‘An extraordinary collection of comparative perspectives is presented in this engaging book. It is arguably more important than at any time in the past, given increasing globalisation, to consider what current themes and approaches exist across jurisdictions that can enable us all to deal with disputes effectively. It is a delight to read and engage with the perspectives of these outstanding thinkers.’

Prof. Tania Sourdin, Dean and Head of School, Newcastle Law School

‘Anyone engaged in the serious study of legal dispute resolution should not only read this book, but also keep it at hand. Dispute resolution students, scholars, practitioners, and policymakers – especially but not only those working across borders – will find striking insights and actionable wisdom about how to research, design, and reform effective dispute resolution systems.’

Dr. Joshua Karton, Associate Professor, Queen’s University Faculty of Law

‘This pathbreaking book brings new perspectives to the study of comparative and transnational alternative dispute resolution. It promises to change the way with we understand the laws, systems, and institutions undergirding the global practice of mediation, arbitration, and other extra-judicial methods.’

Zachary Calo, Professor of Law, Hamad bin Khalifa University College of Law and Public Policy
This edited volume presents research and policy insights into the theory and practice of dispute systems reform in diverse jurisdictions. It highlights how important extra-judicial mechanisms are for resolving cross-border disputes, as evidenced both by the breadth of scholarship dedicated to the issue and the proliferation of parties resorting to non-litigious dispute resolution mechanisms in recent years.

Drawing on selected case studies, the book examines the impact of comparative research and policy analysis in advancing reform of dispute resolution institutions at both the regional and global levels. It explores the challenges and opportunities of understanding and assessing developments in systems of dispute resolution in diverse social and political contexts through comparative research.

With a growing number of disputes which have come to involve cross-border issues, anyone interested in transnational and comparative dispute resolution will find this book a useful reference.

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COMPARATIVE AND TRANSNATIONAL DISPUTE RESOLUTION

Edited by Shahla Ali
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“At each stage in human history, more complex levels of integration become not only possible, but necessary. . . . The demands of the present moment are pushing existing structures for facilitating . . . systems of conflict resolution beyond their capacity.”

—A Governance Befitting: Humanity and the Path Toward a Just Global Order, Baha’I International Community (BIC) 2020

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Introduction
Introduction – Overview of the Book

Comparative and Transnational Dispute Resolution: Research into Practice presents research and policy insights into the theory and practice of dispute systems reform. Drawing on selected case studies, the book examines the impact of comparative research and policy analysis on advancing reform of dispute resolution institutions at both the regional and global levels.

Contributors to the book address current methodological understandings of transnational dispute resolution through seeking common ground to map future methodological directions. Viewing transnational dispute resolution through a “third eye,”1 reviving the oft-neglected perspective of social phenomenon in dispute resolution and bringing to the fore “inclusive devolved reflection”2 are all centred on the premise of refocusing dispute resolution research methodology to reflect inclusiveness grounded in dispute resolution’s founding aims.

A core feature of the book is the emphasis on comparative approaches to understanding current issues in transnational dispute resolution and how those issues can be resolved through a better understanding of both common and divergent themes across nations. The book is an apt addition to existing publications on comparative dispute resolution, such as Palmer et al.’s Comparative Dispute Resolution (Research Handbooks in Comparative Law Series).3 These projects advance the socio-legal analysis of dispute resolution systems beyond pure procedural examinations. Drawing insights from a cross section of jurisdictions,

3 M. Palmer, et al., Comparative Dispute Resolution (Edward Elgar, 2020).
this book offers perspectives on both questions of comparative dispute resolution methodology and policy application through analysis of procedural and ethical standards in dispute resolution practice, regulatory patterns across both mediation and arbitration and comparative approaches to advancing consumer and environmental protection that broadens our perspective of dispute resolution practices.

