Comparative Analysis of Dispute Resolution Mechanisms: Fiji and the Cook Islands

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Abstract

Globally, there is significant literature on comparative Dispute Resolution Mechanism (DRM). However, there are two gaps in the literature. Firstly, most literature on DRM only focus on comparing one single method of resolving disputes such as, conciliation, mediation, or arbitration rather than holistically comparing all the steps of DRM in two or more labour jurisdictions. Secondly, there is limited literature that compares DRM between large developed countries and small developing countries, particularly small island countries. This paper contributes to the literature by holistically comparing all the steps of DRM in two small island nations, Fiji Islands and the Cook islands.

Introduction

Conflicts are inevitable in organisations. Naturally, they need to be resolved for efficient functioning of any organisation. There are a number of methods of resolving disputes; these include use of the organisations internal grievance procedures; conciliation; mediation; arbitration; and courts. A number of people can become involved in resolving grievances and disputes, including internal parties such as human resources staff, managers, shop stewards, employees, and external parties such as trade unionists, government officials, private mediators and lawyers (Walker and Hamilton, 2011a). Governments in all countries prefer employers and employees in the first instance to resolve their disputes within the organisation and exhaust in-house/ internal grievance procedures before seeking assistance of the state as third party intervenors (Chand and Lako, 2010).

Globally, there is good literature on Dispute Resolution Mechanism (DRM) (Latreille, *et al.*, 2012; MacDermott and Riley, 2011; Ridley-Duff

and Bennett, 2011; Saridakis, *et al*, 2008; Antcliff and Saundry, 2009; Knight and Latreille 2000, Scott, 2014). However, most published work only focus on comparing a single method of resolving disputes such as, focusing comparing either the process of conciliation, mediation, or arbitration (see Varda, *et al*, 2009) rather than *holistically* comparing all the steps of DRM. The main aim of this paper is to *holistically* compare and contrast all the steps of DRM of Fiji and the Cook Islands. Secondly, there is limited literature that compares DRM between developed countries and developing small island countries. While this paper does not consider a developed country, it examines DRMs of two developing small island nations.

In terms of theoretical framework, the Comparative Industrial Relations (CER) framework will be used to compare and contrast DRM systems. The DRM of the two countries will be investigated via reviewing their current labour legislation, namely, Fiji's *Employment Relations Promulgation* (2007) and the Cook Island's *Employment Relations Act* (2012). Those familiar with labour regimes of the Pacific Islands may expect Fiji's labour legislation to be more developed and progressive in resolving employment disputes compared to a less developed and weak legislation in Cook Islands.

There are several reasons for choosing Fiji and the Cook Islands for the comparative study. First, both countries are former British colonies, hence had initially adopted the British model of industrial relations framework (with minor variations). Second, Fiji and the Cook Island's labour legislation are now based on the Australian and NZ models of industrial relations, hence making a comparative study worthwhile. Third, both countries are island nations in the Oceania region and have similar socio-economic-legal-political institutional setup.

Literature Review on Dispute Resolution Mechanisms

While there is significant literature on DRM globally (see Foster, *et al*., 2009; McAndrew, 2012; Robson, 2014; Scott, 2014), there is no literature at all on DRM in the Cook islands and only limited literature on DRM in Fiji. Goundar (2007) explored DRM in a case study of the Fiji Police Force. Lako (2008) examined some aspects of DRM of Fiji. Chand and Lako (2010) examined DRM prior to and after the introduction of the Employment Relations Promulgation (2007).

Traditionally, academics examined IR only in single country settings. Comparative studies were rather limited. This was largely on account of the dominance of IR focus of metropolitan countries. Compara-

tive studies began largely in the 1980's. Comparative IR studies have come to be known as 'Comparative Employment Relations' (CER) framework. The CER framework was developed in the 1980s by industrial relations scholars to analyse employment relations in more than two countries (see Bean, 1994; Bamber, *et al*. 2011). The CER framework involves describing and systematically analysing employment relations in two or more countries.

