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BLENDING TRADITIONAL APPROACHES TO DISPUTE RESOLUTION IN FIJI WITH RULE OF LAW - THE BEST OF BOTH WORLDS

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PROBLEM SOLVING COURTS: Blending Traditional Approaches To Dispute Resolution In Fiji With Rule Of Law – The Best Of Both Worlds

Ratu Filimone Ralogaivau

INTRODUCTION

It may be said that the techniques of “alternative dispute resolution” that are being explored with such vigour in the west will be theories that find their substance in the practices of the Pacific.

In traditional Pacific societies most disputes are (and have been) settled through some form of negotiation or adjudication. From time to time the courts in Fiji are faced with “*issues of the usage of custom and traditional apology rituals to mitigate the seriousness of the offences. These are indicative of the plural ‘legal’ systems which are characteristic of the Pacific where customs, tradition and the formal legal system tend to co-exist and overlap.*

There are a number of traditional dispute settlement mechanisms that have existed in Pacific Societies for a very long time. Some follow simple forms of apology where minor disputes are settled informally between families, whilst others take on a more structured court like process with some kind of formal assembly of disputants and community members presided over by a designated person or group of persons who act on behalf of the community to settle the dispute.

...Social and family pressures of any and every kind are brought to bear on the disputing parties to shift ground, to accept, to compromise and to settle the dispute...

The common element of these various models of traditional dispute settlement in Pacific societies is characterized by one of a peaceful settlement, compromise and agreement where communal interests outweigh individual rights and interests.”¹

In Fiji, community has played a large part in dispute resolution and in fact is central to many of the local dispute mechanisms. The community acts as a monitoring and arbitrating presence providing an arena for private feelings to be vented in a public manner and acting as a “safety measure and a sanctioning device to the confronting parties.”²

Concepts of ‘community’ as an important factor in dispute resolution are being explored in western jurisprudential philosophies through approaches such as “restorative justice” and mediation. These are different approaches to the traditional formal adversarial system - a system which may be characterized as relatively impersonal.³

¹ Chief Justice of Fiji, His Honour Justice Daniel V. Fatiaki. (March 2005) “Opening address to Alternative Dispute Resolution (ADR) workshop” Suva, Fiji Islands np

² Ravuvu, Asesela (1995) *Vaka i Taukei : The Fijian Way of Life* Institute of Pacific Studies of the University of the South Pacific at page 109.

³ In an adversarial system, the different parties are usually represented by the State in criminal matters and by lawyers if attending as an accused person or in civil matters and may not ever speak in court. The adversarial system is a controlled and formal process dominated by rules of evidence and procedure.

Restorative justice brings victims and offenders together in a safe and structured manner before the sentence is imposed to discuss the harm caused by the crime. Principles of restorative justice operate on the basis that offending behaviour may be prevented in the future if the offender is aware of the consequences of their actions and the harm caused to the victim. It is a means of structuring a process whereby the offender accepts responsibility for their action.

This process may also allow a victim to address the offender in such a way as to remove their fears which have developed as a result of the crime and where possible to begin a healing process.

Such approaches accord well with the “traditional” approaches to dispute resolution in pre-colonial Fiji.

The “traditional” approach to issues of dispute resolution and justice that has been applied over time in the Fiji Islands is described by Ravuvu⁴ who writes;

“When one man gets angry with another, he is expected to subdue his anger and make an effort to overcome it quickly. Failing this he should make an effort to amicably talk to his adversary, after which both should settle their differences and be friendly to each other again. Customarily, the person who initially caused the unhappiness and proved wrong during the confrontation is expected to be apologetic and express sorrow for his action. It is appropriate for him to offer the injured party an i soro or i bulubulu (object of appeasement) in terms of a number of tabua or an appropriate amount of yaqona. It is bad taste to continue one’s anger after an act of appeasement is executed. Where two parties cannot resolved their differences or cannot see eye to eye, it is the duty of a third party recognised by the two in conflict to initiate an act of appeasement in which an atonement is preferred to the conflicting parties. Once the ritual presentation and acceptance of the atonement is executed, the two parties are supposed to forget their differences and to be once again agreeable and friendly to each other. The party which does not accept the invitation to accept the atonement will be in the wrong and considered lacking the tovo vakaturaga inherent only among the worthy members of a Fijian community. He is either ignored or will be publicly ostracized for not recognizing custom.”