Theoretical Foundations

In exploring the theoretical backdrop for this book, key insights and developments in the field of comparative legal institutions underscore flourishing development through significant contributions by scholars in both the public and private law spheres.4 As there is no one single method exclusive to comparative law, one cannot talk of a “comparative law methodology” or even of a “methodology of comparative law” but instead must speak of methods employed in comparative law research. Comparative law research is moving towards the exploration of backgrounds, contexts and interrelationships by employing a “system dynamics” approach.5

Synthesis of comparative commercial cross-border dispute resolution research methodology builds on existing work in comparative law generally. Comparative law refers not to a body of law resulting in the production of legal norms but to the “systematic application of the comparative technique to the field of law.”6 Such comparative undertakings generally take as their subject matter “two or more legal systems; or parts, branches or aspects of two or more legal systems” depending on whether a macro- or micro-comparison is pursued.7

In reflecting on the study of comparative law, scholars have conceived of the chief function of comparative legal studies as to “facilitate legislation and the practical improvement of law.”8 In light of the constant coming into existence of “new conceptions of rights and duties, owing to far-reaching changes in the political and economic structure of society,” comparison of laws may pro-


7 Ibid.

8 H. S. Maine, Village-communities in the East and West (H. Holt, 1876).
vide guidance. In this vein, comparative legal studies assist us in overcoming a “deficiency in basic knowledge of other legal systems caused by the unavailability or narrow focus of comparative legal studies.” From such analysis, we are assisted in (i) developing better understanding of external systems; (ii) increasing understanding of one’s domestic system; (iii) identifying “best” practices; and (iv) responding to doctrinal or textual questions.

The methodological approach to comparative legal studies has likewise been widely theorized and discussed. Avoiding the prescription of specific comparative procedures, three “phases” of comparative law research (i.e., the descriptive, identificatory and explanatory) are influenced by a comparatist’s jurisprudential outlook and social and legal contexts. In recent times, a “conceptual comparisons” approach has been put forward alongside empirically informed standards for comparison to assist in identifying relevant normative values for comparative assessment.

Within the broad field of comparative legal studies, comparative legal institutions research has likewise employed a range of approaches including “emergent” legal analytics, “complementing functionalism with participation-centered concepts . . . moving beyond the law/politics divide, theorizing doctrine as semi-autonomous and mediated by institutions, and recognizing that the pursuit of all goals and values is transformed by institutions with their own reflexive processes.” While comparative legal institutions literature has provided important methodological insights, much of the discussion has been confined to traditional legal institutions. Emerging comparative research in systems of dispute resolution requires distinct approaches given the legal and extra-legal dimensions of practice.

Comparative dispute resolution studies seek to consider a range of models and experiences in an effort to explore reform options in the context of socio-cultural and legal cultural affinity in order to derive a better understanding of one’s own system of dispute resolution and advancement of reforms within a given system.

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9 H. C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (CUP Archive, 1974).
12 Kamba, “Comparative Law.”
15 Jackson, “Methodological Challenges in Comparative Constitutional Law.”
Focusing more specifically on the subcategory of comparative dispute resolution scholarship, we can see that recent scholarship has germinated into a burgeoning array of work examining the practice, function and approach to dispute resolution in diverse settings,\(^{17}\) drawing on legal analytic and quantitative frameworks, functionalist approaches and systems dynamics to study practices in the field.

Comparative dispute resolution research has taken a number of forms. Mirroring advances in the field of comparative law, no one single method has been adopted by comparative scholars. The plurality of methods and multiplicity of approaches mirrors research possibilities in this field.\(^{18}\)

Dispute resolution is perhaps one of the oldest fields of law. Recently, the systems and relevant stakeholders have become increasingly more sophisticated and “regulated.” Modern dispute resolution institutions have developed often in response to unique external stimuli.\(^{19}\) The sheer variety of possible rules and laws that may be applied and potential jurisdictions and institutions has grown, alongside international knowledge transfer.

