1. Introduction

1. DIGNITY IN MADADENI, MPUMALANGA

While working as an attorney at the Centre for Environmental Rights, a South African law clinic, I represented a community organisation from Mpumalanga, called the Madadeni Mining Committee. The Committee had been established to oppose anthracite mining activities that had commenced on a large area of communal land adjacent to the village school. Standing on the mining site, looking across what used to be open veld, Thelma Nkosi, a member of the Madadeni Committee, explained to me: ‘It used to be so beautiful. We played here, we farmed here, we met here, we grew medicine here. This was our beautiful land. They have taken it away. They have taken away our land and our dignity.’

I was deeply struck by her statement, so I wrote it down in the case file. When I returned to the office, I phoned a local official working for the Department of Water Affairs to discuss the Department’s decision to license water use on the mine. Unprompted by any mention of dignity on my part, the official said: ‘It is for the community’s dignity that we have awarded this licence. The mine will create jobs. If you have jobs, you have dignity. Without the mine, there is no dignity.’

1 Throughout this book I use ‘human dignity’ and ‘dignity’ interchangeably.
2 Mpumalanga is a province in eastern South Africa. In recent decades there has been a significant increase in mining activities in the province, with detrimental impacts on communities living there, as well as on agriculture and critical water resources. See the discussion on mining regulation and impacts in Mpumalanga in Tracey Davies, ‘Mpumalanga Crisis: Why Is Nobody Listening?’ [2014] GroundUp News http://groundup.org.za/features/mpumalanga/mpumalanga_0002.html accessed 19 December 2016.
4 These quotes come from notes I took while working as the main attorney in this case. The case notes are used with the permission of the Centre for Environmental Rights.
Both Nkosi and the Water Affairs official spoke of human dignity as an idea related to the environment – the ways we live in the environment, the ways we change it and use it, the decisions we make about it. Their conclusions about what dignity demands, however, take them in opposite directions both in regard to how the environment should be treated and in determining its value for the community. These conversations had me wondering what the significance of the concept of human dignity is in environmental governance and decisionmaking. What role does or should human dignity play when we face conflicts about the use or value of the environment?

In this book, I discuss some of the possible answers to these questions. I argue that human dignity is a rich and complex concept that does important work in human rights law in a number of legal jurisdictions, both national and international. It is a concept that is undervalued and underexplored, however, in environmental governance and decisionmaking, and, as I attempt to demonstrate, it is also a concept that holds significant potential to enhance judicial reasoning to achieve better outcomes in human rights cases. While I make my argument in the context of human rights courts and with regard to the particular nature of judicial reasoning, it is an argument that tries to remain faithful to Nkosi’s very personal and heartfelt use of dignity. Human dignity, I argue, is a concept that can help us recognise the complexity and intimacy of our relationship to the environment, and this is exactly how I believe Nkosi uses the concept.

2. DIGNITY’S ENVIRONMENTAL PROMISE: THE ARGUMENT IN A NUTSHELL

The argument at the heart of this book is that human dignity is a concept that can enhance judicial reasoning to achieve better environmental outcomes in human rights cases. Human dignity, I argue, is valuable in this regard because it is a concept through which we can come to an understanding of our humanness as being constituted in important ways by the environment. As a result, the concept of dignity can help us recognise that the link between human rights and the environment is a fundamental one, and one in which we ought to
value the environment as an aspect of our own humanness. Human dignity is a concept that can be deployed to bring environmental concerns and interests to the centre of human rights adjudication, as securing environmental interests and human interests are recognised as intimately connected matters.

Human dignity is a concept concerned with the nature of our humanness and protection and respect for human dignity is seen as the goal or foundation of human rights. In an age of great environmental instability and uncertainty, when we face significant human threats to the environment, and environmental threats to human rights, we have the opportunity to revisit and reinterpret human dignity in light of these new threats.6

In this book, I take a hermeneutic, pragmatist approach to understanding dignity’s meaning, role and potential in environmental and human rights law. As a result of this approach, I find that while dignity is often associated with some fixed, essentialist conception of humanness, in law it can be understood as a multifaceted and continually evolving concept.7 In examining dignity case law, I find a concept that speaks to social and individual constructions of identity, and a concept deeply concerned with the relational character of our humanness. As a result, dignity is a concept through which we might recognise our own humanness as constituted not only in relation to self and others, but also in relation to the environment.

I find that dignity is a concept that can account for our relatedness to the environment, our environmental identities and the changing, evolving and unstable environmental circumstances we now face and will face in the future. Dignity allows us an account of humanness that erodes the distinction between human and environmental interests, by recognising our relationship to the environment as essential to our sense of self. In short, dignity extends our understanding of our environmental impacts and duties, and our reliance on and relatedness to the environment extends our understanding of our dignity. Understanding dignity in this way, however, requires us to move away from classic understandings of dignity, often associated with the philosophy of Immanuel Kant, and focus instead on relational approaches to dignity in philosophy and law, as well as on how ideas of the environment are implied or embedded in our uses of dignity.


I consider dignity’s roles and potential in the context of two critical environmental problems. The first is the problem of addressing competing interests in land and resources in circumstances when parties claim a special connection to a particular territory. One finds many examples of these sorts of cases in the indigenous rights jurisprudence of the Inter-American Court and Commission. When indigenous peoples assert special, close or familial relationships to their territories, questions arise, first, about how human rights law responds to those claims and, second, about whether and how human rights law can accommodate and protect these special relationships. Looking at these cases, I argue that the Court and Commission have sought to protect indigenous rights under the right to property and the right to consultation but have failed to adequately protect claims to an environmental identity. I argue that we find in dignity jurisprudence an understanding of identity that the Inter-American system might adopt in its reasoning to better protect the interests at stake in indigenous claims.

The second problem I consider is the problem of human rights law’s temporality. The impacts of environmental degradation may reach far into the future, threatening future generations and the continued functioning of ecological systems. Again I find that dignity offers new insights into these problems, giving courts a tool with which to reason to better environmental ends. Through an environmental interpretation of our dignity, courts can extend our human rights practice to better protect our humanness, our environments and even our future.

In the rest of this chapter, I discuss the relationship between human rights and the environment and what I mean by environment, before addressing a few preliminary questions on the choices and methodology adopted in this book.

3. DIGNITY AND THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE ENVIRONMENT

In this book, I consider the concept of human dignity, and its role in environmental adjudication, in the context of human rights law and in human rights cases. While scholars and practitioners grapple with questions about human
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dignity, and about environmental protection, in the context of human rights law, these topics are rarely brought together. Human dignity, however, may make a valuable contribution to our understanding of the relationship between human rights and the environment.

Questions about how we ought to secure and protect our human rights and questions about how we ought to secure and protect the environment are inextricably connected. This connection is often thought to work in two primary ways. First, the realisation of human rights depends on an adequate quality of environment that does not threaten our rights (through, for example, exposure to dangerous environmental waste) and that provides us with the resources that are preconditions to securing many of our human rights. Environmental


degradation and harm can threaten rights to life, health, property, food, adequate standards of living, culture, home and family life, among other rights. Human rights do not depend only on an unpolluted environment, but also on the availability of abundant natural resources. As Conor Gearty argues, ‘[t]he Universal Declaration of Human Rights presupposes a functioning, human-friendly planet when it asserts the various rights to which (rather blithely we can now see) it declares all humanity to be entitled’. While human rights texts are sometimes silent on matters of the environment, the environment is an immanent, if often invisible, concern in all of human rights law.

