

The Place of Human Dignity in Environmental Adjudication

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Abstract

A number of scholars have argued that addressing the significant environmental problems we face today is not merely a matter of finding technical or technological solutions, it also requires that we interrogate our assumptions about the nature of our own humanness and come to terms with what this means for how we behave towards nature. This paper argues that human rights courts engage in questions of human nature and value through their use of the concept of 'human dignity' and, as a result, it is a concept that may have an important role to play in human rights cases of an environmental nature. Historically, however, dignity is a concept concerned with the superiority of humanity to the rest of nature, and one thought to be anthropocentric and antithetical to environmental concerns. This paper considers whether human dignity might nevertheless have a beneficial role to play in environmental adjudication by considering its role in legal adjudication from a pragmatic perspective. This paper considers an approach to dignity proposed by Jeff Malpas – one that sees humans as embedded in and constituted by place – and examines whether this approach might impact on the course of judicial reasoning in environmental cases.

Keywords:

Human dignity, place, environment, judicial reasoning

1. Introduction

Human dignity might, at first blush, not seem like a particularly useful concept for those lawyers and scholars who wish to see the law – and especially human rights law – utilised to achieve greater care for the environment.¹ Dignity is a concept often associated with a legal construction of personhood that is seen to be antithetical to environmental ends – a conception of the legal person as autonomous, self-interested and individualistic.² In this paper, I consider whether human dignity might nevertheless

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¹ In this paper I use 'human dignity' and 'dignity' interchangeably.

² For further discussion of legal personhood and of personhood in relation to environmental interests see Anna Grear, 'The Vulnerable Living Order: Human Rights and the Environment in a Critical and Philosophical Perspective' (2011) 2(1) *Journal of Human Rights and the Environment* 23; Ngaire Naffine, 'Who Are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66(3) *The Modern Law Review* 346; Evadne Grant, 'International Human Rights Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms' (2015) 6(2) *Journal of Human Rights and the Environment* 156.

have a beneficial role to play in environmental adjudication as a concept that accommodates an environmentally emplaced understanding of humanness.

This paper seeks to insert dignity into an important debate in environmental scholarship. For a number of environmental scholars, 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.³ The idea that we need to engage in 'deep thinking' about who we are when thinking about how we ought to treat the environment is one associated with Arne Næss and deep ecology,⁴ but it is an idea shared by a wide range of environmental scholars.⁵ These scholars argue that our underlying self-conceptions play a crucial role in how we understand and treat that which we perceive as our environment. The blame for this attitude has sometimes been attributed to either the whole of the Western philosophical tradition⁶ or Judeo-Christian teachings.⁷ The bulk of the blame for our misconceived metaphysics, however, is laid at the door of Cartesian dualism.⁸ Robin Attfield describes Descartes as the 'father ... of the characteristic anti-environmental bias of modern philosophy.'⁹ Michael Zimmerman argues that 'Descartes and other early modern scientists interpreted nature as a lifeless machine, thus removing impediments that otherwise would have slowed the economic "development" of natural resources by the emerging class of capitalists.'¹⁰ Cartesian dualism, it is argued, has played a central role in shaping the thinking that has resulted in the environmental crisis we face today.

It is this problematic dualism that is also thought to inform both the general and specific ways in which the human is understood and regulated in law. Anna Grear has argued that it is not only Cartesian dualism but also Kantian metaphysics that has disfigured our thinking about the world and that this has shaped legal thought, including in the field of

³ Such scholars include Grear (n 2); Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate Publishing 2008); Holmes Rolston, *A New Environmental Ethics: The next Millennium for Life on Earth* (Routledge 2012); Lynn White Jr, 'The Historical Roots of Our Ecological Crisis' in Miguel A Santos (ed), *Readings in Biology and Man* (Arden Media 1973) 266-274; Michael E Zimmerman, 'Rethinking the Heidegger-Deep Ecology Relationship' (1993) 15(3) *Environmental Ethics* 195; Eugene C Hargrove, *Foundations of Environmental Ethics* (Prentice Hall 1989); George Sessions and Bill Devall, *Deep Ecology: Living as If Nature Mattered* (Peregrine Smith 1985).

⁴ See generally Sessions and Devall (n 3).

⁵ Although articulated in different ways for different ends, it is a concern of environmental pragmatists, new materialists, eco-feminists, post-colonial ecologists and so forth. See eg Diana Coole and Samantha Frost, *New Materialisms: Ontology, Agency, and Politics* (Duke University Press 2010); Andrew Light and Eric Katz, *Environmental Pragmatism* (Routledge 1996); Chris J Cuomo, 'On Ecofeminist Philosophy' (2002) 7(2) *Ethics & the Environment* 1.

⁶ This is an argument made by, for example, Sessions and Devall (n 3) and Hargrove (n 3). Robin Attfield has endeavoured to demonstrate that, at least to some extent, claims that the Western philosophical tradition is anti-environmental are somewhat overblown: Robin Attfield, 'Has the History of Philosophy Ruined the Environment?' (1991) 13(2) *Environmental Ethics* 127.

⁷ White Jr (n 3).

⁸ For discussion of the role of Cartesian philosophy in our environmental attitudes, see Grear (n 2); Attfield (n 6); Hargrove (n 3); Zimmerman (n 3); George S Sessions, 'Anthropocentrism and the Environmental Crisis' (1974) 2(1) *Humboldt Journal of Social Relations* 71.

⁹ Attfield (n 6) 133.

¹⁰ Zimmerman (n 3) 197.

human rights. She objects that both Cartesian and Kantian philosophy rely on ‘the fundamental split enacted between “rationality” and “nature”, or between “mind” and “matter”.’¹¹ For Grear, this split has meant a conception in law in which rational man stands in a different and opposite realm to the body and to nature: ‘[t]his has profound implications and... appears to drive the ... sense in which nature is rendered an exploitable object to be consumed, used and turned into profit.’¹² Thinking of nature as ‘other’ is not merely a matter of classification or orientation but seems, on these accounts, to have a direct bearing on law’s ability to ensure sustainability.¹³

The importance of arguments that link our self-understanding to our environmental conduct is that they do not (only) focus on how we ought to value nature (as seems to be the approach of both law and ecophilosophy to opposite ends)¹⁴ but rather these arguments require us to consider how it is we value and understand ourselves, and to come to terms with what this means for how we behave towards nature. While many scholars have sought to respond to Cartesian dualism by arguing that we need to recognise the inherent (as opposed to instrumental) value of nature and non-human animals,¹⁵ in this paper I explore the ways we value humanness. Critiques of dualistic accounts of the world often suggest we under- or de-value non-human nature, but I focus instead on the possibility that through a separatist account of humanity we undervalue ourselves by failing to recognise the ways in which we are embedded in and constituted by our environments, and thus we fail to protect adequately our human dignity.

In this paper, I argue that ideas about humanness are explored in judicial reasoning (and specifically the judicial reasoning of human rights courts) through the concept of human dignity. In a number of jurisdictions, human rights courts use the concept of human dignity to grapple with our humanness and to make assertions about what it is to be a human person. If our legal self-understanding has a role to play in our attitudes to and treatment of the environment, then it is important to consider dignity’s role in this self-understanding. Dignity, however, is a concept with a long historical association with claims to human superiority over the rest of nature and a contemptuous, instrumentalist view of non-human animals. This paper explores whether the concept of human dignity as it is used in law prescribes an understanding of humanness that is necessarily anti-environmental.

While human dignity is a concept that might, at first sight, seem to enforce dualistic and comparative accounts of human worth that are antithetical to environmental interests, I

¹¹ Grear (n 2) 26.

¹² *ibid.*

¹³ For an extensive discussion of sustainability in law, see generally Bosselmann (n 3).

¹⁴ Warwick Fox, *Toward a Transpersonal Ecology: Developing New Foundations for Environmentalism* (Shambhala 1990) 149.

