

Regional Dispute Systems: Design Challenges and Potentials

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Abstract

As the frequency and costs of litigation have increased for individuals and entities, a growing number of alternative dispute resolution tools and strategies have become more popular. Among these, dispute systems design (DSD) enjoys an explosion of application across a broad array of industries and organizations. This paper seeks to extend the benefits of a systems approach to conflict resolution to a regional level providing a conceptual framework for addressing conflict on a regional scale. In order to do so, the roots of the DSD field are examined and a concept of conflict as a motivating force is put forward. To extend DSD principles to a regional dispute setting, the resolution system needs to adopt and adapt to important characteristics of that particular region. The traditional hierarchical, nested dispute resolution system is replaced by a horizontal, arborescent design. In doing so, several benefits are accrued to the conflict resolution system: flexible, creative solutions to disputes, empowerment, avoidance of some DSD paradoxes, leaving behind much of the Western bias and improved cross-cultural communication over dispute issues. But a number of challenges to successful system design remain including messy resolutions, difficulty in precisely identifying participants, problematic role of government, a feeling of no progress on the part of participants, choice of less efficient resolution options, and capacity building.

Introduction

As the frequency and costs, including financial, time and psychological, of litigation have increased for individuals and corporations, a growing number of dispute resolution tools and strategies have become more popular to aid parties achieve resolution themselves. These alternative dispute resolution (ADR) processes include arbitration (i.e. a private judge), early neutral evaluation (an outside expert assesses each party's case and recommends a resolution), mediation (a third-party works with all disputants to create a resolution) and negotiation (Ertel and Ferrara 1991). Recognizing the value of individual alternative approaches to dispute resolution, researchers began to explore the impact integrated systems of dispute resolution techniques might have on large organizations. Since its inception, this practice of dispute systems design (DSD) has enjoyed an explosion of application across a broad array of industries and organizations such as health care (Street 1994; Kilmann, et al. 1986), banking (McDonald 1994), and insurance (Bean 1995).

While broadly accepted in the West, DSD application has remained fairly tightly bound to the corporate arena. For example, Costantino and Merchant (1996) in their immensely popular book focus on DSD within organizations, as do Slaikeu and Hasson (1998). But even as the field of dispute systems design matured, some practitioners and theorists sought to extend its principles beyond the original organisational environment (Moore 1994; Kelly 1989). This paper continues in the extra-organisational vein by extending DSD to regional dispute settings in the hope of providing a solid framework for addressing conflict at a regional level.

An extension of a systems design approach to the regional level requires an examination of the roots of the DSD field, particularly that it arose out of the need to respond to disputes within Western (predominantly corporate) organisational structures and thus carries with it a number of traits characterising this unique background. Accepting this relationship, the assumption is made that for a dispute system to be most effective, it should reflect the conflict setting for which it is being designed. Thus, to extend DSD principles to a regional dispute

setting, the system needs to adopt and adapt to important characteristics of that particular region.

Definition and Roots

According to Moore (1994), a dispute system design “involves planning for and implementing a comprehensive process for handling disputes...[and] includes the development of programs or institutions that provide conflict management services” (p. 44). Ury, et al. (1990) say that DSD is about “helping disputants change the way they [handle] disputes” (p. 163). And Costantino (1996) insists that DSDs be “integrated, interest-based conflict management systems created through participative, interest-based design processes” (p. 208).

A simple design for a system of dispute resolution strategies would resemble a series of steps the disputants would climb to achieve a resolution acceptable in their eyes. Each step decreases the autonomous creation of the final resolution and increases the participation of individuals or institutions outside of the original dispute. For example, to resolve disputes between colleagues in a corporation, a dispute systems design could begin with the opportunity for face-to-face discussion. If unsatisfied, the disputants could then employ the services of a colleague or company ombudsperson to assist/facilitate the discussion. The next step might see the use of an external mediator. If resolution is still not achieved, then a company-employed arbiter could intervene. All of these steps would be available to the parties as an alternative or strongly recommended precursor to seeking recourse to the legal system.

