

*Antal Visegrády*

# The Alternative Dispute Resolution in Major Regulatory and Indicative Legal Cultures



## *Summary*

After clarifying the nature of the legal culture, the present study examines the operation and effectiveness of alternative dispute resolutions in six European (including English and Hungarian) Islamic, African, Hindu, and Far Eastern (Chinese and Japanese) legal systems. The final conclusion of the article is that a clear rearrangement in the world of legal cultures has begun since the 20th century, in two main directions. On the one hand, Western legal cultures, among other reasons, are more open to exploring and increasingly open to alternative dispute resolutions due to civic dissatisfaction with the judiciary. On the other hand, in Eastern legal cultures, the role of law in conflict resolution is gradually increasing.

**Keywords:** Legal Culture, Alternative dispute resolutions, European rights, African and Asian Rights

---

## FUNCTIONS OF LAW

As known, one of the functions of law is to interact in shaping the relations between citizens and organizations and in resolving conflicts between them and the state. Law is only one means of social management of conflicts and disputes. Almost worldwide, the circumvention of the law and the organizations applying the law during the resolution of disputes can

---

PROF. DR. DR. HC. ANTAL VISEGRÁDY , professor, doctor of the Hungarian Academy of Sciences (visegrady.antal@ajk.pte.hu).

be perceived, and the so-called increased use of informal mechanisms. The reasons for this are manifold, including the flexibility and effectiveness of non-formal dispute resolution. The most important organization of the legal system for dealing with conflicts and disputes is the court. Historically, however, two other types of dispute resolution procedures have emerged (the latter in two forms). One is the agreement of the parties through direct negotiations, possibly with helpers and experts. Another type of conflict resolution is based on the involvement of a third party. Lastly, in some cases it is not possible to choose the parties; they have to turn to a third party or organization who decides on the basis of a predetermined rule (law).

Participation of the law in the resolution of conflicts, therefore, does not mean the monopolisation of the resolution of conflicts by the law. It depends on the traditional legal culture of society, which method of conflict management is most effective and which ones the parties choose. Based on all this, combining theoretical and empirical exploration, vigorously applying comparisons of law in European, Chinese, Japanese, Hindu, Islamic, and African legal cultures, we examine the ways of resolving disputes and their effectiveness.

The ADR (alternative dispute resolution) “movement” began in the United States in the 1970s with the goal of offering more effective dispute resolution alternatives than litigation. ADR is booming these days because it has proven in several ways to be more than just another means of resolving disputes. The ADR has become an institutionalized part of many judicial systems in many countries worldwide. With the development of the ADR, mediation has become a widespread, preferred method of dispute resolution by many because its procedures are less complex and more flexible. Instead of subjecting them to an “external” system of norms, the goal is to find a solution that is acceptable to both parties in a conflict situation that is mutually reinterpreted by the parties.

#### NATURE OF THE LEGAL CULTURE

The topic of the legal culture is much broader and more comprehensive than the fact that its richness of thought could be perceived in the context of an article as marginal. Linking law to the concept of culture is a relatively recent phenomenon. In the middle of the 19<sup>th</sup> century, the concept of culture that is still accepted today is that culture means everything that it has created through the physical and mental work of human society. At the beginning of the 20<sup>th</sup> century, the German Jurist, Kohler (Kohler, 1909) regarded the most important task of law and jurisprudence as contributing to the advancement of culture. For him, law is a creative science and law evolves to satisfy the needs of society. Professor Radbruch (1978), a German professor, defined law as a cultural power, a component of culture. Zjelmann (1900) saw the main value of comparing law in that it allows law to be perceived as a cultural phenomenon.

Legal culture is still an intensively researched terminus technicus. Perceptions can be divided into at least three types. L. Friedman (1997) separates the “internal” legal culture, which means the set of attitudes and values of the legal profession, from the “external” legal culture, which is the attitude and value set of the laity, society.

The other group of authors, such as Nelken (1997) is a proponent of a broader definition. In this way, the law and the tendency to sue are included in the concept. Finally, there are those who suggest a different concept than “legal culture”. Cotterrell (1997) replaced it with the notion of “legal ideology”. According to him, “Legal ideology consists of the elements of value and cognitive ideas assumed, expressed and formed in the practice of the development, interpretation and application of the legal doctrine in the legal system.”

Upendra Baxi (1991) differentiates between “residual”, “emerging” and “dominant cultures”. The first is a remainder of the past, but it is also actively involved in the cultural processes of the present. The emerging culture is associated with emerging strata or groups, but is usually difficult, slow, and subordinate to the dominant culture. Applying this theory to the legal culture, the author emphasizes that residual elements are active, expressing living experiences and even values. The situation of the dominant culture is unstable compared to the other two, the situations may change. There is also a viewpoint that sees a danger in legal culture introducing an anthropological element that is difficult to define into law.

As for the latest developments, the concept of “comparative legal cultures” has emerged, which, according to its representatives, can serve as a primary means of exploring more deeply the connections and interconnections that work in the creation and operation of many factors of law. The evaluation of this new Janus faced (double sided) trend can be a way out of the uncertain situation associated with the paradigm shift in the field of comparative law, and on the other hand it can contribute to the integration of comparative law into the broader framework of legal history, legal ethnology or sociology of law.

