Weavers of people: rangatira and… arbitrators?

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Titiro ki te moana he ngohi e ranga ana
Titiro ki te whenua he tira tangata e hāereere ana
Mā wai e raranga, kia kotahi ai?

Introduction

Our topic refers to the idea that rangatira are weavers of their people.[1] They are responsible for holding their hapū together and defending its interests. In carrying out their obligations of rangatiratanga, they may have to resolve disputes, within their hapū and more widely. Arbitrators, of course, also have to resolve disputes. The question is really whether arbitration is a model for Māori dispute resolution; in other words, can arbitrators also be weavers? Does it make sense to draw upon principles of commercial dispute resolution law to address problems arising within the Māori world?

At its most basic level, arbitration is a process for just adjudication that is founded on party consent. *Autonomy. Freedom from the state.*[2] If arbitrators are weavers, then there is also a further question whether these ideas about arbitration also support the freedom of Māori to exercise tino rangatiratanga, or self-determination. Does arbitration have the potential to contribute to incremental constitutional change?

This issue of whether arbitration is a good thing or not for resolving Māori disputes is part of a wider picture of Māori social, economic and legal development. Treaty settlements, resource management and claims to customary marine areas have re-ignited age-old disputes about mana whenua and mana moana.[3] More positively, Treaty settlements have prompted increasing economic interactions among Māori,[4] and the creation of new governance

* Tumu Whakarae, Te Aka Matua o te Ture. My grateful thanks to Justice Joe Williams for comments on an earlier draft, Louise Norton for obtaining difficult to find materials, and to Toni Wharehoka for her footnoting assistance.
[1] See Merata Kawharu *Tāhuhu Kōrero* (Auckland University Press, 2008) at 153 discussing the Ngāti Kahu saying reproduced above and the etymology of 'rangatira'.
[2] Jan Paulsson *The Idea of Arbitration* (Oxford University Press, Oxford, 2013) at 1: "arbitration is freedom reconciled with law".
[3] For example, *Re Edwards (Te Whakatōhea (No 2))* [2021] NZHC 1025 under the Marine and Costal Area Act 2011; and *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2021] NZHC 2768.
[4] For example, the Iwi Collective Partnership that represents the commercial fisheries interests of several iwi: <www.iwicollective.co.nz>.

arrangements. Much of this activity needs to be supported by mechanisms for resolving disputes and holding people together.[5]

In some cases, a determination of a dispute may be needed, and the parties may want the dispute to be determined in accordance with tikanga Māori.[6] If the parties have undertaken a tikanga process which is not legally effective under state law, then that process can be undermined by one of the parties seeking a determination through the courts. If they choose arbitration however, any litigation will be stayed.

My thesis is this. Through arbitration you can have an adjudication process which can recognise and provide for Māori substantive and procedural norms. Because it sits outside the state system, arbitration also enables the exercise of Māori leadership and authority, of weaving people and repairing fabric, to an extent that is unlikely to happen in the courts. But arbitration is not a Māori process. So, after explaining how tikanga can be recognised and provided for in arbitration, I will consider some objections to using arbitration to resolve disputes arising within te ao Māori and also whether the objections can be overcome.

A Why arbitration

Substantive law

The argument for arbitration as a model for Māori dispute resolution begins with liberation of Māori law using the existing and liberal framework of the Arbitration Act 1996. The negative impacts of colonisation on Māori have been vast. One has been our inability to source our right to do anything in the rules of our own law, except where those rules have been accepted by state law.[7] There have been significant recent gains in redressing this issue. The courts are increasingly giving legal effect to tikanga, including it among the "values" of the common law.[8] Customary rights to property have been recognised as pre-existing rights that continue to exist and are protected under the common law until lawful extinguishment.[9] Te Kōti Mana Nui has affirmed that tikanga is inherently cognisable and potentially determinative when dealing with matters affecting Māori rights and interests.[10] Tikanga principles are also increasingly being relied upon to interpret legislation, and are being referenced in legislation directly. In situations where there has been statutory extinguishment of tikanga, the underlying principle may still be a relevant consideration. But in any given case, the specific

[5] See Te Aka Matua o te Ture | Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, 2006) at 109–126.
[6] The system of norms and values that reflect an ideal way of behaving across all aspects of human endeavour. See Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 15–17.
[7] Moana Jackson "The Treaty and the Word: The Colonization of Māori Philosophy" in Graham Oddie and Roy Perrett (eds) *Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992) 1 at 6.
[8] *Takamore v Clarke* [2012] NZSC 116 at [94]; *Ellis v R* [2020] NZSC Trans 19; and *Ellis v R* [2020] NZSC 89 at [3].
[9] *Attorney General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [85]–[86] and [183].
[10] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

recognition of tikanga by a court is subject to evidence and proof, satisfaction of certain criteria, and the condition that the particular rule or principle must not be contrary to statute or to fundamental principles and policies of state law. If parties to litigation seek to apply tikanga, then there is a risk that it will not satisfy these criteria or will come into conflict with or have to be balanced with other competing legal principles.[11]

