

Human Dignity in Indian Constitutional Adjudication

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1 INTRODUCTION

The Supreme Court of India has accorded an exceptionally high status to human dignity as a constitutional value. Human dignity has been held to be ‘the founding faith of the Constitution’ and the ‘core of Fundamental Rights’. According such high status to dignity in the Indian context is intriguing as the constitutional text lists dignity as one of many values such as equality, liberty, fraternity, and justice. Dignity is not articulated as a supreme value or as a source of rights. In fact, it does not find any mention in the chapter on Fundamental Rights.¹ How then has the Court explained the special significance of dignity, and what implications does that have for constitutional adjudication?

Towards answering these questions, this chapter conducts a bottom-up exercise in mapping the application of human dignity by the Supreme Court of India (hereafter ‘the Court’). Section 2 describes the place of dignity in the constitutional text. Section 3 examines how dignity has figured as a source of unenumerated Fundamental Rights and points out inconsistencies in judicial reasoning about dignity in this context. Section 4 first describes how dignity has been employed as a foundational value both for the Fundamental Rights and for the Constitution itself. By examining landmark cases on non-discrimination, the right to die, and privacy, I point out how dignity figures as a right, a value justifying rights, and a reason for limiting rights. Section 5 examines the status of dignity as an absolute value or a limited right.

I draw the following conclusions from this mapping exercise. First, the Court’s articulation of the content of dignity is perilously thin even if it leans towards a Kantian intrinsic-worth account. Second, the Court has transitioned from

^{*} I thank Akruti Ramchandran, Prarthana Bhatija, and Raja Venkata Krishna Dandamudi for research assistance. The chapter has benefitted from comments by participants in workshops at the Human Dignity in Asia Conference, Academia Sinica Taipei, the IVR Annual Conference 2019, and the Faculty Research Seminar Series at Jindal Global Law School.

¹ Part III of the Constitution of India is on Fundamental Rights. They act as standards for judicial review for legislative and executive action.

unanchored speculation on the content of dignity to uninhibitedly relying on academic literature across disciplines on dignity. This transition has not lent more clarity to the content of dignity; rather, it raises questions about the use of extralegal materials in judicial decisions. And finally, the Indian experience, akin to several other jurisdictions, raises concerns that arise when legal actors employ moral and political values as justifications for decisions.

The primary evaluative lens that I employ for these conclusions is that of the content of dignity. I prioritize content over the institutional role that dignity can play (e.g. as an agreement-gathering tool that generates a sort of overlapping consensus on moral and political disagreement). In the burgeoning literature on dignity in philosophy, law, and bioethics, the questions of content and of institutional roles have emerged as central concerns about dignity.² The standard view on content, particularly in law, is that the content of dignity is indeterminate. Consequently, dignity has been characterized as an essentially contested concept, an interpretive concept, and a placeholder.³ Debates in law have particularly invited fresh philosophical reflection on dignity along these lines.⁴ Indeterminacy allows sustaining arguments about dignity being culture-relative, on the one hand, and universal and foundational on the other.⁵ Despite such debates on content, Kantian intrinsic-worth accounts and rank-and-status-based accounts have emerged as substantive theories of the content of dignity.⁶ I argue here that, in Indian constitutional adjudication, it is the intrinsic-worth account articulated by individual autonomy and self-worth that has been firmly established by judicial decisions.

Questions about the institutional role of dignity are necessarily dependent on the question of content. If a concept must play a justificatory role in adjudication (i.e. as a source of reasons for decisions), then determination of its content is necessary. Content assumes special significance if one is committed to a reason-giving account of constitutional adjudication, which distinguishes adjudication from a notable

² Christopher McCrudden (ed.), *Understanding Human Dignity: Proceedings of the British Academy* (Oxford: Oxford University Press, 2013) (for the legal and philosophical academic interest in dignity).

³ Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law* 19, no. 4 (2008): 655.

⁴ Michael Rosen, *Dignity: Its History and Meaning* (Cambridge, MA: Harvard University Press, 2012); Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', *Metaphilosophy* 41, no. 4 (2010): 464–80.

⁵ Paul Carozza, 'Human Dignity and the Judicial Interpretation of Human Rights: A Reply', *European Journal of International Law* 19, no. 5 (2008): 931; Stephen Riley, *Human Dignity and Law: Legal and Philosophical Investigations* (Abingdon, UK: Routledge, 2018); Christopher McCrudden (ed.), *Understanding Human Dignity: Proceedings of the British Academy* (Oxford: Oxford University Press, 2013) (for the legal and philosophical academic interest in dignity).