The second way in which human rights and the environment are sometimes recognised as connected is the inverse of the first: securing the environment often necessitates securing human rights. As Michael Anderson puts it, ‘the full realisation of a broad spectrum of first and second generation rights would constitute a society and a political order in which claims for environmental

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14 As the Pakistani Court found in Zia v Water and Power Development Authority [1994] PLD 1994 SC 693 (Supreme Court of Pakistan) [12–13].
15 See, for example, the findings in Inter-American Commission on Human Rights, ‘Report on the Situation of Human Rights in Ecuador’ (1997) OEA/Ser.L/V/II.96 Doc. 10 rev. 1; Free Legal Assistance Group and Others v Zaire [1995] Comm No 25/89, 47/90, 56/91, 100/93 (African Commission on Human and Peoples’ Rights); Fundepublico v Mayor of Bugalagrande and Others 4 IELR International Environmental Law Reports (Constitutional Court of Colombia).
16 Courts have recognised environmental threats to property in cases such as Kichwa Indigenous People of Sarayaku v Ecuador (2012) Series C No 245 (Inter-American Court of Human Rights); Palza Corvacho v Director of Irrigation of the First Region and Others 4 International Environmental Law Reports 120 (Supreme Court of Chile).
18 See, for example, the reasoning of the Indian Supreme Court in Bandhua Mukti Morcha v Union of India (1984) 3 SCC 161 (Supreme Court of India) 12.
19 The connection between land, environment and culture was explored in cases such as Lubicon Lake Band v Canada [1990] Communication No 167/1984 UN Doc Supp A/45/40 (United Nations Human Rights Committee); Kayano et al v Hokkaido Expropriation Committee: ‘The Nibutani Dam Decision’ [1999] Sapporo District Court ID 1635447, 38 International Legal Materials 394.
20 See, for example, López Ostra v Spain [1994] Application no 16798/90 (European Court of Human Rights) 44–58.
21 In his separate opinion, Judge Weeramantry found ‘damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments’ in Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Reports 7 (International Court of Justice) 92.
22 Gearty (n 9) 13.
protection are more likely to be respected’. For example, ensuring sustainable and environmentally sound decision-making necessitates proper processes of information generation, participation and consultation. Securing rights to free association, fair trial, and life has also proved critical to challenging and preventing unsustainable and detrimental environmental practices.

Despite the interconnected nature of realising human rights and securing the environment, there are a number of critical problems associated with the use of human rights tools and instruments to address environmental questions. It has been argued that the relationship between human rights and the environ-

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23 Anderson (n 11) 3.
26 See for example the reasoning in the matters of Social and Economic Rights Action Center v Nigeria (n 17) and Kichwa Indigenous People of Sarayaku v Ecuador (n 16). The importance of civil and political rights to securing environmental care is also highlighted in Global Witness, ‘On Dangerous Ground’ www.globalwitness.org/en/reports/dangerous-ground/ accessed 7 October 2016.
Human dignity and the adjudication of environmental rights

ment is ‘at best … uneasy, and at worst … antithetical’. Human rights law is thought to be necessarily (or structurally) antithetical to environmental ends. Human rights law has been described as anthropocentric, individualistic, or temporally or spatially limited; human rights law’s environmental failings are attributed to its putative neoliberal commitments, or to its alleged sexist or racist commitments. While human rights and the environment are inextricably connected, important tensions exist in the realisation and protection of both.

For example, it is sometimes argued that human rights law is focused on the interests and claims of the individual and, as a result, overlooks environmental


impacts felt by society, or that it prioritises the value of the individual over the value of the larger whole. Francesco Francioni has argued that using human rights to combat environmental degradation ‘tends to reduce environmental values to the very limited sphere of individual interests, thus adulterating the inherent nature of public goods indispensable for the life and welfare of society as a whole.’ Evadne Grant argues that ‘[e]nvironmental degradation very seldom affects isolated individuals. Rather the effects of environmental damage are increasingly felt across communities or even globally.’ By focusing on the individual, rights ‘atomize the social’ and, as Charles Taylor argues, fail to recognise obligations to society as of equal importance as those owed to individuals.

Individualism in human rights law is often associated with a particular kind of liberal capitalist model, based on a Cartesian construction of disembodied personhood that is sometimes thought to be oppugnant to environmental concerns. Louis Kotzé argues:

the liberal notion of human rights that is grounded in Modernity, itself pits humans as masters of nature and entitled recipients against a defenceless environment. To be sure, human rights, with their anthropocentric focus and liberal ideas of individual freedom and human dignity, are partly to be blamed for the current ecological overreach. Such closures provide a haunting analogue to the way in which human rights in the environmental context are also imprisoned by the prevailing illogic of anthropocentrism.

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36 Francioni (n 30) 55.

37 Grant (n 30) 159.


41 Kotzé (n 6) 263 (references removed).
It is argued that an idea of individual personhood that promotes private and corporate interests devalues communal and environmental worth. At the very least, the idea of the autonomous, free agent ‘repeatedly choosing paths through life and being at liberty to pursue them’ is an idea of humans as each separate from the other, unburdened by interrelatedness with others or the world. Klaus Bosselmann sees this as a ‘reduced concept of freedom’, one that can merely ‘protect individualized legal positions in relative isolation from social and ecological conditions’.

While these individualistic objections suggest rights do a poor job of considering or protecting the environment, the opposite argument might also be raised: too much concern with the environment might undermine human rights. We might end up protecting areas or environments at too high a human cost, or we might ‘balance’ the interests of future generations against current generations in a way that renders vulnerable groups even more vulnerable. Undue consideration of environmental questions by human rights courts may undermine the protection of human rights.

The recognition that human rights and the environment are inextricably linked suggests the importance of working through tensions such as this, and of attempting to address these barriers and objections to human rights approaches to environmental questions. Human dignity has an important role to play in addressing at least some of the problems and tensions that exist between human rights and environmental outcomes. This is because the concept of human dignity can help us see new ways in which human rights and the environment are interconnected, and it can encourage human rights

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42 Grear (n 32) 106–8; Grear (n 28) 34–5. This critique is perhaps most easily levelled against libertarian theories of human rights, concerned primarily with the individual freedom, privacy and property claims to negative rights. Shue (n 38) 58.
44 Gearty (n 9) 8.
46 See, for example, the decision of the High Court of Kenya in which the Court decided to deny an indigenous group access to their traditional land on the basis of environmental considerations. *James Kaptipin & 43 Others v The Director Forest & two others* [2014] eKLR (High Court of Kenya at Kitale). I discuss this case in detail in Chapter 6.
47 For discussion on the tensions of human rights and environment from both a human rights and environment perspective, see Woods (n 9).
49 As Anderson puts it, these problems should ‘stimulate careful analysis and jurisprudential innovation rather than intellectual surrender’. Anderson (n 11) 23.
judges to ask new questions when assessing environmental cases. While human dignity may not be able to fully resolve these tensions, it is a concept through which we might ease the tensions between these areas of concern in some ways, or at least one that offers us a new lens through which to consider the problems we face in our attempts to achieve better human rights and environmental outcomes. In particular, human dignity has a role to play in regard to three key ways in which human rights law is sometimes identified as un- or anti-environmental. These are the objections that human rights law is anthropocentric, that human rights law is individualistic and that human rights law is temporally limited. The latter two problems – the individualistic and temporally limited nature of human rights law – are addressed fairly directly in Chapters 4, 5 and 6. As the first problem – anthropocentrism – is not explicitly discussed in those chapters, but is an overarching theme in the book, it is worth briefly considering it here.

3.1 Anthropocentric Rights

Human rights are sometimes thought to be antithetical to environmental ends and interests because of their anthropocentrism. Anthropocentrism ‘confers intrinsic value on human beings and regards all other things, including other forms of life, as being only instrumentally valuable’. Anthropocentrism in human rights is thought to be problematic from an environmental point of view because ‘it can supposedly accord the natural world little respect or protection’. Human rights have a long historical association with the idea that ‘the world outside the human [is] inherently capable of belonging to the individual, and therefore [is] something over which complete human mastery

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can be exercised’. Failing to recognise the intrinsic value of that which is other to human, or unduly and exclusively focusing on that which matters to humans, is thought to put the environment at risk.

Anthropocentric human rights are sometimes accused of speciesism – an ‘unjustified preference for the human species’ – that renders all other creatures vulnerable. Thomas Berry argues: ‘All rights have been bestowed on human beings. The other than human modes of being are seen as having no rights. They have reality and value only through their use by the human. In this context the other than human becomes totally vulnerable to exploitation by the human.’ Anthropocentrism in human rights, it is sometimes objected, pits human rights against environmental ends. As the environment is without recognised rights or interests, human rights will work for the protection or destruction of the natural environment in so far as such measures are necessary to secure human rights. Indeed, human rights often provide a compelling justification for environmentally destructive conduct and development.

