

## OVERVIEW: MAPPING DIGNITY LAW

[H]uman dignity—the inherent, equal, and inalienable worth of every person—is foundational to a just rule of law; and . . . the American Bar Association urges governments to ensure that “dignity rights”—the principle that human dignity is fundamental to all areas of law and policy—be reflected in the exercise of their legislative, executive, and judicial functions.

— American Bar Association Resolution 113B, adopted August 2019

Respect for human dignity is often assumed to be one of our most cherished social and legal ideals. It hovers over our laws like a guardian angel. It is invoked on ceremonial occasions, in preambles to constitutions and charters of rights, and in solemn pronouncements of courts—in an effort to display the majesty of the law. Yet dignity has attracted relatively little analysis as a concept, whether by legal scholars or philosophers. There is a sense in which Dignity with a capital “D” might be thought to underlie every norm of a just legal system; human dignity in a very abstract sense provides the ultimate justification for every legal rule.

— Denise G. Reaume, *Indignities: Making a Place for Human Dignity in Modern Legal Thought*, 28 QUEEN’S L.J. 62 (2002)

In jurisdictions around the world, lawyers and judges conceive of human dignity as the normative basis of human rights, a principle that demands the constitutional protection of human rights, the basis for interpreting constitutional rights, a standard for justifying limitations on constitutional rights, and as a substantive constraint on the power to amend the constitution to dilute rights protection. Wherever disputes arise about the duty that attends the exercise of public authority, the concept of human dignity inevitably emerges.

— Jacob Weinrib, *Human Dignity and Its Critics*, in COMPARATIVE CONSTITUTIONAL THEORY, Gary Jacobsohn & Miguel Schor (eds.), Edward Elgar, 2019

Acknowledged as a notion that neither exists in today’s society nor is a proper description of the world, human dignity is nonetheless accepted as possibly “the premier value underlying the last two centuries of moral and political thought.”

— George P. Smith II, *Dignity in Living and Dying*, 25 IND. J. GLOBAL LEGAL STUD. 413, 414 (2018)

Welcome to the study of dignity law. The concept of human dignity has deep roots in philosophy, governance and religion going back millennia. Philosophers throughout the world, from Aristotle, Cicero, Jesus, Siddhartha Gautama, Ignatius, Kant, to Arendt, Lacan, Heidegger, Kateb, Dworkin and Waldron have all been drawn to the challenge of understanding and defining it. Only in the last few decades has it found a foothold in law; but once there, its roots have spread quickly and far. This casebook is

designed to show how law has adapted to the recognition of universal and inherent human dignity. We do this mostly by focusing on the cases that have developed, defined, and applied it in countless cases. Although the topic is broad and deep, the casebook is designed to be accessible by anyone interested in law's potential, including students, lawyers, judges, policymakers, and others.

So what difference does dignity make to law? It turns out it makes a lot of difference, and that impact can be seen just about everywhere on the planet. In fact, dignity is the strong thread that weaves together all human rights, whether found in international, regional, domestic or municipal law. Advancing dignity is the founding premise of the United Nations, the primary objective of the Universal Declaration of Human Rights, sole shared attribute of the twin covenants on international rights, and the conceptual foundation of virtually all human rights treaties. The constitutions of more than 160 nations expressly protect recognize legal rights to dignity. And, thousands of court decisions from nearly every culture and country on the planet have turned to human dignity to define rights and dispense remedies. Simply, despite its abstruse philosophical underpinnings, dignity matters in real ways to real people. *See* Erin Daly & James R. May, *A Dignity Rights Primer*, 3 JURISTE INTERNATIONALE 21–27 (2018).

Among the most dramatic changes in law over the last few decades is dignity's increasing purchase to advocates and judges. In addition to describing an objective of normative behavior, dignity has a significant impact on law and legal systems of all stripes as both a stand-alone right and a basis for issuing remedies. While this is a "case" book, we don't only turn to cases to tell the story of dignity law because we are lawyers and academics. We do so because it is largely in courtrooms—and not with philosophical debate, treaties, or even constitutions—that dignity is put into action. Judges hear claims based on violations of rights to human dignity, decide whether there are infractions and if so what to do about it, and then ensure compliance, if at all. It is in courtrooms that dignity finds its voice, sometimes softly—*e.g.*, as applied a right to water or higher education—and other times seemingly screaming—*e.g.*, as applied to application of the death penalty, conditions of incarceration, or the effects of climate change.

