THE EFFECTIVENESS OF ALTERNATIVE DISPUTE RESOLUTION METHODS

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Abstract

Historically there have evolved two types of dispute resolution. The first one is the resolution through direct negotiation between parties, maybe with a recourse to experts or supporters. Second one evolved in two forms: The first type of the second form rests on taking a third person into the dispute. Lastly, in some cases, there is no opportunity for the parties to choose, they have an obligation to go to a third person or organisation, who decides through a predetermined measure.

Finding the best conflict-solving methods in a country depends on the legal culture of society.

We will examine methods of dispute resolution and their effectiveness in European, African, Chinese, Japanese, Muslim and Hindu legal cultures by combinng theoretical and empirical methods and using contrasting.

As a final conclusion we can conclude that in the 20th century a clear rearrangement took place in the world of legal cultures, in two main directions.

On the one hand, Western legal cultures - for several reasons - are, as a result of civic dissatisfaction with the judiciary, discover alternative dispute resolution procedures and become more and more open to them. On the other hand, the role of law in resolving conflicts gradually increases in oriental legal cultures.

Keywords: *ADR, legal cultures, courts, non formal mechanisms, effectiveness*
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1. Introduction

As we know, one function of the law is to solve conflicts between citizens and organisations, but it is important to observe that law is only one resort for treating social conflicts. All over the world we can observe sidestepping also the law and judicial organs during the resulotion of conflicts and we can see an increase in recourse to non-formal mechanisms. The reasons for this are various, but we can highlight the effectiveness and flexibility of non-formal methods.

The court is the most important organisation for handling disputes.

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The ADR (alternative dispute resolution) „movement" started in the 1970s in the USA with the purpose of proposing efficient alternatives to litigious proceedings. Nowadays it is prospering, because the efficiency of ADR has been verified. Mediation has increased widely and has become a prefered dispute-resolution method with the development of ADR, because these procedures ensure bigger felxibility and have low complexity. The purpose of parties is to find a respectable solution instead of submission to an external norm system.

2. The concept of legal culture

The subject of legal culture is wider and more comprehensive than would enable us to present its mental richness in one article.

The interconnection between law and culture is not a new phenomenon (Ed. Nelken, 1997; Kulcsár, 1997:129-148; Péteri, 2000:80-92). The conception of culture - recognized in our days - evolved in the 19th century. According to this, culture means everything that is the product of the mental work of persons or society.

According to German Professor Gustav Radbruch, law is only one component of culture.

L. Friedman makes a distinction between inward and outward legal cultures. The first one means the culture of jurists, the second one means the codomain and attitude of laymen.

Upendra Baxi makes a distinction between "residual", "evolving" and "predominant" cultures. The first one is the residuum of the past, lives in the present's cultural procession. Evolving culture joins into the dominant culture very slowly. The status of predominant culture is unstable compared to the first two.

In my opinion, there is permanent interaction between law and culture that can be summarized in two main theses. On the one hand, law is one component of a society's culture, on the other hand, a legal system cannot be imagined without a cultural aspect. Legal culture can be examined by reference

to fundamentally different legal systems. However, such cultures can also be differentiated between systems with a shared history and basis which are now otherwise influenced by factors that encourage cultural change.

Legal culture contains the next main components (Kondorosi, Visegrády & Maros, 2008:12):

a) "law in books" and "law in action"
b) Institutional infrastructure
c) Models of legally relevant acts, and
d) Knowing of law

We can make a distinction between “regulative” and “orientative” legal cultures.

Regulative legal culture means the Western cultures, where law has a real force, relations between people are regulated by law.

In orientative legal cultures the first regulating method is not the law, but mainly morality, custom, equity and the religion influence the society’s life.