While there are different aspects of dispute resolution systems that various authors emphasise, at least three components are required. In component number one, the entity (eg. organisation, industry, region) for which the design is being created must be a system, “a set of interrelated parts, working independently and jointly, in pursuit of common objectives of the whole, within a complex environment” (Shrode (1974) as quoted in CDR 2001: 21). More simply stated, a system “has multiple interactions between many different components” (Rind 1999: 105) and can be exemplified by climate, multinational corporations, or the human digestive system. The systemic nature of an entity gives it the structural and interaction predictability on which to design a dispute resolution system.

The second component of a DSD is the potential for repeated conflict over similar issues. DSDs have always been created where an “ongoing series of disputes was inevitable” (Ury, et al. 1990: 162). Many conflicts are stochastic in nature and therefore unpredictable. For a systemic design approach to work, there must also be recognisable and likely (re)occurrence of one or more disputes over time.

The first two key components of a dispute system design addressed the environment in which the design will be implemented. The final required component focuses on the design system itself in that it should adopt a nested structure¹ for resolution strategies (Ury, et al. 1990) in which autonomy over solutions on the part of the disputants decreases as they move through the system, for example as they move from interpersonal negotiations to third-party assistance to adjudication. This is in short a hierarchical system that calls into play increasingly higher levels of authority as the dispute persists or grows.

DSD Roots

Recognizing the key components to a dispute system design, however important, is not enough for a dispute system designer to be able then to apply them at the regional level. One

¹ Rowe (1997) offers an interesting departure from the orthodoxy with her emphasis on options from which the parties may choose.

must also be aware of the foundational traits upon which the current structure of DSD is built and which influence so heavily the form taken. As noted above, the field of dispute systems design took root in the fertile dispute environment of the corporate organisational structure. Much like a flower's structure, colouration and robustness are attributable in part to the geological substrate on which it grows, this corporate environment lent DSD a number of its characteristics including those pertinent to our examination: western culture, organisational roots and hierarchical difference.

"Any particular collection [of cultural constructs] is identified by the people who hold it...or by the institutions or settings in which it is found" (Bailey 1991: 61). Dispute systems design, originating in the western corporate structure, by its nature displays the unique collection of cultural constructs called western standards. These standards include a "political theory about the role of conflict in society, the importance of equality, participation, self-determination and a form of leaderless leadership in problem-solving and decision-making" (Menkel-Meadow 2001: xiii). They "reflect a cultural bias towards rationality, individuality, an orientation to the future and an emphasis on formal agreement or outcome rather than on the relationship between the participants and the process" (Bagshaw 1996: 1) and promote a

"patriarchal paradigm characterized by hierarchy, linear reasoning, the resolution of disputes through the application of abstract principles, and the ideal of the reasonable person. Its fundamental aspiration is objectivity, and to that end it separates public from private, form from substance, and process from policy" (Grillo 1991: 1547).

The hierarchical nature of DSD taken from its western roots is reinforced by its organisational roots. While "[a]t the uppermost levels of the corporation in the nineteenth and earlier twentieth centuries" democratic, plutocratic and technocratic "groups contended for power" and still do somewhat today (Dunlavy 1998: 15), these governing bodies are tending now to remain independent of the day-to-day management for increased efficiency and productivity (Bhagat and Black 1998). Instead, these decisions are largely made in a hierarchical structure (see Szilagy and Wallace 1987: 548-553; Malone 2003). Thus, decision-making is often centralized and higher authority is recognized and generally shown deference.

An outgrowth of the hierarchical structure inherent in western organisational roots is the occurrence of hierarchically-related power differences. Power, in this sense, is similar to a definition of power presented by Blalock (1989) in that it is in relation to another party.

"Here we have the notion that power exerted by party X can, ideally, be measured by noting the change in a second party Y's behavior that is due to the actions or threatened actions of X. If Y's behavior is not altered, then X has not exerted power or influence over Y" (p. 28).

The concept of power differences along hierarchical lines impacts on our discussion because it suggests that the greater the disparity in hierarchy, the more that difference inhibits the resolution of disputes. This is because

"[w]hen power is unequally distributed: (1) Mediation is challenging, (2) The chances of reaching a mediated settlement are slim, (3) High-Power holders have little interest in the needs of low-power holders, (4) High-power holders are not generally willing to accommodate, (5) High-Power holders are not likely to initiate a win-win solution" (Wiseman and Poitras 2002: 55).

