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"Bricolage" as Comparative Research Method for Critical Legislative Innovation

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“BRICOLAGE” AS A COMPARATIVE RESEARCH METHOD FOR CRITICAL LEGISLATIVE INNOVATION

Marie-Claire Belleau*

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INTRODUCTION

Canada is a true comparative law laboratory—of mixed nature by the cohabitation of Indigenous and Inuit legal orders, complemented by civil law and common law systems and traditions; multicultural; multilingual; and officially bilingual.

Moreover, comparative law is not only part of the Canadian adjudicative traditional method but also part of the very identity of the Supreme Court of Canada. In 2016, Chief Justice Beverley McLachlin asserted that, “Canadian lawyers are comparative lawyers; Canadian judges are comparative judges. It’s not a matter of debate; it’s simply the way we are, the way our history

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As far back as 2010, while delivering an address at Yale Law School, she spelled out her thoughts on the effect of the use of comparative law on national legal identity:

But in my observation, the use of foreign law does not prevent national courts from expressing their own unique national character—a character based on the particular country’s history, values, and needs. Independent courts working within the rule of law will develop distinctive legal approaches and doctrines that respond to the traditions and needs of their countries. And a willingness to look at foreign law is no impediment to developing and maintaining distinctive legal approaches that respond to the particular history, values, and needs of a nation.

Internationally, the Supreme Court of Canada is perceived as an active leader in the development of comparative law. For instance, in constitutional matters, Professor Eszter Bodnár describes Canada’s highest court as a “comparative constitutional powerhouse.” Ranking ahead of every institution that import and export comparative law:

As a leader in the importation and exportation of constitutional ideas, the Supreme Court of Canada (SCC) has a high level of openness and is regarded as a “comparative constitutional powerhouse.”

... Some regularly cite foreign court decisions and compare foreign constitutional and statutory texts in their judgments—for example, the Supreme Court of Israel, the Australian High Court, and the Supreme Court of Ireland. Others only include foreign citations in their judgments sporadically—for example, the Supreme Court of Japan and the German Federal Constitutional Court. The SCC not only belongs to the first group, among apex courts internationally, it is one of the most prolific users of comparative law.

... Justices of the SCC not only accept the legitimacy of the use of foreign law, they also actively practice comparative analysis.

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Finally, while this paper focuses on the “import” of constitutional ideas (Canada is a world leader in this regard), it is noteworthy that Canada is also an “exporter.” The Canadian constitutional system is admired abroad for its success, and it serves as a model for other countries.³

From their earliest training, Canadian jurists are exposed to the practice of comparative law in Canadian rulings. This reality is even more tangible in the Province of Québec where private law roots itself in civil law inspired by the French system and public law in common law for British origins. These traditions operate within an array of legal orders stemming from the ten First Nations and the Inuit communities. In short, comparative law intrinsically constitutes the very fiber of the Canadian legal traditions.

Comparative law enables us to imagine a range of solutions in response to particular social problems that arise in different parts of the world. It consists of the study of legal solutions available for the handling of a similar situation. Its wealth lies in the multiplicity of distinct measures available to oversee its resolution. Cultural, social, linguistic, political, and economic contexts differ. As a result, the same norm or the same legal proceeding is likely to lead to varying results. And yet, the limits to understanding foreign law are legion.

We propose a modest comparative methodology based on creativity and imagination, borrowing from the notion of “bricolage” for the purposes of legislative innovations (Part I). In light of a few descriptive examples related to mandatory mediation (Part II), we examine the major shortcomings of comparative law (Part III) while still advocating for its rich and fertile potential.

Before entering our first section, a word of caution is in order. The criticism of comparative law that follows may appear severe, scathing even, considering its tentacular and ruthless scope. It rests on acknowledging the almost impossible task of reaching a true and just understanding of allogenous legal norms. Its redemption resides in the ingenious use of a type of recycling that consists of the reprocessing of certain elements. These elements, that remain obscure for comparatists, nonetheless allow them to answer new goals in another context. This celebration of creativity includes encouraging the resort to unexplored reusages composed by making new juxtapositions, superpositions, combinations, and pairing of heteroclite

materials infused by foreign law systems. The “bricoleur.se”\(^4\) workshop becomes a social experimentation laboratory rooted in the revalorization of what can be perceived as weaknesses into regenerated forces aiming to fulfill unknown vocations. Admitting the inherent limits of the comparative exercise frees the auspicious space to collect the muses’ inspiration.

I. **“BRICOLAGE” AS A COMPARATIVE METHOD**

“Bricolage” as a comparative method suggests a humble but promising approach to identifying diverse options for legislative innovations. The approach leans on the assembling of legal fragments (Section A) implying many significations of which some will be new and others unexpected (Section B) and in keeping with the orientations of a political program (Section C).

A. **Collection of Legal Fragments**

The notion of “bricelage” in Claude Lévi-Strauss’ *The Savage Mind* highlights the randomness of the contrasting and eclectic materials at the disposal of the “bricoleur”:

The “bricoleur” is adept at performing a large number of diverse tasks; but, unlike the engineer, he does not subordinate each of them to the availability of raw materials and tools conceived and procured for the purpose of the project. His universe of instruments is closed and the rules of his game are always to make do with “whatever is at hand,” that is to say with a set of tools and materials which is always finite and is also heterogeneous because what it contains bears no relation to the current project, or indeed to any particular project, but is the contingent result of all the occasions there have been to renew or enrich the stock or to maintain it with the remains of previous constructions or destructions. . . . [P]utting this another way and in the language of the “bricoleur” himself, because the elements

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\(^4\) In contrast with English words where many nouns are gender neutral, in French, most nouns must be adapted to the gender of the subject. Thus, “bricoleur”, is the masculine version and “bricoleuse” the feminine form. One way to use inclusive language in French is to add a period after the masculine version of the word to make sure that it doesn’t represent only men, when the context requires broader inclusion of gender identity and expression. In this precise case, all genders are encompassed in the neologism “bricoleur.se”.
are collected or retained on the principle that “they may always come in handy.”

Like the “bricoleur.se,” comparatists borrow norms, measures, and modalities of application without necessarily detecting the true significations and with no true comprehension of how they react in the context of legal systems and traditions from which they originate. Claude Lévi-Strauss adds:

Such elements are specialized up to a point, sufficiently for the “bricoleur” not to need the equipment and knowledge of all trades and professions, but not enough for each of them to have only one definite and determinate use. They each represent a set of actual and possible relations; they are “operators” but they can be used for any operations of the same type.

Thus, following the “bricolage” approach, comparatists do not need to understand thoroughly the depths of the whole legal systems under study, nor all the technical particularities of each aspect of the object they analyze. Likewise, certain legislative rules can, at the same time, aim specific functions and attract new uses.

In The Savage Mind, Claude Lévi-Strauss evokes the kaleidoscope to illustrate old usages and those that emerge through interaction with new elements:

This logic works rather like a kaleidoscope, an instrument which also contains bits and pieces by means of which structural patterns are realized. The fragments are products of a process of breaking up and destroying, in itself a contingent matter, but they have to be homologous in various respects, such as size, brightness of coloring, transparency. They can no longer be considered entities in their own right in relation to the manufactured objects of whose “discourse” they have become indefinable debris, but they must be so considered from a different point of view if they are to participate usefully in the formation of a new type of entity: one consisting in patterns in which, through the play of mirrors, reflections are equivalent to real objects, that is, in which signs assume the status of things signified. These patterns actualize possibilities... [and] project models of intelligibility which are in a way provisional, since each

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6 Id. at 18.
pattern can be expressed in terms of strict relations between its parts and since these relations have no content apart from the pattern itself . . . .