In spite of the legal supremacy of British colonial law in Fiji since 1874, local systems of dispute resolution remained in force.

*“...customary practices of conflict resolution have continued at the community level. Many of these have been successful in maintaining communal coherence and good relations. They are practiced mainly at a communal level involving entire kinship groups although the dispute may have originated between two individuals. The cultural logic is that individuals are part of a larger socio-communal setting and that the whole group needs to be involved in repairing social fractures and rehabilitating those individuals concerned. The group becomes the guarantor for community peace and ensures that fractious individuals conform to collective expectations. In the Fijian language, community peace building translates roughly as veisaututaki and conflict resolution as veivakameautaki. One of the means by which these are achieved is veisorosorovi.”*⁵

At the risk of simplifying a very complex concept, “veisorosorovi” is a process well described by Ratuva in his important essay “Reinventing the cultural wheel.”⁶ In essence, it is to “ask for forgiveness while

⁴ Ravuvu op cit at page 110

⁵ Ratuva, Stephen (2003) “Reinventing the cultural wheel: re-conceptualising restorative justice and peace building in ethnically divided Fiji” in Dinnen, Sinclair (ed) et al “A Kind of Mending: Restorative Justice in the Pacific Islands” Pandanus Books ANU pp149-163 at page 156.

⁶ *ibid*

admitting fault ...as a means of redressing conflict between two parties and involves the interplay between socio-cultural and psychological factors.”⁷

In fact, although there has been a formal legal system based on the Westminster model, there have been parallel systems of dispute resolution in Fiji since colonial times. That it has been an issue for Fiji since independence in 1970 is reflected in the current Constitution that allows for the enactment of specific laws for distinctive linguistic and cultural groups.⁸

The Constitution⁹ of the Republic of the Fiji Islands requires that “The Parliament must make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes.”¹⁰ Regard must be paid to the “customs, traditions, usages, values and aspirations of the Fijian and Rotuman people”¹¹. The Constitution also addresses issues of customary fishing rights and the extraction of minerals from the land or the seabed.¹²

Also within the Constitution, in the chapter entitled “Bill of Rights,”¹³ are essential provisions asserting the right of every person to equality before the law.¹⁴ It is not constitutionally possible to set up a system of courts and laws that apply to any one group of people defined by reference to race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability or opinions or beliefs.

Furthermore, in a significant review of the Fijian Administration¹⁵ it was recommended that:

*“The establishment of courts solely for Fijians is a retrograde step because it will encourage two systems of justice. We propose that the jurisdiction of the Magistrate’s Court should be extended to ensure easier access and more timely justice in the rural areas. These courts would administer village by-laws and other remedial measures to be applied locally. This would allow people in the rural areas to be dealt with in their environments.”*¹⁶

There was also concern that little of the Fijian customary law remained operational or viable --- however approaches to dispute resolution were known and applied within the different communities.

⁷ Ibid at page 156 Ratuva states these factors as: the ceremonial setting, admission of mistakes, reciprocal engagement, pre-emptive approach, trust and expectations and transforming and crystallizing collective relations” see pages 156-159.

⁸ The Banabans are not specifically included in the 1997 Constitution though there is specific legislation in force in Fiji for this group of people.

⁹ **Constitution (Amendment) Act 1997 of the Republic of the Fiji Islands**

¹⁰ Section 186(1) of the **Constitution (Amendment) Act 1997**

¹¹ Section 186(2) of the **Constitution (Amendment) Act 1997**

¹² Section 186(3) of the **Constitution (Amendment) Act 1997**. Legislation is currently under consideration.

¹³ Chapter 4 of the **Constitution (Amendment) Act 1997**

¹⁴ Section 38(2) *A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:*

- (a) *actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or*
- (b) *opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others;*

or on any other ground prohibited by this Constitution.

¹⁵ Parliament of Fiji **Ministry of Fijian Affairs, Culture & Heritage Review of the Fijian Administration Report – Volume 1** February 2002. Parliamentary Paper No 70 of 2002

¹⁶ Ibid Recommendation 7.7 at page 117.

As was discussed in the Review of the Fijian Administration, *“the advocates of a separate Fijian Court system expect that it would administer customary laws....The simple fact is that very little of customary law is extant.... Apart from the practice of i soro, matanigasau or i bulubulu there is very little else that would be featured in a customary law code unlike Papua New Guinea or Vanuatu where much of it has survived. The various regulations and by-laws are not customary laws but rules for keeping some order in the villages.”*¹⁷

The challenge then rests with instituting a system that blends approaches to dispute resolution (sufficient to accord with traditional understanding of dispute resolution), with the mainstream rule of law that offers fundamental protections to all people in Fiji through the Bill of Rights within the Constitution.