None of these criteria apply in arbitration. Instead, arbitrating parties can choose to apply non-state laws to their relationship, either in combination with a national law or as a stand-alone system of legal rules. The Arbitration Act is very clear about this; it provides that: "The arbitral tribunal shall decide the dispute in accordance with *such rules of law as are chosen by the parties* as applicable to the substance of the dispute".[12] Parties can opt for arbitration and choose tikanga as the applicable proper law. They do not have to prove that a particular principle of tikanga meets common law rules for recognition, they can apply it directly in its own right as an independent system. If the parties also wish to apply state law as well – which might be useful, for example to fill any gaps – then they can choose which law should have priority in the event of a conflict.[13]

The application of tikanga in arbitration has obvious parallels with religious arbitrations. In these arbitrations, the tribunal is tasked to apply religious codes in order to resolve disputes between members of the particular religion. The Beth Din courts have operated in this way for over 100 years in England, relying on the Arbitration Act 1996 (Engl) and its predecessors to make binding decisions in respect of civil disputes applying Jewish law. Through arbitration, parties can opt out of mainstream litigation and instead articulate, test and apply their own rules and values, and embed those rules and values within their communal infrastructure.[14]

The application of tikanga in arbitration also has parallels with the application of international business principles or lex mercatoria in international commercial arbitration, although the use of this particular form of non-state law has given rise to a substantial academic debate. (Possibly more debate than the limited use of lex mercatoria really warrants.) One of the major criticisms of the lex mercatoria, recently in the context of claims to arbitration's existence as a legal order, has been that without a system of arbitral precedent the lex

[11] See *Public Trustee v Loasby* (1908) 27 NZLR 801 (HC) at 806; and *Takamore v Clarke* [2012] NZSC 116 at [95].
[12] Arbitration Act 1996, sch 1 art 28(2).
[13] See *Channel Tunnel Group Ltd v Balfour Beaty Construction Ltd* [1993] AC 334 (HL) at 358; and see *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2006] EWCA Civ 1529.
[14] See Michael A Helfand "Arbitration's Counter-Narrative: The Religious Arbitration Paradigm" (2015) 124 Yale LJ 2994 at 2999.

mercatoria will be applied inconsistently. It has been said that this conflicts with the rule of law principles that rules must be known in advance, and that like cases must be treated alike.[15]

Closer to home, it has been argued that tikanga should not have any influence on the common law because of its alleged uncertainty and non-secular foundations,[16] but much of the negative commentary has been uninformed. It is enough for present purposes to say that, while tikanga practices vary across different tribal territories, there are also large "areas of commonality" and agreement on fundamental principles.[17] Ad hoc arbitration seems well suited to the tasks of identifying the applicable tikanga, partly because arbitrators do not carry the same public obligations of judges to apply law consistently with precedent, but mainly because parties can appoint arbitrators who are knowledgeable about tikanga and can analyse what the applicable tikanga is and then apply it to a particular situation.[18] The fact that arbitrators do not have to consider implications for other parties in the way that courts do also recognises the pluralism that exists within te ao Māori.

Procedural law

A further hallmark of arbitration is that the parties can determine their arbitral procedure, subject to mandatory natural justice protections concerning arbitrator neutrality and the right to be heard.[19] It is characteristic of Māori dispute resolution to emphasise principles such as whanaungatanga and utu, or maintaining balance and collective interests.[20] Exercising their procedural autonomy, Māori disputing parties can apply these and other principles to the design of their arbitration. They could, for example, locate hearings at a marae and conduct proceedings in te reo Māori.[21] This would have a number of advantages. For example, to:

- Centre authority within the community and its leadership.
- Enable community participation in at least some aspects of proceedings, which is important because its mana is at stake and because it has a responsibility to maintain collective values.[22]

[15] See Thomas Schultz *Traditional Legality: Stateless Law and International Arbitration* (Oxford University Press, Oxford, 2014).
[16] See for example Stephen Franks' comments in Martin Ven Beyen "The Peter Ellis case and Māori customary law" Stuff <www.stuff.co.nz>.
[17] Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 28.
[18] See Arbitration Act 1996, sch 2 cl 3(1)(b): arbitrator can draw on own knowledge and expertise.
[19] Arbitration Act 1996, sch 1 art 19.
[20] Carywn Jones "Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes" (2014) 4 VUWLRP 115 at 125.
[21] See Arbitration Act 1996, sch 1 art 22: parties can choose their language.
[22] See Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori World* (Wellington, 2001) at 89–92: providing an example of marae-based dispute resolution.