In the sub-field of comparative dispute resolution reform-oriented research, the proliferation of studies, surveys, statistics, academic research and other


publications has enhanced the availability of data in this area. Although the data provide a rich base of comparison, they face unique challenges including, at times, a lack of transparency, insufficient data sets and partiality, given that data informants are often beneficiaries of the same systems under review. The number of cases that can be compared in studies remain relatively low. At the same time, this body of insight provides a growing base of information from which to identify strengths and areas for reform. For example, the International Council for Commercial Arbitration (ICCA) and the Queen Mary University of London published their “Report on Third-Party Funding in International Arbitration” in April 2018 not for a specific reform project but as part of the ICCA Reports series “in the hopes that these occasional papers, prepared by ICCA interest groups and project groups, will stimulate discussion and debate.” Similarly, the International Arbitration Survey, published annually by the Queen Mary University of London, attempts to collect views of stakeholders and reflect the most recent developments in practice. The 2018 instalment, “The Evolution of International Arbitration,” identifies “principal drivers and stakeholders” in the continuing development of cross-border arbitration. A variety of stakeholders with diverse interests, aims and ideas contribute to shaping the system, including input from “associations and councils . . . departments of law firms, commercial organizations and chambers” and relevant scholarship. Efforts at reform have employed a variety of approaches, including both intrinsic and extrinsic models initiated from either top-down (government or regulating

25 Ibid.
body), with input from experts, or from bottom-up (initiated by stakeholders) vantage points – or through a combination of both.\textsuperscript{28}

While this existing body of work has provided important insights into particular dispute resolution policy domains, it is now timely to analyze such approaches with the aim of contributing to a systematic understanding of the relationship between cross-border dispute resolution research methodologies and policy application.

In exploring the relationship between comparative dispute resolution research and policy reform, it is useful to look to the aims of such research, which draws on a paradigm of empowerment whereby the knowledge sought “increases awareness . . . [and] directs attention to the possibilities for social transformation inherent in the present configuration of social processes.”\textsuperscript{29} Mirroring the aims of comparative dispute resolution through the identification of the conditions in which dialogue can be developed, “people are stimulated to develop critical awareness and commit themselves to . . . transformation”\textsuperscript{30} and positive social change.\textsuperscript{31}

As explored in Chapter 3, the role of stakeholders in developing empirical research in arbitration and dispute resolution presents unique challenges.\textsuperscript{32} Such system-intrinsic reflections are necessary to inform practice yet often consist of subjective observations. As noted by Stipanowich and Vasconcellos, “It must be remembered that empirical surveys on [alternative dispute resolution, ADR] practices and perspectives are not a matter of objective and observable facts, but instead rely on subjective observations, recollections, opinions and general estimates.”\textsuperscript{33} Such input provides insights into otherwise private processes and can be used to analyze emerging practices, diagnose existing problems and review existing reforms. In recent years, systematic efforts have likewise been made to introduce public input alongside insider perspectives. For example, when the United Nations Commission on International Trade Law (UNCITRAL) tackled the question of transparency in the Mauritius Convention, the question had already been the subject of vigorous public debate, oftentimes in the context of perceived arbitrator bias.\textsuperscript{34}

\textsuperscript{28} Ali, \textit{Court Mediation Reform}.
\textsuperscript{31} N. Andrews and S. Bawa, “‘People Come and Go But We Don’t See Anything’: How Might Social Research Contribute to Social Change?” \textit{The Qualitative Report} 24 (2019).
\textsuperscript{32} Stipanowich and Vasconcellos, “The Interplay Between Empirical Studies and Commercial Arbitration Practice.”
\textsuperscript{33} Ibid., 479–480.
Singapore Convention was published after two decades of public consultation on relevant issues. It is hoped that the diverse insights into methodology and application in this book will advance understanding of the interrelation between comparative dispute resolution research and policy reform.

Structure of the Book

The chapters contained in this book form a tapestry of perspectives that contribute to the overall discussion of dispute resolution research methodology, policy reform and practice development. The chapters discuss methodological considerations and ethical and jurisprudential concerns of institutional development from a comparative and transnational perspective. In addition to a core commitment to considering transnational dispute resolution from a comparative perspective, the book also considers how hybrid forms of dispute resolution in mainland China widen our theoretical understanding of dispute resolution developments.

Following this chapter, this book proceeds to explore four themes including Methodological Considerations in Comparative and Transnational ADR; Comparative ADR Ethics, Standards and Jurisprudential Ideals; Comparative Approaches in Mediation and Arbitration; and ADR Developments and Reform in Mainland China.