CURRENT IMPETUS

The community in Fiji has stated a need to maintain respect for the law and also to recognize the importance of young people.¹⁸

Over representation of indigenous youth in prison was also of concern and the Law and Justice Sector in Fiji, a cross sectoral program formed in 2003 and working with the formal institutions of the Government of Fiji identified the need to *“establish policies to reduce the over representation of indigenous Fijians in conflict with the criminal justice system.”*¹⁹

There was also concern by the Great Council of Chiefs [GCC] that there are a disproportionate number of indigenous youth in jail for offending. Out of a total prison population of 1,130²⁰ -- 925 prisoners were Fijians (82%), 165 were Indians (15%), 1 Chinese, 1 Rotuman, 29 part European and 9 others (3% in total).

Ratu Filimone Ralogaivau was delegated by the Great Council of Chiefs to examine options and develop a practical working solution(s) to this issue. He commenced work in September 2004 visiting the courts that were established in Australia to address similar issues with over representation of Aboriginal and Torres Strait Islanders in conflict with the criminal justice system.

In both cultures, it is recognised that there are many reasons for this high rate of imprisonment, including a high rate of unemployment among young people, a steady drift away from rural areas to urban areas, increase in drug use, and a general move away from the traditional values that were inculcated in former times.

Further, it has been recognised that many offending behaviours that appear in the courts are a result of health or social issues such as drugs, or mental impairment or perhaps domestic violence. Offending behaviours may also arise when there is a sense of dislocation or alienation from the community by reason of family or community breakdown.

Different approaches within the mainstream courts system have been developed with indigenous youth in Australia. The aim of these new courts is to identify the problem that is causing the offending behaviour

¹⁷ Parliamentary Paper No 70 of 2002 at page 112

¹⁸ Community Survey 2003-2004, University of the South Pacific conducted by (now Justice) Mere Pulea and others

¹⁹ Law and Justice Sectoral Objectives – No 11. Formulated in consultation with the law and justice agencies across the Fiji Islands in conjunction with the Australia Fiji Law and Justice Sector Program.

²⁰ Annual Report Prisons of Fiji – figures as at December 2003.

and to treat the cause of that offending behaviour so that the criminal behaviour stops. It would seem that these approaches have been successful.²¹

Courts in Australia set aside particular days on a fortnightly or monthly basis, depending on the demand, to sentence Aboriginal offenders. Aboriginal elders sit in the court to assist the Magistrate – they act as advisers to the court in determining the nature of the sentence and how it is to be implemented.

Rigorous selection and training processes are necessary to ensure that the most appropriate people are available to assist in the courts.

These elders bring to the court their knowledge and their status and it is submitted that their presence is a powerful factor in deterring the offender from similar behaviours in the future. It is argued that “interventions that involve families and the wider community are recognised as crucial components in reducing repeat offending.”²² Making undertakings and promises by the offender in front of people who are from the same area or to whom kinship obligations are owed is seen as “far more consequential, meaningful and enduring than statements made by their legal representatives in an impersonal mainstream court.”²³

Based on the operation of the courts in Australia and the apparent success in breaking the cycle of offending, a model has been developed for Fiji that incorporates approaches to dispute resolution that were operational in pre-colonial times.²⁴

A NEW APPROACH

The options that were studied are incorporated into a model of a single legal system that is available to all people. The law is applied as it must be -- equitably and fairly to all who appear in the courts -- but the approaches to the application of the law will depend on the approaches that have resonance to the different communities.

There is no separate legislation that gives effect to the approaches that the court applies. In essence, the same laws are imposed but existing court processes are modified to improve outcomes not only for the offender but for the broader community.