In line with the persona of the “bricoleur.se researchers,” first conceptualized by Claude Lévi Strauss,\(^7\) then, among others, by Denzin and Lincoln,\(^9\) comparative law is seen here as offering the object of study the benefit of showcasing many viewpoints and perspectives.\(^10\) According to this conception, comparative “bricolage” or “montage” is not at odds with the rigorous caution that informs the entire process. It enables one to account for the particularities and objectives of legislative reform projects, without distorting them. Evidently, knowledge of the main characteristics of the studied judicial tradition remains imperative. It also accounts for particularities of legal reform projects while adopting a humble stance that recognizes the intrinsic limits of a methodology inspired by allochtone legal norms whose true comprehension remains inaccessible and impenetrable.

**B. Norms Susceptible to Multiple Meanings**

Comparatists keep at their disposal scattered pieces of foreign law, more or less well understood and represented, which nonetheless remain beneficial as sources of inspiration when they interact with other legal contexts in order to assume similar or distinct functions. Lévi-Strauss describes the components prone to assembling that emerge via serendipity as a function of indeterminate and sometimes indeterminable potential future uses:

Now, the characteristic feature of mythical thought, as of “bricolage” on the practical plane, is that it builds up structured sets, not directly with other structured sets but by using remains and debris of events: in French “des bribes et des morceaux”, or odds and ends in English . . . .

. . . . The significant images of myth, the materials of the bricoleur, are elements which can be defined by two criteria: they have *had a use*, as words in a piece of discourse which mythical thought “detaches” in the same way as a bricoleur, in the course of repairing them, detaches the cogwheels of

\(^7\) *Id.* at 36.

\(^8\) *Id.*


an old alarm clock; and they can be used again, either for the same purpose or for a different one if they are at all diverted from their previous function.\footnote{LEVI-STRAUSS, supra note 5, at 21–22, 35.}

These means, and their combinations, create almost infinite possibilities from which the comparatist can draw inspiration for legislative innovation. In this sense, despite their limitations, legal norm fragments derived from documented research in comparative law reflect themselves in an imperfect manner. Nonetheless, these elements produce a multitude of legislative reform possibilities to manage particular social phenomena. This range of options with diverse fruitful blends is likely to gain new, but also unpredictable, effects in the adoptive jurisdiction.

Following the methodology inspired by The Savage Mind, the process of comparatists-bricoleur.se.s consists of building an inventory to list and analyze these legal materials to search for their meaning, while admitting in advance that their work remains susceptible of other meanings and functions in the new context where they will be transplanted.

Consider him at work [the “bricoleur”] and excited by his project. His first practical step is retrospective. He has to turn back to an already existent set made up of tools and materials, to consider or reconsider what it contains and, finally and above all, to engage in a sort of dialogue with it and, before choosing between them, to index the possible answers which the whole set can offer to his problem. He interrogates all the heterogeneous objects of which his treasury is composed to discover what each of them could “signify” and to contribute to the definition of a set which has yet to materialize but which will ultimately differ from the instrument set only in the internal disposition of its parts.\footnote{Id. at 18.}

Finally, the “bricoleur” posture is legitimized by the complexities, the contradictions, and the incoherencies intrinsic to the indeterminate character of law:

For Denzin and Lincoln, adopting a bricolage approach helped researchers respect the complexity of meaning-making processes and the contradictions of the lived world. As they suggest: “the combination of multiple methodological practices, and empirical materials, perspectives, and observers in a single study is best
understood, as a strategy that adds rigor, breadth, complexity, richness, and depth to any inquiry.\textsuperscript{13}

In this text, we borrow from our experiences of using comparative law research to imagine ways of encouraging the use of dispute prevention and resolution processes (Alternative Dispute Resolution, ADR) as well as judicial procedure, to improve greater access to justice for Québec citizens.\textsuperscript{14}

C. Political Action

The approach consists in adopting a healthy skeptical attitude, promoting a modest comparative methodology. The methodology is akin to “bricolage,” meaning a form of creative imagination supplied with necessarily unintelligible foreign options that, because of their inaccessible character, lead knowingly to deficient borrowings as an inspiration source. To the humility of the posture of comparatist-bricoleur.se, it is important to add the input of curiosity, but also the desire to contribute positively to society in the interpretative part of research:

\[T\]he importance of three key ideas to conducting both meaningful interpretation and useful interpretation research:\textit{ curiosity, humility, and the drive to do good}. Curiosity is what drives all meaningful research endeavors, as we start with a question about something and collect data to seek out the answers. Implicit within this journey, and central to

\textsuperscript{13} Rogers, supra note 10, at 4.

\textsuperscript{14} In 2022, the author of this Article wrote a 474-page report entitled \textit{Médiation en justice civile: Étude comparative sur la mixité des modèles volontaires & obligatoires} [\textit{Mediation in Civil Justice: Comparative Study of Diverse Voluntary and Compulsory Models}] for the Ministry of Justice of the province of Québec in Canada. The content of this report remains strictly confidential. This Article only uses general descriptions to illustrate the critical reading of the comparative methodology. It does not reveal the main observations and recommendations given to the Ministry and jurists of the State. To nourish the reflection on the “bricolage” dimension of the methodology, the writer also draws inspiration from her experience in comparative law research at the basis of two other confidential reports, also produced for Québec’s Ministry of Justice: (1) \textit{Petites créances: Propositions de réformes par des modes de PRD & des processus judiciaires} [\textit{Small Claims: Reform Proposals through ADR and Judicial Processes}] in 2022 (232 pages) and (2) \textit{Modes d’intervention en situation de conflits pour contrer la maltraitance des personnes vulnérables} [\textit{ADR and Judicial Processes to Fight Vulnerable People Abuse}] in 2023 (366 pages). MARIE-CLAIRE BELLEAU, QUE.’S MINISTRY OF JUST., MÉDIATION EN JUSTICE CIVILE: ÉTUDE COMPARATIVE SUR LA MIXITÉ DES MODÈLES VOLONTAIRES & OBLIGATOIRES [\textit{MEDIATION IN CIVIL JUSTICE: COMPARATIVE STUDY OF DIVERSE VOLUNTARY AND COMPULSORY MODELS}] (2022) (Can.); MARIE-CLAIRE BELLEAU, QUE.’S MINISTRY OF JUST., PETITES CRÉANCES: PROPOSITIONS DE RÉFORMES PAR DES MOODES DE PRD & DES PROCESSUS JUDICIAIRES [\textit{SMALL CLAIMS: REFORM PROPOSALS THROUGH ADR AND JUDICIAL PROCESSES}] (2022) (Can.) [hereinafter SMALL CLAIMS]; MARIE-CLAIRE BELLEAU, QUE.’S MINISTRY OF JUST., MODÈES D’INTERVENTION EN SITUATION DE CONFLITS POUR CONTRER LA MALTRAITANCE DES PERSONNES VULNÉRABLES [\textit{ADR AND JUDICIAL PROCESSES TO FIGHT VULNERABLE PEOPLE ABUSE}] (2023) (Can.).
conducting good research, is a strong sense of humility. We must identify areas of our own ignorance to develop a relevant research question, and we must be open to our hypotheses about the answers being wrong. Schwartz (2008) referred to this as “productive stupidity,” or the idea that asking and pursuing the answers to important questions requires us to first accept our own ignorance. Without sufficient doses of curiosity and humility, the research enterprise could not provide valid and useful findings for the field. In other words, researchers wouldn’t be doing the field any good.15

The process then consists of imagining different options born of heteroclite allochthonous legal norms through research and analysis, while exercising our critical judgment, before mixing components and assessing their value to the needs and interests at stake. Consequently, the comparative methodology must imperatively include dissenting arguments to paint a resembling picture, while allowing a critical and enlightened reading of the elements to consider for the legislative choices offered to the legislative body. In the context of our report on mandatory mediation, it was necessary to document arguments unfavorable to the obligation to resort to mediation, but also the opinions against varying modalities to make it compulsory. The goal of this exploratory exercise consisted in creating fruitful legislative innovation propositions to improve access to justice for Quebec citizens.