53 Gearty (n 9) 8. Freyfogle argues: ‘When lawyers refer to the physical world, to this field and that forest and the next-door city lot, they think and talk in terms of property and ownership. To the legal mind, the physical world is something that can be owned.’ Eric T Freyfogle, Justice and the Earth: Images for Our Planetary Survival (University of Illinois Press 1995) 49.

54 O’Neill (n 52) 128.


56 Burdon, ‘Environmental Human Rights: A Constructive Critique’ (n 27) 67; Anderson (n 11) 14; Freyfogle (n 53) 71.


58 Gearty (n 9) 9.

59 Tim Hayward, Constitutional Environmental Rights (Oxford University Press 2005) 34.

60 Gearty (n 9) 9.
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This account of the anthropocentric objection to human rights approaches to environmental matters is,\(^{61}\) it is recognised, brief and simplified,\(^{62}\) but it is one that is intended to highlight the core complaint. Human rights are seen to arbitrarily and unfairly value humans over all other species and at the cost of the environment. While rights may sometimes require us to protect the environment where doing so is necessary to secure human ends, rights seem to offer no security or protection for the environment beyond human needs and may even justify environmental degradation.

In this book, I will argue that human dignity is a concept that may be useful in addressing this anthropocentric objection to human rights despite the fact that it is a concept that does not challenge the idea that humans have a unique and inherent value. Indeed, it often does exactly the opposite. Historically, human dignity is associated with claims that humans are the centre of the world,\(^{63}\) made in the image of God,\(^{64}\) with God-given authority over all the rest of creation,\(^{65}\) having special and morally worthy features that no other creature has.\(^{66}\) Human dignity is a concept long used to distinguish humans from the rest of nature,\(^{67}\) singling us out as normatively significant in law,\(^{68}\) with a

\(^{61}\) It is also a description that does not capture all the nuances of such objections. For example, some scholars oppose centrisms of any kind and object to both anthropocentric and ecocentric approaches. See, Robin Attfield, ‘Reconciling Individualist and Deeper Environmentalist Theories? An Exploration’ in Donato Bergandi (ed), The Structural Links between Ecology, Evolution and Ethics (Springer 2012) 137. Attfield argues that we must remember ‘the exclusionary meanings attaching to anthropocentrism, sentientism, biocentrism and, for that matter, ecocentrism of the purely holistic kind’. Redgwell also points out that there are different types of objections to anthropocentrism (environmentalist objections and animal rights objections) and I have treated these as more closely linked than the proponents of these arguments might. See Redgwell (n 29).

\(^{62}\) It does not, for example, examine the differences between strong and weak anthropocentrism, or the relationship of anthropocentrism to sustainability. See Woods (n 9) 141; Redgwell (n 29) 73.

\(^{63}\) See the discussion of the history of the concept of human dignity in Chapter 2.

\(^{64}\) Ruedi Imbach, ‘Human Dignity in the Middle Ages (Twelfth to Fourteenth Century)’ in Marcus Dülwell, Jens Braarvig and Dietmar Mieth (eds), The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives (Cambridge University Press 2014) 70.

\(^{65}\) ibid 65.

\(^{66}\) Hayward (n 55) 53–4. I come back to this discussion of historical accounts of dignity in Chapter 2.

\(^{67}\) Oliver Sensen, ‘Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms’ (2011) 10 European Journal of Political Theory 71, 156.

‘worth that demands recognition and respect’. It will be no surprise, then, that I do not argue in this book that dignity is a concept that might help address the problem of anthropocentrism by doing away with anthropocentrism. I also do not argue that we ought to extend our concept of dignity to include animals or nature more broadly, as some scholars have. Rather, I argue that by allowing us to reconsider and reconceive the nature of our humanness, human dignity helps us see that protecting and respecting our humanness is not something separate from protecting and securing our environment.

A dignity-based approach to human rights is one that can be seen to bring the environment into our understanding of the purpose of rights. I make this argument by proposing that we ought to extend our understanding of dignity to include our relatedness to our environments. Although often seen as highly individualistic, I find that dignity is a concept used to define our humanness as relational – constituted in relationships with self and others in a common community. In addition, I contend that we can understand relational humanness as also in a relationship or transaction with the environment. I align myself with those who argue that our new, unstable environmental conditions – in an era sometimes referred to as the Anthropocene – require us to revisit and reinterpret the values that we take to underlie the rights regime. Therefore, I argue that we need to revisit and reconceptualise our dignity (and what it protects) in light of environmental threats, and in doing so we can recognise our humanness as constituted in relation to self, others and the environment.

The argument in this book, with its focus on the nature of our being, is undeniably centred on the human. It is not, however, anthropocentric in the sense that it is speciesist or committed to the view that the environment has only instrumental value. As Onora O’Neill and Tim Hayward have pointed out, not all forms and varieties of anthropocentrism are environmentally unsound.

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71 I make this point with reference to the argument of Jeff Malpas, ‘Human Dignity and Human Being’ in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007).
72 An idea often attributed to Paul J Crutzen, *The ‘Anthropocene’* (Springer 2006).
73 Kotzé (n 6) 253–4; Dryzek (n 6) 944.
74 I develop this argument in Chapter 4.
or committed to speciesism,76 and in this book I argue that the problem is not so much the fact of human centrality in human rights, but rather limited understandings of what constitutes the human. While personhood remains central to my concept of dignity and human rights, that personhood might be recognised as environmentally emplaced and constituted in ways that undermine speciesism and that demand greater environmental care and protection.

In this sense, this book belongs to a body of environmental scholarship that sees our task in addressing environmental matters as ‘reconceptualising the human and reconceptualising the self’.77 My approach, however, is not to deny the special dignity of humans,78 but rather to look for ways in which human rights questions about the nature of humanness can be used and extended to better protect our environmentally implicated rights, and better protect the environment.

4. WHAT IS THE ENVIRONMENT? A PRAGMATIST APPROACH

The argument in this book is that the concept of human dignity makes a valuable contribution to our understanding of the relationship between human rights and the environment and that greater attention to human dignity can improve judicial adjudication in cases concerning human rights and the environment. This necessarily requires that we carefully consider the meaning and function of human dignity in human rights law and adjudication. While much of the rest of this book is devoted to that task, it is worth taking a moment to clarify what I am talking about when I talk about the ‘environment’ and what relationship the environment has to human rights and the courts overseeing their enforcement. My approach to understanding both human dignity and the environment is informed by the theory and methodology developed in pragmatist philosophy, and especially the hermeneutical, pragmatist philosophy of Richard

76 O’Neill (n 52) 129; Hayward (n 55) 60. Hayward argues that rather than thinking of biocentrism and anthropocentrism as competing conceptions, we can understand biocentrism as a complement to anthropocentrism.
78 By asserting the dignity of other animals, for example, as seems to be the approach in Taylor (n 77) 208; Wise (n 70). See also the Supreme Court of India’s reference to the intrinsic worth of animals in Center for Environmental Law WWF-I v Union of India [1999] 1 SCC 263 (Supreme Court of India) [39].
Rorty. This is an approach I explore throughout the book, but here I also briefly introduce some of its key methodological claims.

4.1 ‘Environment’ – A Common, Controversial Concept

To talk of the environment is to identify the area of law in which one locates oneself, even if there is some ambiguity in the meaning of the term in that context. Although the word ‘environment’ is exceedingly common in law, its definition can be controversial.

When the term ‘environment’ is used in the context of environmental law, the focus has often been on what is sometimes referred to as the physical or extended environment. The 1972 Stockholm Declaration, for example, refers to the ‘natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems’. Environment has also been defined to include its value and significance for humans, or to include the cultural environment. In the South African National Environmental Management Act, for example, environment is defined to include ‘the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being’.

While use of the word ‘environment’ is common in law, in scholarship the word courts some controversy. Scholars have objected that the word environment suggests context – that within which we live but of which we are not part. Black’s Law Dictionary, for example, defines environment as ‘The milieu in which an organism lives. Includes the sum of all of its surroundings.’ Since environmental law (and law generally) addresses human concerns and interests, we are the organism and it is our surroundings to which the word environment refers. For some scholars this is a troubling place to start – it reduces all of the world to background, the stage upon which the drama of our (human)
lives unfold. To distance themselves from the idea of environment as mere background or context, scholars sometimes talk instead about landscape, or the more terrestrial terminology of ‘Earth’ or ‘the world’, or simply ‘nature’.