¹⁵ See eg the argument of Val Plumwood, *Environmental Culture: The Ecological Crisis of Reason* (Routledge 2002). Plumwood argues that we need to add ‘ecology and nature to the annals and dialogues of western philosophy’: *ibid.* 12.

argue that dignity's great value is in its openness to different conceptions of humanness. In part two of this paper, following the approach of David Luban,¹⁶ I adopt a pragmatist approach to determining dignity's role in legal adjudication, and I argue that this reveals dignity to be a complex and multi-faceted concept, and one that is constituted over time by way of a number of complimentary contributions. This suggests that dignity might have a critical role to play in incorporating new kinds of self-understandings into legal adjudication. Human dignity is a concept that can accommodate understandings of humanness in which we are not only recognised as embedded in the world, but in which we are recognised as environmentally constituted. In the last section of this paper, I attempt an application of the topographical philosophy of Jeff Malpas in the context of judicial reasoning. I argue that it offers us a possible approach to humanness as 'in the world' in contradiction to the potentially problematic dualist accounts mentioned above.

2. Human Dignity and Our Self-Understanding

2.1. Human Dignity and the Environment in the History of Western Thought

For much of its history, human dignity was a concept used to express humanity's specialness and superiority to the rest of nature. In Ancient Rome, *dignitas hominis* referred to the high social rank and excellence of men in the ruling classes.¹⁷ Marcus Tullius Cicero, however, adapted this concept of high individual rank to speak of the high rank of man in the natural order. While broader, dignity in Cicero's use did not cease to be a concept deeply concerned with hierarchy and comparison. The broadening of dignity meant the widening of the terms of comparison – dignity no longer answered the question about where a person stood in society, but rather where humanity stands in relation to everything else in the world. Dignity came to be a concept deeply concerned with the environment, and specifically its lesser worth and significance, in comparison with humankind. 'We should never forget,' Cicero argued, 'how much the nature of man transcends that of the rest of the animal kingdom.'¹⁸ This idea of dignity, as that which defines the superior position of humanity in the cosmic order, continued through the Middle Ages and into the Renaissance.¹⁹ Historically, dignity was a concept used to

¹⁶ Luban's approach is set out in David J 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) 263-278.

¹⁷ For a detailed discussion of dignity in Ancient Rome and in the work of Cicero, see Hubert Cancik, "Dignity of Man" and "Persona" in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* I 105 – 107' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002) 19-39.

¹⁸ Quoted in John Higginbotham (trans), *Cicero on Moral Obligation* (University of California Press 1967) 75-76.

¹⁹ For further discussion of the historical concept of dignity in the Middle Ages and the Renaissance, see Ruedi Imbach, 'Human Dignity in the Middle Ages (Twelfth to Fourteenth Century)' in Marcus Düwell, Jens Braarvig and Dietmar Mieth (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 64-73; Oliver Sensen, 'Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms' (2011) 10(1) *European Journal of Political*

frame not only human self-understanding, but also the terms for understanding the rest of nature.

In the modern era, Immanuel Kant's approach to dignity is often identified as marking a significant shift in our understanding of the concept (towards inherent worth arising from autonomy). Oliver Sensen argues, however, that even in the Enlightenment, dignity remained a concept concerned with the human position in nature. Sensen argues, '[w]hen Kant refers to the dignity of humanity, he expresses the view that human beings have a prerogative over the rest of nature in virtue of being free.'²⁰ Sensen rejects the idea that Kant's conception of dignity was one of inherent human worth and that it is this worth that demands respect.²¹ Instead, he suggests, Kant's use of dignity is similar to that set out by Cicero and the Stoics – as a concept of high status within the natural order.

Dignity in the history of Western thought (from Cicero to Kant) is a deeply anthropocentric concept and one that seems to enforce a view of nature as of merely instrumental worth. It is a concept that appears to offer little to those seeking to challenge our anti-environmental self-understanding. In the next section, I consider whether this historic concern with our rank in the natural order continues to inform our understanding of human dignity in its contemporary legal uses, and whether dignity is a concept necessarily antithetical to environmental concerns.

2.2. Human Dignity in Human Rights Law

Human dignity came to prominence as a central concept in human rights law through its inclusion in both the United Nations Charter (the Charter)²² and the Universal Declaration of Human Rights (UDHR)²³ after the Second World War.²⁴ Human dignity's inclusion in the Charter and the UDHR marked it as a concept concerned with both our shared humanity and our individual vulnerability.²⁵ The Charter and the UDHR sought, in the wake of two world wars, to mark a new world order and thus sought to articulate

Theory 71; Giovanni Pico della Mirandola and others, *Oration on the Dignity of Man: A New Translation and Commentary* (Cambridge University Press 2012).

²⁰ Oliver Sensen, 'Kant's Conception of Human Dignity' (2009) 100(3) *Kant-Studien* 309, 309.

²¹ *ibid.*

²² Charter of the United Nations 1945 (1 UNTS XVI).

²³ Universal Declaration of Human Rights 1948 (UNGA Res 217 A(III)).

²⁴ For a different account of dignity's history in law, see Samuel Moyn, 'The Secret History of Constitutional Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 95-111.

²⁵ For further discussion on this, see Sensen (n 19); Matthias Mahlmann, 'The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 593-614. For an alternative account, see David Hollenbach, 'Human Dignity: Experience and History, Practical Reason and Faith' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 123-139; Moyn (n 24); Rebecca J Scott, 'Dignité/Dignidade: Organizing against Threats to Dignity in Societies after Slavery' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 61-93.

universal values, true for every person in that new order.²⁶ In the face of the horrors of National Socialism, ‘the principle purpose of the [Universal Declaration] was to put down a non-negotiable marker against the denial of human dignity.’²⁷ The denial of human dignity, the Universal Declaration states, results in ‘barbarous acts which have outraged the conscience of mankind.’ David Hollenbach argues that the contrast between the shocking barbarism of the holocaust and respecting human dignity is critical in these post-war texts.²⁸

In the post-War era, the monopoly of states on the use of force was no longer seen as a legitimate ground of sovereignty, but was associated instead with the atrocities of the holocaust. The drafters of the Charter and the Universal Declaration saw in the horrors of the war a ‘blurring of violence and legality’.²⁹ No longer could sovereignty and the power to control territory by means of force ground the legitimacy of international law. Rather, in the post-war era international law sought legitimacy from ‘a humanity transcending the state.’³⁰ In the Charter, the drafters looked to a *universal conception of humanity* as international law’s new goal and purpose. Stephen Riley sees this as ‘an attempt to reconfigure international law with humanity as its *Grundnorm*.’³¹ As Anne Peters argues, sovereignty was humanised – it was not merely constrained by human rights but rather sovereignty ‘is from the outset determined and qualified by humanity, and has a legal value only to the extent that it respects human rights, interests and needs.’³² Human dignity was incorporated into the Charter and the UDHR as a concept that asserted the central importance and worth of our humanity. In the context of human rights law, dignity both defines the class of things (humans) which are bearers of the rights and it acts as a justification for those rights.³³

Human dignity was subsequently adopted into a range of international and domestic human rights instruments. Human dignity is identified as the source of human rights in the International Covenant on Civil and Political Rights³⁴ and the International Covenant on Economic, Social and Political Rights,³⁵ and has been incorporated into a wide range

²⁶ Michael Kirby, ‘Health Care and Global Justice’ (2011) 7(Special Issue 03) *International Journal of Law in Context* 273, 275.

²⁷ Roger Brownsword, ‘Human Dignity from a Legal Perspective’ in Marcus Düwell, Jens Braarvig and Dietmar Mieth (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary perspectives* (Cambridge University Press 2014) 1-22, 2.

²⁸ Hollenbach (n 25) 127.

²⁹ Stephen Riley, ‘The Function of Dignity’ (2013) 5(2) *Amsterdam Law Forum* 90, 92.

³⁰ *ibid* 93.