- We can observe a major belief in law in the culture of the middle-east-European region. Effectivity of law is influenced by the habits of persons.
- Surveys refer to the legal culture of Hungarian society as having given signs of knowing and commending the traditional-valued measures.
- As a summary we can lay down that the legal culture agree with the measure’s target increases the manner of organs and citizens, otherwise it de-emphasise effectivity of law.
- We cannot find any country where there is a unique and standard legal culture. The reason for this is the complexity of societies.
- There is another conception, which deals with legal subcultures, for example the legal anti-culture of criminal offenders.
- Legal culture is as the product of history, similarly to political culture, that is why it can affect and constitute the realization of the former.

Alan Watson’s theory – the theory of legal transplant – gives an interesting explanation for the progress of legal culture. He verifies with many cases that transplantation of law is a universal, generative factor in law, and the legal culture develops not uprightly from the economic, social and political relations.

3. European legal cultures (Mercz, Aradi & Posch, n.d.)

Hereinafter we will take stock of the operation of alternative dispute resolution in six European countries.

In the Czech Republic there is a defined concept of arbitration, mediation and concilation. According to the statutes there is not obligatory mediation either in civil cases or criminal cases. One and only compulsory direction is the first

meeting, which can last maximum 3 hours, and means a meeting with a mediator. The obligatory exams are prescribed by law for the mediators.

On the whole we can say, an alternative dispute resolution culture is starting to evolve, because of the rise in administrative cases and serious conflicts in society.

In the Slovak legal system there is no factual definition of ADR. We can find various acts constituting dispute resolution beyond courts, like mediation or arbitration. Under the Act 2004/420 mediation is an alternative method for resolving conflicts that derives from a contractual relation. Act 2003/550 governs mediation in criminal cases. In this case, mediation is a dispute resolution process between the plaintiff and defendant.

Act 2004/420 on the solution of family conflicts regulates civil conflicts and disputes deriving from family relations, and commercial or labour relations.

In Lithuania there is a gradual surpassing of the approach that the only way in dispute resolution is turning to court. The mediation process is defined as a civil dispute resolution process. There is a third, independent and impartial person involved in the dispute between the parties. The mediator must meet the requirements that are laid down in European Ethical Codex of Mediators.

In Italy we can find examples of conciliation, mediation and artbitration too.The parties are taking part in negotiations with their solicitors and in some cases with experts, in order to reach an agreement that corresponds the most to the individual expectations.

In Hungary, Act LV of 2002 defines mediation. According to this, mediation is a specific, litigation-preventing process, the purpose of which is to create a written agreement that contains the way of resolving the dispute. Act 2006 of CXXIII provides for mediation in criminal cases.

Nonetheless ADR has historical antecedents in Hungary (for example: judicion in „bigfamilies"), there is a strong aptitude of pleading in Hungarian legal culture which indicates the important role of the court.

Henceforth we will examine ADR in Great Britain. In England and Wales the Ministry of Justice is responsible for mediation in civil and family cases. The Ministry of Justice and Her Majesty's Courts and Tribunals Service configured two mediation process in civil cases, which parties can order their disputes – independently from the value of their claims. The Small Claims Mediation Service is for low value claims. For higher vaule cases (above 10 000 GBP) there is an accreditation system, through the organs one can apply to get into the register.

The field of mediation in family cases is self-regulated. Mediators can join many organizations. Mediation in civil cases is not regulated in any Act or Statute, and it is not a condition of the court process, but there is a duty for the courts, they have to urge the parties to have recourse to the ADR process, if it is possible in the given case.

If the parties can make an agreement on mediation, and it is equitable, they can ask the court to approve their agreement. As a result of this the agreement becomes a legally-binding and enforceable settlement.

4. Muslim legal culture (David, Jauffret- Spinozi & Goré, 2016:369-393; Glenn, 2004:170-221; Badó & Bencze, 2007:245-267; Bányai & Nagypál, 2006:119-132; Jani, 2006:369-393).

Islam belongs to religious legal systems besides Hindu. A common feature of this legal system is that main legal rules are derived from their "Holy Book".