⁶ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, tr. Mary Gregor (Cambridge: Cambridge University Press, 1998) (for the intrinsic worth account). For status-based accounts, see Jeremy Waldron and Meir Dan-Cohen, *Dignity, Rank, and Rights* (New York: Oxford University Press, 2012); and Laura Valentini, 'Dignity and Human Rights: A Reconceptualization', *Oxford Journal of Legal Studies* 37 (2017): 862.

aspect of constitution-making.⁷ Ideas such as Rawls' 'overlapping consensus', Cass Sunstein's 'incompletely theorized agreements', or Christopher McCrudden's dignity as a 'placeholder' have gained considerable traction in legal theory.⁸ Such views highlight the agreement-generating role that dignity and other vague values can assume when faced with moral and political disagreement. To be sure, agreement-generating views might explain the role of values in constitution-making as they are suited to bringing people together without having to determine specific rights. Content may not have a significant role in such contexts. Adjudication, however, is a different enterprise, both in terms of purposes and expectations. While in constitution-making we lay out a future project of a political community based on values and other considerations, in adjudication we expect justifications for the determination of rights when faced with disagreement on narrow and focused issues.⁹ Employing concepts in adjudication thus warrants reliance on the content of concepts that litigants employ. Such constraints of justification may be beneficially absent in constitution-making.¹⁰

An additional reason why adjudication is a reason-giving exercise is related to how we view the authority of courts. If courts are authoritative bodies that bind people, then the exercise of legitimate authority requires that courts consider the reasons relevant to the dispute being adjudicated in a transparent manner. Legitimacy, in part, requires that courts provide transparent justifications for their decisions. If courts employ concepts such as dignity as sources of reasons, then transparency cannot begin without what dignity means (i.e. what its content is). For these reasons, I will employ content as a benchmark to assess how the Court has employed the concept of dignity.

2 DIGNITY IN THE CONSTITUTIONAL TEXT

Dignity finds textual space in the Preamble, the Directive Principles of State Policy, and the Fundamental Duties.¹¹ Dignity finds no mention in the chapter on

⁷ Pritam Baruah, 'Human Dignity in Adjudication: The Limits of Placeholder and Essential Contestability Accounts', *Canadian Journal of Law and Jurisprudence*, no. 27 (2014): 329.

⁸ See generally Samuel Freeman, 'Public Reason and Political Justification', *Fordham Law Review*, no. 72 (2004): 2021 (for a comparison of Rawls' and Sunstein's views).

⁹ For reason-giving views of adjudication, see Ronald Dworkin, chap. 4 in *Taking Rights Seriously* (London: Duckworth, 1977); Ronald Dworkin, chap. 3 and 7 in *Laws Empire* (Oxford: Hart Publishing, 1998); Neil McCormick, chap. 5 in *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1978); Mattias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review', *European Journal of Legal Studies* 1, no. 2 (2007): 1; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review', *Law and Ethics of Human Rights* (2010) 4, no. 2: 142.

¹⁰ Cass Sunstein, chap. 2 in *Legal Reasoning and Political Conflict* (Oxford: Oxford University Press, 1996).

¹¹ In the Preamble: 'and to promote among them all FRATERNITY assuring the dignity of the individual and the [unity and integrity of the Nation]'; Fundamental Duties: 'Art. 51A. It shall be the duty of every citizen of India – ... (e) to promote harmony and the spirit of common brotherhood

Fundamental Rights. Despite limited textual mention, the extensive application of dignity in Fundamental Rights adjudication was made possible by creative interpretive techniques. Initially, courts did not consider the Preamble to be a part of the Constitution.¹² This was later overruled by the view that it was an integral part of the Constitution,¹³ containing its ideals and aspirations.¹⁴ The values in the Preamble have since assumed an important interpretive role.

In the Preamble, dignity is to be assured by fraternity. The textual proximity of the two values might be indicative of their mutual content. Until recently, fraternity had not figured as prominently as dignity in judicial decisions.¹⁵ Scholars have, however, pointed out that the relationship between the two values points towards an empowering idea of dignity.¹⁶ Upendra Baxi suggests that dignity and fraternity have distinct roles: dignity being rights-apt and fraternity being duty-apt, where dignity has a rights-generating role. To play that role, however, a question of content must be settled first as it is the content of dignity that would justifiably determine what kinds of rights it supports.

