

# CULTURALLY-APPROPRIATE DISPUTE RESOLUTION TECHNIQUES AND THE FORMAL JUDICIAL SYSTEM IN HAWAII

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## I. Introduction

Ethnic, racial, cultural, and other similar inter-group conflict is certainly not a new phenomenon in America. It pervades every aspect of American history. Nonetheless, some people are optimistic that it will not be a significant part of the future. They are hopeful that certain judicial, legal, administrative and, indeed social decisions which have occurred since the Second World War are ameliorating the worst of the causes of this conflict, and in fact are resulting, perhaps slowly, but still surely, in a fairer, more equitable, fully-integrated and "color-blind" America.

Of course, there are many others who scoff at this. They insist that America is still a racist, monocultural, and white/male-dominated society. In this view, America is "open" only for a token few, and then only to the extent that those few are willing and able to lose their own cultural identity and become a kind of "white/male" themselves.

Whatever the situation might be in the past, present, or thus-extrapolated future, there is good reason to be concerned that cultural conflict might be dangerously on the rise--or at least taking a dangerous new turn--presently, and that the future of intercultural relations in the US is problematic.

There are many reasons for such an unpromising prognosis. Over the past decade (and not only in the US), there has been a rise in ethnic identity and pride. Instead of eagerly attempting to submerge in the "melting pot" and become undifferentiated "Americans," more and more people seem to be enhancing, re-discovering, or perhaps actually inventing cultural roots and traditions different from those of the white majority. They seem to prefer greater cultural separatism and behavioral variety. They do not want to live in a society where everyone is expected to follow a single set of norms determined by a cultural majority of which they are not a part. This perspective seems apparent in many spheres, none more controversial presently than on some American university campuses where racially or culturally-defined organizations of various kinds seem to be increasing in number and visibility while certain parts of the curriculum have been changed to decrease the amount of time spent studying the ideas of "dead white men" so that more time might be spent on the ideas of non-white women and men, dead or alive, instead.

For a while, these behavioral and curricular changes were viewed as insignificant, benign, or perhaps even laudable by some members of the cultural majority in the US. Some people still feel this way, but recently, voices have spoken loudly against these developments, saying that the new "politically correct" movement for multiculturalism is a retrogressive, divisive, and dangerous trend which must be exposed and resisted by all means necessary. The speed and extent of this backlash is said to be additional evidence that white/male domination is far from

overcome in American society. Even the slightest movement towards the recognition of the equal worth of the different values and behaviors of other ethnic groups, gender, sexual orientation, or the rest, is viewed as profoundly threatening, some people say.

At the same time, demographers have noted changing patterns in fertility within and immigration to the United States. The birth rate of nonwhites is significantly higher than that of whites while increasing numbers of the new immigrants (legal as well as illegal) are nonwhites as well. Thus, in many parts of the US, whites are no longer in the majority and in general the population mix in the US is forecast to be much more varied than it was at any time historically.

What is apparent demographically in the US (and Canada, for that matter) is even more characteristic of the world: the number of nonwhites globally is geometrically exceeding that of whites. If these trends continue, the future population mix of the world in the 21st Century will bear little resemblance to what it was in the 20th Century.

Hawaii has always been much more demographically varied than the rest of the United States. Yet the future population mix of Hawaii is likely to differ from its past and present as well. Thus some observers express similar concerns about the future of racial, ethnic and cultural relations in Hawaii.

These and other related issues should be of vital concern to the Hawaii State Judiciary. Not only do they portend the possibility of new or renewed cultural conflict here, but they also suggest that the composition of the personnel of the Judiciary itself might be influenced by the changed composition of the population generally.

These changes should not be viewed only, or even primarily, as threats. Like every other aspect of the future, they should also be considered to be opportunities. Within these demographic changes might lie helpful judicial and legal developments.

## II. Elements of the SJI Project

The State Justice Institute (SJI), a federally-funded agency supporting research concerning state judiciaries, funded a project in 1989 proposed by the Hawaii Center for Futures Studies (HRCFS) in cooperation with the Hawaii Judiciary. The basic premise of the project is that the formal judicial system should study the demographic and cultural changes underway in the country and consider the possibility of incorporating into the present system some of techniques which other cultures use for resolving conflicts.