There is a constant interaction and a multifaceted relationship between culture and law, which can be summarized in two basic theorems: on the one hand, law is one of the components of the culture of a given society, and on the other hand, there is no law or legal system that is not influenced by the culture of society.<sup>1</sup>

The legal culture consists of the following elements:

- the written law and the law in force (‘law in books’ and ‘law in action’);
- institutional infrastructure (court system, legal profession);
- models of legally relevant behavior (e.g. litigation), and
- legal awareness.<sup>2</sup>

In broad lines, a distinction can be made between the so-called *regulatory* and *indicative* legal cultures. The former covers Western cultures, where the acceptance of law takes place as a rule of conduct indeed, in a normative sense, but by no means to the same extent. In the common law system, for example the authority of the court is more preeminent than in other countries. However, the European so-called continental legal cultures are not uniform either. To note just two examples: In contrast to the German legal culture, which traditionally values law and is at the forefront of civil litigation in Europe, Dutch legal culture is characterized by the legal term *Beleid* (the English policy), which means following favorable laws and avoiding harmful laws (circumvention). An utmost example of this is that until the enactment of the Euthanasia Act of 1993, according to which medical assistance for suicide is permitted and not punishable in exceptional cases, the Criminal Code had banned it, but the medical practice continued with assistance for suicide. The Dutch are working to resolve their conflicts out of court.

In indicative legal cultures - such as the Asian and African legal cultures - the law is not necessarily normative in the true sense of the word, nor is it perceived as such by society. They traditionally had an informative and indicative significance, and this social attitude is only reinforced by the increase in the number of unenforceable, often symbolic, laws. A separate scientific trend, the so-called "Law and Development" deals with the problem of how modern legal acts and legal institutions are introduced / taken over and function from regulatory legal cultures in the legal cultures in question. The legal culture of the Central and Eastern European region is characterized by a historically developed legal approach, the essence of which is a belief in legal regulation, excessive trust in legal regulation. Simultaneously, there has been and still is an approach to social problems within a certain legal framework. The effectiveness of the law was also influenced by the growing importance of the norms of behavior developed by real processes due to untraceable legal regulations.

At the same time, studies on the legal culture of Hungarian society indicated knowledge and approval of legislation embodying traditional values (e.g. in 1976: 83% of respondents said that an increase in the number of divorces was "unfavorable") (Sajó, 1976). However, the divorce rate is very high in Hungary. All of this sheds light on the contradictions in the legal culture.

To sum it all up, a legal culture that shapes the behavior of organizations and citizens in line with the objectives of the legislation enhances the effectiveness of the law, otherwise it reduces the effectiveness of the law. There is no country with a single, unified legal culture. This is because there are many different cultures in each country, due to the complexity of societies (communities, groups). Another view speaks directly to legal "subcultures". He notes as an example the legal-anti-culture of criminals (Noll, 1972) and the legal culture of law enforcement. The latter is well illustrated by the fact that the courts condemn conscientious objectors in northern and southern Norway, while acquitting them in western and central Norway. Although legal cultures in the same society lead to different behaviors, relevant research has also shown that age, gender, income, nationality, race, and so on, therefore this is why they are correlated with an attitude towards the law.

Legal culture has historically developed just like political culture and the latter influences and may even shape the characteristics and realization of the former. Legal culture is always between tradition and innovation. The development of a legal culture is a long-term process, involving not only intrinsic growth but also the task of nurturing an existing culture. Hence, a legal culture is not only an adherence to what has developed, but also a change for the sake of change.

An interesting and valuable explanation for the development of legal cultures is given by Alan Watson's (1974) theory of transplantation. Many case studies show the mystery and novelty of the similarity of legal development in the most diverse socio-economic formations and legal arrangements from the ancient Middle East to present-day New Zealand, rather than in original ingenuity, rather, it lies in taking over what is already known elsewhere and at most thinking it further. Transferring of law is a universal development factor for the legal system. In his recent work, he explains (Watson, 1978) that his studies of the history of law have convinced him that, since the rulers of the Western world had little interest in the private

law, this task gradually fell into the hands of a non-legislative elite (e.g. Roman jurists, medieval English judges and continental legal professors). These legal developers then developed their own legal culture, detached from social reality, which determined, on the one hand, the parameters of their legal thinking and, on the other hand, the nature of the legal system they considered worthy of lending and the extent of lending. This culture differs from society to society, but it does have common historical characteristics. Thus law and legal culture do not develop mechanically from economic, social and political relations!

We can also give a modern example of all this. In Austria, in 1977, the institution of the ombudsman was taken over from the Scandinavian legal system and transformed into a parliamentary oversight body called the 'People's Advocacy', in accordance with their political system. However, under various circumstances, it has survived its "transposition" into the Austrian legal system and has proved its worth in the meantime.

### EUROPEAN LEGAL CULTURES<sup>3</sup>

In the following, we review the operation of alternative dispute resolution in six European countries, including Hungary, with other researchers working on family mediation and arbitration.

In the Czech Republic, the concepts of arbitration, mediation and conciliation are defined and regulated in the current legislation. Under Czech law, there is no mandatory mediation in either civil or criminal cases. The only binding requirement required by law is the first meeting, which can be up to 3 hours long and involves a visit from a registered mediator. The law regulates mandatory exams for registered mediators. An alternative dispute resolution culture is beginning to emerge in the Czech Republic. The growing number of civil and administrative cases and serious social conflicts all serve as a motivation for the wider practical application of the ADR and mediation, and a sufficient number of professionals is ready to actively support this process.

