il est tout simplement impossible de stopper ce qui est à l'œuvre, *i.e.* les déplacements massifs de populations en provenance d'Afrique, mais également du Moyen-Orient. L'Europe doit se faire à l'idée qu'elle n'est plus une terre de départ[84] et qu'elle doit fondamentalement se penser et se construire comme un continent d'immigration. La révolution, si elle doit être politique et juridique – si elle doit penser l'accueil, l'absorption et l'intégration de nouveaux venus qui ne feront qu'enrichir, à terme, son environnement – doit être avant tout et surtout culturelle et mentale.

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[81]Booker et Rickman (2018), p. A17. Les premières lignes de cet article qui met en évidence l'impréparation américaine à "miser" sur le continent africain, sont les suivantes : "Beginning in 2035, the number of young people reaching working age in Africa will exceed that of the rest of the world combined, and will continue every year for the rest of the century."

[82]La lecture du rapport de l'Institut Montaigne est nécessaire afin de mettre en perspective les chiffres relatifs à ce que l'on appelle la « pression migratoire », *Le défi migratoire : mythes et réalités*, Note, Juillet 2018, 81 p. (voir plus particulièrement le fait que « la population de l'Afrique (2,52 milliards d'habitants) en 2050 sera plus de trois fois supérieure à celle de l'Europe », p. 50).

[83]L'ouvrage de S. SMITH est, sur ces questions, exemplaire, v. Smith (2018).

[84]Wihtol de Wenden (2017), p. 192 : « L'Europe, ancienne terre de départ, ne s'est jamais pensée comme continent d'immigration et celle-ci apparaît illégitime à beaucoup de ceux qui refusent cette réalité. L'Europe a en effet longtemps été une terre de départ vers les grandes découvertes, la colonisation, le commerce international, les missions étrangères, le peuplement de pays vides. »

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On the Modes of Confluence in Law

Ko Hasegawa

[I] In this brief essay, I wish to discuss the importance of what the late H. Patrick Glenn called "confluence" between different legal traditions in the world. Confluence is the axis of the making of legal ideas and systems in a society through its interactive and transformative relationships to different legal ideas and systems in the world, as Glenn explored in his seminal works of *Legal Traditions of the World* and *Common Laws*.[1] We may say that any law in the world that had occurred, is occurring, and will-occur, has been shaped with certain elements of confluence, albeit fragmentarily or partly. And we can observe this process by exploring historical developments of various laws in the world, especially by investigating significant legal documents, legal actors, legal practices, legal movements and the like. We may find here a possibility of a significant academic collaboration between comparative law and legal history, as partly done well by Glenn in his works mentioned above.

Yet, not only that: we can also find in the problem of confluence in law significant relationships between comparative law and legal philosophy. Glenn already suggested some of them in the works mentioned above. For example, Glenn grasped

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[1] Glenn (2014), Chs. 9 & 10; Glenn (2007a), Ch. 3.

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legal tradition as the blun-tub of legal information, the substance of which can be the ideals of law and the ways of legal thinking. The basic features of law are determined, even if partly, by the essential nature of various conceptions of law. These issues are already the very fundamental problems of legal philosophy: moral and political values in law, the structure of legal reasoning, and the concept of law. Here we can find a merger of the problem interests and approaches of comparative law and legal philosophy.

Indeed, the merger might not be complete. This may be because of the problem interests of those disciplines being different in that, while the former is an observation, the latter is a justification. The approaches of them may also be different in that, while the former is descriptive, the latter is normative. Yet, this divide should not be simply emphasized, if we take into consideration that theorizing under this setting can itself be a dynamic sort of "com-paring", a term I would like to borrow from the fascinating terminology coined by Glenn.[2] Theorizing in this regard is not a detached observation of phenomena but rather a self-conscious reflection of human activity within the very phenomena itself, namely an interpretation of our thinkings and doings from within. For, theorizing is itself an aspect of our activity of thinkings and doings at a meta-level of our own activity. It is an articulation of the meta-consensus for our own thinkings and doings. Thus, when we theorize the significance of comparative law, our theorizing itself is a reflection of our own thinkings and doings in the movement of the cultural domain of law.

As for this point of theorizing, I wish to add the following methodological notes. First note is concerned with the popular distinction between scientific description and normative valuation of legal practice. This distinction is sometimes understood as confrontational in that while the former aims at a detached analysis the latter is focused on a committed valuation. This is, in some sense, an unavoidable parity. And yet in the theorizing of law, in my perspective, both are different aspects of the same activity. If theorizing is an engaged activity, the persistent distinction between description and evaluation is much relativized: description is a limiting form of evaluation when evaluative impartiality reaches to the highest degree of fact following. That is, description is a deconstructive criticism of the practice in question and valuation is a reconstructive criticism of it. In other words, valuation is a deflective analysis and description a reflective analysis. The distinction between descriptive and normative theories of law becomes a form of division of labor in the sense that they show various aspects or dimensions of law by some methodological sort of checks and balances.

Second note to heed to is the possibility that this division of labor may vary depending on the character of the societal domain in question. If the problem is concerned with the domain of the economic, it is easiest for participants to satisfy the conditions of meta-morality of rationality and reasonableness in communication. If the problem is in the domain of the political, it is relatively not so easy to satisfy the conditions of this meta-morality. If the problem is in the domain of the cultural, it is

[2]Glenn (2007b), pp. 91–108.

hardest to satisfy the conditions of that meta-morality. Also, if there is a combination of those societal domains, problems will become more complicated to satisfy the conditions of the meta-morality.

Third note to point out is that this division of labor assumes a third standpoint which tries to maintain some integrative quality of the discussions in question. One might want to separate descriptive and normative views as diverging or independent, or even critical with each other. This postmodern standpoint of a therapeutic kind would be itself not insignificant, and yet I wish to point out that, if this standpoint would wish to say, everything is dispersed then it could not be true. This is because it already says that the very something it wishes to claim is itself not dispersed, and also because we cannot suspect of the very working of meta-morality of rationality and reasonableness in the midst of our struggle for finding truth and justice in human world. This is, I believe, a very fundamental root of our universal humanity.

All this is enough for preliminary notes before I begin my substantive discussion. My theoretical concern in the following is a reflective interpretation of the ways of the working of confluence in law.

[II] Let me start by recapitulating the points of confluence in law. Glenn's ultimate theme in his seminal works mentioned earlier lies in the explication of 'sustainable diversity' between various legal traditions.[3] Legal tradition is a dynamic flow of legal information that shapes, transforms, and diffuses itself in legal history. The confluence of law is the necessary site of the interaction between divergent legal traditions. Also, we should note that confluence of legal traditions shapes the state of hybridity in the legal system of a society, which yields the collaboration of relevant legal traditions in the diffusive process of law. Glenn himself talked about confluence by introducing examples from European law and East Asian law and identified the mixture of several European 'common laws' and several western laws. However, I wish to emphasize that confluence is not just the merger of different legal traditions but rather a *dynamic* process of fusion between different traditions via the efforts of mediators in the movement. We can distinguish some *modes* in confluence, namely some ways of confluential thinking for the interaction of laws. Indeed, understanding the modes of confluence in law is a complex philosophical task, because we must face the themes indicated in the previous section. As I suggested already at the beginning of this essay, there are several relevant issues in legal philosophy such as the structure of legal reasoning, moral and political values in law, and the concept of law, when we try to consider comparative features of different laws. Still, as I do not have enough room to discuss all the relevant issues, I wish to concentrate in this essay on the processual features of confluence in law.

In confluence in law, there should be certain connecting points between different legal systems. One of them is what I have explicated as "normative translation" of foreign legal ideas. It is the process of incorporating culturally different legal ideas through translation, which is characterized as the evaluative accommodation of

[3] Glenn (2014), Ch. 10.

different legal ideas by translation from original language to target language, for example from German or English to Japanese in the context of the legal modernization in Japan. The logical construction of this process is characterized in terms of what I call "isomorphic recognition" and "contextual substantiation".[4] Based on this exploration, what I am trying to indicate now is that the process of normative translation is *a* mode of nexus and there are at least two others in it.

I now wish to maintain that normative translation is to be re-characterized as *rendition*. Rendition occurs often at the basic level of legal ideas which is pivotal to the legal practice in question; whose examples are, as I once explained, the translation of the idea of rights, liberty, and society by Yukichi Fukuzawa, one of the important intellectuals in the late nineteenth century Japan.[5] The translations of those ideas from English to Japanese, normative and creative, are to be placed in the entire process of confluence as word-to-word, concept-to-concept transference between different legal systems in determining the basic character and orientation of the legal practice in question.

Besides rendition, two other modes of confluence in law are important, namely *modulation* and *construction*. The former indicates the translational accommodation of different legal thoughts that is carried out by introducing some theoretical package of legal doctrines into some part of the existing legal theory in a society. And the latter indicates that translational accommodation is carried out by establishing some new law in the existing space of law in a society. Let me give a couple of examples.

As for modulation, it is very useful to explore a so-called "hybrid" legal system, such as that in Japan after the late nineteenth century. It is well known that, in the modernisation process of law in Japan, legal academics tried to combine divergent legal ideas from the West in an effective way through the incorporation of new legal perspectives. A specific example related to this process is the reinterpretation of Article 416 of the Japanese Civil Code, which deals with the scope of compensation for the breach of contract. It is now recognized that the historical origin of Article 416 is in the common law regulations that focused on the scope of the foreseeability of the contracting parties, which itself has its historical root in the French legal convention. It is also recognised that the later Japanese scholars tried to understand this regulation from a German perspective: the scope of compensation is determined by the scope of adequate causal relationship between the acts and the results arising from the violation in question. Here we may find the connection point of legal traditions where three different kinds of legal views merged at the axis of Japanese understanding. English, French and German understandings of the contractual damages are connected through some Japanese intervention. Furthermore to note, there also appeared another understanding of this Article in the 1980s that was influenced by American realist thinking. This perspective critically emphasized the

[4]Hasegawa (2015), pp. 501–517, esp. p. 506ff.

[5]Hasegawa (2009a), p. 88ff.

pragmatic character of the determination of the scope of compensation to protect the best interests of the parties in question.[6]

The point concerning confluence of law here is that the incorporation of foreign legal thoughts and ideas is done through a unit of legal theory, and not directly through the translation of legal ideas. An original theory for contractual damages is, in this case, based on the subjective capability of the contracting parties, namely the ability of foresight on consequence in making contract with others. For this, ontological assumptions are the actual subsistence of an individual and its intellectual ability to foresee the negative consequences of the contract, as well as its free will in making a contract. These are prerequisite elements in the original understanding of Article 416 above, influenced by English-cum-French perspective.

However, the situation gets changed when this original assumption is replaced by another view of contractual damages, though the sentence that expressed the original picture still remains the same. One important change is brought by some objective causal perspective on the relationship between the act of contracting and the damages as a consequence of that act, which has a German origin. Critical element here is not in individual capability but rather in the objective causal link between the action and its consequence. From this viewpoint, the damages in question are whether it is a causal product of the action in question or not. Thus, whether foreseeable or not, damages should be compensated if it is judged relevant from an objective causal viewpoint. This is the so-called adequate causal relationship theory of contractual damages. In this theory, the ontological assumptions are very different from the subjective capability theory above. Although the importance of individuals and free will are almost the same as in the formation of the parties in a contract, the point is rather in the causal relationship between the actions done and the results yielded. The point of evaluation is very different in that not subjectivity but rather objectivity is in question. Influenced from this sort of theory-change in contractual damages, Article 416 is re-interpreted in accordance with another objective view. The wording of Article 416, that compensation must be made for "the damages normally yielded", is to be understood in objective terms and not in subjective terms.

To add, as mentioned earlier, when this Article 416 was re-evaluated as indicating some pragmatic concern for the policy-making of judges, the theoretical background has changed in that this view circumscribes those subjective and objective assumptions and appeals directly to the value judgements of the person who applies this article to a particular case. It is evident here that theoretical assumptions are also very different in that every factor relevant in the case in question depends on the perspective and value orientation of the person who judges the case.

Thus, in modulation, a unit of theory, which originated in different legal traditions, changes the understanding of law at a deeper level. This situation is different from rendition I have discussed earlier, because the problem of confluence in law here is concerned with a theory and not an idea. This difference should be adequately

[6]Hasegawa (2016), p. 4ff.

distinguished as the difference of the site in the modes of confluence in law. Still, the logic as a whole, namely the replacement of the background conditions of the legal material in question and the new reading of the law in question, may be grasped in the same way as in the case of normative translation. The process of isomorphic conversion and contexual substantiation repeats itself for the practical accommodation of law in the process of confluence at the different level of theory change. In the case above, the problem of understanding the scope of contractual damages is identified as isomorphic and substantiated in different objective or policy-oriented ways. We may see the set of theory-unit as the idea infused and the re-reading of law as the product confluenced by the original and the adaptive theories.

Lastly as for construction. Construction here means new legislation in the existing legal space in a society. This legislation develops various systemic rules and standards in a new territory of legal space in a society. Based on foreign law, say a new international treaty adopted by pressure from foreign countries, or some specific law in the domain of administrative or economic regulation that are established in a foreign country, new law in the society in question opens a new space of law among existing laws. In a sense, this is similar to rendition in which new legal ideas are translationally introduced. In this case, the new idea explores a new space of law, even if at the very basic level of pivotal concepts in legal practice, through a new concept. However, in construction, the difference lies in the very development of legal space by creating a systemic cluster of new rules and standards.

Of course, formally speaking, legislation may follow the existing pattern of other legislations. For example, the drafting process might be affected from the existing legal thinking.[7] In this aspect, a thorough space of the new law may not be possible like in the case of rendition. Still, this sort of formal constraints from existing frames in law may appear, even if as the problem of degree, in the cases of rendition and modulation. In rendition, we need our own native language to translate foreign legal ideas. In modulation, we face the existing frame of law and legal concept to incorporate some theory unit in place of the existing theory unit. These two modes may be constrained by some basic problem framework. However, in the aspect of substance in these processes, conceptualization in rendition, theory replacement in modulation, and new establishment in construction are three different types of the process of the confluence in law.

An example of construction as a process of confluence in law may be the establishment of Anti-monopoly law in Japan in 1948. This law was introduced in Japanese society under the heavy influence of American monopoly regulation after the defeat of WWII. Before the end of WWII, economic system in Japan was totalitarian due to the Important Industry Regulation Law in which the necessity of governmental control for “fair economic activities” suppressed “free competition”. And this control was based on the German totalitarian thought then prevalent that the state and its leader can have almost absolute authority to determine the way of

[7]New law needs coherence with existing laws. This is a logical consequence of the fundamental requirement of legal stability, which is also a collorary of the ideal of the rule of law.

economic order in society. Yet, after the end of WWII, with the regret that this state-oriented control of economy and other societal spheres led Japan to the disaster of defeat, American way of economic regulation was introduced by GHQ that occupied Japan, and it led to the incorporation of American legal thinking while emphasizing the basic importance of free competition and the exclusion of "unfair activities" in Japanese legal thinking. Here the issue was which should be the basis of Anti-monopoly thinking: free economy under 'fair' conditions or the exclusion of unfair activities in a free economy. And this finally led to the wording of "fair and free competition in economy" for the change of the monopolistic situation in the Japanese economy to establish the new 1947 Anti-monopoly law in place of the old control law.[8] This movement is to be understood as a confluence between German and American legal thinkings in the form of construction in my sense distinguished above.

[III] These examples show that some bridging and translational thinkings by legal actors intervene the dynamics of confluence of legal traditions. The confluence of legal traditions is possible by the driving force of human activities in law, which produces the macro movement of confluence. Both sides, as it were objective and subjective, are important. Still, we need to reflect on the salient features of the accommodative process of the people involved in order to understand the essential nature of the confluence in law in question. In particular, as the confluence of legal traditions is not a simple accident but rather a historically continuous process, we need to reflect on the extension and reprise of that process. Especially in Japan and other East Asian societies, the reprise of confluence and its accumulative effects are conspicuous. In the example of Article 416 of the Japanese Civil Code or in the Anti-Monopoly Law, we are now facing the situation where several perspectives are being contested.[9]

Probably, to understand this situation in its entirety, we should grasp the process of confluence at the *triple* dimensions of rendition, modulation and construction; which surely are constitutive of practical accommodation and contextual substantiation of legal thoughts and yet differ with each other by the practical focus for theorizing. What I mean by this is that rendition is conspicuous when our eyes focus on the workings of pivotal legal concepts in the law in question, and that modulation is conspicuous when our eyes focus on the workings of derivative legal doctrine such as contractual damages in the law in question, and further that construction occurs when there is a free space of law in which new legislation can be pursued as a result of confluential thinking. While the understanding of pivotal legal concepts is an essentially basic part of law, the understanding of concrete framework utilizing that concept in a certain context as fixed and operating it in various decisions in law are an applicational part of law. In the latter aspect, we may keep silent about the very contestability of that pivotal concept, unless it is picked up as basically contested. If

[8] See Kinoshita (2010), p. 123ff.

[9] Cf. Dworkin (1986), Ch. 2.

this grasp be possible, then rendition and modulation may have the same logical conditions that I explored for normative translation. And, in this regard, we may keep theoretical integrity to understand the importance of confluence in law.

Further, construction of the new law is to be grasped in line of this view. Rendition and modulation are the cases of confluence where we need to accommodate different ideas or theories of law in law. Still, in construction, the accommodation is being tried in a new direction where confluencing two thinkings are connected in a new way. In this case, not the connecting of ideas or theories but rather the creating of a new space for the connection is important. However, its logic is another extension of the logic of confluence in rendition and modulation. Important difference is only that fusing ideas or theories are at the point within an existing law or between existing laws.

Incidentally, how to understand this entirety of the confluence in law in terms of human activities is itself a deeper philosophical problem. Although I need to further my exploration on this problem, it suffices here to suggest that this is an aspect of the epistemologically global spiral of the so-called *hermeneutic circle*. Here notable is the prerequisite work in human intellect, generally referred as interpretation: the activity of preunderstanding, articulation, and reflective reconstruction, which develops spirally toward a better understanding of the matter in question for attaining a wider interpretive equilibrium. Also, in terms of law, people, whether lawyers, scholars, officials, or ordinary citizens, are themselves interpreting units of the normative world including law. They start their legal activities from the pre-understanding of given legal values, norms, and institutions; they articulate the contents of them constructively; and they revise those understandings reflectively to make law more integral to the possibly adequate interpretation. Thus, I say that rendition, modulation and construction are aspects of hermeneutic circle in law, which totally entangles with each other to make a law vital in a complex society.[10]

[IV] To conclude, I wish to note briefly how all these points relate to the problems of legal philosophy, which lead again to the point that Glenn's insight on the confluence of legal traditions broke a fresh theoretical ground by approaching the substantive aspect of the diffusion of law. We already know that there are multifarious studies of law, including not only doctrinal studies of law, jurisprudence, comparative law, or legal history, but also sociology, anthropology, and even evolutionary theory of law. The transformation of law in terms of the dynamic confluence of legal traditions is a significant connecting theme among these studies. Here we find a new place for the interdisciplinary, or even trans-disciplinary, exploration of the interaction of law in the world.