In social sciences and humanities, the metaphor of bricolage rests on an eclecticism that can lead to political action, understood in its broadest sense:

The etymological foundation of bricolage comes from a traditional French expression which denotes crafts-people who creatively use materials left over from other projects to construct new artifacts. To fashion their bricolage projects, bricoleurs use only the tools and materials “at-hand” (Levi-Strauss, 1966). Generally speaking, when the metaphor is used within the domaine [sic] of qualitative research it denotes methodological practices explicitly based on notions of eclecticism, emergent design, flexibility and plurality. Further, it signifies approaches that examine phenomena from multiple, and sometimes competing, theoretical and methodological perspectives. Advocates, like Berry (2004a) explain that the approach enables researchers to embrace a multiplicity of epistemological and political dimensions

15 Marc J. Stern & Robert B. Powell, Curiosity, Humility, and the Drive to Do Good in Interpretation Research and in Interpretation, 27 J. INTERPRETATION RSCH. 71, 71 (2022).
through their inquiry. Methodological approaches based on
multiplicity, Kellner (1999) explains, not only provide
unique possibilities for knowledge construction they also
create opportunities for informed political action.\textsuperscript{16}

In the present Article, the comparative method carried out for a
mandatory mediation report had the avowed goal to design legal reform
propositions to better access to justice for Québec citizens, notably via
participatory justice. Participatory justice constitutes an innovative approach
by which parties in a conflict determine the solution and modalities of the
settlement agreement, instead of a ruling imposed by an independent third
person such as a judge or arbitrator. More specifically, the purpose was to
make the mediation process more accessible but also improve its quality by
the review of different legal measures available to make it compulsory or not.

\section*{II. Example: Making Mediation Mandatory or Not}

For this Article, the thorny question to make mediation mandatory or
not serves as a concrete example to illustrate the benefits and gaps of
comparative methodology. In 2021, Québec’s Ministry of Justice was
considering whether to impose mediation in specific activity sectors to better
access justice. The ambition was to identify the different potential ways to
facilitate or force mediation to nourish legal thinking for the aims of
legislative reform.

The comparative law research achieved in the goal of legislative reform
to promote mediation must be recognized as modest. It allowed the analysis
of approximately 225 documents from twenty-eight countries, including
Australia, Belgium, Canada, China, Norway, South Africa, and the United
States.\textsuperscript{17}

Mediation constitutes a conflict resolution process in which protagonists
work out the solutions to their dispute with the help of a mediator, a third
person, selected jointly by the parties.\textsuperscript{18} This third person “helps the parties
to engage in dialogue, clarify their views, define the issues in dispute, identify

\textsuperscript{16} Rogers, \textit{supra} note 10, at 1–2.

\textsuperscript{17} To be more precise, research led to the analysis of 225 documents from the following countries:
Argentina, Australia (Federal and per State: New South Wales, Queensland, and Victoria), Austria,
Bangladesh, Belgium, Bulgaria, Burkina Faso, Canada (per Province: Alberta, British Columbia,
Newfoundland and Labrador, Ontario, Quebec, and Saskatchewan), China, Columbia, England, European
Union, France, Germany, Greece, Hong Kong, Indonesia, Ireland, Italy, Kosovo, Netherlands, New
Zealand, Norway, Poland, Romania, Scotland, South Africa, Switzerland, and the United States (Federal
and per State: California, Colorado, Florida, Georgia, Iowa, Maine, New York, and Texas). \textit{See Small
Claims, supra} note 14.

\textsuperscript{18} Code of Civil Procedure, C.Q.L.R., c C-25.01, art. 3 (Can.).
their needs and interests, explore solutions and reach, if possible, a mutually satisfactory agreement.\footnote{Id. art. 605.}

Generally, protagonists of a conflict freely take part in the mediation process. For example, section two of Québec’s Code of Civil Procedure states that “[p]arties who enter into a private dispute prevention and resolution process do so voluntarily. They are required to participate in the process in good faith, to be transparent with each other, including as regards the information in their possession, and to co-operate actively in searching for a solution.”\footnote{Id. art. 2.}

The majority of mediation authors and experts describe this voluntary nature of mediation as one of the defining elements of this conflict resolution process. According to them, the free and enlightened consent of the parties forms the foundation of mediation. To oblige parties to contribute to the process leads to potential unwanted digressions in terms of participation and the search for options and solutions. Indeed, the imposition of mediation is antonymic to its traditional character, which roots itself in the will and the autonomy of the parties to participate voluntarily and in good faith.\footnote{Fatime Dërmaku, Mandatory Mediation in Family Disputes: Limitations and Future Foresight in Kosovo, 4 EUR. J. ECON. L. & SOC. SCI. 25, 29 (2020).}

Nevertheless, most writers recognize, like Professor Dorcas Quek, that leaving the decision to mediate solely to the will of the parties has its limits:

The number of cases reaching mediation in voluntary basis is significantly lower than the number of cases that are encouraged by the courts to use mediation and as such it has been argued that the benefits of mediation are not achieved fully when the parties are left to decide on voluntary basis to use mediation (Quek, 2010).\footnote{Id. at 30.}

To this realization, we must add mediation’s lack of recognition as an ADR process in jurists’ as much as the general public’s minds. Judicial litigation remains the only proceeding known by parties struggling with a conflict and, by default, the main available remedy. In this context, experts have progressively changed their point of view, advocating for an approach that requires at least consideration of ADR modes and, at most, trying to settle parties through the guidance of an independent and impartial third person, the mediator. Some authors support mandatory mediation by arguing that the right to a trial remains at the disposition of parties and distinguishing the
imposition of trying to reach a common understanding and the obligation to reach an agreement.\textsuperscript{23}

Oddly, the most convincing argument to force the resort to mediation rests on the human propensity towards apathy. In her excellent master’s thesis on mandatory mediation, lawyer Joëlle Duranleau writes the following on mandatory mediation programs with an opt-out system requiring parties to take active steps in order to be exempted:

Beyond the enthusiasm of legal actors and parties for mediation, the choice of conflict resolution mode is influenced, above all, by inertia. When parties are already involved in a dispute resolution process, they tend less to opt out. If they are systemically sent to mediation, parties will not necessarily try to exclude themselves.\textsuperscript{24}

Consequently, research shows that parties grappling with a dispute make few distinctions between mandatory and voluntary mediation. For this reason, parties gain similar benefits from all programs, and the rare data available shows high levels of satisfaction and settlement rates.

