Dignity and Mana in the "Third Law" of Aotearoa New Zealand

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Abstract:

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

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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.

Key words: dignity, mana, bijuralism, bilingualism, indigenous laws, tikanga Māori, statutory interpretation, legal theory, legal values.

INTRODUCTION

Intrinsic dignity is not just a metaphysical concept. … it must live and breathe in the real world.[2]

One way in which the concept of dignity "lives and breathes" is in law. The term dignity is frequently deployed in modern Aotearoa New Zealand case law and legislation, across a variety of contexts—from human rights, to child welfare, to employment law. The prevalence of "dignity talk" in our legal texts suggests that Aotearoa is following the twentieth century international legal trend towards embracing dignity as an organising principle for making a variety of legal claims. Such use of dignity is unsurprising, given dignity's strong normative pulling power. But human dignity[3] is a famously contested concept, and multiple conceptions of dignity are possible. As such, dignity's use in law—whether for expressive, theoretical, or doctrinal purposes—ought not to be glossed over nor embraced without puzzling about its deployment. To that end, this Article sets out a novel, comprehensive overview and critique of the use of the term "dignity" within New Zealand law. One objective of our research is 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.

Importantly, and in addition, dignity as a New Zealand legal value must account for the intersection of two cultural legal traditions in Aotearoa, Māori and Pākehā. Where legal traditions intersect, it is inevitable that associations will be drawn—in legislation, legal arguments, judgments—between concepts with different cultural heritages. So it is that in New Zealand law, the term dignity has been used alongside the purportedly related Māori concept of mana.[4] For example, enacted in 2017, the Substance Addiction (Compulsory Assessment and Treatment) Act refers to the protection and enhancement of "mana and dignity". In 2019, the Oranga Tamariki Act 1989 was amended to include the concept of "mana tamaiti (tamariki)", defined as relating to "the intrinsic value and inherent dignity of the child". And in the employment law context, mana is frequently deployed in pleadings relating to loss of dignity.

Mana, commonly translated as status, prestige, authority, or leadership, is a rich and complex concept in its own right and one that does not correspond neatly to dignity. As such, we interrogate the character and appropriateness of associations in New Zealand law between mana and dignity. We also consider the potential for dignity in the law of Aotearoa New Zealand to be an example of what Justice Sir Joe Williams has described as a "third law": an area where New Zealand's two "streams"[5] of Māori law and Anglo-New Zealand law meet in a potentially meaningful and transformative way, leading to the creation of what can legitimately be called a "third law".[6]

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[2] *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [201] per Hammond J.

[3] We use the terms "human dignity" and "dignity" interchangeably, but our focus is exclusively on human dignity, not a concept of dignity applied to other subjects such as sovereign states or animals.

[4] Other Māori terms that might be associated with dignity but which are beyond the scope of our inquiry include mauri (often translated as "life force" or "life principle") and tapu (often translated as "sacred" or "under restriction"). Importantly, we did not find any instances in legislation or case law of dignity being used to explicate these Māori concepts.

[5] ET Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8 Otago LR 449.

[6] Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1.

We begin with a description of the New Zealand legal system, focusing on the establishment over time of the two "streams" of law that make up our legal system: Māori law, and Anglo-New Zealand or Pākehā law. We also set out a brief and necessarily simplified summary of dignity and mana as ideas in Western and Māori thought respectively; dignity as linked with autonomy in the modern Western legal tradition, and mana as closely connected with the value of whanaungatanga or connectedness in te ao Māori (the Māori world). We then set out the results of our empirical review of dignity in New Zealand case law and legislation. Our approach is bottom-up, in that we investigate examples of dignity's practical usage in order to work towards a contextual appreciation (rather than definition) of (various) conceptions of dignity apparent across a variety of legal sub-disciplines. This mapping of dignity includes an analysis of the "mana and dignity" association drawn in legislation and case law. Adopting Nicole Roughan's framework of "legal associations",[7] we find that this association is largely linguistic, and suggests a problematic tendency to assume conceptual equivalence between mana and dignity. Finally, and drawing on the results of our research, we discuss the potential for development of a "third law" conception of dignity in Aotearoa, one that represents a meaningful intersection of Western and Māori values, with regard to underpinning values not only of autonomy but also of whanaungatanga. In this way, this proposal for a third law conception of dignity also speaks to the broader bijuralism project taking place in the legal system of Aotearoa New Zealand.[8]

THE LEGAL SYSTEM IN AOTEAROA NEW ZEALAND

Prominent legal writers have long made the point that our legal system is made up of two streams of law: Māori law, and Anglo-New Zealand or Pākehā law.[9] Māori settlement of Aotearoa took place some 800 to 1000 years ago and saw the establishment of a system of customs, values, practices, and laws that came to be known as "tikanga Māori". Tikanga Māori can be translated as "the system by which correctness, rightness or justice is maintained".[10] Moana Jackson has described the handing down of tikanga:[11]

> … through the precedent and practice of ancestors. Like an intricate taniko [*a method of weaving*] pattern, it was interwoven with the reality of kinship relations, and the ideal balance for those within such relationships. It provided sanctions against the commission of hara or wrongs which upset that balance, and it established rules for negotiation or agreement between whānau, hapū, and iwi. It formulated a clear set of rights which individuals could exercise in the context of

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[7] Nicole Roughan "The Association of State and Indigenous Law: A Case Study in 'Legal Association'" (2009) 59 University of Toronto LJ 135.

[8] For discussion of this project generally, see Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree* (Ngā Pae o te Māramatanga, 2020).

[9] Moana Jackson "The Treaty and the Word: the Colonization of Māori Philosophy" in G Oddie and R Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992); Durie, above n 5; Mikaere, above n 31; Williams, above n 6; Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Toronto, 2016); and Jacinta Ruru "First Laws: Tikanga Māori in/and the law" (2018) 49 VUWLR 211.

[10] Williams, above n 6, at 2.

[11] Jackson, above n 9, at 5.

> their responsibility to the collective. It also laid down clear procedures for the mediation of disputes and for adaptation to new and different circumstances.

While different concepts might be described as central to tikanga Māori,[12] the concept of whanaungatanga (broadly, connectedness; kinship) is highlighted by experts as fundamental. This is because social connections, as well as legal rights and obligations, are all established, identified, and regulated through kinship.[13] Whanaungatanga connects people, but it also establishes relationships between the spiritual, natural, and human realms.[14] As Williams explains:[15]

> … whanaungatanga might be said to be the fundamental law of the maintenance of properly tended relationships. The reach of this concept does not stop at the boundaries of what we might call law, or even for that matter, human relationships. It is also the key underlying cultural (and legal) metaphor informing human relationships with the physical world – flora, fauna, and physical resources – and the spiritual world – the gods and ancestors.

In the early to mid-19th century, British citizens began to arrive in the country in large numbers. In 1840 the British Crown and about 540 rangatira (Māori chiefs) signed a treaty (the Treaty of Waitangi/te Tiriti o Waitangi) which, by its English text, purported to confer sovereignty on the Crown over the land and its inhabitants. Queen Victoria issued a Royal charter which formally provided for the establishment of the colony of New Zealand and introduced machinery of government. A colonial legislature was established in 1852 to "make laws for the peace, order, and good government" of the country.[16] Thus, the British Crown brought an entirely new system of law and the structures through which to enforce it. In time, the confiscation and sale of large swathes of Māori land, the extended civil war from 1845 to 1872, and other impacts of colonisation, dramatically undercut Māori governance and social and economic systems and structures.[17] Ultimately tikanga entered a state of fragility; at its weakest, tikanga "lived on only in villages, homes and marae on that remnant land base", its future bleak.[18] Colonial law became the dominant system of law, interacting with tikanga Māori at most in a restrictive, procedural manner (for example in the transformation of Māori customary land into freehold title).[19]

The dominance of colonial law is reflected in the language of our modern legal texts. Although some of colonial New Zealand's foundational documents were enacted in both Māori and English, te reo Māori (the Māori language) was gradually de-legitimated over the course of the 19th century,

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[12] Law Commission *Māori Custom and Values in New Zealand Law* (SP9, 2001).
[13] Williams, above n 6, at 4.
[14] Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave and others *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) at 332; Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 5.
[15] Williams, above n 6, at 4.
[16] New Zealand Constitution Act 1852, preamble.
[17] MPK Sorrenson "Land Purchase Methods and their Effect on Maori Population, 1865–1901" (1956) 65 The Journal of the Polynesian Society 183; Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996).
[18] Williams, above n 6, at 11.
[19] See, for example, Native Land Acts from 1862 onwards.

in that it lost authority and recognition as a standard civic language.[20] In the 20th century, this process began to be reversed, with several important steps taken towards re-legitimating te reo Māori. Most significantly, in 1984 the Waitangi Tribunal legally recognised te reo Māori as a taonga (treasured thing), and in 1987, the Māori Language Act recognised te reo Māori as having official language status.[21] However, English remains the dominant civic language of New Zealand today, at least outside of the marae;[22] the vast majority of parliamentary speech, legislation, and case law is in the English language.