Section 1: Methodological Considerations in Comparative and Transnational ADR

The first section on Methodological Considerations begins with a foundational chapter by Matthew S. Erie on “The Problem of Method in the Study of Transnational Dispute Resolution.” This insightful chapter examines how, more so than other areas of law, transnational dispute resolution has generated a bifurcated scholarship since the late 1990s. On the one hand, the social scientific approach describes sociologists of law who have located dispute resolution practices such as international arbitration as an exclusive field of elite practitioners who generate transnational norms through their own ideologies and practices of dispute resolution. On the other hand, the legal-formalistic approach describes practitioners who, to a significant extent, dismiss such “crit” or social scientific approaches as overly vague or politicized and lacking technical rigour.

This chapter considers a third approach to transnational dispute resolution methodology by considering what Chinese anthropologist Mingming Wang (2002)
has called the “third eye.”\textsuperscript{36} The third eye neither reproduces practitioners’ views nor falls back on critique but rather engages in para-ethnography, which takes experts’ own theories and explanations for their work seriously while also identifying divergences between academic knowledge production and business models. The chapter presents collected data from approximately two years of fieldwork in Dubai, Singapore, Astana, Hong Kong, Shenzhen and Shanghai to provide ethnographic evidence that significantly contributes to the understanding of transnational dispute resolution methodology. This chapter uses the ethnographic research on “legal hubs,” one-stop shops for dispute resolution based in nonliberal regimes, as a window to consider the “third eye” approach. The conclusion drawn is that a para-ethnographic approach to transnational dispute resolution offers a bridge between the two current dominant approaches and that legal hubs offer opportunities to advance substantive knowledge about transnational dispute resolution and the methods by which we come to understand it. Thus, the chapter greatly contributes to the existing literature by endowing a comparative and interconnecting methodological approach to understanding transnational dispute resolution.

This is followed by Michael Palmer’s important chapter on “Modes of Dispute Response: Exploring Issues in the Range.” This chapter examines how societies around the world offer disputants a range of processes that can be called into operation when “trouble” arises. At one end of the spectrum of responses lies avoidance and the “lumping” of problems, where a party with a grievance for a variety of reasons does not pursue her or his grievance and/or unilaterally readjusts a relationship in which a dispute has arisen so that tensions are mitigated or even dissolved. At one end of the spectrum another important response is the use of violence, sometimes with a degree of social acceptance, and other forms of self-help, in response to disagreement or more serious forms of tension. This chapter examines the nature and characteristics of, on the one hand, avoidance and lumping, and on the other, the threat and use of force for resolving “civil” disputes. In so doing, the chapter considers social phenomena to which texts on “alternative dispute resolution,” “civil procedure” and so on tend not give a great deal of attention. The mainstream focus is, of course, primarily on the more morally appropriate and legally acceptable processes of negotiation, mediation and umpiring.

The intent of this chapter is to explore the two more neglected forms of response in order to provide a fuller understanding of the range of decision-making responses to “trouble.” In this respect, the chapter contributes to the existing literature by reflecting various forms of avoidance, such as the role of an apology, in contrast to other forms of self-help, including violence, and provides a reflection on how they operate on the borders of formal ADR procedures. A

unique insight into Chinese historical and cultural understanding of these two forms of dispute resolution is provided throughout the chapter.