³¹ *ibid* 92-93.

³² Anne Peters, ‘Humanity as the Alpha and Omega of Sovereignty’ (2009) 20(3) *European Journal of International Law* 513, 514.

³³ For arguments that rely on or assess the idea of dignity as the purpose of human rights, see Patrick Capps, *Human Dignity and the Foundations of International Law* (Reprint edition, Hart Publishing 2010); Thomas Finegan, ‘Conceptual Foundations of the Universal Declaration of Human Rights: Human Rights, Human Dignity and Personhood’ (2012) 37 *Australian Journal of Legal Philosophy* 182; Jeremy Waldron, ‘Is Dignity the Foundation of Human Rights?’ [2013] *New York University Public Law and Legal Theory Working Papers*.

³⁴ International Covenant on Civil and Political Rights 1966 (UNGA Res 2200 A(XXI)).

³⁵ International Covenant on Economic, Social and Cultural Rights 1966 (UNGA Res 2200 A(XXI)).

of international treaties. Dignity features in the European Charter of Fundamental Rights,³⁶ the African Charter on Human and Peoples' Rights,³⁷ the American Convention of Human Rights³⁸ and the Arab Charter on Human Rights.³⁹ Dignity has also been incorporated into the constitutional texts of 162 countries (up from only 5 prior to the Second World War).⁴⁰ With this proliferation of dignity references in legal text, there has also been a proliferation of dignity jurisprudence in human rights and constitutional courts around the world.⁴¹

As a concept that asserted and affirmed humanity, human dignity was often incorporated into the constitutional texts of states emerging from the oppression and violence of colonialism, Soviet rule, one party rule and apartheid.⁴² Human dignity is employed in these contexts to reassert a shared humanity that was previously denied. For instance, the Constitutional Court of Hungary found:

Human dignity, as the integrity of personality, means along with human life the essence of man. Dignity is the elevating quality of our human existence and value: it is worthy of an unconditional respect, the honour of our human essence. It is a prior value in the same way that life is, and it expresses the human dimension of life. Being a human and human dignity are inseparable from one another.⁴³

In these contexts, human dignity becomes inextricably bound to assertions and claims about the nature of our humanness.

While textual references to dignity abound in constitutional and human rights legislation, it is really in the jurisprudence of human rights courts that the value of the concept of

³⁶ Charter of Fundamental Rights of the European Union 2000 (OJ C 364/01).

³⁷ African Charter on Human and Peoples' Rights ('Banjul Charter') 1981 (CAB/LEG/67/3 rev 5, 21 ILM 58 (1982)).

³⁸ American Convention on Human Rights ('Pact of San José') 1969 (OEA/Ser. K/XVI.I.1, doc. 70, rev. 1, corr. 1 (1970)).

³⁹ Arab Charter on Human Rights 2004 (reproduced in English at 12 IHRR 893 (2005)).

⁴⁰ Guy E Carmi and Doron Shultziner, "'Dignitizing" Constitutions Worldwide: On the Proliferation of Human Dignity in National Constitutions' (2013) Selected Works <http://works.bepress.com/guy_carmi/6/>.

⁴¹ A number of scholars have explored the appearances and significance of dignity in judicial reasoning. See eg Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655; Paolo Carozza, 'Human Dignity in Constitutional Adjudication' in Tom Ginsburg and Rosalind Dixon (eds), *Research Handbook in Comparative Constitutional Law* (Edward Elgar Publishing 2011) 459-472; Erin Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (University of Pennsylvania Press 2013).

⁴² See eg the Constitution of the Republic of South Africa 1996, the Constitution of the Republic of Namibia 1990, the Fundamental Law of Hungary 2011, the Constitution of Kenya 2010. After World War Two, Germany, Japan and Italy all included references to dignity in their constitutions. See also Doron Shultziner and Guy E Carmi, 'Human Dignity in National Constitutions: Functions, Promises and Dangers' (2014) 62(2) *American Journal of Comparative Law* 461.

⁴³ Decision No. 23/1990 (X31) (Hungarian Constitutional Court); quoted in Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity*, vol 1 (Hart Publishing 2003) 108.

dignity has been realised.⁴⁴ Frequently, human rights courts use dignity to explore questions of our self-understanding and identity. In the case of *Nova Scotia (AG) v Walsh*, for example, the Supreme Court of Canada found that '[d]ignity is by its very nature a loaded and value-laden concept comprising fundamental assumptions about what it means to be a human being in society. It is an essential aspect of humanity...'.⁴⁵ In *Movement for Quality Government in Israel v Knesset*, the Supreme Court of Israel held that 'human dignity bases its recognition upon the physical and intellectual integrity of the human being, his or her humanity, and his or her values as a person...'.⁴⁶ In the case of *Ferreira v Levin NO and Others*, Justice Ackermann of the South African Constitutional Court stated that '[h]uman dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential'.⁴⁷ Dignity is a concept intimately involved in judicial approaches to understanding the nature of our humanness and its implications for law. While dignity is by no means the only concept through which courts have sought to express something about the nature of humanness, it is perhaps the concept through which this judicial attempt to grapple with what it means to be human is most explicit.

Dignity's particular and unusual history in law suggests it is a concept with very different concerns and orientations to dignity in the history of Western thought. Dignity *in law* is a concept concerned with human rights and the horrors we impose on one another, rather than our position in the natural order. Dignity retains, however, a concern with human specialness, and it is a specialness that sets us apart from all else in the world. Dignity tells us that humans are normatively significant in law, but also that things are normatively insignificant, without legally defensible interests. Deciding who belongs inside the class 'human' is also a decision about who belongs outside of that class – 'things'.⁴⁸ In drawing this distinction, dignity is used to establish a hierarchy of normative and legal significance with humans at the top and non-humans again relegated to the lower levels. Jack Donnelly argues that human dignity 'signifies *worth that demands recognition and respect*'.⁴⁹ For Donnelly, the basic features of a definition of dignity include 'the honourable status associated with dignity' and 'the form(s) of respect due to it'.⁵⁰ Through dignity we demand for ourselves respect that we do not recognise as owed to those who lack dignified worth.

⁴⁴ For a thorough analysis of dignity in courts, see Daly (n 41). For further discussion of dignity's uses in judicial reasoning, see McCrudden (n 41); Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury Publishing 2016).

⁴⁵ [2002] 4 SCR 325, 378.

⁴⁶ (2006) 61(1) pd 619, 685.

⁴⁷ [1995] ZACC 13 at para 49.

⁴⁸ See the discussion on the Kantian approach to dividing the world into different normative categories in Christine M Korsgaard, 'Kantian Ethics, Animals, and the Law' (2013) 33(4) *Oxford Journal of Legal Studies* 629.

⁴⁹ Jack Donnelly, 'Normative Versus Taxonomic Humanity: Varieties of Human Dignity in the Western Tradition' (2015) 14(1) *Journal of Human Rights* 1, 1.

⁵⁰ *ibid* 2.

Human dignity is often associated with a claim to human worth based on some inherent capacity or attribute.⁵¹ Dignity is thought to entail a conception of the human that is rational and autonomous, sometimes attributed to Kantian philosophy.⁵² Kant argued that all humans, unlike any other creatures, are to be presumed autonomous, rational and free.⁵³ The idea that human dignity and autonomy are associated is one often expressed by courts.⁵⁴ This conception of personhood is criticised for being ahistorical and decontextualised, and one that recognises little relevant relationship to the surrounding environment. It is a conception of humanness often thought to be problematic for those concerned with environmental protection and preservation.⁵⁵

Human dignity might make those scholars who are concerned with Cartesian dualism immediately suspicious. As a concept concerned with defining and defending the *human* of human rights, dignity in law seems to retain the antiquated idea of the comparative superiority of humanity and thus offer us little assistance in addressing environmental concerns. But does dignity commit us to a particular self-understanding? If human dignity is a concept used to express law's underlying understanding of our being, is it also a concept that commits us to a particular account of humanness?