From the 1970s onwards, some key shifts occurred in the extent to which Anglo-New Zealand law was willing to look to tikanga Māori as a source of legal concepts – or, at least, as a source of legal language.[23] Increasingly, Māori words began to be included in New Zealand statutes, such as the Resource Management Act 1990, and in judicial decisions.[24] These developments have been mapped in some detail by the (now) Supreme Court Justice Sir Joe Williams in his seminal *Lex Aotearoa* article.[25]

Another key event was the landmark case of *Takamore v Clarke*, in which Elias CJ observed that "tikanga is … part of the values of New Zealand common law".[26] Recent case law suggests *Takamore* heralded a shift in the way New Zealand common law approaches tikanga Māori. For example, in *Mercury NZ v The Waitangi Tribunal,* Cooke J observed, citing *Takamore,* that treating tikanga Māori as a source of development for common law was "uncontroversial", since the courts frequently look to customs and social attitudes when developing the common law.[27] His Honour went one step further, observing that "in some situations, tikanga will *be* the law, rather than merely being a source of it".[28] Similarly, in *Sweeney v The Prison Manager,* Palmer J cited *Takamore* in support of the relevance of tikanga Māori values to judicial review.[29] Specifically, his Honour determined that the remedy of a declaration was appropriate in part to vindicate the plaintiff's mana, and that mana as a concept was "understood implicitly by Māori and, now, by most New Zealanders".[30]

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[20] Māmari Stephens and Phoebe Monk "A Language for Buying Biscuits? Māori as a Civic Language in the Modern New Zealand Parliament" (2012) 16(2) AILR 70 at 73.
[21] Stephens and Monk, above n 20, at 73.
[22] Stephens and Monk, above n 20, at 70.
[23] Arnu Turvey "Te Ao Māori in a "Sympathetic" Legal Regime: The Use of Māori Concepts in Legislation" (2009) 40 VUWLR 531; Roughan, above n 7.
[24] Julian R Murphy "Legislating in Language: Indigenous Languages in Parliamentary Debate, Legislation and Statutory Interpretation" (2020) 43(3) UNSW L J 1006; Tai Ahu "New Zealand's First Bilingual Statute – Does New Zealand have an Appropriate Legal Framework?" [March 2014] Māori L Rev 20; Turvey, above n 23.
[25] Williams, above n 6.
[26] *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].
[27] *Mercury NZ v The Waitangi Tribunal* [2021] NZHC 654 at [103].
[28] At [103].
[29] *Sweeney v The Prison Manager* [2021] NZHC 181.
[30] At [76]. Also of interest is the ongoing appeal against conviction of Mr Peter Ellis, who passed away before the appeal could be heard. The Supreme Court, in determining whether the appeal ought to proceed, asked for counsel to make submissions on whether tikanga-based concepts, including mana, ought to inform the law that governs the continuance of criminal appeals after the death of the appellant: see *Ellis v R* [2019] NZSC Trans 31. See also Martin Van Beynen "The Peter Ellis case and Māori customary law" *Stuff* (online ed, Auckland, 9 July 2020).

A "Third Law" for Aotearoa New Zealand

Despite the developments just outlined, today our legal system remains very heavily weighted towards Anglo-New Zealand law. Recently, however, Williams has proposed a new framework for understanding the interactions between the two legal systems. Building on Ani Mikaere's description of tikanga as "the first law" of Aotearoa,[31] Williams suggests the law brought by the British Crown can be understood as "second law". Second law, "at its positivist height", recognised first law "only to the extent necessary to succeed in extinguishing it".[32] Williams then draws a key distinction between the colonial, positivist peak of second law, and second law in the post-1970s modern period. In this latter period, recognition of custom or tikanga Māori within the law is "intended to be permanent, and admittedly within the broad confines of the status quo, *transformative*".[33] Thus, Williams says, in some parts of the legal system, we can identify a "third law". Third law:[34]

> … is predicated on perpetuating the first law, and in so perpetuating, it has come to change both the nature and culture of the second law. And it is at least arguable therefore that the resulting hybrid ought to be seen as a thing distinct from its parents with its own new logic.

All three "kinds" of law can and do exist in the present tense; as such, the legal eco-system is complex and far from uniform. However, Williams' third law concept can be deployed descriptively and normatively. Descriptively, it provides a lens through which we might critique the "third law-ness" of certain areas of law. Normatively, third law is proposed as an aspirational destination in Aotearoa New Zealand's ongoing search for itself.

Our examination of dignity provides an opportunity to assess the "third law-ness" of conceptions of dignity in our legal system. Our research suggests that, while dignity remains firmly rooted within "second law" modes of thinking, there are opportunities to draw on values or concepts from Māori law, including mana. Indeed we argue that this is imperative, and that dignity must be situated in both "first" and "second" philosophical traditions, as is fitting for our bicultural legal context.

In order to achieve this, it is important to engage with the distinct cultural values that underpin each stream of law. In particular, Western legal culture is strongly influenced by ideas of personal autonomy, and Western conceptions of dignity have tended to follow this influence to date. Māori legal culture, by comparison, tends to put a stronger emphasis on connectedness. These divergences will be a thread throughout the discussions of dignity and mana below.

The Concept of Dignity in Western Philosophy and Law

In modern Western legal traditions, dignity is commonly used to denote the inherent worth of all persons by virtue of their humanity, something that "accrues to individuals through their awareness

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[31] Ani Mikaere "Tikanga as the First Law of Aotearoa" (2007) 10 Yearbook of NZ Jurisprudence 53 at 331.
[32] Williams, above n 6, at 10–12.
[33] At 12 (emphasis added).
[34] At 12.

of their status in their own eyes and in the eyes of others".[35] Dignity further posits that others should recognise and respect this universal worth; this "relational claim" is used in law as the basis for various arguments about individual rights against each other and against the state.[36]

This abstract, general understanding of dignity can be seen as its "core idea" or "organising principle". Beyond this, multiple conceptions of dignity are possible, and the boundaries and implications of dignity are subject to ongoing and lively debate. For example, the assumption of inherent worth may be seen as deriving from a theological premise, such as that humans are made in God's image, or a secular premise, such as that humans have dignity because of their unique capacity for autonomy. As to the latter, McCrudden notes that a secular conception of dignity is often associated with the German philosopher Immanuel Kant, and in particular his understanding that dignity requires treating people as autonomous beings, as ends and not as means to an end.[37] Indeed, Kant is sometimes regarded as "the father of the modern concept of human dignity"; a Kantian conception of dignity is one that is closely associated with the idea of "dignity as autonomy".[38]