The last chapter of the Methods section is by Shahla Ali on “Advancing Research and Practice in the Governance of Dispute Resolution Institutions through Inclusive Devolved Reflection.” This chapter explores how efforts to develop and reform systems of dispute resolution have been undertaken through a variety of methodologies, including commissioned research studies, citizen input, use of model laws and rules, regional accompaniment and indicator assessment. Among such efforts, this chapter focuses on the role of “devolved reflection” as a tool to support institutional dispute resolution reform. Devolved reflection can be understood as a process by which relevant stakeholders engage in earnest deliberation to arrive at a greater understanding of existing circumstances, review accomplishments, analyze challenges, learn from experience and plan next steps to improve service delivery. The United Nations Sustainable Development Goals (SDGs) include the target of building “inclusive institutions at all levels” through “citizen participation in decision making.”37 However, the dynamics of how such participation may be enhanced through reflective processes in advancing systems of dispute resolution remains understudied. The capacity to reflect as individuals and communities has increasingly been tapped to varying degrees within institutions of governance. This chapter explores what may be described as an emerging approach to devolved reflection as a mode of organizational practice, as an emerging legal principle and norm of customary international law, as an analytic and normative framework for new governance policy,38 as an applied reflective research methodology39 and as a component of a larger framework of learning through reflective action.40

The chapter draws on insights from research highlighting the role of engaged reflection and shared knowledge generation in facilitating conditions conducive to dynamic advancement within transnational dispute resolution systems – whether it be in the form of community engagement with consumer financial institutions,41 cross-border arbitration,42 court mediation reform43 and development or post-disaster governance initiatives.44


38 Ibid., 6.

39 Ibid., 8.

40 Ibid., 18.

41 Ibid., 12.

42 Ibid., 10.

43 Ibid., 11.

44 Ibid., 6.
Section 2: Comparative ADR Ethics, Standards and Jurisprudential Ideals

The second section on Comparative ADR Ethics, Standards and Jurisprudential Ideals begins with a thoughtful chapter by Michal Alberstein, “Comparative Judicial Conflict Resolution (JCR): Between Summary Trials and ADR.” Building on the methodological framing of Section 1, this chapter examines the intersection between ADR and contemporary court systems by referring to the changing roles of judges in an age of vanishing trials⁴⁵ and the emergence of new hybrids of judicial activities.

The chapter presents research data collected from both civil and criminal fields in Israel, Italy and England and Wales. The findings suggest that judges are significantly involved only in a small number of cases that enter the courts and that most cases are settled or reach plea bargains without a substantial intervention of judges. However, when judges do intervene in legal disputes, their involvement is characterized by encouraging consent between parties regarding either process or substance. Interventions that refer to process include convincing the parties to accept a form of summary trial (Israel civil, Italy criminal), enforcing mediation through judicial orders (Italy civil) and encouraging parties to go to mediation (Israel and England and Wales) whereas interventions that refer to substance include providing predictions of the legal outcome (Israel, Italy and England and Wales), using procedural and administrative incentives (England and Wales and Israel) and addressing the negative aspects of pursuing the legal process for the parties (Israel).

The chapter reviews the variety of these forms of intervention and examines the possible connection between ADR and these new models of judicial work. In particular, the chapter questions whether the ideals of ADR resonate in judicial practices of concluding cases efficiently. The chapter identifies two trends that characterize contemporary judicial work: the diminishing of the trial and the shift to an inquisitorial process or summary trial and the development of new judicial roles related to mediation and conflict resolution. These two trajectories offer different ideals for the development of legal systems, and the chapter discusses them in reference to jurisprudential ideals on the judicial role. The chapter makes two important findings. In cases that do reach court, judicial intervention is narrow with an encouragement for the parties to settle but focuses on the specific legal issues in the case rather than the wider benefits of ADR. Further, an emphasis on judicial intervention akin to a summary trial basis is more aligned to the effective management of cases rather than jurisprudential goals of ADR.⁴⁶ The chapter concludes that a paradigmatic shift is required in designing the court

⁴⁶ Ibid., 18.
system based on preventing and resolving conflicts. Thus, a substantial contribution is made to assessing the jurisprudential goals of ADR in light of emerging judicial practices.

