

ALTERNATIVE DISPUTE RESOLUTION IN PACIFIC ISLAND COUNTRIES^[1]

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“Dispute Resolution” takes place in each and every culture. Its modern forms are so expansive that Goldberg, Green and Sander refer to a “disputing universe” and suggest taxonomy of procedures based on the “primary processes” of negotiation, mediation, and adjudication. We understand from the “dispute resolution continuum” that practices range from those in which the parties retain full control of the process, to those in which the parties yield control to one or more third parties. In each jurisdiction the extent of formal participation in dispute process by state agencies varies in accordance with tradition, culture, and need. In the past several decades formal dispute mechanisms, including judicial, have become open to a range of additional practices.

Most Pacific societies are familiar with the ideas of “alternative dispute resolution” without necessarily being familiar with the term. As Vanuatu Chief Justice Lunabek informed a conference on conflict resolution held in Vila in 2000:

“ADR is not a new concept to Pacific Island jurisdictions and, in particular, to Vanuatu. It is, in fact, consistent with traditional methods of dispute resolution that predated the introduction of the formalised system of justice”^[3]

Anthropological investigation has contributed considerable information on such elements of customary dispute resolution as scope, structure and process, duration, visibility, location, desired outcomes, reasoning, remedies, standing (to participate), and patterns of communication.^[4] Traditional systems of customary law often incorporated a sliding scale for conflict resolution: different approaches were applied to conflicts inside the village and the kin-group, in distinction to conflicts with others: the former were solved through ceremonies (including sorcery), compensation and exchange; the latter, through endemic warfare.^[5] For many groups, moreover, the exercise is one of conflict management rather than resolution:

...no victory was every complete, no defeat ever final.^[6]

The resolution of conflict is described as being "deeply embedded in the culture" in many societies, so that its structures remained unobtrusive. Black, writing of the Tobi of Micronesia, reports:

On Tobi, disputes were generally acknowledged and managed in an extremely indirect fashion. The expression of overt conflict, or even its direct acknowledgement, was resisted because of the Tobian truism that to do so would bring on disaster by endangering the essential web of relationships of mutual support (particularly in the exchange of labour and food) which bound everyone to everyone else. Tobian techniques of conflict management, as

might be expected in light of the foregoing, also tended to be very inexplicit and to operate in rather indirect and subtle ways.^[7]

Among the Dou Donggo, similarly,

There is a strong feeling that disputes, conflicts, and misbehaviours are matters for the community to deal with internally. There is a strong disposition to avoid washing dirty linen in public, and a general reluctance to involve authorities from outside the community.^[8]

Constraints on conflict in Papua New Guinea, particularly, include the use of reciprocity, a principle of major significance in Melanesia, both substantively (items) and symbolically (rituals). This includes gift exchanges between groups (e.g. pigs, bride-price, and now money and beer) as well as aggressive retaliation. Such reciprocity provides appropriately-scaled balancing mechanisms that do militate against excessive or cumulative imbalance and violence which could negate survival viability.^[9]

Legal anthropological investigation has reported, also, on the effectiveness of court systems. Chalmers and Paliwala point out that the form of law and legal processes are much less rigid in many customary societies in comparison with Western law.^[10] Rules of law are often stated in the form of argument. The forms of dispute settlement give much greater emphasis to what the parties wish - in particular the need to come to amicable settlement of disputes between people and groups.

It is also the case, on the other hand, that there are different levels of awareness of alternative dispute resolution procedures within jurisdiction across the Pacific region. An initial inquiry suggests that in some smaller jurisdictions, such as Nauru for instance, there is little or no awareness of ADR practices.^[11] In Tonga there are no common mediation or arbitration practices or mechanisms, and only on rare occasions have arbitration provisions been included commercial contracts.^[12]

There are, on the other hand, several Pacific jurisdictions - notably Fiji, Solomon Islands, Papua New Guinea and Vanuatu - in which ADR processes are known to the courts, and to other state agencies charged with upholding the rule of law. Labour officers throughout the region have statutory obligations to try to resolve disputes through mediation.^[13] The Fiji Human Rights Commission has conducted conciliation sessions to address issues of discrimination.