Compulsory mediation is a concept that allies a wide array of models. Comparative law documentary research revealed the immense proliferation of possibilities to make the mediation process mandatory. To those multiple options, analyzed independently, we had to add the almost limitless possible foreseeable combinations. To illustrate this pullulation, we ask the reader to imagine how the comparatist-bricoleur.se author enabled her creative mind with a “game” she used that had the following settings:

1. Find a huge wooden dining table;
2. Get multicolored Post-its;
3. Make columns identified by themes, subjects, modalities, applications, chronologies, etc.;
4. Take the notes and reassemble, then dissemble, then move again before deciding on the multiple potential matches in the columns.

Indeed, in terms of mediation, variety is mandatory in the areas where mediation is required, the potential sanctions for refusal to submit to the process or insufficient participation, the terms of application (which relate to


the formalities), the persons who can act as a mediator, as well as the funding of various measures. In brief, the common denominator of these models rests in the mix and match of approaches.

As part of the comparative law research, every studied country owned a mix of mediation models amongst them. Therefore, voluntary mediation is offered everywhere and in a wide range of legal fields.

The conditions to impose mediation differ widely from one domain of law to the other, but also between jurisdictions. For example, in British Columbia, a party can prompt his or her adversary to appeal to mediation by way of notification to this effect. In Australia, the State may require proof that parties made genuine, good-faith attempts to find solutions to their conflict before applying to court. In England, in complex cases, pre-court protocols provide beforehand the methods of communication and transmission of information, as well as the resolution process for conflicts that may arise between parties. In Italy, an information or mediation session may be required prior to filing an application and setting a hearing date. In the Netherlands, when court proceedings are undertaken, judges in case management or at trial may recommend, refer, or order parties to resort to mediation. In the United Kingdom and Hong Kong, judges sometimes have the discretionary power to impose monetary and procedural sanctions at the end of the trial to penalize parties who refused, omitted, or passively took part in a mediation process. Finally, some countries impose penalties on the party at fault and tax credits on the one who behaved in an exemplary manner.

31 For example, Italy gives a tax credit for the entirety of mediation costs if parties reach a settlement and penalties to parties that fail to take part in the first mediation session for no valid reason. Giuseppe De Palo & Lauren Keller, Mediation in Italy: Alternative Dispute Resolution for All, in MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 667, 673 (Klaus G. Hopt & Felix Steffek eds., 2013); Indovina, supra note 28, at 77. However, in 2020, an author mentions that
Mandatory mediation is appropriate in every area of law practice, even if some countries provide exceptions and grounds for exemption. It also applies, in certain cases, to the amount of money at stake, whether modest or substantial.

A fundamental challenge that raises thorny questions remains the recommended moment to attempt mediation. Research highlights that there is no general rule applicable to all areas of law practice on the right time to impose mediation. Different jurisdictions prescribe various time limits concerning court proceedings to force parties to submit to mediation and complete the process.

Few jurisdictions require training and certifications to allow individuals to intervene as mediators, although several maintain a list of accredited and experienced professionals.

writings in the domain do not indicate if judges’ sanction bring recalcitrant parties to mediation. He suggests that these orders must remain rare because “the trend did not significantly change over the years.” Indovina, supra note 28, at 78.

32 To this point, exclusions include disputes concerning child adoption (Australia), Michael Grant, C.J., Sup. Ct. of the N. Terr., Inaugural ADR Address at the Supreme Court of the Northern Territory on The Interaction Between the Courts and Alternative (or Assisted) Dispute Resolution 4 (May 30, 2019), as well as bankruptcy, habeas corpus, taxes and social security (New York, U.S.), Adam Noakes, Mandatory Early Mediation: A Vision for Civil Lawsuits Worldwide, 36 OHIO ST. J. DISP. RESOL., 409, 417 (2020).

33 The Alberta program includes these criteria for a mediation exemption: “Previous participation to ADR for the same conflict if the Court believes that a new try would not be beneficial; the nature of the conflict does not lend itself to it; there is an imperious motive that parties should not try to resolve their case in any other capacity than by trial; the resort to ADR modes would be futile in the circumstances; or even when the case is such that a Court decision would be necessary or desirable.” Duranleau, supra note 24, at 39 (author’s translation).

34 In California, judges keep the power to order mediation in cases where they think it is pertinent following the analysis of the case, if the amount does not exceed $50,000. Rainer Kulms, Mediation in the USA: Alternative Dispute Resolution Between Legalism and Self-Determination, in MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE, supra note 31, at 1245, 1258.


Mediation costs vary from one region to another. Professional fees are loosely regulated and therefore obey the free market. Generally, the parties pay the costs, but some countries cover all or a portion of the amount.

The agreement reached in mediation is sometimes enforceable, but forcing its application usually requires additional court proceedings.

On the other hand, comparative law research brings to light a common finding. The legal community mostly shows reluctance to the mandatory resort to mediation, a resistance that progressively decreases with use, in jurisdictions where this resolution process is expressly imposed in civil matters.

In summary, the comparative methodology revealed an abundance of levels of restrictions, models, and conditions to encourage parties to manage their conflict and make decisions to resolve them, with the help and guidance of a neutral and impartial person. The next part identifies some shortcomings of comparative law with examples of modes of imposition of mediation that make it compulsory.

### III. SOME SHORTCOMINGS OF COMPARATIVE LAW

Despite the worth and richness of the comparative approach, it is not without its failures. In general, comparative law suffers from an indubitable occidental hegemony. As Professor Günter Frankenberg justly explains:

Legal comparison tended to start from the West, and it would invariably return there, leaving little cognitive and imaginative space, in this circular movement and intellectual round-trip, for recognizing the other—foreign legal systems, cultures, institutions—in its own right and therefore genuinely appreciating differences.

Comparative law research undoubtedly contains mistakes. Those inaccuracies prove to be normal because of the numerous limits due to

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38 For example, in Ontario, professional fees of mediators in private practice are left to the parties’ responsibility in civil and commercial matters, but these fees are regulated. Duranleau, *supra* note 24, at 131.

39 To this point, in Italy, persons who benefit from legal aid can be exempted from mediation costs for litigations where this process is mandatory. Ali, *supra* note 26, at 180.


language, translations, and the absence of real and realist knowledge of the
digital systems in which mediation models, more or less compulsory, are
adopted. Moreover, the research holds intrinsic inexactitudes because it lies
solely and entirely on research in texts, not in action.

Broadly speaking, the sheer number of analyzed documents, within tight
deadlines, often on a part-time basis, in diverse areas of law, carries its own
risks and leads undoubtedly to mistakes, inexactitudes, and imprecisions.
Also, despite customary verifications, it is unavoidable that arguments,
measures, and modes are distorted because of an erroneous or misunderstood
comprehension. However, from the humble and curious perspective of
“bricoleur.s,” these mistakes constitute fragments, residues, or debris that
are legitimate and inspiring for legislative innovation.

The purpose of the next section seeks to identify some unavoidable and
inherent pitfalls of the comparative approach that also illustrates its richness
and methodological worth.