There is no specific definition of ADR in the Slovak legal system. Various laws include out-of-court dispute resolution, such as mediation or arbitration. Under Act 2004/420, mediation is an out-of-court activity in which the parties have a contractual or other legal dispute, assisted by a mediator to resolve their dispute. Law 2003/550 provides the legal definition of mediation in criminal matters. In this case, by definition, the activity of mediation is an out-of-court dispute resolution process between the victim and the accused party.

Due to the quick rise in the number of divorces and the deteriorating family relations in recent years, another form of mediation has also been enshrined in law. As a means of resolving family conflicts, Law 2004/420 provides for mediation, civil disputes, disputes arising from family relationships, and business and labor disputes, as well as cross-border disputes, in all the legal cases already mentioned. Arbitration is allowed in Slovakia or internationally in property cases (both commercial and private) that are conducted in the territory of the Slovak Republic.

The activity of mediation may be carried out only by a natural person who is registered with the Slovak Ministry of Justice and who carries out this activity in his own name and at his

own risk, for profit, in accordance with the regulations applicable to him. There are currently about 740 intermediaries and 25 centers registered with the Ministry of Justice. Persons who are not restricted in their capacity to act, have a university degree, or have a notarized document certifying that they have received appropriate training abroad, are not on the criminal record, and have completed some special mediation training may register. A university degree is enough to be able to work as a mediator and apply to the list of mediators. Moreover, you must complete an accredited mediation course, along with a special final exam, at a training institution that is eligible to provide such training. In Slovakia, the use of mediation is far from satisfactory. It seems that Slovak citizens find their disputes in mediation less reliable in court than out of court, rather than a court judgment that can be sanctioned and enforced.

The use of the ADR is becoming increasingly popular in Lithuania. Gradually, the notion that a court settlement may be the only way to settle the disputes of disputing parties is fading. In this country, there is the possibility of both judicial and extrajudicial mediation. Mediation is defined as a civil dispute resolution procedure. In doing so, one or more mediators shall assist the parties in resolving their dispute amicably. Intermediary services shall designate intermediaries, ensure an appropriate regulatory framework, and make available the costs and material and material resources available. A third, independent, impartial person shall be involved in the dispute between the parties. The mediator must comply with the mediator's professional experience requirements, confidentiality, and the European Code of Ethics for Mediators. In Lithuania, the ADR is also widely used in disputes concerning the protection of consumer rights.

In Italy, family mediation with its originality stands out among the methods of conciliation, arbitration and mediation. The other model, which is already widespread throughout Italy, is completely cut off from the judicial environment, roughly equivalent to the level of advice. In Italy, there has been no mass application of family mediation in civil matters, and this situation cannot change as the Italians are steadfast in this conservative attitude. However, collaborative law is a real breakthrough in the ADR in Italy. This legal procedure is based on the parties to the dispute participating in the negotiations with their lawyers and, in some cases, with other experts (e.g. financial experts) in order to avoid an uncertain outcome of the court proceedings and to reach an agreement, which best meets individual expectations.

In Hungary, according to the Act 2002 / LV on Mediation, mediation is a special litigation prevention, conflict management and dispute settlement procedure, the purpose of which is to resolve the dispute between the parties not involved in the dispute by mutual agreement of the parties involved in the dispute establishment of an agreement. Act CXXXIII of 2006 deals with mediation in criminal matters and defines mediation and its purpose in different contexts. "It shall be the duty of the mediator, during the mediation, to contribute impartially, conscientiously and to the best of his knowledge to the conclusion of an agreement between the parties." Employees of natural or legal persons are entitled to conduct mediation proceedings from the date of their official registration. In accordance to the Mediation Act, the Ministry of Justice is responsible for the list of mediators. To be included in the contact list, an applicant must meet the following conditions: must have a higher education degree and at least five years of relevant professional experience from the date of obtaining the qualification, must have completed professional training in mediation, must have no criminal record

and must not be subject to a ban on pursuing the profession of mediator. In accordance with IRM Decree 63/2009 (XII, 17), the following professional training must be completed for inclusion in the list of intermediaries: a 60-hour theoretical part with specific content and an completed practical unit that represents a completed, complete mediation case with feedback from the trainer. Natural persons are required to undergo continuous professional training. Continuing education takes place in consecutive continuing education periods of five years.

In Hungary, various forms of the ADR are used, such as community issues, child protection and family matters, conflicts in the education system, labor and trade disputes, and criminal matters. Along with bottom-up activities, top-down initiatives are needed to support the ADR culture at the societal level. Further steps are needed to harmonize the different ADR specifications and services to facilitate their joint application. Despite the fact that the ADR had historical antecedents in Hungary (e.g. large family court, Romani court), there is a strong propensity to sue in Hungarian legal culture, which indicates the importance of the court as an institution involved in resolving legal disputes. All this draws attention to education, as the socio-cultural competence of those “involved” in the debate is also needed.