Although they only mentioned meditation—one of many possible strategies in a dispute resolution system—Wiseman and Poitras have described the general problem inherent to dispute resolution in the western corporate setting. The concept of hierarchical differences will be revisited at a later point.

Contrasting Characteristics

With an introductory grasp of the definition and roots of dispute systems design, we are now capable of exploring the possible problems and potentials of extending its principles to the regional level. The next step in this examination is to contrast defining characteristics of both the region and the organization to see if or where DSD may need to be adapted. The four critical characteristics discussed here are structure, culture, bounds, and level of dispute focus (summarized in Table 1).

Structure

The first major area of adaptation for a dispute system design is in terms of structure. The nested hierarchy of resolution strategies suggested by Ury, et al. (1990), *inter alia*, blends very well within a corporate organization where hierarchies of authority are recognisable and accepted. But nested approaches dependent on increasing levels of authority offer the greatest challenge to extending DSD principles to the regional level, where structure is characterized by horizontal relationships and resource flows. Within an organization there is often a clear line of increasing authority to which disputants can be referred or along which a resolution system can be constructed. Such is generally not the case in a region. While it is true that most sub-regions do recognize some higher authority, often the immediate authority lies a great distance away. For example, in the central desert region of Australia the primary authorities are found in Darwin and Canberra, hundreds of difficult kilometres away. In the instance of a dispute between Aboriginal communities or two pastoral stations, authority-dependent strategies to resolution will be very costly in terms of time and money and may be inappropriately large given the level at which the dispute takes place. Other options should be explored before resorting to a regional authority. Therefore, a dispute resolution system that is horizontally or network oriented may be a more apt solution than traditional hierarchical designs. This idea will be explored in greater detail below in the section on conflict paths.

Culture

A second point of contrast between organizations and regions is the role culture plays in dispute resolution. For an organization, culture can often be a unifying trait, as it comprises “the philosophies, ideologies, values, assumptions, beliefs, expectations, attitudes, and norms that knit an organization together and are shared by employees.” (Kilmann, et al. 1986: 89). A dispute system designer needs to understand and take into consideration the organization’s culture when undertaking the initial assessment (Bendersky 1998; Costantino 1996), because culture “provides a framework that explains ‘the ways things are done around here’” (Szilagyi and Wallace 1987: 519).

A dispute system designer at the region level cannot make the assumption that understanding the regional culture will facilitate resolution designs, because regions are quite often multicultural in nature; there is rarely one culture that typifies the region. Using language as a proxy for cultural diversity in a simple illustration, in the sparsely populated central deserts region of Australia, three large and three small Aboriginal linguistic groups are recognized representing *twenty-five* different languages (IAD 2002).

Cultural difference does more than just complicate a dispute system’s design; it also shapes the disputes themselves. Avruch et al. (1991) were among the first to describe how

culture impacts conflict and conflict resolution. In the introduction to their groundbreaking work *Conflict Resolution: Cross-Cultural Perspectives*, Leonard W. Doob writes,

“When efforts are made, as they must be, to resolve conflicts between members of ethnic groups who reside in the same society or in different societies, their expectations, interactions, and eventual acceptance or rejection of proposed resolutions are likely to be markedly affected by their cultural backgrounds as well as by their own unique ways of behaving and assessing current problems” (p. ix).

This occurs for two reasons as Avruch (2003) describes. First, culture shapes how a party perceives “time, risk or uncertainty,...hierarchy, power, or authority” (p. 345), which fundamentally shapes a party’s response to conflict. Second, culture provides the substrate for the “metalinguistic forms as symbols or metaphors” (*ibid.*) by which people communicate with one another.²

Culture further complicates the dispute system design at the regional level in three other ways. Firstly, since dispute designers and other alternative dispute resolution (ADR) professionals are often from or “very familiar with [western] legal culture and their clients are not” they unintentionally “operate to exclude or alienate people in ways outside [their] awareness” (Lebaron and Zumeta 2003: 468). Secondly, hearkening back to the discussion on the western roots of dispute system design, many critics of ADR practices such as DSD insist that these practices are not necessarily acultural, but that they perpetuate and recreate a western bias through their resolutions. In the case of mediation, Kowalski (1996) warns that if mediators do not consider cultural difference they risk pushing their clients to comply with the western paradigm, ultimately reinforcing a status quo the client may find discriminatory or otherwise disadvantageous (see also Bagshaw 1996; Brigg 2003).

