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DIGNITY AND MANA IN THE "THIRD LAW" OF AOTEAROA NEW ZEALAND

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The concept of dignity is increasingly recognised in Aotearoa New Zealand case law and legislation as an important value. Indeed, it has the potential to become a foundational interpretive value within our legal system. Although its precise theoretical basis is contested, in its current conception it is typically grounded in the right to equality and/or autonomy and is presented as being equally inherent in all people. This conception generally fits well within the Anglo-New Zealand form of law that currently dominates New Zealand's legal system (New Zealand's "second law"). In contrast, in recent years, tikanga Māori has been recognised as a further source of law in this country (New Zealand's "first law"). There are now promising signs that a "third law" is developing: a hybrid of the two streams, drawing on but conceptually distinct from each of its parents. Consistent with this development, the Māori concept of mana is increasingly invoked, in law, alongside dignity. In this article we describe the results of our comprehensive overview and critique of the use of the term "dignity" within New Zealand law. We seek to convey a sense of the many ways in which dignity is being used in contemporary case law and legislation, and to encourage thoughtful engagement with the concept. As part of doing so, we critique the associations being drawn between mana and dignity and suggest that, to date, most invocations of mana and dignity fail to examine conceptual differences between the two terms. We further suggest that there is potential for a new, richer, third-law concept of dignity to develop: one that is distinctly "Aotearoan", drawing on but conceptually different from its first- and second-law parents.

E mōhio whānui haere ana i te ariā o 'dignity' hei whanonga pono hirahira i ngā ture kēhi me ngā hanganga ture ki Aotearoa. Otirā, he pito mata pea kia tū hei whanonga pono tūāpapa ki roto i te pūnaha ture. Ahakoa e tautohe ana te paparahi tātai pū, kei tana huatau o nāianei, ka ahu mai i te mana taurite, i te mana motuhake hoki, ā, ka whakaaturia, he momo ōrite ki roto i ngā tāngata katoa. Ka noho tēnei huatau i roto i te ao ture Pākehā e whakatuanui ai i te pūnaha ture ki Aotearoa (ko te "ture tuarua" ki Aotearoa). Engari, i ngā tau inā tata nei, kua āhukahukatia ngā tikanga Māori hei puna ture hoki ki Aotearoa (ko te "ture tuatahi" ki Aotearoa). Ko te āhua awhero nei, e whakawhanake ana i tētahi "ture tuatoru": he momorua o ēnei mea e rua, e whakamanawatia ana, heoi, e noho huatau ā-motuhake ana i ngā mātua. Pērā i te whakawhanaketanga, i te ao ture, e noho tahi ana te kupu Māori o 'mana' i te taha o 'dignity'. Kei tēnei atikara, ka kōrerohia ngā tukunga iho o tā māua tirohanga whānui me tētahi arotaketanga i te kupu 'dignity' i te ao ture o Aotearoa. Ka hiahia māua kia whakaatu, he maha ngā whakamahinga rerekē o te dignity i te ture kēhi me ngā hanganga ture, ā, e akiaki ana i te whakawhitinga mahara ki te ariā. Hei wāhanga o tērā mahi, ka arotake māua i ngā hononga i waenganui i te mana me te dignity, ā, e taunaki ana, i nāia tonu nei, kāore te nuinga o ngā whakamahinga i te mana me te dignity e tautuhi i ngā rerekētanga ā-ariā i waenganui i ngā kupu e rua. E taunaki hoki ana i te pito mata mō tētahi momo hou, mō tētahi momo hira ake o te ariā ture tuatoru o te dignity: he momo nō Aotearoa, he momo e whakamanawatia ana, heoi, e noho huatau ā-motuhake ana i ngā mātua.

JUSTICIABILITY AND TIKANGA: TOWARDS "SOFT" LEGAL CONSTITUTIONALISM

David V Williams

This article notes various responses to the question of when (if at all) courts should provide legal remedies to parties not satisfied with outcomes reached by other branches of government in highly contested political matters. The author's focus is on Treaty of Waitangi redress settlements concluded by political negotiations between iwi and the Crown. The executive branch of government relies on Crown prerogative powers to pursue these settlements. Negotiated Deeds of Settlement are then implemented by legislative enactments in parliamentary proceedings that are not subject to ordinary processes for amendment. The courts have long shielded negotiated Deeds of Settlement from judicial scrutiny, concluding that they involve decisions that ought not be justiciable in the ordinary courts. This article discusses "hard" instances of legal constitutionalism in South Africa and possible over-reach by courts there. It then discusses recent cases on Treaty of Waitangi-related matters in Aotearoa New Zealand. These cases indicate a sea change away from political constitutionalism, and from deference by courts to executive branch decision-making, towards a "soft" version of legal constitutionalism. Incremental common law decision-making is elevating tikanga Māori from a seldom noted instance of customary practices to an integral source of the common law of Aotearoa New Zealand.

