S532 SHARPE, S. Transplanting mediation into complex settings

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TRANSPLANTING MEDIATION INTO COMPLEX SETTINGS: DISPUTE RESOLUTION OF MAORI FISHERIES ISSUES.

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I INTRODUCTION

There is a risk that in implementing dispute resolution methods we assume they will automatically work in all contexts. Today mediation and other dispute resolution methods are transplanted into varied cultural and environmental settings. There are implications in trying to transplant mediation into these complex settings. Mediation may have difficulty in functioning or fail to be utilised. In order to transplant mediation successfully into varied contexts it is necessary to be aware of the features of mediation. An awareness of the assumptions upon which the mediation model is based, will allow an assessment of whether it is possible to transplant mediation into complex settings. Then, and only then will we be able to say that mediation is, as Folberg and Taylor state, "a conflict resolution process [that] is universal and comprehensible to people of many cultural and ethnic views"[1].

In Part II, this paper examines the Dispute Resolution Procedures available in Maori fisheries disputes. Maori fisheries issues present is a useful case study of how dispute resolution procedures have been transplanted into a complex setting. Examination will be given to the transplanting of mediation into this context. Te Ohu Kai Moana (TOKM)/Treaty of Waitangi Fisheries Commission[2] has put a range of Dispute Resolution Procedures[3] in place. But in Maori fisheries disputes, iwi commonly take their dispute to court rather than use other 'alternative' methods of resolution. Dispute resolution will be an ongoing process in the Maori fisheries setting so it is important to examine problems with implementation of dispute resolution procedures. Whaimutu Dewes stated that:[4]

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[1] M Le Boron Duryea *'Conflict and Culture - A Literature Review and Bibliography'* (Uvic Inst. for Dispute Resolution, Canada, 1992) 20.

[2] These are both names for the same organisation. This organisation will be referred to as TOKM or the Commission in any further references.

[3] Te Ohu Kai Moana/Treaty of Waitangi Fisheries Commission *Dispute Resolution Procedures* October 1995.

[4] W Dewes "Fisheries - A case study of an outcome" (1995) 25 *VUWLR* 230.

> A matter of some urgency is the process for dispute resolution. There is some need for the whole process to be addressed from a strategic point of view and some rationalisations made so that the people concerned have an expeditious, efficient and affordable process that takes account of the nature of the issues and the participants.

Maori fisheries disputes occur in a complex cultural setting. This paper will focus on disputes in Maori commercial fisheries as opposed to customary and traditional fisheries. The disputes are largely inter and intra-Maori. Adding to the cultural context, the disputes relate to environmental and natural resource concerns. Further to these factors, Maori fisheries operations function within the commercial setting of the fishing industry.

Part III of this paper will look at the mediation model and its development. It is somewhat of a paradox that these largely consensus based models of dispute resolution, like mediation, were drawn from processes in indigenous tribal cultures. Processes such as mediation were stripped of their original cultural content and designed, as a model, to fit contemporary North American society. The model of mediation we discuss today is built upon the cultural assumptions of western society. There are many advantages in the use of mediation. In order to take advantage of these benefits we need to be aware of how mediation interfaces with the concepts of culture and the environment.

Part IV addresses critical features of the mediation model and the assumptions they are built upon.

Part V looks at specific issues that may arise for Maori in mediation. The issues of mandate and participation affect and intersect with any dispute resolution mechanisms used in Maori fisheries disputes. These issues are central to the failure of mediation in this complex setting. They also affect any design of dispute resolution procedures to fit this setting.

Mediation has been transplanted into the complex setting of Maori fisheries disputes. Part VI looks at the use of mediation in this setting. The prescribed model of mediation transplanted into this arena is hardly used and its use is difficult to evaluate. There is however, a use of mediation in a more general sense. This is because the Court has in some situations directed parties to mediation and Maori have their own form of traditional mediation processes.

In Part VII an examination is made of whether there are any issues in the design of dispute resolution procedures that can be addressed in order to successfully transplant mediation into this complex setting. The options of developing a process by involving the parties in the design of solutions; focusing on process in the design; and linking of traditional and contemporary frameworks for dispute resolution are examined. All these solutions are plausible but will require the resolution of mandate and participation issues central to Maori fisheries disputes.

II DISPUTE RESOLUTION OF MAORI FISHERIES ISSUES

A BACKGROUND

The depletion of fisheries and the call for sustainable management of fisheries led to the introduction of the Quota Management System (QMS) in New Zealand. In response to Maori claims[5] that the QMS was a breach of the Treaty of Waitangi, Maori were initially given a settlement of 10 percent of existing quota under the QMS along with $10 000 000 to set up an infra-structure for Maori fisheries development[6]. The Sealords negotiations[7] offered a further, final settlement. This settlement involved Crown purchasing a half share of Sealords (a major commercial fishing company) on behalf of Maori, and undertaking to allocate 20 percent of any new quota to Maori. These assets given to Maori were vested with TOKM. This deal was confirmed in legislation by the Treaty of Waitangi (Fisheries Claim) Settlement Act 1992.

The legacy of the Sealords deal continues to shape Maori participation in the use of fisheries resources. The unstructured nature of the Sealords negotiations have left many issues for TOKM to address. For instance, the method of allocation for Maori fisheries assets was left to TOKM to devise. There are very high stakes in terms of current and future iwi fisheries assets. It is therefore not surprising that the conflict over these stakes is quite high.

TOKM is involved in a range of disputes relating to Maori fisheries quota. Topics of dispute have included the development of an allocation method and iwis establishing their

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[5] Waitangi Tribunal *Muriwhenua Fishing Report - Wai 22* (Department of Justice, Wellington, 1988).

[6] Section 4 Maori Fisheries Act 1989 established the Maori Fisheries Commission, later renamed the Treaty of Waitangi Fisheries Commission, as amended by section 14 Treaty of Waitangi (Fisheries Claim) Settlement Act 1992.

[7] This opportunity arose when Sealord Fisheries Ltd, a major company in the New Zealand fishing industry, was put on the market in 1992. This sale was due to Carter Holt Harvey, the parent company, infringing the foreign control restrictions contained in s28Z Fisheries Act 1983.

mandate to fisheries quota. More technical matters such as the drawing of rohe(boundaries) within fisheries management areas, have also been the subject of debate.

The debate surrounding the allocation method to be used for Maori fishing quota has involved much dispute and attracted much attention. Disputes over allocation of quota have been mainly dealt with in the court system. There are two primary issues in the allocation dispute. Firstly, there is the question of which method should be used for allocation. The proposed method at present for deepwater fishing quota is a combination of 60% manamoana (on iwi coastal line rights) and 40% mana whenua (iwi population based model).[8] This proposal is still the subject of much debate. The second issue is whether "iwi" or groups representing iwi, are the only group that can be allocated quota. Related to this question is the question of whether "iwi" refers only to traditional Maori tribes. Urban Maori Authorities argue that they should receive some benefit from the Maori fisheries assets,[9] even though they are not traditional Maori groups.

Disputes in Maori fisheries involve an intertwining of many issues. Two primary dynamics in this setting are cultural and environmental issues. It will take a well designed and grounded process of dispute resolution to unravel these situations.

The Maori fisheries situation is not completely without parallel. There have been similar fisheries situations in North America. In the state of Washington in the United States, Judge Bolt made a key decision in 1974. This decision led to the important recognition of Indian rights to off-reservation fisheries, including commercial fishing rights, as well as an increasing role in overall fisheries management.[10]

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[8] "Rough voyage ahead for Maori fisheries deal" *New Zealand Herald*, Auckland, New Zealand, 18 April 1997, A11.

[9] See *Treaty Tribes Coalition Te Runanga o Ngati Porou & Tainui Maori Trust Board v Urban Maori Authorities & Ors* [1997] 1 NZLR 513 (PC).

[10] RT Price *Assessing Modern Treaty Settlements: New Zealand's 1992 Treaty of Waitangi (Fisheries Claims) Settlement and its Aftermath* (MacMillan Brown Working Paper Series no. 3, University of Canterbury, 1996) 10.

There has been a trend in the US and Canada, particularly along the Pacific Coast, whereby communities of fishermen and governments have worked out agreements to share decision-making over fisheries.[11] These disputes are inter-cultural, between the Governments and Indian tribes. Often tribal fishing rights have been the stimuli for co-management arrangements. Particular tribes in the United States formed the Northwest Indian Fisheries Commission to co-ordinate their fisheries interests. In this area, to avoid day-to-day recourse to the courts on routine matters the Fisheries Advisory Board was established in 1978. The structure of the Board, permits disputes over management to be discussed in an informal and non-judicial setting. A similar forum for dispute resolution could also be advantageous to Maori fisheries disputants.

B TE OHU KAI MOANA AND DISPUTE RESOLUTION

The Dispute Resolution Procedures publicised by TOKM demonstrate that there are alternatives to the predominant use of litigation in Maori fisheries disputes. TOKM reports[12] that favourable comments have been received about the booklet explaining its five step process for dispute resolution. However TOKM's Hui-A-Tau Report of June 1996[13] noted the reluctance to settle or submit disputes to the disputes resolution procedures promoted by TOKM. These procedures do not appear to play a large part in resolving ongoing issues. Dissatisfaction with the disputes resolution process has led to its criticism. Lawyer Don Mathieson QC, acting for the Otaki-based Raukawa tribe said, "the disputes resolution process used by the tribunal when tribes were not happy with lease arrangements was inadequate."[14]

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[11] *US v Washington State* (1974) 384 F.Supp. 312. A landmark decision by Judge Boldt which affirmed the treaty right of off-reservation fishing for fourteen plaintiff tribes and ruled that they were to share this right equally with the citizens. This led to a new management system where tribes would have the opportunity to catch 50% of the harvestable fish destined for their usual and accustomed fishing places.

[12] Treaty of Waitangi Fisheries Commission *Te Reo O te Tini a Tangaroa* (Mana Productions, Wellington, October 1995) 6.

[13] Te Ohu Kai Moana/ Treaty of Waitangi Fisheries Commission *Hui -A-Tau Report* June 29 1996,13.

[14] "Court hears Otaki tribe fishing case" *The Dominion*, Wellington, New Zealand, 17 July 1997, 12.

1 Use of Consultation

Consultation and prevention of disputes is an aspect of dispute resolution that should not be ignored. TOKM involves itself in consultation with interested parties over policy formation issues. The Commission and its staff aim to actively involve iwi in consultation on a wide range of fisheries issues.[15] Consultation has been useful in trying to reach decisions by allowing a wide spectrum of input in decision making. Successful examples of consultation also provide an example of how a mediation process can be altered, and therefore successfully transplanted into a complex setting.

The Commission has aimed to gather together many different viewpoints on issues involving allocation. Then in finding an agreement or at least the best possible solution from all these different viewpoints a favourable outcome is achieved.

One way this idea has worked in reality has been through the involvement of Pae Pae Taumata working groups.[16] This group of various interested Maori is hoped to represent a cross section of the Maori viewpoints. Their input is considered by the Commission. TOKM is not bound by any of the views of this working group. The key to the success of this group is that it involves the input of different points of view and fits in with the reality of Maori politics by involving a number of parties. There is still tension in the process of development of an allocation method. This is because the optimum model devised by such working groups is not necessarily in line with the Commissions views.

Robin Hapi, chief executive of TOKM, says the work of Pae Pae Taumata:[17]

> [I]s an intense and difficult process because of the many people involved, the different levels of understanding and the different priorities held by various

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[15] *Te Ohu Kai Moana Report for the year ended 30 September 1994* [1994] AJHR 6.
[16] Information from interview with Matuanuku Mahuika, TOKM solicitor.
[17] Treaty of Waitangi Fisheries Commission *Te Reo O Te Tini a Tanagaroa* (Mana Productions, Wellington, December 1996) 2.