2.3. Human Dignity's Plural Universality

So far I have argued that dignity is a critical concept in human rights law and adjudication and one that is deployed by courts to explore the nature of our being. As such, it is a critical concept to consider in any discussion of the implications of our self-understanding for our environmental adjudication. From an environmental perspective, however, dignity is a concept historically associated with an anthropocentric ethic that seems anti-environmental (or at least environmentally indifferent) in its predisposition. In law, dignity seems to maintain a separatist account of humanity. Is dignity, then, a concept to be overcome (or abandoned) in attempts to make law a tool for sustainability? In the next few paragraphs, I argue for a pragmatic understanding of dignity in law that suggests it is a concept that might in fact have a positive role to play in achieving more environmentally sound (or at least receptive) adjudication.

⁵¹ See Ackermann's discussion of dignity in law in Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta & Company Ltd 2012); *S v Makwanyane* (1995) 3 South African Law Reports 391 (CC).

⁵² Grear (n 2); James Griffin, *On Human Rights* (Oxford University Press 2008).

⁵³ See Christine Korsgaard, *Interacting with Animals: A Kantian Account* (2008); Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press 1998); Thomas E Hill, 'Kantian Perspectives on the Rational Basis of Human Dignity' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 215-221.

⁵⁴ In *Obergefell et al v Hodges, Director, Ohio Department of Health, et al*, the US Supreme Court majority held 'The fundamental liberties [protected by the fourteenth Amendment of the US Constitution] ... extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs': 135 S. Ct. 2584, 2594 (2015). See also *Mayelane v Ngwenyama and Another* [2013] ZACC 14 (South African Constitutional Court); 'Microzensus' decision of 16 July 1969, BVerfGE 27, 1 (German Federal Constitutional Court); *Goodwin v United Kingdom* (1996) 22 EHRR 123 (European Court of Human Rights); *Maneka Ghandi v Union of India* (1978) 2 SCR 691 (Indian Supreme Court); *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 Others Petition 440 of 2013* [2015] eKLR (High Court of Kenya); *R v Morgentaler* (1988) 1 SCR 30, 166 (Canadian Supreme Court).

⁵⁵ This is a concern expressed by, for example, Grear (n 2) and Grant (n 2).

In legal adjudication, dignity is not a concept with a fixed or uncontested meaning. The trouble with the concept of human dignity, Christopher McCrudden argues, is that it points us to a question – ‘what kind of beings are we?’ – that is capable of radically different answers.⁵⁶ In the last few years, it is a concept that has been the subject of significant criticism by legal academics and practitioners who deny its universality and argue that it is defined in very different ways in different jurisdictions.⁵⁷ According to McCrudden, while there has been wide-spread adoption of the concept of dignity into different legal systems and by a vast array of courts in their interpretation and application of human rights, this supposedly shared concept is revealed to be variable; a multitude of conceptions of dignity exist, often in direct conflict with one another.⁵⁸ Some scholars have further argued that dignity’s indefinite meaning, but great significance in human rights law, makes it a dangerous and corrupt concept – a means by which judges introduce personal values and bias into their reasoning.⁵⁹

However, dignity’s openness may be exactly what makes it an important and useful concept in matters concerning the environment. Human dignity has indisputably different roles and functions in judicial reasoning as well as international treaty law and domestic law.⁶⁰ For those who do not embrace ‘dignity scepticism’, an account must be given as to what our shared understanding of dignity might be and of what dignity adds to our understanding of law or rights.

In his assessment of dignity in law, Luban adopts a pragmatic approach that forefronts experience rather than attempting to identify what the word ‘dignity’ points us to in the world.⁶¹ He argues that instead of taking an *a priori* approach to determining the meaning of dignity, we ought to determine the meaning of human dignity by determining its use in legal practice.⁶²

Pragmatists view the law as a social institution and one that has the goal of furthering social purposes.⁶³ Pragmatists often take an instrumentalist and outcomes-oriented approach to law and legal interpretation.⁶⁴ Furthering social purposes is a context-specific, plural and provisional process. Pragmatism brings a recognition of contingency

⁵⁶ McCrudden (n 41) 657.

⁵⁷ See eg Michael Rosen, ‘Dignity: The Case Against’ in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) 143-154; Mirko Bagaric and James Allan, ‘The Vacuous Concept of Dignity’ (2006) 5(2) *Journal of Human Rights* 257.

⁵⁸ This is an argument made by McCrudden (n 41). For a response to McCrudden’s argument, see Paolo G Carozza, ‘Human Dignity and Judicial Interpretation of Human Rights: A Reply’ (2008) 19(5) *European Journal of International Law* 931.

⁵⁹ An argument made particularly forcefully by Rosen (n 57).

⁶⁰ McCrudden (n 41).

⁶¹ Luban (n 16), 21-23.

⁶² David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press 2007) ch 2.

⁶³ Roscoe Pound, ‘The Scope and Purpose of Sociological Jurisprudence. I. Schools of Jurists and Methods of Jurisprudence’ (1911) 24(8) *Harvard Law Review* 591, 598.

⁶⁴ For further discussion of legal pragmatism and outcomes-based approaches, see Richard A Posner, ‘What Has Pragmatism to Offer Law’ (1989) 63(6) *Southern California Law Review* 1653.

in its denial of foundational accounts of knowledge.⁶⁵ This recognition of contingency means pragmatists largely reject a single, right-answer approach,⁶⁶ arguing instead that we need to continually revisit problems – an approach Margaret Radin refers to as non-ideal justice: '[w]e must look carefully at the nonideal [*sic*] circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep re-deciding as time goes on.'⁶⁷ Pragmatists see judges as engaged in creative problem solving rather than deriving correct answers from overarching principles. Importantly, pragmatists recognise a range of values that might come to play in decision making and in justification in legal reasoning.⁶⁸ Legal pragmatists argue that adjudication should look both back to precedent and forward to a better future,⁶⁹ and this makes pragmatism a particularly useful theoretical grounding from which to consider judicial reasoning in cases of an environmental nature, particularly given the changing nature of environmental threats and our understandings of them.

Luban looks at function to determine the substantive meaning of the concept of dignity. This is an analysis of dignity in law as context-dependent, interpretive, social, rhetorical and historical discursive practices. A pragmatist analysis of dignity reveals that understanding dignity's contours is an evolving process that is open to different interpretive possibilities. Between hegemonic, universalist accounts of dignity that seemingly fail to take into account legal and cultural plurality, and a relativist account that sees dignity as an empty vessel, Luban offers us a middle road. We can see dignity's universality as a process rather than a fixed meaning.

When judges use the concept of dignity, they are neither filling in their own meaning nor strictly adhering to some found meaning in precedent or moral theory, but rather they are reconstructing the concept, and adding additional layers to what dignity already tells us about the nature of our being.⁷⁰ Dignity retains an openness that is an essential component of its meaning and function in judicial reasoning.⁷¹ It is in this openness that we see dignity as an evolving concept, appropriate to accounting for our evolving and unstable understandings of ourselves.⁷² Rather than understanding dignity as a judicial

⁶⁵ See generally Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge University Press 1989).

⁶⁶ Stanley Fish, 'Almost Pragmatism: Richard Posner's Jurisprudence' (1990) 57(4) *The University of Chicago Law Review* 1447, 1447.

⁶⁷ Margaret Jane Radin, 'The Pragmatist and the Feminist' (1989) 63(6) *Southern California Law Review* 1699, 1700.

⁶⁸ Brian Bix, *Jurisprudence: Theory and Context* (6th ed, Sweet & Maxwell 2012) 284.

⁶⁹ William Andrew Shutkin, 'Pragmatism and the Promise of Adjudication Essay' (1993) 18(1) *Vermont Law Review* 57, 75. Dworkin has argued that pragmatism is problematic because it requires adjudication to be exclusively forward looking: Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 161. However, as Shutkin and others have argued, pragmatism's concern with both context and the future depends upon adjudicative practices that look backwards as well as forwards. .