There are a number of advantages of using CER framework (Barbash, 1989; Bean, 1994; Sisson, 1994; Kelly, 1998; Kochan, 1998; Strauss 1998; Schuler *et al.* 2002; Doellgast, 2008; McLaughlin, 2009; Bamber, et al., 2011). First, as Bamber *et al.* (2011) argue, the CER framework by comparing and contrasting allows us to better understand the pros and con of industrial relations in different countries. Second, Strauss (1998) argued that academics and practioners need to know not only about what is happening in a single country but by comparing and contrasting employment relations practices in *more* than one country, they are able to fully comprehend the unique features of industrial relations in different socio-economic environments and the CER framework is very much helpful in this aspect (Strauss, 1998). Third, CER framework provides academics theoretical insights into common and different variables that explain employment relations between employers, workers and trade unions (Barbash, 1989; Bean, 1994; Sisson, 1994; Kelly, 1998; Kochan, 1998; Strauss, 1998; Schuler et al. 2002; Doellgast, 2008; McLaughlin, 2009). Fourth, as Bean (1994) argues, the CER framework can provide models for policy-makers, human resource managers and trade unions leaders to replicate best practices in their own countries.

Bean (1994) and Bamber, *et al.,* (2011) propose that there are two different types of research designs for CER. The first research design is known as 'most similar case design'; this involves comparing employment relations in two or more counties which have some common features such as size, historical traditions, economy, or industrial relations institutions. The second research design, known as 'most different case design', involves comparing employment relations in two or more countries which have different employment relations features. This paper uses the 'most similar case design' to compare DRM and processes in the two countries on account of significant similarities between Fiji and the Cook islands.

There are two school of thought on the global trends in ER. One school of thought is that ER is *converging* globally. This perspective was initially developed by Kerr *et al*. (1960). The second school of thought is that ER is *diverging;* this perspective was developed by Katz and Darbishire (2000). The *divergence* perspective argues that despite globalisation, employment relations in countries are still *different*. This debate between 'convergence' and 'divergence' perspectives is ongoing (Bamber, *et al.*, 2011).

Industrial relations scholars have highlighted a number of advantages of using CER framework (Barbash, 1989; Bean, 1994; Sisson, 1994; Kelly, 1998; Kochan, 1998; Strauss 1998; Schuler *et al.* 2002; Doellgast, 2008; McLaughlin, 2009; Bamber, et al., 2011). First, as Bamber *et al.* (2011) argue, the CER framework by comparing and contrasting allows us to fully understand employment relations in different countries. Second, to globalisation, industrial relations and human relations academics and professionals need to know about employment relations practices in *more* than one country CER framework allows this (Strauss, 1998). Third, CER framework provides academics theoretical insights into common and different variables that explain employment relations between employers, workers and trade unions (Barbash, 1989; Bean, 1994; Sisson, 1994; Kelly, 1998; Kochan, 1998; Strauss, 1998; Schuler et al. 2002; Doellgast, 2008; McLaughlin, 2009). Fourth, as Bean (1994) argues, the CER framework can provide models for policy-makers, human resource managers and trade unions to replicate best practices in their own countries.

There are, however, some limitations and difficulties with CER framework that need to be acknowledged (Ryan, et al., 2004; Blanpain, 2010; Bamber, et al., 2011). The first difficulty is deciding *what* and *how* to compare (Bamber, et al., 2011). Second, *lack of common terminology* (conceptual equivalence) may create problems when comparing employment relations in two or more countries (Kahn-Freund, 1974; Blanpain, 2010). Identical words in different countries may have different meanings (Blanpain, 2010). For example, in some countries, the generic word 'industrial dispute' refers to all types of disputes, while in other countries, the term is further subdivided into 'dispute of right' and 'dispute of interest' with each having different meanings (Chand and Lako, 2010). On the whole, although the CER framework has some limitations, it is still a useful and worthwhile framework to use to compare and contrast employment relations of various countries (Bean, 1994; Strauss, 1998; Kochan, 1998; Bamber, *et al.,* 2011).