> different working groups. However, there is a commitment from all those involved to move forward.

This sort of decision-making presents a realistic way of allowing for divergent interests to be considered by TOKM. There is no way that all Maori interests can be considered. This is because the mandating of any iwi group is a difficult process. It is hard to locate iwi definitively, let alone establish a mandate for representation from each group, in order for all Maori interests to be considered in the process of decision making. Nor is the overall solution devised by TOKM likely to be supported by all Maori groups. It is rather a matter of finding the solution that suits the largest number of groups. It is not realistic to think that all views can be catered for in devising a model. Overall this process of consultation can help to resolve issues of dispute and prevent dispute.

2 Creating the Dispute Resolution Procedures

The document explaining TOKM's Dispute Resolution Procedures is designed for the use in disputes between and within iwi. It is not for use between iwi and the Crown, or TOKM and the Crown.

These procedures were developed by Tim Castle, a Wellington barrister. Castle was briefed in December 1993 about the project to establish a design for TOKM's Dispute Resolution Procedures. Castle explains in an open letter to the Commissioners that he perceived his task to be:[18]

> To design a dispute resolution process which recognises this inherent conflict in respect of the desired objective of the Commission - implementing an optimum method of allocation of the assets - and yet provides for a means by which disputes inherent in that very issue can be resolved. I am convinced that the key to

[18] T Castle *Open letter to Commisioners of Te Ohu Kai Moana* (20 April 1995) 3.

> ultimate successful resolution, is securing the agreement - even by way of compromise worked out over considerable time - of those whose demands compete - even directly compete - to the ultimate allocation, or, at least, the principles by which allocation is made.

Castle gave serious consideration to the philosophical underpinning of advocating a dispute resolution process for adoption by TOKM. He did this by making an in depth examination of the use of consensus based models of resolution that operated in Maori society historically and in contemporary times.

The development of the disputes processes involved discussion and debate with Commissioners. Consideration was also given to material on dispute resolution, including that made available by the New Zealand Law Society. Castle cites a number of New Zealand and Australian sources that he consulted in preparing the Dispute Resolution Procedures.[19] Opportunity was given to Maori to comment upon the design and the proposed procedures. The proposed design of these processes was sent out to all iwi and many constructive responses were received in return.

Castle describes the principal and critical objective of the Dispute Resolution Procedures to be, in his opinion, "to help preserve the integrity, and ultimate immunity from successful challenge, of the Commission's asset allocation decision."[20] This objective indicates that in the design of these dispute resolution mechanisms, TOKM's concerns are primary. These processes have not, for example, been designed specifically to facilitate the resolution of a dispute between two iwi over rohe or mandate.

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[19] Including material from the New Zealand Law Society Disputes Resolution Committee, material published by the NZLS August 1994 seminar, LEADR (Lawyers Engaged in Dispute Resolution), information from the Chartered Institute of Arbitrators(UK), Council of the Queensland Law Society 1994.

[20] T Castle *Memorandum for the Treaty of Waitangi Fisheries Commission* , 31 January 1995, 5.

3 The Dispute Resolution Procedures

As a whole TOKM describes the procedures as representing the ideal of an "empowering process."[21] This is because the procedures allow for claimants to deal with problems or disputes themselves, rather than being forced into settlement through the courts.

The processes are not to act as a substitution for other processes used in dispute resolution. They are an alternative to actions in the courts and Waitangi Tribunal. It depends on the nature of the dispute as to whether the courts or Tribunal have jurisdiction over the matter. In accessing these alternative procedures that TOKM has devised, disputants will be required to commit, in writing, their good faith in using these procedures for dispute resolution. In this way it is hoped parties will be deterred from turning to the courts as soon as there is a problem.

The process detailed in this document published in October 1995, consists of a five step process of options:

1)agreement after discussion
2)mediation
3)arbitration
4)expert appraisal
5)mini-trial

Price has described the Dispute Resolution Procedures as:[22]

> A multi step, sequential process, which will first involve an attempt to reach the goal of consensus through discussion between the disputing iwi. After a suitable length of time to give the discussion process a chance of working, four other

[21] See above n 3, 3.
[22] See above n 10, 36.

> alternative dispute resolution processes can be utilised, upon agreement of the disputants. These include, mediation, arbitration, expert neutral evaluation and finally mini-trial.

This five step process does not present any radically new dispute resolution process. It is rather a consolidation of common 'alternative' dispute resolution methods already in use. It demonstrates the borrowing and transplanting of processes into new settings such as Maori fisheries. The main purpose of the publication promoting these procedures is to increase the awareness of the existence of alternatives to litigation, and how these alternatives work. Not all matters that arise in Maori fisheries suit resolution by these procedures. Certain matters, technical or factual, may need a Court's interpretation and an adversarial approach.

4 Informal tikanga process

The Commission favours consensus as the desirable approach for dispute resolution. This approach is the use of step one, agreement after discussion. It is expected that most disputes between iwi will be settled in this way. Such a process resembles traditional Maori dispute resolution methods, and is in accordance with tikanga Maori.[23]

The Commission states that it will have to allow a 'reasonable time' [24]for such consensus to be reached. If consensus is not reached any of the other four steps in the process can be utilised. One should note that 'reasonable time' is variable, especially between cultures.

Evidence of consensus as a preferred option for dispute resolution is clear. Robin Hapi, chief executive of TOKM, wrote (in relation to the agreement signed between the Treaty Tribes and Area One Consortium):[25]

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[23] C Blackford and H Matunga, *Maori Participation in environmental mediation* Information Paper no. 30, (Centre for Resource Management, Lincoln University, August 1991) 59.
[24] See above n 3, 3.

> It has also highlighted the fact that talking things through in an effort to achieve consensus is more effective than litigation. It is certainly cheaper, is likely to achieve a quicker and more satisfactory result, and is more in keeping with our traditional way of doing things.

Hapi also commented that he hoped other groups in other disputes, "will take on board the message of the hui that working together and using mediation and other alternatives to achieve consensus will bring happier results and more benefits for everyone."[26] The agreement he speaks of concerned the agreement of these two Urban Maori Authorities, (named above) not to litigate while the Commission tried to resolve the allocation issues, and began a consultation process.

The non-binding nature of these types of informal agreement can mean that a change in events then threatens the agreement. In comparison to a court ruling, the parties involved are not strongly bound by the agreement. For example, when TOKM announced that it planned to allocate fisheries assets on a tribal, iwi basis, on April 17 of this year, despite the informal agreement these two authorities had signed not to litigate, they responded to TOKM's announcement by saying they were proceeding with court action. And at the Annual General meeting of the Treaty of Waitangi Fisheries Commission on the 26 of July this year, the Urban Maori Authorities announced they would continue to contest their right to Maori fisheries quota.[27]

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[25] Treaty of Waitangi Fisheries Commission *Te reo O te Tini a Tangaroa* (Mana Productions, Wellington, August 1995) 2.
[26] Above n 25.
[27] "Tribes look to Urban Maori plan" *The Dominion*, Wellington, New Zealand, 28 July 1997, 2.

5 Interplay of Litigation

Litigation has had widespread use in resolution of Maori fisheries disputes. In any lease round it is predictable that some parties will go to court. It seems parties to these disputes feel they have to resort to litigation to have their interests recognised. Maui Solomon comments that:[28]

> No client let alone Iwi wishes to pursue litigation for its own sake. However, in the case concerned, my client felt it had no other option but to issue proceedings. Lengthy endeavours to negotiate matters outside of the courtroom with both the Commission and other parties had proved futile. If anything, this litigation highlights the difficulties and frustration's confronted by Maori in not having an entirely suitable "forum convenium" to air their grievances.

The dispute over an allocation method for quota and who is entitled to quota have been long running court battles. Interestingly most of these disputes are resolved at the interlocutory stage; parties do not precede past this preliminary stage. Few proceedings involving TOKM have gone to trial.[29]This demonstrates how litigation itself is used as a tool in dispute resolution. Litigation can allow a progression towards resolution of a dispute. Parties use the litigation process to gain leverage in negotiation. Munro has made a detailed study of the use of litigation by Maori as a key strategy to force the Government to negotiate.[30] For Maori, litigation has provided them with significant leverage by increasing their bargaining power, and placed considerable social and political pressure on the government to negotiate. This conclusion is qualified by the fact that litigation's leverage can be limited. Munro comments that, often the courts were unable to give Maori sufficient bargaining power to compel negotiations in all cases.

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[28] T Bennion (ed.) *Maori Law Review* March 1996,4. Concerning note received from Maui Solomon in response to a review of *Hauraki Maori Trust Board v Treaty of Waitangi Fisheries Commission* where Solomon was involved as counsel.

[29] Comment made by Matuanuku Mahuika in interview.

[30] J Munro *Maori in the Courts - The Limits of Litigation 1987-1995* M Litt. (Law) 1996,166-167.

This use of litigation as a negotiation tool is an accepted practice. In writing about dispute resolution in the United States and the options for Native American Indians, Haberfeld and Townsend state, "It is common knowledge that 90 to 95% of the cases brought to court in this country never reach the judge. Most are resolved in last minute negotiations".[31] Price, another commentator, notes that, "the court decisions in Canada and New Zealand sometimes provide the necessary leverage for indigenous peoples to bargain effectively with governments."[32]

Goodpaster has analysed the use of lawsuits as negotiations.[33] He points to a number of reasons why lawsuits act as a form of negotiation. These include the fact that litigation limits the scope of the dispute therefore making it amenable to third party resolution. Litigation acts as a fact finding process necessary for dispute resolution. Litigation can also act as a bargaining power equaliser. It provides the power to require another party to attend to one's claims seriously. A lawsuit provides a way of entering negotiation. The costs and threat of adjudication then prompt the parties to negotiate. Goodpaster states, "it is the deadline that a pending trial imposes on the possibilities of a negotiated settlement, the risk of loss at trial, and the possibly the added expense of trial that motivates many lawsuit settlements."[34]

It is clear that action through the court system is the method of dispute resolution prevalent in Maori fisheries disputes. The same fisheries issues come before the courts in cycles of litigation, time and time again.

Litigation is not necessarily appropriate for the sorts of disputes that arise in Maori fisheries. Some judges comment that there is limited scope for Maori fisheries issues to be resolved in the courts. Gendall J in *Te Runanga O Raukawa Incorporated v Treaty of Waitangi Fisheries Commission* comments, "The Court discourages constant judicial

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[31] S Haberfeld & J Townsend "Power and Dispute in Indian Country" (1993) 10 *Mediation Quarterly* 417.
[32] See above n 10, 3.
[33] G Goodpaster "Lawsuits as Negotiation" (1992) 8 *Negotiation Journal* 221.
[34] Above n 33,221.

review litigation by groups of Maori in this unique and exceedingly difficult area where the Commission has to exercise its discretion, wisdom and judgement."[35] Often actions, as in this case, are taken on judicial review grounds. In such cases the Court cannot substitute its view for that of an iwi on matters such as mandate. In time we may see that the financial costs of litigation lead Maori to use other dispute resolution procedures. Mediation can resolve disputes in Maori fisheries that are not justiciable, such as participation and mandate, at a lesser cost to the parties.

[35] *Te Runanga O Raukawa Incorporated v The Treaty of Waitangi Fisheries Commission* (HC) Wellington, 7 August 1997, CP 322/96, 45.