⁷⁰ For an argument on legal adjudication as both finding and making conceptual content, see Robert B Brandom, 'A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges' Chain Novel' in Graham Hubbs and Douglas Lind (eds), *Pragmatism, Law, and Language* (Routledge 2014) 19-39.

⁷¹ Adeno Addis, 'Human Dignity in Comparative Constitutional Context: In Search of an Overlapping Consensus' (2015) 2(1) *Journal of International and Comparative Law* 1, 27.

⁷² Riley (n 29) 92.

attempt to pin down what it is that is the nature of our being, dignity is a concept open to many different aspects and understandings of humanness.

Paolo Carozza and Adeno Addis argue that human rights courts, through their use of and dialogue in relation to the dignity concept, have constituted a shared, transnational dignity discourse, creating rather than finding dignity's universality.⁷³ A pragmatist approach that focuses on the practices of courts in their use of the dignity concept reveals a convergence or overlapping consensus on certain understandings of the concept across different legal jurisdictions in which the concept is used.⁷⁴ Since this pragmatic approach is concerned with outcomes and uses, rather than on fixing dignity's conceptual content, it both allows us to deal with diversity in dignity applications by courts and to recognise that dignity does not prescribe a particular conception of humanness.

What is perhaps most significant about a pragmatist approach to understanding human dignity is the recognition that dignity is a concept that evolves and changes in response to new threats to it. Some of these may be threats that have long existed but are only recently recognised as such by our legal institutions – such as the denial of the right to marry to those not in heterosexual relationships. Others may be new threats, emerging as a result of technological developments or environmentally degrading practices. This is an aspect of dignity highlighted by Jürgen Habermas, who argues that human rights emerge in response to violations of human dignity and that it is these experiences that define human dignity: 'different aspects of the meaning of human dignity emerge from the plethora of experiences of what it means to be humiliated and be deeply hurt.'⁷⁵ This, Addis tells us, is what is most valuable about dignity. Addis argues:

For the human dignity pragmatist, the idea of dignity is always a work in progress, not so much because of the limitation of our capacity to fully comprehend the true meaning of human dignity, but rather because the notions of dignifying humans or subjecting them to indignities are, as an initial matter, worked out within (or are contingent on) particular histories, structures and cultural resources that are themselves contingent.⁷⁶

Our understanding of dignity's contours is an evolving process open to different interpretative possibilities. Dignity is a central concept to determining what judges

⁷³ Carozza explores the emergence of a global concept of dignity through the dialogue of courts, which examine and engage with each other's decisions across jurisdictions. See Paolo Carozza, "My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81(4) *Texas Law Review* 1031; Carozza (n 58); Addis (n 71).

⁷⁴ Addis (n 71) 5.

⁷⁵ Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41(4) *Metaphilosophy* 464, 467-8. Also see Beitz's discussion of Habermas in Charles R Beitz, 'Human Dignity in the Theory of Human Rights: Nothing But a Phrase?' (2013) 41(3) *Philosophy & Public Affairs* 259, 269-270.

⁷⁶ Addis (n 71) 28.

perceive as law's underlying ontological commitments and to understanding what the implications of those commitments are.

None of this is to suggest that historical and theoretical accounts of dignity play no role in our understanding of dignity in law. A pragmatist account is one that is open to and attempts to account for dignity's association with a number of values. Theoretical and historical meanings attributed to dignity continue to shape and inform judicial reasoning, but any particular definition (dignity as Kant's moral law,⁷⁷ or dignity as the absence of humiliation,⁷⁸ for example) cannot give a full account of dignity or dignity's particular legal functionality. Pragmatism offers an approach to understanding rather than an attempt to define the concept of dignity in judicial reasoning. Pragmatists do not, however, take the view that dignity can mean *anything* and different approaches have been offered to determining the limits of dignity's scope. Addis, for example, argues that we should look for overlapping consensus in the uses of the concept by different courts.⁷⁹ Others have suggested dignity may be constrained depending on the language game in which it is being used, or that correct uses of dignity are determined with reference to ideas of 'fit'.⁸⁰ What is clear, however, is that dignity's uses are not constrained by a single moral or historical definition; dignity is best understood as consisting of a number of complementary aspects, and as productively incomplete.⁸¹

Understood pragmatically, dignity is a concept that may be open to accounts of humanness that are not antithetical to the environment or concerned with our comparative and relatively greater worth than the other animals. Dignity is a concept that may be open to accounts of humanness that recognise us as embedded in and constituted by our engagements with the world in which we live. In the next section, I consider one such account offered by Jeff Malpas. I ask whether Malpas' topographical philosophy might be usefully applied in judicial reasoning about dignity and about the environment. While Malpas argues that his account of dignity provides the best 'picture of that in which human being actually consists',⁸² I do not consider it here as an alternative to existing judicial uses of dignity, but rather as an understanding that helps us see the ways in which dignity might be useful in expanding judicial reasoning in response to environmental threats.

⁷⁷ Sensen (n 20).

⁷⁸ For a critique of such negative accounts of dignity, see Marcus Düwell, 'Human Dignity and Human Rights' in P Kaufmann and others (eds), *Humiliation, Degradation, Dehumanization* (Springer 2011) 215-230.

⁷⁹ Addis (n 71), 5.

⁸⁰ See eg Mary Neal, 'Dignity, Law and Language-Games' (2012) 25(1) *International Journal for the Semiotics of Law* 107; Luban (n 16).

⁸¹ Laurie Ackermann, 'The Soul of Dignity: A Reply to Stu Woolman' in Stu Woolman and Michael Bishop (eds), *Constitutional Conversations* (Pretoria University Law Press 2008) 217-230, 223-224.

⁸² Jeff Malpas, 'Human Dignity and Human Being' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007) 19-25, 21.

3. Dignity and the Environment – Understanding Humanness in the World

Environmental threats to the realisation of human rights and to our very existence pose new and significant challenges to the recognition and respect of our human dignity. If these new threats require us to revisit some of our ontological assumptions, as the scholars considered at the beginning of this paper argue, dignity may be a concept open to new self-understandings that see us not as separate to our environments but as deeply embedded in and constituted by those environments.

Malpas suggests an alternative conception of ourselves that he argues ought to inform our use of dignity.⁸³ Malpas argues, ‘our self-identity and our self-conceptualisation (and our conceptualisation of others) is something that can only be worked out in relation to place and to our active engagement in place’.⁸⁴ He offers us an account of humanness as dependent on the world. We are not faced with an ‘external world’ but rather ‘[w]e must understand ourselves as already “in” the world if we are to be capable of understanding at all.’⁸⁵

While Malpas is not concerned directly with the environment or with dignity as a concept of legal reasoning, his approach to dignity is one that may nevertheless have some useful implications in both of these areas. It may allow courts to consider our humanness as spatially embedded and to examine the ways in which our identities are tied up with the world. Since it is an account that seems to locate humanness so thoroughly in the world, in contradiction to potentially problematic dualist accounts, it is worth exploring further.

3.1. Topographical Humanness : a Malpasian Approach to Dignity

Malpas makes the argument that place and space play a central role ‘in the possibility of thought and experience...’.⁸⁶ He argues that subjectivity is preceded by a grasp of space ‘as a structure within which experience (and action, thought and judgment) is possible.’⁸⁷ For Malpas, a grasp of space within which our actions, experience and thought are possible is essential to agency:

The very possibility of being a creature that can have thoughts and that can have experience of a world is dependent on being a creature that has the capacity to act in relation to objects within the world. And this, in turn, is dependent on being a creature that has a grasp of both the subjective space correlated with its own capacities, as well as with features in its

⁸³ *ibid.*

⁸⁴ Jeff Malpas, *Place and Experience: A Philosophical Topography* (Cambridge University Press 1999) 178.