Henceforth, we turn to the presentation of British alternative dispute resolution. The Ministry of Justice is responsible for civil and family mediation policy and promotion of mediation in England and Wales only. In order to ensure the proper quality of mediation in civil disputes brought before a court by a mediator (with the exception of family law disputes under the jurisdiction of England and Wales), the Department of Justice and Her Majesty’s Courts and Tribunals Service have set up two civil mediation procedures, which allows the parties to settle their disputes, depending on the value of the claim. The Small Claims Mediation Service is an internal service operated by the HMCTS for small claims cases, usually under £ 10,000. For cases with a higher value (above £ 10,000), the Department of Justice, in co-operation with the Civil Law Mediation Council, has set up an accreditation system through which organizations providing mediation services can apply to be entered on the civil mediation register and the courts before them refer to the parties. The CMC is an organization representing civil and commercial law intermediaries. In the case of family law mediation, self-regulation applies, and mediators can join a number of membership-based organizations or accreditation bodies.

Mediation can settle a number of everyday civil and commercial disputes, including housing issues, business and workplace disputes, small claims and other claims, land boundary disputes, labor and contractual disputes, personal injury and negligence claims, and intra-community disputes such as harassment or harassment issues. Civil mediation is not regulated by law and is not a prerequisite for court proceedings. However, parties to civil lawsuits are required to seriously consider the possibility of mediation before going to court.

The practice and procedures of the civil chambers of the Court of Appeal, the High Court, and the County Courts are governed by the Code of Civil Procedure (CPR). The primary purpose of the CPR Code of Conduct is to assist courts in the fair judgment of cases. Part of this primary objective is that the court should actively deal with cases. In this context, the parties concerned should be encouraged to use alternative dispute resolution, if the court considers this to be the appropriate procedure.

Although the use of mediation is entirely voluntary, the Code of Civil Procedure sets out the criteria to be followed in deciding on the costs to be assessed. The court should take into account any efforts made before and during the proceedings to resolve the dispute. Thus, if the successful party has previously refused to accept a reasonable proposal to use mediation, the judge may decide that the losing party is not obliged to reimburse the successful party's costs. Mediators in England and Wales are not bound by a separate code of conduct at a national level. However, CMC accreditation is conditional on the civil mediator complying with a code of conduct modeled on the European Union Code of Conduct. It is not the job of the professional regulator and the government to encourage compliance with any voluntary code. There are no national training bodies for civil law mediators in England and Wales. The training of civil law intermediaries takes place in the private sector, in a self-regulatory manner. Profession regulates itself and trains its members itself.

If the parties to a civil dispute before a court have reached an agreement as a result of mediation, they can ask the court for judicial approval of their agreement. If the court finds the agreement reached fair, it approves it. This makes the agreement a legally binding and enforceable "agreement".

#### MUSLIM LEGAL CULTURE<sup>4</sup>

Islamic law, as a source system of religious law, bears a strong resemblance, often similar to other similar legal systems, primarily Jewish and Zoroastrian law, but is also fundamentally identical to the source system of Hindu law. A common feature of these legal systems is that the basic rules are derived from their Qur'an. Traditional Islamic law (sharia) is enforced by the Qadi through its decisions; however, there are other dispute settlement procedures in addition to it.

In early Islam, the procedure of the market inspector (muhtasib), who investigated fraud, abuse, and non-payment in the markets, was important. It deviated from the Qadi's procedures in two important respects: the market inspector could also act *ex officio*, and the purpose of the procedure was intimidation, so the use of force during the procedure did not count as an infringement or exceeding the competence. Later, the market supervisor's task extended to the moral supervision of the community's life and they could take action against conduct that violated Islamic standards. Although he had a connection to religious law, he did not follow the rules of his Qadi procedure. Another long-established actor in Islamic law is the Mufti. The mufti can be defined as a jurist, his task is to make theoretical decisions and make fatwa. Anyone who is unsure whether a particular act is correct (halal) or forbidden (haram) can turn to the Mufti. The Mufti's procedure also differs from that of a Qadi in important respects: while a Qadi can only be a physically healthy, free, Muslim man, a Mufti can be a handicapped person, a slave, or a woman who can make decisions. Another difference is that there is no direct coercive force behind the mufti's decisions, while in the case of qadi's judgments. To this day, muftis are important players in the legal system, and their decisions can even legalize or prevent state acts. As anyone can turn to them with questions, cases awaiting resolution can now be posted on online forums, where answers can also be read, making it easier for Muslim people to find justice.

In a system of law on which the revelations of Allah are based, the Qur'an has the first place in the hierarchy of sources of law. The Qur'an does not see itself as a code, merely as a guideline. In the Qur'an, approximately there are 350 poems with legal content. At the same time, the mediation already appears in the Qur'an: "And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people." (Q- 4:35). "If two parties of believers fight each other, make peace between them; then if *after that* one of them transgresses against the other, fight the party that transgresses until it returns to the command of Allah. Then if it returns, make peace between them with equity, and act justly. Verily, Allah loves the just. Surely *all* believers are brothers. So make peace between your brothers, and fear Allah that mercy may be shown to you."(Q- 49: 9-10).