But each of these are controversial in their own rights. Disagreements about what constitutes the environment or nature, and, therefore, what our obligations might be to it, have been at the heart of environmental ethical debates for decades. A limited set of words (nature, the environment, ecology, landscape, the wild and so forth) are used across a range of discourses and constructions that hide within their folds competing values and priorities. A Lockean construction of wildness and nature, for example, is of something both untouched by humans and of little value, for value is that which is added when we combine it with our labour – transforming nature into property. For John Locke, when we apply our labour to nature, it is nature no more. This idea is one that seems to be shared by some contemporary scholars. Bill McKibben, for example, argues that since all of nature is now ‘touched’ by humans, nature has ended. Sometimes the debate turns on where to locate humans – are we, as Bertrand Russell puts it, part of nature or to be contrasted with nature? If we are part of nature, are we at the centre of it or simply a component of some of the ecosystems that make up nature? If we are something outside of nature – to be contrasted with nature – are we superior to nature or is it the case that we cannot speak of a world out there beyond human construction?

Behind these debates lies a concern with the idea that the world, and our place in it, can be more or less accurately described in one way or another. For example, when Klaus Bosselmann objects that it is reductive to talk of the environment as a collection of ‘natural resources’, he seems to suggest that

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83 See for example Steven Vogel, ‘On Alienation from the Built Environment’ (2013) 17 Ethical Theory and Moral Practice 87, 87; Bosselmann, ‘From Reductionist Environmental Law to Sustainability Law’ (n 29) 205.
85 Vogel (n 83) 87.
86 See the discussion in Andrew Light, ‘Contemporary Environmental Ethics from Metaethics to Public Philosophy’ (2002) 33 Metaphilosophy 426.
90 Hailwood (n 84) 134–5.
this language fails to represent the environment as it is – as a rich complex of eco-systems that are not simply there for our use.

4.2 Pragmatism and Understanding the Concept of the Environment

An approach that cuts through debates about what the environment is, and one that animates many of the arguments in this book, is offered by pragmatist philosophy.

Pragmatism refers to a school of thought that includes an array of understandings and approaches. Pragmatism is a term used sometimes to refer to ‘traditional’ or founding pragmatist theory (associated with the work of Charles S Peirce, William James and John Dewey) and sometimes to the ‘new pragmatists’ (which includes scholars such as Richard Rorty and Robert Brandom, among others). While some pragmatists are primarily concerned with the pragmatist theory of truth and interpretation, others are more interested in pragmatism as a methodology (concerned with experimentation and experience), others still use ‘pragmatism’ in a much looser sense, associated with the idea of assessing conduct in light of utility and practical consequences.

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92 John P Murphy, Pragmatism: From Peirce to Davidson (Westview Press 1990); William James, Pragmatism, a New Name for Some Old Ways of Thinking (New Impression, Longmans, Green and Co 1921).

93 Murphy (n 92); Robert B Brandom (ed), Rorty and His Critics (Wiley-Blackwell 2000); John R Shook and Joseph Margolis, A Companion to Pragmatism (John Wiley & Sons 2008).


95 James argued that pragmatism is ‘a method only’ so it is perhaps artificial to divide the theory of truth from method, and this is apparent in my work. Nevertheless, it’s a useful distinction as in some instances scholars seem to refer to pragmatist method (particularly its emphasis on experience) without much discussion of other aspects of pragmatist thought. James (n 92) 51.

Disagreement and diversity in the work of pragmatists makes it a difficult theoretical approach to fully capture in one brief overview – a task that is anyway beyond the scope and needs of this book. Nevertheless, a brief overview of some of the key claims of pragmatist theory (as I understand them) may be useful for clarifying and contextualising my approach to understanding environment in this book (and my approach to the concept of dignity).

Pragmatists reject a long-standing dualistic view in philosophical thought with regard to the nature of human knowledge – what Dewey referred to as a spectator theory of knowledge. Pragmatists reject a Cartesian split between immaterial mind and material body and, with it, the problem of connecting our immaterial impressions of the world that occur in our minds with an objective, material world. For pragmatists this is not the problem it claims to be as they deny the duality of mind and body, and of appearance and reality, treating knowledge or enquiry as a product of our evolution and as a tool for coping with our environments and guiding our behaviour. While earlier pragmatists were concerned with knowledge, enquiry and behaviour, later pragmatists add a non-representationalist theory of language to this antidualist, antirepresentationalist account.

Rorty has argued against the idea that ‘[t]o know is to represent accurately what is outside the mind’, or the correspondence idea of truth. The correspondence idea of truth sees the mind as a mirror of nature, and knowledge as the accuracy of its reflections, represented through our language. On this account, in knowing the world we seek understandings and descriptions that best represent the intrinsic or fundamental nature of an external and knowable world. Rorty argues, however, that we cannot stand outside our language and compare it to reality. We have ‘no coherent conception of a language-independent determinate reality, no conception of how words

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Murphy (n 92) 5.
ibid 12.
relate to non-words such that the words picture them, no conception of how sentences correspond to facts (sentence shaped bits of the world'). 104

With his rejection of representationalism, Rorty also rejects foundationalism – the idea that certain of our beliefs or claims are so compelling, they require no justification and it is these beliefs which support or justify all others. 105 As Jacques Bouweresse puts it:

For Rorty, the idea that matter, spirit, the self or other such things have an intrinsic nature that in principle is in no way dependent upon our activities of knowing and that we attempt to represent in increasingly better ways, represents the secular descendant of a conception which should not have survived the era of the theological world view from which it emerged. 106

Pragmatists give up on the attempt to obtain a ‘God’s eye view of things’, 107 offering instead an antiessentialist and historicist position. 108 Pragmatists ‘treat everything – our language, our conscience, our community – as a product of time and chance’. 109 Our beliefs are not assessed against some foundational truths, but with reference to their coherence with other beliefs we already hold. The idea of an objective world out there against which we might assess our beliefs is replaced by the understanding that there are no uninterpreted experiences. 110

For pragmatists, language and knowledge are a matter of ‘conversation and social practice, rather than an attempt to mirror nature’. 111 The coherence or acceptability of a particular belief is something assessed in a particular context, with reference to ‘a given audience, with given interests at a particular time and place’. 112 With this comes a commitment to fallibilism – as our beliefs are always contingent and historically emplaced, they are subject to change at a later point when they are reasonably reassessed or when we face a discordant

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112 Nielsen (n 104) 131.
experience. For pragmatists, ‘there are no intrinsic goods, no ends that are not subject to revaluation’.113

What does a pragmatist approach mean for how one understands ‘environment’? Importantly, the link between our language and the environment is causal, not representational.114 We use our tools – including our language – in our interaction with the environment, and to deal with the environment rather than to represent the intrinsic nature of the environment.115

With pragmatism’s abandonment of representationalism, an individual can no longer stand on her own, checking her subjective beliefs against an external, objective environment. As Jürgen Habermas argues, ‘with the pragmatic turn the epistemic authority of the first person singular, who inspects her inner self, is displaced by the first person plural, by the “we” of a communication community in front of which every person justifies her views’.116 Knowledge ‘of the world’ is something we gain through our engagement with a communication community, rather than through some isolated process of reflection and observation.

Here I want to focus on two key implications of a pragmatist approach to understanding the environment.

The first is that the environment is our context, the world in which our lives take place. It encompasses the spaces and places in which we find ourselves. For the purposes of this book, this includes Thelma Nkosi’s beautiful land but also the work environment created by the mine, the territories that indigenous peoples seek to protect in their appeals to human rights courts, the altered climate and landscapes that are being left for future generations, the room in which I am sitting and typing these words.