In the Directive Principles of State Policy, dignity figures in the context of the state's responsibility towards the healthy development of children.¹⁷ The Directive Principles themselves are non-justiciable.¹⁸ However, courts employ them to interpret Fundamental Rights by taking Directive Principles and Fundamental Rights to be complementing and supplementing each other.¹⁹ The balance and harmony between the two is held to be a basic feature of the Constitution.²⁰

In the Fundamental Duties, Art. 51A invokes dignity in the context of derogatory practices related to women within a sub-clause about brotherhood amongst the people of India. Dignity's connection with fraternity therefore resonates in this provision. The role of dignity in the Fundamental Duties has not yet witnessed adjudicative action.

amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women'. For the Directive Principles, see n 17.

¹² *Berubari Union and Exchange of Enclaves*, Re, 3 SCR 250 (1960).

¹³ *Kesavananda Bharti v. State of Kerala*, 4 SCC 225 (1973).

¹⁴ *Subbarao J in Golak Nath v. State of Punjab*, 2 SCR 762 (1967).

¹⁵ Smaran Shetty and Tanya Sanyal, 'Fraternity and the Constitution: A Promising Beginning in Nandini Sundar v. State of Chhattisgarh', *NUJS Law Review* no. 4 (2011): 439 (for how fraternity has been applied). Recently fraternity has received more attention in the concurring opinion of Justice S. Ravindra Bhat in *Prathvi Raj Chauhan v. Union of India and Others*, Writ Petition [C] No. 1015 (2018).

¹⁶ Upendra Baxi, 'The Place of Dignity in the Indian Constitution', in Marcus Düwell, Jens Braarvig, Roger Brownsword, and Dietmar Mieth (eds.), *The Cambridge Handbook of Human Dignity* (Cambridge: Cambridge University Press, 2014), pp. 429–30.

¹⁷ 'Art. 39 (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment'.

¹⁸ 'Art. 37. The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.'

¹⁹ 3 SCC 84 (1969).

²⁰ *Minerva Mills Ltd. v. Union of India*, 2 SCC 591 (1980).

The limited textual significance of dignity stands starkly in contrast with the singularly high status accorded to dignity in judicial decisions. In what follows I map how the Court has applied dignity; categorize its application through the lens of content; and bring out inconsistencies that future decisions might have to iron out. I employ the term ‘inconsistency’ as opposed to ‘incoherence’, as the facts of different cases may warrant a distinctive application of the concept that may not immediately cohere or make sense, considering earlier decisions. Such incoherent decisions can still be justified in the context of a specific case. Inconsistencies on the other hand suggest contradictions and, in that sense, share a tenuous relationship with other decisions.

3 UNANCHORED REASONING: DIGNITY AS A SOURCE OF RIGHTS

Human dignity has been central to the Court’s reading of unenumerated rights into the Constitution. Article 21 of the Constitution, which declares a right to life and personal liberty, has been the preferred source for pronouncing unenumerated rights.²¹ Dignity has figured prominently in expanding the scope of this right, as the Court has read the right to life as meaning a right to life with dignity. Though this interpretation was made famous by the decision in *Francis Coralie Mullin*, a case concerning the right of persons in detention,²² its application was extended not only to other civil political rights but also to socio-economic rights. In employing dignity to expand the right to life by pronouncing unenumerated rights, the Court at times takes a minimum-requirements view: that dignity guarantees the bare minimum necessities of life. At other occasions it takes a maximalist view: that dignity guarantees human flourishing. The roots of the minimum-requirements view are found in *Francis Coralie Mullin*, the first case in which dignity was specifically invoked as a justification. The Court held that the right to life with dignity must include the right to basic necessities and ‘the right to carry on such functions and activities as constitute the bare minimum expression of the human self.’²³ This indicated that the burden that dignity put on the state was of securing the basic necessities of life. However, subsequent cases, especially involving socio-economic rights, suggest a maximalist view of dignity.