The underlying reason for this suggestion is that the legal system in the US originally derived from the British system and evolved to what it is today. While the American system has survived for two centuries, and while many would say that it should continue essentially unchanged indefinitely into the future, there are other people who doubt the likelihood, or perhaps even the desirability, of that happening.

There appear to be three major reasons why the system should or might change. The first was mentioned above: immigration and demographic shifts are

significantly changing the mix of cultures, not only in Hawaii, but in the US as a whole. The US is rapidly becoming more ethnically diverse and culturally pluralistic. The second reason is that the growth of mediation, neighborhood justice centers, and the alternative dispute resolution movement indicate either dissatisfaction with aspects of the formal legal system or a desire by some people to settle their own disputes (or both). Thirdly, the formal legal system has been at least sympathetic to the idea of the legitimacy of alternative dispute resolution techniques and sometimes (as in Hawaii) has taken the lead in creating and using them. Perhaps the judiciary (especially the Hawaii Judiciary) would be willing to take the lead in considering and perhaps utilizing culturally-appropriate dispute resolution techniques as well.

A team of nine researchers from HRCFS and the Hawaii Judiciary proceeded to carry out work in four major task areas: (1) demographic and cultural changes, (2) legal precedents, (3) alternative dispute resolution techniques in the Pacific Region, and, (4) videotaped discussions with members of different ethnic groups in Hawaii.

(1) The Changing Ethnic Mix in Hawaii and the Nation. According to US Census Bureau estimates, growth rates for the white population will substantially slow in the 1990s and begin to decline within the next 40 years. While the white population is expected to plateau after growing by an additional 29 million, other races will grow proportionately faster. By 2040, the black population will have grown by as much as 14 million persons and Asians, Pacific Islanders, and American Indians in the "Other Races" category will have grown by 16 million--tripling their present total combined populations.

Major shifts will occur among the groups which comprise "Asian Americans." In 1980, the groups with the largest populations were Chinese, Filipino, Japanese, and Asian Indians respectively. By the year 2000, the numbers of Filipinos will surpass Chinese while the Japanese will lag behind the total numbers of Asian Indians. By 2030 the top four Asian population groups will be Filipino, Vietnamese, Korean, and Chinese Americans.

In Hawaii the situation is considerably different. While Chinese and Filipinos are also relatively rapidly growing groups here as well as on the Mainland, this is not the case for Asian Indians or Vietnamese in Hawaii.

These population growth and immigration statistics were primarily derived from straight-line extrapolation of current trends and did not attempt to anticipate any major technological or social changes which are very likely to render the traditional forecasts inaccurate, at best. The project team therefore generated a range of alternative scenarios which might mitigate the "standard" projections. These scenarios clustered around four themes: economic shifts, governmental and political restructuring, environmental changes, and technological innovations.

(2) Legal Precedents. Another area of project research focused on United States Supreme Court decisions which allow certain groups to have some measure of dispute-resolution autonomy from the formal courts. This research looked primarily at the legal situation for autonomous dispute resolution among labor groups, religious bodies, Native Americans, and Pacific Island communities.

There is a large body of law concerning the rights and limitations of labor groups in terms of settling their own disputes. Our conclusion was that the ability of

labor unions to settle their own disputes, though extant, is extremely limited by Court decisions.

On the other hand, the claim to autonomous internal dispute resolution by religious groups recognized by the US Supreme Court seems significantly stronger because that right is argued to derive from the religion clause of the First Amendment to the US Constitution. In making a decision regarding a dispute within a religious organization, clearly the Court has, on occasion, accepted the standards and decision-making rules of the religious organization itself rather than imposing the its own external decision-making standards. There are, however, many instances where the Court has limited this autonomy on the basis of the overriding superiority of other constitutional rights or powers.

Similarly, certain Native American tribes are held to have some constitutionally-recognized legal autonomy. This too has been subject to legal and political limitations (and less often, expansions). One possible basis for a claim of Native Hawaiian judicial autonomy might be the sections of the US Constitution used by Native Americans.

Finally, there have been claims of (and judicial interpretations concerning) limited rights to use "traditional" dispute resolution techniques by some residents of Pacific Islands under US jurisdiction (US territories and the several "freely-associated" states in Micronesia).