Fiji and Cook Island Economies and Labour Legislation

Fiji, a former British colony gaining independence in 1970, now has a population of approximately 0.84m of which around 335,890 are in the

labour force (Fiji Bureau of Statistics, 2014). GDP per capita is estimated to be FJD 8,236 (USD 3,898) (Fiji BOS, 2014). Major industries are agriculture, tourism, sugar, garments, and gold mining. The colonial government had enacted a number of legislation relating to employment in the country. After independence, these were replaced by the Industrial Relations Act (1970), the Trade Dispute Act (1973) and the Trade Union Recognition Act (1976). All of these labour laws, however, were mostly replica of the British, Australian and NZ industrial relations legislation.

The first phase of reform in industrial relations in Fiji came in 1992, 5 years after the first military coup in the country in 1987. The regime then amended the Trade Disputes Act through the Trade Disputes Act (Amendment) Decree 1992. This amendment was universally criticised, including by the International Council of Free Trade Union (ICFTU) and International Labour Organisation (ILO) for undermining the powers of the trade unions, workers and interference by the state in union matters. In 2007, a more progressive legislation, the *Employment Relations Promulgation* (ERP) (2007), was promulgated by a military regime which came to power after another extra-legal regime change in December 2006. This law was developed by the democratically elected governments which came to power after the 2001 and 2006 elections but had not, at the date of the 20006 coup, been enacted. This ERP (2007) was drafted by a New Zealand consultant, Stan Williams; its based on the British, Australian and NZ industrial relations legislation. This law regulates resolution of industrial disputes now.

Like Fiji, the Cook Islands is also a former British colony, though much smaller than Fiji. It has a total population of 10,800 and has a workforce of 4,100 (CIBOS, 2010). Key industries underpinning the economy are tourism, financial services, marine and agriculture. The Cook Islands has a GDP of NZD357million and GDP per capita is estimated to be FJD 22,828 (USD 10,804) (CIBOS, 2010). The Cook Islands is a protectorate of NZ, with which it maintains a very close economic-political relationship. It uses NZ dollar as its currency and its citizens have NZ passports which allows them free movement between New Zealand and Cook Islands (ADB Report, 2011). This close economic-political relationship with NZ has influenced the development of labour legislation in the Cook Islands.

The first labour legislation in the Cook Islands was the Industrial and Labour Ordinance (1964). This was amended a few times between 1966-2002. The current Cook Island's labour legislation is the Employment Relations Act (ER) (2012). It is modelled on New Zealand labour laws. The ER Act (2012) provides the terms and conditions of employment to workers and covers both the public and private sector workers. The Cook Islands Workers Association (CIWA) believes that this legislation is a weak and pro-employer legislation, and with the absence of organised worker political movement like a labour party as in Fiji or NZ, there was a lack of political representation in the development of this law (interview with CIWA officials, January 2015).

Comparative Analyses of DRM of Fiji and the Cook Islands

The various steps of DRM of Fiji and the Cook Islands are examined and analysed in this section. The steps of resolving disputes in each country are diagrammatically illustrated in Figures 1 and 2 respectively.

Step 1: In-house Grievance Procedures

Like in many other countries, the first step of resolving disputes in Fiji and the Cook Islands is by using an organisation's *internal grievance procedures* (Chand and Lako, 2010). Fijian and the Cook Islands labour laws require employers and employees to initially resolve their grievance internally at the organisation (in-house) level (Chand and Lako, 2010). The same is the case in most countries (Walker and Hamilton, 2012a).

The philosophy underpinning this is the notion of 'good faith'. An employer and an employee work together, thus must develop good-will to resolve their grievances (Walker and Hamilton, 2012b; Chand and Lako, 2010). Labour legislation in the two countries emphasises self-resolution before seeking state assistance; only if the two parties are unable to resolve the grievance at the organisation level can they resort to the dispute resolution machinery at the state level. In other words, employers and employees are required to *exhaust* the organization's internal grievance procedures before seeking third-party intervention. If the dispute remains unresolved the matter goes to conciliation and mediation.