While the environment is our context, it is a context that we help constitute. We are part of our environments and we are engaged in a constant process of ‘reciprocal adaption and readaption’117 with those environments. This is a transactional understanding of the environment.118 In seeing and coming to

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116 Habermas (n 110) 36.
117 Ari Santas, ‘The Environmental Value in G.H. Mead’s Cosmology’ in Andrew Light and Eric Katz (eds), Environmental Pragmatism (Routledge 1996) 77.
know the world around us, we are not merely observers staring out onto an external world that we simply find or experience in an unmediated way. We do not step onto a prepared stage, nor have we been inserted into a knowable and fixed physical space. While the environment is our context, it is not something exclusively external to us, that we can observe and describe and know. Rather, our beliefs and language are a product of our engagements with each other and with the environment. As Kelly Parker argues: ‘Mind is not apart from the world; it is part of the world. “Knowing the world” is not a detached activity. It is, rather, a mutual transaction between the organism and its surroundings.’ ¹¹⁹ As a result, Parker argues, ‘The attempt to dominate nature completely is thus an attempt to annihilate the ultimate source of our growth, and hence to annihilate ourselves.’ ¹²⁰

The second point I want to emphasise about a pragmatist understanding of environment is that with the rejection of the idea that the world outside of ourselves is capable of a correct or representative single description, we can see that there are many different linguistic resources available to us for talking about the environment. A pragmatist approach is one that is ‘situated, historical, practice-constituted’, ¹²¹ in contrast with ahistorical, universal and foundationalist accounts that speak to the essential nature of things. ¹²² Pragmatism accommodates a wide range of different discourses or vocabularies. Since the value of descriptions cannot be tested against some external reality, we assess them instead in terms of their utility and their consequences. This is a point I come back to both in my discussion of dignity and in my assessment of indigenous rights cases in Chapter 5.

The idea of environment that I explore and, ultimately, hope to advance in this book is one that is concerned with our context, both immediate and more distant – the entirety of the world that surrounds us. However, while I wish to retain the idea of context, it is a context which both constitutes who we are and is constituted by us.

¹¹⁹ Kelly A Parker, ‘Pragmatism and Environmental Thought’ in Andrew Light and Eric Katz (eds), Environmental Pragmatism (Routledge 1996) 23.
¹²⁰ ibid 30.
¹²¹ Grey (n 99) 801.
¹²² While many accounts of dignity might be described as ahistorical, universal and foundationalist, the most common among these is perhaps Kant’s understanding of human dignity as incomparable, human worth. See Immanuel Kant, Groundwork of the Metaphysics of Morals (Cambridge University Press 1998). I discuss Kantian dignity further in Chapter 2.
5. SOME PRELIMINARY QUESTIONS

5.1 Why Human Rights Courts?

In this book, I examine human dignity and the environment not only in the context of human rights law but, more specifically, in the context of human rights adjudication and judicial reasoning in rights disputes in court.

Oscar Schachter has argued that we ought to think of dignity’s wide range of applications outside of the sphere of human rights and outside of the sphere of litigation.\(^{123}\) Respect for human dignity may be realised in other ways than by asserting claims of right. In many cases, the application of a ‘rights approach’ to affronts to dignity would raise questions involving existing basic rights such as free speech. In other cases, respect for dignity may be more appropriately and effectively attained through social processes such as education, material benefits, political leadership and the like.\(^{124}\)

Schachter seems to suggest that we ought not dwell too much on dignity in human rights disputes, but that the concept ought to be explored more widely. This is an important point and dignity might be best protected and advanced by considering it in fields other than human rights adjudication. The Madadeni matter, which I discussed in the opening paragraphs of this introduction, suggests we might do well to consider dignity’s role in administrative decision-making, for example. We might also have regard to the ways in which dignity plays a role in international environmental law,\(^{125}\) or in shaping initiatives like the Sustainable Development Goals.\(^{126}\)


\(^{124}\) ibid 853.


What is more, human dignity’s importance and applications extend beyond the limits of judicial reasoning so why focus on courts? While Schachter is right that human rights adjudication does not offer us an uncomplicated setting in which to consider the concept of dignity, if one wishes to ascertain what dignity means in law’s practice, there are few areas of practice that offers as wide or carefully considered a dignity jurisprudence as human rights courts.

I look at courts, and specifically human rights courts, in this book for two primary reasons. The first is that it is in human rights courts that we find environmental cases evaluated on the basis of human rights norms founded on the notion of human dignity. What is more, many human rights courts engage in a process of public reasoning and justification in their decisionmaking. In many of the cases I consider, courts give an indication of how they interpret dignity and what role they see it playing in their deliberations and decisions. Human rights courts give us a picture of dignity ‘at work’.

The courts I consider in this book all, to a greater or lesser extent, seek to lay out and explain their decisionmaking processes in their judgments – they engage in public justification. This has informed my choices of courts per se and my choice of jurisdictions (discussed further below).

The second reason why I have chosen to look at courts is because human rights courts are the institutions that have really seen the possibilities in the concept of dignity – possibly significantly beyond any legislative intent. Jack Donnelly argues that over the last half century, ‘it has become increasingly difficult (and infrequent) to think of human dignity without human rights or vice versa’. It is human rights courts who have realised the ‘practical cash-value’ of the word, as William James would put it. Catherine Dupré writes that ‘courts’ prolific and imaginative interpretation of human dignity has significantly contributed to making this concept a part of everyday human rights adjudication’. Dupré argues:

The phrase ‘human dignity’ is … not only an important rhetorical device enshrined in constitutions in a context of democratic foundation … but it has also acquired through judicial interpretation its own semantic and normative reality. In other words, it has left the realm of constitutional drafting to be appropriated by judges and (a point that is often forgotten) by applicants and alleged victims of human dignity breaches, and has therefore become everybody’s concept, rather than a ‘founding fathers’ concept. The development of human dignity through case law


127 Donnelly (n 69) 14.
128 James (n 92) 53.
129 Dupré (n 8) 82.
therefore confirms the concept’s continued relevance today, that is well beyond the special foundation period that originally led to its codification in the aftermath of war and dictatorship in Europe.130

The development of the concept of dignity in human rights courts, coupled with the fact that these courts are called on to hear matters of environmental importance and impact, makes them a compelling and revealing context in which to explore dignity’s possible roles in environmental reasoning.

5.2 Which Courts?

In this book, I do not analyse a single jurisdiction’s conception of dignity, but rather I argue for a cross-jurisdictional interpretation of dignity that emerges from the practice of a range of domestic, regional and international courts. Although I argue for a global concept of dignity, and refer in my construction of that concept to a wide range of jurisprudence over a number of jurisdictions, my materials are primarily drawn from the superior courts’ (and sometimes the High Courts’) jurisprudence of South Africa, Germany, India, Canada, and the key regional human rights courts, namely the African Commission of Human and Peoples’ Rights (ACHPR), the Inter-American Court (IACtHR) and Commission of Human Rights (IACHR) and the European Court of Human Rights (ECtHR). Where possible I have sought to refer to African case law,131 as many African countries have a significant environmental and dignity jurisprudence, sometimes overlooked in scholarship. In fact, African dignity jurisprudence generally, with the exception of South Africa, gets very little attention in legal scholarship and I have endeavoured to include this case law wherever possible.

My jurisdictional choices are motivated by a number of factors, but a significant one is that these are courts that seem to be in a dialogue, of sorts, with one another around the concept of dignity.132 In this book, without arguing the matter, I take a broad approach to judicial dialogue including both ‘collective deliberation on common legal problems’ and the simple citation of the cases of one court by another. As Anne-Marie Slaughter argues, these different types of ‘dialogue’ have in common ‘a sense of common judicial identity and

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130 ibid.
enterprise’ even (perhaps especially) when courts take the time to disagree with each other’s findings. The jurisprudence of these courts leads one to the jurisprudence of the other courts. I started with South Africa – the jurisdiction with which I am most familiar – and my research radiated out from there, to the courts that have been referred to in South African jurisprudence, or to courts that refer to South African jurisprudence.

Another factor that has motivated my choice of jurisdictions is the extraordinary wealth of dignity jurisprudence in these courts. These are all courts that have grappled with the concept of dignity in a number of different disputes and from a number of different perspectives. They have not shied away from the complexity of the concept or the challenges it presents in their reasoning, choosing instead to embrace these very features of the concept. My choices have also been determined by questions of language and my familiarity with the different systems.