Scholarship on dispute resolution in Pacific societies is still discussing the ways in which traditional forms of conflict resolution remain valid and effective in the present day. There has been a very active grass-roots mediation movement in Papua New Guinea and Bougainville.^[14] It is interesting to note, however, the similarity in fundamental approaches to mediation presented in the work of, for example, the mediation and restorative justice training offered at Divine Word University in Madang, Papua New Guinea, and the work of Christopher Moore.^[15] The program at Divine Word University, for instance, offers a nine-step mediation process:

1. Talk to each person or group separately
2. Allow each to set out their needs
3. Brainstorm options for dealing with the conflict
4. Select options for dealing with the conflict
5. Assist the parties in their bargaining to modify the options to suit both parties
6. Write down the agreed options and give time for discussion and further negotiation if necessary
7. Write an agreement
8. Set a time to reopen the matter if one party fails to carry out their agreement

9. Reconciliation

This “mediation path” is very similar to that taught world-wide, and the cultural content of the mediation process is evidently woven into the manner in which the process is carried out. The “Talanoa” interactive dialogue process being advocated by Sitiveni Halapua, Director of the East West Centre’s Pacific Islands Development Program, seeks a less formalised and possibly more ‘intuitive’ approach. It has been used in Fiji, Tonga, and Hawaii to bring leaders together in an effort to solve political and public policy disputes. To date there has been no assessment, however, of the effectiveness of the approach in resolving the difficult issues facing the parties, at least in Fiji. In Tonga, on the other hand, Dr. Halapua’s facilitation is credited with resolving a dispute between public servants and the government that had lasted 44 days and thwarted the hopes of other mediation efforts.^[16]

Mediation and ADR can be regarded as one facet of the larger projects ‘peace-building’ and ‘conflict reduction/prevention’, which are gaining attention at global and regional levels, with a follow-on effect for the Pacific Island countries. There are, for instance, the “Global Project for the Prevention of Armed Conflict” organised by the European Centre for Conflict Prevention (2003-2005), and a 2005 “Workshop on Peace-Building and Conflict Prevention in the Pacific Islands” organized jointly by the Pacific Islands Forum Secretariat and the United Nations Department of Political Affairs (Nadi, 25-27 April 2005).

There are now numerous ‘conflict monitoring projects’ around the globe: International crisis group; Conciliation Resources, and others. Human Rights organizations, particularly Amnesty International, have contributed to alerting the international community of Pacific conflicts.^[17] UNIFEM is developing “early warning” capacities, beginning with Solomon Islands.^[18] Of the NGOs, perhaps Conciliation Resources is most familiar with Pacific conflicts. It has published a comprehensive study of the Bougainville conflict, and is a partner to the Citizens’ Constitutional Forum. The Pacific Concerns Resource Centre has recently undertaken a feasibility study for the establishment of a “Pacific Conflict Transformation Network.”^[19]

In early 2005 the Peace and Conflict Studies program at USP surveyed the extent of current practices in ADR in Pacific states, in preparation for the convening of the 3rd Asia Pacific Mediation Forum in Fiji in 2006. The findings of this survey, covering ADR and mediation training; court annexed and non-court annexed mediation; and provision for the use of ADR in legislation, are provided in point-form below.

ADR/MEDIATION TRAINING

Pacific

University of the South Pacific

§ ADR is taken as a major component of the Civil Procedures course in the LLB Program at the USP Law School.^[20]

§ “ADR is intensively taught in the Professional Diploma in Legal Practice (PDLP) which law graduates from Vanuatu have to take at IJALS (USP) before they can be admitted to the Bar.”^[21]

§ The Pacific Institute of Advanced Studies in Development and Governance is establishing mediation training in its Peace and Conflict Studies Program.