III MEDIATION

A DEVELOPMENT OF MEDIATION

The increasing costs of traditional methods of dispute resolution and dissatisfaction with adversarial methods of dispute resolution, has led to growing interest in other methods of dispute resolution. Haberfield and Townsend comment that, "Alternative dispute resolution (ADR) has gained increasing attention and popularity on the United States during the past ten to fifteen years."[36] Methods like mediation are often referred to as 'alternative dispute resolution'. Due to their wide acceptance in many areas of the law, and integration into existing New Zealand dispute resolution systems,[37] these methods are no longer merely 'alternatives'. There are many different options for dispute resolution processes. Mediation is one of the less structured informal processes that have been developed to cater for disputes that require a consensus-based approach, or to move other conflicts away from rights to consensus.

The origins of mediation as a model for dispute resolution have come from North America. Fisher and Ury treat mediation as an extension of the negotiation process, or as 'collaborative interest based negotiations'. Their interest based model has been influential upon mediation practice. The strategy in mediation is distinguished from resolving disputes with a third party decider or negotiator because of its concentration on direct face-to-face deliberations with a third party mediator. The model of mediation, as a series of stages, is fairly constant across settings in the United States and Canada.[38]

In New Zealand similar models of mediation have been adopted. The New Zealand movement has been influenced by the same types of issues as in North America. The use

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[36] See above n 31,405.
[37] Examples of provision for mediation and conciliation methods are: Disputes Tribunal Act 1988, s18(1); The Employment Contracts Act 1991,s78(1) and s78(2); The Family Proceedings Act s8(1),s13(1),s17; The Residential Tenancies Act 1986; The Resource Management Act, s268; The Children, Young Persons and their Families Act 1989, s170-177.
[38] See above n 1, 11.

of mediation in New Zealand has been institutionalised in the areas of family law disputes, tenancy disputes and recently environmental disputes. It has spread across to be used in a number of areas of the law including the commercial and employment law areas.

In New Zealand the introduction of mediation into various areas of dispute resolution has been partly a political response to the need to address Maori values in dispute resolution. Macduff comments that, "In New Zealand the promotion of mediation, both officially and privately, comes at a time when there is also a powerful articulation of the value and place of the Maori voice in the direction of this society."[39] It is thought that the shape mediation eventually acquires will be influenced by knowledge of Maori culture.

Much of the theory behind mediation is drawn from non-western cultures. The development of dispute resolution theory has come in part from the study of anthropology, and comparative studies of dispute resolution processes of non-western cultures. For example, Ury has looked at conflict resolution amongst Bushmen in Africa to finds lessons on disputes systems design[40]. Mediation may be the 'new' dispute resolution technique but it has existed in North American tribal cultures, cultures of the Pacific and Asia, in various forms for hundreds of years. Garrett states that, "Throughout the history of the many North American tribes and cultures, the use of mediation as a viable alternative to adversarial justice can be found."[41]

Barnes explains that, "the nations and cultures of the Pacific Basin, particularly those on the Pacific Rim - People's Republic of China(PRC), Taiwan, Phillipines, Japan, Australia, United States and Canada - have historical and cultural bases for extensive mediation practice."[42] In Confucian societies, in particular, the use of mediation was a principal

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[39] I Macduff "Mediation in New Zealand: Legislating for Community?" *Transcultural Mediation in the Asia Pacific* (Asia Pacific Organisation for Mediation, 1988) 222.
[40] W L Ury "Conflict Resolution among the Bushmen - Lessons in Disputes Systems Design" (1995) 11 Negotiation Journal 379.
[41] R D Garrett 'Mediation in Native America' (1994) *Dispute Resolution Journal*, 2.
[42] B E Barnes "Conflict Resolution Across Cultures: A Hawaii Perspective on a Pacific Mediation Model" (1994) 12 *Mediation Quarterly* 118.

method of conflict resolution. In Chinese society, and oriental culture generally, it is notable that people prefer 'friendly negotiation or consultation' to litigation.[43]

In New Zealand, the Maori hui process of face-to-face dialogue and reaching a consensus could also be said to portray some features of mediation. The hui process demonstrates the qualities of dialogue and participation that mediation also portrays. Maurice Gray comments that, "The face to face dialogue that is an integral part of the mediation process mirrors the traditional Maori decision making process."[44]

The mediation tendencies of these 'original' cultures are not all the same. The cultural assumptions underlying Chinese mediation will differ from the now popular North American model. And some cultures in Oceania do not have mediation traditions even though they share cultural themes of collectivism and interconnectedness among their people. Many Pacific cultures do not share the basic assumption of a "neutral" mediator or other widespread notions inherent in the North American model.

As mediation has become 'mainstreamed' into areas in the West, it has developed its own characteristics compared to those of its historical counterparts in other cultures. It has become a prescribed process. This structuring of the process into a working format makes it different from original indigenous sources that never recorded or structured their dispute resolution processes. The western model focuses on an outcome, the agreement, as the successful conclusion of the mediation. Some of the key features of the western mediation model, such as its focus on the individual, are quite different from the indigenous sources of mediation.

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[43] L L Yuan "Impact of Cultural Differences on Dispute Resolution" (*1996)Australian Dispute Resolution Journal* 198.
[44] See above n 23,3.

B THE MEDIATION 'MODEL'

Mediation as a model can be defined in a number of ways. Folberg and Taylor state that it is:[45]

> The process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options. Consider alternatives and reach a consensual agreement that will accommodate their needs.

Feinberg provides another definition of mediation as, "a co-operative process through which the parties themselves fashion a mutually acceptable resolution to their dispute with the help of a neutral third party." [46]

The model of mediation, we will discuss, is an informal process involving a neutral third party who helps resolve the dispute and rebuild relations between the parties. The process is a problem solving approach that tries to identify the parties underlying needs and interests in order to provide a solution. It is a co-operative problem-solving process. The idea is that mediation will result in an achievable workable solution rather than winners and losers. In comparison to the traditional indigenous methods of dispute resolution this model is quite structured and rigid.

These definitions of the mediation model are settlement oriented. The voluntary settlement of the dispute is perceived as being the desired outcome of mediation. This model of mediation has been the subject of some criticism. Bush and Folger criticise the problem solving emphasis in this model and highlight the transformative potential of mediation.[47] They believe the mediation process contains within it a potential for transforming people,

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[45] Quoted in New Zealand Law Society Seminar *Introduction to Mediation* August 1994,6.
[46] K R Feinberg "Mediation - a preferred method of Dispute Resolution" (1989) *Pepperdine Law Review* 7.
[47] R A B Bush & J P *Folger The Promise of Mediation - Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass Publ., San Francisco, 1994) 33.

through empowerment and recognition. They say that this potential for mediation receives little attention in mediation theory today. They are critical of the problem solving approach because it does not in the end do a good job of solving problems at all. Fuller, an earlier proponent of the transformative potential of mediation, is also critical of the settlement orientation of mediation. He focused on the "central quality of mediation, namely, its capacity to re-orient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."[48]

For the purposes of this paper, mediation will be discussed as it is set out in the TOKM procedures for dispute resolution. The mediation model published by TOKM for use in Maori fisheries disputes is largely a replica of models already used in New Zealand.[49] The model published is an outline of a standard and ideal model. Tim Castle describes this model as "representing the 'ordinary' mediation model."[50] The TOKM procedure follows a staged mediation model or step approach where the parties are first introduced to the principles and must commit to them.

Mediation is seen by TOKM[51] as a mechanism that it can provide for dispute resolution when Maori are unwilling or unable to resolve their disputes by discussion. This is a relatively open model of mediation in that it allows the participants to choose the ground rules of the process, the mediator who will facilitate the process, and the limits on the outcomes which may eventuate from that process. The focus could therefore be said to be upon the agreed principles for mediation rather than a set process. However the model set out is prescriptive in that is outlines the way a mediation should operate.

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[48] L L Fuller "Mediation - Its Forms and Functions" (1971) 44 *Southern California Law Review* 327.
[49] See above n 45.
[50] See above n 18, 3.2 at 1.
[51] See above n 20,2. Principle seven : The Resolution of Disputes adopted by the Commission in memorandum.

The aim of this mediation model is clearly the agreement. The agreement is treated by Castle as a key aspect of mediation.[52] The TOKM Dispute Resolution Procedures provide a proposed mediation agreement form. This form sets out the standard expectations of the mediation process to be agreed upon by the parties. The form of this mediation agreement was taken by Castle from an agreement approved by the Council of the Queensland Law society in 1994. This agreement is to be a solution that comes from the parties, not the mediator. It is expected that following the mediation, parties will approach the Commission with their agreed position.

For implementation the procedures state that before mediation the parties need to:
- agree that mediation is an appropriate method of trying to resolve the dispute;
- agree on or accept a suitable mediator
- attend a preliminary meeting at which the procedural arrangements for the mediation are made.[53]

[52] See above n 18, 3.1.
[53] See above n 3,7.

The disputants must then create an agenda. This is done at a preliminary meeting where:
-the mediator will outline what mediation is all about and answer any questions. The parties will have the opportunity to decide if mediation is for them and whether they are happy with their choice of mediator;
-the terms under which the mediation will be conducted will be agreed and mediation agreement signed or arranged to be signed before the mediation;
-the parties or their advisers will briefly outline the nature of the dispute;
-a timetable for the exchange of brief statements identifying the issues in dispute, any key documents and any experts or other reports will be set;
-the mediator will discuss with the parties the desirability that they participate fully in the process and invite them to present an opening statement at the mediation;
-the mediator will establish who will attend the mediation and confirm that there will be someone present with authority to settle the dispute;
-a date and venue for the mediation will be agreed to suit the parties conveniences, the availability of the mediator and the timetable which has been set.

Following that, the underlying interests and positions of the disputants are explored at mediation. There are many ways this process may continue. For instance, the mediator will ask each party what brought them to mediation. From these statements, the mediator identifies the issues which are in dispute and the common ground between the parties. Once these issues and the common ground are known, the mediator can then explore the issues with the parties. This exploration may involve joint and private sessions with the mediator. Solutions are then devised once agreement is reached and an agreement formalised. Agreement as to a solution may not always be reached. The parties are free to withdraw at any time from the process.

C ADVANTAGES OF THE MODEL

Apart from being a new and perhaps fashionable way to resolve disputes, mediation is heralded for its advantages. Some of the main advantages are that it is flexible, adaptable, informal, private and confidential, it preserves relationships, disputants are able to retain control of the process, and it is less expensive.

TOKM, in its publication of Dispute Resolution Procedures, lists the many perceived advantages of consensus-based processes such as mediation. These include:

- preservation or enhancement of on-going relationships which may be threatened by a dispute;
- overcoming any evidentiary difficulties of a rights based process;
- reduction of delay;
- choice of time, place and procedure; confidentiality to an agreed extent;
- avoidance of the unpredictability of an imposed decision;
- scope for more creative solutions than those which could be awarded in arbitration or litigation;
- minimisation of cost in executive time, legal fees, lost productivity and lost business opportunities;
- flexibility;
- participation in the decision-making process;
- clarification of issues;
- any solutions reached will only be ones which are acceptable to the disputing parties.[54]

The benefits of mediation that are espoused here in relation to TOKM's mediation model, are those benefits standardly placed upon alternative dispute resolution mechanisms. There are some real advantages in application of the mediation model to the Maori fisheries situation. The reduction of delay and minimisation of cost are the most obvious

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[54] Above n 3,6.

advantages to this situation. Other perceived advantages of this process are more difficult to assess or quantify. There is still a need for empirical evidence and critical evaluation of the mediation process.

D MEDIATION AND CULTURE

Culture is one of the factors that can create a complex setting for mediation. The use of the mediation model may be limited by the extent to which it is linked to European ethnocentrism.