Yet, to stress here, we should be aware that all this understanding is itself a theorizing of law, which should be a part of legal philosophy. We are reflecting here

[10]This circle is also to be understood generally as the interpretive spiral of receptivity, sagacity, and practicality. This spiral develops successively toward a new dimension of itself over time, with a better interpretation and integration of values. See Hasegawa (2009b), p. 91ff.

the substance of legal thought, ways of legal thinking, aspects of human cognition, transformative process of human judgment and action, circumstantial conditions of legal practice, and the moral orientation of all the process involved in these activities. Especially concerning the significance of legal philosophy, I raise here the following points, though tentatively: the significance of translational activities in the interaction of divergent laws, particularly normative translation of concepts and ideas; semantics in the translation of legal language and concepts; translational equivalence of normative meaning and the "semantic twist" of legal ideas and theories; ways and the logic of legal thinking, particularly the general structure of legal thinking and its working in the context of hybrid law; cultural characteristics and its mixture of law and of related moral values; the salient features of legal culture and its relationship to legal practice; and methodology of comparison or "com-paring" in law. While all these are evidently constitutive of the essential themes in legal philosophy, we can also say that these problems are intrinsically related to many other issues in legal philosophy. To pick up a few, legal thinking and logic, the function of law and the role of legal actors such as lawyers and legal scholars, the integrity of law, legality and legal values, and the nature and the concept of law, are evidently relevant. Every issue holds the possibility of extensive and broader considerations in relation to the problem of confluence in law.

In other words, we should think that the problem of confluence in law invites and even demands various philosophical investigations, as raised above. Although working on the answers to these problems remains a task for the future, the question of what the recognition of confluence leads to is worth challenging. The recognition of confluence in law is basically the recognition of law's hybridity in the transformation of all sorts of law and is related to the interest in the dynamics and integral pluralism of law. Of course, all of this is a development of the idea of sustainable diversity of legal traditions, provoked by Glenn in his great works. His view changes the significance of the concept of law in today's new globalizing situation; it will also change our perspective toward the transformation of legal practice in the twenty-first century.

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Law and Religion: The Perspective of Inter-Religious Dialogue

Some Ideas and Two Experiences (Argentina and Spain)

Javier Martínez-Torrón

1 Let me begin with a terminological caveat. When we speak of inter-religious dialogue, we refer to dialogue between different religions and not to dialogue between religions and State authorities. This does not mean that the latter is not important—it certainly is—but it requires a different analytical approach (and a different name).

When the issue of inter-religious dialogue is raised in the context of a congress of comparative law mainly focused on secular law, some questions come immediately to mind. What has the State to do with inter-religious dialogue? Which is, or should be, if any, the role of the State in such a delicate area?

These questions can be posed from different perspectives. One is what we may call the "strategic" perspective: what is the gain—or the loss—for the State when it involves itself in inter-religious dialogue? This strategic perspective is compatible with other, deeper, perspective, which is the one I am particularly interested in this presentation: the conceptual perspective. That is, how can we conceptualize the connection between State and inter-religious dialogue if we depart from the premise of a secular State committed to the guarantee of religious freedom, which is the case of many nations all over the world and certainly of the countries that we normally name "western"—and in general of all truly democratic States.

These pages try to reflect my oral presentation at the round table held at the 20th General Congress of the International Academy of Comparative Law, in Fukuoka (Japan), on 23 July 2018. For reasons of brevity, I have tried to keep footnotes at a minimum.

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In secular States, there is a basic rule that serves as departure point for every conceivable way to organize the relations between State and religion: State laws and structures are distinguishable and autonomous with respect to religious laws and structures, and vice versa. Such distinction or autonomy can be shaped in different ways in the relevant national constitutions. For instance, as strict separation between State and religions (as in the US or France),[1] or as mutual autonomy simply based on the State's religious neutrality and accompanied by a variety of channels of cooperation (as is common in most European and Latin American countries, as well as in Canada).[2] But State cooperation with religions can never be understood as merging or, as the Spanish Constitutional Court put it long ago, "confusion" between State and religious functions.[3]

Irrespective of whether the Constitution has adopted a principle of strict separation or has taken the route of mutual autonomy plus cooperation, the religious neutrality of the State plays a significant role. Such neutrality must be understood not only as impartiality vis-à-vis religion but also as incompetence to make choices in purely religious matters.[4] In such context, therefore, the State can neither represent nor control religions. The logical consequence is that inter-religious dialogue is primarily and immediately a responsibility of religious communities and not of the State. And this moves us to consider with special care which should be the limited role of the State when it decides to involve itself in an area that looks in principle alien to its competences, as well as which would be the justification of such involvement. I shall return immediately to this point.

Prior to it, and in definite connection with the possible justification of the State's intervention, we have to raise another practical question: is it realistic to assume that

[1] In reality, the systems of separation between State and religion, such as the ones existing in USA and France, do not exclude State cooperation with religion; in practice, separation means that public authorities, and the courts, exercise a strict scrutiny to ensure that religions are not privileged in comparison with other non-profit organizations or activities (in theory, they should ensure also that religions are not disadvantaged either, but this not always occurs). For an interesting analysis of the origins and evolution of the relations between State and religion in the US and France, see Chelini-Pont and Gunn (2005).

[2] For summary and precise explanations of the systems of relations between and State in Europe and in the entire world, see Robbers and Durham (2016) (there is also an online version: https://referenceworks.brillonline.com/browse/encyclopedia-of-law-and-religion). As is well known, a few European nations still keep an institutional connection between the State and the national church (e.g., England or Denmark). For the purposes of this presentation, however, these can be considered secular States, because they have managed to reconcile their historical Church-State systems with dynamics of actual autonomy of religious and State institutions, and with a high degree of protection of the freedoms and rights of religious minorities.

[3] See, among others, STC 24/1982, FJ 1; STC 340/1993, FJ 3; STC 177/1996, FJ 5; STC 154/2002, FJ 6; STC 38/2007, FJ 5; STC 51/2011, FJ 3.

[4] Of course, this raises the issue of which are purely religious matters, as well as the issue of "mixed matters", i.e., areas in which there is a convergence of interests of the State and religions. For further details on what I understand as State's religious neutrality, see Martínez-Torrón (2018a), pp. 159 et seq.

churches or religious communities can engage in a productive inter-religious dialogue by themselves, on their sole initiative?

If we look at history, we will probably feel inclined to respond in the negative. Very often—and this is no doubt the case of Europe—the relationship between religions has been of dominance or even persecution, and not so much of collaboration or dialogue.[5] At least until recently.

It is true that in recent times, especially since the mid twentieth century, there is a strong trend to change this pattern and multiple initiatives of collaboration and dialogue have flourished, at an international as well as a national level. This includes the relationship between the various Christian churches in Europe,[6] which was often of overt hostility in the past. However, one might wonder if such change has been the logical consequence of a theological development inside the relevant religions or rather the result of the evolution experienced by civil society after the Second World War and the movement for the protection of human rights. Certainly, the documents and principles of the Second Vatican Council seem to suggest that, at least in the Catholic realm, the theological progress has been a powerful factor in changing the attitudes towards other churches.[7] But at the same time, the irregular application of the Council's principles in various national and geographical contexts also suggest that it has not been the only factor, and that the pressure of the State and the civil society has been of no little significance. Something similar is probably true with regard to most of the other important Christian churches in Europe.

On the other hand, it is debatable which inter-religious dialogue qualifies as *productive*, among other reasons because the meaning of that adjective varies depending on whether we adopt perspective of the State or the perspective of religions—whose positions in this regard, in all likelihood, will not be completely coincident.

This diversity of perspectives, precisely, moves us to consider which is, or should be, the purpose of inter-religious dialogue if we look at it with the eyes of a comparative lawyer. And, in trying to respond to that question, I will not adopt the point of view of religions but that of the law of a secular State, assuming that it is a secular State sincerely interested in the protection of religious freedom.

I do not want to be misunderstood. By adopting this perspective, I am not suggesting that comparative legal analysis should, or could, be reduced to the study of secular law—States' laws and international law. Some churches and religious communities not only have compendia of moral and organizational rules and have their own legal systems, with their own jurisdictions and courts structure,

[5]For a new look at of the European religious wars, see Palaver et al. (2015).

[6]The most remarkable example are probably the Conference of European Churches (CEC), which brings together more than one hundred churches from Protestant, Orthodox and Anglican traditions (https://www.ceceurope.org) (20 November 2018); and, at a global level, the World Council of Churches, whose members are more than three hundred Christian churches (https://www.oikoumene.org/en/member-churches) (20 November 2018).

[7]See especially the Decree *Unitatis Redintegratio* (1964) and the Declaration *Dignitatis Humanae* (1965).

which deserve the name "law" sensu stricto. No doubt, these legal systems are part of the living law in our global world. Indeed, one of them, the canon law of the Roman Catholic Church, has decisively contributed to moulding Western legal culture.[8] If I adopt here exclusively the secular law perspective, it is simply because it is the one I feel more qualified to deal with (and also for obvious reasons of brevity).

Inter-religious dialogue may produce various effects, most of which would be of direct interest above all—and sometimes exclusively—for the churches and religious communities involved in it. Nevertheless, from a secular law perspective there is a potential effect that is of clear interest for the State, and in general for the civil society: an enhancement of social peace or social harmony. It is a fact of life that religious pluralism, although we usually look at it as a positive reality in contemporary societies, often carries with it tensions, and even clashes, between religious communities (or between factions within the same religious community). And experience demonstrates that, when religious communities engage in a true dialogue, the level of tensions decreases. Dialogue leads to empathy, to a more accurate understanding of the positions of others, and of the reasons for those positions, which often materializes into an attitude of respect. The natural expectation of inter-religious dialogue is a better and friendlier relationship between religions, and therefore a gradual building of social harmony—sometimes even reciprocal collaboration between religious and other belief communities.

Therefore, although inter-religious dialogue belongs per se to a realm that is alien to the State competences, it is not difficult to understand that its expected result—the enhancement of social harmony—is certainly a legitimate purpose for a secular State (and for the international community). Religious peace and social harmony are pre-conditions for the actual exercise of freedom of religion or belief by all individuals and groups. And, having the State a definite and positive obligation to ensure the protection of fundamental rights, this constitute a compelling justification for a secular State's involvement in, and even the promotion of, inter-religious dialogue.

Obvious as this may be, it is important not to lose sight of which is the justification for the State's engagement in inter-religious dialogue, because it will allow us to identify which are the limits on the legitimate State's intervention in such a sensitive area. If the State's authorities exceed those boundaries—for instance, by getting involved in strictly religious or doctrinal issues—they will cause considerable damage to the principle of mutual autonomy between religion and secular political power, which is an essential piece of the structure of our democratic systems.

2 Allow me to mention now briefly the experiences of two States in the area of inter-religious dialogue: Argentina and Spain. None of them are aimed at promoting doctrinal unification or convergence between religions. In both cases, at the time they began, their purpose was to involve religious communities in the development

[8] See, among others, Berman (1983), Helmholz (1987), Martínez-Torrón (1998).

of public policies and State action for a better protection of religious freedom and equality.

In Argentina there is a Council for Religious Freedom (CALIR, *Consejo Argentino para la Libertad Religiosa*), whose origin dates back to 2000, when the government gathered an advisory group (a council "ad honorem") to prepare a draft law on religious freedom. The group was composed by various jurists and other people with competence on religious issues, who belonged to different religious traditions. Although all the members of the advisory group acted on their own capacity and did not have any role of official representation, they were influential in their respective churches or religious communities and to a large extent they were able to reflect or transmit their perspective.

The group prepared an interesting draft by 2001 but it was dissolved after the President of the Republic renounced, and the legislative project has not been retaken by any subsequent government until recently.[9] Nevertheless, the experience of working together was so positive for the members of that group that they decided, unanimously, to constitute a civil association, the CALIR, in order to continue their common commitment and to contribute to the development of the protection of religious freedom in Argentina (and to some extent, in the entire Latin America).

Thus, what began as a pro bono advisory group for the Argentinian government was transformed, by initiative of their protagonists, in one of the most interesting experiences of institutions promoting inter-religious dialogue in Latin America.[10] Since its creation in 2002, the CALIR is the main point of reference in matters pertaining to religious freedom in Argentina. It is a plural institution, and its members do not represent officially their respective religious denominations, but they actually reflect the perspective of the most important religious traditions existing in the country: in particular Catholics, Orthodox, Evangelicals, Baptists, Seventh-Day Adventists, Mormons, Jews and Muslims. The purpose of CALIR is not to promote a theological or doctrinal convergence between various religions but rather to contribute to the guarantee of religious freedom, as well as to social harmony through cooperation between religious communities. Their members work together on a number of activities, which include advise on legislation, amicus curiae briefs addressed to Argentinian or foreign courts, organization of and intervention in academic events, publications, and an observatory of problems and good practices in the area of freedom of religion or belief.

The CALIR is, therefore, a remarkable example of how a private institution based on inter-religious dialogue can contribute to social harmony and interact with State institutions in a positive and cooperative way. It is interesting to note that the CALIR, while being an association that is totally independent from the State, probably would not have been born if the government had not called people from

[9]The current Argentinian government seems to be interested in reviving the project after consulting with CALIR among other institutions.

[10]The official Internet pages of CALIR are in: http://www.calir.org.ar/home.htm (20 November 2018).

a plurality of religious traditions to work together on a legislative project (which, paradoxically, could not see the light).

In Spain, the history has been very different. The Organic Law on Religious Freedom (LOLR), enacted in 1980, created an Advisory Commission on Religious Freedom within the Ministry of Justice,[11] with the specific function of providing advice and expert opinion on all legislative and governmental initiatives that may have an influence on the protection of religious freedom and, generally, on the legal treatment of religion in Spain. The *Comisión Asesora de Libertad Religiosa* (CALR) began its functioning in 1981 and has continued, with various structural modifications, up to the present day.[12]

The CALR was designed as having a tripartite composition, which made of it an interesting body from the perspective of the dialogue between government and religious denominations. Presided by the Minister of Justice, the CALR is divided into three-thirds, in conditions of parity: one is reserved to representatives of different departments of the government, other to representatives of the main religions existing in Spain, and other to independent experts of renowned authority.

Religious representatives must include representatives of those religions that have been recognised "well-known roots" (*notorio arraigo*) by the government.[13] They are proposed by the respective religious communities and appointed by the Minister of Justice. At present, there are representatives of the Catholic Church (4), Protestantism (2), Judaism (1), Islam (2), the Mormon Church (1), Buddhism (1), and Christian Orthodoxy (1).[14]

The CALR was never conceived as an institution for inter-religious dialogue but, as mentioned above, as a high-level advisory body with a plural composition.[15] It was supposed to be a sort of "specialised Council of State", which should deliver opinions in legislative projects that touched on areas relating to freedom of religion.

[11]The Organic Law on Religious Freedom (LOLR, *Ley Orgánica de Libertad Religiosa*) was the first of the organic laws foreseen in the 1978 Constitution to develop the constitutional articles on fundamental freedoms. In Spain, an "organic law" is a statute that must be approved by the absolute majority of Parliament. The LOLR was approved almost unanimously, which gives an idea of the high degree of political consensus about how to regulate the relations between State and religion that existed in Spain at the time. For a more detailed explanation and references, I refer to Martínez-Torrón (2018b), paras. 55–69.

[12]The first regulation of the CALR dates back to a royal decree of 1981, which was replaced by another royal decree in 2001. The current regulation of the CALR is of 2013: *Real Decreto* 932/2013, 29 November 2013, *por el que se regula la Comisión Asesora de Libertad Religiosa*. To some extent, this last regulation was inspired by proposals made by some members of the CALR commissioned by the Ministry of Justice, which can be found in the volume VV.AA., *Comisión Asesora de Libertad Religiosa: realidad y future*, Ministerio de Justicia, Madrid, 2009). See also Martínez-Torrón (2018b), paras. 291–296.

[13]See Martínez-Torrón (2018b), paras 302–303 and 356.

[14]The Church of Jehovah's Witnesses, which is recognized well-known roots in Spain since 2006, explicitly renounced its right to have a representative in the CALR.

[15]Such tripartite composition was original at the time of its creation, and it has inspired similar bodies that have been instituted later in other countries, such as Portugal.

In this respect, for a number of reasons, the CALR has not been as influential as expected, mainly because it has been too dependent on the Ministry of Justice and has often been under-utilised or ignored by governments.

But instead, the CALR has produced a result that was not expected at the time it was designed. The fact that religious representatives sitting in the Commission have engaged in a common aim—to build a better framework for the protection of religious freedom—and have worked together on legislative and other initiatives has created a certain sense of commonality among religious communities. This has been perhaps more visible in religious minorities than in the Catholic Church, and it is not infrequent to see them involved in joint initiatives out of the work of the CALR.

As in the case of Argentina, this would have been not easily conceivable had the government not created the Commission. In both countries, the spark that made possible inter-religious dialogue and projects was a governmental initiative.

3 In the light of the preceding remarks, I would like to make four brief statements that summarize my view on the role of the secular State vis-à-vis inter-religious dialogue from a comparative law perspective.

First, it is important to keep in mind a fact: in recent times, among the experiences of inter-religious dialogue that have proved productive or useful for civic life, we find some interesting examples have been the result of a State's initiative and not an initiative of religions. Churches and religious communities are perfectly able to start an inter-religious dialogue on their own, but in practice they tend to follow the State's lead.[16] It is the State the one that normally begins the process, and usually the religious communities involved take later the reins and the State remains as impartial observer or guarantor of the fairness of the process. We may hold different opinions about this, but it is a fact that we should not forget.