Importantly, while I have focused on a few prominent jurisdictions in my research, I have not limited myself to these jurisdictions and where I encounter important or revelatory dignity judgments in other jurisdictions, I have included those. These include the United States, the United Kingdom, Israel, Hungary, Botswana, Pakistan, Chile, Namibia, the Philippines, Peru and the United Nations Human Rights Committee (HRC), among others.

I have not chosen the jurisdictions I consider because they are easy to compare – they are not obviously similar in their legal or political cultures. I look at civil, common law and mixed systems. Perhaps the most striking difference in the courts I consider is that some are domestic and some are international or regional. International courts are differently oriented to domestic courts, addressing themselves to a range of parties and balancing the specific cultural and political demands of different actors within their jurisdictional community.

In my analysis, however, I emphasise what I see as common to these various courts, and I find a great deal of overlap in their judicial reasoning on dignity in a range of cases. I have chosen cases in which courts engage with the concept of human dignity and in which they seek to explain and spell out their dignity reasoning in the content of their judgments. Although courts sometimes come to different conclusions in their adjudication of similar cases, and although they sometimes emphasise one or another aspect of dignity, in many instances the dignity reasoning of these courts follows similar patterns and ideas. While there is variation, there is variation within jurisdictions as well as between

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jurisdictions. I treat these courts as the collective authors of a body of text on the concept of human dignity in judicial adjudication, but I recognise that there are instances when the particular nature or situation of the court makes a difference, and where these arise, I address them or distinguish them as necessary. My approach is one that follows Paolo Carozza’s argument that ‘[d]espite differences in positive law, in historical and political context, in religious and cultural heritage, there is the common recognition of the worth of the human person as a fundamental principle to which the positive law should be accountable’. Mine is not an approach that looks at dignity by compartmentalising different courts that use the concept; rather, I consider dignity references in courts as part of a global practice in which courts are in dialogue with one another.

This approach is not without its problems. Erin Daly argues that ‘[w]e should be wary of “lumping” together meanings of dignity that have evolved in dramatically divergent social, historical, and jurisprudential contexts’. Dupré warns against conducting ‘a rather impressionistic survey of dignity case law, which tends to present specific human dignity rulings out of context … illustrated in sweeping comparative surveys of human dignity considered as a global concept’. While it is important not to be naïve about the cultural and legal differences in each jurisdiction that shape and contribute to dignity’s uses and understandings, it is also important not to overstate the extent to which dignity is a concept that is culturally determined in a manner that produces a wealth of incompatible and immobile interpretations. I come back to this in detail in Chapter 3.

In my finding that courts reach outside of their own judicial confines, to engage with other courts and to engage with a concept that is partially defined by its transjudicial nature, I have approached the cases in a way that does not directly address the political and social factors that might change one’s understanding of these cases. In some jurisdictions, this may seem like a worrying approach. I do not ask how we should read the dignity jurisprudence of the South African Constitutional Court in light of the ever worsening conditions of poverty in that country. I do not look at the dignity jurisprudence of Hungary in the context of its recent movement away from democracy towards authoritarianism. I look at the dignity practice of the Israeli Supreme Court, but do not

134 Carozza (n 132) 1081–2.
135 Carozza (n 132).
136 Daly (n 8) 4.
137 Dupré (n 8) 12.
consider whether such jurisprudence means little in light of the horrors of the ongoing conflict with Palestine.

While my failure to look at these contextual factors (and dignity’s differing impacts on rights realisation in these contexts) is a significant limit in my research, there is important work to be done looking at dignity in transjurisdictional thematic areas rather than in the details of jurisdictional context. For example, dignity has played an important and fascinating role in case law on LGBTQI rights in a number of jurisdictions across the world, with very different legal and social cultures. In this context, dignity is sometimes used in defiance of the cultural specificities of the individual court or political context, specifically to reach out to an emerging global practice or a transnational LGBTQI rights activism and discourse.

I do not analyse the social impact of the dignity jurisprudence I consider here. I do not address the question of what difference, if any, a dignity analysis of rights makes to litigants or society more broadly. My analysis stops with the court’s ruling. I argue that human dignity is a concept through which courts might adopt a more open approach to the human/environment relationship, and this, I argue, may produce more environmentally sound jurisprudence from those courts. It is this impact that is the focus of this book, but this leaves unanswered the broader challenge of whether such cases meaningfully change political and social practice. This is a separate but related question, and one for future research.

It is my goal to present dignity’s possibilities and roles, and to suggest that dignity may do valuable work and have a role to play in different jurisdictions battling shared environmental challenges, even where those jurisdictions do not have a strong dignity jurisprudence of their own. I think dignity should play a bigger role in how we think about environmental cases, in how we construct our arguments and conceptualise the harms that environmental degradation causes. This might not always result in a direct application of the concept of dignity in environmental litigation, but it would nevertheless contribute to our thinking about the human/environment relationship in more complex terms.

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139 LGBTQI stands for Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Intersex.
141 This is an approach that does not diverge from the contextual focus of pragmatism, but that recognises in dignity jurisprudence different contexts beyond jurisdictional context.
5.3 Which Cases?

Today one can find (and, equally, one can overlook) so many cases, constitutions, treaties and statutes that make reference to dignity that one can evidence most accounts of the meaning or function of dignity. For example, there is a vast array of cases that deal with dignity as a concept that pertains to the particular status of courts and judges, and in some jurisdictions (Norway, for example\textsuperscript{142}) these cases are in the majority. These cases suggest a very different conception of dignity, one that seems to have little to do with human dignity. Overlooking these cases may mean we underestimate the extent to which dignity is a concept that is preoccupied with status or, alternatively, may mean we fail to see that courts are willing to divorce ‘dignity’ from ‘human’ and find that all sorts of other categories (possibly including animals, corporations and so forth) are also the bearers of dignity, if not human dignity. My inclination is to see these cases as anomalous, as instances of the word being used when another would be better\textsuperscript{143} – an outdated turn of phrase. As a result, these cases have all but been excluded from my analysis.

Cases are open to different kinds of interpretation. Some cases are examined again and again in the literature,\textsuperscript{144} but a common body of cases does not suggest a common interpretation of what is happening in those cases. For those who see dignity in law as having a ‘broadly Kantian pedigree’,\textsuperscript{145} references to autonomy, inherent worth and the prohibition against objectification in cases all suggest a strong Kantian ontology.\textsuperscript{146} For others, however, autonomy is equally aligned with capabilities and the good life,\textsuperscript{147} or relationality,\textsuperscript{148} or other possible accounts. Furthermore, it is not clear that judges have a clearly
articulated, fully worked out underlying philosophy when they use the concept of human dignity,\textsuperscript{149} and notions of legal culture or judicial borrowing might have more to do with the phrasing in a particular case than any judicial commitment to a particular idea of human dignity. In addition, minority judgments sometimes offer far more in terms of dignity interpretation than majority decisions do, but what these judgments tell us about dignity’s role or meaning in a jurisdiction or case is clearly open to interpretation.

What all of this suggests is the rather obvious point that any attempt to give an account of what dignity means or does in law is coloured by both case selection and the interpretation of those cases. There is significant debate in scholarship about the exact nature and meaning of the concept of human dignity in law (and generally).\textsuperscript{150} It is disputed whether ‘human dignity’ has a single, identifiable meaning;\textsuperscript{151} whether its meaning is its function or its application;\textsuperscript{152} whether it is the foundation of law or human rights;\textsuperscript{153} whether it has any meaning at all.\textsuperscript{154} This might lead us to conclude that while sometimes dignity is a concept concerned with the nature of humanness, sometimes it isn’t – sometimes it is simply a synonym for freedom or equality or some combination of those two.

My initial finding, as I began reading an array of dignity cases, was that the concept of human dignity in law was a concept through which judges could grapple with what it meant to be a human person beyond (but including) the dogmatic limits of legal personhood. Dignity, I found, was a concept used

\textsuperscript{149} Or that it necessarily makes a difference. See Richard Rorty, ‘Pragmatism and Law: A Response to David Luban. The Revival of Pragmatism – Contribution’ (1996) 18 Cardozo Law Review 75, 76; Rosenfeld (n 91) 105. See also Barak’s comment that he cannot assess philosophers such as Kant and Dworkin as he is not a philosopher, at Barak (n 131) 116.