Step 2: Conciliation/Mediation Level

The conciliation and mediation process is the second step of resolving disputes in Fiji and the Cook Islands. However, there are two variations in the operation of conciliation/mediation processes in these countries. The first difference is with regards to *who* can conduct the mediation process. In Fiji, mediation is done *only* by staff of Ministry of Labour. The law does not allow *private* mediators to be involved (interview,

Officials of MoL). The first step is for a worker to report a dispute to the MoL. The MoL then writes to the employer and informs it to attend a mediation meeting. At this meeting all the issues of the dispute are discussed and an attempt is made to resolve the dispute. There can be more than one meeting to resolve the dispute.

In the case of Cook Islands, the mediation process is underdeveloped. Not many cases go to mediation for the reason that the state does not provide mediation services; mediation is done privately outside the realm of Ministry of Labour. Ministry officials are not empowered by the legislation to engage in mediation. The Director of Employment Relations Division can only informally facilitate the parties to find a mediator. The two parties (employer and employee) have to arrange and pay for a private mediator, usually a lawyer or retired senior civil servant. The state does not get involved in this process. The parties normally pay 50% each for the fees of a mediator; the employer usually follows the decision of the mediator (Interview, Director of Employment Relations Division, Cook Islands, 20 February 2015).

The second difference with regards to mediation system is on costs, i.e., who pays for mediation services? In Fiji, mediation service is provided by the Department of Labour without any charge to the parties. In Cook Islands on the other hand, since private mediators need to be engaged, the respective parties need to pay for these costs.

In Fiji, given that there is no charge on conciliation and mediation services, workers do not hesitate to lodge disputes with MoL. In Cook Islands, the costs of conciliation and mediation is an effective bar to workers taking their grievances outside the organisation.

In Fiji the mediation system is well developed and effective in resolving disputes. Here, around 75% of all disputes are solved at the mediation stage (interview with Chief Mediator in Fiji, January 2015). In the Cook Islands, however, the mediation mechanism is very weak and relatively ineffective. This system disadvantages workers because most lower-paid workers cannot afford to pay mediator fees. Consequently, most industrial disputes remain unresolved with workers remaining aggrieved (Director of Employment Relations Division, Cook Islands, Interview, 20 February 2015).

In both the two countries, if the dispute is unresolved at the conciliation and mediation steps then the matter is referred to the Arbitration Tribunal.

Step 3: Employment Relations Tribunal / Arbitration Tribunal

Arbitration Tribunal is the third step of resolving disputes in both these countries. Disputes unresolved at the mediation and conciliation stage are referred to the Employment Relations Tribunal (ERT) in Fiji and the Arbitration Tribunal (AT) in the Cook Islands. In Fiji, the ERT can only deal with claims upto F$40,000. In both, the Tribunal are required to solve the disputes in *good faith* rather than in an adversarial way (Chand and Lako, 2010). The Arbitration Tribunal in both countries have the status of a magistrate's court. They operate in a legalistic manner *vis-à-vis* conciliation and mediation. Each party at Arbitration Tribunal can be represented by a lawyer. If need arises, experts can be called in on behalf of either party.

There, however, is a slight difference as to who *can appoint* the arbitrator. In Fiji, the arbitrators are selected by the state, whereas in the Cook Islands an employer and a worker have the power to nominate and chose arbitrators themselves. They may select either one (sole) arbitrator or one each. Were they to opt for two arbitrators, then the two arbitrator select a third arbitrator, thereby making a team of three arbitrators (ERA 2012, s10(1)).

In both the countries if the dispute is not resolved at by the Arbitration Tribunal level then the matter is referred to the Courts.

Step 4: Courts (Third Party Intervention)

In Fiji, the Labour Court is the fourth step of resolving a dispute. This court, known as 'Employment Relations Court' (ERC), has the status of Fiji's High Court. In the Cook Islands, on the other hand, the institution of Labour Court is missing. Unresolved disputes go directly to the High Court.

The Fijian Labour Court provision is based on the Australian and New Zealand Labour Courts system. The Labour Court deals exclusively with industrial relations matters and deals only with any unresolved and legally complex disputes. In Fiji only a handful cases have gone to the Labour Courts since this institution is not well developed even after nine years since the ERP (2007) came into effect.