Indeed, the comparative methodology has important limitations that will
be showcased in matters of alternative dispute resolution (ADR) processes.
Many factors complicate research work based on comparative law, including
those linked to a cross-disciplinary and transversal approach that necessitates
the appraisal of diverse legal domains in civil as well as penal and criminal
matters. Those factors include vocabulary and translations (Section A), the
diversity of justice systems (Section B), the rarity of conclusive empirical
data (Section C), and the limits of research solely documentary (Section D).
Comparatists run the risk of overlooking the potential of the comparative
method to enhance or transform existing offerings in national law (Section
E). Finally, they remain at the mercy of the political impetus and will of the
moment (Section F).

A. Vocabulary & Translations

Words also matter because they facilitate communication between
interested individuals in conflict resolution by promoting exchanges and
discussions through a language that they become familiar with, slowly but
surely, through multiple, complementary—and sometimes interrelated—
practices and contributions.

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42 See François Ost, Laws as Translation, in THE METHOD AND CULTURE OF COMPARATIVE LAW:
ESAYS IN HONOUR OF MARK VAN HOECKE 69, 69 (Maurice Adams & Dirk Heirbae eds., 2014); Simone
Glanert & Pierre Legrand, Foreign Law in Translation: If Truth Be Told . . . . in LAW AND LANGUAGE 513
(Michael Freeman & Fiona Smith eds., 2013); Vivian Grosswald Curran, Comparative Law and
Language, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 681, 682–84 (Mathias Reimann &
Vocabulary, even when written in French, leads to potential confusion. Comparatist Rodolfo Sacco, in his canonical article *Legal Formants: A Dynamic Approach to Comparative Law* justly described the ambiguities of language:

> Not only can two codes in different countries use the same words with different meanings, but two codes in the same country may give different meanings to the same words, as indeed, may two articles of the same code, two authors of doctrinal works, or two judges. Words do not, in fact, have absolute permanent meanings. Every speaker, whenever he uses an expression endows it with an unrepeatable specific meaning.43

In comparative law, the risks of confusion are amplified to the point of unavoidableness. For example, the expression *médiation judiciaire* (literally judicial mediation) means, in France, the process by which a judge recommends mediation carried out by a mediator from private practice.44 In Québec, the same expression refers to the conciliation managed by a judge as part of a settlement conference (*conférence de règlement à l’amiable*) in which the magistrate assists the parties, in a similar fashion to the mediation process, in the search of solutions to their dispute.45 Prudence is advised when comparing measures that seem linguistically similar, that both register in a judicial process, but differ fundamentally as to the habilitated interveners.

In the same vein, translations usher confusion and, certainly, misunderstandings in the analysis of different mediation programs, either voluntary or compulsory.

In general, comparatists face the same translation problems that those encountered by other fields of knowledge.

> The subject of translation merits special consideration in the context of comparative law, of course, since comparative law’s task of translating legal concepts is illustrative of the problems of translation generally. . . . Inherent in the process of translation is the idea of doing justice to “the other,” whether the other language, the other person, or the other discipline. This implies that the good translator in law and elsewhere is necessarily aware of the fact that he should both

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44 CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 131-1 (Fr.).
45 Code of Civil Procedure, C.Q.L.R., c C-25.01, art. 161–65 (Can.).
assert his position and exercise moderation, because of the impossibility of perfect identity.\textsuperscript{46}

Likewise, comparatists understanding remain subject to more or less exact translations of similar or distinct institutions that are, by definition, approximative.

This obstacle is exacerbated by the fact that not all translation professionals are jurists and even if they detain such knowledge, they often are, naturally, limited to those obtained throughout their studies.

Comparatists also endure limits in their research of translated documents, without access to those still readable only in their original language. This issue has the potential to curtail the real understanding of legal institutions. For instance, while official documents are made available in many languages with the intent of favoring access to justice for citizens, the criticism of those measures concerning simultaneously their goals, their application, and evaluation, does not enjoy the same linguistic treatment.

Broadly speaking, bilingualism surpasses the linguistic scope insofar as it gives access to knowledge and referents from, at once, Anglo-Saxon and French environments, worlds that all too often, unfortunately, ignore one another. Indeed, distinctions do not touch only the ability to read in more than one language, but more fundamentally the content and ideas that circulate in different environments. Therefore, the demeanor towards processes of Alternative Dispute Resolution (ADR) differs from civil law and common law systems. In reality, ADR processes prove to be more widespread, for a longer time, in the Anglosphere than in civil law countries.

While the advent of machine translation may have a promising impact on the future of comparative law, the concerns put forward in the previous paragraphs about the reliability of translation still apply.\textsuperscript{47} For example, which documents in foreign language are accessible online, who can access these writings, and who are the translating authors remain relevant issues. Scholars should thus keep a healthy dose of skepticism and critical mindset in relation to the potential of this innovation. In short, comparatists will have to ponder these consequences and use this tool with prudence.

\section*{B. Diversity of Legal Systems and Traditions}

Even more so, it is important to recognize the lack of knowledge of legal systems as a whole in which the different initiatives to favor or impose mediation take place. For instance, it is essential to note the inherent


\textsuperscript{47} The author thanks Professor Kevin E. Davis for this insight.
distinctions between common law countries, where adversarial procedure dominates, and the inquisitorial system of civil law. This division dons a particular light in matters of ADR since processes belong generally to rules of civil procedure.

Furthermore, the lack of general and legal knowledge heightens undoubtedly the limits of the comparative exercise aiming for a nuanced analysis. A number of studies summon the external and internal factors of compulsory mediation systems applied in different jurisdictions, that unfortunately are impossible to identify and analyze only in documents. For example, one author rightly mentions those factors while announcing advertently that they will not be examined in her study.

Although not discussed here, structural factors such as legal tradition can strongly influence the domestic legal and political environment. For example, differences between civil and common law systems might impact on a state’s approach to mediation. External factors, such as membership to regional or international organisations also impact on a state’s legal framework. . . . Finally, domestic factors are a significant driver in the trend towards mandatory mediation. These include the time it takes for cases to reach trial, the cost of litigation, the prevailing legal culture and political climate, and the attitudes of the legal profession, judiciary, and general public.48

In addition, comparatists seek to identify and analyze legal rules that apply in given countries. In this manner, they often limit themselves to a positivist approach, as Professor Günter Frankenberg attests:

Comparatists have done their “good practice” in a variety of spirits, reaching from noble humanism to straightforward instrumentalism, from lofty idealism to humble pragmatism. They have compared the law as philosophers, historians, anthropologists, and social scientists, as legal scholars and legal engineers, as reformers and defenders of the status quo, mostly, though, as legal positivists bent on determining what the law is in another country, the law as contained in statutes and court decisions and accompanied by scholarly commentary.49

49 FRANKENBERG, supra note 41, at 15.
C. Scarcity of Empirical Data

The rarity of empirical data constitutes a transversal shortcoming typical of the law discipline. By and large, States pass laws that manage social phenomena. However, the application of programs and measures as well as their concrete effects seldom make the object of specific evaluations. Consequently, few quantitative and qualitative studies allowing the assessment of reforms to their goals exist.

Also, the literature research uncovered only a handful of empirical studies providing precious help in gauging the real worth of either compulsory mediation programs or greatly recommended by procedural and pecuniary incentives.50

Of the more than 225 documents studied, only thirty-two articles—14.2%—contain useful data for the analysis of compulsory mediation for legislative orientations. These few documents refer to twenty-two additional studies. These very few studies supply empirical data on the pertinence of compelling the protagonists in conflict to resort to mediation processes.