This approach in Fiji has been called “Problem Solving Courts”. The model has been presented to the Strategic Leadership Group of the Law and Justice Sector and they have endorsed the introduction of a

²¹ See Briggs, D & Auty K (2005) “Koori Court Victoria” Paper presented at the Magistrates Court Conference, Victoria 17th March 2005 no pagination “*The Koori Court initiative is not isolated. South Australia has been operating Aboriginal sentencing courts for about 2 years now in the metropolitan districts of Port Adelaide, Port Augusta and Murray Bridge, with another planned for Ceduna. The SA model while not formally evaluated, demonstrates that Aboriginal people are more willing to attend these courts reflected in the number of people failing to appear – from 50% to 20%. This figure translates into a reduction of ‘failing to answer bail charges’ as prior convictions which lessen ‘flight’ risk opposition to bail applications. There is also anecdotal information that there has also been a reduction in breach rates in community orders.*”

See also Harris (2005) “A Sentencing Conversation – Evaluation of the Koori Courts Program October 2002-October 2004” Department of Justice Victoria, specifically Chapter 5 – measuring the success of the Koori Court.

²² Tomaino John, ‘*Aboriginal (Nunga) Courts*’. Information Bulletin, Government of South Australia, Office of Crime Statistics and Research (no date) page 3

²³ Ibid at page 5

²⁴ It is important to remember that all cultures are dynamic and changing and incorporate aspects of other cultures when those cultures have been in contact.

pilot court for young people in 3 areas – to examine the urban and rural issues that will need to be addressed. These pilot courts will be trialed over the next 18 months in Suva, Ba and Bua.

PROBLEM SOLVING COURTS

The aim of these new approaches is to:

- Divert offenders away from imprisonment and so reduce their over-representation in prisons;
- Reduce the number of re-appearances by the same offender in court;
- Ultimately reduce the frequency of offending within the community.

At this stage, the Courts are to be only sentencing courts – not trial courts. Upon an acknowledgement of the offending behaviour these issues are dealt with in particular ways within the Magistrates Court system. The approach will be applied in urban and rural areas.

The theory is that offending behaviour in the future may be prevented if the offender is made aware of the consequences of their actions and the harm caused to the victim.

BUT it is not just handing out a punishment – it is trying to stop the behaviour from happening again.

The systems that have been developed incorporate principles which are known as “restorative justice.” Restorative justice offers opportunities that bring offenders and victims safely together to address the harm caused by the crime. This is the principle behind “traditional” dispute resolution techniques in Fiji.

In the **urban areas**, young people often feel NO connection to the consequences of their offending behaviour.

To bridge this “alienation” advisers who will “link” the offender with their particular community are to be identified and asked to sit in court to assist the Magistrate. The advisers will be from all communities and bring their connection to those communities to make the sentences that are imposed by the Magistrate more meaningful to the offender. The courts will combine punishment with help – the courts can be seen as a gateway to treatment.

Victims are able to put their issues before the court and to be heard. The court is open and transparent to the community at large.

The same model will apply in the **rural areas** but it will be a lot less formal.²⁵

A formal court setting will not be required --- the village hall can be used and everyone is allowed to speak. It may be that the Chiefs will sit with the Magistrate and this will assist in re-engaging approaches to traditional dispute resolution with mainstream justice. It is an approach that aims to encourage respect, commitment and obligation and aims to reinforce the Fijian tradition of caring for others in the community.

These principles are applied within an over-arching mainstream legal system and before a sentence is imposed. It is essential that there is parity of approach across the Republic of the Fiji Islands and as such an appeal system will be required.

At the pilot stage, not all offences will be within the jurisdiction – sexual offences, child abuse and domestic violence will be outside the ambit of this approach. It is considered that the power imbalance

²⁵ It is important to note that even today 50% of the population of Fiji lives in rural areas.

between the offender and victim is too acute and there are not sufficient support services in place to assist victims. However, this may change over time as the system matures.

There are 3 critical issues:

- The Judiciary & the community are central to the success of the problem solving courts.
- There is a focus on diversion – to keep people out of prison if this is possible.
- Treatment or rehabilitation is essential - it is necessary to understand the cause of the problem.

These are all very significant aspects for the success of the Problem Solving Courts. Importantly it has been endorsed by the Strategic Leadership Group of the Law and Justice sector and there is commitment to the model by the significant players within Fiji. It is also supported through the Australia Fiji Law and Justice Sector Program.

CONCLUSION

New ways of addressing these problems are required.