Next is Lola Akin Ojelabi’s significant chapter on “The Challenges of Developing Global Ethical Standards for Mediation Practice.” Alternative or Appropriate Dispute Resolution has grown exponentially in many jurisdictions. As Ojelabi explores in her chapter, in many parts of the world, the impetus for this growth has been the need to improve access to justice. ADR processes viewed as less costly, less complicated and less time consuming were promoted as better alternatives to judicial determination, and although traditional forms of dispute resolution have existed in many jurisdictions and cultures, ADR processes promoted on the back of the access to justice movement were those developed in the West. These processes have become institutionalized in many nations and form an integral part of the civil justice systems. The common source of ADR terminology and training across jurisdictions has meant that similarities exist. However, a closer look would reveal significant differences in definitions of ADR terms, standards of ADR practice and conceptions of ADR practitioner responsibilities, shaped by social and professional culture. The implication is that developing a set of global standards for ADR would require careful consideration. The chapter explores the significance of harmonizing global ADR standards in the face of localized and cultural ethical practices by looking at ADR policies and practices in various jurisdictions. Specifically, five standards/codes are examined, including the Australian National Mediator Accreditation System (Practice Standards) 2015 (NMAS Standards), The European Code of Conduct for Mediators (EU Code), the Model Standards of Conduct for Mediators, August 2005 (Model Standards), the Singapore Mediation Centre, Mediation Service Code of Conduct (SMC Code) and the IMI Code of Professional Conduct for Mediators (IMI Code). The chapter offers an analysis of both similar and diverging understandings of ADR from a multi-jurisdictional standpoint. It concludes that global harmonization of ADR standards is desirable, though it is not without challenges; cultural understandings of ADR are diverse. A combination of comparative approaches and a “law-in-context” methodology is required to achieve common ground on global ADR standards. The chapter, therefore, significantly contributes to the debate on harmonizing international standards through a better understanding of comparative localized standards.

Section 3: Comparative Approaches in Mediation and Arbitration

The third section on Comparative Approaches in Mediation and Arbitration begins with an insightful chapter by Nadja Alexander on “International

47 Ibid., 19.
48 Ibid., 7.
49 Ibid., 16.
Comparative Mediation Law: Hong Kong and Singapore in Perspective.” This chapter explores how ASEAN (Association of Southeast Asian Nations) is emerging as a significant region for the development of mediation systems. In recent years, both Singapore and Hong Kong have introduced new mediation laws, institutions and credentialing for professional mediators that will impact the practice of commercial and civil dispute resolution in both domestic and cross-border matters. Further, the UN adopted a Convention on International Settlement Agreements Arising from Mediation in December 2018 – the first instrument of its kind on mediation at the international level. The chapter offers an international comparative approach, emphasizing ASEAN, to discussing the development of mediation regulatory systems and infrastructure.

Next is Luigi Cominelli, Eleonora Ciscato and Stefania Lattuille’s important contribution on “Environmental Mediation and Facilitation in Italy: Theoretical Insights and Practical Experience on Non-Adjudicative Mechanisms and ‘Total Conflicts.’” This chapter provides insight and analysis of mediation in Italy from the unique perspective of environmental disputes. So-called environmental conflicts have existed in Italy between individuals and governmental bodies or private organizations tasked with construction waste management and disposal infrastructure throughout the country.

Finally, Xiantao Wen, with an introduction by Susan Finder, explores “Comparative Analysis of the Singapore Convention in Light of the New York and Hague Choice of Court Conventions.” This significant chapter contributes to the understanding of comparative perspectives of the operation of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) on cross-border relief for commercial settlement agreements. The chapter includes a focused analysis of the Singapore Convention’s core provisions, including the scope of application, general principles, grounds for refusing to grant relief and reservations together with a comprehensive interpretation of key concepts such as “settlement” and “mediation.” The chapter highlights the comparative thematic nature of the book by providing a comparative study of the relevant provisions from the Singapore Convention against those from the New York Convention and the Hague Choice of Court Convention in light of Chinese laws and regulations. The chapter concludes that China should actively seek to accede to the Singapore Convention and improve relevant domestic laws and regulations in an effort to accelerate the diversification of civil and commercial dispute resolution regimes, which will help establish a community of shared future for mankind.

Section 4: ADR Developments and Reform in Mainland China

The last section explores ADR Developments and Reform in Mainland China. This chapter begins with an important chapter by Xin He and Yang Su on “Flexibility and Authority: Keys for Informal Justice to Succeed.” This chapter extends existing literature regarding flexibility and authority as key