And finally, “[t]he risk inherent in this approach...is that we quite literally may not hear what is intended, and cross-cultural communication is all about intended meaning: thus we risk compounding existing problems” (Kowalski 1996: 146). In short, culture is a major challenge to designing a regional dispute system.

Bounds

Continuing the contrast between organisations and regions pertinent to DSD applications is the characteristic of bounds³, or the nature of the boundaries defining the entity. While drawing a region on a map may be more easily done than drawing a corporation’s boundaries, particularly one that has many offices and employees across the globe, paradoxically, it is generally easier to determine with greater precision when one is within or without the bounds of a corporate organization than within the borders of a region. In the case of an organization, being within or without bounds is usually determined by the status of one’s employment, but due to the fact that ecological, linguistic or racial traits fade out over space or merge gradually into others, regional boundaries are often much more difficult to detect. A lack of clarity as to where the system begins and ends increases the difficulty of designing a structure to fit it.

Level of focus

The final contrast critical to a dispute system design is the level at which the designer will focus the intervention. In corporate structures, the focus of dispute design is often on the individuals in conflict. This focus is foundational to understanding Costantino and

² For a more detailed discussion on why culturally based misunderstandings occur, see Borisoff and Victor (1998) chapter 5: “Cross-cultural Awareness in Conflict Management.”

³ For an interesting discussion on defining the boundaries of a firm, see Holmström and Roberts (2003).

Merchant's (1996) concept of interest-based, participative design processes, for example. At the regional level the community or group takes over as the focus of intervention, because a focus on the individual in disputes would be overwhelmingly difficult and counterproductive in most instances. First of all, there are simply too many people and possible conflicts to regulate through any design. And second, disputants in regional conflict are not always identifiable or quantifiable, but their groups are⁴. This is partly due to the lack of clear boundaries defining a region, allowing individuals to come and go while maintaining the community or group presence. Also, the same overall dispute may be carried on by many different people at different times, like in the case of Northern Ireland (Cox et al. 2000).

Change in Thought

The switch from a hierarchical organisational setting to a horizontal social setting requires system design morphs from a nested hierarchy into a horizontal system. To allow for such a change, an important shift in thinking in relation to conflict would need to take place among systems designers and their clients.

A regional approach to dispute systems design would benefit from adopting a broader view of conflict than the negative definition commonly promoted in the West, where "[c]onflict is an expressed struggle between at least two interdependent parties who perceive incompatible goals, scarce resources, and interference from others in achieving their goals" (Wilmot and Hocker 1998: 35). In the minds of many, coercion and violence are inseparably associated with conflict. Because of this, in the western perspective, conflict carries strong, negative connotations representing "destructive and unhelpful ways of being" (Brigg 2003: 287). But to some other cultures, "[v]iolence and conflict are not seen as destructive of society but as one of a number of means for forming and maintaining groups" (*ibid.*: 290).

The value attributed to conflict should be determined not by its presence, but by the approach taken to resolve it. For example, asking someone to share the seat on a bus is seen as a positive way to resolve the conflict of wanting to sit next to someone who does not seem to want you to sit in the adjacent seat. Pushing your way into the seat or screaming and yelling at the person to let you sit is seen as a negative solution to the same problem. Therefore, if conflict value is determined by the strategy one chooses to resolve it, conflict itself can be said to be neutral or impartial. At its simplest, conflict is best described as the tension created during an encounter between competing differences. It is a motivating force for change. This tension, or energy, can be released in a variety of forms. An enlarged field of options becomes available through the realization that conflict can be resolved in many different ways. For example, instead of a nested, hierarchical system, one can imagine the construction of a horizontal, arborescent dispute system design.

Conflict Paths

Viewing conflict from this broader perspective permits the dispute system designer to analyse potential conflict scenarios before they manifest themselves in a negative manner. From this broader perspective, disputants can choose from three possible strategies or paths to resolve their conflict: dominance, avoidance and collaboration. In choosing a dominance strategy, at least one party to the dispute seeks to exert its interests over those of the other for the sole satisfaction of its interests. Randall Collin's theory of conflict focuses primarily on this strategy. "[T]here is conflict because violent coercion is always a potential resource" (Collins 1974: 56)⁵.