A logical consequence of this fact is that State authorities have a certain responsibility to engage in the promotion, or at least the facilitation, of inter-religious dialogue. Their role, however, is not to be the leader or the controller of the dialogue between religious communities, but rather to act as "launcher" of it and to make sure that it makes positive contributions to civic life—and that religious or belief communities are adequately represented. Needless to say, the intervention of State authorities in these processes raises a possible practical problem: that, due to an excessive zeal of public authorities or the passivity of religious representatives, inter-religious dialogue may become too dependent on the State. This would run ultimately against religious autonomy and could possibly pave the way for a certain breach of the principle of the State's religious neutrality.

[16]This, however, is not always the case. An interesting example of a recent initiative in this regard is KAICIID (King Abdullah Bin Abdulaziz International Centre For Interreligious And Intercultural Dialogue), with headquarters in Vienna, founded in 2011. See: https://www.kaiciid.org (accessed 20 March 2019).

The second point I would like to make is that the inter-religious dialogue for religious or doctrinal purposes, or for the better achievement of religions' spiritual mission, is not of the State's competence. This is the religious communities' and not the State's concern. Indeed, the more distant the State stays from it the better. In my opinion, this type of inter-religious dialogue is very positive from various perspectives, but the State should not have any saying on it.

The reason is that it is not for the State to make pronouncements on strictly religious or spiritual issues, and even less to take sides on doctrinal debates. Defining religious orthodoxy falls out of the boundaries of a secular State. In this regard, we should remember an important principle declared by the European Court of Human Rights almost 20 years ago: when there is doctrinal or leadership division between different religious groups, the role of the State is not to support any particular party in order to eliminate the tension but to guarantee that religious freedom and pluralism are duly protected.[17] The State must act as an impartial arbiter and not as an orchestra conductor.

My third point is in close connection with the foregoing. A secular State, if it wants to be truly respectful of religious freedom, must be aware of its intrinsic limitations when it engages in initiatives aimed at facilitating or promoting inter-religious dialogue. And the same applies to international organizations involved in the protection of human rights. Especially important is that the State's involvement in the promotion of inter-religious dialogue does not become—intentionally or inadvertently—a tool for the control of religion, i.e., for filtering those religions that can be deemed "acceptable", "respectable", or "convenient". The main justification for the State's legitimate intervention in the promotion or facilitation of inter-religious dialogue is social peace and harmony, which appears as a necessary condition for the existence of religious pluralism and for the actual exercise of religious freedom by all individuals and groups, irrespective of whether they hold a mainstream or a minority belief. The aim of controlling religion is impermissible in a democratic secular State and runs against its neutrality and impartiality.

Finally, my fourth point is that the State must be attentive to significant practical difficulties in the promotion of inter-religious dialogue. Among them is how public authorities should choose religious representatives that will be involved in initiatives of inter-religious dialogue, in order to ensure that they adequately reflect social religious reality. This seems easier in hierarchically structured religions in

[17]In the European Court's words: "Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other" (*Serif v. Greece*, 14 December 1999, para. 53; this doctrine has been reaffirmed by the Court in various occasions). The issue of religious autonomy in Strasbourg has been the theme of numerous recent essays. For an extensive analysis of the European Court's case law in the light of the French and German evolution of the notion of State's neutrality, see Valero Estarellas (2017) (doctoral dissertation presented at the Universidad Complutense Law School, full text available in: https://eprints.ucm.es/47989/1/T40016.pdf) (20 November 2018).

comparison with other religions that have a decentralized organization, or a democratic or assembly-style functioning. However, even in the case of hierarchical churches it is important to take into account that the official members of the hierarchy do not always represent adequately their entire religious community.

This places State authorities in a difficult position: should they rely exclusively on the relevant religious sources or should they make also their own choices with regard to the protagonists of inter-religious dialogue, even at the risk of invading religious autonomy? We may even add further problems, as, for instance, that very often the main religious leaders are male, which raises the issue of whether the State should look at inter-religious dialogue also from a gender perspective[18]; or the fact the activity of religious leaders obeys to a complex variety of factors, and religion alone does not necessarily explain everything that they do, preach or proclaim.

In sum, the active participation of the State in inter-religious dialogue is per se a positive reality. However, its practical realization is everything but easy. In my view, it is definitely worth pursuing it but without trivializing its inherent difficulties and seriously considering how to face them.

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[18]I owe this idea to Dr. Stephanie Berry, from Sussex University.

Part III
Ateliers / Workshops

Solving Conflicts Through Administrative Procedure. Citizen Participation, Its Judicial Review, Alternative Dispute Resolution

Hermann Pünder and Anika Klafki

1 Introduction

Citizens all over the world demand more participation in administrative decision-making. Voting for political representatives is no longer sufficient to ensure general public acceptance of administrative decisions.[1] The more complex conflicts between the common good and individual interests are (e.g. in constructing power plants, traffic routes, airports, energy pipelines, and refugee centers), the less appropriate unilateral decisions are perceived to be. Scholars throughout the world voice criticism, ranging from Pippa Norris, who mourns "democratic deficits" in our societies,[2] to Benjamin Barber's advocacy for a "strong democracy"[3] and to Chantal Mouffe

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[1] See from a German perspective Pünder (2015), p. 713.

[2] Norris (2011).

[3] Barber (1984).

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demanding the "return of the political".[4] There is, however, a procedural dilemma.[5] On the one hand, public participation and cooperation can contribute to the democratic legitimacy of an agency's decision, provide the parties involved with effective pre-judicial remedies, and may facilitate the administration's information gathering. But, on the other hand, the involvement of citizens and judicial control carries high costs; in terms of time, personnel, materials, and money. It may thus be at odds with the necessities of an effective and efficient completion of administrative duties. Alternative means of dispute resolution may be necessary. Comparing the different solutions to this procedural dilemma can not only deepen the understanding of the legal and political culture in different countries,[6] but might also provide food for thought and options for reform.[7]

2 Workshop Design

To analyze the conflict-solving capacities of administrative law in different legal orders in an interactive way, the workshop was conceptualized as a practical case-study in the format of a "world café".[8] The world café method is a conversational process in which groups discuss different aspects of a more general topic in order to encourage everyone's participation and reap the benefits of collective wisdom. All participants play an active role in the discussion process. The idea behind this combination of a role-play scenario and the world café format was to differentiate the workshop format from the conventional session format within the General Congress of the International Academy of Comparative Law. While these sessions see first various national reports presented, followed by a comparative general report, with a brief discussion with the audience only possible at the end, the aim of the workshop was a more active involvement of the participants from the very beginning.

The workshop participants were provided with the scenario of an international investor wishing to establish and run an airport. This case study encompasses complex political and legal issues as the construction of an airport creates conflicts between different members of society. Infrastructural planning law is a prime example of the conflict-solving capacities of administrative procedures and alternative dispute resolution mechanisms. In the workshop case-study, the investor has

[4]Mouffe (1993).

[5]For a comparative analysis of the administrative procedure law of the European legal systems, see Pünder (2013), p. 940.

[6]For the need to include underlying cultural, political, and societal insights to compare different legal systems, see Watt (2012), pp. 86 ff.

[7]For an analysis of the practical application of comparative law in general, see Smits (2006), pp. 511 ff. For a reflection on the utility and applications of comparative law in court reasoning, see Andenas and Faigrieve (2012), pp. 27 ff.

[8]The concept was developed by Brown and Isaacs (2005).

identified four possible locations for the airport: one in China, one in the USA, one in France, and one in Germany. In order to enable a functional comparison[9] during the workshop, the participants of the workshop were asked to advise the investor with regard to seven questions:

1. Who is permitted to operate an airport (foreign, public or private entities)?
2. Who decides on the establishment of an airport (central government, regional authority or independent institution)?
3. Do affected citizens have influence on the decision?
4. Can ecological NGO's influence the decision?
5. Can the affected municipalities influence the decision?
6. What are the possibilities for judicial review for the various stakeholders? How long will the judicial review process take?
7. Are there any means of alternative dispute resolution?

In the first phase of the workshop, the participants were asked to form four groups for each jurisdiction, namely USA, China, France and Germany. Each group was tasked with providing answers to the above questions for their respective national legal order on the basis of materials prepared by four national experts: Prof. John C. Reitz (University of Iowa) for the U.S., Prof. Chengdong Jin (Zhejiang University) for China, Prof. Dominique Custos (Université de Caen Normandy) for France and Dr. Anika Klafki (Bucerius Law School) for Germany.[10] The national experts also acted as "table hosts" during the group working phase. That means they advised and supervised the group discussion in the process of answering the questions with regard to their national legal order. The participants, thus, also had the opportunity to pose further questions and to understand how the law is practically applied in the respective national system. Thereby the participants of the workshop themselves became legal experts with regard to the seven legal issues.

In the second phase of the workshop, each group presented their findings for the respective national legal order. The main findings were recorded by the workshop instructor in a table, which was projected onto the wall of the conference room. As a result, the participants were on the one hand actively involved in the analysis of the national legal solutions to the conflicts of interests arising in airport planning procedures. On the other hand, the tabular overview provided them with a good opportunity to functionally compare the legal systems in question. In the final phase the participants, together with the legal experts, discussed the similarities

[9]The term 'functional method' in comparative law has been established by Zweigert and Kötz (1987), pp. 30 ff. See for an in-depth critical reflection Michaels (2008), pp. 339 ff. See also Gordley (2012), pp. 107 ff.

[10]To obtain the workshop materials of the national legal systems, please contact the national legal experts. For the workshop materials of the USA please contact Prof. John C. Reitz (johnreitz@uiowa.edu), for the materials relating to China please contact Prof. Chengdong Jin (jchdong@zju.edu.cn), for the materials on the French system please contact Prof. Dominique Custos (dominique.custos@unicaen.fr), and for the materials on Germany please contact Dr. Anika Klafki (anika.klafki@law-school.de).

and differences between the legal orders under analysis. Furthermore, the participants enriched the discussion by also explaining the procedures in their home jurisdictions which were not analyzed in the group work phase. Unsurprisingly, a clear answer to the investor, at which location the airport construction would be most advantageous, couldn't be found. The discussion revealed that the compared legal systems seem to converge with regard to the written administrative procedure rules but differed with regard to alternative dispute resolution mechanisms.

3 Comparative Findings

So far, no international comparative analysis of aviation planning law has been published.[11] The workshop thus broke new academic ground. Even though the immediate findings only reveal a small sample of the conflict solving capacities of administrative law and the law of administrative court procedure, they open a wider view on important legal developments in the field of infrastructural planning law throughout the globe. As explained above, due to the interactive design of the workshop, only four jurisdictions were compared, namely China, the U.S., France, and Germany.

3.1 Privatization of Public Infrastructures

Airports are vital infrastructure projects, both for passenger and goods traffic in modern states. Technological advances have led to a major expansion of flight traffic. The importance of a solid airport network for public welfare can, thus, hardly be overestimated in times of globalization.[12] Traditionally, transport infrastructure has been planned and operated by the state sector. However, airports are globally more and more congested due to the ever-increasing amounts of passengers and goods.[13] The opening of airport construction and operation to private actors is, thus, seen as an effective way forward to mitigate the current shortcomings in capacity.

In all analyzed jurisdictions, the opening of airport construction and operation to private companies is a relatively new development that has not yet fully materialized in practice.[14] In Germany, the privatization of airports began comparatively early. In the 1990s, existing airports which were in public ownership were partly privatized

[11] For a general comparison of public participation procedures in infrastructure planning law in Europe see Gross (2015).

[12] Abeyratne (1993), p. 79.

[13] Abeyratne (1993), p. 79.

[14] The following analysis only relates to civil aviation. Different rules apply to the establishment of military airports.

through the sale of shares on the stock exchange.[15] Nonetheless, even today, most shares of the German airports are still held by public entities.[16] In the U.S., where privatization of public services has a long tradition, the operation of airports by private bodies is not only legal, but has been promoted by the federal government by issuing the Airport Privatization Pilot Program in 1996.[17] However, there are two important economic obstacles for private investors, with the effect that almost all airports in the U.S. are still publicly owned. First of all, the federal income tax exemption for interest paid on municipal bonds enables public bodies to borrow money at lower costs than private bodies. Secondly, the Airport Improvement Program favors publicly owned airports. While the costs of airport improvement programs for privately-owned airports may only be covered up to 70% by federal grants, improvement costs of publicly owned airports can be covered by federal grants for up to 90%.[18] Therefore, currently only two U.S. commercial service airports have completed the privatization process.[19]

In France and China, privatization efforts started comparatively late. Also, there is a statutory reservation for strategically important airports, which must be created and operated by the state.[20] In France, it was not until 2004/2005 that ownership and operation of airports was opened to private parties by a decentralization[21] and privatization[22] reform.[23] Nonetheless, today, public shareholders remain dominant in the stock companies operating the Parisian[24] and state-owned regional airports. Also, the prospect of foreign investors becoming majority shareholders of airports has provoked protest. With regard to the airport in Toulouse, public demonstrations stopped the State from selling its remaining shares.[25] In China, the operation of civil airports was only opened to private parties in 2016.[26] Prior to this, the state had to hold the majority of shares of any airport. Whether the reform of 2016 will lead to more privately established and operated airports in China remains to be seen.

[15]See Tetzlaff (2002), p. 7.

[16]For the current statistics see https://www.forschungsinformationssystem.de/servlet/is/241596/.

[17]49 U.S.C. § 47134. See also Reitz, *Workshop Materials USA* (fn. 10) at 1 f. <05.12.2018>.

[18]14 C.F.R. § 152.103(a)(1). See also Reitz, *Workshop Materials USA* (fn. 10) at 2.

[19]See for details Tang (2017), pp. 5 ff.

[20]See for France L6311-1 TC. Such airports are listed in a decree. For China see Jin, *Workshop Materials China* (fn. 10) at 1.

[21]Statutes of 13/08/2004. See also Statutes of 07/08/2015.

[22]Statute of 20/04/2005, Art 7 (II).

[23]See also Custos, *Workshop Materials France* (fn. 10) at 1.

[24]Following the privatization of 13% of the shares of the Paris Airport in 2013, the state owns a 50.6% stake. Reportedly (June 2018), additional privatization of Paris Airport is to be launched in 2018. See also Custos, *Workshop Materials France* (fn. 10) at 2.

[25]Custos, *Workshop Materials France* (fn. 10) at 2.

[26]Civil Aviation Administration of China's Opinions on Encouraging Social Capital to Invest in Constructing and Operating Civil Airports, issued 3.22.2016. See Jin, *Workshop Materials China* (fn. 10) at 1, 6.

3.2 Infrastructural Planning Procedures Between Centralization and Decentralization

In the four legal orders under analysis, the establishment of an airport is a multi-stage-process, which is covered not only by aviation law, but is also affected by general planning law and environmental regulations. Unsurprisingly, the French system is the most centralized. The establishment or operation of airports is subject to an infrastructure project authorization granted by the federal aviation minister.[27]

In federalized national orders, rather than having one administrative body competent for the decision, different levels of the state jointly decide on different aspects of the airport construction. However, also in the U.S. and China, the role of federal agencies is quite strong. In the U.S., federal power to regulate the airspace has been delegated to the Federal Aviation Administration, a federal agency within the Department of Transportation.[28] The Federal Aviation Administration also issues the necessary safety certificates to airport operators[29] and decides on the award of federal grants for airport improvements. However, the states and their subunits, which include local and municipal bodies of government, have regulatory power over zoning and other forms of land use regulation within the territory they control. Generally, these regional planning decisions are not pre-empted by federal adjudication.[30] As a result, no airport can be built or expanded without the approval of the state or local governmental body with jurisdiction over the land where the airport is located.[31] In China, mainly, the civil aviation administration has competence for planning and airport construction decisions. Whether the central or the regional civil aviation administration is in charge depends on the size of the airport. The site selection for a transportation airport shall be proposed by the competent department of the local government of the province, autonomous region or municipality directly under the Central Government. The German system seems to be most decentralized.

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[27]Decree 59-779, 22 June 1959; Order (*arrêté*) 26 October 1960. See for details Custos, *Workshop Materials France* (fn. 10) at 2 ff.

[28]The Federal Aviation Administration regulations on the certification and operation of an airport are found primarily in Federal Aviation Regulations (FAR) Part 139, 14 C.F.R. Part 139.

[29]49 U.S.C. § 44706. No airport may be operated without such a certificate, see regulation 14 C.F.R. § 139.101.

[30]See Hoagland v. Town of Clear Lake, Indiana, 344 F. Supp.2d 1150, 1158 (N.D. Ind. 2004) ("Many other state and federal courts, applying similar reasoning, have found that regulation of landing sites, or land-use regulations in general, are not subject to field preemption"); Faux-Burhans v. County Commissioners of Frederick County, 674 F. Supp. 1172, 1174 (D. Md. 1987), aff'd (4th Cir. 1988) (county zoning restrictions were not preempted by different, but not conflicting, federal requirements); Gustafson v. City of Lake Angelus, 76 F.3d 778, 790 (6th Cir. 1996) ("[f]ederal preemption of the airspace under the [Federal Aviation] Act does not limit the right of local governments to designate and regulate aircraft landing areas"); Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles, 979 F.2d 1338, 1340 (9th Cir. 1992) ("non-proprietor municipalities are preempted from regulating airports in any manner that directly interferes with aircraft operations").

[31]See Reitz, *Workshop Materials USA* (fn. 10) at 2 f.

Even though the planning and approval process is governed by federal law[32] and the execution thereof is also attributed to the federation,[33] the federation has delegated the task to the states.[34] In consequence, the state authorities make the main planning and approval decisions.

3.3 Participatory Rights of Citizens

The right of public participation in planning procedures of infrastructure projects is strongly promoted by environmental law and the environmental impact assessment procedures. This procedure was firstly formally enacted in the U.S. by the National Environmental Policy Act of 1969. In Europe, public participation as part of environmental protection procedures was generally introduced by the Aarhus Convention,[35] which was drafted by the United Nations Economic Commission for Europe. This environmental law convention has been ratified by the EU as well as in France and Germany. Therefore, the rules concerning public participation in France and Germany are relatively similar. Nevertheless, the public participation rules in France are more extensive than those in Germany. That may be due to Germany's legal tradition of focusing on subjective-public rights and its subjective legal protection system.[36] Interestingly enough, meanwhile, even in China, far-reaching participation provisions are emerging. Despite this converging trend to more public participation, the procedures differ considerably in detail. The administrative procedure for the approval of infrastructure projects is strongly influenced by national legal traditions. Therefore, there is still a broad variety of procedural norms in the different national legal systems.