It is imperative that younger people are kept out of systems that have the potential to increase their criminal behaviour. This is an issue that is being addressed in jurisdictions all around the world. Fiji is not alone but it now has the opportunity to develop a new approach to address the problems.²⁶

The Constitution requires “*that the Parliament must make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes*”. And “*... in doing so must have regard to the customs, traditions, usages, values and aspirations of the Fijian and Rotuman people*”.²⁷

The Constitution speaks of “traditional Fijian processes”. The model proposed does not institute a separate system of dispute resolution -- it is not a new court but seeks to establish a more effective system of justice incorporating these traditional Fijian processes. The approach is not discriminatory on the basis of race or any of the other grounds prohibited by the Constitution. It can be applied to all communities in urban and rural settings.

It is a model that takes account of the “customs, traditions, usages, values and aspirations” of the Fijian people.

It blends traditional approaches to dispute resolution into a system of rule of law. And rule of law is essential if Fiji is to take its place on the international stage in this increasingly globalised world.

It blends the best of both worlds.

²⁶ It may be that these approaches could be applied on a regional basis across the Pacific. It is important that the model is trialed in the first instance in Fiji before it is taken further. In other communities it would be necessary to take account of the local approaches to dispute resolution and ensure that these approaches could be melded with the rule of law that is necessary in an increasingly globalised world.

²⁷ See Section 186(1) & (2) Constitution (Amendment) Act 1997 of the Republic of the Fiji Islands

REFERENCES

Reports

Beattie Sir David, (1994) *Commission of Inquiry on the Courts*, Fiji August 1994.

Briggs, Daniel & Auty, Kate (2005) *Koori Court Victoria*, paper presented at the Magistrates Court Conference 17th March 2005 not paginated.

Community Survey conducted 2003-2004 by (now Her Honour, Justice) Mere Pulea and others in the University of the South Pacific.

Ministry of Fijian Affairs, Culture and Heritage (2002) *Review of the Fijian Administration* in 2 volumes February 2002 tabled as Parliamentary Paper No 70 of 2002.

Project Unit (2003) *Report on the Review of the Fijian Administration "Good Governance and Well-Being of the Fijian People"* 05 December 2003.

Articles

Hinton Martin (1997) "Sentencing and Indigenous Australians – addressing over representation from within the criminal justice system" in *Indigenous Australians and the Law* ed by Elliott Johnston Qc, Martin Hinton and Daryle Rigney, Cavendish Publishing 1997.

Lunabek Vincent, The Honourable Chief Justice of Vanuatu (2004) "Adjudication of Customary law in the Pacific" in *Commonwealth Judicial Journal* 15(4) December 2004 pp 25-35.

Marchetti E & Daly K (2004) "Indigenous Courts and Justice Practices in Australia" Australian Institute of Criminology Trends and Issues in crime and criminal justice, Government of Australia. Paper No 277 May 2004.

Newton, Dr Tess. (1999) "The incorporation of customary law and principle into sentencing decisions in the South Pacific Region." Paper presented at the History of Crime, Policing and Punishment Conference convened by the Australian Institute of Criminology in conjunction with the Charles Sturt University and held at Canberra December 1999.

Ratuva, Stephen (2003) 'Reinventing the Cultural Wheel: re-conceptualising restorative justice and peace building in ethnically divided Fiji' in Dinnen, Sinclair et al (eds) (2003) *A kind of mending: restorative justice in the Pacific Islands* Pandanus Books Australian National University ANU pp 149-163.

Tomaino John, (2004) *Aboriginal (Nunga) Courts* Office of Crime Statistics and Research, Government of South Australia August 2004.

Texts

Dinnen, Sinclair et al (eds) (2003) *A kind of mending: restorative justice in the Pacific Islands* Pandanus Books Australian National University ANU.

Harris, Dr. Mark (2005) "A Sentencing Conversation – evaluation of the Koori Courts Pilot Program October 2002- October 2004" Commissioned by the Department of Justice, Victoria Australia.

Ravuvu, Asesela (1995) *Vaka i Taukei The Fijian Way of Life*, Institute of Pacific Studies of the University of the South Pacific.

Legislation

Fijian Affairs Act (Cap.120) Revised edition 1985 including subsidiary legislation.

Constitution (Amendment) Act 1997 of the Republic of the Fiji Islands, July 1997.

Pamphlets

Courts Administration Authority of South Australia Restorative Justice -- Adult restorative conferencing in South Australia.

Australia Fiji Law and Justice Sector Program. (2004) Seventeen (17) Objectives of the Law and Justice Sector – agreed by the agencies and institutions involved in law and justice across Fiji.

Video

Courts Administration Authority of South Australia Nunga Court.