

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.

More information about this series at <http://www.springer.com/series/11943>

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 20^{ème} 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.

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.

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 à l'occasion du précédent Congrès thématique de Montevideo qui a eu lieu en 2016.

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

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.

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

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

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.

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.

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.

Le prochain Congrès général aura lieu en 2022 à Asunción 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.

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

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

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.

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.

The next General Congress will be held in 2022 in Asunción, 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.

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.

Paris, France

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.

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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