The practice of describing culture is difficult and fraught with contradictions. Some people will argue that individuals do not ponder why they acted in a certain way, let alone whether their culture influenced their behaviour. I believe for the purposes of this paper that it is important to be aware that culture may influence behaviour during dispute resolution.

Culture for the purposes of this paper relates to differences of ethnicity and race. Culture could be defined as, "the configuration of learned behaviour and results of behaviour whose components and elements are shared and transmitted by the members of a particular society."[55] It is acknowledged that culture can be associated with a much wider spectrum of ideas. Culture is a dynamic concept that is constantly changing and evolving. It is not static and set. Characteristics of cultures have been identified and described differently by social scientists. It is therefore difficult to generalise about culture. People of the same culture will share the same cultural beliefs and practise common cultural norms, but within a culture there is also often, much diversity.

The cultural orientation of individuals will mean that their perceptions and attributes concerning conflict and dispute resolution differ. One example of the diversity of

[55] See above n 1, 4.

interpretations between different cultures is the difference between individualistic and collectivist cultures. For example in collectivist cultures, the values of family integrity, security, obedience, and conformity are highly valued. In individualistic cultures achievement, pleasure and competition may feature more prominently. Mediation, as a process could be said to borrow from both types of cultures. This is because of its emphasis on cooperative problem solving(collectivist), to create a solution for individuals needs(individualist). The model of mediation under discussion, has a primary focus on settlement and agreement, a feature of individualistic culture.

In the Maori fisheries setting tikanga Maori is a part of the diversity of the setting. Tikanga Maori refers to the Maori way of doing things. Hudson has made an examination of tikanga Maori and mediation.[56] He explains that tikanga Maori is based upon norms and values which are inherently Maori. There are a number of concepts that are central to tikanga Maori; including, tapu and noa, mana, utu, whakapapa, and kawa[57]. For Maori the mediation process is associated with hui. Hudson also explains that tikanga Maori requires the Maori parties to adhere to a certain procedure, for example the customary whaikorero and karakia and other related tikanga.

Cultural norms often develop when dealing with conflict. 'Culture' clearly will have an impact on mediation. Lim Lan Yaun states that "Culture has an impact on the attitude towards dispute resolution."[58] In order to progress with the use of mediation in diverse settings we need to decide how 'culture' will be addressed. We may not need to specifically design a process to accommodate an individual culture. However an understanding of the dynamics of the mediation process and how culture fits into this interaction is a first step.

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[56] For further reference see J H Hudson *Tikanga Maori and the Mediation Process* (LLM Paper) Victoria University Wellington 1996; C Blackford and A Smith *Cross Cultural Mediation . Guidelines for those who Interface with Iwi* (Lincoln University, Christchurch, 1993).
[57] See above n 56 for more detail.
[58] See above n 43,197.

The situation of Maori fisheries disputes is somewhat unique in talking about transplanting mediation into different settings. Most discussion of the use of mediation centres around inter-cultural conflict, or about taking the North American techniques of mediation into another culture, where that 'other' culture is predominant. Maori fisheries issues are largely inter or intra-Maori. In the Maori fisheries situation the setting is that of Maori culture, operating within the dominant Pakeha culture. The model of mediation used is imported from yet another culture, North America. Transplanting the mediation model into this situation is therefore a double transplantation.

There are many ways to deal with the interplay of culture and mediation. On the least interventionist end of the scale there is the importance of having an 'awareness' of the other culture and your relation to that culture. Rubin and Sander say the wisest approach is to "be aware of our biases and pre-dispositions, acquire as much information as possible about our counterpart as an individual; and learn as much as we can about the norms and customs that are to be found in our counterparts home country."[59] This increased awareness of the other party is also applicable to resolving differences within a culture, as with Maori fisheries disputes. In practice this would involve identifying and being aware of the factors that might make mediation between Maori participants different.

Another approach is to examine the cultural or theoretical assumptions the mediation model itself is based upon. This should be done before we transplant a model into a new context. Lederach has commented that there cannot be exportation of the mediation model into another cultural setting. He writes about his experience with mediation in Central American cultures: "embedded implicitly in the mediation process I presented were fundamental assumptions about conflict and how to handle it that were appropriate and applicable in one cultural setting but not necessarily shared by another."[60]

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[59] J Z Rubin and F E Sander "Culture, Negotiation and the Eye of the Beholder" (1991) 7 *Negotiation Journal* 253.

[60] J P Lederach *Preparing for Peace - Conflict Transformation Across Cultures* (Syracuse University Press, 1995) 38.

Once we are aware of these assumptions, upon which mediation functions we can then hope to operate mediation in complex settings. Huber comments that, "mediation involves culturally bound assumptions about what is of procedural interest to the parties - that is, roles and characteristics of the intervener and goals of the process."[61] An examination of the bases of mediation will help identify issues in the mediation model. These issues are the key to achieving a working mediation process. Then we can hope to successfully transplant dominant culture mediation processes into vastly differing contexts. The resulting model will be grounded first, rather than modified from a dominant culture process to accommodate for culture.

E ENVIRONMENTAL ISSUES AND MEDIATION

Dispute resolution of environmental and natural resources issues present a complex dynamic for disputants. Baylis states that "Environmental problems involve a high degree of public interest, are usually multi-dimensional and values laden."[62] By their nature environmental problems have a certain dynamic in dispute resolution. This is because the features of environmental problems impact upon the means of dispute resolution.

To describe the features of environmental problems would be a large task. I will mention some examples from this large group of problems. One feature of environmental problems are their wide consequences. Environmental problems can be immense, affecting whole ecosystems. There may also be difficulty in assessing the long term effects. The nature of the consequences of environmental decisions means that there is a substantial public interest involved in the outcome. This public interest itself may be difficult to identify.

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[61] M Huber "Mediation around the Medicine Wheel" (1992) 10 *Mediation Quarterly* 355.
[62] C Baylis *Legitimacy of Environmental Mediation: Toward a Model for New Zealand* LLM (Thesis) Victoria University, i.

Environmental problems may also be characterised by the involvement of diverse values, due to the likelihood of a number of different parties being involved. The polycentricity of environmental disputes means there will be a wide spectrum of interests involved. Different parties bring widely different perspective's to any problem. Each disputant will have their own values. These values will fall in a wide spectrum from a focus on the value of the ecosystem to a focus on the technological value of the resource. There may be a fundamental conflict of values in such disputes that is difficult to reconcile. Whether parties can involve themselves in dispute resolution such as mediation will largely be determined by the amount of disparity between the parties values and interests.

Environmental conflicts such as fisheries cover a wide range of issues. The 'harm' or 'effects' these issues may create have a diffuse impact that is difficult to judge. There is an inherent uncertainty in environmental issues. The science of measuring fisheries is often limited by the data collected. Resource issues such as fisheries often involve highly complex technical matters.

Mediation has a greater chance of responding to the multi-dimensional traits of environmental and natural resource problems than adjudication. However, there are still problems with the practice of mediation in this area that place in question the legitimacy of such practice.

IV FEATURES OF MEDIATION

A FOCUS ON THE INDIVIDUAL

Dispute resolution mechanisms such as the mediation model focus on an individual's interests. The individual is the critical grouping to which the mediation model can cater. Gunning comments that "The value of respect for the individual reflected in the structure of American mediation is appropriate for our culture and its shared values on individual rights."[63]

The process involved in mediation reflects the emphasis on the individual. It assumes that an individual representing each side of the dispute will be readily identifiable. The use of mediation assumes that the parties operating in the process will be able to explain their issues in the dispute as an individual. What if the individual is a representative of a range of views? Will they then be able to relate their issues in dispute? Abel, in his early critique of Alternative Dispute Resolution(ADR), points to the individualising of grievances as a way these ADR methods neutralise conflict. He states with regard to individualisation, "This seems to me a more subtle form of the very explicit, often brutal, efforts by state and capital to prevent, undermine, and delegitimate attempts by the oppressed to organise and take collective action."[64] He also criticised informal institutions such as mediation because they lack the power to compel parties to participate or comply.

Can mediation cater for a person whose main identity is not as an individual but as a part of a larger grouping of people? That individual may have great difficulty operating in a mediation process because they cannot relate what they as individuals, want out of the process. Huber comments that "mediation as it is widely practised in the dominant culture

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[63] I Gunning "Diversity issues in Mediation : Controlling Negative Cultural Myths" (1995) *Journal of Dispute Resolution* 85.
[64] R L Abel *The Politics of Informal Justice* (Academic Press, 1982) 289.

is oriented to individuals and the assertion of individual needs rather than to the individual-in-community."[65]

The whole idea of a consensus based approach is that the individuals will reach better resolution through face to face dialogue. This process will be most manageable where there are individuals as disputants. In the context of Maori fisheries it will be a tribal grouping of iwi or hapu who are in (a situation of) dispute. It would be a mistaken assumption that one Maori individual is sufficient to represent iwi complexity and diversity. Allowing only one official representative of each group that participates may render the mediation ineffective or inoperative. It is the collective will of the tribe that will have to be considered in any mediation.

B THIRD PARTY INVOLVEMENT

Mediation involves a third party, the mediator, to assist the parties. The mediator is an independent person chosen to direct the proceedings. It is expected that the mediator will facilitate the creation by the parties of their own solution.

The mediator's task is to focus on the issues for discussion. This can be done by the mediator helping in isolating the issues in dispute, and then developing and exploring options for the resolution of the dispute. The mediator could in fact be said to be the controller of the dialogue, but not of the content. Critics such as Cobb, Rifken and Millen see a paradox in the neutrality mediators are expected to possess.[66] The perceived neutrality and impartiality of the mediator demands an unbiased approach to mediating. There will however be conflicting demands in trying to maintain neutrality. It is very difficult for the mediator not to influence the process and outcomes of the mediation. The

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[65] See above n 61, 355.

[66] J Rifken, Millen and S Cobb "Toward a New Discourse for Mediation - A Critique of Neutrality" (1991) *Mediation Quarterly* 160.

mediation technique, using the mediator as the main communication between disputants is thought to increase the probability of severing the relationship between the parties. Cobb, Rifken and Millen support the discourse of storytelling, to overcome this problem of neutrality, and thus empower the disputants and mediators toward the construction of an agreement.

The assumption is that the parties to a dispute will welcome the involvement of a third party and agree on the functions and role of a mediator. This model of mediation assumes that having a third party entering the lives of the parties to resolve the dispute and then departing, is appropriate. In some cultural situations, such as Maori fisheries, outside intervention may not be welcomed into the dispute resolution process.

The question of the choice of mediator will also arise. The mediator needs to have an understanding of the complexities of the situation. A mediator may be chosen for a range of qualities; for example, as a process manager, or even as an expert in the subject matter of the dispute. It should not be assumed that mediation can only involve one mediator. Mediation can function with co-mediators.

Under this staged model of mediation it is up to the parties in the dispute to appoint a mediator. With this model of mediation it is seen as important to choose a neutral mediator, who probably does not know the disputants personally. The mediator must have the respect of the parties. In traditional Maori society often a Kaumatua, Tohunga, or Rangatira acted as mediator.

C INFORMALITY

Mediation assumes that the informality will be beneficial to resolution of the dispute. Mediation allows thoughts and ideas to be expressed freely. It is assumed that the disputants will communicate directly with each other. The style of the proceedings may be

direct and up front, with verbal skill being emphasised. Some sessions in the mediation are conducted privately with the mediator, but a necessary part of the mediation is face to face dialogue between the disputants. Direct communication among disputants is a necessary ingredient for resolution of the dispute. There are no constraints like rules of evidence to regulate the information presented at mediation.