There is also an important equality dimension to dignity, in that, as used in modern legal texts, this worth is understood as inhering equally in all persons—it is universal, not contingent on traits, circumstances, or status. In this sense, dignity is understood as egalitarian, not hierarchical. However, Waldron has suggested that surprising linkages can be drawn between this modern understanding of dignity and the ancient rank-based concept of *dignitas*.[39] *Dignitas* was a decidedly inegalitarian concept, referring to the respect, honour and prestige due to certain institutions (e.g. states) or people (e.g. nobles) by virtue of rank. Over time, there has been a "generalization" of this "respect and solicitude for dignity" from the elite to all.[40]

This idea of dignity as an "evolution of rank- or honour-based legal norms" is picked up in the work of Hennette-Vauchez, who identifies "dignitarian" aspects to contemporary dignity jurisprudence, where dignity is used to ground obligations rather than rights.[41] An example is the infamous dwarf-throwing case, where a municipal ban on consensual "dwarf tossing" was upheld by the French Conseil d'État on the basis that it violated human dignity.[42] This was despite arguments presented by Wackenheim, a man of short stature, that the ban violated his autonomy. Other instances of dignitarian jurisprudence—where dignity is essentially used to trump, rather than ground, autonomy interests—arise in relation to prostitution, abortion, the right to refuse life-saving treatment, and sadomasochistic sexual behaviour. In such cases, argues Hennette-Vauchez, dignity is used to "protect humanity *as a matter of rank*".[43] In other words:[44]

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[35] Judith Resnik and Julie Chi-hye Suk "Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty" (2003) 55 Stanford Law Review 1921 at 1929.

[36] Christopher McCrudden "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19(4) European J of International L 655 at 679; Resnik and Suk, above n 35, at 1929.

[37] McCrudden, above n 36, at 659.

[38] McCrudden, above n 36, at 659.

[39] Jeremy Waldron "Dignity and Rank: In Memory of Gregory Vlastos" (2007) 2 Archives Européennes de Sociologie 201 at 201.

[40] Waldron, above n 39, at 232.

[41] Stéphanie Hennette-Vauchez "A Human *Dignitas*? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence" (2011) 9(1) I-CON 32.

[42] *Wackenheim v France,* Comm. No. 854/1999; France, 26 Feb. 2002, UN Doc CCPR/C/75/D/854/1999.

[43] At 38 (emphasis in original).

[44] At 43.

> … the source of the obligations is to be found in the concept of humanity. The mode of reasoning invariably unfolds as follows: every human being is a repository (but not a proprietor) of a parcel of humanity, in the name of which she may be subjected to a number of obligations that have to do with this parcel's preservation at all times and in all places. "Human dignity" is thus believed to synthesize all the obligations that stem merely from belonging to humankind.

This conception of dignity, resting on the idea of humanity as a status that grounds obligations, strongly differs from the aforementioned "dignity as autonomy" conception.

This dualism between dignitarian and autonomy-focused accounts of dignity points to a fundamental debate about dignity as a legal principle: whether it is too contested, vague, or indeterminate to be useful as an organising legal value. But despite concerns about dignity's indeterminacy, its normative status is enduring. Since the end of the Second World War, dignity has emerged as a remarkably prominent concept in both international and domestic legal orders, even as the aforementioned debates as to its meaning and implications continue.

Mana and Dignity: A Brief Theoretical Comparison

As noted at the outset, in New Zealand law, dignity is used alongside the Māori term "mana" in a variety of contexts. Like dignity, mana is a rich and contestable concept. Here we briefly explore the concept of mana within Te Ao Māori – literally, within the "Māori world", or from a Māori perspective[45] – and how the theories of dignity just described depart from, or converge with, the Māori concept of mana.

Mana has a spiritual component that is not necessarily present in all conceptions of dignity. In Te Ao Māori, atua (gods) are considered the source of all mana.[46] This spiritual or supernatural aspect of mana is ever-present, even if not explicitly communicated wherever the term mana is used.[47]

While mana has its ultimate source in the supernatural realm, humans can exercise some control over their degree of mana. This is expressed by the idea of mana tangata (tangata meaning person), which can be contrasted with the mana ascribed by one's ancestors (mana tupuna; mana inherited by virtue of one's whakapapa or genealogy).[48] So, for example, a leader might acquire

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[45] We consulted a range of sources, including Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013). *Te Matapūnenga* is a compendium of usages of Māori words, which collates numerous examples of the word "mana" being used in Māori source material. It also draws attention to the connections between mana and other Māori concepts. We also consulted expert Māori commentary about tikanga Māori over time, including by Te Rangi Hiroa Buck, Māori Marsden, Mason Durie, Hirini Moko Mead, and Carwyn Jones. Finally, we found certain ethnographic "outsider" commentaries useful, where these adopted a reflexive and critical approach towards their examination of Māori ways of being and doing, primarily Joan Metge *In and Out of Touch: Whakamaa in Cross Cultural Context* (Victoria University Press, Wellington, 1986).

[46] Maori Marsden "God, Man and Universe: A Maori View" in Michael King (ed) *Te Ao Hurihuri: Aspects of Maoritanga,* (Penguin, Auckland, 2011) at 118.

[47] Joan Metge *In and Out of Touch: Whakamaa in Cross Cultural Context* (Victoria University Press, Wellington, 1986) at 71–72.

[48] This "triadic" characterisation of mana (mana atua, mana tupuna, mana tangata) comes from Māori Marsden; see Law Commission, above n 12, at [138].

additional mana "by the wise administration of his tribe at home and by the successful conduct of military campaigns abroad".[49] Similarly, skills of oratory or acts of daring or generosity could serve to increase one's mana. Hence many writers, both historical and contemporary, have associated mana with English-language concepts connoting leadership.[50] Another English word that captures part of the idea might be "reputation". It is also possible to lose mana.[51] As such, mana tangata can ebb and flow; Metge likens it to a body of water whose level is able to both rise and recede.[52]

In this respect, mana departs from certain modern conceptions of dignity, in terms of dignity being an inherent, inalienable quality that vests equally in all people. This difference is also reinforced when we consider that mana is not necessarily "an inseparable, inborn part" of the human being.[53] While mana is described as highly personal,[54] it is not inherent, in the way that some conceptions of dignity are understood to be. Rather, mana is bestowed on people by the atua, by the gods.[55]

Notably, mana tangata accrues to the individual but is dependent for its existence on the collective. For example, a leader does not decide or determine, independently of the group, how much mana they hold; rather, this is determined by the person in question as well as the people in their community.[56] Hence, says Metge:[57]

> … [o]ther people may be influenced by a person's own assessment in the short but rarely the long run. Members of the relevant community – local, regional, or national – usually come to their own conclusions on the basis of performance, not mere claim.

Further, the bestowal or recognition of mana is understood to come with reciprocal responsibilities to the collective. This is pointed out by a participant in Metge's research with the Māori community of Ahipara: "When my people told me to stand up and speak for them, I did, because I was given the mana. That is quite a responsibility, not something you treat lightly".[58] As such, the concept of mana is heavily influenced by connections between the individual and the collective. These connections are foundational to tikanga Māori and are expressed through the concept of whanaungatanga (broadly, kinship, as discussed above). The prior, inherent connectedness of people is not an assumption necessarily shared by a Kantian, autonomy-focused conception of dignity.[59] But as a whanaungatanga-based, responsibility-grounding value, there are apparent

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[49] Te Rangi Hiroa Buck *The Coming of the Māori* (2nd ed, Whitcombe & Tombs, Wellington, 1950) at 346.
[50] Buck, above n 49, at 45; Api Mahuika "Leadership: Inherited and Achieved" in Michael King (ed) *Te Ao Hurihuri: Aspects of Maoritanga,* (Penguin, Auckland, 2011); Williams, above n 6, at 4; Ella Henry and Rachel Wolfgramm "Relational leadership – An indigenous Māori perspective" 14 (2018) Leadership 203.
[51] Metge, above n 47, at 69.
[52] At 68.
[53] Metge, above n 47, at 63.
[54] At 69.
[55] Marsden, above n 46, at 120.
[56] Williams, above n 6; Metge, above n 47, at 70.
[57] At 70.
[58] At 64.
[59] Although as noted above, central to a modern legal conception of dignity is the "relational claim" – that the dignity of the individual grounds certain arguments about individual rights against each other and against the state. In this

parallels between mana and and a "dignitarian" conception of dignity, with its understanding of connected, situated persons as members of the "rank of humanity" and carrying obligations flowing from membership of that rank.