\textsuperscript{150} Recent contributions to this debate include Marcus Düwell and others, \textit{The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives} (Cambridge University Press 2014); Christopher McCrudden (ed), \textit{Understanding Human Dignity} (Oxford University Press 2013); Michael Rosen, \textit{Dignity: Its History and Meaning} (Harvard University Press 2012); Luis Roberto Barroso, ‘Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse’ (2012) 35 Boston College International and Comparative Law Review 331; Riley (n 145).

\textsuperscript{151} McCrudden (n 8); Carozza (n 138); Adeno Addis, ‘The Role of Human Dignity in a World of Plural Values and Ethical Commitments’ (2013) 31 Netherlands Quarterly of Human Rights 403.

\textsuperscript{152} Riley (n 68).

\textsuperscript{153} Patrick Capps, \textit{Human Dignity and the Foundations of International Law} (Reprint edition, Hart Publishing 2010); Waldron (n 8).

Introduction

to speak to a multifaceted and complex conception of personhood, and one concerned with the ways in which we explore our identities and are constituted in our relationships with ourselves and with others – and it is this relational, identity-focused concept of dignity that I seek to make sense of here. As Jeff Malpas argues, ‘[t]he question of human dignity is surely inseparable from the question of what it is to be human’. Accounts of dignity that reduce it to other concepts – freedom, equality, autonomy even – don’t seem to articulate what it is that is particular about dignity in the legal texts and judicial reasoning in which it arises. This understanding of what sets dignity apart has also informed my choice of cases.

I have already suggested that I see dignity playing a role in easing some of the tensions that exist in attempts to address human rights and environmental problems together, including the problem that human rights are seen to be anthropocentric. In addition to this overarching role for dignity in our understanding of human rights and the environment, I argue in the following chapters that dignity may also have specific roles to play in addressing particular limitations in the approach of human rights courts to environmental matters. Although we are widely recognised as dependent on the environment in human rights law, a narrow focus on environment as a precondition for health and life has meant that in many cases there has been only limited consideration of what the Stockholm Declaration referred to as the ‘moral, social and spiritual’ ways in which our existence is interdependent with the environment.

Judges engage in justificatory reasoning that rests on what the court identifies as relevant reasons emerging from its classification of the facts before it and its choice of applicable law. In the case of environmental matters, however, the environment occupies an awkward position in the reasoning of courts. It is both overwhelmingly all-encompassing – few matters are not, in some sense, environmental – but at the same time not really there at all – environmental interests are subsumed into other sorts of claims and concerns. As a result, judges often have a great deal of discretion in regard to how they

155 Malpas (n 71) 19.
158 May and Daly (n 48) 91.
locate the environment in their reasoning.\textsuperscript{160} In some instances, human rights courts take an unduly narrow approach to the role of the environment in human rights law and in their understanding of the human/environment relationship.\textsuperscript{161}

In the following chapters, I look at a few examples of courts being unduly narrow in their approach to rights and environment (resulting in either an unsustainable environmental decision, or a decision that inappropriately limits rights, or both) and I examine how the consideration of dignity might have produced a better outcome in those cases. I argue that dignity has both substantial and functional roles to play in such cases: substantial in that it is a concept that gives courts new ways of thinking about environmental problems and questions (asking, for example, how the environment relates to our identities), and functional in that dignity can sometimes operate as a tool, allowing courts to do things in their justificatory reasoning which they otherwise would not do (such as taking an expansive approach to rights interpretation).

The courts and environmental cases that I look at act as examples that suggest some of the ways in which dignity, as I understand it, might change the outcome in a case. In Chapter 5, for example, I look at the Inter-American system in constructing an argument about the importance of environmental identity and dignity in protecting indigenous groups. Although the cases heard by the Inter-American system are unique to that system, the idea that certain ways of thinking about and relating to the environment are ignored in judicial reasoning is not. The jurisprudence of the Inter-American Court reveals some of the limits of current jurisprudential practices, but also some of the possibilities for extending human rights protections.

Human rights courts are extremely diverse in their approaches to environmental law and environmental rights,\textsuperscript{162} but a broad reading of environmental cases suggests that these courts are often cautious and conservative in their approaches to environmental cases. Hari Osofsky’s analysis of environmental case law leads her to argue:

\begin{quote}
Environmental damage can harm humans in a wide variety of ways. It can undermine their present health or increase their risk of future health problems. It can destroy a resource upon which they rely for their livelihood. It can invade the privacy of their persons or their homes, or take away their property. In the case of an indigenous community with a deep connection to traditional lands, it can destroy their culture and way of life.\textsuperscript{163}
\end{quote}

\textsuperscript{160} May and Daly (n 48) 91.  
\textsuperscript{162} May and Daly (n 48) ch 3.  
\textsuperscript{163} Osofsky (n 13) 94.
In many cases, however, it seems that this is not a few examples of the ‘wide variety of ways’ in which the environment is recognised by law as harming humans, but rather an account of the totality of the environmental harms which human rights courts generally recognise. Courts recognise and protect only a limited number of procedural rights (access to information, participation, remedy) and substantive rights (health and life, basic needs, culture, property and real rights, privacy and home life) when assessing which human interests in the environment count for the purposes of establishing a rights infringement. Dignity, I argue, can help us bring environment into the core of our judicial reasoning – as constituting its own reason or justification – by drawing a bright line connecting our understanding of our own humanness and the environment.

Certain courts are arguably weaker than others in their approach to environmental matters. For example, in a number of cases, the ECtHR has taken a very conservative stand in respect of environmental claims, emphasising a lack of

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164 See, for example, Social and Economic Rights Action Center v Nigeria (n 17); Van Huyssteen and others NNO v Minister of Environmental Affairs and Tourism and Others [1996] (1) SA 283 (Cape Provincial Division of the High Court of South Africa).


166 See for example, Öneryildiz v Turkey [2004] Application no 48939/99 (European Court of Human Rights).

167 See for example, Inter-American Commission on Human Rights (n 15); Social and Economic Rights Action Center v Nigeria (n 17); Free Legal Assistance Group and Others v Zaire (n 15); Fundepublico v Mayor of Bugalagrande and Others (n 15).

168 See for example, Francis Coralie Mullin v The Administrator, Union Territory of Delhi & Ors (1981) 2 SCR 516 (Supreme Court of India); Bandhua Mukti Morcha v Union of India (n 18); Social and Economic Rights Action Center v Nigeria (n 17); Suray Prasad Sharma Dhungel v Godawari Marble Industries and others [1995] WP 35/1992 (Supreme Court of Nepal).

169 See for example, Öneryildiz v Turkey (n 166); Fundepublico v Mayor of Bugalagrande and Others (n 15); Palza Corvacho v Director of Irrigation of the First Region and Others (n 16).

170 See for example, López Ostra v Spain (n 20); Hatton and others v The United Kingdom [2003] Application 36022/97 (Grand Chamber European Court of Human Rights); Powell and Rayner v the United Kingdom (1990) 12 EHRR 355 (European Court of Human Rights).

171 Fisher (n 157) 242–3.
environmental rights in the European Charter. When I look at examples of cases from the ECtHR, to argue that a dignity approach might allow a better environmental outcome in those cases, I do not mean to suggest that the limits in European jurisprudence are common to human rights courts’ approaches to environmental matters everywhere (or even that the European Court has been entirely consistent in its reasoning). Rather, my argument is that dignity might be a useful tool in courts’ reasoning, allowing greater consideration of environmental concerns and impacts where such consideration is necessary. The ECtHR cases are taken as an example – an instance where a broader approach would be beneficial.

6. A BRIEF OUTLINE OF THE BOOK

In the following three chapters, I engage in an environmental reading of dignity’s history, its current judicial uses and its future potential. I argue that if we are to know whether dignity might be useful – whether it has a role to play in environmental cases – we need to get to grips with what the concept of human dignity means and does, but also the ways in which human dignity could evolve to better reflect the interconnected nature of the human/environment relationship.