- Enable respect for the meeting house, which is a repository of knowledge and whakapapa.[23]
- Emphasise whakapapa accountability (where the actions of people today are measured against the interests and values of past and future generations).[24]
- Allow the parties to identify themselves and relate to each other in a way that supports their ongoing relationships.
- Promote the effectiveness of outcomes. Decisions that are made on a marae will generally carry more weight than decisions made elsewhere, for the reasons just given.[25]

There are other procedural advantages too. For example, witnesses do not need to be sworn-in, which may be important and more respectful for example, when kaumātua are asked to provide evidence. Arbitral tribunals usually sit behind tables, allowing arbitrators to face the parties and speak with them directly. Judges can do this too, but usually sit above.

Freedom from the state

Already we can see that arbitration enables things to happen in ways that would not be possible in litigation, because of the wide autonomy parties have to develop an approach to their adjudication that best suits their interests. The most important freedom is really the ability to do this in the first place. Arbitration is distinguishable from litigation fundamentally because jurisdiction is founded on consent. Thus the precondition to any valid arbitration is existence of a valid agreement to arbitrate. It creates jurisdiction but also supports an ethic of unity. As the former leader of Te Pāti Māori Hon Te Ururoa Flavell explained, "the process of arbitration as a consensual method of disputes resolution is … aligned with kaupapa Māori, particularly the attainment of kotahitanga—the oneness of purpose."[26] The freedom to choose arbitration, and have that choice respected by the state, is also consistent with the exercise of tino rangatiratanga, at least to some degree (I return to this later).[27]

[23] Nin Tomas and Khylee Quine "Māori Disputes and Their Resolution" in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Oxford, 1999) 205 at 215.
[24] Carywn Jones "Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes" (2014) 4 VUWLRP 115 at 127.
[25] See Mason Durie *Te Mana Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 2015) at 221.
[26] Hon Te Ururoa Flavell (October 2007) 642 NZPD 12181.
[27] See for example the submissions by Te Aitanga a Mahaki Trust on proposed amendments to Te Ture Whenua Māori Act 1993, in support of arbitration as an alternative to Māori Land Court adjudication, to "avoid a Pakeha system determining the outcome between two whanau": Te Atianga a Mahaki Trust "Submission to the Māori Affairs Committee on the Te Ture Whenua (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019" at [4].

B Why not arbitration

Apart from arbitration, ordinary litigation, the Māori Land Court, negotiation and other dispute resolution techniques all have roles in resolving Māori disputes. What is unique about arbitration is its flexibility as a process for adjudicating disputes. Nonetheless, arbitration does not yet enjoy widespread acceptance or use in te ao Māori. It may be that we prefer the familiarity and convenience of the court system. Arbitration can also be very expensive, because the parties have to pay for the costs of their tribunal. For some hapū, this could be managed as a cost of business. For others it may be an insurmountable barrier, particularly for groups that are yet to settle their Treaty claims and that should not anyway have to pay to resolve mana disputes to get themselves ready for settlement. In addition to the cost issue, arbitration raises other principled and practical concerns, including:

1. The objection that arbitration is a Pākehā approach to dispute resolution which is not grounded in Māori values, so that using arbitration to resolve Māori disputes forces tikanga into a Western model.
2. The idea that relying on the Arbitration Act to give effect to tikanga-based dispute resolution might make tikanga more effective, but it does not address the constitutional problem that tikanga becomes even more dependent on state law than it is currently. The law captures rangatiratanga; it does not set it free.
3. The lack of people who have expertise in both arbitration law and tikanga, and the risk of failure.

1. Arbitration is a Pākehā thing

One objection concerns the idea that arbitration is a Western model for resolving disputes and applying tikanga within it does not substitute for a genuinely tikanga-driven approach. Instead, we are only using existing techniques and making them 'Māori friendly'. My initial response to this is that like any normative system, tikanga is adaptable.[28] We should be open to accepting and adapting practices and ideas from other legal cultures, to sustain our own culture and institutions. Nonetheless, it is important examine the nature of the arbitral process and compare it with Māori approaches to resolving disputes to test whether an adjudication model for resolving Māori disputes makes sense.

The arbitral process

[28] Hirini Moko Mead *Tikanga: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 335; and Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP 9, 2001) at 2–6.