This inherent informality can suit varied cultural contexts such as the Maori fisheries because it will allow Maori cultural and spiritual values to be voiced, recognised and considered. Informality in mediation can allow the emotive issues to be addressed. Fisheries are a part of Maori whakapapa and to try and ignore the strong emotions involved and deal with them separately will ignore a part of the disputed issues.

This informality element may mean mediation can lend itself to a complex setting involving a range of issues. A range of issues including political, emotional, identity, recognition and self determination issues can be addressed.

Informality is not always an aid to dispute resolution. Mediation may not cater for situations where non-verbal skills are important, or where an individual has to suppress their concerns at dispute, for example, an individual wishing to preserve the unity of their wider grouping. In mediation therefore, care should be taken over the level of formality governing proceedings.

Formality is sometimes appropriate. Formality can bestow upon a dispute an element of importance, or ritual. In Maori fisheries the appropriate Maori protocol should be an important part of the process. It demonstrates respect for the other party. It can give the effect of the parties recognising the seriousness of their dispute and its process. Clear recognition of the dispute and the interests involved in it are important in the Maori fisheries setting.

D FLEXIBILITY AND ADAPTABILITY

Mediation has been said to be applicable to any kind of dispute. Folberg and Taylor refer to mediation as, "a conflict resolution process [that] is universal and comprehensible to people of many cultural and ethnic views."[67] It can be employed at any stage of the dispute. There is nothing to govern or restrict its use. Procedural flexibility is promoted as one of mediation's foremost characteristics. The process can be tailored to suit the parties and the situation. The promotion of mediation as flexible and adaptable, has not gone unchallenged. Bush and Folger criticise mediation for a lack of flexibility, because it is shaped by the desire for an outcome.[68]

The flexibility of mediation allows parties to set their own rules and procedures. The formality associated with conventional methods of dispute resolution is gone. This flexibility could be beneficial in helping mediation to adapt to different settings. The cultures involved can create their own process, and negotiate the protocols of the mediation according to their cultural needs. There is nothing to stop mediation, in theory, incorporating spiritual content and using the forum of a cultural gathering or ceremony.

Russel Barsh in contrasting indigenous North American and Aboriginal Australian dispute resolution models with the imported British system stated that, "The heart of the traditional dispute resolving system is procedure - not fixed rules for setting norms of conduct. Traditional systems are designed to settle conflict, not to implement formal social planning and this requires flexibility."[69] For instance, in traditional Australian Aboriginal society dispute resolution was flexible enough to encompass adversarial and inquisitorial forms.

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[67] See above n 1, 20. (Quote from Folberg and Taylor, 1984)
[68] See above n 47, 63.
[69] P R Grose "Towards a better tomorrow; a perspective on dispute resolution in Aboriginal communities in Queensland" (1994) *Australian Dispute Resolution Journal* 333.

Mediation as described in the TOKM model follows a prescribed and structured framework. Delineation of issues and agenda are seen in a western perspective. A mediator will try to organise the disputed issues in order, and then lead discussion to resolve each issue in sequence. This mediation model is clearly flexible in comparison to traditional Court processes. In comparison to traditional Maori dispute resolution processes, such as Maori hui, it is however, quite rigid. The rigidity of this model stems from the fact that in captures agreements in writing. Parties are expected to 'sign off' on principles and sign off on the outcomes before mediation is finished. The outcome of mediation is therefore more enforceable. The benefit of this mediation model may be that it can add rigidity to where traditional dispute resolution methods fail.

In some cultures however, disputes are treated in a more holistic manner. Treated holistically, each issue in dispute will be interrelated to another. These interrelationships have to be considered before a decision can be made on any issue. The nature of traditional processes lends them to being more fluid than the mediation 'model' discussed, more holistic. The mediation model may be too rigid to adapt to a setting where the dispute needs to be treated 'holisitically'. The mediation model in place for Maori fisheries issues can benefit from incorporation of Maori kawa and tikanga. The dialogue of mediation could benefit from following the process of traditional Maori protocol.

E VOLUNTARY AND NON-BINDING

The Dispute Resolution Procedures published by TOKM state, "Mediation is a voluntary process".[70] Before going into mediation the parties have to agree that mediation is an appropriate method of trying to resolve the dispute. The mediation is not binding on any party unless an agreement is actually reached.

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[70] See above n 3, 7.

Feinberg describes the process thus, "Both the initial decision to try mediation and the decision to continue participation in the process are left entirely to the parties. If either party is dissatisfied at any time with any part of the proceeding that person can withdraw, the only commitment involved is to give it a try."[71]

This assumes that parties will find it appropriate to initiate the mediation process of their own accord. It assumes that parties will have the volition to choose mediation and then to apply themselves to mediation. Haberfeld and Townsend comment that:[72]

> Negotiation and Mediation are not options as long as the adversary is unwilling to sit down to talk seriously. They are only appropriate in those contexts in which the disputants acknowledge their interdependence and resign themselves to the fact that getting beyond the current impasse and avoiding current or anticipated losses will require direct talks.

The non-binding nature of mediation places the emphasis in mediation upon the parties 'owning' the process and their final agreement. It is thought that this 'ownership' of mediation will mean parties find mediation as an acceptable form of dispute resolution. Mediation assumes that self imposed decisions are more likely to have effect than solutions devised by an outside party. The non-binding nature of mediation, and the lack of commitment required, assumes parties have the ability to decide when the mediation process is no longer assisting them.

A direction from a court that the parties go to mediation has led some Maori fisheries disputes[73] to be mediated. The issues surrounding the operation of mandatory mediation

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[71] See above n 46, 7-8.
[72] See above n 31,415.
[73] Three instances of a direction from the court to mediate are reported by Matuanuku Mahuika (solicitor for TOKM). The first is in the situation involving Ngati Mutunga in the Chatham Islands, see *Te Runanga O Wharekauri Rekohu Incorporated v The Treaty of Waitangi Fisheries Commission and others* (HC) CP297/95 27 Nov 1996. A second instance involved a boundary dispute in the far north and a related Waitangi Tribunal Claim. A Court order was also used in a mandate iwi representation dispute in the Bay of Plenty.

raise key questions about the compulsion to mediate, voluntariness, and about the attempt to settle substantial issues of rights through negotiation. One major implication of mandatory mediation is that it compels the parties to mediate often against their will. This lack of willingness to mediate will affect how the mediation itself operates. If mediation is defined as a voluntary process, then mandatory mediation may in fact be something quite different from mediation, a hybrid of mediation.

V SPECIFIC ISSUES FOR MAORI IN MEDIATION

A MANDATE

In order for a Maori group to establish a right to Maori fisheries quota they have to establish their mandate, their right to fisheries. Resolution of mandate issues is in itself a large part of resolution of disputes in Maori fisheries. It is important that the 'appropriate' organisational unit or units be involved in the mediation. For instance, Urban Maori Authorities are trying to establish that they are legitimate groups, with rights to quota. There is however no firm TOKM policy to deal with the establishment of a tribal mandate. TOKM is still in the process of determining a policy to cover this matter.[74]

In establishing a mandate the focus has been on iwi as the legitimate grouping to receive quota. TOKM allocation principles have stated that allocations are to be made to iwi.[75] "Iwi" therefore is the grouping that will be involved in any decision-making and dispute resolution concerning fisheries allocation. The issue then arises as to what constitutes an iwi.

A lengthy process of litigation has finally led to the Privy Council ruling on this mandate issue in January 1997. The Privy Council said that the Court of Appeal acted incorrectly in its consideration of what was meant by 'iwi' and had deprived the appellants of the opportunity to make submissions on the question. It said the matter should be returned to the High Court. The Privy Council said the question to be heard in the High Court should be:[76]

> Does the Maori Fisheries Act 1989 require that any scheme for the distribution of the assets held by the Commission before the settlement date, which the

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[74] TOKM has so far approved a set of "recognition" criteria for Iwi organisations wishing to be formally recognised to receive fisheries assets.

[75] Treaty of Waitangi Fisheries Commission "Hui agrees on Allocation principles" *Te Reo o te Tini a Tangaroa* (Mana Productions, Wellington, July 1996) 3.

[76] Treaty of Waitangi Fisheries Commission "Privy Council decision has far reaching implications" *Te Reo o te Tini a Tangaroa* (Mana Productions, Wellington, February 1997) 7.

> Commission includes in a report furnished to the Minister under section 6 (e)(iv) of the 1989 Act, should provide for allocation of such assets to "Iwi" and/or bodies representing "iwi". If the answer is 'yes'..... does "iwi" mean only traditional Maori tribes?

The Privy Council effectively quashed the Court of Appeal ruling that the:[77]

> Treaty of Waitangi Fisheries Commission has a statutory duty to consult persons entitled to be members of iwi although their specific tribal affiliation may have not been and cannot ever be established. The most practicable mode of consultation with those persons is through the Urban Maori Authorities (UMAs)... The Commission's statutory duty extends to ensuring that any scheme or legislation proposed by the Commission includes equitable and separately administered provision for Urban Maori.

The key to this Court of Appeal judgement was the requirement that any scheme devised by TOKM to distribute assets of the settlement should include provision for Urban Maori. This decision from the Privy Council means that the mandate issues is still unresolved and more litigation will follow on the issue.

Related issues of iwi identification and iwi representation are also in need of resolution. Iwi will have to meet certain criteria in order to be identified as iwi. This may involve TOKM consulting with neighbouring iwi in question. TOKM has in some instances advised the group in question to negotiate with iwi in that area so that their interests are considered.[78]

In terms of representation, the problem remains that in some instances more than one group claims to represent an iwi. Resolution of this problem requires one group to

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[77] *Te Runanga o Muriwhenua & Ors v Te Runanganui O Te Upoko O Te Ika Assoc Inc & Ors* (CA) 30 April 1996, CP 155/95.

[78] Treaty of Waitangi Fisheries Commission "Progress on Iwi identification and representation issues" *Te Reo o te Tini a Tangaroa* (Mana Productions, Wellington ,June 1995) 7.

demonstrate that the iwi has accorded it sufficient mandate to represent them. This could be achieved by a well notified and public hui on issues involved. These issues of recognition and representation are critical in the resolution of fisheries allocation and any disputes resolution involved in allocation.

In practice the resolution of mandate issues is a lengthy process. Where there is a dispute over hapu or iwi authority, the hapu or iwi have to assert their authority and then have this authority accepted. The group has to satisfy those around them, and convince other groups that they are entitled to their mandate. This may involve a number of hui and even then it will not necessarily be a final settlement. In succeeding years the group will have to re-establish this mandate. In contemporary Maori society this issue is further complicated by contemporary demographics. A large proportion of Maori are urbanised and have little connection to the more rurally based marae of the iwi structures.

B PARTICIPATION

The mediation model assumes that the parties to the dispute will be able to identify themselves and select representatives to participate in its resolution. This will not always be as straight forward as it sounds. It is not clear in the staged model of mediation discussed whether there is room for leaders of groups to participate and what their role would be. It is not clear how mediation can cater for additional participants. Assuming that mediation is very adaptable, complex situations of participation could be catered for. Difficulties may arise for the mediator. How will the mediator know who he/she is talking to, or should be talking to when there are complex groups of participants to a dispute? Where large groups of people are gathered together at a forum for mediation how can their interests be communicated? Who ought to decide who should participate? The issues surrounding participation in dispute resolution are very problematic in Maori fisheries disputes.

Once disputants have agreed to use mediation it is necessary for them to focus inwards, and look at their own group. It is necessary for each group in the dispute to identify its representatives. Mediation is consensus and interaction based. In order for mediation to operate it requires a representative group of iwi to participate. It is also necessary for the party to identify its approach to mediation. The mediation process will function better when the representatives of each side of the dispute know clearly what their issues and arguments are in the disputed matter.