Based on these findings we conclude that the area is far from "settled" at the level of the U.S. Supreme Court; that groups with explicit constitutional authority appear to have a stronger claim to the right to solve their own disputes internally; that constitutional law indicates no clear affirmation of, or prohibition to, the use of culturally-appropriate forms of dispute resolution; and, that the unsettled nature of judicial interpretation in this area suggests the possibility that groups wishing to use culturally-appropriate dispute-resolution techniques might be able to have that authority enacted into state and/or federal law and possibly upheld by the US Supreme Court.

(3) Alternative Dispute Resolution Techniques. A review and annotated bibliography of alternative dispute resolution (ADR) techniques was carried out which not only explored individual techniques but also identified general elements characteristic of mediation and other ADR techniques. Evidence came from Africa (the Kpelle), China, Hawaii, India (Lok Adalat), Japan, Korea, Micronesia, Melanesia, Polynesia, Nepal, New Zealand, Thailand, the Philippines, and from sources which compared the dispute resolution methods and practices of a number of non-western cultures.

The analysis revealed that most if not all societies have both informal and more formalized dispute resolution processes. It showed that there was a rural and urban dichotomy reflected in the locations where formal and informal dispute resolution takes place, with mediation being more prevalent in rural settings in most cultures reviewed. Similarly, the level of development of a given society also seems to have a strong relationship to the degree to which more formalized courts are used to resolve disputes (specifically: the "higher" the level of social development, the greater the reliance on formal judicial procedures. But it was questioned whether this historical relationship would continue into the future). Another aspect of the development perspective is that the nature of conflicts change as society develops:

interpersonal conflicts in hunter-gatherer, agricultural, and industrial societies may be similar, but disputes concerning property, land, and commerce, for example, are quite different. Will the same apply to post-industrial, electronically-driven "information" societies?

The literature suggests, in general, that Western cultures appear to be more litigious than non-Western cultures. For example, the importance of "apology" in Polynesian, Micronesian, and even Japanese dispute resolution processes can be seen as a marked contrast to the adversarial Western legal system. One of the most crucial elements in mediation and ADR processes generally is that of proximity--defined both in terms of physical and emotional distance between disputants. The literature suggests that the closer the proximity, the greater the chances that disputes will be settled. Other major factors were addressed in this analysis, such as power relations and differences between disputants; the exercise of personal "choice" whether or not to try to settle a dispute; community or power-figure involvement; and a variety of other cross-cultural issues. Our review suggests there is a wealth of dispute resolution strategies available to formal judiciaries of the present in the pool of human experience. That pool is especially deep and rich in Hawaii, and seems to be deepening in most places on the U.S. Mainland. It is a resource too valuable to waste.

(4) Videotaped Discussion with Four Ethnic Groups. Based on a combination of absolute numbers of minority populations, projected immigration rates, history of conflict, and other dimensions of non-Western conflict resolution, the project team chose four communities to interview about conflict resolution and therefore talked to people of Filipino, Hawaiian, Korean, and Samoan ancestry. The individuals interviewed did not comprise a scientific representative sample of their ethnic group, and their responses should be seen as indicative of their personal opinion and not necessarily as a measure of their culture's attitudes toward conflict and practices of dispute resolution.

The HRCFS research team asked members of each of these four ethnic groups to meet with their cultural cohorts in a television studio. There they were shown three sets of ambiguous 35mm slides; asked to identify the behavior depicted on the slides; and, if they believed it to be a conflict of some kind, to indicate who the people in the conflict were, what the nature of the conflict was, how this particular conflict should be dealt with, and how this kind of conflict, in general, could be minimized or prevented. The same slides were shown, and questions asked, of a group of judges from all levels of the Hawaii Judiciary. The discussion with the members of these five groups was separately videotaped and their responses analyzed and edited together into two 30-minute videotapes. One tape depicts the commonalities and differences among the groups in terms of identifying the nature of the "conflict" shown on the slides. The other videotape shows the commonalities and differences of the members of the groups in terms of how these conflicts should be resolved and how further conflicts of these types should be discouraged.

### III. The 1991 Hawaii Judicial Foresight Congress

In January 1991, the HRCFS team made a presentation on the project and presented the second of the two videos indicated above to the participants of a Judicial Foresight Congress which included Hawaii's Supreme Court justices, State judges, members of the Bar, key Judiciary staff, legislators, academics, and members of community interest groups. Following a panel presentation and discussion of the SJI Project, Congress participants were asked to indicate their preferences

concerning culturally-appropriate dispute resolution techniques and the Hawaii Judiciary.