3.3.1 Participatory Rights of Citizens in the U.S.

In the U.S., the right of the public to participate is ensured, firstly, by the National Environmental Policy Act and the respective order of the Federal Aviation Administration. The National Environmental Policy Act requires an 'environmental assessment' or even a more detailed 'environmental impact statement' which must be accompanied by extensive notice to the public and opportunities for comment, both

[32]Air Traffic Act (*Luftverkehrsgesetz*, BGBl. I 2007, 698). Several other laws apply, such as the Regional Deveolpment Act (*Raumordnungsgesetz*, BGBl. I 2008, 2986) and the Law on Environmental Impact Assessment (*Gesetz über die Umweltverträglichkeitsprüfung*, BGBl. I 2010, 94).

[33]Art. 87d Basic Law (*Grundgesetz*).

[34]§§ 10, 31 (II) Air Traffic Act (*Luftverkehrsgesetz*).

[35]Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25.06.1998. The construction of airports with a basic runway length of 2100 m or more is specifically listed in Annex 1 Nr. 8 lit. a of the convention.

[36]For an in depth analysis of German administrative procedure law, see Pünder (2013).

written and at public hearings.[37] Each federal agency has been tasked with promulgating rules about how the National Environmental Policy Act applies to their specific proceedings. The current Federal Aviation Administration's rules for the airport planning and certification process, as well as with respect to Airport Improvement Program grants, are set out in a special guidance document.[38] According to this order, for permission to construct an airport, the applicant must provide pertinent information to the affected communities and agencies and consider their comments at the earliest appropriate time. Comments received during early scoping and any reasonable alternatives identified must be considered. Furthermore, the Federal Aviation Administration holds public meetings, workshops, or hearings, when appropriate. As soon as a draft environmental assessment or environmental impact statement is ready, a public meeting or hearing is conducted.[39] Also, the process of reviewing the environmental assessment or the environmental impact statement must be accompanied by extensive notice to the public and opportunities for comment, both written and at public hearings. A public hearing is a formal process that has a designated public hearing officer who presides over the meeting and a court reporter present to compile a transcript of all oral comments.[40] Apart from these federal public participation rules, state and local zoning laws may also provide for public participation.

3.3.2 Participatory Rights of Citizens in France and Germany

Similarly, France and Germany also have public participation provisions on all levels of the decision-making process. There are participation provisions concerning environmental issues of the planned project as well as general public inquiries and public discussions, which are prescribed by the respective planning law. In France, the right to public participation even has constitutional status, enshrined in Art. 7 of the Charter for the Environment, which was incorporated into the Constitution in 2005.[41]

[37] 42 U.S.C. § 4332 (1)(C).

[38] Federal Aviation Administration Order 1050.1F, issued on July 16.2015, available under https://www.faa.gov/documentLibrary/media/Order/FAA_Order_1050_1F.pdf. <05.12.2018>.

[39] The environmental assessment is a simpler document that requires consideration of whether the environmental impacts will be significant, explores alternatives and mitigation measures, and provides information to determine whether an environmental impact assessment, a full-blown consideration of all environmental impacts and alternatives, is required. It must include an assessment of the project's impact on noise, air quality, water quality, endangered species, wetlands and flood plains, possible alternatives, and mitigation plans. See Reitz, *Workshop Materials USA* (fn. 10) at 3.

[40] Federal Aviation Administration, Order 1050.1F, 7/16/15, at 2-12 ff.

[41] See for details Marrani (2014), p. 107.

As for any infrastructure planning procedure, in both France and Germany, the airport planning procedure is divided into several phases.[42] In France, the first public participation concerns the need for the airport as such. To this end, a first draft plan is subject to a public debate which is conducted by an independent administrative authority, the National Commission for Public Debate.[43] The public debate involves individuals, juridical persons, and public entities. The National Commission for Public Debate writes a summarizing report including alternative solutions.[44] The project developer must respond publicly to the report. In Germany, the need for the airport as such is generally not subject to a mandatory public hearing. Since 2013, however, the project developer has been 'urged' to give the public concerned the opportunity to comment and discuss the objective of the project before a formal application for the planning approval procedure is made.[45] The law is however, criticized as being a mere paper-tiger, as there are no sanctions foreseen if the project developer omits such an early public participation procedure.[46] Thus, the right to early participation, also including the need of the project itself and possible alternatives, is much stronger in France than in Germany.

After the general need for the airport has been established and a first draft has been accepted by the competent authority, an environmental impact assessment has to take place if the airport is planned with a runway which is at least 2100 m long. This already follows from the Aarhus Convention, the EU Directive on Public Participation,[47] as well as from national environmental law in France[48] and Germany.[49] To this end, the planning documents and the environmental report are publicly displayed in the affected communities. Whereas in France the general public may submit written comments and take part in the public enquiry, in Germany, only the 'concerned' public is entitled to comment in writing. Due to the extensive interpretation of the term 'concerned public', though, this restriction is of less relevance in practice than it might seem at first glance.[50] Furthermore, in France and in Germany, there are also further general participation procedures foreseen which can be combined with the environmental impact enquiry. In France, a special

[42]Custos, *Workshop Materials France* (fn. 10) at 2 ff.

[43]*Commission nationale du débat public*, CNDP; Article L121-1 of the Environmental Code (*Code de l'environnement*). A translation of the entire French Environmental Code by M. Faure can be found under http://www.wipo.int/wipolex/en/text.jsp?file_id=180787 <05.12.2018>.

[44]Article L121-11 Environmental Code (*Code de l'environnement)*.

[45]§ 25 para. 3 Administrative Procedure Act (*Verwaltungsverfahrensgesetz*).

[46]See for example Appel (2012), p. 1366. More optimistic Ziekow (2013), p. 754.

[47]Directive 2003/35/EC of the European Parliament and of the Council of 26.05.2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

[48]Annex to Article R122-2 Environmental Code.

[49]§ 6 in conjunction with Nr. 14.12 Annex 1 of the Law on the Environmental Impact Assessment (*Gesetz über die Umweltverträglichkeitsprüfung*, BGBl. I 2010, 94).

[50]See for example Lippert (2013), pp. 206 ff.

public inquiry is necessary, if the planned project also requires the expropriation of private land.[51] In Germany, the Administrative Procedure Act gives every citizen, who is affected by the planned project, the right, to submit written comments.[52] In France, as well as in Germany, the public inquiry is conducted by another authority than the authority that is granting the permission,[53] in order to ensure neutrality. The hearing authority summarizes the outcomes of the public enquiry and submits it to the plan approval authority. The comments from the public have to be considered in the decision-making process. Finally, in France, a state-sponsored referendum may also be conducted with regard to the question where a state-owned airport should be located.[54] This non-binding procedure led to the abandonment of the Notre-Dame-des-Landes airport project.[55] In Germany, direct democratic elements exist only at the level of the federal states and municipalities. Most state laws and state jurisdiction exclude planning decisions from citizen law making.[56] The ratio behind this is, that planning considerations are too complex to assess within a simple yes-or-no decision in a public vote.

3.3.3 Participatory Rights of Citizens in China

In China, there is no general administrative procedure law or environmental code which entails public participation provisions. However, public participation law is evolving steadily. Regarding the establishment of airports, Chinese administrative law distinguishes between transportation airports and civil airports. Transportation airport planning procedures require neither public disclosure nor any participation process. The construction and extension of a civil airport, though, is considered as a project of vital interest for citizens under the Regulation on the Disclosure of Government Information.[57] It thus requires a public announcement that is published in the main local newspapers and posted in the area around the airport project to be constructed or extended. Furthermore, legal persons or other organizations also may, if they have a legitimate interest, file an application for accessing relevant government information. At the moment, in practice, however, the scope of disclosed

[51] Articles R11-14-1 – R11-14-16 Takings Code (*Code de l'expropriation pour cause d'utilité pubilque*).

[52] § 73 Administrative Procedure Act (*Verwaltungsverfahrensgesetz*).

[53] In France, the public inquiry concerning the environmental impact assessment is conducted by a special *commissaire enquêteur* or an enquiry commission appointed by the President of the administrative tribunal, Article L123-4 Environmental Code (*Code de l'environnement*).

[54] Ordinance of 21.04.2016, L123-20 –L123-33 Environmental Code (*Code de l'environnement*).

[55] See for a timeline of this failed airport project Custos, *Workshop Materials France* (fn. 10) at 9.

[56] For details see Volkert (2016), pp. 26 ff.

[57] The Regulation was enacted in January 2007 by the State Council. See for details Jin, *Workshop Materials China* (fn. 10) at 3.

government information is still limited.[58] The Regulation on the Disclosure of Government Information is currently being revised. According to the draft of the new regulations, the scope of government information to be disclosed will be broadened. As a general rule, all information should be released, unless a special law classifies specific government information as not accessible.[59]

The establishment of a civil airport requires several administrative licenses under the Administrative License Law of 2003.[60] It entails further transparency, hearing and public consulting obligations. First, it requires the disclosure of all relevant materials for an administrative license.[61] Additionally, the applicant for the license and any party with a legitimate interest shall be entitled to make statements. A public hearing of citizens, legal persons and experts is required, if an administrative license of major public interest is to be issued.[62] The hearing shall be carried out openly and impartially. Furthermore, licenses which are issued by a law or regulation of a province, autonomous region or municipality directly under the Central Government require that the opinions of the public and experts are consulted for their opinions.[63] The public may file opinions and suggestions on the establishment and implementation of an administrative license to the competent authority.[64]

Finally, the State Council of China is formulating an Interim Regulation on the Procedures for Major Administrative Decision Making, according to which any major administrative decision making must be subject to the procedures of public participation and expert demonstration. The site selection and allowance of civil airports are to be classified as major administrative decisions, which will be subject to further procedures of public participation and expert consultation in the future.[65]

3.4 Participatory Rights of NGOs

In general, non-governmental organizations (NGOs) in all analyzed legal systems may participate in public hearings as part of the general public. Apart from that, in France and Germany, specially certified ecological NGOs enjoy a special status in the administrative planning procedures of infrastructural projects. In France, certified environmental associations hold membership in environment-related advisory

[58] See also Li (2011), p. 166 ('Up to now, in cases of administrative proceedings concerning government information disclosure, the plaintiff has always lost').

[59] Jin, *Workshop Materials China* (fn. 10) at 4 f.

[60] An English translation of the Administrative License Law of the People's Republic of China is available under http://www.asianlii.org/cn/legis/cen/laws/allotproc500/ <05.12.2018>.

[61] Art. 5, 13, 40 48, 54, 61 Administrative License Law.

[62] Art. 47 ff. Administrative License Law.

[63] Art. 19 Administrative License Law.

[64] Art. 20 (III) Administrative License Law.

[65] See for details Jin, *Workshop Materials China* (fn. 10) at 5 f.

commissions and the National Commission for the Public Debate, which conducts the first public inquiry in the planning procedure (see above).[66] In Germany, certified environmental NGOs may always contribute opinions during public hearing proceedings without having to show that their interests are affected by the planned project.[67] Furthermore, certified ecological associations enjoy a standing presumption in administrative court proceedings concerning environmental law.[68] In France, specifically accredited ecological NGOs may even file class actions for environmental liability.[69]

In the U.S. and China, no special privileges apply to ecological NGOs. The standing rules in the U.S. do not exempt them from the constitutional requirement to show injury in fact to at least one of their members.[70] As a result, the practice has arisen for NGOs to support their standing in cases challenging governmental violations of environmental protection laws by attaching to the complaint affidavits from one or more of their members alleging a personal interest in the specific land affected by the alleged agency violation of the law. For airport litigation, this would probably mean alleging either ownership of adjacent property that is adversely affected (for example, by noise of overflights) or a close personal connection and a determination to try to enjoy the aesthetics and recreational opportunities of a neighboring wetland or other wild area that is negatively affected.[71]

3.5 Participatory Rights of Affected Municipalities

As seen above, apart from Germany, in all other analyzed legal systems airport planning is quite centralized. Nonetheless, in all four legal orders, the municipalities where the airport project is located are involved in the planning process. In the U.S., as explained above, the states and localities are fully competent with regard to zoning and land use. While the federal government has the power also to grant or withhold its approval through the airport certification process, it does not have the power to order the state or local government to permit the construction of a commercial airport. As a result, no airport can be built or expanded without the

[66]Article L121-3 Environmental Code (*Code de l'environnement*). See also D. Custos, *Workshop Materials France* (fn. 10) at 2.

[67]§ 73 (IV) Sentence 5 Administrative Procedure Act (*Verwaltungsverfahrensgesetz*).

[68]For France see Articles L142-1, L142- 2 Environmental Code (*Code de l'environnement*). For Germany see § 2 Environmental Remedies Act (*Umwelt-Rechtsbehelfsgesetz*, BGBl. I 2017, 3290). See for a translation of the most relevant provisions Klafki, *Workshop Materials Germany* (fn. 10) at 6.

[69]Law 2016-1547 of 18/11/2016. See Custos, *Workshop Materials France* (fn. 10) at 6.

[70]Lubbers (2018), p. 389.

[71]Reitz, *Workshop Materials USA* (fn. 10) at 5.

approval of the state or local governmental body with jurisdiction over the land where the airport is located.[72]

In China, the local or municipal level is, above all, involved in the early planning phase: The site selection for the airport shall be proposed by the competent department of the local government of the province, autonomous region or municipality. When the competent department of the local government of the province, autonomous region or municipality directly under the Central government selects the proposed site, they must solicit the written opinions of relevant military organs, as well as the relevant departments of the local government in charge of urban and rural planning, municipal traffic, environmental protection, meteorological affairs, cultural relics, land and resources, earthquake, radio management, power supply, communication and water conservation. Furthermore, after the project developer has handed in the overall plan of the airport, the competent civil aviation administration organizes, in conjunction with the local government, a joint examination of the overall plan.[73]

In France and in Germany, the affected and neighboring municipalities can participate in all phases of the approval procedure. In the early project phase they are involved as a part of the general public and are actively asked for their opinion.[74] Furthermore, the municipalities are responsible for notifying the public in the affected region. The municipalities are also treated with special care in the final project phase. The impact assessment is submitted to them by the project developer.[75]

3.6 Judicial Review

In the U.S. legal system, judicial review can be sought through tort remedies against trespasses and nuisances as well as on the basis of the Administrative Procedure Act: Despite the preemption of federal regulation of airports by the Federal Aviation Administration, full compliance with federal rules does not necessarily shield the airport owner or operator from tort liability because, as the courts have noted, an airport that fully complies with the federal requirements for airports can be operated

[72]Reitz, *Workshop Materials USA* (fn. 10) at 2 f.

[73]See Jin, *Workshop Materials China* (fn. 10) at 1 f.

[74]For Germany, see § 15 (III) Regional Planning Law (*Raumordnungsgesetz*, BGBl. I 2008, 2986); § 73 (II) Administrative Procedure Act (*Verwaltungsverfahrensgesetz*). For France see Article R122-23 Takings Code (*Code de l'expropriation pour cause d'utilité pubilque*).

[75]Furthermore, under the French Urban Planning Code, the approval or revision of the noise exposure plan or an aeronautic servitudes plan are also subject to public inquiry requirement and consultation with the neighbouring municipalities. See Custos, *Workshop Materials France* (fn. 10) at 5.

in a way that constitutes a nuisance to or trespass on neighboring private property.[76] Judicial review under the Administrative Procedure Act centers on the review of the administrative procedure, namely the Federal Aviation Administration's actions in compiling, reviewing, and providing for public participation with respect to the environmental assessments and environmental impact statements required by the National Environmental Policy Act. Also, a court can be asked to review the legality of the merits of the decision. An agency decision can be challenged on grounds of acting beyond the boundaries of delegated powers or contrary to the Constitution or the agency's own regulations.[77] However, the rationality standard only allows the court to strike down the agency action if it finds it 'arbitrary and capricious', that is, so unreasonable that it is irrational.[78] In order to have standing in front of the courts, the claimant must show 'injury in fact'.[79] No special standing rules apply for NGOs. As explained in detail above, they must show injury suffered by at least one of their members.

In France and Germany, judicial review of an approval decision before the administrative courts can be sought by citizens, certified ecological NGOs or municipalities in front of the administrative courts. As seen above, certified environmental associations enjoy a standing presumption before administrative courts to challenge any administrative act directly related to their declared objectives and with damaging effects on the environment within the territory for which they were granted recognition. This privilege is particularly important in the strictly subjective legal system of Germany, where judicial protection normally requires that the claimant alleges an infringement in his or her own rights.[80] German judicial review is traditionally focused on the review of the merits of administrative decisions rather than on procedural flaws.[81] Due to EU law, however, procedural issues may now also lead to the annulment of infrastructural planning approval decisions.[82]

[76]See Provident Mutual Life Ins. Co. of Philadelphia v. City of Atlanta, 864 F. Supp. 1274, 1289-90 (N.D. Ga. 1994); Chronister v. City of Atlanta, 99 Ga.App. 447, 447-48, 108 S.E.2d 731, 732 (1959) ("One who operates and controls an airport from a certain runway of which airplanes habitually fly over the plaintiff's home at altitudes of 50 to 100 feet may be guilty of maintaining a nuisance for which such owner is compensable in damages even though the aircraft flights themselves are made pursuant to and in full conformity with Federal regulations governing landings and take-offs from the air field"). See also Reitz, *Workshop Materials USA* (fn. 10) at 4.

[77]Reitz, *Workshop Materials USA* (fn. 10) at 5 f. See For a comprehensive explanation of judicial review of administrative action see Lubbers (2018), pp. 387 ff.

[78]Cf. State Farm Mutual Automobile Insurance Co. V. Campbell, 538 U.S. 408 (2003).

[79]Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970).

[80]See for a comprehensive explanation of the German standing requirement from a comparative perspective Backes (forthcoming), Chapter 4, Section IV.

[81]For a brief explanation of the German judicial review system see Pünder and Klafki (2018), pp. 81 ff. From a comparative perspective see Pünder (2013). See also Pünder and Klafki (forthcoming), Chapter 6 Section VI.

[82]See for details Pünder (2016a), §14 para 87.