Arbitration *sounds* Western. It has its roots in latin, with 'arbiter' being a person who decides. In the pūrakau Pākehā concerning the Judgment of Paris, Zeus appointed Paris to determine who was the most beautiful among Hera, Athena and Aphrodite. Paris (who was bribed by all parties) made his award in favour of Aphrodite (who bribed Paris with Helen and begat the Trojan War). Arbitration also makes an appearance in the early Roman Justinian Code.[29] Under the Roman system, the parties made their arbitration agreement, chose their arbitrator, and fixed the penalty for breach of the award. If needed, the state enforced the penalty, but the success of the system rested on an aspect of Roman culture which required every 'good man' (rangatira) to make himself available as arbitrator and to act fairly when performing his duties.[30]

Arbitration's precise origins are disputed, however, which may suggest that the process has a wider resonance. Natural justice precepts were applied in the Panchayat system of community decision-making in ancient India, for example.[31] Arbitration procedures first appear in the English law reports in the 13th century, in a dispute concerning the appointment of a new Bishop of Lincoln.[32] It is not clear that arbitration's establishment in England was a legacy of Roman occupation as opposed to a more organic development of adjudication.[33] In medieval English marketplaces, disputes were arbitrated by leaders of the particular trade. The process worked because these leaders were experienced and knowledgeable (rangatira again), and because the acceptance of their decisions was one of the bonds which held the trade and its traders together as a stable and orderly whole.[34]

Legal philosophy also provides insights into the nature of arbitration. Constitutional writing on decision-making and adjudication emphasises the relationship between participants and state authority. For Lon Fuller, however, any study of adjudication should begin by explaining the objectives and participation of the parties. Fuller was interested in how relationships between participants shape the structure of a given legal process, and in the moral aspirations embodied within it.[35] In relation to adjudication, Fuller identified its distinguishing

[29] Justinian *Digest* (Alan Watson (translator), University of Pennsylvania Press, Philadelphia, 1985) at 42. The rule against bias in the Justinian Code and Institutes is also discussed in DJ Hewitt *Natural Justice* (Butterworths, Wellington, 1972) at 1–2 and 16.
[30] See the Oxford Book News cover endorsement of Derek Roebuck and Bruno de Loynes de Fumichon *Roman Arbitration* (HOLO Books: The Arbitration Press, Oxford, 2004) in Derek Roebuck *Early English Arbitration* (HOLO Books: The Arbitration Press, Oxford, 2008).
[31] VS Mani *International Adjudication* (Martinus Nijhoff, The Hague, 1980) at 2.
[32] Stephen Kós "Foreward to the Second Edition" in David Williams and Amokura Kawharu (eds) *Williams & Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, 2017).
[33] It seems it was not: Derek Roebuck *Early English Arbitration* (HOLO Books: The Arbitration Press, Oxford, 2008) at 227.
[34] David Williams and Amokura Kawharu *Williams & Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, 2017) at 23.
[35] Kenneth Winston (ed) *The Principles of Social Order: Selected Essays of Lon L. Fuller* (2nd ed, Hart Publishing, Portland, 2001) at 28

characteristic as third-party decision-making through the presentation of proofs and reasoned argument by the disputing parties, each of whom seeks a decision in their favour.[36] He described adjudication's function, and its place in a civil society, as "a device which gives formal and institutional expression to the influence of reasoned argument in human affairs".[37]

Fuller said that adjudicative decisions should be grounded in pre-existing standards which are accepted by the parties, otherwise there would be no point in the parties presenting reasoned arguments.[38] The third-party decision-maker should be impartial (and not insane, bribed or hopelessly prejudiced), in order to be open to reason.[39] To ensure respect for their participation, each party must have the opportunity to present its reasons. Finally, and since it is characterised by rationality, at the end of the process the adjudicator has a responsibility to give a reasoned decision. Otherwise, the parties may be left to doubt whether their participation has been meaningful, which impacts on the fairness and effectiveness of the process for achieving a resolution of the dispute.[40] What we can take from Fuller is that the minimum requirements for a just adjudication are a neutral tribunal, the right to be heard, and a reasoned decision.

The point of this is simply that arbitration is not defined by the technicalities of the Arbitration Act. It is also socially relevant as a way of governing relationships between people,[41] and may include a leadership dimension.

Dispute resolution in te ao Māori

I explained earlier how arbitration can accommodate both substantive and procedural tikanga Māori. Arbitration could be viewed in terms of a contemporary use by Māori of a process which has been accepted across cultures as a useful and legitimate way to determine legal rights.