During the panel presentation, the project team specifically recommended that the "Congress instruct the Hawaii Judicial Foresight Commission (or the Annual Judicial Conference, as appropriate) to prepare recommendations for having culturally-appropriate dispute-resolution procedures be accepted by, or incorporated into, the formal judicial system." At the same time the team noted that during their research it had gained renewed respect for the formal judicial system, as well as for dispute resolution techniques of other cultures. There are many instances where the adversarial system still seems superior to consensual systems. Situations involving significant power differentials between the disputing parties may be one such instance, and the issue of small-group coercion versus individual rights is especially perplexing. In addition, it is very difficult to determine clearly who is and who is not a member of any given "culture," and to decide what any culture's "appropriate dispute-resolution procedures" are, especially if there is dispute about the procedures themselves.

The participants in the Foresight Congress were given ballots which contained the team's recommendation along with several other suggestions. They were asked to choose the one which came the closest to their view. Below are the ballot choices, with the percentage of participants favoring each option.

- 1) Culturally-appropriate dispute resolution techniques ought to be incorporated into the judiciary and ought to replace the current adversarial system in most situations. [9%]
- 2) The Hawaii Judicial Foresight Commission or the Annual Judicial Conference, as appropriate, ought to prepare recommendations for having culturally-appropriate dispute resolution procedures be accepted by or incorporated into the formal judicial system. [62%]
- 3) Although I am sympathetic to letting people use their own culturally-appropriate modes of settling disputes, the formal legal system ought not be involved. [17%]
- 4) We ought to be focusing our energies on making sure that current laws are administered fairly to all groups regardless of cultural background rather than risking even more unequal treatment. [12%]
- 5) Culturally-appropriate dispute resolution techniques of the sort discussed today have no place whatsoever within the formal judiciary. There is no need for the Hawaii Judiciary to consider this matter any further. [0%]

Seventy-one percent of the participants favor culturally-appropriate dispute resolution techniques playing a larger role in the formal judicial system. Moreover, if we include those who feel that people should be able to use their own dispute resolution procedures, although outside the judiciary (Question 3), then 88% of the participants in the Judicial Foresight Congress are sympathetic to the use of culturally-appropriate techniques. It is remarkable that absolutely no one voting felt that these procedures have "no place whatsoever within the formal judiciary" (Question 5).

#### IV. Recommendations

Therefore, on the basis of the research outlined above, and detailed in the accompanying material, and especially on the basis of the overwhelming preference expressed by the participants voting at the 1991 Hawaii Judicial Foresight Congress, the HRCFS research team respectfully requests the Chief Justice of the Hawaii Supreme Court to appoint a committee to review the accompanying material and to recommend to him appropriate action to be taken in order to incorporate culturally-appropriate dispute resolution techniques into the Hawaii Judicial system as quickly and effectively as possible.

Persons appropriate for appointment to such a committee might include the representatives from the four cultural groups who participated on the Project Panel during the Foresight Congress; staff from your Center for Alternative Dispute Resolution and the Program on Conflict Resolution of the University Of Hawaii; selected members of the SJI Project Team, and other persons in the community known to active in promoting culturally-appropriate dispute techniques.

The Project Team further requests that you instruct the Committee to consider the following substantive suggestion:

1. After reviewing the material developed for this present Project, and any other available to it, the Committee should choose several locally-viable culturally-appropriate dispute resolution techniques.
2. Set up experimental procedures similar to the way in which certain suits presently are randomly assigned to conventional judicial deliberation or to binding arbitration, and similarly to assign a number of randomly chosen disputes to the regular courts or to culturally-appropriate dispute resolution procedures (the ethnicity of those involved in the dispute should not be a criterion in assigning cases. That is, people are assigned to--for example--Ho'oponopono, Ifoga, Fa'aleleiga or the conventional courts regardless of their own ethnicity. However, the ethnicity of the participants should be noted and related statistically to criteria of "resolution effectiveness".)
3. Establish criteria for "resolution effectiveness," monitor each case accordingly, and analyze and report the results to the Committee.
4. The Committee should then use these results to assist in making recommendations to the Chief Justice concerning incorporating culturally-appropriate dispute resolution techniques into the formal judiciary in Hawaii.