The traditional Muslim law (sharia) is cited by cadi during his judgment, but besides this there are other processes for resolving disputes. In early Islam the "muhtasib's" process was important, who investigated the frauds and misuses in vent. It is different from the cadi's process, firstly, a muthasib could proceed ex officio, and the purpose of the process was intimidation.

Another person in Muslim law is called "mufti". He can be described as a legal bookman, and his task was to make the "fatwas". Anybody can turn to mufti who is uncertain in a given case whether that the given action is true (halal) or prohibited (haram). The process of the mufti is different from the process of the cadi. A cadi can be choosen only from healthy, free Muslim men. A mufti could be a woman or slave too. Another difference is that the mufti's verdict, unlike the cadi's verdicts, has no binding force.

Muftis are very important actors of legal life nowadays too, questions can be sent to them on the internet.

The highest legal source is Koran. In this holy book of Islam, we can find reference to mediation.

"If they were afraid that they would break between them, send them a mediator from the husband's and another from the woman's family. If both want reconciliation, then God will make them happy." (4,35.)

"If two groups of believers fought one another, confess them. But if one continues to suppress the other, fight the oppressor until he returns to the commandment of God. And if he returns, then bind between them fair peace, and do righteousness. God loves those who do righteous deeds. Believers are brothers. Create peace between your two brothers and fear God for grace." (49,9-10.)

Typically, in Upper Egypt and in the Sinai Peninsula, large families continue to exist today, where minor or more severe conflicts occur. The oldest, wisest members of the family have negotiations, if they do not wish to turn to state bodies, the police or the courts.

The problem arises when a member of the community commits a crime against another member of the community, for example, homicide. The perpetrator is then punished by state law (imprisonment), but the community nevertheless acts against the opposing community on the basis of the "eye-to-eye" principle (which is still applicable today) and the infinite bloodshed begins.

The conflict between communities can end when a person committing a "homicidal" or "white-burial" commits a hostile community (quasi-killing, but not doing), ending hostility, but offering cannot be a valuable, esteemed member of the community. This is therefore the ancient, traditional form of mediation, which still lives.

Malay customary law belongs to the Muslim legal culture and it tried to make divorces difficult, especially those that were said to be premature. Therefore, if a man wants to divorce his wife, first a small celebration must be arranged, which is called „besuarang". Here he can present his grievances and explain the reasons of the divorce. At this time, the invited people, especially the elderly, are involved and through mediation between the parties, they try to reconcile their relationship again and avoid divorce. In the end, divorce can only take place if mediation does not lead to any results.

5. African legal culture (David, Jauffret- Spinozi & Goré, 2016:481-516; Murungi, 2013; Varga, 2000:139-156)

Today's legal systems in Black Africa are plural, in most of them there are three types of legal sources present together.

a) Tribal customary law

(b) The law of the colonial period (English, French, Deutch, Belgian, Portuguese, Spanish) and

c) The law applied since independence of France.

Among the three, the "most massive" is tribal customary law, which was spread through oral tradition and was based on fears of supernatural powers and public opinion. The violation of the custom brought people the danger of "rage on the earth", the most serious consequence was outlawing from the community. Their interest was directed at the group instead of the individual, whose cohesion was the most important goal, for example, obligations effaced the individual subject's rights.

If two people collide over the possession of a certain piece of land or cow, this could rock the whole social situation and - in worse cases - lead to the breakup of the group. Tribal magistrates not only have the task of finding out who has right; but also to restore the disadvantaged social balance to enable the tribe to survive. They must not only decide on the matter before them, but also have to defend the litigious parties - while maintaining intact the general principles of the law. This dual purpose, the enforcement of law and the reconciliation of the parties best demonstrate that the principle of natural truth is indeed found in Africa.

According to most prominent researchers, 80-90% of the African population continue to follow the old way of life and keep away from any modernization movement. Actually, they continue to observe the customary tradition, the arbitrary arbitration or even more conciliation of the state against the state courts.