In order to examine further the tikanga compatibility of arbitration, I have turned to Sir Hirini Moko Mead's series of tests for evaluating the tikanga compatibility of an issue not previously

[36] Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353 at 366. His explanations of the distinctive elements if legal procedures have been described as "classic in their analytic purity": Carrie Menkel-Meadow "Mothers and Fathers of Invention: The Intellectual Founders of ADR" (2000) 16 OHSJDR 1 at 14 (although noting that with developments in the Alternative Dispute Resolution field, such as hybrid processes, Fuller's rigid definitions may now be less compelling for all purposes).
[37] Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353 at 366. At the same time, Fuller did not claim that adjudication was appropriate for all kinds of disputes. For example (and reflecting the reference to 'limits' in the article's title), he thought that adjudication would not be apt for managerial disputes, which may require flexible solutions rather than legal resolution. He also doubted whether adjudication was possible for 'polycentric' or multi-party disputes since its typically binary approach may not be capable of resolving all issues. These considerations may also be applicable in relation to some Māori disputes and grievances.
[38] At 373.
[39] At 364.
[40] At 388.
[41] At 357.

encountered in te ao Māori. The responses to these tests can also help establish a tikanga position in respect of the issue. The tests are especially helpful for assessing moral and ethical issues, but they were probably not designed for evaluating legal procedures. Subject to that caveat, I have attempted to subject arbitration to these tests. The first two tests ask whether arbitration breaches a person's tapu or mauri and I find these hard to engage with.

Mead's third test requires consideration of a take-utu-ea framework. The framework refers to a situation where there is a cause or grievance (take), which requires a response (utu), where the response will in turn lead to a state of satisfaction (ea).[42] Arbitration's role in light of this framework would seem to be as a mechanism through which a grievance can be addressed. It also does not take us very far, except to highlight that dispute resolution, and weaving, are important.

Mead's fourth test requires consideration of any precedents within te ao Māori. In our case this means precedents with respect to dispute resolution. We are looking for "ancestrally informed guidelines"[43] rather than legal precedents as such.

Traditionally, dispute resolution took many forms although there was a strong preference for consensus.[44] As community leaders, rangatira were (and are) responsible for securing outcomes that best served their hapū. Sometimes, the community would meet to discuss a problem, and rangatira would guide the meeting to consensus.[45] Sometimes, only the direct parties to a dispute would meet with the rangatira, who would then decide the outcome for them.[46] Sometimes rangatira would meet with leaders of other tribal groups and negotiate a resolution.[47] Arbitration of disputes has been identified as a specific responsibility of tribal leadership, although it is unclear whether the word "arbitrator" was used in a technical sense

[42] See Hirini Moko Mead *Tikanga: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at ch 21. See also Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev. Māori Marsden* (The Estate of Rev Marsden, Masterton, 2003) at 33–35: emphasising the importance of holistic solutions to problems and reconciliation, as well as consensus decision-making and kin-accountability.
[43] Merata Kawharu and Paul Tapsell *Whāriki: The growth of Māori community entrepreneurship* (Oratia Books, Auckland, 2019) at 7–8. Further research might reveal relevant pūrākau, whakataukī, whakatauākī and other sources addressing peaceful dispute resolution which I have not yet been able to find.
[44] Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev. Māori Marsden* (The Estate of Rev Marsden, Masterton, 2003) at 35; Mason Durie *Te Mana Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 2015) at 219; and Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori World* (Wellington, 2001) at 89–92.
[45] Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori World* (Wellington, 2001) at 89–92; Nin Tomas and Khylee Quine "Māori Disputes and Their Resolution" in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Oxford, 1999) 205 at 215; and Te Rōpū Whakamana i te Tiriti o Waitangi *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 30.
[46] Nin Tomas and Khylee Quince "Māori Disputes and Their Resolution" in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Oxford, 1999) 205 at 215.
[47] At 215; and Te Rōpū Whakamana i te Tiriti o Waitangi *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 30.

as it would be understood by a lawyer.[48] In all their activities, decision-making by rangatira was underpinned by their mana and tapu, as well as their kin-accountabilities. While leadership could be inherited, it had to be maintained through principled and fair administration.[49]

Angela Ballara has argued that colonisation impacted on traditional leadership and dispute resolution techniques in the way it motivated people to seek alternative solutions to matters that previously might have been determined by the rangatira of the relevant hapū. She argues that this was partly a response to some irresponsible actions by individual chiefs regarding land sales. She cites several examples of hui and rūnanga to work out various tribal boundaries, as well as instances where disputes were referred to the Native Land Court or a magistrate for resolution.[50]

There were a number of other examples of collective decision-making structures being established in this period too, including Te Kōmiti Nui (Ngāti Pikiao, Ngāti Whakaue) and Te Whitu Tekau (Tūhoe). Between 1900 and 1909, legislation provided for the establishment of papatupu block committees to make recommendations on title to land. Committee members were nominated by claimants. Proceedings were normally conducted in te reo and could be adversarial. Numerous committees were established in Te Tai Tokerau, with smaller numbers established elsewhere. Findings were often appealed to the Native Land Court however, which compromised their effectiveness.[51]

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[48] Maharaia Winiata *The Changing Role of the Leader in Maori Society* (Blackwood & Janet Paul Ltd, Auckland, 1967) at 31. See also Margie Kahukura Hohepa and Viviane Robson "Māori and Educational Leadership: Tū Rangatira" (2008) 4 *AlterNative* 20 at 24–25: rangatira are expected to be able to settle disputes; and Te Rōpū Whakamana i te Tiriti o Waitangi *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 30: rangatira "mediated" in disputes.