⁴ See Lecocq (2002) for an in depth discussion of this topic in relation to the Tuareg rebellions in Mali during the 1990s.

⁵ Dominance is not always exerted through reference to violence or the threat of violence. For example, one can refer to authority arguments (e.g. being older or more knowledgeable), or rights arguments.

The avoidance strategy is chosen when the disputants separate or are separated from one another, seeking to satisfy their interest in another manner or area, or suppressing their interest altogether. Finally, collaboration strategies see the disputants releasing the tension generated at the encounter of their competing differences in a creative manner, working together to modify their interests or create more opportunities to satisfy them.

Along these same lines, Slaikeu and Hasson (1998) propose a slightly different typology of resolving conflict in which one of four options—avoidance, power plays, higher authority, and collaboration—is chosen by disputants. Although this typology may seem to provide more options than that proposed above (4-3), it is in fact the same. Power plays is the conceptual equivalent of the dominance strategy, while higher authority can be seen as another form of avoidance, in which the disputants avoid a solution and instead seek to push this task onto someone else.

Two additional notes need to be appended to this discussion of conflict paths. The first concerns the common practice of compromise, which was not mentioned above. Compromise does not merit its own categorisation as a path of conflict resolution because it is actually a subset of the dominance strategy. Compromising is an attempt to avoid the possibility of one party completely dominating all the rest by creating a solution in which theoretically every disputant equally dominates and is dominated by the others. All are equal winners and all are equal losers.

The second note relates to the fact that enormous amounts of resources are spent on finding ways to convince disputants who have chosen the dominance path to reverse their course and switch to paths of avoidance or collaboration (Bingham 2004; Bercovitch 2002; Freeman 1995; Bush and Folger 1994; Lederach and Wehr 1991). “Avoiding disputes that seem to defy resolution requires proactive measures to identify the source of conflict before it intensifies into an intractable situation” (Wondolleck and Yaffee 2000 quoted in Brody, et al. 2004: 122). Dispute systems design is one proactive measure that seeks to “provide a means for the parties to put out the brush fires before they escalate into bushfires” (Street 1994: 185).

The concept of conflict paths incorporates a broader perspective of conflict as neither negative nor positive, but rather as the point at which energy is created that may be released along three possible paths. A dispute system designed for a region could achieve a horizontal structure by implementing this concept. Instead of ratcheting up the level of authority at the failure of one strategy, perhaps a new set of choices can be laid in front of the disputants that will see them once again choose which path they are to take. Then, if all choices have been exhausted, a jump up to the regional authority may be justifiable and appropriate (see Figure 1, p. 12).

Regional DSD: Benefits

A number of benefits may accrue to communities or groups through a horizontal regional dispute system design. Some of these are flexible, creative solutions to disputes, empowerment, avoidance of some DSD paradoxes, leaving behind much of the Western bias and improved cross-cultural communication over dispute issues.

Solutions in this system are flexible because one may return repeatedly to the diverging point for conflict paths if a resolution attempt has stalled. This reinforces in the disputants that they are not locked into a particular style of conflict, that they can instead choose at any point to follow another path. And, returning to the diverging point is akin to what would be termed a ‘loop-back’ procedure (Ury, et al. 1990) in a hierarchical design where the disputants can return to a resolution technique formerly attempted. Just because a technique has been unsuccessful at some stage in the dispute, it does not necessarily mean that the same technique would not be successful at another.

The benefit of empowerment for communities comes through a focus on them as the key force in creating and resolving a dispute. By not resorting to regional authorities unless appropriate and necessary, the communities or groups become the resources from which resolutions are drawn.

Another benefit a dispute systems designer may find in designing for the region level is the opportunity to avoid a number of paradoxes found in organisational DSD (Wolski 2005). One paradox often encountered is that with a system in place disputants may feel encouraged to escalate the dispute, simply because they are not as motivated to resolve at that level since another option exists if the current one fails. A horizontal design avoids encouragement of dispute escalation by frequently returning to the starting point. It emphasises pursuing a different path, not increasing the intensity of the dispute.