6. Hindu legal culture (David, Jauffret- Spinozi & Goré, 2016:395-428; Bányai & Nagypál, 2014:133-143; Jany, 2016:295-338)

Hindu law is the law of the community in India and other countries of South-East Asia profess Hinduism.

In Hinduism, there are only "humans" who are classified by the social category to which they belong. People belong to different castes, have specific rights, duties and even morals, and they also have a defined hierarchy of the different categories.

The rules for people's behavior are contained in the „sastras", one of them is dharma. It is based on the belief that there is a universal order inherent in the nature of things that is necessary for the protection of the world, and the gods are just the guardians of this order. Dharma expresses the eternal laws that govern this world. In the axis of dharma lies the notion of obligation, not the law. It tells everyone how to behave if they want to be a decent person.

The explication of dharma can be found in the manuals called dharmasastras and in the short commentary of these manuals, in the nibandhas. Since dharma is unable to regulate secular life alone, Hindu law has two other sources: custom and equity. Legislation and the judicial precedent are not considered by law as Hindu.

In Hindu reconcilation and mediation remained the primary resorts of resolving disputes. This feature is related to the fact that the great traditional oriental cultures, in order to maintain the unrestricted and harmonious nature of relations, attach less importance to the individual and give priority to the duty.

In civil cases, civil law courts could deliver judgments that could adjudicate on their own and not based on the right delegated by the ruler. The tower was a sort of family court ruling on disputes between people belonging to the family. The „śreni" was the court of the same craftsmen ("guilds"), in which members also had the right to dispose over the members. Such courts had craftsmen, peasants, money launderers, dancers, and so on. It is likely that these bodies are primarily concerned with arbitration between members.

There are a number of principles for dealing with the divine and non-divisive people's conflict, both for prevention and for post-conflict rebellion. In the Hindu conception, the role of disagreement and the education of this is more pronounced. There are a number of principles that apply to the conflict between people of different religions, as well as to conflict resolution between people of the same religion.

For example, the Krsna-believer tradition sees the practical realization of conflict prevention in the care of affectionate relationships based on forward-looking and mutual respect among the peasants.

It is only mentioned that mediation, compromise, and the peaceful arrangement of disputes were considered in the Hindu legal culture as a formal lawsuit in Burma, such as formal litigation and the conduct of the case.

7. The Far Eastern legal cultures (David, Jauffret- Spinozi & Goré, 2016:429-479; Ed. Smits 2012:137-139, 462-479; Jany, 2016:396-521; Jordán, 2008; Kondorosi, Maros & Visegrády, 2008:109-142; Bányai & Nagypál, 2014:61-74)

Looking at the history of the Far East, we get a very diverse picture. From this diversity, we believe that at least European eyes can notice certain features that are characteristic of the Far East. Contrary to the West, peoples of the Far East do not build the foundations of the rule of law. Although there is law there, but it has a very minor role.

To the Court, people only turn if conflicts cannot be eliminated otherwise, and the disturbed order cannot be restored otherwise. The solutions of the law and the use of violence contained in them are mostly disapprovEd. The social order rests primarily on the methods of persuasion, the mediation process and on the other hand the constant awakening of the self-image and the spirit of temper and reconciliation.

One of the most prominent countries of the Far East, Japan, by 1853 had no relationship with the West, but with China. The gyr replaces the right, and to some extent the moral order, and is voluntarily followed, for failure to keep up with the approval of society would be shameful and disturbing to a Japanese.

For a respected Japanese human being, the law is undesirable, and even despicable. In other words, the Japanese do not like the law. The Japanese prefer personality, specificity and individuality, and their round emotional attitude is hurt by the angular, rational nature of law and court proceedings.

Japanese society is based on the spirit of wa, harmony, and agreement. In such a society, there is no place for debate.