In the context of the right to food, the Court invoked both maximal and minimal standards of dignity in articulating the justification for the right. The Court acknowledged the minimal standard in *Francis Coralie Mullin* in that the right to life and personal liberty implied something ‘more than mere survival or animal existence’. However, it went on to hold that the right included aspects of life that would ‘make

²¹ Anup Surendranath, ‘Life and Personal Liberty’, in Madhav Khosla, Pratap Bhanu Mehta and Sujit Choudhury (eds.), *Oxford Handbook of Indian Constitutional Law* (Oxford: Oxford University Press, 2016), pp. 746–61.

²² *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, 1 SCC 608 (1981).

²³ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*.

a man's life complete and worth living'. This included 'enjoyment of life and its attainment – social, cultural and intellectual – without which life cannot be meaningful'.²⁴

A maximalist interpretation of what dignity requires is affirmed by other cases such as those on the right to residence, where the Court articulates the objective of the right to dignity as developing a person into a 'cultured being'.²⁵ A maximalist interpretation of dignity might also be supported by decisions that hold that dignity, along with equality, is the basis of all Fundamental Rights as well as other parts of the Constitution such as the Preamble and the Directive Principles.²⁶ Drawing such a connection entails that dignity is not limited to interpreting the right to life alone. Rather it is germane to understanding the values in the Preamble that include social and economic justice, liberty, equality, and fraternity.

This expansive interpretation gets further vindicated when dignity is related to the Directive Principles, which aim at promoting social welfare and the common good. These principles articulate a range of state obligations including protection of women and children, prevention of concentration of wealth, the right to work, workers' rights, compulsory education, public health, and a uniform civil code. It is no coincidence that the Court often employs the Directive Principles when it imposes positive obligations on the state to protect Fundamental Rights. A good example is the landmark case on the prohibition of bonded labour, where the Court held that the link between the Directive Principles and the right to life with dignity is fundamental to an understanding of the right to life under Article 21.²⁷ The uniqueness of this view merits extracting this long passage:

14. It is the fundamental right of everyone in this country, assured under the interpretation given to Article 21 by this Court in Francis Mullen's case, to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles . . . and at the least, therefore, it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.

This is a peculiar excerpt since here dignity itself is derived from different specific requirements that are posited in the Directive Principles. It appears that the Court thinks that components of a dignified life are articulated in the Directive Principles; however, in doing so it seems to have made freedom and dignity a part of the components of a dignified life articulated exclusively through socio-economic

²⁴ *PUCL v. Union of India*, I.A. Nos. 94 and 96 in W.P. (C) No. 196 (2001) and I.A. No. 82/2008 in W.P. (C) No. 196 (2001). Decided on: 23 January 2012.

²⁵ *Chamelli Singh v. State of U.P.*, 2 SCC 549, para. 8 (1996).

²⁶ *Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil*, 8 SCC 525 (1996).

²⁷ *Bandhua Mukti Morcha v. Union of India*, 9 SCC 322 (2000).

rights. Perhaps the Court intends that the Directive Principles provide an indication of what a dignified life should be, but then dignity would only be aimed towards securing socio-economic rights. This conclusion is not implied by the present case alone. In *Re: Noise Pollution*,²⁸ dealing with implementation of laws restricting use of loudspeakers and high-volume sound systems, the Court held:

9. Article 21 of the Constitution guarantees life and personal liberty to all persons. It is well settled by repeated pronouncements of this Court ... [that] the right to life guarantees a right of person to life with human dignity. Therein are included, all the aspects of life which go to make a person's life meaningful, complete and worth living.

Such an extensive view of the right to life with dignity suggests that the right included all socio-economic rights within its fold. In contrast, in other cases, the Court again leans towards a minimal-requirements interpretation of the right. For example, in cases on the right to food itself, the Court employs dignity along with the idea of self-reliance to indicate that the state's role was to provide conditions where individuals could feed themselves. The Court contrasts the right with notions of 'command economics of big government' and the unsuitability of the state in being a 'super-entrepreneur'.²⁹ Such ideas that the Court finds unfavourable could otherwise well justify extensive state obligations to provide for a socially, culturally, and intellectually meaningful life, which the Court had earlier held to be entailed by the right to life with dignity.

There are numerous other cases where dignity has been employed as a source right.³⁰ The number and variety of cases do indicate that the Court favours an expansive meaning of dignity. However, one implication of such interpretation is that it takes focus away from other values that might better justify specific rights. Another undesirable development has been that the content of dignity gets short-changed to an extent that belies commonly held intuitions about human dignity. Both these trends are noticeable in the right to education cases.