One of the most important battles in the Arab and Islamic history was in Siffin which was fought not only by weapons, but also by arbitrators. Typically, Upper Egypt and the Sinai Peninsula are still inhabited by large-scale communities, with minor or more severe conflicts. The oldest and wisest members of the families are called upon to resolve them through negotiations, if they do not wish to apply to a state body, the police or a court. The problem arises when a member of a community commits an offense against another member of the community that the state must take action against, like homicide. The perpetrator then receives his/ her punishment (imprisonment) under state law, however, the community nevertheless acts against the opposing community on an "eye for an eye" basis (which has also been applied to this day) and the endless bloodshed begins. Conflicts between communities can be ended if someone from the murderous community "offers his soul," that is, appearing in a white funeral shroud in front of the hostile community (they can kill the person, but they do not), ending the hostility, but because the offering he can no longer be a valuable, esteemed member of the community. So this is an ancient, traditional form of mediation that lives on to this day.

Malay customary law belonging to the Muslim legal culture tried to make it difficult or to prevent divorces, especially those that have been pronounced hastily. Therefore, if a man wants to divorce his wife, he must first hold a small ceremony, the name of which is Besuarang, to which he must invite his and his wife's relatives. Here he presents his grievances and explains the reasons that led to his intention to divorce. At this point, the guests, especially the elderly, get involved and, through mediation between the parties, try to re-establish harmony and avoid a divorce. Divorce can ultimately only take place if the mediation does not lead to any results.

#### AFRICAN LEGAL CULTURE<sup>5</sup>

Today's legal systems in Black Africa are pluralistic, as most of them have three coexisting sources of law:

- customary tribal law,
- colonial law (English, French, Dutch, Belgian, Portuguese, Spanish law), and
- a right created since their independence (the former French colonies, for example, issued more than 100 codes).

The “most massive” of the three is the tribal customary law, which spread through oral tradition and was based on fear of the supernatural forces and public opinion. Breaking the custom risked people reaping the “wrath of the earth,” the most serious consequence of which could be expulsion from the community. Their interest was focused on the group rather than the individual, the cohesion of which was the most important goal, so, for example, obligations pushed individual rights into the background.

A member of an African tribe lives his entire life with the same people, usually with close or distant relatives, and can only achieve all their goals if it is done together with the relatives. Together, they raise, educate, teach their children and make a living together, and form the same political group and religious community. If someone breaks the “law” in any way, it causes confusion that causes chaos over all the other activities.

If in such a small group two people quarrel over the possession of a certain piece of land or cow, it can cause social mayhem or, worse a split in the group, which can lead to the disintegration of the group. The task of tribal judges is not only to determine who is right, but also, in general, to restore the shocked social balance for the survival of the tribe. They must not only decide the case before them, but also reconcile the litigants, while preserving the general principles of the law. This dual goal of enforcing the law and reconciling the parties is the best proof that the principle of natural truth is indeed to be found in Africa.

All of these are well exemplified by an incident in the Tiv tribe in Nigeria. Once a man fell from a tree and fell on another clan member who died, however, the member who fell had no injury. The killer’s clan immediately offered compensation, but the victim’s clan did not accept this and insisted on killing the culprit. As their claim was not waived, this right was also recognized by the tribal judge; but according to the principle of the Talio, the sinner had to be punished in the same way as he sinned. The judge, therefore instructed the killer to walk up and down under the tree, and sent the victim’s relative to the tree to fall from it again and again until the killer got his punishment. This judgment did not bring reassurance to the plaintiff, even though the other relatives of the murdered would have been satisfied with the compensation by then, the judge said that they had already lost their right to do so. Anyone who once refuses to resort to a more compassionate remedy cannot expect lighter treatment, even when the situation turns unfavorable for the person.

According to the most competent researchers, 80-90% of the African population still follows the old way of life and refrains from any modernization movement. In fact, they continue to follow former customary law and prefer traditional arbitration, or even conciliation, over state courts.

## HINDU LEGAL CULTURE<sup>6</sup>

Hindu law is the right of a community in India and other countries in Southeast Asia that professes to belong to Hinduism. For Hinduism, there are only “people” who are classified by the social category to which they belong. People belonging to different castes have specific rights, duties, and even morals, and it also means a defined hierarchy between different categories.

The rules of human conduct are explained by the Sastras, one of which is Dharma. It is based on the belief that there is a universal order inherent in the nature of things that is necessary to preserve the world, and that the gods are only guardians of that order. Dharma expresses the eternal laws that sustain this world. At the heart of dharma is the idea of duty, not law. It dictates to everyone how to behave if they want to be a decent person and care about the afterlife. The duties thus imposed vary according to the circumstances of each person and the age of the individual, and are particularly strict for senior people.

The explanation of dharma can be found in the manuals called dharmasastras and in the brief commentary on these manuals, the nibandhas. Because dharma is incapable of regulating worldly life alone, there are two other sources of Hindu law: custom and fairness. Legislation and judicial precedent are not considered sources of law by dharma and Hindu theory. Judicial organizations may well be established in Hindu law, in the realms and kingdoms of traditional times, yet the reconciliation and conciliation remained the primary means of resolving disputes. This characteristic is related to the fact that the great traditional Eastern cultures, precisely in order to maintain the conditions smoothly and harmoniously, give less importance to the individual and give priority to duty over entitlement.