As discussed above, modern dignity jurisprudence assumes that dignity vests equally in all persons. The concomitant question of whether, in tikanga terms, "everyone has mana", is one that has been debated.[60] Metge has suggested that the idea of "democratised" mana is a post-colonial interpretation, influenced by the introduction of Christianity and the emphasis within Pākehā culture on individuality.[61] John Patterson prefers to suggest that we need to understand the difference between idealised values and practice. The fact that certain traditional tikanga Maori practices did not appear to reflect a belief in the mana of all individuals may simply be the result of practices not living up to ideals.[62] Mead makes the same point that "what we see happening when tikanga is put into practice is not necessarily the ideal manifestation of that tikanga".[63] In other words, we ought not to assume that recognition of the mana of all individuals was *not* a foundational value of tikanga-governed society, simply because we know of instances where individual mana was not recognised.

Our purpose with this discussion of mana has simply been to highlight some of the ways in which it diverges from the concept of dignity. It is far from a comprehensive review of mana; for example, we have not discussed dimensions of mana that correspond to English-language concepts of jurisdiction and control.[64] Nor have we reviewed all the ways in which second law has sought to draw on the word or concept of mana, beyond its association with dignity.[65]

It is also important to note that a discussion about how mana is distinct from dignity is constrained from the outset, because it is focused only on *mana*, and not on *tikanga*. Therefore it does not consider interrelated tikanga concepts that convey the idea of personhood, and that might, when considered together, come closer to approximating certain Western conceptions of dignity. Such tikanga concepts include tapu (sacred or restricted), mauri (life force or life principle), wairua (spirit or soul), and hau (vitality, vital essence). As noted by Hirini Moko Mead in his authoritative text on tikanga values, these concepts, *together* with mana, can form a "bundle of attributes that defines the importance and sanctity of the person".[66] This is a significant point that we return to in

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respect, dignity is indeed deeply engaged with an account of relations to others; but the *premise* of that engagement is the autonomous, dignified self.

[60] Metge, above n 47, at 64-65.

[61] At 65.

[62] John Patterson *Exploring Maori Values* (Dunmore Press, Palmerston North, 1992) at 27.

[63] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 21.

[64] See for example the use of the term mana in He Whakaputanga o te Rangatiratanga o nu Tirene / The Declaration of Independence of 1835 connoting Māori control over the land (Mason Durie *Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland 1998) at 2) and in the context of "mana whenua" and "mana moana", referring to Māori jurisdiction, power or authority over land/territory and water bodies (Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 162-174; 178-204).

[65] See for example the Māori Language Act 2016, s 8(2) stating that "the Māori language has inherent mana and is enduring"; the Resource Management Act 1991, s 2, defining "mana whenua" as customary authority exercised by an iwi or hapū (tribal group) in an identified area; and the Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013 / Te Ture mō Mokomoko (Hei Whakahoki i te Ihi, te Mana, me te Rangatiratanga) 2013.

[66] Mead, above n 63, at 65-66.

the final section of this article, when we consider the prospect of a "third law" conception of dignity for the law of Aotearoa New Zealand.

DIGNITY IN NEW ZEALAND LAW

We turn now to the results of our empirical research. The term "dignity" appears in 30 New Zealand Acts[67] and 11 legislative instruments currently in force. The term "indignity" appears in three Acts.[68] It was feasible to analyse all usages of dignity in legislation, and we describe our findings below. Our review of the case law was necessarily more targeted, given that searching for "dignity" (and variants) across New Zealand case law returns almost 4000 hits. We first reviewed all Supreme Court judgments referencing dignity (27 total). We also searched all courts for the term "dignity", sorted the hits by relevance, and reviewed the first 20 hits for trends and further search terms. This informed some further targeted research, from which emerged our key findings about dignity in New Zealand case law, also described below.

The Transition from Institutional to Human Dignity

Prior to the 1960s, all references to dignity in New Zealand case law related to the dignity of various institutions, roles, or legal status. The first judicial reference to human dignity was in the 1967 Court of Appeal case of *R v McKay,* concerning the admissibility of defendant statements made while under the influence of "truth serum".[69] McCarthy J posited, *obiter dicta,* that interrogative narcoanalysis techniques, even if scientifically sound, to "delve into man's unconscious mind [could] conflict with the upholding of human dignity".[70] Since *McKay*, human dignity has attained the status of an assumed norm in New Zealand case law. The same is true in legislation; dignity—understood as something possessed or exercised by all humans, by virtue of their humanity—is descriptively assumed (although not defined) in 22 Acts and seven legislative instruments, spanning a range of contexts, from employment law and privacy law to child protection and police powers. Importantly, these statutory references to dignity as an aspect of personhood all postdate 1990.[71] This correlates to the radical post-World War II turn, in international law, from institutional dignity towards dignity as a foundational human rights value. As Resnik and Suk have argued in another context,[72] this correlation suggests causation—that offshore human dignity talk (including as in international legal instruments such as the UN Declaration of Human Rights and the International Covenant on Civil and Political Rights) permeated into New Zealand statutes and case law towards the end of the twentieth century, despite the lack of an explicit constitutional reference to dignity as a fundamental value.

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[67] This figure excludes 10 Acts where the term "dignity" is included only in an appended international treaty.
[68] No instruments contained the words "dignified" or "undignified".
[69] *R v McKay* [1967] NZLR 139 (CA).
[70] At 152.
[71] The New Zealand Bill of Rights Act 1990 ("NZBORA") was the first to use "dignity" in reference to human dignity; all other legislative references to dignity as applying to humans resulted from post-1990 amendments.
[72] Resnik and Suk, above n 35, at 1926.

Functions of Dignity in Legislation

There are three main functions of human dignity in New Zealand legislation. First, dignity may establish a right to be treated in a certain way—for example, persons deprived of liberty by the state have the right to be treated with respect for their inherent dignity.[73] Related to this are Acts which allow damages for "loss of dignity", which amounts to a legal liability on certain bodies for failure to respect dignity (we discuss the appropriateness of a "loss of dignity" formulation below).[74] Secondly, dignity is used as an interest to be balanced when individual privacy or autonomy is intruded upon for legitimate state purposes. In these contexts—mainly in the area of information privacy breaches, searches and drug testing—dignity functions as a limiting or controlling factor on state conduct, in a way that seems to emphasise the individual autonomy dimension of dignity. For example, the Misuse of Drugs Act 1975 (s 13ED(2), inserted in 2005) provides that rubdown or strip-searches must be conducted in a way that affords the person being searched "the greatest degree of privacy and dignity consistent with the purpose of the search".

Thirdly, some Acts use dignity as a policy objective, with consideration for dignity intended to guide how decisions are made or services are delivered. For example, the Public Service Act 2020 provides that individuals must be treated with respect for their dignity when functions are performed pursuant to the Act.[75] Hammond refers to these kinds of policy-oriented statements as "the transmission of large-scale legislative 'messages' by government";[76] they set out aspirations that actors or decision-makers operating under particular legislative schemes ought to try to achieve.[77] Hammond points out that such messages are deliberately broad and ambiguous.[78] In these contexts, therefore, dignity is positioned as an aspirational value for decision-makers, with much scope for those decision-makers to "fill out" a particular conception of dignity as they see fit. In the absence of case law engaging with these policy provisions in any detail, such legislative usages do not contribute much to a broader jurisprudential understanding of dignity as a New Zealand legal value. They do, however, reinforce the normative power of the concept of dignity.