LAST RITES FOR FULLER AND PERDUE

Paul G Scott

Lon L Fuller and William R Perdue's article "The Reliance Interest in Contract Damages" is one of the most famous contract law pieces of all time. The authors classified contract damages into restitution, reliance and expectation damages. They prioritised restitution damages over reliance damages, which, in turn, had priority over expectation damages. This classification has been influential, with numerous courts adopting it and favourably citing the authors.

In this article, it is suggested that judicial reliance on Fuller and Perdue has been, and is, deleterious. It is suggested that Fuller and Perdue's classification is needlessly complex, contradictory and ignores what courts actually do when they award damages – which is to apply the classic contract law calculation of expectation damages as set out in Robinson v Harman*. Fuller and Perdue's so called "reliance" interest is merely the expectation interest, which the rule in* Robinson v Harman *seeks to vindicate. Fuller and Perdue's classification has led courts to assert erroneously that plaintiffs can elect between expectation and reliance damages. This article examines the authorities which led to this assertion and explains how it is incorrect.*

It is concluded that courts should abandon Fuller and Perdue's classification and that the last rites should be read over it.

WHY INTIMATE PARTNER VIOLENCE IS DIFFICULT TO SEE AS GROUNDS FOR SELF-DEFENCE: OLD COMMON LAW LEGACIES

Stella Tarrant

In the past 30 years, considerable attention has been paid to the difficulties women have had in accessing the law of self-defence when they have responded with lethal force against intimate partner violence (IPV). This article examines why successful reliance on self-defence remains rare in these circumstances despite significant changes to the law: decision-makers in the criminal justice system continue to call on deeply held cultural assumptions about violence and relationship that directly undermine a defendant's claim to have acted to defend herself. The first half of the article examines the old common laws of "marriage" and "self-defence" to reveal the cultural paradigms those laws embodied. The "fight" paradigm underpinning se defendendo and the doctrine of marital unity that constituted marriage as a status hierarchy resulted in there being no real foundation for a claim of self-defence by a wife. The second half of the article examines in close detail a recent, typical homicide trial, Liyanage v Western Australia (Liyanage)*, to demonstrate that, in spite of significant law reforms, there are similarities between the implicit conceptualisations the State relied on to construct its case, and those that underpinned the old common law. The State's case in* Liyanage *was: (i) anchored to the "fight" paradigm of self-defence; (ii) presented and structured so that sexual violence against a wife was "invisibilised"; and (iii) failed to perceive the status-hierarchy in the marriage as itself abusive. It is argued not only that the State's case in* Liyanage *was in line with the old common law, but that because of these features, the State did not discharge its obligation to prove the defendant did not act in self-defence. Just one illustrative case is analysed in order to probe far deeper into how the law is operating than is possible to discern from the rules themselves.*

VARIATION WITHOUT CONSIDERATION

Francis Dawson

This article reviews a decision of the High Court not to follow the dictum of the Court of Appeal in Antons Trawling Co Ltd v Smith *that no consideration is required to support a contractual variation if the agreement is acted upon and is not the product of illegitimate pressure. In what follows it is argued that the Judge was correct not to do so. Every variation has the effect of discharging the original contractual obligation and substituting it with a revised obligation. How is the release of the original obligation effected? Accrued obligations are guarded jealously by the common law and generally speaking are not released except for valuable consideration or under deed. The promisee does not discharge an accrued obligation by simply renouncing it. Existing authority distinguishes between the variation (and discharge) of obligations occurring under deeds and those occurring under simple contracts, and also between variations and discharges occurring before breach and those occurring after breach. None of the relevant cases appear to have been cited to the Court of Appeal in Antons Trawling and the dictum contradicts a mass of established authority on the discharge of existing obligations occurring on a variation.*