A number of bodies acting as courts in civil matters could pass judgments, which could be judged by their own law and not by the power delegated by the ruler. The Kula was a kind of family court that ruled on disputes between family members. The Shreni was a court of the same trades ('guilds'), which also had judicial power over its members. Craftsmen, peasants, creditors, dancers, etc. had such courts. It is likely that these bodies dealt primarily with arbitration between members, and their decision should be seen as a compromise proposal rather than a court ruling. Either party had the right to appeal against the aggrieved decision to the ruler, who, however, rarely acted in person.

Although it is not our job to present the strife management of Hindu religious culture, we will touch on it briefly. There are a number of principles that apply to the treatment of strife between a devout and a non-believer, both in prevention and in the aftermath of the strife. In the Hindu conception, conflict prevention and education play a more prominent role. Many principles apply to conflicts between people of different religions, as well as to conflict resolution between people of the same religion. By way of example, the Krishna-believing tradition sees the prevention of strife as the practical realization of loving relationships based on forward-looking and mutual respect between fellow believers.

Let us just mention that even in the Burmese conception of law belonging to the Hindu legal culture, mediation, compromise and the peaceful settlement of disputes were thought to be more important than formal litigation and the conduct of a given case.

#### THE LEGAL CULTURES OF THE FAR EAST<sup>7</sup>

We get a very varied picture of the countries of the Far East, whether we look at their history or their current situation. From this diversity, we believe that, at least from a European perspective, some features can be identified that are characteristic of the entire Far East. Unlike the West, the peoples of the countries of the Far East do not build the foun-

dations of the order of society and justice. Although there is a right there, it has only an ancillary function and a very small role. People only go to court if they apply the law only if the contradictions cannot be eliminated otherwise and the disturbed order cannot be restored in any other way. The solutions of the law and the use of violence resulting from them are most deplored. The social order rests primarily on the methods of persuasion, the mediation process, and on the one hand the vigilance of the constant self-judgment, and on the other hand the spirit of temperance and reconciliation.

Until 1853, Japan, one of the most important countries in the Far East, had no connection with the West, much less with China. There are many historically developed rules in Japanese society that have the origin of decency rather than morality. They regulate the behavior of people so that they must witness to each other in every situation that occurs in their life. These rules of conduct which are similar to Chinese rites are called *Giri*. The mother, son, husband and wife, brothers, owner, creditor, debtor, etc. they all have their separate *giri*. The *giri* replaces the law, and to some extent the moral order, and is followed voluntarily, because by not keeping the *giri* it would provoke the disapproval of society, which would be shameful and destructive to the Japanese. For a respected Japanese man, the law is an undesirable, and even despicable, something to be wary of as far as possible. In a word, the Japanese do not like the law. The Japanese prefer the personal, the concrete, the unique; their round emotional attitude is violated by the angular, rational nature of the law and court proceedings. Japanese society is built on the spirit of *Wa*, which is a peaceful unity and conformity in a social group. There is no place for debate in such a society.

The Japanese, if possible, do not engage in litigation because it is simply incompatible with the traditional Japanese character. However, there are other historical reasons why courtrooms are avoided. Firstly, social stability and the rule of *on-giri-ninjo* provided relatively few opportunities for legal intervention. Secondly, pre-modern Japanese codes were made available only to court officials, and only they could rotate them.

In Japan, even before the pre-trial phase, the first form of conciliation, *jidan*, is used, in which the police play a major role. If the mediator is unable to settle the dispute amicably, the parties will go to court. Throughout the proceedings, the judge must endeavour to reach an agreement between the parties and withdraw from the proceedings (Section 136 of the Japanese Pp. States this). Moreover to this procedure, called *wakai*, it is possible to use a conciliation committee, the *chotei*, to propose a way to reach an amicable settlement. For the sake of appearance, a judge of that committee is not taking part in the proceedings, so that the dispute may appear to have been settled by agreement between the parties, with the successful participation of the two conciliators.

Under current Japanese law, there are two *chotei* procedures: the *kadsi-chotei* for family cases, which is used in family courts and has some special features, and for the civil cases, and the *mindzote*, which is used in all ordinary courts. Every year, 20% of disputes brought before the courts are subject to *chote* proceedings.

According to the Japanese literature, *chotei* is really only a real alternative to legal proceedings for those who have a fairly high level of legal knowledge and good advocacy

skills. At the same time, the Chotei still plays an important role in the judiciary - with its economy (court labor savings, procedural fees). Since 1974, lawyers and non-legal professionals have been the main sources of recruitment and there is an opportunity for selected mediators to receive training.

The conception of the social order in China, which is based on tradition and developed free of all foreign influence until the 19th century, is in stark contrast to the Western conception. The basic idea of this conception, regardless of any religious dogma, is the postulate that there is a cosmic order that interacts between heaven, earth, and people. Whether there is order or disorder in the world depends on the behaviour of mankind as long as they can control their actions, obeying the immutable laws of the Cosmos.

Secondly, the necessary harmony means harmony between people. In social relations, the idea of reconciliation must prevail, and consensus must be sought. Conviction, all kinds of sanctions and decisions made by the majority must be avoided. Disputed affairs should be “resolved” rather than solved and decided. Solutions must be accepted voluntarily by everyone on the basis that they consider it fair. These solutions must not make anyone feel that they are losing their authority. Education and persuasion should come to the fore, not violence and power.