The studies on which some publications support their empirical logic are often ancient. For instance, the 2014 article by Professor Julian Sidoli del Ceno bases its reasoning on publications dating back to 1993, 1985, and 1982. Likewise, the scarce empirical analysis highlights that parties benefit from the mediation process even if they were reluctant initially: “[A] number of studies have found that even participants who entered the process reluctantly, nevertheless, benefitted from it (Pearson and Thoennes, 1985; Wall and Schiller, 1982; McEwen and Milburn, 1993).”51 Professor Dorcas Quek’s 2010 study arrives at the same finding: “[P]arties who have entered mediation reluctantly still benefited from the process even though their participation was not voluntary.”52

Several articles took some liberty with the data on which they root their reasoning to give weight to their statements. With all due respect to the authors of these publications, the exercise seems to rest rather on rhetorical arguments than empirical data. To this point, in the article Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a

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50 There are at least two sources of quantitative cross-country data on civil procedure: (1) the now-defunct, Reports, Doing Business Archive, WORLD BANK, https://archive.doingbusiness.org/en/reports/global-reports/doing-business-reports (last visited Jan. 2, 2024); and (2) Research and Data, WORLD JUST. PROJECT, https://worldjusticeproject.org/our-work/research-and-data (last visited Jan. 20, 2024).


52 Quek, supra note 23, at 483.
Court-Mandated Mediation Program, as well as Mediation in England and Wales: Why Should it be Mandatory, the writers corroborate their argument that “there is no clear difference between the mediation settlement rates for mandatory schemes as compared with similar voluntary schemes” while relying on “studies conducted in Australia.” Yet, when tracking the article and the cited authors, it appears that the “studies” mentioned are rather linked to the understanding of the Chief Justice of the Australian province of New South Wales on mandatory mediation, who voiced the following statement: “I am advised that in Victoria no difference in success rates or user satisfaction between compulsory and non-compulsory mediation has been noted. Not all research or anecdotal evidence is to this effect.”

This fundamental shortcoming raises questions of even greater importance. For instance, is it possible to come to conclusions based only on a few empirical studies, similar to those mentioned in the previous paragraphs? Furthermore, from foreign empirical data? Is this approach defensible methodologically? What is the probative value of those conclusions founded on such a paucity of data, empirical analysis, and program evaluations? In those circumstances, is it more judicious, nay necessary, to ignore or not to report on them?

For this reason, only genuine empirical studies, both qualitative and quantitative, allow the examination of not only the true reach of legislative programs but also the conditions that favor and those that disfavor their efficacy. For example, in compulsory mediation matters, data analysis enables the understanding of jurists’ and litigants’ reactions. They also inform on the agreement rates after the imposed or voluntary mediation process. This precious information advises decision makers on the winning conditions as well as potential obstacles for the measures they wish to adopt and adapt.

53 Id. at 486.
54 Julio César Betancourt & John Lee, Mediation in England and Wales: Why Should It Be Mandatory?, 1 MEDIATION THEORY & PRAC. 95, 95 (2016).
55 Id. at 102.
56 Id.
58 Id. (citing James Jacob Spigelman, C.J., Sup. Ct. N.S.W., Address at the University and Schools’ Club LEADR Dinner (Nov. 9, 2000)).
59 MacFarlane & Keet, supra note 40, at 700–02; Ali, supra note 26, at 170.
D. Law in Books v. Law in Action

The greatest limit to comparative research methodology rests on the fact that it only analyzes textual documents. At the beginning of the twentieth century, Dean Roscoe Pound of Harvard Law School published an article titled Law in Books and Law in Action that became canonical.\textsuperscript{61} To provide realistic information and data, comparative research should be supplemented notably by the interview of national experts and practitioners on the diverse programs analyzed to verify and validate their application in a concrete and pragmatic fashion. However, this more complete approach too often exceeds the usual settings of comparative law mandates and the time frame allotted for its realization.

This results in a flattening of nuances, a reduction of details and, broadly, an incapacity to truly know the scope and effects of the legal norms studied. Professor Frankenberg denounced in this manner the fundamental limitations of the comparative exercise as well as the notion of “bricolage,” which we defend in the present text:

Therefore, “mainstreaming” comparative law, like all reductions in complexity, does not capture the variety of motivations, spirits, and practices but encompasses the general drift of the discipline and, for starters, records who is in and who is out. What is more, the heterogeneity and vastness of the subject-matter dooms to failure any attempt to identify and trace the various rivulets and strands and then to render a detailed, accurate picture of the past and present of comparative law. So, concentrating on mainstreams or, if you prefer, dominant paradigms representing different modes of comparative bricolage will have to do.\textsuperscript{62}

Like the late renowned comparatist Rodolfo Sacco, Professor Horatia Muir-Watt emphasizes the subversive function of comparative law insofar as comparatists do not limit their analysis to formal and positivist legal norms:

One of the greatest advances in modern comparative thought consists precisely in the care given to the critical perception of how one’s legal reality is informed by the observation of others. To realize this critical potential, observation must avoid proceeding through a flattening conception of reality and must penetrate beneath the formal surface of law. It must investigate what Sacco calls the “silent dimension” of the

\textsuperscript{61} See Roscoe Pound, Law in Books and Law in Action, 44 AM. L. REV. 12 (1910).

\textsuperscript{62} FRANKENBERG, supra note 41, at 15–16.
law, which mobilizes reading grids as different as history, sociology, anthropology, religion and economics, in order to understand the other, explain its differences, and grasp its dynamics, instead of being satisfied with a static vision provided by the examination of texts and official sources only. Therefore, we need to search the cultural substratum (subtext).63

The question of pecuniary sanctions used in certain countries to favor resorting to mediation illustrates the real difficulty of determining its practical reach in jurisdictions inaccessible to foreign researchers. This limit is so serious that it also leads to the absence of sufficiently precise knowledge to assert the potential worth of a measure, as the next detailed paragraphs attest. Indeed, the literature research did not allow us to seize the order of magnitude of penalties used as a means of indirectly imposing mediation, if only to learn that it is a technique deployed by many countries. In these cases, mediation becomes compulsory, particularly in practices where the mandatory resort rests on future monetary sanctions.

Legal documentation remains more than fragmentary when it comes to determining the exact nature of the monetary sanctions imposed to oblige the recourse to mediation. Apart from a few rare exceptions, a word, few terms, or expressions reflect a financial penalty, without disentangling the range of amounts or their content. For example, in a text on mediation in Greece, the author merely mentions in passing: “If a party fails to attend the first mediation session, the court may impose monetary sanctions on it.”64 In Ontario, “[a] judge may also order a non-complying party to pay the costs or make any other order that is just.”65

In research produced from books alone, it seems just as difficult to identify the impact and effectiveness of such sanctions. This difficulty is naturally exacerbated by the lack of knowledge of the ground realities of the legal practice as well as the consequences of private and public funding among the numerous jurisdictions studied for research on compulsory mediation. Also, legal costs differ significantly between the inquisitorial procedure that prevails in civil law systems and the adversarial one in common law.