[49] See Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev. Māori Marsden* (The Estate of Rev Marsden, Masterton, 2003) at 35; Merata Kawharu and Paul Tapsell *Whāriki: The growth of Māori community entrepreneurship* (Oratia Books, Auckland, 2019) at 8; Angela Ballara *Iwi: The dynamics of Māori tribal organisation from c.1769 to c.1945* (Victoria University Press, Wellington, 1998) at 206; Te Rōpū Whakamana i te Tiriti o Waitangi | The Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2018) vols 1 and 2 at 152; Te Hunga Rōia Māori o Aotearoa "Submission to Te Aka Matua o te Ture | Law Commission on the Class Actions and Litigation Funding Issues Paper 2020" at 3; Peter Buck *The Coming of the Maori: Te Rangi Hiroa* (Whitecombe and Tombs Ltd, Wellington, 1949) at 345–346; and New Zealand Māori Council *Kaupapa: te wāhanga tuatahi* (Wellington, 1983) at 5–6. Cf Maharaia Winiata *The Changing Role of the Leader in Maori Society* (Blackwood & Janet Paul Ltd, Auckland, 1967) at 38–40.

[50] See Angela Ballara *Iwi: The dynamics of Māori tribal organisation from c.1769 to c.1945* (Victoria University Press, Wellington, 1998) at ch 19 and especially at 287; Paul Hamer and Paul Meredith *'The Power to Settle the Title'?: The operations of papatupu block committees in the Te Paprahi o Te Raki inquiry district, 1900–1909* (report commissioned by the Waitangi Tribunal in Wai 1040, October 2016) at 7: which discusses Te Komiti o te Tiriti o Waitangi (Ngāpuhi); Steven Oliver "Te Rangi Paetahi, Mete Kīngi" (1990) Ngā Tāngata Taumata Rau | Dictionary of New Zealand Biography <www.teara.govt.nz>: discussing various efforts by a rangatira in the 1870s to resolve conflict over land, including organising hui, and a proposal that land titles be investigated by a Māori committee with legal standing; and Āpirana Ngata "Te Tiriti o Waitangi" (1922) 11 Toa Takitini 5 at 7–8: preferring a judicial process over further bloodshed for resolving intertribal claims.

[51] Paul Hamer and Paul Meredith *'The Power to Settle the title'?: The operation of the papatupu block committees in the Te Paparahi o te Raki inquiry district, 1900-1909* (report commissioned by the Waitangi Tribunal in Wai 1040, October 2016) at 215.The establishment of Papatupu Block Committees was provided for by the Maori Lands Administration Act 1900 to investigate customary ownership of blocks of Māori land. Committee members comprised people nominated by claimants to adjudicate claims. A Committee could recommend the grant of title to the local Māori land council and, if accepted, the council could grant title (in the same way as the Native Land Court). It was intended that the system would help maintain Māori title. The Committee system was not continued in the Native Land Act 1909.

Mead's fifth and final test asks whether there are any other tikanga principles not already considered that may be relevant to the matter being evaluated. I think mana might be important.[52] If we ask how we can uphold a person's dignity, influence and kin responsibilities in an adjudication process, especially for the party that will lose, the response is that their views should be heard by a decision-maker who is open to hearing them, and that each party should be told why they have won or lost. These ideas are consistent with Fuller's description of the distinctive elements of adjudication. The procedural flexibility of arbitration can also be used to uphold the mana of participants, as I mentioned earlier.

My research on the tikanga of dispute resolution is preliminary, so what I offer here are some tentative conclusions:

1. From what I have found thus far I think we can conclude that it was not unknown for rangatira either individually or collectively to hear disputes and then deliberate upon their resolution.

2. There was some early acceptance of adjudication through the state system in the decades following te Tiriti o Waitangi, albeit this was often in relation to disputes that arose from the Crown's failure to abide by it. There was also a preference for community-based initiative in this period. In other words, community-based dispute resolution, including elements of adjudication, are not new to te ao Māori.

3. Arbitration is a vehicle through which we can give expression to hapū rangatiratanga. In the first instance, this means respect for the role of community leadership through the appointment of arbitrators. Even where this is not possible (because rangatira are not available to act as arbitrators), in the second respect, it means self-determination through the ability to enter into an arbitration process which must be respected by the state.