⁸⁵ *ibid.* 12.

⁸⁶ *ibid.* 72.

⁸⁷ *ibid.* 71.

immediate environment, and the objective space within which the creature and its environmental surroundings are located.⁸⁸

Malpas argues that the specifics of the place in which we find ourselves are critical. He argues, ‘the mental life of the subject is dependent on the subject’s active engagement with the surrounding environment and so on its situatedness within a particular place.’⁸⁹ Malpas is not making a psychological claim about the importance of particular places in our general self-definition. Rather, he thinks that we are ‘the sort of thinking, remembering, experiencing creatures we are’ as a result of our engagement with the places in which our lives unfold.⁹⁰

Malpas offers us an idea of place that is social. ‘In grasping the structure of place that is at issue here,’ Malpas explains, ‘what is grasped is an open and interconnected region within which other persons, things, spaces and abstract locations, and even one’s self, can appear, be recognised, identified and interacted with.’⁹¹ Malpas’ understanding of place is not wholly subjective, rather ‘places are established in relation to a complex of subjective, inter-subjective and objective structures that are inseparably conjoined together within the overarching structure of place as such.’⁹² For Malpas, place is understood ‘in terms of complex conjunction of factors involving the natural landscape, the pattern of weather and of sky, the human ordering of spaces and resources, and also those individual and communal narratives with which the place is imbued.’⁹³

In his understanding of place as both objective (the physical world) and subjective, Malpas offers us a way of conceptualising the environment not merely as context – ‘out there’ as dualist accounts have it – but rather as something both extended and social and as a matter of our self-understanding.

Malpas argues that belief is dependent on action and active engagement with one another and the world:

Understanding an agent, understanding oneself, as engaged in some activity is a matter both of understanding the agent as standing in certain causal and spatial relations to objects and of grasping the agent as having certain relevant attitudes – notably certain relevant beliefs and desires – about the objects concerned.⁹⁴

He goes on:

... what is crucial to note here is the way in which the identification of belief depends both on our being causally embedded in the world (which

⁸⁸ *ibid* 58.

⁸⁹ *ibid* 177.

⁹⁰ *ibid*.

⁹¹ *ibid* 36.

⁹² *ibid* 185.

⁹³ *ibid*.

⁹⁴ *ibid* 95.

includes our being able to be causally affected by the world through our senses) and on our own acquaintance with the character of that causal embeddedness (in our own case as well as that of those whom we aim to interpret) – it depends, in other words, on the beliefs we have about the causes of our and others' beliefs. ... The identification of belief depends on identifying the causes of belief, and so the identification of beliefs depends on already having access to the causal connections that obtain between particular beliefs and the world.⁹⁵

In relation to our most basic beliefs, identifying them requires identifying their objects and causes. We identify the causal connections between the beliefs and the world through our 'common causal engagement' with others in relation to the world – our shared descriptions of these causes. There is between self, others and the world a process of 'triangulation'⁹⁶ which can be 'understood as a matter of the ongoing adjustment of our own dispositions, and the dispositions we attribute to others, in the light of our changing environmental circumstances.'⁹⁷ This triangulation, Malpas claims, always takes place in a particular context in relation to particular beliefs: 'Triangulation thus depends on the way in which interpreter, interlocutor, and entity or event come together within a particular environmental circumstance...'.⁹⁸ It is for this reason that Malpas argues that this triangulation and our understanding of our beliefs is always 'topographical': 'Uncovering the rationality of particular beliefs is thus always a matter of delineating a particular epistemic topography – of uncovering a particular configuration of attitude, behaviour and environment.'⁹⁹

Just as humanness consists in relationships with self, other and the world, so dignity plays out in these three areas:

...there is a sense of dignity that obtains in terms of the sense of worth that we have in relation to ourselves, a sense of dignity that we have of ourselves in relation to others, and so also a sense of the worth of others in relation to ourselves, a sense of the worth of ourselves in relation to the wider world, and of that wider world as it stands in relation to us.¹⁰⁰

Malpas offers us an understanding of dignity that is relational and topographical. When we conceptualise ourselves as constituted in the world in which we find ourselves, we have a radically different understanding of humanness from that offered by dualist accounts that are the subject of critique by (amongst others) environmental scholars.

⁹⁵ Jeff Malpas, 'On Not Giving Up the World – Davidson and the Grounds of Belief' (2008) 16 (2) *International Journal of Philosophical Studies* 201, 207.

⁹⁶ Malpas takes the idea of 'triangulation' from Davidson. Malpas (n 84) 45.

⁹⁷ Malpas (n 95) 208.

⁹⁸ *ibid.*

⁹⁹ *ibid* 209.

¹⁰⁰ Malpas (n 82) 22.

For Malpas, dignity ‘refers us instead to the worth of a human life which is given only through the articulation of that life in relation to self, others and the world.’¹⁰¹

3.2. The Implications of a Topographical Approach to Dignity for Environmental Adjudication

Might a Malpasian approach¹⁰² to the concept of dignity make any difference to how courts (who use and apply the concept of dignity) make decisions in cases concerning environmental impacts? What does a Malpasian approach tell us about how or whether we can alter our environments, or what the implications of such alterations might be for the protection of our human dignity?

When we understand our humanness as constituted by our being in the world, our impact on and reordering of the space of the world (through construction or destruction) has an impact on our subjectivity. Malpas states:

... the ordering of place through narrative forms ... is itself tied to the material instantiation of a culture and a society – for cultures like our own, in our shaping of space and environment through the construction of rooms, houses, offices, public buildings, roads and so on; for cultures that stand in less obtrusive relation to the land, through the establishment of pathways and sites. These structures order and reorder space in ways that establish and constrain the actions and lives of the individuals who inhabit that space – indeed, inasmuch as they order and reorder that space, so they also order and reorder the possible forms of subjectivity in that space.¹⁰³

When we change the world, we not only change the context in which our lives occur, but we change the possible forms of our subjectivity. But is this a problem? Reordering the possible forms of subjectivity, even if it implicates our dignity, is not, necessarily, unlawful (and as Malpas’ quote above indicates, we reorder our subjectivity even with unharmful changes to the environment).

Malpas views change, loss and vulnerability as part of the process:

Only ... in the concreteness of an embodied, located, bounded existence ... can we come to understand that in which the value and significance of a life is to be found. And, as every such life is a life lived amidst a richness that cannot be protected from vulnerability and loss, so every such life is defined by the experience of both the wonder and the fragility of place –

¹⁰¹ Ibid 24-25.

¹⁰² By a ‘Malpasian approach’, I do not mean an approach adopted by Malpas (who has not – as far as I am aware – considered the implications of his theory for dignity in law or environmental reasoning by courts) but rather an approach to environmental adjudication influenced by my reading of Malpas’ theory.

¹⁰³ Malpas (n 84) 186.

by the experience of place lost and regained, by the experience of place as indeed 'humanized and humanizing'.¹⁰⁴

We are no less human when the environment around us is degraded beyond recognition – indeed our loss may be 'humanizing'. While a relational/topographical perspective does not allow us a Cartesian disinterest in the world as separate from ourselves, it is not clear that the inevitable shaping of our space and our subjectivity ought to be constrained in one way or another by the law. It is not clear that we can establish legally relevant harm to dignity, even when we have a conception of humanness as deeply embedded and emplaced in the world.

Malpas argues, however:

To the extent that human lives are lives whose meaning, indeed, whose very character as human, derives from their relational character, then so the greatest threats to human dignity derive from those actions and circumstances that strip human lives of their relational connection – that disable the sense of relatedness to self, of relatedness to others and of relatedness to the world.¹⁰⁵

While change and loss may be humanising and not (necessarily) harmful, Malpas does identify those circumstances that strip us of our sense of relatedness as threatening and degrading of human dignity. When considering whether an action or circumstance violates human dignity (as protected under law), a judge could take into account threats to dignity that manifest themselves in each of these areas of relatedness.