In France, certified NGOs even have exclusive standing to commence a class action lawsuit for environmental liability.[83]

Also in China, citizens or legal persons have the right to apply for administrative reconsideration or administrative litigation, if they claim that their rights and interests have been infringed by the administrative decisions.[84] An interesting aspect of the Chinese law is, that in order to protect the national interest or protect the public interest, the procuratorate may offer recommendations to the administrative authorities in charge and urge them to perform their duties in accordance with the law. If the respective administrative authority rejects these recommendations, the procuratorate can file a lawsuit.[85] However, municipalities do not have the right to apply for administrative reconsideration or administrative litigation. That is due to the fact that they are seen as part of the state in China. Additionally, NGOs usually lack standing to apply for administrative reconsideration or administrative litigation, although they can encourage the procuratorate to protect the national or public interest. Furthermore, citizens, legal persons, or other organizations whose disputes cannot be resolved through administrative reconsideration or administrative litigation, may file an opinion or complaint to the governments at various levels or to departments of the governments at or above the county level. The relevant administrative organs deal with such fact reports, proposals or opinions, or complaints according to the law. Such administrative letters of complaint and visits are an important informal redress mechanism in the Chinese administrative system.[86]

With regard to the length of judicial proceedings, the situation differs across the four legal orders. In the U.S., actions under the Administrative Procedure Act will in general be relatively expeditious because, firstly, the legal challenge to Federal Aviation Administration action must commence in the appropriate federal court of appeals, secondly, there is no jury, and, finally, there is generally no discovery. This is because judicial review under the Administrative Procedure Act standards is generally confined to the record already compiled by the Federal Aviation Administration, unless the allegations involve factual questions outside of those committed to agency discretion by the delegating statute, such as bribery or other clear violations of the rules against bias.[87] In China, there are set time limits to accelerate judicial review proceedings. The complaint against the administrative decision must be filed within 3 months from the day when the claimant knew or should have known that the administrative action was taken.[88] The court of first instance must enter a

[83]See Custos, *Workshop Materials France* (fn. 10) at 6.

[84]See for a comprehensive description of China's judicial review system: Bing (1994).

[85]Jin, *Workshop Materials China* (fn. 10) at 5.

[86]Jin, *Workshop Materials China* (fn. 10) at 6.

[87]Reitz, *Workshop Materials USA* (fn. 10) at 6.

[88]Article 39 Administrative Procedure Law of the People's Republic of China, adopted at the 2nd Session of the 7th National People's Congress on 4/4/1989, English translation available under http://www.china.org.cn/english/government/207335.htm <05.12.2018>.

judgment within 3 months from the day of the filing of the case.[89] If the claimant subsequently files an appeal, the appellate court must enter a final judgment within 2 months of receipt of a written appeal.[90] In Germany, there is a 1-month deadline for filing an annulment claim.[91] However, the proceedings in front of the administrative courts are very time consuming as they involve full fact finding by the courts, and the duration of such law suits against important infrastructural projects has often been criticized. Even the ECtHR has repeatedly stated that German courts do not sufficiently take into account the conventional right to timely legal protection under Art. 6 of the ECHR.[92] Germany is not alone in this however. In France, administrative court proceedings can also be time consuming.[93]

3.7 Alternative Dispute Resolution in the Field of Administrative Law

Alternative dispute resolution mechanisms are quite evolved in the U.S. The Administrative Dispute Resolution Act (1990)[94] requires federal agencies "to adopt a formal alternative dispute resolution policy, appoint personnel, and provide for their training in alternative dispute resolution methods."[95] Non-monetary, multipolar disputes, however, are not amenable to the existing alternative dispute resolution mechanisms. Thus, conflicts concerning the sufficiency of an environmental impact statement or the participation procedure would rarely be the subject of alternative dispute resolution in the U.S.[96]

In France, alternative dispute resolution is pursued during the administrative planning and approval procedure, and is largely not understood as an alternative to court proceedings. Mediation can be used as a means to determine whether an airport project should be pursued during the administrative procedure by the competent authority. For instance, a controversial airport project from 2012 saw a three-member dialogue commission established in November, with a mediation board established in June 2017 by the Prime Minister. Also, alternative dispute resolution via advisory commissions may be used to improve the quality of public participation during the project phase, or in order to reach balanced decisions relating to airport

[89] Article 57 Administrative Procedure Law of the People's Republic of China.

[90] Article 60 Administrative Procedure Law of the People's Republic of China.

[91] § 74 Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*, BGBl. I 1991, 686).

[92] See for example ECtHR, Judgment of 2/9/2010, Case 46344/96 – *Rumpf v Germany*, where the Court determines 'structural problems' of guaranteeing adequate length of court proceedings in Germany.

[93] See for instance Conseil d'État, judgment of 28/06/2002, N° 239575 – *Magiera*.

[94] 5 U.S.C. §§ 571 ff.

[95] See for criticism Werhan (1996), pp. 439 f.

[96] Reitz, *Workshop Materials USA* (fn. 10) at 6.

operation.[97] In Germany, the situation is similar. Although a mediation law, which also applies to public law disputes, was passed in 2012,[98] it does not contain any special provisions for administrative disputes. If mediation is used by the competent authority in an administrative procedure, it is regarded as purely informal administrative action. The result of the mediation usually has no legally binding effect. Also, during the administrative court proceedings, the administrative court may propose mechanisms for out-of-court dispute resolution with the aim of externally reaching an agreement between the parties or by way of settlement. However, this is not very common in the field of administrative law in Germany.[99]

In China, administrative disputes cannot be solved by arbitration. According to China's Arbitration Law, only contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organizations that are equal subjects may be arbitrated.

4 Concluding Remarks

The format of the workshop as a combination of a case study and a world café proved to be very fruitful in terms of activating the participants. At the same time, the workshop gave interesting insights in the conflict solving capacities of administrative law in modern complex societies, using the example of infrastructural planning procedures. A first interesting result revealed that major infrastructure is increasingly open to private parties. Public participation procedures therefore provide an effective means to integrate society in the decision-making process. The workshop revealed that legal orders all around the world are converging in this respect. Nonetheless, the administrative proceedings differ in detail. Even the European national legal orders foresee very different decision mechanisms despite the harmonizing effects of EU law. With regard to judicial review of administrative action, the legal systems differ particularly with regard to the rights of NGOs. Whereas special standing rules apply in France and Germany due to EU law, no such privileges exist in the U.S. or China. Alternative dispute resolution mechanisms appear to varying degrees throughout the analyzed legal system. Nonetheless, none of the analyzed legal systems pursue alternative dispute resolution as a common alternative to court proceedings to mitigate multipolar disputes in administrative planning procedures. Even though mediation practices are used in public participation procedures, they cannot substitute for administrative judicial review.

[97]For details see Custos, *Workshop Materials France* (fn. 10) at 7.

[98]Mediation Law (*Mediationsgesetz*, BGBl. I 2012, 1577).

[99]See for details Pünder (2016b), § 16.

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Lauréat / Laureate

- KOSAR, David, *Perils of Judicial Self-government in Transitional Societies*, (Cambridge University Press, 2016)

Mentions honorable / Honorable Mentions

- EMERICH, Yaëll, *Droit communs des biens: perspective transsystémique* (Editions Yvon Blais, 2017);
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Moderation: Silvia Ferreri (Turin)

La propriété au défi des « communs »
Property Meeting the Challenge of the "Commons"
RG/GR: Ugo Mattei (Turin) représenté par / represented by Alessandra Quarta (Turin)
Moderation: Lukas Heckendorn Urscheler (Lausanne)

Les Principes UNIDROIT comme cadre commun de référence pour l'interprétation uniforme des droits nationaux
The UNIDROIT Principles as a Common Frame of Reference for the Uniform Interpretation of National laws
RG/GR: Alejandro M. Garro (New York), José A. Moreno Rodríguez (Asunción)
Moderation: Naoki Kanayama (Tokyo)

Études juridiques bilingues: opportunités et défis
Bilingual Legal Education: The Need and the Challenges
RG/GR: Nicolás Etcheverry Estrázulas (Montevideo)
Moderation: Dominique Custos (Caen)

K. Boele-Woelki, D. P. Fernández Arroyo (eds.), *Current Issues of Comparative Law – Questions actuelles de droit comparé*, Ius Comparatum – Global Studies in Comparative Law 35, https://doi.org/10.1007/978-3-030-20659-8

Les conditions de reconnaissance de l'état civil des personnes transsexuelles et transgenres
Conditions of the Recognition of the Civil Status of Transsexual and Transgender people
RG/GR: Isabel Jaramillo Sierra (Bogotá)
Moderation: Gerard de Groot (Maastricht)

Les systèmes d'indemnisation des dommages liés aux soins de santé et les alternatives aux actions judiciaires
Compensation Schemes for Damages Caused by Healthcare and Alternatives to Court Proceedings
RG/GR: Dobrochna Bach-Golecka (Varsovie/Warsaw)
Moderation: Marek Safjan (Varsovie/Warsaw & Luxembourg)

Défis multiculturels en droit de la famille
Multicultural Challenges in Family Law
RG/GR: Nadjma Yassari (Hambourg/Hamburg), Marie-Claire Foblets (Halle sur Saale/Halle (Saale))
Moderation: Katharina Boele-Woelki (Hambourg/Hamburg)

Obligations d'information et désinformation des consommateurs
Information Obligations and Disinformation of Consumers
RG/GR: Gert Straetmans (Anvers/Antwerp)
Moderation: Marko Baretic (Zagreb)

Accords optionnels d'élection de for
Optional Choice of Courts Agreements
RG/GR: Mary Keyes (Nathan, QLD)
Moderation: Yuko Nishitani (Kyoto)

Questions de droit international privé de la responsabilité sociétale des entreprises
Private International Law for Corporate Social Responsibility
RG/GR: Catherine Kessedjian (Paris)
Moderation: Jürgen Basedow (Hambourg/Hamburg)

L'injonction anti-poursuite dans la procédure d'arbitrage et juridictionnelle
The Anti-Suit Injunction in Arbitral and Judicial Procedures
RG/GR: Filip De Ly (Rotterdam)
Moderation: María Blanca Noodt Taquela (Buenos Aires)

Contrôle des prix dans les clauses contractuelles standard
Control of Price Terms in Standard Contracts Terms
RG/GR: Yesim Atamer (Istanbul), Pascal Pichonnaz (Fribourg)
Moderation: Jacques E. Du Plessis (Stellenbosch)

Les groupes de sociétés
Groups of Companies
RG/GR: Rafael Manóvil (Buenos Aires)
Moderation: Franklin Gevurtz (Sacramento)

La régulation juridique du crowdfunding
Legal Regulation of Crowdfunding
RG/GR: Caroline Kleiner (Strasbourg)
Moderation: Mauro Bussani (Trieste)

Les sûretés en droit de la propriété intellectuelle
Security Rights on Intellectual Property
RG/GR: Eva-Maria Kieninger (Würzburg)
Moderation: Ergun Ozsunay (Istambul)

Le rôle de la négociation collective dans les régimes de droit du travail
The Role of Collective Bargaining in Labour Law Regimes
RG/GR: Ulla Liukkunen (Helsinki)
Moderation: Dan Wei (Macau)

Aspects légaux des croisières
Legal Aspects of Cruises
RG/GR: Cecilia Fresnedo de Aguirre (Montevideo)
Moderation: Hannah Buxbaum (Bloomington)

La lutte contre la pauvreté et le droit au développement
The Fight against Poverty and the Right to Development
RG/GR: Mads Andenas (Oslo), Jeremy Perelman (Paris)
Moderation: Lauro Gama Jr (Rio de Janeiro)

La révision formelle et informelle de la Constitution
Formal and Informal Constitutional Amendment
RG/GR: Mortimer Sellers (Baltimore)
Moderation: Giuseppe Franco Ferrari (Milan)

Réconcilier le pluralisme juridique et le constitutionnalisme: nouvelles trajectoires pour la théorie juridique dans l'âge de la mondialisation
Reconciling Legal Pluralism and Constitutionalism: New Trajectories for Legal Theory in the Global Age
RG/GR: Guillaume Tusseau (Paris)
Moderation: Susi Dwi Harijanti (Bandung)

Le droit au déréférencement / à l'oubli
The Right to be Forgotten
RG/GR: Franz Werro (Fribourg & Washington D.C.)
Moderation: Marie Linton (Uppsala)

La pratique de la déférence dans le cadre du contrôle juridictionnel de l'action administrative
Deference to the Administration in Judicial Review
RG/GR: Guobin Zhu (Hong Kong)
Moderation: Suzanne Comtois (Sherbrooke)

Délinquance des jeunes et développements récents dans les droits des enfants: l'enfant comme auteur et victime d'infractions pénales
Juvenile Delinquency Under Recent Developments in Children's Rights: Child as Perpetrator and Victim of Criminal Offences
RG/GR: Julia Sloth-Nielsen (Belville & Leiden)
Moderation: Bettina Weißer (Cologne)

La confidentialité des correspondances avec l'avocat en tant que garantie nécessaire du droit à un procès equitable
Confidentiality of Correspondence with Counsel as Necessary Requirement of the Right to a Fair Trial
RG/GR: Lorena Bachmaier (Madrid), Stephan C. Thaman (Saint Louis)
Moderation: Krzysztof Wojtyczek (Cracovie / Krakow / Strasbourg)

Protection des données dans l'internet
Data Protection in the Internet
RG/GR: Dario Moura Vicente (Lisbonne/Lisbon), Sofia de Vasconcelos Casimiro (Lisbonne/Lisbon)
Moderation: Joost Blom (Vancouver)

Les aspects juridiques des tests génétiques en relation à l'assurance et l'emploi
Legal Aspects of Genetic Testing Regarding Insurance and Employment
RG/GR: Lara Khoury (Montréal), Adelle Blackett (Montréal)
Moderation: Camelia Toader (Bucarest/Luxembourg)

Les professions juridiques et les transferts immobiliers
The Market in Legal Services and Conveyancing
RG/GR: Andrea Fusaro (Gènes/Genoa)
Moderation: Jorge Sánchez Cordero (Cité de Mexico / Mexico City)

Le changement climatique et les responsabilités individuelles
Climate Change and the Liability of Individuals
RG/GR: Makane M. Mbengue (Genève/Geneva), Franceso Sindico (Glasgow)
Moderation: Ewa M. Baginska (Gdansk)

Les solidarités entre générations
Solidarity Across Generations
RG/GR: Eri Kasagi (Bordeaux)
Moderation: Danuta Mendelson (Burkwood)

Tables Rondes / Round Tables

En mémoire de H. Patrick Glenn
Remembering H. Patrick Glenn
Moderation: Vivian Curran (Pittsburgh)
Intervenants/Speakers: Bénédicte Fauvarque-Cosson (Paris), Helge Dedek (Montréal), Ko Hasegawa (Sapporo), Ralf Michaels (Durham), Máximo Langer (Los Angeles), Catherine Valcke (Toronto)

Droit et religion: la perspective du dialogue inter-religieux
Law and Religion: the Perspective of the Inter-Religious Dialogue
Moderation: Silvio Ferrari (Milano)
Intervenants/Speakers: Vincente Fortier (Strasbourg), Arif A. Jamal (Singapour / Singapore), Michael Karayanni (Jerusalem), Javier Martínez-Torrón (Madrid)

L'admission de réfugiés: comment réagissent les systèmes juridiques nationaux?
The Refugee Admission: How Do the National Legal Systems Respond?
Moderation: Marit Jänterä Jareborg (Uppsala)
Intervenants/Speakers: Niki Aloupi (Strasbourg), Laurence Bougorgue Larsen (Paris), Shotaro Hamamoto (Kyoto), Roberto Toniatti (Trento)

Arbitrage commercial: un ordre juridique transnational autonome?
Commercial Arbitration: an Autonomous Transnational Legal Order?
Moderation: Diego P. Fernández Arroyo (Paris)
Intervenants/Speakers: George A. Bermann (New York), Dominique Hascher (Paris), Julio C. Rivera (Buenos Aires), Anna Mantakou (Athenes/Athens)

Ateliers / Workshops

L'assistance internationale en matière d'insolvabilité transfrontière: L'adoption de la loi-type de la CNUDCI sur l'insolvabilité internationale par les parlements nationaux et son application par les juridictions nationales
International Judicial Assistance in Cross-Border Insolvencies: the Enactment of the UNCITRAL Model Law on Cross Border Insolvency by National Legislatures and its Application by National courts
Moderation: Jenny Clift, CNUDCI/UNCITRAL (Vienne/Vienna), Antonia Menezes (Washington D.C.), Young Seok Kim (Seoul), Jin Chun (Kyoto)

La résolution de conflits par la procédure administrative – Participation des citoyens, son contrôle judiciaire, règlement extrajudiciaire de différends
Solving Conflicts Through Administrative Procedure – Citizen Participation, its Judicial Review, Alternative Dispute Resolution
Moderation: Hermann Pünder (Hambourg/Hamburg)

Conflits de juridictions en matière pénale et l'interdiction de la double peine
Conflicts of Jurisdiction in Criminal Matters and Double Jeopardy Protection
Moderation: John A.E. Vervaele (Utrecht), Katalin Ligeti (Luxembourg)

Réunion déjeunatoires / Luncheon Meetings

Perspectives de droit comparé de l'Asie du sud-est
Southeast-Asian Perspectives of Compartive Law
Moderation: Gary Bell (Singaopour / Singapore), Topo Santoso (Jakarta)

Systèmes juridiques mixtes
Mixed Legal Systems
Moderation: Yasunori Kasai (Tokyo), Thomas Bennett (Le Cap / Cape Town), John Cairns (Édimbourg/Edinburgh)

Les petits États
Small States
Moderation: Tony Angelo (Wellington), Jennifer Corrin (St Lucia, Queensland)

Quel avenir pour l'arbitrage d'investissement?
What Future for Investment Arbitration?
Moderation: Marilda Rosado (Rio de Janeiro), Francis Botchway (Qatar), Shotaro Hamamoto (Kyoto), José Fontoura (Sao Paulo)

L'établissement d'un cadre pour le contentieux en Asie: la Convention de la Haye sur l'élection de for et au-delà
Setting a Framework for Litigation in Asia: The Hague Choice of Court Convention and Beyond
Moderation: Frank Poon (Hong Kong), Nig Zhao (La Haye/The Hague), Yuko Nishitani (Kyoto)

Les dirigeants indépendants en Asie: une greffe juridique faussement complexe
Independent Directors in Asia: a Deceptively Complex Legal Transplant
Moderation: Souichirou Kozuka (Tokyo)

Les principes asiatiques de droit international privé
Asian Principles on Private International Law
Moderation: Naoshi Takasugi (Kyoto), Kwang Hyun Suk (Seoul), Chen Weizuo (Pekin/Beijing)

La reconnaissance et l'exécution des décisions étrangères en ANASE, Australie, Chine, Inde, Japon et Corée
Recognition and Enforcement of Foreign Judgments in ASEAN, Australia, China, India, Japan and South Korea
Moderation: Mary Keyes (Nathan), Elizabeth Aguiling-Pangalangan (Quezon City), Adeline Chong (Singapour / Singapore), Yujun Guo (Wuhan), Narinder Singh (Noida) Koji Takahashi (Kyoto)