In the Cook Islands, on the other hand, there is no Labour Court. The parties can take the unresolved disputes to the High Court. In practice, this approach is rare on account of costs.

In both the countries, provision is made for appeals from the decisions of the Labour/High courts.

Step 5: Appeal Courts

The appeal system is the fifth step of resolving a dispute. An appeals mechanism provides an aggrieved party an opportunity for further redress. In Fiji, appeals go to the Court of Appeal. Similarly, in the Cook Islands an employer or an employee can appeal to the Court of Appeal. In both countries appeals are allowed only on the ground of 'question of law'.

In Fiji, aggrieved parties can go one step further and appeal a decision of the Court of Appeal in the Supreme Court (ERP, 2007, s245), The Supreme Curt is the highest court in the country. Again, the basis of the appeal is 'questions of law'. In Cook Islands, appeals from the Court of Appeal can be made to the Privy Council.

The disadvantage of the court system is that it is expensive for employees. Court system requires either self litigation or engagement of lawyers. Lawyers almost always demand upfront payment of some portion of the total fees. Given the fee structure and practices in Fiji and Cook Islands, legal fees are often beyond the reach of ordinary workers. Court system also is time consuming. In Fiji, this often runs into many years, during which an aggrieved employee would remain with his/her grievances, including remaining without a job in cases of termination.

Summary and Conclusion

This paper has examined the DRM systems in Fiji and the Cook islands. Results show that generally the systems are similar in the two countries. This is expected as both systems have their effective origin in New Zealand labour laws, experiences and expertise. There are two major similarities. In both countries, the law requires in-house resolution of disputes as the first step. This is a form of de-regulating and de-centralising DRM. The foundation of this is that the parties must develop adequate goodwill to attempt to resolve their disputes themselves. This reduces the burden on the state and allows parties the opportunity to build good working relationship at the organisation level. Generally, involving third parties in dispute resolution tends to become progressively more acrimonious, with parties tending to harden their attitudes towards each other. Second, there is provision for aggrieved parties to escalate their grievance to the labour court (Fiji) or high court (Cook Islands), and follow through to the highest courts.

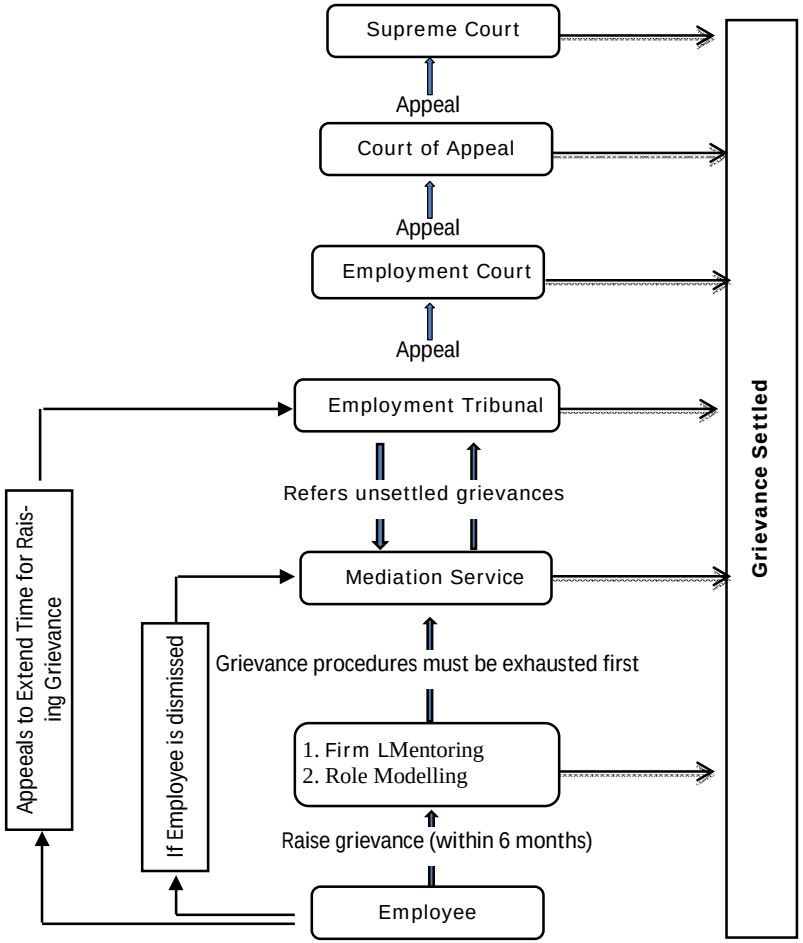
There are some variations in DRM systems between the two counties. First, in Fiji, the conciliation, mediation, arbitration and the Labour