This suggests that a Malpasian reading of dignity may impact the ways in which courts reason in two ways: firstly, human rights courts can consider issues of place and environment in cases in which they seek to secure and protect the dignity of the applicants. Secondly, when courts are called on to adjudicate cases of an environmental nature, they can (perhaps, *should* in certain instances) consider these cases in light of human dignity and consider remedies necessary to secure human dignity.

First, the recognition of a relational connection to place as an aspect of dignity may allow courts to bring environmental considerations into cases where they have previously been overlooked. Malpas' idea of triangulation – that we are constituted by our relationships with self, other and the world – seems to build effectively on one of the key ways in which dignity has come to be understood and used in the jurisprudence of human rights courts. An important feature of dignity that emerges from the case law is that it is a concept used to express our humanness in relational terms – we are recognised as social beings, constituted through our engagements with others.¹⁰⁶

¹⁰⁴ *ibid* 193.

¹⁰⁵ Malpas (n 82) 24.

¹⁰⁶ Neomi Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86(1) *Notre Dame Law Review* 183, 244-248.

Dignity is closely associated with the demand that we are recognised in our humanity and in our individuality, and that the denial of social recognition and acceptance harms and alters us in fundamental ways.¹⁰⁷ Courts have expanded and extended the concept of dignity – beyond a negative right to autonomy – as they have faced cases pertaining to the identity of transsexuals,¹⁰⁸ the equality and bodily integrity of women,¹⁰⁹ the right to marry of same-sex couples,¹¹⁰ and the vulnerability of those in poverty.¹¹¹ Dignity is recognised as manifesting in our individual relationships, but also in our participation in society at large. Justice Sachs, in the matter of *Port Elizabeth Municipality v Various Occupiers*, found:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.¹¹²

Malpas offers an account of dignity that builds on and adds a dimension to the existing judicial practice that expresses dignity as a concern with our social relatedness and seeks to protect that relatedness. For Malpas, we are constituted not only in our relationships with each other, but also in our relationship with place. While courts already consider the ways in which the stripping of our relationships with others violates our dignity, a pragmatic application (and extension) of a Malpasian approach suggests that these enquiries could be extended to consider the ways in which those relationships are spatially embedded, and to consider the ways in which our identities and memories are tied up with the environment.

This suggests dignity might be a means by which environmental concerns can be integrated into human rights law – one by which courts can take cognisance of environmental matters in a broad range of human rights cases. One of the key ways in

¹⁰⁷ See eg *Goodwin v United Kingdom* (n 54) (European Court of Human Rights); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15 (South African Constitutional Court).

¹⁰⁸ *Goodwin v United Kingdom* (n 54).

¹⁰⁹ There have been a number of cases that address the freedom, equality and bodily integrity of women, particularly in relation to abortion. In addition to these cases, courts have also relied on dignity reasoning to address concerns about the ways in which women are perceived in society when considering peep-shows, pornography and prostitution: see eg decision of 15 December 1981 in the 'Peep Show' case, BVerfGE 64, 274 (German Federal Constitutional Court); *R v Butler* (1992) 1 SCR 452 (Supreme Court of Canada); *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* [2002] ZACC 22 (South African Constitutional Court).

¹¹⁰ *Obergefell et al v Hodges, Director, Ohio Department of Health, et al*, 135 S. Ct. 2584 (2015) (US Supreme Court); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (n 107); Michèle Finck, 'The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective' [2015] *International Journal of Constitutional Law* <<http://dx.doi.org/10.1093/icon/mow009>> accessed 8 February 2016.

¹¹¹ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7 (South African Constitutional Court); *Francis Coralie Mullin v The Administrator, Union Territory of Delhi & Ors* (1981) 2 SCR 516 (Indian Supreme Court).

¹¹² *Port Elizabeth Municipality v Various Occupiers* (n 111) para 18.

which dignity functions in judicial reasoning is as a concept through which other rights are interpreted.¹¹³ Where dignity is understood to encapsulate our relatedness to place, this is a concern that can be read into judicial understandings and applications of a range of human rights. In Pakistani jurisprudence, for example, courts have used the concept of dignity to extend the right to life to include 'all such amenities and facilities which a person born in a free country is entitled to enjoy'.¹¹⁴ In *Zia v WAPDA*, the Court found that the construction of grid stations, factories, power stations and similar facilities might violate the right to life read in light of dignity. The Court expanded the right to life to include concerns about the alteration of place which included considerations of an environmental nature.

A Malpasian approach to dignity suggests it is a concept through which courts can consider the ways in which place *matters to us* (and matters to the realisation of our rights) and to consider how our environmentally degrading activities not only damage a world 'out there', but may also have significant bearing on our sense of our own identities in our engagements with others and the world. Malpas argues, '[o]nce we understand the way in which subjectivity is tied to embodied, active spatiality, and to particular places, then we can well understand how the separation from places and possessions may indeed be almost literally a separation from parts of oneself.'¹¹⁵

Human rights courts already recognise the importance of place to cultural and individual identity in certain instances, and have recognised that removing people from their home or territory harms people in ways that extend beyond economic interests in property. In the *Endorois* judgment, for example, the African Commission of Human Rights found that the forced separation of the Endorois people from their land threatened their collective identity as a people.¹¹⁶ Stripping away a sense of relatedness to the world and to others may also result from the significant changes that arise as a result of environmental degradation and industrialisation. A number of scholars have explored the impacts of significant industrialisation and environmental transformation on individuals' and communities' articulations of their own identities.¹¹⁷ Glenn Albrecht has argued that environmental destruction can cause symptoms of 'place pathology' – a sense of disorientation and displacement - for those who experience it, and that degradation of the environment surrounding one's home can cause the breakdown of the normal relationship between their psychic identity and [the] home'.¹¹⁸ Albrecht's idea of 'solastalgia' suggests that one can have the experience of being forcibly removed from

¹¹³ Waldron (n 33); Daly (n 41).

¹¹⁴ *Zia v Pakistan Water and Power Development Authority*, PLD 1994 Supreme Court 693, paras 712–713.

¹¹⁵ Malpas (n 84) 183–184.

¹¹⁶ Decision of 4 February 2010 in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, 276/2003 (African Commission on Human and Peoples' Rights).

¹¹⁷ See eg Anna J Willow, 'The New Politics of Environmental Degradation: Un/expected Landscapes of Disempowerment and Vulnerability' (2014) 21(1) *Journal of Political Ecology* 237.

¹¹⁸ Glenn Albrecht, "Solastalgia". A New Concept in Health and Identity' (2005)(3) *PAN: Philosophy Activism Nature* 41, 44.

one's home when the environmental circumstances of that home are significantly degraded.

This points us to the second way in which a Malpasian reading of dignity may be useful in judicial reasoning in regard to the environment. A Malpasian reading of dignity suggests courts should be considering the ways in which environmental harms *threaten dignity*, extending beyond the limited, common recognition of environmental harms only in instances of an imminent threat to health or life, or threats to property.¹¹⁹

In the matter of *Kyrtatos v Greece*, for example, the European Court of Human Rights (ECtHR) found that 'even assuming that the environment has been severely damaged ... the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights...'.¹²⁰ The Court noted that the land the applicants sought to preserve was not part of the property they owned. The applicants in that case alleged that the area had lost its beauty and was transformed from natural habitat to tourist development. This, the Court found, did not constitute a violation of rights to privacy or family life under Article 8 of the European Convention on Human Rights.¹²¹ Thus, the Court appears to hold that the conservation of nature is not an interest that would be ordinarily assumed to be protected by human rights norms.