The Meaning of Human Dignity: *Marshall v Idea Services*

Dignity is not defined in any New Zealand statute. However, various conceptions of dignity are apparent in different legal contexts. For example, the Human Rights Review Tribunal (HRRT) has jurisdiction to determine claims for "loss of dignity" under the Privacy Act, Health and Disability Commissioner Act, and Human Rights Act; these Acts can be understood as focusing, respectively, on the privacy, autonomy, and equality dimensions of dignity. In an important 2020 decision, *Marshall v IDEA Services Ltd*, the HRRT for the first time engaged substantively with the meaning

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[73] NZBORA, s 23(5).
[74] Privacy Act 2020; Human Rights Act 1993; Health and Disability Commissioner Act 1994; Employment Relations Act 2000.
[75] Section 92C.
[76] R Grant Hammond "Embedding Policy Statements in Statutes: A Comparative Perspective on the Genesis of a New Public Law Jurisprudence" (1982) 5 Hastings Int & Comp L Rev 323 at 326.
[77] At 331.
[78] At 329.

of dignity across these cognate jurisdictions.[79] Importantly, the Tribunal grounded its analysis of dignity in international human rights law and emphasised dignity's inherent, inalienable nature. The case concerned a loss of dignity claim relating to sub-standard care of a profoundly disabled boy. The Tribunal found that in determining whether there has been a loss of dignity the question is whether failure to comply with the Code of Health and Disability Services Consumers' Rights 1994 has:[80]

> … diminished or caused loss to the aggrieved person's equal worth, caused him or her to be treated as if he or she had no value, or caused him or her to be dismissed, ignored, mistreated or abused as if he or she or their humanity did not matter or meant nothing.

"As if" he did not matter—because as the Tribunal also noted, dignity is inherent and vests equally in all people.[81] It follows that dignity is not actually degraded by, for example, objectifying or disrespectful behaviour; however, in such cases there is a harmful and wrongful messaging and appearance of dignity's degradation for which the "loss of dignity" formulation allows redress. Indeed, if dignity is conceived of as inherent and inalienable, we submit that "affront to dignity" might be more appropriate than the "loss of dignity" formulation.

Importantly, *Marshall* involved a plaintiff who was not capable of subjectively experiencing humiliation or emotional injury. As such, an evolving approach to dignity was needed; prior to *Marshall,* the Tribunal had generally followed the Canadian *Law v Canada* decision in explicating "loss of dignity". In *Law v Canada*, dignity was described in subjective terms, relating to feelings of self-respect and self-worth.[82] But the Tribunal in *Marshall* took dignity to mean, in the statutory context, a normative principle of the equal and inherent worth of all people, rather than a subjective experience such as humiliation: "dignity is to be understood in its normative sense and not as a feeling or reaction".[83] This might seem at odds with the "loss of dignity" formulation but aligns with the "core concept" of dignity prevalent in international law as discussed above. And in *Marshall,* it allowed for recognition of harm in the absence of a subjective experience of emotional harm, in a way that vindicated Mr Marshall as an equal bearer of dignity despite his profound disability.

An Overarching Interpretative Principle? *Udompun*, *Brooker* and *Takamore*

In the case law we reviewed, dignity references typically occurred in cases involving claims of breaches of NZBORA s 23(5). Section 23(5) provides that "[e]veryone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person". They also occurred in respect of claims alleging "loss of dignity" under the four applicable Acts (the Privacy, Health and Disability Commissioner, Employment Relations, and Human Rights Acts).[84]

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[79] *Marshall v IDEA Services Ltd* [2020] NZHRRT 9.
[80] At [125].
[81] At [79] and [86].
[82] *Law v Canada* [1999] 1 SCR 497.
[83] At [99].
[84] See above at n 74 and accompanying text.

In these contexts, a key conundrum facing the courts has been how to quantify compensation for dignity infringements. On this point, Hammond J has centred his interpretation of s 23(5) of NZBORA on an understanding of human dignity as fundamental, universal and inalienable; this leads to a characterisation of s 23(5) as "not a 'liability' rule [but] an 'inalienability' rule":[85]

> …[F]ull and proper recognition must be accorded to the "public" dimensions of the breach of rights … [and the fact that] the inherent dignity of human beings is a "merit" good. It is not a tradeable private right. To the extent that compensation is awarded, that compensation should therefore, in principle, be of a "superliability" character.

Hammond J's argument here, as explicated in his extrajudicial writing, is that human dignity is "an area of law where the relationship between right and remedy is more than usually important". As such, courts must ensure that remedies give "proper context to the norm" itself—the norm of dignity as non-contingent, fundamental, and inalienable.[86] In the case of *Udompun*, a Court of Appeal decision addressing the treatment of a Thai national on being denied entry to New Zealand, this centring of dignity as inalienable and therefore of a "superliability" character would have led Hammond J to allow for a higher amount in damages than was awarded by the majority.[87]

Indeed, Hammond J has argued extrajudicially that the New Zealand courts have tended to be too cautious in awarding remedies relating to dignity.[88] This may relate to the status of dignity in New Zealand law. Unlike comparable jurisdictions such as Canada, Aotearoa has not afforded dignity the status of a foundational constitutional value. Hammond J in *Udompun* seems to suggest that it should be so recognised—his argument is that dignity "must live and breathe in the real world", and he expressly cites to international jurisprudence on "the centrality of dignity, and the importance of squarely recognising and adequately addressing that interest".[89]

Two years later, in the Supreme Court decision of *Brooker v Police*, Thomas J seemed similarly to advocate for dignity as an overarching value that impacts the weighing of competing rights and interests in law.[90] Importantly, unlike *Udompun, Brooker* did not involve interpretation of an express statutory reference to dignity. The case involved a member of the public staging a protest outside the home of a policewoman; the Court was tasked with balancing conflicting free speech and privacy interests. The majority interpreted the relevant provision of the Summary Offences Act in light of the right to freedom of expression (NZBORA s 14), finding that in the circumstances Brooker's conduct was not "disorderly behaviour". In his dissent, Thomas J adopted a dignity-centred focus reminiscent of Hammond J in *Udompun*. Noting that the case was essentially a balancing exercise, Thomas J framed not only freedom of expression, but also privacy (which is not referred to in NZBORA), as a "fundamental value"; as such, the case was characterised as

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[85] *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [214].
[86] Grant Hammond "Beyond Dignity?" (paper presented to the Second International Symposium on the Law of Remedies, Auckland, 16 November 2007) at 38.
[87] Ms Udompun was detained overnight in a prison pending her repatriation; she had inadvertently not been provided with sanitary products during a heavy menstrual period, and no washing/bathing facilities were made available to her before her departure. The High Court found, inter alia, a breach of s 23(5) of NZBORA; on appeal, the Court of Appeal reduced the award from $50,000 to $4,000.
[88] Hammond, above n 86.
[89] At [203].
[90] *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

involving "two fundamental values compet[ing] for ascendancy".[91] Thomas J then invoked dignity as a sort of touchstone or lens for evaluating these competing rights, positing that dignity is "the key value underlying the rights affirmed in the Bill of Rights".[92] His Honour observed that:[93]

> [a]ll these rights either protect or recognise the dignity and worth of the person or are designed to promote or protect conditions in which human dignity may exist and flourish.

Thomas J went on to say that "[p]robably, none are more basic to human dignity than privacy … The nexus between human dignity and privacy is particularly close, including the link between a person's dignity and the sanctity of his or her home where their privacy is nurtured".[94] By vesting privacy with the normative authority of dignity in this way, Thomas J reached the conclusion that the officer's residential privacy should prevail against Brooker's freedom of expression.