4. Arbitration can promote kotahitanga, whanaungatanga and utu. It can facilitate the achievement of a state of ea or finality for the parties by bringing about a resolution of a dispute in a way that respects their mana. Researching tikanga to bring forward its jurisprudence is challenging though, and maybe that is also an important point in and of itself.

Some things that would need to change – law reform issues

[52] For discussion of mana, see Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 32–36.

The form of arbitration represented by the Arbitration Act has been designed primarily for commercial arbitration and is modelled on an international template for transnational commercial arbitration. To reflect a more "for Māori, by Māori" process, some things would need to change, either through new legislation or a new schedule in the Act. For example, I think the following would need to be revisited through law reform:

- The default rule in favour of confidentiality. It seems impractical and contrary to the community orientation of these disputes to expect the level of confidentiality currently provided by the Act.
- The default arbitrator appointment provisions. If a party fails to cooperate in the establishment of the tribunal, we need to think about the most mana-preserving way for appointing arbitrators by default, and any criteria for default appointees. We also need to develop guidance for managing conflicts of interest and for identifying which conflicts should disqualify a person from appointment.[53]
- The default availability of appeals to the High Court on questions of law (by leave) is also problematic. The promise of arbitration as a model for Māori dispute resolution includes its independence from the state court system, and with the appointment of experts to deal with tikanga. We could have some variant of the AMINZ Appeals Tribunal, supported by the state in its role as Treaty partner, as an alternative safeguard instead.

2. Arbitration will not fix the constitutional problem

A second critique is that arbitration under the current legislation fails to address the constitutional issue, which is that our current constitutional arrangements do not sufficiently reflect the governance arrangements envisaged by te Tiriti o Waitangi. The Māori legal realm remains in a subordinate position to state law because the operation of Māori law is dependent on and conditioned by a framework established by state law, i.e. the Arbitration Act 1996. This is not really tino rangatiratanga.

[53] The *Bidois v Leef* [2015] NZCA 176 case is a stark illustration of a serious conflict of interest arising in a Māori context, where the arbitrator had an identity with a party through marriage. The Court of Appeal held that the conflict had been waived, although the affected party was barely allowed an opportunity to object, and it is questionable whether under the Arbitration Act 1996 such conflicts are anyway capable of being waived. The Court cited English case law in support of the proposition that conflicts of interest can be waived, although the structure of the English Arbitration Act 1996 clearly allows this (our legislation does not). In one of these English cases, the Commercial Court emphasised how it is within the party's control to make a timely objection when they believe there are grounds for doing so, and that arbitrators from within the same trade may be appropriately appointed despite existing relationships with a party if this is the manner in which disputes are habitually resolved within the trade: *Rustal Trading v Gill & Duffus SA* [2000] CLC 231 (QB). This latter proposition from *Rustal* is cited with approval in another English decision cited by our Court of Appeal, *ASM Shipping Ltd of India v TTMI of England* [2005] EWHC 228 (QB) at [12] and [26], although the Court of Appeal did not discuss how it might be appropriate in a Māori context.

The initial analysis of arbitration's potential for Māori was not about transforming the constitution, it was about finding ways of resolving disputes and legal problems arising in te ao Māori. That said, addressing the issue of dispute resolution has the potential to progress constitutional transformation. A process for adjudicating disputes about rights and obligations is a hallmark of an effective legal system and a basis for its recognition as a legal system in its relations with others. A system for dispute resolution can itself be recognised as an autonomous legal system of procedure.[54]

So how can state law recognise Māori arbitration as having its own status? Conceptually, it is not that difficult: the framework for foreign arbitration provides us with a template. When New Zealand acceded to the 1958 New York Convention, we agreed to recognise and enforce foreign arbitral agreements and awards as binding, subject to narrow grounds for refusing recognition and enforcement.[55] Recognition by a court gives the award status within that court's law; the award is treated as equivalent to a domestic judgment and is enforceable as such.[56] However, its primary legality derives from the legal order within which the award was made. An English award remains an English award whether a court in Aotearoa New Zealand recognises it or not.

If we extend this approach to Māori arbitration, then we would also need to settle on the grounds for non-recognition. Here we face the classic paradox of arbitration, that it wants to free itself of the state, but still depends on the cooperation of the state authorities for its effectiveness.[57] To secure that cooperation, the arbitration system has been required to abide by the minimum natural justice conditions enshrined in state law. These conditions are reflective of deep rule of law values and the human right to a fair hearing.[58] Failure to meet them, in the case of foreign awards, means non-recognition.