It is a highly respected tradition among the Chinese that a sense of humanity (ching) should be considered first in resolving disputes, rites (li) and rationality (lii) in the second place, and law (fa) should be referred to only last. Today’s Chinese law distinguishes between out-of-court mediation by popular mediation committees and out-of-court mediation by the lowest government judiciary from conciliation within mediation (conciliation). People’s mediation is partly separated from official mediation, where the latter includes mediation by judicial clerks and court mediation. In-court mediation is only required as a procedural condition in divorce cases. Otherwise, with the consent of both parties, mediation may take place as an out-of-court proceeding. If the mediation by the People’s Court fails, the judge who previously conducted the mediation must make a judicial decision in the case immediately. From 2004 onwards, it is possible, with the consent of the parties, for the court to entrust certain bodies or persons with the mediation of the case, and any settlement will be recognized by the court.

Hence, in the Chinese dispute settlement system, traditional mediation, as well as official and court mediation, near-court mediation and court litigation, operate on the one hand - and take a huge burden off the courts in terms of numbers.

The institutional system of mediation committees is structured as follows and linked to the system of government in the metropolitan and rural areas. In the urban area, the highest level is the city government, with subordinate district governments, street offices, and at the lowest level, residents’ committees. In the countryside, the province is the highest level, followed by the county, municipal and small town administrative levels, and the lowest level of the hierarchical chain is the village committee.

The Chinese government regularly provides data on the mediation. According to the 2002 yearbook, 4,636,139 civil disputes were brought to mediators. According to the 2003 Yearbook, 95% of mediated cases were successful in the first three quarters,

although only 70% of the parties stated that they would follow the agreement. In 2003, 139,000 quarrels were prevented, including 19,110 suicides, involving 2,546 people, preventing them from becoming criminal affairs in 45,895 civil quarrels, preventing 126,372 people from fighting, and being involved in gang armed fighting, and preventing group petitions in 41,518 cases, affecting 1,166,417 people. In addition to modernization and the transformation of traditional society, these experiences also play a role in the shift in conflict management towards law and justice, which can be traced statistically, despite the aforementioned embellishment data.

While in 1981 673,926 civil court cases were pending against 7,805,400 mediation cases, by 2006 there were 4,385,732 civil court cases in 4,628,018 mediation cases, so the proportion of the two types of conflict management has almost completely levelled off.

In Asia, the Chinese legal culture is a dominant culture that developed its own conception of law, politics, and society on which the normative structure was built, and then through the export of this complex world, similar solutions emerged elsewhere, with local variants. In particular, it fundamentally influenced Korean and Vietnamese legal thinking, which was nuanced, even modified, by local traditions, but could neither be superseded nor exalted.

If we look at Vietnamese society, it is still not characterized by legal-based thinking, which for many centuries has become accustomed to the law being best regarded as a command of state power. Other means, especially illegal ones, must be used to resolve social conflicts and goals. In this way, legal conflicts are still not resolved primarily in court, but through a system of mediation and coercion in social relations and networks.

As for the other country in China's legal culture, Korea, like Japan, the laws were kept secret and not even made available to members of society. As a result, the law had virtually no social esteem, even less than what is experienced in China.

In criminal cases, they sought to reach an agreement and exclude formal proceedings, which led to the law penalizing private agreements to be condemned, as revenge was considered a moral obligation in the case of the killing of a close relative following the Confucian model. In Korea, *hyangyak* is the institutional mechanism for resolving rural conflict. The meaning of this is a community treaty, an agreement, and its essence is to strictly enforce the Confucian morality again. *Hyangyak* also includes the behaviors expected of members of a given community (village) and their punishment, but left the jurisdiction not to the royal officials but to the local elite, the *yangban*. So the conflicts were resolved locally, thus they were quickly resolved, they remained in place, and much was done for the broad representation of generally accepted Confucian morality.<sup>8</sup>

As a final conclusion, it can be deduced that a clear rearrangement in the world of legal cultures has begun since the twentieth century, in two main directions. On the one hand, Western legal cultures, among other reasons, are exploring and increasingly open to alternative dispute resolution due to civic dissatisfaction with the judiciary. They sort of discover and are open towards the alternative dispute resolution ways. On the other hand, in Eastern legal cultures, the role of law in resolving conflicts is gradually increasing.

## NOTES

- <sup>1</sup> D. Nelken (ed.), 1997.; Kulcsár K., 1997. 129-148.; Péteri Z.: 2010. 80-92.
- <sup>2</sup> Kondorosi F – Maros K. – Visegrády A., 2008. 12.
- <sup>3</sup> Mercz E. – Aradi E. – Posch E., 2011-2013.
- <sup>4</sup> R. David – C. Jauffret-Spinozini – M. Goré, 2016. 369-393.; Glenn, 2004. 170-221.; Bányai F. – Nagypál S., 2014, 119-132; Jany J., 2006.; Visegrády A. 2021, 93-96.; U. Kischel, 2019. 789-852.
- <sup>5</sup> R. David – C. Jauffret-Spinozini – M. Goré, 2016. 481-516.; J. Murungi, 2013; Varga C., 2000. 139-156.; Visegrády A., 2021. 101-104.; U. Kischel, 2019. 631-674.
- <sup>6</sup> R. David – C. Jauffret-Spinozini – M. Goré, 2016. 395-428; Bányai F. – Nagypál S., 2014.; Jany J., 2006.; Visegrády A., 2021. 91-93; U. Kischel, 2019. 752-773.
- <sup>7</sup> R. David – C. Jauffret-Spinozini – M. Goré, 2016. 429-479.; J.M.Smits (ed.), 2012. 137-139.; Jany J., 2016. 396-521.; Jordán G., 2008; Kondorosi F. – Maros K. – Visegrády A., 2008. 109-142.; Bányai F. – Nagypál S., 2014.; U. Kischel, 2019. 675-751.
- <sup>8</sup> C. Kuk, 2010.