Congrès dans le Congrès / Congress in Congress

L'économie collaborative et le droit
Sharing Economy
Moderation: Shinto Teramoto (Fukuoka)
Intervenants/Speakers: Emerson S. Bañez (Manila), Benjamen Gussen (Melbourne), Danuta Mendelson (Melbourne), Annelise Riles (Ithaca), Nicholas Felix L. Ty (Manila), Yuichiro Watanabe (Tokyo)

La conduite autonome
Autonomous Driving
Moderation: Shinto Teramoto (Fukuoka)
Intervenants/Speakers: Kenji Hirahara (Tokyo), Danilo V. Vargas (Fukuoka), Steven Van Uytsel (Fukuoka)

Nouvelle technologie, l'économie de l'innovation et le droit
New Technology, the Innovation Economy and the Law
Moderation: Nikolaus Forgo (Hanovre/Hannover, Vienne/Vienna)
Intervenants/Speakers: mThomas Hoeren (Münster), Gyooho Lee (Seoul), Cecilia Magnusson-Sjöberg (Stockholm)

Il n'est pas possible d'échapper à la LegalTech et à l'intelligence artificielle
There is No Escape from LegalTech and Artificial Intelligence
Moderation: Erik Vermeulen (Tilburg)
Intervenants/Speakers: Wulf Kaal (Minnesota), Craig Calcaterra (Minnesota)

Forum des jeunes chercheurs / Younger Scholars' Forum

La séparation des pouvoirs et ses défis dans une perspective comparative
The Separation of Powers and its Challenges in Comparative Perspectives
Intervenants/Speakers: Carolina Alves das Chagas, Antonia Baraggia, Lica Pierto Vanoni, Brian Barry, Eoin Carolan, Surabhi Chopra, Luis Eugenio Garcia-Huidobro, Sergio Guiliano, Lando Kirchmair
Provocateur Discutant/Discussant: Mortimer Sellers (Baltimore)
Moderation: Daniel Wunder Hachem (Curitiba), Ren Yatsunami (Kyushu)

Populisme et approches comparatives à la théorie démocratique
Populism and Comparative Approaches to Democratic Theory
Intervenants/Speakers: Enrico Albanesi, François Xavier Arnoux, Monika Augustyniak, Marco Bassini, Joshua Braver, Enrico Buono, Felix B. Chang, Johanna Fröhlich, Shannon Fyfe, Jurgen Goossens, Sascha Hardt, David Kenny, Younsik Kim, Shao-Man Lee, Julieta Marotta, Eugene D. Mazo, Matteo Monti, Hoai-Thu Nguyen, Purush Purushothaman, Neliana Rodean, Artem Sergeev, Aviram Shalhal, Ronald Van Crombrugge, Juliano Zaiden Benvindo, Fernando José Gonçalves Acunha, Sirio Zolea

Provocateur Discutant/Discussant: Oran Doyle (Dublin)
Moderation: Cristina Fasone (Rome), Yaniv Roznai (Herzliya)

Réponses comparatives de droit public/privé à la diversité religieuse
Comparative Public and Private Law Responses to Religious Diversity
Intervenants/Speakers: Dia Dabby, Alidadi Katayoun, Lucas Rademacher, Lorraine Finley, Zachary Calo, Reyniers PYY, Dania Suleman, Karolina Mendecka, Mareike Schmidt, Eugenia Relaño Pastor, Kyriaki Topidi, Amjad Mahmood Khan, Leora Dahankatz, Léa Brière-Godbout, Marie-Andrée Plante, Mohsin Alam Bhat, Andrea Borroni, Marco Senghesio, Roman Zinigrad, Giuseppe Laneve
Provocateur Discutant/Discussant: Michel Rosenfeld (New York)
Moderation: Jaclyn Neo (Singapour / Singapore), Ioanna Tourkochoriti (Galway)

Défenses à la responsabilité: philosophie et doctrine
Defences to Liability: Philosophy and Doctrine
Intervenants/Speakers: Igor Vuletić, Krzysztof Szczucki, Delphine Defossez, Patryk Gacka, Kartika Paramita, Karmen Lutman, Jane Richards, James C. Fisher, Mindy Nunez Duffourc, Tan Zhong Xing, Katerina Florou, Ekaterina Perevoshchikova, Hent Kalmo, Quincy C Lobach, Matteo Dragoni, Eduardo Ferreira Jordão
Provocateur Discutant/Discussant: Cora Chan (Hong-Kong), Eduardo Ferreira Jordão (Rio)
Moderation: C.M.D.S. Pavillon

Technologie et innovation: défis pour les frontières juridiques traditionnelles
Technology and Innovation: Challenges for Traditional Legal Boundaries
Intervenants/Speakers: Elena Falletti, Markus Naarttijärvi, Alex Reiss Sorokin, Althaf Marsoof, Marta Infantino, Weiwei Wang, Paul Wragg, Andrew Woods, Chien-Chih Lu, Itay Ravid, Yueh-Ping (Alex) Yang, Cheng-Yun Tsang, Enguerrand Marique, Qian Tao, Jing Li, Alexandra Horváthová, Ana Gascón Marcén, Baskaran Balasingham, Andrea Mulligan, David Mangan, Jeanne Huang, Mateusz Piątkowski, Pompeo Polito, Magdalena Jozwiak, Mayu Terada, Rossanna Ducato, Lu Xu
Provocateur Discutant/Discussant: Sofia Ranchordás (Leiden)
Moderation: Catalina Goanta (Maastricht), András Koltay (Budapest)

Migration et asile: approches comparatives et nécessité d'harmoniser les régimes
Migration and Asylum: Comparative Approaches and the Need for Harmonizing Regimes
Intervenants/Speakers: Daniel Ghezelbash, Kevin Fredy Hinterberger, Andrea Romano, Andrea De Petris, Peter Szigeti, Gabriel Haddad Teixeira, Leonardo Jensen Ribeiro, Carole Viennet, Martijn van den Brink
Provocateur Discutant/Discussant: Adelle Blackett (Montréal)
Moderation: Asha Kaushal (Vancouver), Dimitry Kochenov (Groningen)

Abus de pouvoir dans le droit privé et public: double perspective à propos de la corruption

Misuses of Power in Both Private and Public Law: Dual Perspectives on Corruption

Intervenants/Speakers: Annuska Macedo, Túlio Felippe Xavier Januário, Caroline da Rosa Pinheiro, Raphael Vieira da Fonseca Rocha, Cédric Bernard, Daniel Melo Garcia, Joshua Karton, Kehinde Folake Olaoye, Lucas Bossoni Saikali, Marta Andrecka, Murilo Borsio Bataglia, Raul Murad Ribeiro de Castro, Mário Baracho Thibau, Rui Carlo Dissenha, Tamar Groswald Ozery, Fábio de Sousa Santos, Ana Cristina Aguilar Viana, Cristina Poncibo, Osayd Awawda

Provocateur Discutant/Discussant: Geneviève Cartier (Sherbrooke)

Moderation: Sebastián Paredes (Buenos Aires), Maxime St-Hilaire (Sherbrooke)

Approches méthodologiques du droit constitutionnel comparé: évolutions et révolutions

Methodological Approaches to Comparative Constitutional Law: Evolutions and Revolutions

Intervenants/Speakers: Christina Lienen, Karol Poplawski, Dave AG. Van Toor, Patricia Garcia Majado, Onerva- Aulikki Suhonen, Carolina Silva Portero, Lucas Nonato, Maria Chiara Locchi, Giacomo Capuzzo, Xavier Sujith, Andrea Romano, Han Zhai, Elisa Bertolini, Graziella Romeo, Maria Daniela Poli, Angel Aday, Jimenez Aleman, Zhang Weidong, JoãoPaulo Santos Araujo, Andrea Borroni, Giovanna Carugno, Jun Shimizu

Provocateur Discutant/Discussant: Guillaume Tusseau (Paris)

Moderation: Luisa Fernanda García López (Bogotá), Tomasz Koncewicz (Dantzig)

Directeur/Director (Speakers' Corner): John Haskell (Manchester)

Présentation du nouveau Bureau / Presentation of the New Executive Committee

Présentation du nouveau Bureau

Le 27 juillet 2018, l'assemblée générale de l'Académie internationale de droit comparé a élu son nouveau Bureau pour un mandat de quatre ans (2018–2022). Katharina Boele-Woelki (Présidente), Giuseppe Franco Ferrari (Vice-Président), Ulrich Sieber (Vice-Président), Joost Blom (Trésorier) et Diego P. Fernández Arroyo (Secrétaire général) ont été réélus pour un second mandat. 4 nouveaux membres du Bureau ont été élus à Fukuoka. Leurs profils assurent une plus grande diversité dans la composition du Bureau : Vivian Curran (Vice-Présidente, Etats-Unis), Makane Mbengue (Vice-Président, Sénégal), Marilda Rosado De Sá Ribeiro (Vice-Présidente, Brésil) et Dan Wei (Vice-Présidente, Chine). Une biographie de chaque membre est reproduite ci-après:

PRÉSIDENTE DE L'AIDC
Katharina Boele-Woelki

Katharina Boele-Woelki est présidente de la Bucerius Law School, la première école de droit privée en Allemagne, où elle est Claussen Simon Foundation

Presentation of the new Executive Committee

On 27 July 2018, the General Assembly of the International Academy of Comparative Law elected its new Executive Committee for a four-year term (2018–2022). Katharina Boele-Woelki (President), Giuseppe Franco Ferrari (Vice-President), Ulrich Sieber (Vice-President), Joost Blom (Treasurer) and Diego P. Fernández Arroyo (Secretary-General) were reelected for a second term. 4 new Executive Members were elected in Fukuoka. Their profile ensures a greater diversity in the composition of the EC: Vivian Curran (Vice-President, US), Makane Mbengue (Vice-President, Senegal), Marilda Rosado De Sá Ribeiro (Vice-President, Brazil) and Dan Wei (Vice-President, China). A biography of each EC Member is reproduced hereafter:

IACL PRESIDENT
Katharina Boele-Woelki

Katharina Boele-Woelki is President of Bucerius Law School, the first private law school in Germany, where she also serves as the Claussen Simon

K. Boele-Woelki, D. P. Fernández Arroyo (eds.), *Current Issues of Comparative Law – Questions actuelles de droit comparé*, Ius Comparatum – Global Studies in Comparative Law 35, https://doi.org/10.1007/978-3-030-20659-8

Professor of Comparative Law. Jusqu'à septembre 2015, elle a été professeure de droit international privé, droit comparé et droit de la famille à l'université d'Utrecht aux Pays-Bas. En 2017 elle a été nommée Extraordinary Professor à l'Université de Stellenbosch en Afrique du Sud. Elle a mis en place la Commission on European Family Law (CEFL) et le Utrecht Centre for European Research into Family Law (UCERF). Elle est membre et membre du Bureau de plusieurs institutions et associations professionnelles, notamment la *Deutsche Gesellschaft für Internationales Recht* et l'Institut suisse de droit comparé. Elle est dans le comité editorial de plusieurs revues, séries d'ouvrages et plateformes open access globales, européennes et sud-africaines. En 2014, elle a été élue présidente l'Académie internationale de droit comparé. Elle est membre du Curatorium de l'Académie internationale de droit comparé et a reçu plusieurs doctorats honoris causa des universités d'Uppsala, de Lausanne et d'Anvers, ainsi que le *Anneliese Maier-Forschungspreis* de la Alexander von Humboldt Foundation. Elle est member élue de l'*Akademie der Wissenschaften in Hamburg*.

Foundation Professor of Comparative Law. Until September 2015, she was Professor of Private International Law, Comparative Law and Family Law at Utrecht University, the Netherlands. In 2017 she has been appointed Extraordinary Professor at the University of Stellenbosch, South Africa. She established the Commission on European Family Law (CEFL) and the Utrecht Centre for European Research into Family Law (UCERF). She is member and board member of various professional associations and institutions, such as the *Deutsche Gesellschaft für Internationales Recht* and the Swiss Institute of Comparative Law, and serves on editorial boards for Global, European and South African law journals, book series and open access platforms. In 2014, she was elected president of the International Academy of Comparative Law. She is a member of the Curatorium of the Hague Academy for International Law and was awarded honorary doctorates from Uppsala University, the University of Lausanne and the University of Antwerp, as well as the *Anneliese Maier-Forschungspreis* from the Alexander von Humboldt Foundation. She is an elected member of the *Akademie der Wissenschaften in Hamburg*.

VICE-PRÉSIDENTE DE L'AIDC
Vivian Curran

Vivian Curran est Professeur Distinguée à la faculté de droit de l'Université de Pittsburgh. Elle est présidente de la section nord-américaine de la Société de législation comparée et a été présidente de la Société américaine de droit comparée. Elle est Chevalier dans l'Ordre des Palmes Académiques de France et par ailleurs est lauréate de la

IACL VICE-PRESIDENT
Vivian Curran

Vivian Curran is Distinguished Professor of Law at the University of Pittsburgh. She is the President of the North-American Section of the Société de législation comparée and former President of the American Society of Comparative Law. She has been decorated by France as a Chevalier dans l'Ordre des Palmes Académiques and

große goldene Ehrenzeichen für Verdienste um die Republik Österreich de la République d'Autriche. Elle est membre de l'American Law Institute qui rédige les Restatements of the Law des Etats-Unis. Pr. Curran est l'auteur de nombreuses publications dans le domaine du droit comparé et de son application au droit transnational.

VICE-PRÉSIDENT DE L'AIDC
Giuseppe Franco Ferrari

Giuseppe Franco Ferrari est professeur de droit constitutionnel et de droit public comparé à l'Université commerciale Luigi Bocconi (Italie). Auparavant, il a enseigné à l'Università di Pavia, à l'Università Cattolica del Sacro Cuore et à l'Università degli Studi « Gabriele d'Annunzio ». Il a été professeur invité et boursier Fulbright à la faculté de droit de l'Université de Virginie et est l'auteur d'un très grand nombre de publications. D'avril 2001 à juin 2016, il a été président de Associazione di Diritto Pubblico Comparato ed Europeo. Depuis 1997, il est membre du comité exécutif de Associazione Italiana di Diritto Comparato. Il est directeur de la revue « Diritto Pubblico Comparato ed Europeo » et co-directeur du « Comparative Law Review ». Il est également membre du Consello editorial de « Revista Galega de Administración Pública », du Consejo Cientifico du « Grupo de Investigación de Derecho Público Global » et de la « Revista General de Derecho Público Comparado », de la « Asociación Internacional de Derecho Administrativo ». et membre du conseil scientifique de Giurisprudenza Costituzionale, MUNUS, Percorsi Costituzionali et de Misión Jurídica. De 2002 à 2007, il a été membre du Comité d'experts sur l'administration publique créé par le

by Austria with the große goldene Ehrenzeichen für Verdienste um die Republik Österreich. She is a member of the American Law Institute which drafts the Restatements of the Law of the United States. Professor Curran is the author of many publications in the area of comparative law and its application to transnational law.

IACL VICE-PRESIDENT
Giuseppe Franco Ferrari

Giuseppe Franco Ferrari is professor of Constitutional law and Comparative Public Law at the Università Commerciale Luigi Bocconi (Italy). Previously, he has taught at the Università di Pavia, at the Università Cattolica del Sacro Cuore and at the Università degli Studi "Gabriele d'Annunzio". He was a Visiting Professor and Fulbright Scholar at the University of Virginia School of Law and is the author of a very large number of publications. From April 2001 to June 2016, he has been the president of "Associazione di Diritto Pubblico Comparato ed Europeo", while, since 1997, he is member of the Executive Committee of "Associazione Italiana di Diritto Comparato". He is director of the review "Diritto Pubblico Comparato ed Europeo" and co – director of the "Comparative Law Review". He is also member of the Consello editorial of "Revista Galega de Administración Pública", the Consejo Cientifico of "Grupo de Investigación de Derecho público global" and of the "Revista General de Derecho Público Comparado", the "Asociación Internacional de Derecho Administrativo", and member of the scientific board of Giurisprudenza Costituzionale, MUNUS, Percorsi Costituzionali and of Misión Jurídica. From 2002 to 2007, he has been member

Conseil économique et social de l'Assemblée générale des Nations Unies. En particulier, il a été impliqué dans des affaires telles que les services publics et les marchés publics.

VICE-PRÉSIDENT DE L'AIDC
Makane Mbengue

Makane Moïse Mbengue est Professeur de droit international à la Faculté de droit de l'Université de Genève où il enseigne le droit international général, le droit international de l'environnement, le droit international des investissements, le changement climatique et le droit international, le droit international de l'eau, le droit du règlement des différends internationaux et la philosophie du droit international. Professeur Mbengue est également professeur associé à la Faculté de droit de Sciences Po Paris où il enseigne le droit international général, le droit de l'Organisation mondiale du commerce (OMC) et le règlement des différends dans le droit de la mer. Il est titulaire d'un doctorat en droit international public de l'Université de Genève. Il était l'expert principal pour les négociations et la rédaction du Code panafricain de l'investissement (CPPI) dans le contexte de l'Union africaine. Il était également parmi les experts qui ont préparé le Pacte mondial pour l'environnement. Il a agi et agit en qualité d'expert auprès de l'Union africaine, de la Commission économique des Nations Unies pour l'Afrique, du Programme des Nations Unies pour l'environnement (PNUE), de l'Organisation mondiale de la santé (OMS), de la Banque mondiale, de l'Organisation internationale du travail (OIT) et de l'Institut international du développement durable (IISD), entre autres. Il est également professeur dans

of the Committee of experts on Public Administration established by the Economic and Social Council of the UN General Assembly. In particular, he was involved in matters as public services and government contracts.

IACL VICE-PRESIDENT
Makane Mbengue

Makane Moïse Mbengue is Professor of International Law at the Faculty of Law of the University of Geneva where he teaches General International Law, International Environmental Law, International Investment Law, Climate Change and International Law, International Water Law, International Dispute Settlement Law and Philosophy of International Law. Prof. Mbengue is also an Affiliate Professor at Sciences Po Paris (School of Law) where he teaches General International Law, the Law of the World Trade Organization (WTO) and Dispute Settlement in the Law of the Sea. He holds a Ph.D. in Public International Law from the University of Geneva. He was the Lead Expert for the negotiations and drafting of the Pan-African Investment Code (PAIC) in the context of the African Union. He was also among the Experts who have prepared the Global Pact for the Environment. He has acted and acts as expert for the African Union, the United Nations Economic Commission for Africa, the United Nations Environment Programme (UNEP), the World Health Organization (WHO), the World Bank, the International Labour Organization (ILO) and the International Institute for Sustainable Development (IISD) among others. He also acts as a Professor for courses in International Law organized by the United Nations Office of Legal Affairs (OLA) and by the United

le cadre de cours de droit international organisés par le Bureau des affaires juridiques des Nations Unies et par l'Institut des Nations Unies pour la formation et la recherche (UNITAR). Prof. Mbengue intervient en tant que conseil dans des litiges devant des cours et tribunaux internationaux (en particulier devant la Cour internationale de Justice et dans des affaires d'investissement) et en tant que conseiller auprès des gouvernements. Il est impliqué dans les négociations de plusieurs accords internationaux d'investissement en Afrique. Il est l'auteur de plusieurs publications dans le domaine du droit international.