This casebook aims to listen to and convey dignity's voice. In a way, the book engages in a sort of intellectual anthropology: it studies how dignity is implemented under law by examining the best evidence of its legal existence—the work that dignity does in courtrooms across the world. Thus, for the most part, this book engages dignity law through the lens of the jurisprudence that gives it operative shape.

Our interest in dignity law arises out of several hypotheses. As you read the cases and familiarize yourself with this body of law, consider whether or not you agree with the following suppositions:

1. The rights associated with dignity are rights that all human beings have just *by virtue of being human*. By understanding these cases, we can understand something about the nature of being human. This is perhaps why, despite the variations in legal cultures throughout the world, there is remarkable consensus in what the cases say about dignity and the scope and applications of dignity rights. We can read the cases as if they are ultimately describing what we all have in

common: anywhere in the world, a human being is a being who has a personality they want to develop, who wants to express themselves freely, who wants to be treated fairly and live with comfort above a mere subsistence level, so that they can live in community with others and participate in the life and development of that community. This list probably applies generally to everyone, regardless of culture. And it probably applies in some way to every person who has ever lived, as well as to future generations—even though the specific conditions will vary over time and across space.

2. Dignity cases are more people-centered than cases in other areas of law in that they are more likely to concern the actual circumstances of people's lives than abstract rules and principles. Are these cases more compassionate? Do they understand the injuries people feel in ways that are more holistic? Courts are referring to dignity because they want to say something important about human nature and the relationship between human beings and the state. Consider the recent global spate of cases relating to social justice, gender and sexual orientation and identity, the decriminalization of same-sex conduct, the right to marry and adopt, and the right to self-identity according to one's sense of self rather than according to the category assigned by others at birth. Almost all of the cases come out the same way, holding that there is a dignity right to marry the person of your choice regardless of gender. This is a stunning development given that human history has, up until now, legally sanctioned only opposite-sex marriages. Moreover, in some sense, these cases are about non-discrimination and most could have been decided as violations of equal protection. But it is noteworthy that these cases have arisen on the crest of the wave of dignity jurisprudence and, in country after country, courts have chosen to decide them by reference to human dignity. What work is dignity doing in these cases? And what applications does this have to challenges like the Covid-19 Pandemic, Black Lives Matter movement, and climate crisis?
3. Judges construing dignity rights are jurists, not philosophers. They do not have the luxury of writing about the nature of humanity just for its own sake. Rather, they are obligated to resolve questions that arise from specific factual circumstances, apply existing law to those facts, and then devise remedies for any wrong that has been done, usually by the government against an individual or group. If there is no dignity violation, the government need not do anything but if there is, the government must rectify it. Dignity cases are blurring the line between positive and negative rights, since violations of dignity can occur just as readily from acts of commission as from acts of omission.
4. In writing what it means to be human, courts are also defining the line between the individual and the government, between private authority and public power; in so doing, they are defining what governments owe people so that every person everywhere may live with dignity. Jurisprudence in which the value of (or right to) dignity is vindicated is more likely than other areas of law to advance democratic values of political engagement and participation.

## Features of Dignity Law

This casebook surveys the body of law that touches on almost every interest that is important to people, and across the entire globe. Take a look at the table of contents of this book to get a sense of its scope and coverage. You will notice several things: the jurisprudence is global, it is mostly from apex courts, it touches on nearly every matter of importance to people, and it is an emerging and dynamic field of law. We invite you to reflect on the following sets of questions as you read the cases:

**First, the jurisprudence is global.** The cases herein come largely from national courts and on rare occasions regional courts and international bodies. For the most part, we are considering the domestic constitutional law of each country; however, rather than focusing on a single jurisdiction or region, we scan the entire world for trends and examples of dignity jurisprudence. In this sense, it is also a project of comparative law in that in reading the cases, we can see differences and similarities across countries.

- The book includes cases from dozens of countries. To what extent does each court's dignity jurisprudence reflect the nation's culture and history? What region of the world is the country in? Do you know anything about the religious or cultural influences in the country? Be aware of what you know about each country and if necessary, do a little bit of research on the countries so you have a sense of their story. Notice any reasons why that country might be particularly attuned to the concept of human dignity and consider what particular interests or needs dignity under law would be expected to serve in that country.