Another, related, paradox avoided in a horizontal design is that parties to the dispute treat the steps *pro forma*. They may have in mind the level at which they want to take the dispute (i.e. litigation), but for whatever reason they decide to ride through the dispute system until they arrive at that level. This paradox is quickly avoided in the horizontal design since at each step in the system the disputants choose which path they will be taking. Nothing is prescribed for them. They thus have more interest vested in each resolution technique, as they are the ones who chose it, and there is no clear, predetermined number of steps they must take before arriving at the step they prefer.

And finally, this model of regional dispute system design allows one to leave behind much of the western bias associated with traditional, hierarchical schemes, as presented earlier in the section on DSD roots.

Regional DSD: Challenges

Although in adopting a regional approach many of the problems associated with organisational dispute systems design are left behind, six new problems unique to the regional setting crop up. Perhaps most apparent is the problem that resolutions become 'messy' since few people, if anyone, are in control or directly accountable. Who directs the process? Who participates? As discussed earlier, when contrasting the focus of the dispute between organizations and regions, it is difficult to identify precisely which individuals are involved in a particular dispute at a particular time due to characteristics inherent at the regional level.

Messy resolutions lead to another problem. Without clear leadership, resolution processes may slow down significantly compared to the speed at which resolutions may be achieved within an organization. Who has the mandate or ability to push the resolution along if it gets bogged down?

Another challenge the dispute systems designer may encounter at the regional level is the impact governmental backing or involvement in some manner has on the resolution process. The role of the government problematizes regional dispute systems design in two different ways. First, since state or national governments are often the principal authority at the regional level, it is incumbent upon the systems designer to seek their approval and assistance, or else the viability and sustainability of the system may be jeopardized. But, with the involvement of government, there is often the risk of impeding the process through reintroduction of hierarchical differences. Defined broadly, hierarchical differences are those produced by significant power disparities between parties. Hierarchical differences exist within a society, state or region where significant gender, cultural, historical, ethnic, religious and/or other factors have been the basis of differentiation and discrimination for several generations. Over time, these differences result in relatively rigid, clearly demarcated lines between the powerful and powerless. In many instances, the government represents the

powerful in settings of hierarchical difference. If such a government authority is viewed as a party to the regional dispute, then regional dispute systems may be compromised.

A few other potential challenges to regional dispute systems design face the designer. In a horizontal, arborescent system where disputants are repeatedly returning to a point from which they may choose the next step, disputants may feel like they are getting nowhere; they are just circling again and again. Also, in a system that has no strict structure or hierarchy of resolutions steps, disputants may opt for a technique that would be less efficient in terms of money time expenditures than other options with which they are less familiar or less comfortable (e.g. litigation over mediation). Finally, a regional dispute system designer may see that it becomes monumentally difficult to “[m]ake sure that disputants have the necessary knowledge and skills to choose and use” the techniques available at each point of diverging paths (Costantino 1996: 210; see also principle 6 of Ury, et al. 1990: 167). The horizontal, regional approach is very demanding in terms of information accessibility and training across a wide geographic and cultural range.

Conclusion

Many pressures, including the rising time and financial costs of litigation, have pushed the development of a number of alternative dispute resolution tools and strategies of which dispute systems design is an increasingly popular choice. This paper sought to extend the benefits of a systems approach to conflict resolution to a regional level showing that the resolution system needs to adopt and adapt to important characteristics of that particular region. Doing so avoids some important weaknesses inherent to the DSD organisational setting and several benefits are accrued to the conflict resolution system: flexible, creative solutions to disputes, empowerment, avoidance of some DSD paradoxes, leaving behind much of the Western bias and improved cross-cultural communication over dispute issues. Concomitantly, a number of challenges to successful system design remain such as messy resolutions, difficulty in precisely identifying participants, problematic role of government, a feeling of no progress on the part of participants, choice of less efficient resolution options, and capacity building. An additional important observation is that with a focus on making the system fit the dispute setting, dispute systems design at the regional level becomes less an attempt to produce or impose a set of structures by which most conflicts can be resolved and more an attempt to promote a system in which parties to a dispute can operate on an equal basis to resolve their disputes themselves.

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