Court institutions are well developed, while in the Cook islands, these institution are still in infant stages. Workers in Cook Islands believe that these institutions do not strengthen workers positions within the industrial relations system. Second, in Fiji, mediators of the Department of Labour have the power to resolve disputes. In the Cook islands, on the other hand, officials of the Department of Labour do not have any power to solve industrial disputes. Consequently, most disputes in Cook islands which are not resolved at the organisation level, can not get resolved without reference to the parties outside the organisation and the state. In Fiji, mediation is the prime external first stage dispute resolution mechanism. Most disputes are resolved by the end of the mediation and conciliation process. In contrast, in the Cook Islands, mediation does not work as effectively as mediators need to be engaged by the respective parties at their own costs. Since, most workers cannot afford to pay for the cost of mediation and/or pay for the cost of taking action in High Court, in Cook Islands most worker grievances unresolved at the organistation level remain unresolved.

Results show that the labour legislation generally and the DRM in particular in Fiji is more progressive and effective in resolving employment disputes than that in the Cook Islands.

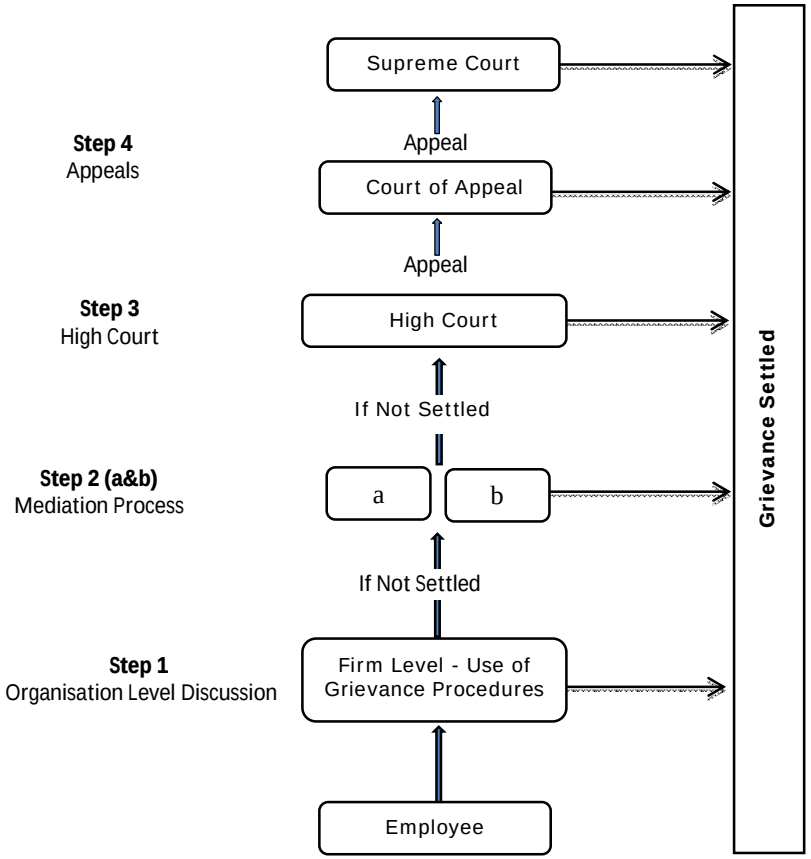
Appendix 1

Figure 1: Dispute Resolution Mechanism in Fiji under Employment Relations Promulgation (2007)



Appendix 2

Figure 2: Dispute Resolution Mechanism in the Cook Islands under Employment Relations Act (2012)



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