The mediation model assumes the parties are on an equal footing, that there is no power imbalance nor hierarchy operating. This underpinning assumption may be true of its use in some settings. Current discussion however identifies the probability of unequal power in mediation. Cobb list the conditions that lead to a power imbalance in mediation as disparities in: levels of self esteem; resources; gender; race and class; and the quantity and nature of information.[79] Kelly lists another set of factors that can contribute to a power imbalance in mediation: the history and dynamics of the disputant relationship; personality and character traits; cognitive style and capabilities; knowledge base; economic self sufficiency; gender and age differences; cultural and societal stereotypes and training; and institutional hierarchies.[80] In implementing the mediation model into Maori fisheries disputes there is an assumption of equality. This assumption does not take account of the fact that there is great inter-iwi and intra-iwi diversity.

In Maori fisheries disputes it is necessary to consider how intra-iwi diversity can be catered for. Allowing more than one iwi representative to participate at the mediation may aid this. Increasing the numbers of representatives too greatly could however hinder the management of the mediation process. There are some modern structures in place that can

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[79] S Cobb "Empowerment and Mediation: A Narrative Perspective" (1993) *Negotiation Journal* 245.

[80] J B Kelly "Power Imbalance in Divorce and Interpersonal Mediation :Assessment and Intervention" (1995) *Mediation Quarterly* 86.

be used as a means of choosing appropriate representatives.[81] There is however no consistency in the methods by which representatives have come to represent certain iwi.

In some cases it may be appropriate for iwi leaders or Kaumatua to represent their iwi at a dispute. Using iwi leaders as representatives is one way to resolve complex participation issues is mediation. Use of leaders as the participants in mediation could change the nature of mediation, making it similar to a negotiation. This change would result from the likelihood of leaders being steadfast in their perspective on the issues in dispute and being unwilling to compromise.

Another means of selecting iwi representatives would be a poll or vote by all identifiable iwi members, on the matter of representation at the mediation. It may be necessary for mediation to incorporate mechanisms of election for participation problems, in order for it to transplant successfully into the Maori fisheries setting. One problem with such a mechanism are the logistical difficulties of its operation. This may detract from the appeal of mediation as an accessible and informal process.

Another way to look at the participation issue in Maori fisheries disputes is that it will not always be solved before mediation. Participation could become an issue at the mediation itself. Emphasis need not be placed so much on the outcome of mediation. Instead mediation can transform the relationship between and within parties. The option to participate in mediation, when taken up in whatever form, has the potential to help progression of a dispute. Getting parties together via mediation are steps that help avoid grid-lock in any subsequent litigation. Participation can 'free' the situation up. Preconceived ideas of how participation should be constructed may only frustrate mediation as a process.

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[81] By voluntary resolution; section 30 Te Ture Whenua Maori Act; section 6A Treaty of Waitangi Act 1975; and legislated settlements.

VI TRANSPLANTING MEDIATION INTO MAORI FISHERIES DISPUTES

A THE MEDIATION MODEL IN USE

One dispute has been submitted to the mediation procedures promoted by TOKM Dispute Resolution Procedures.[82] This use of mediation was seen as a trial run of the procedures in place. The dispute in this instance related to the sharing of 1995/1996 lease round quota in Fisheries Management Area 8(FMA8)[83]. It was successfully settled to the satisfaction of all the parties. In this dispute, a chairman, Tim Castle (also the designer of the Dispute resolution procedures) acted as a mediator. The disputants were able to agree that each would receive an equal share of quota for the lease round, and committed themselves to discussing and agreeing upon the procedures for fair distribution in the following lease round. It was noted that the important aspects of this meeting were:

- All interested parties were present
- Everyone was able to hear first hand the view of everyone else
- Views were freely given and respected by all present
- The independent Chairman had no stake in the outcome.

Commission staff were only involved to supply information and answer questions

Robin Hapi said of this mediation that:[84]

> It proved to be a significant exercise in dispute resolution with the outcome agreed between participants rather than being forced on them, ... this sort of approach avoids delays, high costs and bad feelings which can result from court action.

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[82] The only recorded use of the mediation procedure was at a hui in Wanganui on 22 September 1995 over FMA8. See: Treaty of Waitangi Fisheries Commission "Successful trial for dispute resolution" *Te Reo o te Tini a Tangaroa* Mana Productions, Wellington, October 1995, 6.

[83] An FMA is a designated area generally extending outwards from points on the New Zealand coastline to the limit of its economic zone. FMA8 is that area of ocean comprised in a triangular shape with its boundaries being near the linear high coastline from Tirau Point in North Taranaki to approximately Titahi Bay, and extending from those points, to the north from Tirau Point to the boundary of the 200 nautical mile exclusive economic zone and to the south to the Brothers Island and thence to the same point on the exclusive economic zone boundary.

[84] See above n 82, 6.

This case demonstrates a successful use of the mediation model. This is, however, the only recorded instance of the mediation model being used. It is apparent that this model has rarely been used in Maori fisheries.

Since the operation of this mediation, a Disputes Committee has also been set up by TOKM. The process uses commissioners as members of the committee to resolve disputes referred to it.

B BACKGROUND TO MEDIATION - A CASE STUDY OF THE FMA8 DISPUTE

The dispute over Fisheries Management Area 8 has a longer history than the mediation case already described. It is an ongoing dispute, with the use of mediation in this one instance being but one example of a dispute arising over FMA8. The ongoing nature of the dispute is typical of disputes in Maori fisheries.

Since 1992 TOKM has made annual distributions to groups of Maori in the form of leased quota. These are interim distributions, while an ultimate method of allocation for quota is still being devised by TOKM. Since 1993 TOKM has made leased quota available to groups of iwi within an FMA, then leaving it to the individual iwi, to determine how to allocate the quota to be divided amongst themselves.

Each year disputes have arisen over issues related to the lease round in FMA8. The use of the TOKM mediation model, has been but one attempt to resolve issues in the sequence of the ongoing dispute. At this time an agreement was reached through the use of the mediation model, that the quota should be shared equally.

Up until the 1996/97 lease round, quota allocated to iwi in FMA8 were distributed within that group on an equal basis between sharing iwi. Essentially the issue that recurs in

dispute, is the equality of allocation in each lease round and whether the quota allocated should be divided equally amongst the eight iwi involved. Some iwi, for example Raukawa, consider they have a stronger claim therefore the quota should not be divided equally.

A challenge to this agreement of equal sharing has been taken in the courts in *Te Runanga O Raukawa Incorporated v The Treaty of Waitangi Fisheries Commission.*[85] Gendall J said in this case that the plaintiff's (Raukawa) contentions were without merit. The plaintiffs had sought judicial review, contending that the decision for the 1996/97 leasing round for FMA8 was unlawful, and that TOKM has at all times in the past acted unlawfully in the distribution of quota. The plaintiffs also contented that the Disputes Procedures set up by TOKM fail to comply with natural justice and are inadequate as a matter of law. Gendall J stated that the decision on FMA8 by TOKM under its Dispute Resolution Procedures was fair to all.

Gendall J in this case, describes the situation over FMA8 thus; "Despite the passage of time since then the complete resolution of the complex issues within FMA8 in the individual lease rounds, has not proved possible. It is a polycentric situation. There being agreement at least up until 1996/97, but underlying dissatisfaction."[86] This polycentric nature of the dispute means that the conflicting claims are many, each being affected by any decision in favour of one or other. The polycentricity of this Maori fisheries dispute, and other disputes in this setting may mean that they are unsuited to resolution by mediation.

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[85] *Te Runanga o Raukawa Incorporated v The Treaty of Waitangi Fisheries Commission* (HC) Wellington, 7 August 1997, CP 322/96.
[86] See above n 85,10.

C USE OF COURT ORDERED MEDIATION

Maori fisheries allocation disputes have involved the use of court orders directing the parties to mediate. This resolves the difficult problem in these entrenched disputes of obtaining the parties agreement to mediate. To resolve this problem, and obtain some progression in situations of dispute, TOKM has used court orders.[87] In the Chatham Islands, a court ordered mediation has been used in an attempt to resolve a mandate dispute where two parties are claiming to represent Ngati Mutunga.

The TOKM in its application for an order that the parties attempt mediation in the Chatham's situation, has prepared submissions on mandatory mediation. These submissions state that such action is appropriate "Because of the continuing dispute on the Chatham Islands and the failure of the plaintiff to advance this litigation."[88] It noted that mediation may be particularly suited to situations involving disputes between iwi.[89]

The jurisdiction of the Court to order a mediation was outlined by McGechan J in a court hearing involving the Chatham Islands situation:[90]

> I now turn to the second application that was for directed mediation. There is an interesting question as to jurisdiction. I am prepared to assume jurisdiction, whether indirectly through r477 or more directly through inherent jurisdiction to stay upon conditions or indeed to simply and directly order mediation. The latter direct jurisdiction might require further argument in another case if in contest.
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> I am very satisfied that, the prospect having been raised, both second defendant and plaintiff express a willingness in principle. This dispute is one, in the end which

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[87] See above n 73.

[88] Submission to the Court in *Te Runanga O Wharekauri Rekohu Incorporated v Treaty of Waitangi Fisheries Commission* (HC) Wellington, 27 November 1996, CP 297/950. Prepared by Bell Gully on behalf of TOKM, 1.

[89] Above n 88, 11. Note include reference to 'Practice note on Procedure of the Waitangi Tribunal' which provides for mediation of claims pending in the Tribunal

[90] *Te Runanga o Wharekauri Incorporated v Treaty of Waitangi Fisheries Commission & Others (HC Wellington*, 27 November 1996, CP297/950,7.

> must be resolved by agreement reached between the conflicting interests, however strongly conflicting views are held, and a first step is necessary, however long the path may prove.

The second part of this statement by McGechan J, alludes to the rationale for such an order. It can be argued that without a court order compelling the parties to mediate, they will not progress in the resolution of the dispute. Continuing difficulty in resolution of such a dispute will cause the parties to incur increasing costs in terms of money and time. TOKM argues mandatory mediation is particularly appropriate because "the continuing litigation in this case is generating large legal fees for all parties concerned."[91] The need for voluntariness to begin the mediation is outweighed by the costs of a protracted, unresolved dispute. Placing the parties in a situation where they have talk and interact, even if no solution arises as a result, can be beneficial to the ongoing dynamic of the dispute. In the situation of Maori fisheries disputes this is a beneficial tool because it aides the ongoing dialogue of the dispute by causing the parties to interact.

The mediation between Ngati Mutunga in the Chatham Islands involved very serious and sensitive tribal matters amongst Maori. The interpretation of tribal genealogy was at stake. The two parties in this situation could not agree upon a suitable form to advance either of their claims to the tribal mandate. There is an insoluble difference between these two groups interpretation of the genealogy, so it was unable to be resolved even by Court ordered mediation. This matter is currently being litigated. The reason for the failure of mediation in this case was not the fact that mediation was used or Court ordered. It seems that failure to reach resolution was due to the nature of the dispute itself.

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[91] Above n 88, 11. Contained in TOKM's submission that mandatory mediation in the Chathams Islands is necessary.

D EVALUATING THE USE OF MEDIATION

Mediation is held in private and is confidential. It is hard to trace its effects. Mediators have an ethical obligation to protect the confidentiality of the mediation process. Mediation does not leave a record so it is hard to judge just how it is operating. I have talked to people involved in the use of mediation in Maori fisheries disputes in order to assess how mediation is operating.