Fiji

Ecumenical Centre for Research Education and Advocacy

§ Provides mediation training (with Eastern Mennonite University).^[22]

Guam

- The Inafa'maolek Mediation Centre has been established to establish conflict resolving dialogue through use of both traditional Micronesian systems of dispute resolution, as well as contemporary approaches.[\[23\]](#)

Hawaii

- Mediation Centre for the Pacific
- The East West Centre
- Aids in facilitating dialogue.[\[24\]](#)

Papua New Guinea

- Divine Word University
- Peace and Conflict Resolution Course taught by Pat Howley.[\[25\]](#)

Solomon Islands

High Court

- A session on ADR related concerns was planned for the end of March 2005.[\[26\]](#)

University of Queensland ACPACS

- Has conducted mediation training for the National Peace Council.[\[27\]](#)

Solomon Islands Development Trust

- In 2002, members of Peace Foundation Melanesia trained 18 staff from SIDT and other Solomon Islands' NGOs in the Restorative Justice Program they had developed on Bougainville. By 2005 SIDT was using the program with prisoners, villages, women's organizations, and police. In 2005 Rove prisoners graduated from a 12-week Restorative Justice certificate program and approximately 55% of the uniformed police had undergone similar training since 2002 while others had attended a one week course on conflict resolution.[\[28\]](#)

Vanuatu

- "Mediation skills training for employees of the Ombudsman and mediation policy development in the Ombudsman Office has taken place. Some mediation pursuant to the Ombudsman Act has taken place. Internal policy guidelines for the use of mediation by the Ombudsman have been drafted."[\[29\]](#)
- "Vanuatu Public Service lawyers were given an introduction to mediation (concepts more

than skills) during the 2003 Continuing Legal Education sessions sponsored by the Vanuatu Legal Strengthening Project.” [30]

• Senior public sector employees took part in two day workshops on dispute resolution and management in April and July, 2005.” [31]

COURT-ANNEXED ADR

Federated States of Micronesia

- There is no government branch involved in dispute resolution. Courts have encouraged out of court resolutions in the past by pressuring for settlement, but this is at the judge’s discretion. [32]
- No ADR programme is available to the Chief Justice’s knowledge. However, there is awareness. [33]

Fiji

• “Out of court settlement is encouraged in Fiji though it is very much initiated by the lawyer. There have been cases though, especially in minor offences cases where the magistrate has ordered that the two parties resolve the matter before a suspended sentence and or a compensatory order is made, usually the cost of repairs, etc.” [34]

Papua New Guinea

• The National and Supreme Court has an alternative dispute resolution program, chaired by Justice Ambeng Kandakasi.

Vanuatu

Supreme Court

- Provides for Alternative Dispute Resolution.
- “The Community Legal Centre does engage in negotiation as a means of resolving disputes. This occurs on a regular basis in accordance with clients' instructions, much as it does in other legal practises. There are no precise statistics on this. The Community Legal Centre acts for one party and does not provide mediation services at this time.” [35]

NON-JUDICIAL ADR

Fiji

Fiji Employers Federation

§ Mediation training offered by the Australian Conflict and Dispute Centre and Macquarie University, February 21-5, 2005. [36]

Fiji Human Rights Commission

§ Uses conciliation as a Constitutional and legislative requirement to attempt to resolve disputes or complaints of violation of human rights, whether in the work place or other. It is a requirement that the two parties are called together, if they are both willing to come together, and a resolution is sought within the Commission, and confidentiality is strictly observed, failing which, the Commission takes the matter further to court” [37]

§ Provides for “conciliation/mediation conducted by an impartial third party where the parties to the complaint agree to a mutually acceptable resolution” as part of an outcome in its Complaints Procedure. [38]

- David Spencer and Bill McCabe conduct Mediation training. [39]

Samoa

- A Committee was set up to look at ADR following a seminar in 2004, but little formal progress has been made. [40]

Solomon Islands

- The Ombudsman uses a pro-active approach, by aiming at educating people on the importance of complying with rules and regulations, conducting workshops on good governance, public accountability. The Ombudsman believes non-compliance by public officials is a serious problem in creating disputes. Acts on an advisory basis, by only giving recommendations. A workshop for National Politicians was to be held in June 2005. [41]

Vanuatu

- Chiefs can play a major role in resolving disputes, or be a primary means of resolution. They are sometimes used as a “last resort”, following discontentment with public solicitors. [42]

Department of Labour

- Labour officers have a statutory obligation to try to resolve disputes through mediation. (In other countries throughout the region labour officers carry out similar functions.)” [43]

ADR IN LEGISLATION

Fiji

- In 2005 the Qarase government introduced the “Reconciliation, Tolerance and Unity Bill”,

which seeks “closure” to the legal proceedings that have followed the coup attempt of 2000. While the bill advocates a “restorative” approach to justice, it has stirred much opposition from those who resist the application of a “restorative” approach in preference to a more “rights based” application of justice and punishment.