More recently, in the case of *Takamore v Clarke,* Elias CJ similarly touched on dignity as relevant to judicial balancing, albeit without taking the analysis as far as Thomas J.[95] In *Takamore,* the Court was faced with competing claims to determine the burial place of Mr James Takamore. Elias CJ noted at the outset that the case engaged "the human rights to dignity, privacy and family";[96] she later reasoned that one aspect of human dignity is cultural identification,[97] citing with approval an Australian authority that discussed respect for human dignity as requiring consideration for the "cultural, spiritual and religious beliefs, practices and traditions of the deceased".[98]

It would go too far to suggest that these three cases—*Udompun, Brooker* and *Takamore*—illustrate an emerging consensus. But they do point to a potential future direction for New Zealand dignity jurisprudence—the adoption of dignity as a foundational interpretative value. Indeed, Thomas J has expressly argued for such a role for dignity in Aotearoa, at least in relation to cases requiring the balancing of competing rights-based claims:[99]

> The enforcement of human rights, and the exercise of the power conferred on the courts under s 6 of the Bill of Rights, will only reach full maturity when the courts develop and articulate an intelligent and intelligible conception of human dignity and recognize that dignity is the right of all persons. A person's dignity matters. It is a basic value which cannot be ignored in any discourse on rights.

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[91] At [164].
[92] At [180].
[93] At [182]. Compare McGrath J at [123]: "Privacy is 'an aspect of human autonomy and dignity'" (citing Lord Hoffmann in a UK House of Lords decision). Thomas J has also written extra-judicially on dignity as underlying human rights: see "Recognising and Protecting Dignity" (2012) 186 New Zealand Lawyer 14 at 14-16; and "*Bonkers and Ors v The Police:* Judgment of Athena J in the High Court" [2011] 19(1) Waikato L Rev 94.
[94] At [182].
[95] *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.
[96] At [1].
[97] At [12].
[98] At [77].
[99] EW Thomas "*Bonkers and Ors v The Police:* Judgment of Athena J in the High Court" [2011] 19(1) Waikato L Rev 94 at 115.

This resonates with the description of dignity put forward by the HRRT in *Marshall*:[100]

> … the key point is that the role of dignity is to supply a value, or set of values, that other approaches do not …[i]t is an irreducible, core principle of human rights.

A comparative analysis of offshore dignity jurisprudence illustrates that dignity is commonly used as a foundational value or constitutional norm across domestic jurisdictions, even in jurisdictions where dignity is not expressly referred to in a constitutional text.[101] The approaches of Justices Hammond, Thomas, and Elias suggest that New Zealand's lack of a single, entrenched constitutional text would not necessarily preclude adoption of a similar approach here.

Importantly, these cases, along with *Marshall,* also provide some guidance as to the meaning of dignity as a New Zealand legal value; collectively, they suggest that our domestic understanding of dignity has been largely influenced, to date, by international and comparative law, often with a focus on a Western cultural concept closely associated with autonomy and human rights. For example, in *Marshall*, the HRRT used Canadian dignity jurisprudence as the starting point for its analysis of dignity. And in *Udompun,* Hammond J defended human dignity "as a universal value; as an inalienable value; and as a matter which is significantly tied up with human autonomy".[102] As outlined above, autonomy is frequently understood as a foundational premise of dignity in Western jurisprudence, and indeed of Western law more generally. However, autonomy is not the premise of the "first law" of Aotearoa; in tikanga Māori, there is great emphasis on connections between people, expressed in the concept of whanaungatanga. As we argue below, if dignity is to become a touchstone principle in New Zealand law in the way hinted at in *Udompun, Brooker* and *Takamore*, it ought to be informed by the underpinning values of both first law *and* second law.

Associations Between Dignity and Mana in Law

The final key finding emerging from our research concerns the associations being drawn between dignity and mana in both case law and legislation. Beginning with case law, we found 40 cases of interest where dignity and mana are discussed in relation to one another, all from the level of the Court of Appeal or below.

Mana and dignity have been associated in the criminal sentencing context in the Court of Appeal case of *Zhang v R*.[103] There, the Court of Appeal held that:[104]

> … ingrained, systemic poverty resulting from loss of land, language, culture, rangatiratanga, *mana and dignity* are matters that may be regarded in a proper case to have impaired choice and diminished moral culpability.

The Court in that case did not define mana or dignity, nor did it discuss whether the two concepts ought to be treated as cultural or legal equivalents. Because *Zhang v R* is the guideline sentencing

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[100] *Marshall v IDEA Services Ltd* [2020] NZHRRT 9 at [81], [82].
[101] McCrudden, above n 36.
[102] *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [201].
[103] *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
[104] At 159 (emphasis added).

judgment for methamphetamine offending, the extract above has been subsequently cited many times, but no cases have had cause to explore or critique this association between "mana and dignity".

In employment law, several cases refer to the need to deal with disciplinary matters in a way that respects "mana and dignity",[105] drawing from the wording used in a particular collective employment agreement. Similarly to *R v Zhang*, however, to date no cases have explored or defined those concepts, or considered what respect for mana and dignity might demand from a particular disciplinary process.

We also found examples in case law of claimants resorting to mana to flesh out or support dignity-based arguments. The Employment Relations Act 1993 provides for payment of compensation for (among other things) "loss of dignity";[106] we found examples in that jurisdiction of plaintiffs making mana-based arguments to support their claims about loss of dignity. For example, in *Hawkins v Patutahi Enterprises Ltd,* the applicant said false accusations by his employer which spread within the community caused him embarrassment and "affected his mana"; the Employment Relations Authority found this was relevant to his claim for loss of dignity under the Employment Relations Act.[107]

In sum, case law associations between mana and dignity have placed the two concepts alongside each other, without defining their content or being explicit about whether they are being treated as equivalents. In particular, we see no engagement, as yet, with the conceptual differences between autonomy, as embodied in certain conceptions of dignity, and whanaungatanga, as a value which underpins tikanga Māori and ought to contextualise the concept of "mana".

In legislation, we see two further associations between mana and dignity. First, a mana/dignity association is drawn in the Substance Addiction (Compulsory Assessment and Treatment) Act 2017, which aims to enable compulsory treatment that may "protect and enhance [the recipient's] mana and dignity and restore their capacity to make informed decisions about further treatment and substance use". Here too, it is not clear whether mana and dignity are being treated as equivalents. We might assume that, since the statute uses both words, it recognises some conceptual difference between them, although what that might be is not made clear. We note that the linking of mana and dignity with making "informed decisions" suggests a dignitarian ideal of exercising one's autonomy in a positive, self-respecting way, although this point has not yet been discussed in case law.[108]

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[105] See, for example, *Board of Trustees of Marlborough Girls' College v Sutherland* [1999] 2 ERNZ 611 (CA). Compare *Totorewa v Robinson* FC FAM 2006-019-1746, 21 October 2008 (referencing the respondent's impressive "dignity and mana").

[106] Section 123(1)(c)(i).

[107] *Hawkins v Patutahi Enterprises Ltd* [2018] NZERA Auckland at [31]. Compare *Kamizona v Norske Skog Tasman Ltd* [2017] NZERA Auckland 51 at [18], [19] (accepting that applicant's inability to provide for his whānau resulted in a "loss of dignity and mana"); *Tawhiwhirangi v Attorney-General* [1994] 1 ERNZ 459 (EmpC) (accepting plaintiff's sensitivity to dignity injury was heightened by weight he placed on his "personal mana").

[108] According to a submission received on the Bill, the inclusion of restoration of mana as a core objective was posited by Māori addiction leaders and was intended to send "a strong signal of the need for an appropriate cultural response to the management of those with severe addictions". Concerns were also expressed that the Bill did not go far enough in terms of ensuring proper respect for cultural identity and personal beliefs in addiction treatment. For example, Dapaanz, a professional addiction association, argued that in addition to mana, the principles of tino rangatiratanga

The Oranga Tamariki Act 1989 was amended in 2019 to affirm mana tamaiti (tamariki) as a guiding principle for decision-makers under the Act. Mana tamaiti is defined as "the intrinsic value and inherent *dignity* derived from a child's or young person's whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person".[109] This conception of dignity is inherently relational, deriving from one's interconnectedness with others and requiring acknowledgement of those connections. This seems to resonate with the dignitarian understanding, canvassed above, of the collective dignity of humanity as imposing obligations and limits on individual exercises of autonomy. Indeed, the Oranga Tamariki Act goes on to expressly tie mana tamaiti to the foundational tikanga value of whanaungatanga, which understands kinship as grounding certain "responsibilities based on obligations to whakapapa".[110]

DIGNITY AND MANA – A PRODUCTIVE ASSOCIATION?