## REFERENCES

- Bányai, F. – Nagypál, Sz. (2014): *Közvetítés és vitarendezés a jogi és vallási kultúrákban [Mediation and dispute resolution in legal and religious cultures]*. Budapest.
- Baxi, U. (1991): The Conflicting Conceptions of Legal Cultures and the Conflict of Legal Culture. In: Sack, Peter – Wellman, Carl P. – Yasaki, Mitsukuni (hrsg.): *Monismus oder Pluralismus der Rechtskulturen? [Monism or Pluralism of Legal Cultures?]* Duncker&Humblot, Berlin, 267-282.
- Cotterrel, R. (1997): The Concept of Legal Culture. In: Nelken, David (ed.): *Comparing Legal Cultures*. Routledge, London, 1997.
- David, R. – Jauffret-Spinozini, C. – Goré, M. (2016): *Les grands systèmes de droit contemporains [The major systems of contemporary law]*. (12e éd.) Paris
- Friedman, L. (1997): The Concept of Legal Culture. In: Nelken, David (ed.): *Comparing Legal Cultures*. Routledge, London, 33-40.
- Glenn, H. P. (2004): *Legal Traditions of the World*. (2nd ed.) Oxford, New York.
- Hopt, K. J. – Steffek, F. (2012): *Mediation in Comparative Perspective*. Oxford.
- Jany, J. (2006): *Klasszikus iszlám jog [Classical Islamic law]*. Budapest.
- Jany, J. (2016): *Jogi kultúrák Ázsiában [Legal cultures in Asia]*. Budapest.
- Jordán, Gy. (2008): „Az ég magas, a császár messze van.” *igazságszolgáltatás, jog és politika Kínában [The sky is high, the emperor is far away: Justice, Law and Politics in China]*. Budapest.
- Kischel, U. (2019): *Comparative Law*. Oxford.
- Kohler, J. (1909): *Lehrbuch für Rechtsphilosophie [Textbook for philosophy of law]*. Berlin- Leipzig-Rotschild, passim.
- Kondorosi, F. – Maros, K. – Visegrády, A. (2008): *A világ jogi kultúrái – a jogi kultúrák világa [Legal cultures of the world - the world of legal cultures]*. Budapest.
- Kuk, C. (2010): *Litigation in Korea*. Cheltenham.
- Kulcsár, K. (1997): *Jógszociológia [Legal sociology]*. Budapest.
- Mercz, E. – Aradi, E. – Posch, E. (2011-2013): *Az alternatív vitarendezés helye öt európai országban [The place of alternative dispute resolution in five European countries]*. (Készült a Redict project keretében 2011-2013).
- Murungi, J. (2013): *An Introduction to African Legal Philosophy*. Lanham.
- Nelken, D. (1997): *Comparing Legal Cultures*. Aldershot.
- Noll, P. (1972): Gründe für die soziale Unwirksamkeit von Gesetzen [Reasons for the social ineffectiveness of laws]. In: Rehinder, Manfred – Schelsky, Helmut (hrsg.): *Jahrbuch der Rechtssoziologie und Rechtstheorie 3. Zur Effektivität des Rechts*. Bertelsmann Universitätsverlag, Düsseldorf, 259-270.
- Péteri, Z. (2010): *Jögösszehasonlítás [Comparison of laws]*. Budapest
- Radbruch, G. (1978): Über die Methode der Rechtsvergleichung [About the method of comparative law]. In: Zwe-

- igert, Konrad – Puttfarcken, Hans-Jürgen (hrsg.): *Rechtsvergleichung* Wissenschaftliche Buchgesellschaft, Darmstadt.
- Sajó, A. (1976): Jogi nézetek az egyéni tudatban [Legal views in the individual mind]. *ÁJT*, 3. sz. passim
- Smits, J. M. (2012): *Elgar Encyclopedia for Comparative Law* (2nd. ed.) Chalterham.
- Tárkány, Sz. E. (2003): *Magyar jogi népszokások [Hungarian legal customs]*. Budapest.
- Varga, Cs. (2000): *Összehasonlító jogi kultúrák [Comparative legal cultures]*. Budapest.
- Visegrády, A. (2021): *Mozaikok a világ nagy jogrendszerei tükréből [Mosaics in the mirror of the world's major legal systems]*. Miskolc.
- Watson, A. (1974): *Legal Transplants*. University Press of Virginia, Virginia.
- Watson, A. (1978): *The Nature of Law*. Columbia University.
- Zitelmann, E. (1900): Aufgaben und Bedeutung der Rechtsvergleichung [Tasks and importance of comparative law]. *Deutsche Juristische Zeitung*, 15. sz. 329-332.