Tim Castle, in discussion of his involvement in the dispute resolution of FMA8 issues, stated that his role was not given the label of 'mediator', but of 'chairperson'. This demonstrates the flexibility of the mediation concept. He also explained that initially he was given the message that a Maori person should have been sent to resolve Maori disputes by Maori procedures. He felt that as a non-Maori mediator his role was perceived, by some Maori involved, as inappropriate. This highlights the fact that third party intervention is not always suitable to every setting. As the mediation process progressed, this issue of the third party mediator being Pakeha, was seen to matter less. In the end he thought that, had a Maori been sent to act as mediator, it may not have worked because of issues of neutrality in representation.

The mediation in which Castle was involved, followed a format where traditional Maori protocol was incorporated. The process began with a formal greeting, karakia and whaikorero. This demonstrates that mediation is flexible, and able to adapt to different settings.

Castle believes the primary benefit the western model of mediation can provide for Maori fisheries disputes is a sense of finality. The agreement reached may not be binding, but this mediation model can help parties to reach 'outcomes' where traditional hui cannot.

Charl Hirschfeld,[92] Counsel for one of the parties in the Chatham Islands mediation case, makes the comment that in Maori fisheries situations, there is a divergence of opinion between sub-groups of the same tribe (intra-iwi), is likely to remain. Mediation will be unable to resolve a situation involving such identity issues of groups. This is because mediation (with its focus on the individual) cannot easily deal with the opinions of groups. The issues surrounding fisheries allocation methods are also unlikely to be resolved through mediation, because they are involve serious group rights issues.

There are a number of reasons why the mediation model in place is not being utilised. There are factors indicating that mediation is unsuitable for transplantation into the Maori fisheries complex setting. Third party intervention is not always welcome in this setting and mediation is unable to deal with the polycentricity of Maori fisheries disputes. The nature of the issues involved, such as mandate, are not susceptible to mediation.

It could be that mediation's role has not yet been fully realised. It is designed for use in resolution of disputes once an allocation method is in place for Maori fisheries assets. Once the allocation methods are fully in use for fisheries quota, we may see an increased use of these methods. It may just be a matter of time.

Mediation could aid the process of dispute resolution. It has benefits in that it is flexible and adaptable enough to cater to different protocols and formats. Mediation is able to provide an agreement. Mediation also has a potential role in assisting parties to clarify issues in dispute, to acknowledge issues of identity, need, recognition and respect. Where there are smaller matters to be decided before going to court or in the process of deciding upon a proposal for allocation, mediation can assist.

Education is needed about the availability of the mediation model and how it functions, in order for it to be utilised. This will help in gaining commitment to the process of mediation

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[92] Interview with Charl Hirschfeld via mail, 7 August.

rather than litigation. Otherwise processes such as mediation are unlikely to be used just by simply transplanting them into a new complex setting.

E MEDIATION IN VARIOUS FORMS

I have described mediation so far as a prescribed process, a mediation model. I have focused on the prescribed process set out in TOKM Dispute Resolution Procedures. There is no doubt however that mediation is being practised widely under other labels and without being informed by such a prescribed process. Mediation following a traditional Maori process continues to be used. Maori have always had processes which could be applied in order to resolve disputes. Hui which are held on marae in accordance with tikanga Maori are examples of these processes. These traditional Maori processes are sometimes labelled as mediation. It is sometimes just a matter of the labels we place upon the process. Hui are however quite a different process compared to the mediation model I have discussed. The traditional hui or korero is less structured than the mediation model and does not exhibit the facilitated dialogue of mediation.

These hui and conciliations are hard to track but are definitely happening. A recent news report[93] recorded five North Island hui having occurred, with ten more scheduled to discuss the proposed allocation mechanism for fisheries quota. They do not necessarily come under the auspices of a TOKM dispute resolution process. Nor are they necessarily mandated by the courts. Often parties themselves will give notice of a hui to resolve matters and initiate it themselves. It is also not unheard of that parties will call on a 'facilitator' or 'chairperson' to help resolve issues and manage the process of the hui. In these instances one could say the process was akin to mediation because of the third party intervention.

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[93] "Hui want allocation of fisheries assets through iwi - soon" *The New Zealand Herald*, Auckland, New Zealand, 22 September 1997, A8.

VII DESIGNING DISPUTE RESOLUTION PROCEDURES

A INVOLVEMENT OF PARTIES IN DESIGN OF SOLUTIONS

It is important that the dispute resolution mechanism favours the disputants' ownership of both the problems and the solutions in order to advance the wider process of self determination. Ury, Brett and Goldberg comment on the importance of working with the disputing parties in dispute systems design. They state "it is exceedingly difficult to change a dispute resolution system without working closely with the disputing parties. The designer needs their knowledge to tailor his general ideas to the particular situation. Moreover, without the parties' active support, any changes are unlikely to take hold."[94]

In the situation of Maori fisheries there have been repeated calls for better mechanisms for dispute resolution to be developed. The framework for dispute resolution that the Commission has now published has not had any impact on the call for better dispute resolution mechanisms.

For effective use of dispute resolution procedures Maori should implement a mechanism themselves instead of having models for dispute resolution transplanted and imposed upon them. The mediation model in use was designed by a Pakeha lawyer. There was some involvement of Maori in the consultation process that led to implementing the Dispute Resolution Procedures. The involvement of potential disputants in this creation process was however insufficient.

We can learn from situations in other countries where mediation models have been transferred and designed for the context they are to operate within. In Canada, The Salmon and Steelhead Advisory Commission employed the Seattle based Mediation Institute to make a study of dispute resolution procedures they could use. Norman Dale

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[94] W L Ury, J M Brett and S B Goldberg *Getting Disputes Resolved - Designing Systems to Cut the Costs of Conflict* (Jossey-Bass Publ.' San Francisco, 1988)65.

reports that the approach used to frame the dispute resolution mechanism "was largely based on the idea that it is likely to be useful and used only if co-designed with the future disputants themselves."[95]

The design of the model, 'Mediation around the Medicine Wheel'[96] in Vancouver, Canada is another example of a design solution made by the parties involved in dispute. A need for an aboriginal mediation model was seen by Native Court workers in British Columbia who were already utilising the dominant culture mediation process. A working group was formed to examine the questions relating to mediation for aboriginal people in urban settings. The group comprised of urban community leaders, with members from five different aboriginal nations within British Columbia.

This idea of consultation with the potential disputants is not foreign to the Maori fisheries setting. Working parties like Pae Pae Taumata have had a role to play in the operation of TOKM's consultation process. A working party could therefore be established to explore ideas of dispute resolution that are suitable to Maori fisheries issues.

One problem with the proposal of a mediation process designed from the 'bottom up' is obtaining a mandate from Maori to do this. In New Zealand Maori are still tribal, especially in political matters. Pan-Maori structures have had difficulty functioning. In fact this is clear from the operation of TOKM itself. It has been difficult for TOKM to establish its mandate as a pan-Maori entity. For example, TOKM's mandate to make a decision concerning an allocation method for fisheries quota has been continually challenged.

To establish a mandate and obtain participation in a working group in order to form dispute resolution processes would be difficult. Obtaining a process designed for Maori by

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[95] N Dale in E Pinkerton(ed.) *Co-operative Management of Local Fisheries - New Directions for Improved Management and Community Development* (University of British Columbia Press, Vancouver 1989) 60.

[96] See above n 61.

Maori is unlikely because it cuts across tikanga. It cuts across hapu mana and iwi mana to impose the idea that they themselves, should create a model for dispute resolution.

B FOCUS ON THE PROCESS IN DESIGN

We need to recognise the importance of the design of the process for dispute resolution. A focus on the outcome will too often determine the process and the involvement of participants in it. Focus on outcomes is therefore a problematic approach. A transformative approach can be taken instead, shifting the focus from the outcome to the process itself. Mediation and other dispute resolution techniques can be useful in that they are flexible and fluid enough to adapt to different situations. The resulting process that is designed may not equate to the mediation model as we have discussed in its staged and progressional format. Allowing mediation concepts to adapt to diverse situations will lead to increased utilisation of the concept.

The current trend of incorporating indigenous peoples conflict resolution systems into arenas such as criminal justice programs provides an example of designing a process that is owned by its people, and therefore functions. The 'Medicine Wheel' mediation process is an example where a model was created that was grounded in culture rather than modified from a dominant culture process to accommodate for culture. Certain factors were able to be identified so that this new model could operate successfully. For example, the need for a grounding in aboriginal spirituality, and the role of the intervener to be someone who the parties could trust. The model does not include a delineation of issues and agenda early in the process. The holistic nature of the 'Wheel' and its alignment with storytelling are important features. In this way the participants can see their experience in mediation in relation to ongoing life experiences, life as a process around the 'Wheel'.

The failure to transplant mediation into the Maori fisheries setting, may mean there is a need to let go of the western mediation model. Instead, mediation could develop as a dialogue in a range of forms.

C LINKING TRADITIONAL METHODS WITH CONTEMPORARY FRAMEWORKS

In theory the idea of linking traditional and contemporary frameworks presents a solution for adapting the mediation model. Uniting the contemporary model of mediation with traditional Maori dispute resolution processes could culminate in a process more in tune with the dynamics of the Maori fisheries situation. It could incorporate Maori protocol and be tailored to deal with particular concerns of Maori disputes. The TOKM mediation model is rigid in comparison to the fluidity of traditional Maori processes. The North American model can provide a settlement of issues. It can help in rescuing final decisions not adequately resolved by the traditional cultural model. Obtaining a balance between the rigidity of the North American model and the purely cultural model could bring increased success in mediation. It might stop the cycle of Maori fisheries issues that come up time and time again for resolution.

There are some problems with this unity as a solution. Simply adding a Maori traditional 'colour' to the North American mediation model will not sufficiently address the problems of transplanting mediation. Changing the surface, the 'colour' of the process is not a sufficient remedy. Such a measure cannot resolve the deeper problems of mandate and participation inherent in Maori fisheries disputes. Nor can it help the polycentric and cyclical nature of these disputes.

Maori fisheries disputes may be too complex for a truly hybrid dispute resolution process. This solution assumes that contemporary Maori society correlates easily to traditional Maori society. All cultures are evolving and changing. To impose traditional indigenous conflict resolution methods on an evolving contemporary Maori society and add western

developed mediation models, will simply add to the confusion already inherent in this complex setting.

The central problem with this solution of a hybrid mediation model will be gaining participation. In Maori fisheries the disputants are unlikely to submit themselves to such a mediation process, especially if the model is too complex or difficult to implement. It is just too much to assume that the North American model of mediation and the Maori consensus based mediation can be completely meshed together, and then accepted into use.

VIII CONCLUSION

Maori fisheries disputes present a complex dynamic. In this setting, issues of culture, politics and the environment, are all intertwined. Te Ohu Kai Moana tries to use consultation as a preventative measure, to avoid disputes. TOKM has also expressed its opinion that wherever possible informal 'tikanga', or consensus based processes, should be used to resolve disputes before resorting to other measures. The use of litigation as a means of dispute resolution in the Maori fisheries setting is prolific. Litigation is used in this setting not only to resolve disputes, but also as a negotiation tool.

The Commission has developed Dispute Resolution Procedures to help resolve disputes in this complex setting. Much consideration was given to the development of these procedures. A Pakeha lawyer, Tim Castle was consulted by the Commission. He developed a five staged set of procedures that emulate procedures already in common usage.

Dispute resolution procedures such as mediation draw on indigenous cultures for ideas of how to resolve conflict. Then stripped of cultural content, models such as the predominant North American mediation model were devised. In New Zealand, in situations like Maori fisheries, we can see that this mediation model has been transplanted with little or no adjustment. The mediation model was not designed for intra or inter-iwi disputes. The design of the mediation model was intended to preserve TOKM's authority.