Some countries have glommed onto dignity for particular historical reasons. For instance, the 1949 Basic Law of Germany was adopted in the immediate aftermath of World War II to help the country transition from the Nazi regime to a democratic one based on human values. The 1949 Constitution of Japan was adopted at the same time, and transitioned the country from a militaristic and imperialistic nation into a modern democracy without an active military. The 1950 Constitution of India was adopted after India gained independence from Britain in 1947. Some of the constitutions in Latin America from the 1980s and 1990s were adopted after the end of military dictatorships, and the constitutions of Eastern Europe of the early 1990s were adopted when democracy returned after perestroika when the former republics of the Soviet Union became independent. The 1996 Constitution of South Africa was adopted to help the country transition from one that was defined by the apartheid policies of racial segregation and oppression into a "rainbow nation" under the leadership of Nelson Mandela. Consider these transitions as you read the cases from these countries.

- "Borrowing." Notice how in this emerging and evolving area of the law, courts are aware of trends outside their borders. For instance, you will see that dignity law "travels" as constitutional courts "borrow" or learn from one another. Sometimes, judicial borrowing occurs even where the political landscape would seem to resist it. For instance, some courts in Pakistan have borrowed heavily from

Indian constitutionalism, as well as from Israeli decisions about human dignity. What are the advantages of judicial borrowing? What are some challenges?

A major challenge might be how the “borrowing” court knows if it is getting another country’s jurisprudence “right.” For instance, you will see in the landmark decision of *Makwanyane v. South Africa*, in which the Constitutional Court of South Africa invalidated the death penalty as contravening both the right to life and the right to dignity, that the Court relied heavily on jurisprudence from the United States (among other countries). But although the United States experienced a moratorium on the death penalty for a few years in the 1980s, the Supreme Court subsequently changed course and has since found that capital punishment is constitutional. Under these circumstances, what is the purpose and the effect of the South African Court’s borrowing of U.S. law?

Hungary furnishes another example of the challenges of borrowing: In the 1990s, the Hungarian Court was among the most progressive in the world on the subject of dignity, having developed a broad and deep jurisprudence expounding the importance what it called a general personality right. Many courts borrowed from that jurisprudence because the court was so insightful about the meaning of dignity, particularly in the transformative context. But in 2011, Hungary amended its constitution and eliminated the right to dignity and rendered ineffective the dignity jurisprudence that had built up. How should courts that had borrowed from Hungary during the dignity years think about their own jurisprudence? Dignity rights are a global concept, having derived from the Universal Declaration of Human Rights and being reflected in almost all the major human rights instruments. Yet, each country’s constitutional court is giving dignity the particular meaning that it must have within the cultural, historical, economic, political, and social context of that country. You will see similarities across jurisdictions—what can be called an “overlapping consensus.” But you will also notice national distinctiveness. Although courts are “borrowing,” they are making dignity jurisprudence specific to their own country’s conditions at this particular time. In some countries, for instance, it is a religious concept (*e.g.*, in Unit 2 a case from Pakistan explaining that dignity is a Muslim concept, or in Unit 3 a case from Israel explaining that dignity is a Jewish concept), and in other countries, it is secular or not specific to any one religion or cultural tradition. For more on the concept of “borrowing,” see Catherine Dupré, *Human Dignity in Europe: A Foundational Constitutional Principle*, 19 EURO. PUB. L. 319 (2013); *Human Dignity as a Foundational Value of Our Constitutional Order*, 2000 S. AFR. J. HUM. RTS. 193; Michelle Freeman, *The Right to Dignity in the United States*, 68 HASTINGS L.J. 1135 (2017); Michael Sachs & Ariel Bendor, *Human Dignity as a Constitutional Concept in Germany and in Israel*, 44 ISRAEL L. REV. 25 (2011); Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 46 CORNELL INT’L L.J. 1 (2013); Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity, and the Struggle for Constitutional Transformation* (2014); and CJA Chaskalson, *Human Dignity as a Foundational Value of our Constitutional Order*, 2000 S. AFR. J. HUM. RTS. 193.

**Second, the jurisprudence is mostly from apex courts in each country.** Although some of the cases in this book are from lower courts within a country, and some are from supra-national regional courts, we focus on constitutional courts for several reasons.