The right to education was inserted as a fundamental right under Article 21 A in 2002 by the 86th Amendment to the Constitution of India. The amendment was preceded by a judicial decision that had already pronounced the right to be a fundamental right by reading the Right to Life along with the Directive Principles of State Policy. Education was pronounced to be essential for a dignified life by the Court:

The dignity of man is inviolable. It is the duty of the State to respect and protect the same. It is primarily the education which brings forth the dignity of a man An

²⁸ AIR 2005 SC 3136.

²⁹ *Kapila Hingorani v. State of Bihar*, 6 SCC 1, para. 50 (2003).

³⁰ *State of M.P. v. Kedia Leather and Liquor Ltd.*, 7 SCC 389 (2003); *Virender Gaur v. State of Haryana*, 2 SCC 577 (1995); *Subramanian Swamy v. Union of India*, 13 SCC 356 (2015); *Prem Shankar Shukla v. Delhi Admn.*, 3 SCC 526 (1980); *Devidas Ramachandra Tuljapur v. State of Maharashtra*, 6 SCC 1 (2015); *Vikram Deo Singh Tomar v. State of Bihar*, Supp. SCC 734 (1988).

individual cannot be assured of human dignity unless his personality is developed and the only way to do that is to educate him.³¹

Watchers of the Court would vouch for the staple nature of the language employed by the Court. A charitable reading of the passage might suggest that the Court only intends to say that a life with dignity requires that every individual must have an equal opportunity to be educated, and that burden falls on the state. However, it is difficult to ignore that the Court does not invoke equality but rather inviolability of dignity. It simultaneously indicates dignity to be a latent value that is capable of being ‘brought forth’ and ‘developed’ through education. It is difficult to ignore the counter-intuitive implications that the words chosen by the Court have for the content of dignity. The Court seems to indicate that dignity is assured only if an individual is educated and if that dignity is increasingly realized through education. Such a view can perhaps be supported on a novel interpretation of performance-based dignity, where dignity is a virtue realized through human actions, as opposed to existing just by virtue of being human.³² On what view of a life with dignity does such an interpretation become plausible, since the Court holds that the right to education flows from the right to life with dignity?³³

My ascribing a plausible performance-based view to the decision is not as far-fetched as it might seem, as in the same case the Court notes that ‘the Fundamental Rights . . . cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity’.³⁴ Observations of this nature surely indicate that the Court views dignity as a virtue to be realized. As much as this might seem absurd according to the enlightenment-based Kantian view of dignity, it is not unknown to other views on the nature of virtues. In that sense, the Court’s observations do bring in alternative ways of looking at dignity in Indian constitutional jurisprudence, even though this stands in tension with the Court’s view in other cases, discussed in the following section, where it unambiguously embraces the Kantian view.

Another question that arises in the right to education case is regarding the relationship between education and dignity. The Court does not explain why dignity is the best-candidate justification in relating education to the right to life. An intrinsic relationship between the two can be justified by other values that might provide more specificity to the relationship. Arguably obligations to provide education can be justified by the constitutional mandate to achieve social and economic justice, to ensure equality of opportunity, or to facilitate the liberty of thought and expression. These values find mention not only in the Preamble and Directive Principles but also in the Fundamental Rights, where freedom of thought and expression as well as equality find express mention. Significantly, there is also

³¹ *Mohini Jain v. State of Karnataka*, 3 SCC 666, para. 8 (1992).

³² See Sungmoon Kim’s Chapter 10 in this volume, on Confucian tradition.

³³ *Mohini Jain* (n 31), para. 12.

³⁴ *Mohini Jain* (n 31), para. 13.

more legal material (e.g. on equality of opportunity, freedom of speech and expression, and socio-economic rights) that can be employed to articulate the relationship between the right to life and education. By recourse to dignity, to the exclusion of other values, perhaps an opportunity was lost to anchor socio-economic rights such as education to multiple constitutional values in a deeper manner.