Marshall Islands

- There is an Arbitration Statute, which Chief Justice Ingram reports is never used.^[44]

Papua New Guinea

- Public Services Conciliation and Arbitration Act 1969.
- [Industrial Relations Act 1962](#) provides for the establishment of arbitration tribunals, and used of negotiation in settlement of industrial disputes.
- [Organic Law on Provincial Governments and Local-level Governments](#) provides for an Arbitration and Mediation Tribunal for all inter-government disputes.
- Fairness of Transactions Act 1993 provides for mediation (through the court) or arbitration through an Arbitration Tribunal (chosen by parties involved).
- [Oil and Gas Act 1998](#) provides for “land Mediators” to mediate disputes over title to customary lands, and for arbitration in case of dispute between government and other party.
- [Arbitration Act 1951](#).

Vanuatu

- [Trade Disputes Act \(Cap 162\)](#), Part III, Conciliation and Arbitration in Trade Disputes.
- [Customary Land Tribunal Act 2001](#) has provisions for Land Tribunals; this mechanism is an alternative form of dispute resolution.
- [The Island Courts Act \(Cap 167\)](#) provides for grass-roots, custom based justice systems, under the state’s judicial framework:

PROMOTION OF RECONCILIATION

20. The court may promote reconciliation and encourage and facilitate the settlement in an amicable way, according to custom or otherwise, of any proceedings for an offence of a personal or private nature punishable by imprisonment for less than 2 years or by a fine only, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.

- “Vanuatu Civil Procedure Rules No 49 of 2002 includes Part 10 which deals with the referral of cases by judges to mediation, the staying of matters, pending outcome of mediation and the registration and enforcement of mediated settlements as orders of the court. Recently, judges have begun using these rules to refer cases for private mediation. This is just a trickle at the moment and will require confidence building and indications of success but it will probably increase during the next year.”^[45]
- The Ombudsman Act 1998 - provision (section 13) “authorizes and in some cases directs the Ombudsman to deal with complaints which are within the Ombudsman's jurisdiction by way of mediation. This has been implemented sporadically. There are ambiguities in the legislation and inconsistencies in the statutory role of the Ombudsman which limit the extent

that this can be usefully employed. Capacity limitations in the office also affect the use of mediation by the Ombudsman's office.”^[46]

- The Commissioner for Labour indicated an awareness of conciliation/mediation/arbitration provisions in an act, but did not regard them as “main stream”. There is ongoing discussion with the ILO about legislative review to improve dispute resolving mechanisms.^[47]

OTHER CONFLICT RESOLUTION INITIATIVES

Pacific

- Pacific Concern Resource Centre - survey on feasibility of Pacific Conflict Transformation network.
- East-West Centre, Hawaii, aids in facilitating dialogue.^[48]

Fiji

Ministry for national Reconciliation and Unity

- Does not offer training in ADR but is meant to provide the framework for communities to go through dispute resolution processes. Pro-actively use advertisements and various Radio and Television events to raise awareness and encourage reconciliation. Working on conflict/stability indicators.^[49]

Papua New Guinea

UNDP

- UNDP has a programme that explores “traditional / village court justice systems”.^[50]

PEACE Foundation Melanesia (PFM)

- Conducts mediation training and restorative justice training in settlements.^[51]

Solomon Islands

Department of Justice and Legal Affairs

- No ADR Programs. All complaints made through the Police directly go to court. However, at the village level, disputes are often resolved through the Chiefly system.^[52]

UNDP

- Runs a conflict prevention program.^[53]

- Has a programme that explores “traditional / village court justice systems”. [54]

Tonga

- In civil cases Judges will encourage disputants reaching out-of-court settlements but there is no legislative framework requiring that this be sought. [55]

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[4] Groves, for example, documented conflict resolution customs in Papua and New Guinea. In one report on court sessions on Tabar which appeared to a European “to waste much time”, Groves wrote “...a single case sometimes occupies some hours. But from the natives' point of view the proceedings are valuable, and the time not wasted. The air is cleared, and a feeling of satisfaction is produced just because the whole matter has been brought to public notice” (Groves, Settlement of Disputes, 503).

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