Nations Institute for Training and Research (UNITAR). Prof. Mbengue acts as counsel in disputes before international courts and tribunals (in particular, before the International Court of Justice and in investment cases) and as advisor for governments. He is involved in the negotiations of several International Investment Agreements in Africa. He is the author of several publications in the field of international law.

VICE-PRÉSIDENTE DE L'AIDC
Marilda Rosado De Sá Ribeiro

Marilda Rosado De Sa Ribeiro est associée chez BARBOSA RAIMUNDO, GONTIJO AND CAMARA -BRGC Advogados. Elle est Associate Professor de droit international à l'Universidade do Estado do Rio de Janeiro-UERJ (1998 – . . .) et coordinatrice du CEDPETRO—Center of Advanced Studies and Research at the Law School of UERJ, et partenaire de CEDPEM—Center for Development, Petroleum, Energy and Mining. Elle est membre de l'Association des négociateurs internationaux (AIPN) depuis 1997, où elle a siégé au Conseil pour deux mandats. Elle est membre du conseil consultatif de l'éducation de l'AIPN et coordinatrice de la section étudiante de l'UERJ-Rio de Janeiro. Sur le plan éditorial, elle est rédactrice en chef du Brazilian Journal of Oil Gas and Energy Law Journal—RBDPRB, publié à l'UERJ et membre du comité exécutif du Journal of World Energy Law et Business—JWELB, édité par Oxford University Press.

IACL VICE-PRESIDENT
Marilda Rosado De Sá Ribeiro

Marilda Rosado De Sá Ribeiro is a partner at BARBOSA RAIMUNDO, GONTIJO AND CAMARA–BRGC Advogados. She is a part time Associate Professor of International Law, Universidade do Estado do Rio de Janeiro-UERJ (1998 – . . .) and a coordinator of CEDPETRO—Center of Advanced Studies and Research at the Law School of UERJ, as well as a partner of CEDPEM—Center for Development, Petroleum, Energy and Mining. She has been a member of the Association of International Negotiators- AIPN since 1997, where she served the Board for two terms. She is a member of the Education Advisory Board of AIPN and a coordinator of the Student Chapter at UERJ-Rio de Janeiro. At the editorial front she is a Chief editor of the Brazilian Journal of Oil Gas and Energy Law Journal—RBDP, edited at UERJ and a member of the Executive Committee of the Journal of World Energy Law and Business—JWELB, edited by Oxford University Press.

VICE-PRÉSIDENT DE L'AIDC
Ulrich Sieber

Ulrich Sieber est directeur de l'Institut Max Planck de droit pénal étranger et international à Fribourg / Allemagne, professeur et membre du corps professoral des facultés de droit de l'Université Albert Ludwigs de Fribourg et de l'Université Ludwig Maximilian de Munich. Ses principaux domaines de recherche portent sur l'évolution de la criminalité, du droit pénal et des politiques juridiques dans la «société mondiale à risque» d'aujourd'hui. Les principaux domaines de projet concernent le droit pénal comparé, le droit pénal européen et le droit de la sécurité, notamment. en ce qui concerne le crime organisé, le terrorisme, la criminalité économique et la cybercriminalité. M. Sieber est vice-président de l'Académie internationale de droit comparé (IACL), vice-président de l'Association internationale de droit pénal (AIDP), vice-président de la Société internationale de défense sociale et de politique criminelle humaine (iSSD). Association allemande pour le droit pénal européen, président de la section allemande de l'Association internationale de droit pénal (AIDP), président du comité d'éthique de la société Max Planck et conférencier de l'École internationale Max Planck de recherche en droit pénal comparé (IMPRS-CC).

IACL VICE-PRESIDENT
Ulrich Sieber

Ulrich Sieber is director at the Max Planck Institute for Foreign and International Criminal Law in Freiburg/Germany, professor and faculty member at the law faculties of the Albert Ludwigs University of Freiburg and the Ludwig Maximilian University of Munich. His main areas of research deal with the changing face of crime, criminal law, and legal policy in today's "global risk society". Major project areas concern comparative criminal law, European criminal law and security law, esp. with respect to organized crime, terrorism, economic crime and cybercrime. Prof. Sieber is vice president of the International Academy of Comparative Law (IACL), vice president of the International Association of Penal Law (AIDP), vice president of the International Society of Social Defence and Humane Criminal Policy (iSSD), president of the German Association for European Criminal Law, president of the German section of the International Association of Penal Law (AIDP), chairman of the ethics committee of the Max Planck Society and speaker of the International Max Planck Research School for Comparative Criminal Law (IMPRS-CC).

VICE-PRÉSIDENTE DE L'AIDC
Dan Wei

Dan Wei est professeure et doyenne associée de la faculté de droit de l'Université de Macao. Elle est membre du Conseil de développement économique du Macao Special Region

IACL VICE-PRESIDENT
Dan Wei

Professor Dan Wei is Professor and Associate Dean of the Faculty of Law of the University of Macau. She is a Member of the Economic Development Council of the Macau Special

administrative Gouvernement et experte invitée de la vérification du droit étranger du Centre de vérification du droit étranger de la Cour populaire suprême de la République de Chine. Elle est arbitre à la Commission chinoise d'arbitrage économique et commercial international (CIETAC), rapporteur général du Comité de la protection internationale des consommateurs de l'International Law Association (ILA), membre du conseil d'administration de International Association of Consumer Law. En Chine, elle est council member de la WTO Research Society of China Law Society, council member de la Consumer Protection Research of China Law Society et council member de Legal Periodicals of China Law Society Elle est la Series Editor de "Laws of Emerging Countries" chez Springer et la présidente de l'Association pour les études brésiliennes de Macao. Elle a écrit plus d'une centaine de publications académiques sur le commerce international et le droit des investissements, droit de la concurrence, droit commercial, arbitrage, droit de la consommation et droit du travail.

Administrative Region Government and Invited Expert of Ascertainment of Foreign Law of the Center for Ascertainment of Foreign Law of the Supreme People's Court of Republic of China. She is Arbitrator of China International Economic and Trade Arbitration Commission (CIETAC), the General Rapporteur of the Committee of International Protection of Consumers of International Law Association (ILA), a board member of International Association of Consumer Law. In China, she is council member of WTO Research Society of China Law Society, council member of Consumer Protection Research of China Law Society and council member of Legal Periodicals of China Law Society. She is the Series Editor of "Laws of Emerging Countries" of the Springer and the President of Macao Association for Brazilian Studies. She has authored more than one hundred pieces of different kinds of academic publications on International Trade and Investment Law, Competition Law, Commercial Law, Arbitration, Consumer Law and Labor Law.

TRÉSORIER DE L'AIDC
Joost Blom

Joost Blom est professeur émérite à la faculté de droit de l'University of British Columbia (Canada) dont il a auparavant été le doyen. Professeur Blom a été professeur invité à Osgoode Hall Law School, enseignant à l'University of Victoria, research fellow et enseignant au Canadian Studies Centre de l'Universität Trier et Senior Fellow à la faculté de droit de l'University of Melbourne. Professor Blom a été le Président de l'Association canadienne des professeurs

IACL TREASURER
Joost Blom

Joost Blom is emeritus professor at the Peter A. Allard School of Law of the University of British Columbia (Canada), where he formerly served as Dean. Professor Blom has been a Visiting Professor at Osgoode Hall Law School, part-time Lecturer at the University of Victoria, research fellow and lecturer at the Canadian Studies Centre at the Universität Trier, and Senior Fellow at the University of Melbourne Faculty of Law. Professor Blom is a former

de et a été élu à quatre reprises par les membres du barreau comme « bencher » (member of the board of directors) de la Law Society of British Columbia avant de devenir « life bencher ». Il est par ailleurs directeur des Board of Trustees du Mackenzie King Scholarship et de l'University of British Columbia Faculty Pension Plan. Professeur Blom s'est en outre vu décerner le titre de Queens's Counsel (Colombie-Britannique). Il est l'auteur de très nombreuses publications dans les domaines du droit comparé, du droit des contrats et de la responsabilité délictuelle ainsi que du droit international privé.

SECRÉTAIRE GÉNÉRAL DE L'AIDC
Diego P. Fernández Arroyo

Diego P. Fernández Arroyo est professeur à l'École de droit de Sciences Po à Paris où il dirige le LLM in Transnational Arbitration and Dispute Settlement. Il est membre du Curatorium de l'Académie de droit international de La Haye, Associé de l'Institut de droit international et ancien président de l'Association américaine de droit international privé (ASADIP). Il est membre de la délégation argentine à la CNUDCI et a aussi représenté l'Argentine et l'ASADIP devant la Conférence de droit international privé de la Haye, l'Organisation des États américains et l'UNIDROIT. Il a par ailleurs une expérience active en arbitrage international en tant qu'arbitre indépendant et expert. Professeur invité dans de nombreuses universités en Europe, aux Amériques, en Asie et en Australie, il a, avant de rejoindre Sciences Po, été professeur aux Universités du Litoral, de Salamanca et Complutense de Madrid, ainsi que

President of the Canadian Association of Law Teachers and was elected as a bencher (member of the board of directors) of the Law Society of British Columbia for four terms by members of the Bar before becoming a Life Bencher. He is Chair of the Mackenzie King Scholarship Board of Trustees and Chair of the Board of Trustees of the University of British Columbia Faculty Pension Plan. Professor Blom was awarded the designation of Queen's Counsel (British Columbia). He is the author of numerous publications in the fields of comparative law, contract law, torts law and private international law.

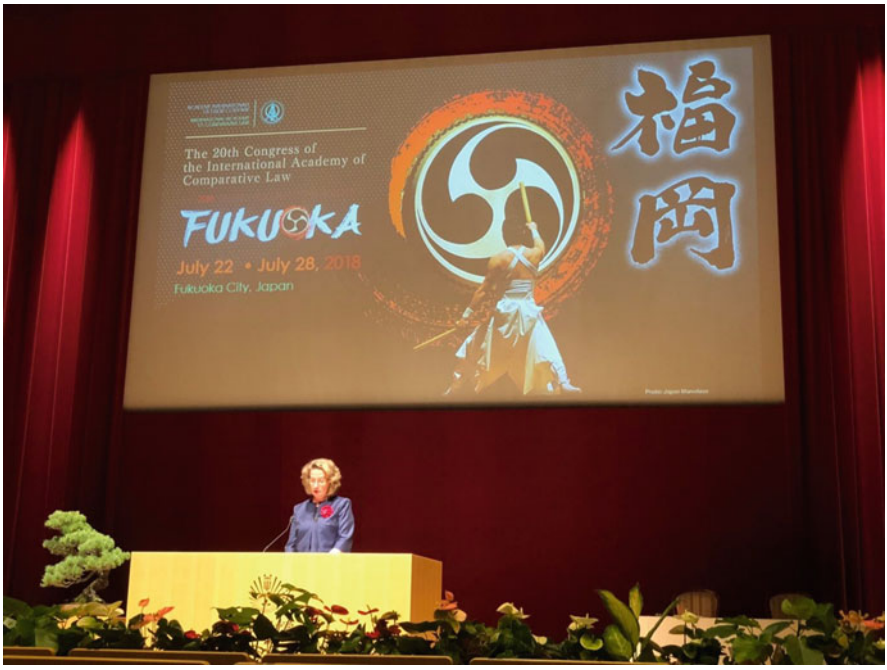
IACL SECRETARY-GENERAL
Diego P. Fernández Arroyo

Diego P. Fernández Arroyo is a professor at Sciences Po Law School in Paris, where he is the Director of the LLM in Transnational Arbitration and Dispute Settlement. He is a member of the Curatorium of the Hague Academy of International Law, an Associate of the Institute of International Law, and a former President of the American Association of Private International Law (ASADIP). He is a member of Argentinean Delegations before UNCITRAL, and he has also represented Argentina and ASADIP before the Hague Conference of Private International Law, the Organization of American States and UNIDROIT. He is actively involved in the practice of international arbitration as an independent arbitrator and an expert. A former Professor at the Universities Litoral, Salamanca and Complutense of Madrid, and Global Professor of the New York University, he has been invited in a number of universities in Europe, the Americas, Asia

Global Professor à la New York University. Il a reçu le titre de professeur honoraire des Universités de Buenos Aires et Nacional de Córdoba. Le Professeur Fernández Arroyo est l'auteur de très nombreuses publications (publiées dans plus de 20 pays) dans les domaines du droit comparé, du droit international privé, de règlements des litiges internationaux, de l'arbitrage international et de la gouvernance globale.

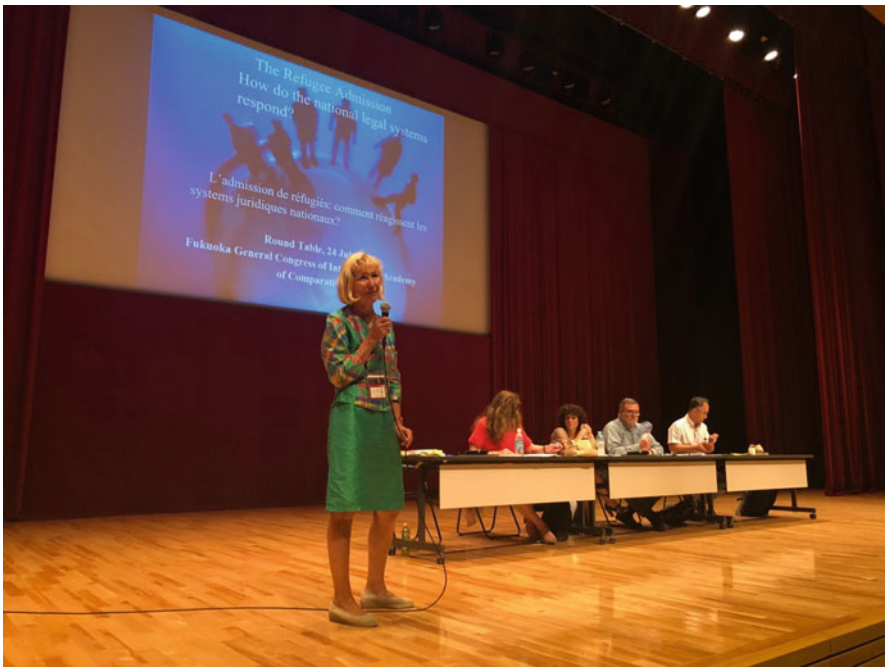
and Australia. The Universities of Buenos Aires and National of Córdoba have awarded him as Honorary Professor. Professor Fernández Arroyo is the author of numerous publications (published in more than 20 countries) in the fields of private international law, comparative law, international dispute resolution, international arbitration and global governance.

Photographies de l'évènement / Photographies of the Event

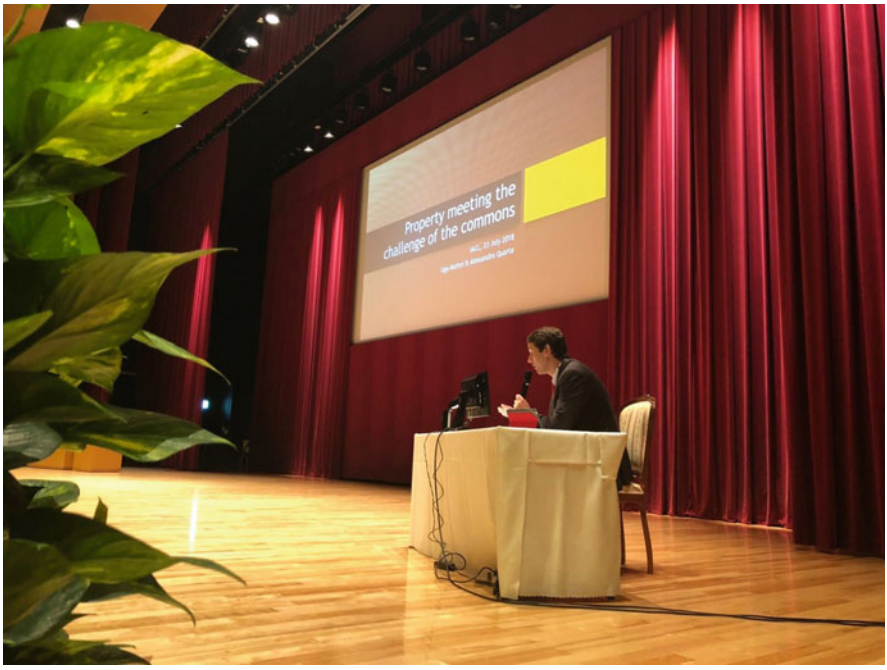


Inaugural Lecture / Leçon inaugurale

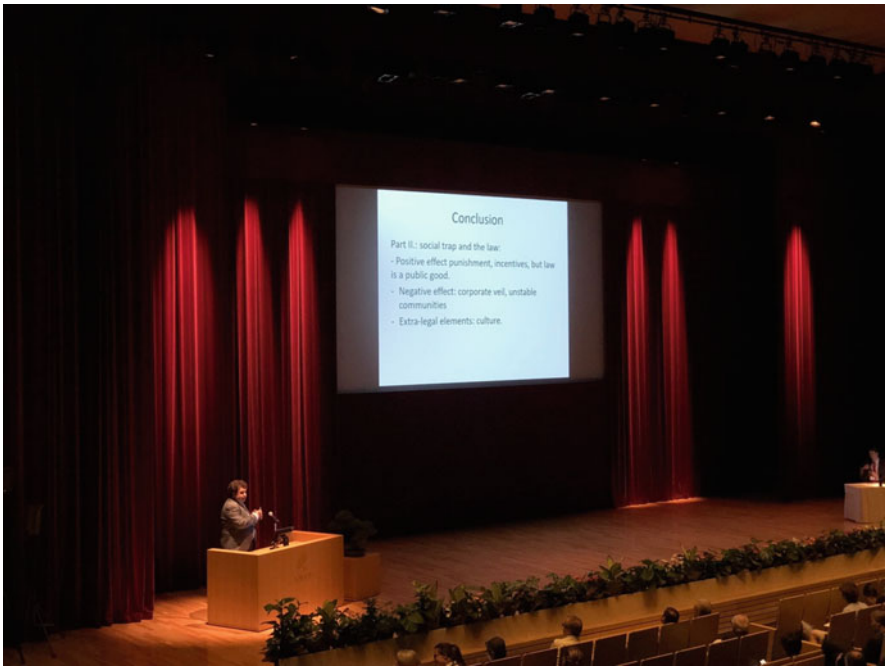
K. Boele-Woelki, D. P. Fernández Arroyo (eds.), *Current Issues of Comparative Law – Questions actuelles de droit comparé*, Ius Comparatum – Global Studies in Comparative Law 35, https://doi.org/10.1007/978-3-030-20659-8