Tying this together, the legality of an award would have to be determined in accordance with the tikanga system, although its recognition by the state through the courts would be according to conditions set by the state law system. It would be consistent with te Tiriti o Waitangi for those state law conditions to give significant weight to the conditions for tikanga

[54] See Emmanuel Gaillard *Legal Theory of International Arbitration* (Matinus Nijhoff Publishers, Leiden, 2010). Also my PhD, whenever I get to finish it.
[55] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (10 June 1958), arts III, IV and V.
[56] See *Kingdom of Spain v Infrastructure Services Luxembourg* [2020] FCAFC 3 at [8]. In some recent legislation, Parliament has taken steps towards accommodating Māori legal concepts. We see this especially in the legislation concerning Te Urewera and Te Awa Tupua, in which Te Urewera and the Whanagui River respectively are declared to be legal entities. But there is a difference between declaring something to exist by virtue of the declaration and recognising and agreeing to be bound to recognise something that has an independent legal existence.
[57] Jan Paulsson *The Idea of Arbitration* (Oxford University Press, Oxford, 2013) at 30.
[58] *Universal Declaration of Human Rights* GA Res 217A (1948), art 10.

legality, or at least be acceptable to Māori. There may not be much difference between the two.

I have mentioned my initial research into the contingent nature of Māori authority. In some recent cases that have come before the courts, we can also see that the Māori parties involved have wanted natural justice principles to apply to the resolution of their disputes. They have wanted neutral arbitrators, procedural equality and reasoned decisions.[59] In the context of the Waitangi Tribunal, Carwyn Jones has observed how, in one case, the Tribunal was able to bring about a satisfactory resolution of a dispute concerning tribal mandate by "using Māori concepts about … representation alongside Western public law rules of fair procedure".[60]

On the basis of these examples, I think we can say that state law due process conditions for award recognition are probably acceptable to Māori (but is an idea that needs further testing, particularly around the role of rangatira). For this to work, again I think we would need to have some variant of the AMINZ Appeals Tribunal to provide a central institutional mechanism to guide and direct parties in the conduct of their arbitrations.

3. Who will arbitrate?

The final issue is more practical in nature but is no less important. It concerns the expertise needed to make Māori arbitration successful. Arbitration law is technical and not the same as civil procedure, so being a really good litigation lawyer is not enough to do arbitration really well. Increasingly, lawyers are having to become more knowledgeable about tikanga. Still, recent experience suggests there is not yet enough expertise that straddles both arbitration law and tikanga Māori. There has been a small number of cases involving Māori parties to arbitrations that have come to light in recent years, mainly through post award litigation where tribunals have failed to abide by core tenets of arbitration law, including one case involving disputed lands here in Rotorua at Whakarewarewa and Arikikapakapa.[61] There has been another recent case where the parties disputed the subject-matter arbitrability of the dispute.[62]

[59] See cases discussed in Amokura Kawharu "Arbitration of Treaty of Waitangi Settlement Cross-Claim Disputes" (2018) 29 PLR 295.
[60] Carwyn Jones "Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes" (2014) 4 VUWLRP 115 at 126.
[61] *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486. See also *Bidois v Leef* [2015] NZCA 176. These cases are discussed in Amokura Kawharu "Arbitration of Treaty of Waitangi Settlement Cross-Claim Disputes" (2018) 29 PLR 295.
[62] See *Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board (No 2)* [2021] NZHC 291.

It is positive that the parties wished to use arbitration to help resolve their disputes, but the post-award litigation must have been frustrating. I suspect that in some recent cases the parties were not advised about and did not fully understand the implications of an agreement to arbitrate, in terms of the bindingness of the agreement and the application of certain default rules under the Arbitration Act.[63] As a consequence, they were not able to take full advantage of the flexibility afforded by the Act to design a process that really suited their circumstances, or they were taken by surprise by what was required of them through the application of the default rules. We need to think about ensuring a good mix of both arbitration and tikanga competencies on the tribunal and developing opportunities for people to upskill across both. A code of practice that deals with options for the best use of arbitration in this context could also be a good idea, at least until we have new legislation.

Conclusion

There is much at stake in disputes among Māori entities when their resolution will have inter-generational effects. This makes me a hesitant about promoting a dispute resolution process which sits independently of judicial support and oversight, or which might encourage the filing of opportunistic claims. In litigation, adverse costs and the potential for public rebuke work as disincentives to such claims. I am unsure how effective they would be in Māori arbitrations. Providing appeal rights, or refusing recognition on substantive grounds, also do not seem adequate responses to these issues if the case for arbitration includes respect for Māori legal autonomy and the ability to appoint the right expertise for a given dispute. So, my conclusion is that arbitration holds promise. Working within the current legislative framework is sufficient for now, but not ideal. There are also capacity issues that need to be addressed as part of the long-term rebuilding of Māori legal institutions.

[63] For example in *Bidois v Leef* the parties were unrepresented. See *Bidois v Leef*, above n 61.