In this section, we consider the nature of the existing associations being drawn between dignity and mana in New Zealand law. To explore this question, we draw on Roughan's proposed framework describing the ways that two different legal systems can be associated—at the level of words, concepts, rules, or systems.[111] Like Williams, Roughan assumes some critical depth, going beyond symbolism, in the way that a Māori legal dimension is reflected in mainstream New Zealand legal institutions; as such, she suggests it is, at the least, worth theorising about "the character of the association" between Māori law and Pākehā law.[112]

If mana is treated simply as a translation of dignity, then the mana and dignity association is word-level.[113] No distinction would be drawn between the English signifier and the Māori signifier, and the focus would be on achieving a unitary meaning, by way of a linguistic fiction that Cao has described as "necessary for legal certainty and consistency".[114] Viewed optimistically, such usage might be seen as symbolising a political commitment not only to the Māori language, but to biculturalism and bijuralism more generally.[115] As Murphy has argued, "symbolism is a central means of shaping, and reshaping, a national political culture".[116] Writing in the Australian context,

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(self-determination) and mana motuhake (autonomy) must also be applied by addiction professionals to actively protect the rights of Māori clients.

[109] Section 2, emphasis added.

[110] Oranga Tamariki Act 1989, s 2.

[111] Roughan, above n 7, at 156.

[112] At 146.

[113] Roughan, above n 7, at 156.

[114] Deborah Cao "Inter-lingual uncertainty in bilingual and multilingual law" (2007) 39 Journal of Pragmatics 69 at 73.

[115] Murphy, above n 24, at 1014. See also the statement by Matthew Palmer, in the context of legislative references to the Treaty of Waitangi, that symbolism is "the most important, and most undervalued, function of legislation": Matthew Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207 at 209.

[116] Murphy, above n 24, at 1014.

Murphy considers Indigenous language lawmaking to be "a powerful expression of political commitment to decolonisation, reconciliation and redress".[117] He goes on to argue that:[118]

> … to the extent that one believes, or hopes, that a political community can share certain values and ideas, lawmaking processes ought to express and embed those in an enduring way, including through the considered use of symbolism.

Importantly, Turvey notes a more sceptical view is possible—that the incorporation of te reo Māori terms amounts to "government accommodating Māori values in its own decision-making process in order to defuse growing challenges to its right to exclusive sovereignty".[119]

Moreover, as discussed above, the words "mana" and "dignity" represent different concepts, concepts that do not map neatly onto one another. Indeed this is a point that can be made in respect of many Māori and Western concepts.[120] As Turvey has argued, when te reo Māori words are selected, translated, and interpreted in New Zealand law, those processes take place within a colonial structure in which Māori are not the power-holding group. Māori concepts may become "detached from their original purpose and meaning".[121] The formulation of "mana and dignity" might lead to mana being defined primarily by reference to dignity, or *as* dignity, and then being divorced from its cultural base. In other words, to treat mana and dignity as linguistic and therefore conceptual equivalents within our legal system risks opening the way to subversion and transformation of the concept of mana. The question of subversion relates closely to the ability of judges to interpret Māori terms deployed in New Zealand legislation in a way that promotes rather than subverts Māori cultural concepts. For this reason, Ahu argues that tikanga Māori must play a central role in determining the meaning of Māori words in the New Zealand legal system.[122]

Alternatively, the "mana and dignity" formulation could potentially be used to signify an association at the level of the *concept* each word conveys. A conceptual association between mana and dignity in law might be *productive*, bringing two separate cultural concepts into conversation with each other. This would require judges, lawmakers and officials to look for points of resonance, symbiosis and tension between the two concepts, some of which were discussed above. However, our research has shown a lack of meaningful engagement, in case law and legislation, with those points of resonance, symbiosis and tension to date. This may suggest that legislators and judges alike are ill-equipped, at this stage in New Zealand's grappling with a potential transition to "third law", to move beyond word-level associations. Most notably, we found no evidence in case law, as yet, of engagement with the autonomy/whanaungatanga dichotomy that a *conceptual* dignity-mana association would embody. Passing references to mana as relating somehow to dignity, without engaging with their different legal heritages, risks entrenching a false understanding of mana, subverting its richness, complexity, and whanaungatanga-centric foundations.

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[117] Murphy, above n 24, at 1014. See further, Alamin M Mazrui, "Globalism and Some Linguistic Dimensions of Human Rights in Africa" in Paul Tiyambe Zeleza and Philip J McConnaughay (eds) *Human Rights, the Rule of Law, and Development in Africa* (University of Pennsylvania Press, Philadelphia, 2004) at 63–64 as cited in Murphy at 1014.

[118] Murphy, above n 24, at 1014.

[119] Turvey, above n 23, at 540.

[120] Turvey, above n 23, at 541.

[121] At 532.

[122] Tai Ahu "Te Reo Māori as a Language of New Zealand Law: The Attainment of Civic Status" (LLM Dissertation, Victoria University of Wellington, 2012).

Relating to the whanaungatanga-centric foundation of mana, the association between mana tamaiti and dignity in the Oranga Tamariki Act 1989 is something of an outlier in New Zealand law. This formulation is not based on "mana and dignity"; instead, it positions mana tamaiti explicitly in relation to whanaungatanga, which may serve to retain a closer connection to mana's underlying cultural base. This may in turn pave the way for a more balanced integration of Māori and Pākehā law, at least in the area of child welfare and protection. For example, an understanding of a child's dignity as relating not just to their autonomous capabilities, but also as contingent on legal recognition of their situated status, their whakapapa, their *belonging*, might have radical implications for decision-making about all New Zealand children. This example of mana/dignity illustrates, however, the conceptual tensions that may arise when we bring whanaungatanga-based conceptions of dignity into association with second law. Insight into this tension is provided in a recent Family Court decision, *Oranga Tamariki v BIH*.[123] Otene J considered the "special guardianship" provisions of the Oranga Tamariki Act, which can result in guardians of Māori children having significant decision-making power, to the exclusion of the child's whānau/ family. Otene J pointed out that the concept of special guardianship is "fundamentally irreconcilable", at a conceptual level, with the Act's conception of child wellbeing generally and "particularly those elements grounded in tikanga Māori".[124] In other words, we might say that the introduction of concepts such as mana tamaiti has put the Act in tension with itself.

The mana tamaiti/dignity example gives an indication of the challenges of associating two different legal/cultural concepts, and perhaps some insight into the prospect of moving towards associations at the levels of rules and systems. These are future challenges for a bijural legal project and beyond the scope of this article. Nonetheless, it is worth noting that most of the associations being drawn between mana and dignity in our law to date are under-theorised and leave scope for problematic equivalencies to be drawn between these two concepts. This is not to suggest that we ought to cease looking for productive associations between dignity as a "second law" concept, and mana as a "first law" concept. Rather, care needs to be taken to avoid the assumption that they are conceptual equivalents. Each comes with a different legal heritage, and the search for productive associations between the two concepts needs to take this into account.

In the next section, we consider the potential for a genuinely "third law" conception of "dignity" within our legal system, that would draw on both our Māori and Pākehā legal heritages.

THE FUTURE OF DIGNITY IN "LEX AOTEAROA"

The above survey of New Zealand "dignity talk" illustrates the extent to which dignity as a legal concept has permeated the domestic legal order from international law and offshore jurisprudence. There is clear evidence that legislators and judges regularly lean on the moral authority of dignity as a normative principle, at least to do expressive work—such as explaining the harm of a crime, or why it is important that the state compensates a citizen, or why an employee's treatment was unfair. There have also been some indications—in *Udompun, Brooker* and *Takamore*—that dignity may play an increasingly important role as a centred, fundamental value in our legal order, with implications for judicial interpretation generally.