For example, pecuniary penalties gleaned in the texts included expenses directly related to the recourse or to the refusal to participate in the mediation process. As such, judges can order the payment of mediation costs. These costs can include sums such as:

- Mediators’ fees for the preparation and mediation sessions (United States: Indiana and North Carolina); 66
- Lawyers’ fees for preparation and mediation sessions (United States: Indiana and North Carolina); 67
- Uselessly wasted mediation expenses as well as other penalties (Ontario); 68
- Imposition of damages and interests to the other party for losses suffered, mediation expenses as well as the reduction or the cancellation of interests owed (Québec, Smalls Claims Division). 69

In other cases, the legal costs can be imposed on the party at fault. Depending on the country, these costs notably included:

- Attribution of legal costs or legal fees (Australia; 70 Italy; 71 United Kingdom; 72 Saskatchewan); 73
- Court costs (Italy) 74 and costs of procedures (Italy). 75 In Italy, tribunals can double the procedure costs of a contumacious party; 76
- Action costs (Ireland); 77
- Costs of the winning party including court costs, often substantial lawyers’ fees, as well as procedure costs of the ADR process (United Kingdom); 78

66 Quek, supra note 23, at 496.
67 Id.
68 CIV. JUST. COUNCIL, COMPULSORY ADR 27 (2021) (Eng.).
69 Regulation to Establish a Pilot Project on Mandatory Mediation for the Recovery of Small Claims Arising out of Consumer Contracts, C.Q.L.R., c. 25.01, r. 1, art. 30 (Can.).
70 Civil Dispute Resolution Act 2011 (Cth) s 17, art 12 (Austl.); Grant, supra note 32, at 5–6.
72 The Civil Procedure Rules 1998, 1998 c. 3132(L.17) (Eng.), s. 44.3 (UK).
73 The Queen’s Bench Act, L.S. 1998, c Q-1.01, s. 34 (Can.).
74 Ali, supra note 26, at 179.
75 Ferrand, supra note 29, at 62–63.
76 Id.
Lawyers’ fees of the other party if a person refuses to show up to mediation;
Lawyers’ fees of both parties are imposed on the one who loses the trial (Argentina);\textsuperscript{79}
Allocations and indemnities owed to witnesses (Québec, Small Claims division);\textsuperscript{80}
Expert fees (Québec, Small Claims division).\textsuperscript{81}

Furthermore, it appears that certain terminologies are synonymous without research allowing us to verify the exactness of terms. For instance, in Québec, the expressions “\textit{frais de justice}” (legal costs)\textsuperscript{82} and “\textit{dépens}”\textsuperscript{83} (costs) are synonyms since the former replaces the latter in the \textit{Code of Civil Procedure}.\textsuperscript{84} However, other expressions can indicate the imposition of financial sanctions, quite similar or way different, in terms of penalties. For example, some may pertain only to modest amounts imposed for filing a claim while others may include the condemnation of lawyers’ fees of the adversary party, which in the North American context, can constitute colossal sums. In doubt, all expressions are retained. Finally, as mentioned above, research reveals itself subject to the variability of translation, undoubtedly imperfect, only in French or in English—the two languages the author masters—of foreign judicial and legal customs and traditions.

This brief overview demonstrates the imposing possibilities offered to legislators wishing to make mediation compulsory using monetary sanctions. Thus, it is important to note that only one text recalled a specific sum of money. This is the case in Australia, where a penalty that can go up to $51,000 applies as a sanction to the party refusing to attend the mediation process requested by his/her adversary in franchise contract cases.\textsuperscript{85} Thus, strict documentary research does not allow us to assess a true range of potential amounts that judges can impose in different domains to offer incentives to encourage or concretely force the parties to resort to mediation. The exact content of sanctions as a compelling modality remains extremely obscure when limited to information available in books and without considering action, that is to say, the practical reality of the sums at stake.

\textsuperscript{80} Duranleau, \textit{supra} note 24, at 47.
\textsuperscript{81} Id.
\textsuperscript{82} Code of Civil Procedure, C.Q.L.R., c C-25.01, art. 54, 91, 117 (Can.).
\textsuperscript{83} Code of Civil Procedure, C.Q.L.R., c C-25, art. 27, 59, 67 (Can.).
\textsuperscript{85} Waye, \textit{supra} note 36, at 225.
E. Existing Offer

Regarding legislative reform, comparative law suggests a multitude of promising avenues despite the intrinsic limits of the methodology. However, danger lurks for comparatists when the purpose of research consists of legislative reform propositions. With their attention toward foreign law systems, they risk neglecting already existing solutions on their territory. They risk neglecting programs and measures already applicable without questioning their relevance in the immediate context, without examining the possibilities of improving the existing offers to improve their effectiveness, extend their scope of action, increase their funding, promote their evaluation, as well as perfect the collection and analysis of empirical data.

In the context of a comparative law methodology for legislative reform, it is essential to examine the existing offer on the territory and ascertain which conflict resolution processes are compulsory, semi-mandatory, or voluntary. Innovation research risks concealing processes already in place that respond to current social needs and that a modest bonification could improve or make compulsory with minimal efforts. Consequently, in every case, it is important to take stock of what already exists in our context and check how to validate the existing offer, pursue it as it manifests, or establish different potential modalities. This simple, but necessary, approach constitutes an easy and inexpensive way for advancement.

In this exercise, different modalities inventoried for the comparative methodology become possibilities to explore how and if to make mediation mandatory or not in certain law domains, in specific cases in relation to the value of the amount at stake or in certain judicial districts to relieve the congestion of tribunals.

Here again, we need to complete the analysis of critics’ arguments to counter their shortcomings or to profit from the possibilities of reform to leave them or impose new ones. In the spirit of legislative innovations, the critical analysis not only concerns the constraining modalities imposed before, during, or after the legal process, but also those that could be adopted to supplement existing conflict resolution processes.

For instance, regarding existing family mediation programs, Québec already possesses a diverse offer akin to the obligatory resort to it. The coparenting meeting acts as an information session in family mediation since parents must attend it before filing a judicial application.86 This program,

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86 Fascicule 2: Médiation - VI. Médiation familiale, in JURIS CLASSEUR QUÉBEC PROCÉDURE CIVILE 1, n°42 [Booklet 2: Mediation – VI. Family Mediation, in QUÉBEC CIVIL PROCEDURE JURIS Binder 1, No. 42 ] (François-Olivier Barbeau et al. eds., 2d ed. 2021) (Can.); MINISTÈRE DE LA JUSTICE DU QUÉBEC, COUPLE UN JOUR . . . PARENTS TOUJOURS LA PARENTALITÉ APRÈS LA RUPTURE: SÉANCE
which has proven its worth since 1997, could extend its range to disagreements touching elders, family caregivers, and, more broadly, vulnerable persons. Likewise, as is the case in Belgium, France, and Switzerland, family mediation could be broadened to attend conflicts that tear families apart when it comes to the settlement of estates, but also as a preventive measure when planning a will.

School and community mediation offers free services in communities of every region of the province of Québec. These initiatives aim to repair the social fabric and prepare citizens of today and tomorrow to manage disputes and find resolution using processes based on dialogue and communication. Modest funding of non-profit organizations that train children, school teams,
and childcare centers,\textsuperscript{92} as well as volunteer mediators,\textsuperscript{93} could allow the generalization of these services throughout Québec society. School and community mediations engage in the culture change of conflict management on a long-term basis and in a pedagogical manner by initiating citizens as well as the next generation to dispute prevention and resolution.