Clearly this western mediation model offers some advantages. However, when transplanted into different cultural contexts with environmental issues, this mediation model will have difficulty functioning. The use of mediation in settings like Maori fisheries will be limited, because it is based on certain western assumptions of how to deal with conflict. The mediation process has certain features. It is focused on the individual in dealing with disputes. It requires a third party to intervene and manage the resolution of the dispute. Further to this, it is an informal, flexible, and adaptable process. It is also

voluntary and non-binding. The features of mediation mean that it is not suitable for transplantation into all settings.

In Maori fisheries there are two major issues that need to be addressed if mediation is to function. These are the matters of mandate and participation.

With the Maori fisheries situation we see that parties do not readily submit themselves to the process of mediation. Disputes in the complex setting of Maori fisheries are not amenable to the wholesale transplantation of mediation. Mediation as a prescribed model is having limited effect as a dispute resolution mechanism. Mediation in the sense defined by this model, is geared to a Pakeha dominant culture wishing for a solution rather that the solution being a reflection of the parties in dispute.

In most disputes in Maori fisheries we can see that the same issues come up for resolution continually, in cycles of dispute. The case study of the FMA8 and Chatham Islands mediation are illustrative of a number of factors in Maori fisheries disputes. FMA8 case illustrates the polycentricity and cyclical nature of these disputes. The complex nature of issues in Maori fisheries disputes such as iwi rights and mandate mean that they are not easily mediated.

It is presumptuous of dispute resolution theorists to want to change mediation to fit all settings. We should be careful not to impose new hybrid mediation solutions such as a combination of traditional and contemporary frameworks. This would be an imposition of yet another solution. Such a hybrid is likely to encounter the same problems that transplantation of the TOKM mediation model encountered. It will fail to be accepted into wide usage.

If a dispute resolution method is to be developed to cater for Maori fisheries disputes, the call for it has to come from the interested parties themselves. They should design the process themselves. Only then will it receive proper use. Mediation, if developed by the

potential participants could focus on the process. A process or dialogue of mediation could develop that is more holistic, and which functions in the setting it is to operate within.

We may see, as a natural course of events, that aspects of the mediation model are eventually used by disputants in this setting. As resources lessen, or there are increasing constraints placed on the use of the courts, parties to Maori fisheries disputes may implement mediation. The mediation model can provide them with a way of reaching a final agreement. This outlook for an increased use of mediation in the future has to be tempered with the nature of Maori politics. Maori disputants in fisheries issues will often have insoluble differences between them and are unlikely to submit to a voluntary process.

REFERENCES

A Texts

R L Abel (ed.) *The Politics of Informal Justice* (2 vols) (Academic Press, 1982).

D Amy *The politics of environmental mediation* (Columbia University Press, New York, 1987).

R A B Bush and J P Folger *The Promise of Mediation - Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass Publ., San Francisco, 1994).

R Fisher and W Ury *Getting to Yes: Negotiating Agreement without Giving In* (Houghton Mifflin, Hutchinson, 1981).

J Folberg and A Taylor *Mediation: A Comprehensive Guide to resolving Conflict without Litigation* (Jossey-Bass Publ., San Francisco, 1984).

J P Lederach *Preparing for Peace: Conflict Transformation Across Cultures* (Syracuse University Press, 1995).

E Pinkerton (ed.) *Co-operative Management of Local Fisheries - New Directions for Improved Management and Community Development* (University of British Colombia Press, Vancouver 1989).

W L Ury, J M Brett, and S B Goldberg *Getting Disputes Resolved - Designing Systems to Cut the Costs of Conflict* (Jossey-Bass Publ., San Francisco, 1988).

B Articles

B E Barnes "Conflict Resolution across cultures: a Hawaii perspective on a Pacific mediation model" (1994) 12 *Mediation Quarterly* 117.

T Bennion (ed.) *The Maori Law Review* (Wellington, Esoteric Publications)
(multiple issues; Sept 1996, May 1996, Mar 1996, Feb 1996, Nov 1995, Aug 1995, May 1995).

C Blackford and H Matunga *Maori Participation in environmental mediation* (Information Paper no.30, Centre for Resource Management, Lincoln University, August 1991).

C Blackford and A Smith *Cross-Cultural Mediation - Guidelines for those who interface with Iwi* (Lincoln University, Christchurch, 1993).

S Cobb and J Rifkin "Practice and paradox: deconstructing neutrality in mediation" (1991) *Law and Social Inquiry* 35.

S Cobb "Empowerment and mediation: a narrative perspective" (1993) 9 *Negotiation Journal* 245.

W Dewes "Fisheries - A case study of an Outcome" (1995) 25 *VUWLR* 219.

M Le Boron Duryea *'Conflict and Culture - A Literature Review and Bibliography'* (1992) UVic Inst. for Dispute Resolution, Canada.

G O Faure 'Negotiation Concepts Across Cultures: Implementing Non-Verbal Tools" (1993) 9 *Negotiation Journal* 355.

K R Feinberg "Mediation - a preferred method of Dispute Resolution" (1989) 16 *Pepperdine Law Review* 5.

L L Fuller "Mediation - Its Forms and Functions" (1971) 44 *Southern California Law Review* 305.

R D Garrett "Mediation in Native America" (1994) *Dispute Resolution Journal* 2.

S B Goldberg, J M Brett and W L Ury "Dispute systems design: an introduction" (1989) 5 *Negotiation Journal* 357.

G Goodpaster "Lawsuits as Negotiations" (1992) 8 *Negotiation Journal* 221.

P R Grose "Towards a better tomorrow; a perspective on dispute resolution in aboriginal communities in Queensland" (1994) *Australian Dispute Resolution Journal* 28.

I Gunning "Diversity Issues in Mediation: Controlling Negative Cultural Myths" (1995) *Journal of Dispute Resolution* 85.

S Haberfeld and J Townsend 'Power and Dispute in Indian Country" (1993) 10 *Mediation Quarterly* 405.

M Huber "Mediation Around the Medicine Wheel" (1992) 10 *Mediation Quarterly* 355.

J B Kelly "Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention" [1995] *Mediation Quarterly* 86.

J P Lederach "Efforts to introduce U.S. Mediation Models to Latin American Countries and Cultures" in "Mediation of Private U.S. - Mexico Commercial Disputes" (1996) 26 *New Mexico Law Review* 57.

L J MacDonnell "Natural Resources Dispute Resolution: An Overview" (1988) 28 *Natural Resources Journal* 5.

I MacDuff "Resources, Rights and Recognition - Negotiating History in Aotearoa/ New Zealand" (1995) 3 *Cultural Survival Quarterly* 30.

I MacDuff "Mediation in New Zealand: Legislating for Community" *Transcultural Mediation in the Asia Pacific* (Asia Pacific Organisation for Mediation, 1988).

I MacDuff "The Role of Negotiation: Negotiated Justice" (1995) 25 *VUWLR* 144.

P G McHugh "Sealords and Sharks: The Maori Fisheries Agreement 1992" (1992) *NZLJ* 354.

S E Merry "Disputing without Culture" (1987) 100 *Harvard Law Review* 2057.

A L Mikaere "Maori Issues" (1996) *New Zealand Law Review* 162.

K L Pringle "Aboriginal Mediation: One step towards Re-empowerment" (1996) 7 *Australian Dispute Resolution Journal* 253.

J Rifkin, J Millen, and S Cobb "Toward a New Discourse for Mediation: A Critique of Neutrality" (1991) 9 *Mediation Quarterly* 151.

M H Ross "Interests and Identities in Natural Resources Conflicts Involving Indigenous Peoples" (1995) 3 *Cultural Survival Quarterly* 74.

J Z Rubin and F E Sander "Culture, Negotiation and the Eye of the Beholder" (1991) 7 *Negotiation Journal* 249.

C Savage "Culture and Mediation: A red herring" (1996) *American University Journal of Gender and the Law* 269.

W L Ury "Conflict Resolution among the Bushmen: lessons in disputes systems design" (1995) 11 *Negotiation Journal* 379.

L L Yuan "Impact of Cultural Differences on Dispute Resolution" (1996) *Australian Dispute Resolution Journal* 197.

C Reports, Theses and Other materials

C Baylis *The Legitimacy of Environmental Mediation:Toward a Model for New Zealand* LLM(Thesis) Victoria University.

J H Hudson *Tikanga Maori and the Mediation Process* (LLM Research Paper) Victoria University Wellington, 1996.

J Munro *"The Treaty of Waitangi and the Sealord deal"* (LLM Research Paper) Victoria University Wellington, 1994.

J Munro *Maori and The Courts - The Limits of Litigation 1987 - 1995* (M Litt(Law)) Balliol College, 1996.

New Zealand Law Society Seminar *Introduction to Mediation* August 1994.

R T Price "Assessing Modern Treaty Settlements: New Zealand's 1992 Treaty of Waitangi (Fisheries Claims) Settlement and its Aftermath" (MacMillan Brown Working Paper Series No. 3) University of Canterbury, New Zealand, 1996.

S I Robinson *"Treaty of Waitangi (Fisheries Claim) Settlement Act 1992"* (LLM Research Paper) Victoria University Wellington, 1993.

Reports of Te Ohu Kai Moana/ Treaty of Waitangi Fisheries Commission [years ended 30 September 1993, 1994, 1995]AJHR.

Te Ohu Kai Moana/ Treaty of Waitangi Fisheries Commission - *Disputes Resolution Procedures*, October 1995.

Te Ohu Kai Moana/ Treaty of Waitangi Fisheries Commission *Hui-A-Tau Report*, June 29, 1996.

Te Reo O te Tini a Tangaroa - official newsletter of the Treaty of Waitangi Fisheries Commission (Mana Productions, Wellington, 1995-1997).

T Castle *Memorandum for the Treaty of Waitangi Fisheries Commission*, 31 January 1995.

T Castle *Open letter to Commissioners of TOKM*, 20 April 1995.

C M Wainwright *"Leverage through Litigation: The New Maaori Politics"* (LLM Research Paper) Victoria University Wellington, 1991.

Waitangi Tribunal *Muriwhenua Fishing Report - Wai 22* (Department of Justice, Wellington, 1988).

Waitangi Tribunal *Ngai Tahu Sea Fisheries Report - Wai 27* (Brooker and Friend Ltd., Wellington, 1992).

Waitangi Tribunal *Fisheries Settlement Report - Wai 307* (Brooker and Friend Ltd., Wellington, 1992).

*Research Interview with Matanuku Mahuika, Solicitor for TOKM, April 1997.
*Research Interview with Tim Castle, Barrister and Mediator, 6 August 1997.
*Interview via mail with Charl Hirschfeld, Barrister, 21 August 1997.

D Cases

Te Runanga o Muriwhenua & Ors v Te Runanganui Upoko o te Ika Assoc & Ors (CA) 30 April 1996, CP 155/95.

Te Runanga o Wharekauri Incorporated v Treaty of Waitangi Fisheries Commission (HC) Wellington, 27 November 1996, CP297/950.
(including: Submission to the Court from TOKM, prepared by Bell Gully).

Te Runanga o Raukawa Incorporated v The Treaty of Waitangi Fisheries Commission (HC) Wellington, 7 August 1997, CP 322/96.

Treaty Tribes Coalition Te Runanga o Ngati Porou & Tainui Maori Trust Board v Urban Maori Authorities & Ors [1997] 1 NZLR 513 (PC).

U.S. v Washington State (1974) 384 F. Supp. 312.