Human dignity is not a singular concept in its use by courts, and it is not a concept that belongs to courts – or to the law – alone. For this reason it is important to locate my account of dignity in its historical and scholarly context. I start, in Chapter 2, with a brief introductory history of the concept of dignity. I conduct this historical analysis because historical accounts of dignity – even those we think quite distant to our contemporary legal uses of the concept – continue to shape and influence dignity’s contemporary interpretations by courts. I argue in Chapter 2 that dignity is a concept that has long been concerned with the environment and our relationship to it.

This is a history that has been largely antithetical to environmental concerns, and it is a history that still informs our understanding of the legal concept of dignity today. It is one that cannot be ignored in addressing dignity’s possible roles in contemporary environmental disputes. This brief history allows us to see some of the ways in which dignity has evolved in contemporary uses of

172 See for example, X and Y v The Federal Republic of Germany Application No 7407/76 (European Commission of Human Rights); Kyrtatos v Greece (2005) 40 EHRR 16 (European Court of Human Rights).


the concept, and some of the ways in which ancient ideas remain entrenched in its use. In this chapter I argue that many of our assumptions about dignity’s meaning and function need to be placed in their historical context, and interrogated in our use of the concept in resolving contemporary problems. The historical account I outline here excludes significant thinkers and entire regions of the world. It is a selective rather than a comprehensive history, and one that seeks to demonstrate the environmental interests and assumptions sometimes hidden in dignity’s historical uses.

In Chapter 3, I turn to dignity in human rights law and I argue that understanding dignity’s use and meaning in this legal context necessitates first locating oneself in an important debate about dignity’s universality. Locating myself in that debate involves two steps. First, there are those who see dignity as a global concept, and those who argue dignity has no shared meaning (or, indeed, any meaning at all). I align myself with those who recognise dignity as a global value. Second, there are, among universalists, a number of different explanations for dignity’s universality. Some argue that dignity is an extralegal moral value framing the law. Others argue that dignity is a general principle of law, emerging from the opinio juris communis. I favour a third approach to understanding dignity and making sense of its universality. My approach is one that sees dignity’s global currency in its use and articulation by a plurality of legal institutions (in this book, I focus on courts). Dignity is part of ‘the transnational vocabulary of constitutionalism and human rights’. One of the important implications of this third approach is that dignity is seen to be a global, but nevertheless a complex and evolving, concept, informed by a number of different ideas and conceptualisations.

What this means, in terms of my further analysis of dignity, is that understanding the concept necessitates a broad consideration of different judicial accounts of the concept. Rather than looking for consensus, I look for coher-

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175 See Riley’s discussion of some aspects of this debate in Riley (n 145).

176 There is a great deal of variety in the views of those who see dignity as having shared meaning. Some see this as a shared universal principle (something like respect for autonomy) while others see a more complex idea of shared, global meaning (which is the approach I follow). See, for example, Capps (n 153); Carozza (n 138).

177 Michael Rosen, ‘Dignity: The Case Against’ in Christopher McCrudden (ed), Understanding Human Dignity (Oxford University Press 2013); McCrudden (n 8).

178 See Waldron’s different accounts of dignity’s foundationality in Waldron (n 8).

179 Carozza (n 132).

180 David Luban, ‘Human Rights Pragmatism and Human Dignity’ in Massimo Renzo, Rowan Cruft and Matthew Liao (eds), Philosophical Foundations of Human Rights (Oxford University Press 2015); Addis (n 151).

181 Jackson (n 132) 40.
ence in what I see as different melodies in a contrapuntal concept. 182 This multifaceted, global concept is one which is developed by a range of courts, all of whom have recourse to the concept in their deliberations.

In Chapter 4, I look at how we might begin to interpret dignity from an environmental point of view. Using the approach I develop in Chapter 3, I focus on judicial understandings of our dignity as relational – our humanness is determined by our belonging to and being accepted by our community. This relational conception of self, I argue, ought to extend to include not only our relationship with others but also our relationship with the environment. I examine the argument of a number of scholars that a critical factor that has contributed to our destructive relationship with the environment is our conception of ourselves as distinct and separate from the rest of nature. 183 In particular, these scholars see dualistic philosophical and religious precedents to our legal frameworks as hampering law’s capacity for effective environmental governance. 184 I engage in this discussion by asking whether a different approach would change law’s outcomes in environmental matters. I find that dignity is a concept that might speak not only to the constitutive nature of our relationships with others, but also to the importance of our relationship to environment and the places in which our lives unfold in the realisation and protection of our dignity. 185 This has a number of important implications for how courts might reason in both environmental rights cases and other dignity rights cases.

In Chapters 5 and 6, I attempt to apply the pragmatist, environmentalist conception of dignity developed in Chapters 3 and 4 to two important environmental problems. In Chapter 5, I focus on the role dignity has played in

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182 I take this idea from music theory and explore the notion of a contrapuntal concept in greater detail in Chapter 3.


184 White Jr (n 183).

185 Although place is an idea explored by environmental scholars such as Næss and Plumwood, I examine it through Malpas’ theory to consider an alternative to personal place or ‘spiritual’ conceptions of connection to place. For Næss’ understanding of place in environmental ethics, see Sessions and Devall (n 183); Arne Næss, Alan R Drensgson and Bill Devall, Ecology of Wisdom: Writings by Arne Naess (Counterpoint Press 2008). For more on Plumwood, see Val Plumwood, Environmental Culture: The Ecological Crisis of Reason (Psychology Press 2002).
human rights courts’ attempts to protect our own assertions of our identities. Courts recognise in dignity the idea that human identity is a process, an evolving state of becoming that is constituted in one’s relations with one’s self and with others, but also that our assertions of our identities change our social realities.\(^{186}\) I argue for the importance of bringing this reasoning into cases in which parties assert environmental identities and make claims about how we ought to conceptualise the environment. I examine the Inter-American rights system and the ways in which that system has sought to protect what it sees as the ‘special relationship’ between indigenous groups and their territories.\(^{187}\) By treating these cases as cases about environmental identities and dignity, instead of merely property, I set out to demonstrate that the Inter-American system could better ensure protection of indigenous groups and the environments they seek to secure.

In Chapter 6, I turn to dignity’s role in regard to the temporal features of environmental matters. The environmental problems we face often have a troubling temporality for human rights adjudication – the choices we make today may have significant impacts reaching far into the future.\(^{188}\) I consider dignity’s roles in how we determine our obligations to our contemporaries and to future persons. I argue that dignity is used by courts to navigate our relationships to the past and to the future, and that dignity has been found to be an attribute of humans that extends beyond their lives and beyond the normal periods in which we are considered to have human rights.\(^{189}\) This makes dignity an important and intriguing concept when we consider harms and obligations that are neither immediate nor imminent.

\(^{186}\) This role for dignity has been most explicitly spelt out in cases on the rights of couples in same sex relationships, and the rights of transsexuals. See for example Goodwin v United Kingdom (1996) 22 EHRR 123 (European Court of Human Rights); National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others [1999] (1) SA 6 (South African Constitutional Court).

\(^{187}\) See, for example, Saramaka People v Suriname (n 165).


\(^{189}\) For a far-reaching analysis of dignity’s relationship to time, see Dupré (n 8).
In Chapter 7, the conclusion, I set out some of the key findings and arguments and suggest some of the implications of this research and possible future developments.

In large part, my aim in this book is not to suggest that dignity is a concept that somehow solves our environmental human rights problems, but rather that dignity has a useful role to play in seeking different solutions. Dignity, I argue, requires judges to face the environmental tensions implicit in human rights law in their complexity, and suggests that sometimes, in addressing environmental rights problems, we ask the wrong questions. Dignity helps us reframe and reconsider some of the conflicts we face. As I have argued in this introduction, a proper consideration of the concept of dignity may contribute to easing the tensions between human rights and environmental concerns and to revealing new approaches for judges presiding over environmental human rights cases. To begin this consideration of the concept of dignity, I turn, in Chapter 2, to dignity’s long environmental history.

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191 Not only does a pragmatist approach to rights/environment questions suggest a multitude of approaches and answers, but pragmatism also suggests that rights approaches are just one of a number of ways in which we ought to be trying to solve the problems of both environmental degradation and securing human wellbeing. We should see rights as part of our arsenal rather than as our only, nuclear, weapon. Woods (n 9) 144.