Pre-mediation, pre-hearing mediation, and on-site mediator services that apply to the Small Claims Division at the Court of Québec all constitute promising programs to promote the resolution of conflicts where the amount claimed does not exceed $15,000.\textsuperscript{94} More recently, and in the context of a pilot-project, Québec’s legislature adopted a law and regulations making mediation and arbitration mandatory in Small Claims cases of $5,000 and less to promote these ADR processes.\textsuperscript{95}

Online dispute resolution (ODR), such as the \textit{PARLe consommation} program,\textsuperscript{96} also holds great promise to favor access to justice for everyone throughout the vast Québec territory, mainly because of its virtual offering. Additional research on those programs should be done since they represent the future of justice.\textsuperscript{97}

Following the internal law analysis combined with comparative law findings, exploring applicable legal norms in other countries becomes an inspiring source of promising ways for legal reform, even if its apprehension remains deficient, or sometimes inexact and erroneous.


\textsuperscript{95} An Act to Improve Justice Efficiency and Accessibility, in Particular by Promoting Mediation and Arbitration and by Simplifying Civil Procedure in the Court of Québec, S.Q. 2023, c 3 (Can.); Draft Regulation Mediation and Arbitration of Small Claims, G.O.Q. part II, at 1749.


\textsuperscript{97} See generally RICHARD SUSSKIND, ONLINE COURTS AND THE FUTURE OF JUSTICE (2019). Richard Susskind’s work, and above all the book Online Courts and the Future of Justice published at the end of 2019, describe the ins and outs of the potential usage of technology in judicial matters. In his internationally renowned writings, the English writer emphasizes the importance of ADR in the online justice offer.
F. Political Impulsions and Volitions

In front of the plethora of possible measures identified by the comparative approach, political orientations become determinant when it comes to exercising choices. At the end of the analysis, independent comparatists can offer suggestions, make recommendations, and promote some avenues to the detriment of others. Similarly to every jurist, comparatists, “bricoleur-se” or not, defend their own ideology, principles, and vision of access to justice that informs their preferences.

Political decision-makers are aware of their own constraints, tainted by ideologies, principles, and visions as well as contingencies linked to a set of internal and external factors. Their “choices” register within a context and considerations close to them, including those linked to their political affiliations.

Comparatists’ research work can easily, even necessarily, be instrumentalized. Political choices can, in fact, reclaim the independent comparatist jurists’ expertise to justify certain avenues rather than others, notwithstanding the proposed recommendations.

Despite these limits and risks, the comparative law exercise proves highly instructive insofar as it allows us to explore the plurality of models and draw inspiration from them for Québec’s context. We need to embrace, with lucidity, not only the limits but also the numerous and stimulant options that the comparative method offers to innovate in terms of improving access to justice in Québec via the imposition of the mediation process.

CONCLUSION

Comparative law nourished reflection, creativity, and imagination, offering a panoply of strategies to encourage or force the resort to mediation at many moments, in different ways, and with varying degrees of compulsory incentives. On the resort to imagination and creativity in law, Professor Harold Anthony Lloyd writes:

Thus, we might speak of imagination as “the ability to create and rehearse possible situations, to combine knowledge in unusual ways or to invent thought experiments . . . . Imagination is involved in any flexible rehearsal of different approaches to a problem, and it is wrongly thought of as opposed to reason.”

. . . .

The imaginative lawyer engaged will thus consider various possible Proper ways of viewing the matter at hand for purposes of making her probability analyses for objective
legal analysis and for purposes of persuading the applicable audience for persuasive legal analysis.

Creativity involves two elements. First, creativity requires action or idea production that is “recognizably original,” where the creative person “must be capable of generating ideas or behaviors that are novel, surprising, or unusual.” Creativity thus shares in the imagination. Second, the ideas or behaviors must be “adaptive” in the sense that an “individual’s originality must make a positive contribution to that person’s life or to the lives of others.”

Therefore, comparatists give themselves up to a fertile exercise of assembling and combining allochthonous legal norm fragments susceptible to answer the needs of other legal systems. In doing so, the burden of representing the foreign legal norm adequately and justly is removed. Even in debris form, pieces, parcels, and residues, they remain resourceful to reflection and susceptible to a multitude of diverse associations.

In the case of dispute prevention and resolution, research enabled us to collect a sample of different initiatives allowing the imposition of mediation in their respective jurisdictions. Studying documents from every country provided information of unequal value insofar as some were very detailed and complex while others were fractioned and sometimes confusing. In some cases, such as monetary sanctions, documentary research did not allow the evaluation of imposed amounts nor the effectiveness of financial measures. Nevertheless, research allows us to locate some broad comparative attempts that remain very useful to the analysis.

Hence, despite the sheer volume of documents and information identified, the comparative approach cannot realistically aspire to exhaustiveness. At best, rather, the methodology allows the assembling of a collage or a “bricolage,” or the study of “selected pieces” as Professor

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99 To this point, Joëlle Duranleau’s excellent master’s thesis should be noted. See Duranleau, *supra* note 24. In addition, and without being exhaustive, the analysis was based on comparative works such as Queck; Béatrice Brenneur, Myriam Bacqué, & Caroline Asfar-Cazenave; Maryland studies; and a study by Giuseppe De Palo, Ashley Feasley, & Flavia Orecchini on the European Union. See Queck, *supra* note 23; BEATRICE BRENNNEUR ET AL., MÉDIATION OBLIGATOIRE OU VOLONTAIRE, QUELLES RÉFORMES POUR QUELS ENJEUX? [MANDATORY OR VOLUNTARY MEDIATION, WHICH REFORMS FOR WHICH ISSUES] (2018) (Fr.); LORIG CHARKOUDIAN, MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON RESPONSIBILITY, EMPOWERMENT, RESOLUTION, AND SATISFACTION WITH THE JUDICIARY: COMPARISON OF SHORT- AND LONG-TERM OUTCOMES IN DISTRICT COURT CIVIL CASES (2016); LORIG CHARKOUDIAN, M.D. ADMIN., OFF. OF THE CTS., WHAT WORKS IN DISTRICT COURT DAY OF TRIAL MEDIATION: EFFECTIVENESS OF VARIOUS MEDIATION STRATEGIES ON SHORT- AND LONG-TERM OUTCOMES (2016); GIUSEPPE DE PALO ET AL., EUR. COMM. ON LEGAL AFFS., QUANTIFYING THE COST OF NOT USING MEDIATION—A DATA ANALYSIS (2011).
Frédérique Ferrand titled her articles on mediation in Europe. For instance, research reveals a surprising and stunning set of modalities, criteria, and conditions, all more complex than one another as to ways that countries impose mediation. The labyrinth of possibilities could only be seen by exploring the impressive diversity of modalities of compulsory mediation in numerous countries. The wooden dining table was entirely recovered with them.

The purpose of comparative research for legislative innovation consists of offering a collection of general impressions of various options available to Québec’s legislator to achieve the objectives that it sets, and so, as illustrated in this Article, to make mediation mandatory. Comparatists bring a convincing, eloquent, and useful insight into the realistic legal possibilities as well as pragmatic ones when they complete descriptions with critical elements and empirical data of every measure.

However, jurists lag far behind social sciences and humanities as to the necessity to promote and realize empirical qualitative and quantitative research. Such empirical data proves to be essential to determine policies and orientations in the field of access to justice. The results of the documentary research must be measured against practice via interviews with practitioners and judges. It appears mandatory to adopt multidisciplinary and collaborative approaches to enrich legal knowledge and to understand it in their social context. Finally, it proves to be necessary to proceed to the evaluation of programs and measures to check if they satisfy the objectives or not, and if needed, identify any perverse effects, and follow up on recommendations aiming to improve them.

100 Ferrand, supra note 29.