- Constitutional courts tend to be very influential within their countries: what constitutional courts say matters. It tends to matter in at least three ways. First, constitutional court judgments are most likely to be enforced because they are most prominent. Second, they matter to the development of the law because they are binding on lower courts. And third, they matter to people: constitutional cases are more likely to be reported in the press and more likely to be known and be understood by ordinary people, outside the legal profession.
- In addition (or perhaps because of these facts), constitutional court judges tend to explain their reasoning with care and precision. Thus, we can see both a decision and a rationale. In the context of dignity jurisprudence, this is critical because the jurisprudence is so new and evolving.
- Constitutional court decisions in many countries have enormous normative power. Think for instance of the legal and cultural impact of some decisions of the United States Supreme Court on desegregation (*e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954)), or on abortion (*e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973)), or the rights of suspects in criminal cases (*e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966)). These cases, and cases like them, stand not only for a particular rule of law but for a broader principle that can influence political actors and shape society.

**Third, the jurisprudence touches on nearly everything of importance to human beings.**

- Most casebooks address one particular topic—business, or family relations, or property or religion. But the cases collected in this casebook touch on all of these, and many more issues. This is because human dignity touches on every aspect of being human: it impacts how we feel about ourselves and how we relate to others. People absorb diminutions to their dignity in variegated ways: from physical abuse (be it a slap on the face or torture) to insults to identity that make a person feel “less than” or demeaned (as when the government discriminates or stigmatizes) to conditions that make it impossible for a person to live with dignity (such as when a person is deprived of health care, a healthy environment, shelter, food or water). Any of these—and many others—can prompt a person to pursue legal relief.
  - One case from Colombia, which has a very rich dignity jurisprudence, has said that that country’s dignity jurisprudence falls into three broad categories
    - (i) human dignity understood as autonomy or as the possibility of designing a life plan (living as one wishes);
    - (ii) human dignity understood as certain material conditions (living well) and

- (iii) human dignity understood as intangible goods, i.e., physical and moral integrity (living without humiliation).

*See* Sentencia T-088/08, Colombia (Constitutional Court, 2008).

We have followed this broad categorization in the chapters that follow, considering cases that treat dignity as important to individual identity and personal flourishing (Unit 2), as defining a certain quality of life and the incidents necessary to enable people to live with dignity (Unit 3), as being particularly precarious especially for people in conditions of vulnerability or humiliation either by virtue of their circumstances or because they are entangled in some way in the criminal justice system (Unit 4).

We have added to this trichotomy a fourth category of cases that involve rights of participation in political and public affairs, or what we call “participatory dignity,” (Unit 5). Many of the cases involving other areas of law indicate that it is important to protect individual human dignity so that people can participate in society with others and, in particular, participate in social and political affairs. We believe that these cases merit attention on their own because of the significance of political participation to constitutional democracy. These cases involve what are sometimes known as civil and political rights, essential to a dynamic, dialogic democracy. Many involve dignity-related rights enumerated in the International Covenant on Civil and Political Rights, including, for instance, the right to free speech, the right to vote, and the right to free association.

Nonetheless, the issues raised in all of these cases sometimes straddle several different categories of concern: is a case about forced sterilization a case about identity or about family or about humiliation? Is a case about the displacement of indigenous peoples about self-determination, cultural rights, or environmental rights, or about the right to participate in government decision-making? We have placed such cases in the contexts where they seem to fit best or provide the most insight, though as you read them, you should be aware of the intersecting issues.

**Fourth, dignity jurisprudence is dynamic and emergent.** Although there are a handful of earlier cases, the vast majority of dignity cases decided around the world were decided in the twenty-first century, and most within the last ten years. This means that most cases you will read are cases of “first impression” in which the court has never before considered a similar legal question.

- Consider how this affects the development of the law. As a lawyer, how would you make the case that your client’s right to dignity has been violated if this has never before been accepted in the courts of your country? How would you convince a judge that dignity is an actionable right?
- If you were a judge, where would you turn for guidance? Would you consider similar cases in your own legal system that are not explicitly dignity-based cases? Would you consider the jurisprudence of other countries? Or look to international law, whether treaty-based or customary? Would you rely on values underlying rule of law, democracy, or human rights? What principles would govern your analysis?