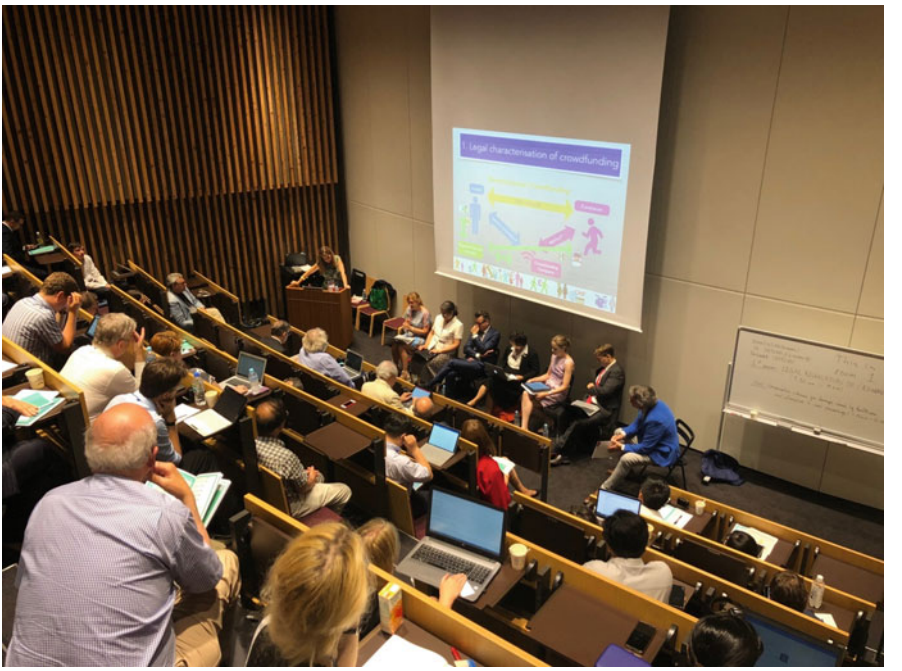


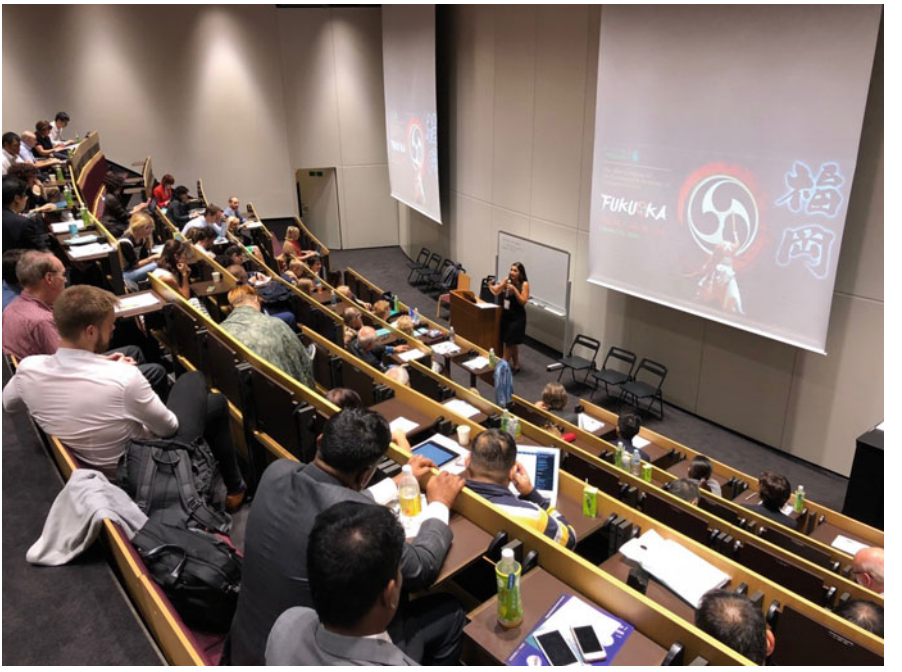
Round Tables / Tables Rondes

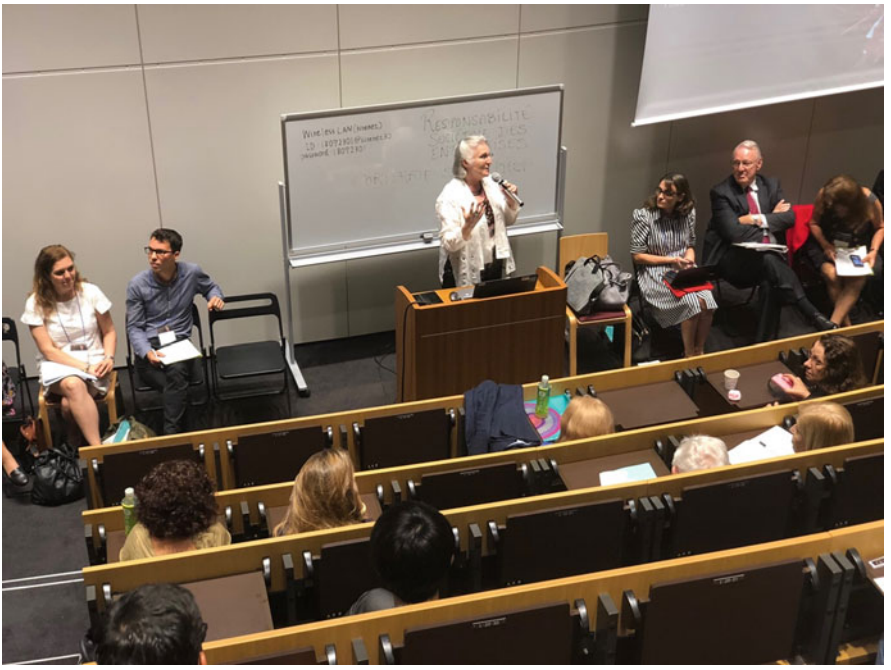


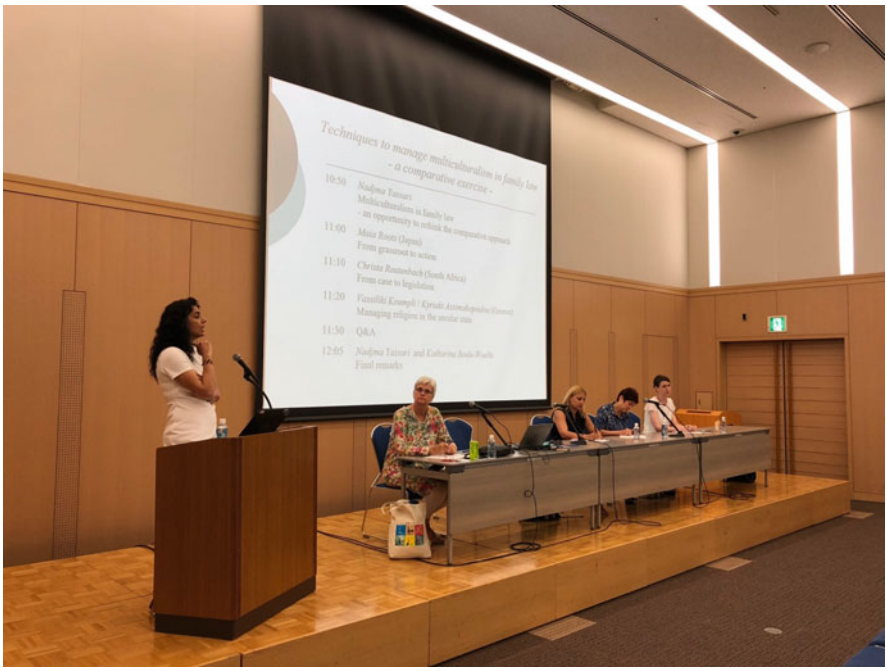
General Report Presentation / Présentation de rapports généraux

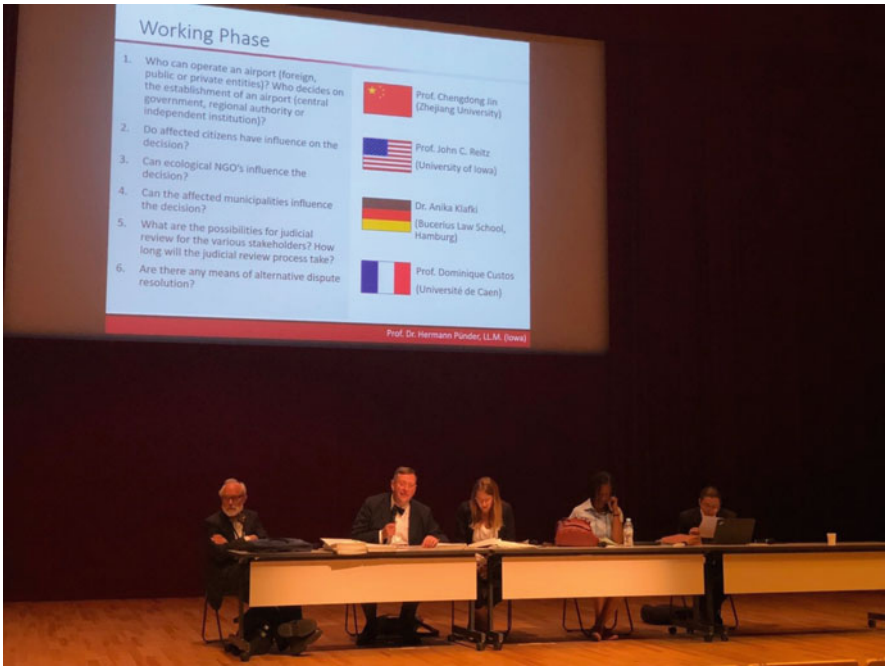

Conclusion
Part II.: social trap and the law:
- Positive effect punishment, incentives, but law is a public good.
- Negative effect: corporate veil, unstable communities
- Extra-legal elements: culture.


1. Legal characterisation of crowdfunding

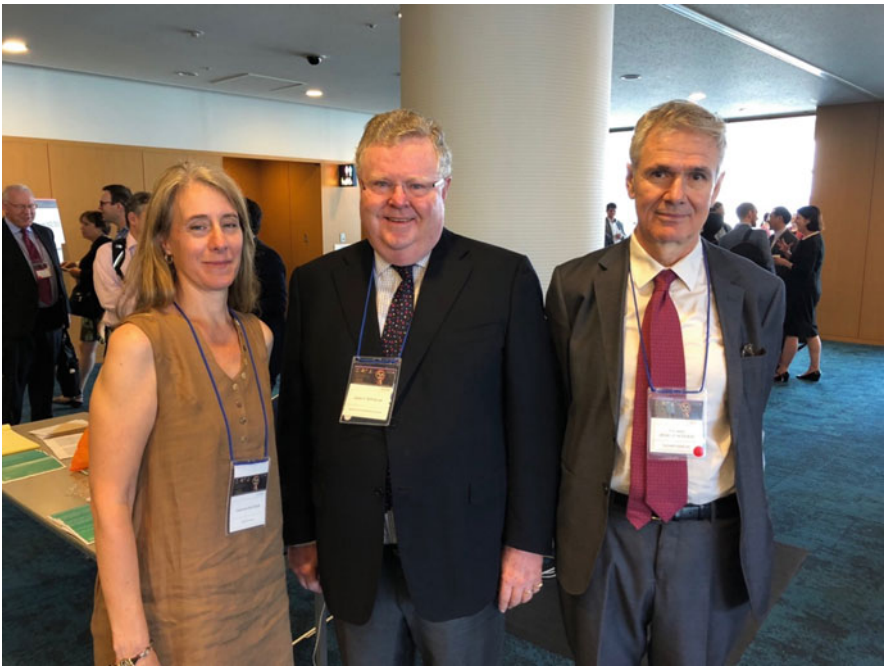

福岡



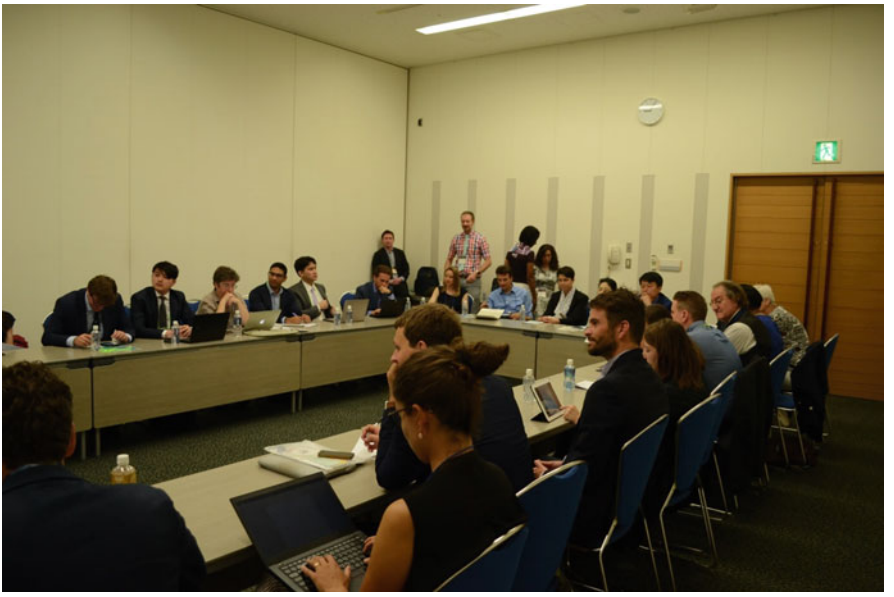




Workshops / Ateliers

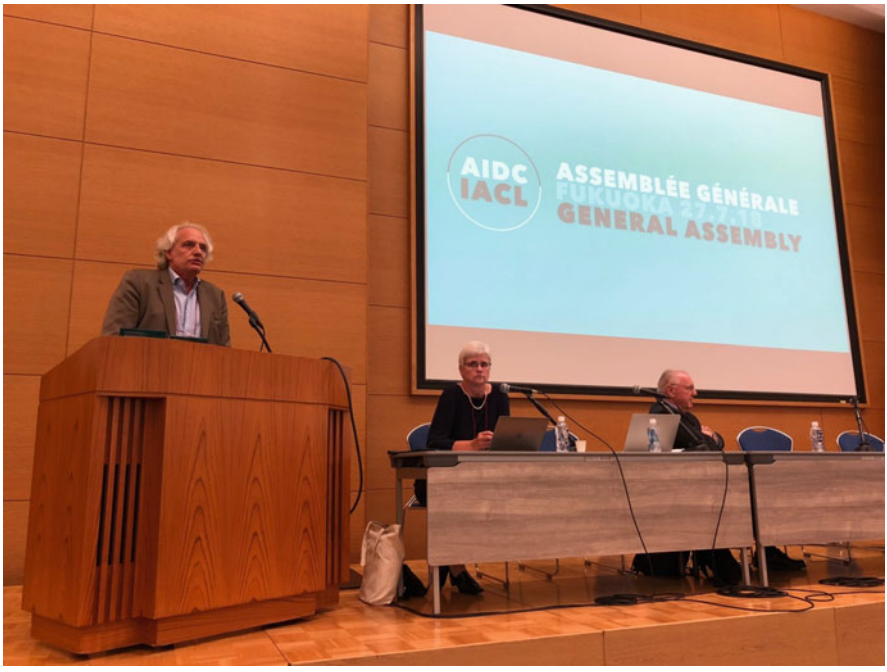


2018 Canada Prize Jury / Jury du Prix Canada 2018

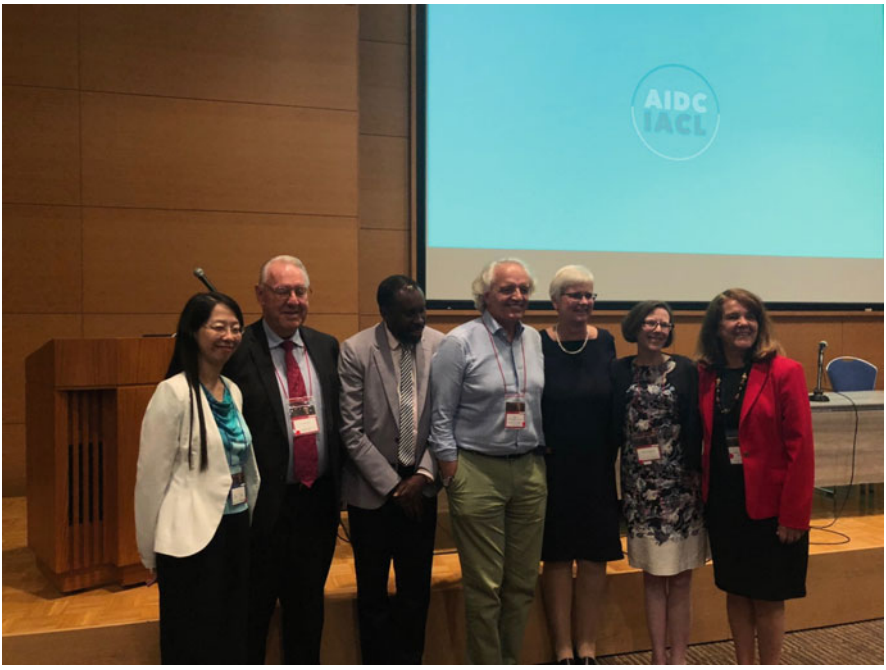


Younger Scholars' Forum / Forum des jeunes chercheurs

Luncheon Meetings / Réunions déjeunatoires



General Assembly / Assemblée générale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Closing Reception of the Congress / Réception de clôture du Congrès