There is another, historical, reason why they avoid the courtrooms. Firstly, social stability and the rule of on-giri-ninjo have given relatively little opportunity to bring about the need for legal intervention. Secondly, the Japanese codes of the modern times were only made available to court officials.

In Japan, prior to the pre-trial phase, the first form of reconciliation, the „jidan", is used in which the police have a major role.

If the dispute has not been passed on to the mediators, the parties will turn to court. The judge must endeavor, throughout the trial, to reach agreement and withdraw from the lawsuit. In addition to the procedure called „Wakai", there is the possibility of using a conciliation committee, called „chotei", which proposes a peaceful settlement. For the sake of appearances, a member of this committee does not take part in the negotiations, so it may seem that the dispute has ended with the agreement of the parties, with the successful involvement of the two conciliators.

Current Japanese law has two chotei procedures: the kadzsi-chotei family affairs, which are used in family cases and have some special features and civil affairs; as well as the mindi-chotei used in all ordinary courts.

Every year, 20% of the litigation brought before the courts is a chotei process.

The concept of social order is based on tradition in China. Until the 20th century, it evolved out of all the foreign influences, it is in direct opposition to the western conception. The basic idea of this concept, irrespective of any religious dogma, is the postulate that there is a cosmic order that interacts between heaven, earth, and humans. Heaven and earth are obedient to unchangeable laws, while men do their work; their behavior depends on the order or disorder in the world. The necessary harmony means harmony between people. In social relations, the idea of reconciliation must prevail, consensus needs to be sought. Condemnation and all kinds of sanctions are avoided, and decisions are made by the majority. Controversial issues should rather be "resolved" than solved and decided; the solutions must be accepted voluntarily by everyone on the grounds that they consider them fair; these solutions should not cause anyone to feel that they have lost their authority.

It is a highly respected tradition for the Chinese to consider the sense of humanity (ch'ing), secondly the rites (li) and the rationality (lii), and to refer to the right (fa) in the first place.

Today's Chinese law distinguishes out-of-court mediation by court mediators from the people's mediation commissions and the lowest government by negotiating in court and negotiating arbitration (conciliation) proceedings.

Folk mediation is partially separated from official mediation, which latter involves mediation and judicial mediation by judicial officers. In-court mediation is only prescribed for divorce cases as a procedural requirement. Otherwise, mediation can be given as a court procedure in the case of both parties agreeing. If the mediation by the People's Court is unsuccessful, the judge who has previously led the mediation must immediately take a judicial decision on the case. From 2004 onwards, it is possible with the parties' consent for the court to entrust certain bodies or persons with the mediation of the case, and any agreement may be recognized by the court.

The Chinese government regularly reports on mediation. According to the Yearbook of 2002, 4.636.139 civilian disputes were sent to mediators. According to the Yearbook of 2003, 95% of the mediated cases were successful in the first three quarters, though only 70% of the parties stated that they were following the agreement. In 2003, there were over 139.000 disputes, including 19.110 suicides.

Along with modernization and the transformation of traditional society, these experiences also play a part in the fact that there has been a shift in the law and the judicial process in conflict management.

In Asia, Chinese legal culture is a dominant culture that has formed its own legal, political and social concept for which the normative structure has been built, and similar solutions have been found elsewhere with local variants through the export of this complex world.

If we look at the Vietnamese society, it is still not characterized by law-based thinking, over the centuries people have accustomed to the rule of law as the rule of state power. To solve social conflicts and goals, other, mostly off-the-shelf tools should be used. In this way, legal conflicts are not solved in court at present, but through mediation.

Conclusion

As a final conclusion we can conclude that in the 20th century a clear rearrangement took place in the world of legal cultures, in two main directions.

On the one hand, Western legal cultures - for several reasons - are, as a result of civic dissatisfaction with the judiciary, discover alternative dispute resolution procedures and become more and more open to them. On the other hand, the role of law in resolving conflicts gradually increases in oriental legal cultures.

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