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[123] *Oranga Tamariki v BIH* [2021] NZFC 210.
[124] At [34]–[35].

To the extent that dignity continues to be used as a legislative and juridical device in the New Zealand legal system, we argue that it must be situated in both first and second law traditions, as is fitting for our bicultural legal context. As Professor Whitman has argued, in comparing the social foundations of "human dignity" in Europe and the United States, legal ideas such as dignity:[125]

> … never seem legitimate on the strength of their own coherence or beauty. They seem legitimate only if they speak to the beliefs and anxieties of a given culture. The right way to characterise this phenomenon is to invoke, without embarrassment, Montesquieu, saying that the *spirit* of the law differs [from place to place]. And it differs because social traditions differ.

Human dignity has the potential to develop as a uniquely Aotearoan, socially legitimate legal concept only if it speaks to the diversity of social traditions in this place. An endogenous, inward-looking understanding of dignity would be informed not only by Western thought and the value of autonomy, but equally by relevant, interrelated tikanga values. If such a conception of dignity were to emerge, we could legitimately suggest that our legal system has crafted a "third law" conception of dignity (and one that could, therefore, be contrasted with a "second law" conception of dignity). We do not suggest we are at that stage yet, but that a third law conception of dignity has the potential to emerge. This depends on the capacity of our judges and legislators to look to tikanga Māori, including but not limited to the concept of mana, and to draw on its values and concepts in an appropriate way.

To date, dignity in New Zealand has been mainly associated with the Māori concept of mana. As discussed above, viewed optimistically, this instance of legal bilingualism might have symbolic importance, sending a message of political commitment to a shift towards a more bilingual, bicultural, bijural legal system. But symbolism has its limits and costs. Our research suggests that the "mana and dignity" formulation does not, as yet, indicate a shift towards a more bijural, third law conception of dignity, because there has not, as yet, been meaningful engagement with the differences between the philosophical systems from which each of the concepts are drawn.

In the past, in respect of certain Māori concepts, it appears that such engagement may have been beyond the capacity of our decision-makers or our legal system. We could point, for example, to commentary on the use of the Māori term "kaitiakitanga" within the Resource Management Act 1991. The term is defined in s 2 of that Act to mean "guardianship" of natural and physical resources as exercised by tangata whenua, in accordance with tikanga, and including the ethic of stewardship. Merata Kawharu has observed that this usage may lock kaitiakitanga into a frame of guardianship, when it could equally be defined as resource management more broadly, and not just of physical resources but also spiritual ones.[126] Turvey has suggested that kaitiakitanga has been interpreted by courts in a manner that is less about giving effect to a tikanga-based meaning, and more about making a generalised gesture towards the role of Māori values in achieving a reconciliatory, dialogue-based management of natural resources.[127]

The definition of kaitiakitanga in the Resource Management Act 1990 does, importantly, contextualise the concept within tikanga Māori. This might be compared to many existing

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[125] James Q Whitman "'Human Dignity' in Europe and the United States: The Social Foundations" in Georg Nolte (ed) *European and US Constitutionalism* (Cambridge University Press, Cambridge, 2006) at 123.
[126] Merata Kawharu "Kaitiakitanga: A Maori anthropological perspective of the Maori socio-environmental ethic of resource management" (2000) 109 The Journal of the Polynesian Society 349.
[127] Turvey, above n 23, at 548.

references to mana in our law, which do not make an explicit connection to tikanga Māori (with the Oranga Tamariki Act 1989 being a notable exception). The notion that our legal system can draw on individual words or concepts from tikanga Māori, such as mana, in isolation from other tikanga values or the system of tikanga, deserves scrutiny. Consider Hirini Moko Mead's explanation of how tikanga Māori conceptualises the importance and sanctity of the person – in other words, how tikanga Māori expresses an idea that approximates certain Western conceptions of dignity. To do this, tikanga Māori calls on a number of interrelated concepts. Mead writes that:[128]

> … several spiritual attributes are fundamental to the spiritual, psychological, and social well-being of the individual. These attributes include personal tapu [*sacredness*], mana, mauri [*life force*], wairua [*spirit*] and hau [*vital essence*]. They all relate to the importance of life, and to the relation of ira tangata [*the human element*] to the cosmos and to the world of the Gods… It is this particular *bundle of attributes* that defines the *importance and sanctity of the person*.

If judges and legislators are reaching for a Māori-oriented approximation of a Western conception of dignity, they are unlikely to locate it within one single Māori concept; mana is one aspect of the importance and sanctity of the person, but it is not the full story. To arrive at meaningful engagement between Western and Māori values, it will not do to cherry pick from tikanga; that is likely to lead to subversive, word-level associations at best. Instead, we need to look more globally, and consider the interrelated concepts and values that create the rules and the system of tikanga Māori. To the extent that a truly bicultural understanding of dignity is to develop in Aotearoa, as we have argued that it should, that concept must be informed by the full range of interrelated tikanga concepts that underpin the inherent importance and sanctity of the person. And as discussed throughout, it must also give due weight to whanaungatanga as a fundamental tikanga value, rather than assuming (only) a premise of autonomy. Admittedly, autonomy and whanaungatanga may stand in tension with one another, but arguably this tension could function as an important and productive aspect of dignity in the New Zealand context. It is also possible that such a biculturally-situated concept of dignity would resonate with "dignitarian" jurisprudence, with its emphasis on an understanding of connected, situated persons as members of the "rank of humanity" and certain obligations attendant on membership of that rank.

There are other ways in which the Māori worldview could inform the development of dignity as a third-law legal value in Aotearoa. For example, consider the issue of whether dignity survives death. This is arguably raised by the Human Tissue Act 2008, which refers to the dignity of the individual whose tissue is collected after his death;[129] it is also an issue squarely before the Supreme Court in the pending case of *Ellis v R*.[130] The idea that dignity can be a posthumous interest may be congruent with a Māori cultural understanding of the status of deceased persons, with death viewed not as a transition from life but a transition "from one state of acknowledged existence into another".[131] In sum, if New Zealand is committed to a "third law" trajectory, there is ample space for our dignity jurisprudence to develop on a path of its own, one that is particularly well suited to the social realities of modern Aotearoa. A conception of dignity informed not only

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[128] Mead, above n 63, at 65-66 (emphasis added).
[129] Section 3(a)(i).
[130] See *Ellis v R* [2020] NZSC 89.
[131] Nin Tomas "Who Decides where a Deceased Person will be Buried?" (2008) 11-12 Yearbook of NZ Jurisprudence 81. We are grateful to our research assistant, Noah Kemp, for bringing Tomas' writing on this topic to our attention.

by key Western philosophical values – autonomy, equality, liberty – but also by tikanga might potentially represent a more capacious, uniquely Aotearoan value.

CONCLUSION

Our research indicates that dignity is obtaining the status of a fundamental norm within our legal system. There remains, however, much scope for development of conception/s of dignity that give due deference to the richness of the two streams of Pākehā and Māori law that form part of this country's legal heritage. By drawing on the underlying worldviews that inform those legal heritages, we see the potential for a uniquely Aotearoan jurisprudence of dignity.

The "mana and dignity" association, as used in New Zealand legislation and case law, is an illustration of how ideas from two different legal cultures can be deliberately associated within a single system of law. However, the associations between the terms to date in our law are under-theorised. They suggest that our judges and legislators have not yet turned their minds to moving beyond associations at the level of the word, and towards associations at the level of the concept, or even at the level of rules and systems. We suggest that this is what is needed if we are to see a genuinely "third law" conception of dignity. The idea of "third law" envisions true biculturalism and transformation, rather than mere symbolism, with Māori and Pākehā legal traditions meeting in a way that is mutually enriching rather than subversive. As dignity continues to play a prominent role in our legal system, and as theorisation on dignity in the context of the New Zealand "legal spirit" continues, a "third law" reading of dignity is needed to ensure that dignity resonates with all New Zealanders as a legitimate, local legal value.