Fifth, you'll notice one other feature of these cases in the aggregate: in almost all of the cases collected here, **the dignity claimants win**. This is lopsided, because in the real world, they don't. But cases where the dignity claimants lose do not tend to address the dignity arguments at length: when courts rule against the dignity claim, they don't tend to explain why. While we don't want to create the impression that dignity is always a winning card, we have selected the cases here to showcase not the win-loss record in this area of the law, but the ways in which courts all around the world are engaging and advancing dignity, so we have over-sampled the opinions that take dignity seriously.

As you read the cases, we encourage you to think about several aspects of dignity jurisprudence that will become clear as you immerse yourself in this area of law. Each of these are issues courts deciding dignity cases must address; some courts address some of these issues explicitly in some of the cases, although we think they exist at a subtextual, if not textual, level in all cases. We can think of these as topics, or as tensions between two competing poles:

1. Judicial authority: where is the line between judicial authority and political power? How sensitive is the court to that line?
2. Nature of dignity: is it an intrinsic human quality or a right to be asserted against a state?
3. Function of dignity in law: is dignity an actionable right or a fundamental value in the society? Or is it an interpretive tool that directs courts how to interpret other rights?
4. Direction of dignity: is dignity the source of rights or the purpose of rights? Can it be both?
5. Type of dignity right: is dignity a substantive right or a procedural right? That is, is the right being claimed to live with dignity (*e.g.*, the dignity right to water or to decent pay) or is the recognition of dignity necessary to achieve or experience something else (*e.g.*, the dignity right to vote or to participate in community governance)? And notice that the line between these categories can be very blurry: is a right to demonstrate in the streets a substantive right of free expression or a procedural right? Most likely, from a dignity standpoint, it's both.
6. Interpretation of constitutional texts: does the constitution use "dignity" explicitly (and if so, in a general sense or associated with a particular interest) or does the court infer dignity from other provisions of the constitution (*e.g.*, the right to life or the right to health or a right to a healthy environment)?
7. Relationship of dignity to other rights: is dignity a stand-alone right or is it supportive of other rights?
8. Whose dignity is at stake: is dignity a right for the individual or for the community? Notice that in some contexts this question may relate to *locus standi* (or standing, as it is called in the United States), which relates to the question of who can bring a claim.
9. Limits of dignity: are dignity rights absolute, or can they be balanced against other rights or important state interests? Can they be limited if necessary to promote "a free and democratic society"?



10. Remedies: does dignity define the contour of the remedy? For instance, if the court orders the cleanup of a river or a revised pension plan or better prison conditions, should the ability to live with dignity be the measure of the remedy? And, again, where is the line between judicial authority and political power? And how sensitive is the court to that line?

### A Note about Case Selection

Like every casebook, this one includes only a small percentage of the total body of dignity law—those cases that have been selected because they are representative of a class of similar cases, or sometimes for the opposite reason: because they are extraordinary in some way. Or a case may be chosen simply because it explains an idea or a principle particularly well. Also like every casebook, this one includes longer case excerpts for cases that are especially important either in their own country or globally, and shorter excerpts and note cases to provide nuance or context or detail about a particular application of dignity doctrine.

In selecting the cases, we have been guided by the following principles. First, although most cases touching on human rights are in some sense about human dignity, we have limited this casebook to cases that discuss dignity explicitly and expressly. Second, there are thousands of cases that mention human dignity; we think of these as the “and dignity” cases because they are usually about some other right and reinforce the weight of their conclusions by saying “equality and dignity” or “life and dignity.” We have excluded these cases, restricting the casebook to cases that say something important about dignity. Third, we have only included cases about *human* dignity, not the dignity of things (like courts or states) or the dignity assigned to people because of their rank (the president, a judge), or the dignity of non-human living beings, even as those beings are increasingly being recognized as bearing rights. Fourth, we have tried to be geographically inclusive, although there is no avoiding the reality that some courts are more focused on dignity under law than other courts and some of those courts are particularly adept at explaining the meaning and application of dignity under law; thus, there are a disproportionate number of cases from India, South Africa, Germany, Colombia, Pakistan, and Israel; but we have tried to include cases from many other countries as well. Even this over-representation, though, is telling as it spans countries from all continents and all legal traditions and countries that root dignity in diverse cultural and religious traditions. Fifth, our focus has been on constitutional court cases (for reasons explained) although we have included some important cases from lower courts or subnational high courts as well as from regional bodies in Europe, the Americas, and Africa. And, sixth, we have been limited largely by cases that are available in English, French, Spanish, and Italian.