The ECtHR interpreted the Article 8 right to home and private life as protecting property, but if it had considered the right in light of dignity (as it has done in other cases),¹²² it might have considered the ways in which the destruction of the swamp implicates the applicants' interests. While dignity plays a central role in the jurisprudence of the Court in relation to its interpretation of a range of rights, including Article 8, the Court tends to steer away from dignity considerations and reasoning in cases of an environmental nature. A Malpasian approach to dignity suggests that dignity may be implicated in these cases, where environmental degradation results in a stripping of the relatedness that claimants have to place or to others. The Court could have interrogated what it means for environmental degradation to impact on the personal sphere of the applicants, requiring it to consider the ways in which people use, engage with and relate to their environments.¹²³

While courts have traditionally considered environmental impacts and harms in almost exclusively physical terms – considering harm to property or human health, for example – Malpas offers an account of humanness and place that calls for a consideration of the

¹¹⁹ See eg *Balmer-Schafroth and others v Switzerland* (1997) 25 EHRR 598 (European Court of Human Rights).

¹²⁰ *Kyrtatos v Greece* (2005) 40 EHRR 16.

¹²¹ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ETS 5).

¹²² Such as in *Goodwin v United Kingdom* (n 54).

¹²³ There is, in the judgment, a suggestion that the court did see this – in the comment (at para 53) that had the degraded environment been a forest area, the court would have recognised an impact on well-being.

ways in which the organisation of space – including through environmentally damaging conduct – impacts our subjectivity and our personal or cultural memory or identity:

We understand a particular space through being able to grasp the sorts of “narratives of action” that are possible within that space; we understand a place and a landscape through the historical and personal narratives that are marked out within it and that give that place a particular unity and establish a particular set or possibilities within it.¹²⁴

Some human rights courts already recognise the importance of place to cultural and individual identity in certain circumstances, and particularly in cases concerning indigenous and tribal groups. Indigenous groups are recognised by various human rights courts as having a ‘special connection’ to land or territory. In a significant number of cases, the Inter-American Court of Human Rights (IACHR) and Inter-American Commission of Human Rights have identified a ‘distinctive’¹²⁵ and ‘special’¹²⁶ relationship between indigenous and tribal peoples and their territories that ‘warrants special measures of protection.’¹²⁷ The protection of this relationship has been recognised as ‘fundamental to the effective realisation of the human rights of indigenous peoples more generally’.¹²⁸ This connectedness to land manifests not only in how individuals and groups engage with nature, plants and animals, but also in how people engage with one another. The IACHR has found that ‘the indigenous population is structured on the basis of its profound relationship with the land’¹²⁹ and that ‘land, for the indigenous peoples, is a condition of individual security and liaison with the group’.¹³⁰

Malpas’ account of dignity may allow courts to consider the role of place in our relationships and self-understanding beyond the idea that connection to land is a cultural phenomenon unique to indigenous groups. If a sense of interconnected concern for the environment is described as spiritual or religious, it is, as Rawls argued, discounted from the kinds of public reasons that can legitimately justify judicial decisions – that is, reasons that are ‘capable of being understood and accepted by people of different faiths and cultures.’¹³¹ The exclusion of cultural content in reasoning is

¹²⁴ Malpas (n 84) 186.

¹²⁵ *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) Series C No 79 (Inter-American Court of Human Rights) para 149.

¹²⁶ *Saramaka People v Suriname* (2007) Series C No 172 (Inter-American Court of Human Rights).

¹²⁷ *Mary and Carrie Dann v United States* (2002) Doc. 5 rev. 1 at 860 Case 11140, Report no 75/02 (Inter-American Court of Human Rights) para 128.

¹²⁸ *ibid.*

¹²⁹ *Fifth Report on the Situation of Human Rights in Guatemala* [2001] OEA/SerL/V/II111 doc 21 rev XI.

¹³⁰ *Second Report on the Situation of Human Rights in Peru* [2000] OEA/SerL/V/II106 Doc 59 rev (Inter-American Court of Human Rights) X; Inter-American Commission on Human Rights, ‘Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources’ (2009) OEA/Ser.L/V/II. Doc. 56/09.

¹³¹ John Rawls, ‘The Idea of Public Reason Revisited’ (1997) 64(3) *The University of Chicago Law Review* 765; Jeremy Waldron, ‘Public Reason and Justification in the Courtroom’ (2007) 1(1) *Journal of Law,*

evident even in those cases where courts stress their recognition of a cultural connection to land. In a string of cases before the IACHR, the Court recognised the spiritual significance of the land to the indigenous group before it, but decided the cases as collective property right claims.¹³² While courts such as the IACHR have taken great strides in protecting indigenous land claims by securing indigenous groups property rights, this jurisprudence has failed to adequately protect the *relationship to land*. What is protected, ultimately, is the right to property and the challenges that mining, logging and other environmentally destructive activities pose to this connectedness become redefined as ‘a standard property law problem’ of control and exclusion.¹³³ The IACHR rarely considers the importance of protection of the relationship to land as a matter of dignity.¹³⁴

There are distinctive features of indigenous groups’ cultural, historical and practical relationships to place that merit special protection, but a Malpasian approach allows us to explore the nature of our relationship to place both within and beyond indigenous land claims in a way that may allow us to better protect indigenous and non-indigenous people. Malpas argues that this connection to land is not unique to indigenous groups but that we might ‘begin to admit some recognition, in our own experience, of the presence of something of the Aboriginal feeling for the intimacy of the connection to land and to locality’.¹³⁵ A Malpasian approach to dignity suggests an avenue for courts to begin to consider interests and protections beyond property by asking what is necessary to protect our relatedness to place as an aspect of our dignity, rather than limiting our human interests in the environment to property, health or religious belief.

While Malpas does not outline a practical philosophy, and while he does not stipulate the implications of a place-based account of humanness for our relations with the environment in which we live, his topological account is, nevertheless, useful, particularly when considering the role of dignity in judicial decision-making. In contemplating our dignity, human rights courts have contemplated who we are (as actual and legal persons), and interrogated how we are to be protected and how our rights are to be realised. A Malpasian reading of dignity suggests not only that we must take into account place in our understanding of dignity but that place cannot be dismissed or considered to be merely contingent in the reasoning of courts. In stripping away our sense of relatedness to the world, we strip away at ourselves and we dilute that which we think gives our lives meaning.

Philosophy and Culture 107. See also Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford University Press 2002) 289.

¹³² Eric Dannenmaier, ‘Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine’ (2008) 86 *Washington University Law Review* 53, 90.

¹³³ *ibid.*

¹³⁴ See, however, the discussion on *vida digna* in Thomas Antkowiak, ‘Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court’ (2013) 35(1) *University of Pennsylvania Journal of International Law* 113.

¹³⁵ Malpas (n 84) 10.

4. Conclusion: Making Human Dignity Count for the Environment

In this article I have sought to insert the concept of human dignity into discussions about the roles our ontological assumptions play in our environmental decision-making and conduct, and particularly into the environmental reasoning of human rights courts. Courts frequently rely on the concept of human dignity to explore questions of our self-understanding and identity. Understanding human dignity is important if we are to identify and challenge the ontological assumptions shaping judicial reasoning in environmental cases.

While human dignity is a concept that emerges from a long historical association with the superiority of humanity over the natural world, it is a concept that, in its legal articulations, is open to a number of different accounts of our humanness. Most importantly, it is a concept that has evolved, and continues to evolve, in response to our experience of indignity and to the emergence of new threats. Rather than importing into law's framework an anti-environmental understanding of humanness, dignity is a tool through which courts might reconsider the human/environment relationship as they face divergent environmental threats.

Dignity is a concept that can accommodate a conception of humanness that is emplaced and constituted in the world in which we find ourselves. In this respect, I considered an account offered by Malpas that extends our relational self-understanding to include our relationship to the world. While a topographical understanding of humanness does not offer easy answers to questions about how, when and why we ought to change the world we live in, it does offer courts an opportunity to consider how our emplacement shapes who we are, and to recognise the ways in which stripping our relationship to the world (through displacement and through degradation) threatens our dignity.