The cases discussed in this section surely accorded dignity a high status, but they did so in an unanchored manner. In employing dignity in its reasoning, the Court rarely referred to literature on dignity as reasons for its conclusions. Even the Constituent Assembly Debates were not invoked to support the significant weight accorded to dignity. In this sense, its reasoning was not anchored to sources about the content of dignity or its role. The Court employed dignity with confidence, without anticipating any objections that might arise to its application. This is perhaps explained by the wide powers the Court assumed during the development of its Public Interest Litigation (PIL) jurisdiction, where it assumed wide powers to relax rules of standing in fundamental rights cases. Socio-economic rights cases discussed in this section were landmark decisions in the exercise of the Court's PIL jurisdiction. The Court's PIL jurisprudence has, however, drawn severe criticism in terms of excessive exercise of judicial power and in being populist.³⁵ In its application of dignity, at least, the first line of criticism would be vindicated in that there has been an unanchored exercise of wide judicial powers.

4 UNINHIBITED REASONING: DIGNITY AS THE FOUNDATION OF FUNDAMENTAL RIGHTS

A set of landmark decisions in 2017 and 2018 reaffirmed the Court's view that the role of dignity in constitutional adjudication was not limited to the right to life. Dignity captured something that related to all the Fundamental Rights, whether as a value that was the 'core' of all Fundamental Rights or one that tied all Fundamental Rights together. There was also a marked shift in the manner that dignity was employed in judicial reasoning. Unlike in the cases discussed in Section 3, the Court expressly and extensively relied on academic literature on dignity. The most noted of these decisions was the Court's decision on the right to privacy in *KS Puttaswamy v. Union of India* (hereafter 'the privacy decision').³⁶ A nine-judge bench of the Court declared the existence of a fundamental right to privacy by overruling previous decisions. The decision of the nine-judge bench arose out of a reference made to it by a five-judge bench of the Court that was hearing challenges against the AADHAAR (Targeted Delivery of Financial and Other Subsidies, Benefits and Services Act, 2016). The Act promised targeted delivery of governmental services

³⁵ See Anuj Bhunia, chap. 4 in *Courting the People: Public Interest Emergency in Post-Emergency India* (Cambridge: Cambridge University Press, 2016), (for a contemporary critical appraisal of public interest litigation in India).

³⁶ *KS Puttaswamy v. Union of India*, 10 SCC 1 (2017).

through a mandatory unique identity number assigned to each citizen based on personal data including biometric information. Violation of the right to privacy was one of the chief challenges to the Act. The nine-judge bench answered the reference by declaring that the right to life and personal liberty included a fundamental right to privacy.

In doing so, the Court articulated a fundamental relationship between dignity and privacy, mediated through the ideas of liberty, personhood, and autonomy.³⁷ This view was first articulated in the Indian context by the Delhi High Court in the *Naz Foundation* decision.³⁸ The High Court grounded its view of the right to privacy in the concept of personhood rooted in personal autonomy, which in turn was explained in terms of human dignity.³⁹ The High Court, however, did not elucidate the content of dignity and how it was related to autonomy, personhood, and privacy. In the privacy decision, the Court filled this gap by devoting an entire section to the concept of dignity to articulate its relationship with liberty and individual autonomy. In doing so, it prizes dignity over other values when it holds that ‘dignity is the core which unites the Fundamental Rights because the Fundamental Rights seek to achieve for each individual the dignity of existence’.⁴⁰ Privacy is accorded an even higher status as it is held to be ‘the constitutional core of human dignity’.⁴¹ In fact, the Court holds:

Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognized. . . . (Privacy) . . . straddles across the spectrum of Fundamental Right and protects for the individual a zone of choice and self-determination.⁴²

These statements mystify the relationship between dignity and privacy. To state that privacy is the core of dignity is an intriguing proposition. Surely, dignity can perhaps exist even without privacy as undignified acts can be of a public nature. For example, caste- and gender-based unfair discrimination is often aimed at public humiliation, and opposition to them is also public in nature.⁴³ Recent objections to Dalit (lower caste) grooms riding horses is a case in point. These objections are attempts at

³⁷ Mariyam Kamil, ‘Puttaswamy: Jury Still out on Some Privacy Concerns?’, *Indian Law Review*, no. 1 (2017): 190, 193–4.

³⁸ *Naz Foundation v. NCT of Delhi*, 160 *Delhi Law Times* 277 (2009).

³⁹ Pritam Baruah, ‘Logic and Coherence in *Naz Foundation*: The Arguments of Non-Discrimination, Privacy and Dignity’, *National University of Juridical Sciences Law Review*, no. 3 (2009): 505–24.

⁴⁰ Chandrachud J, in *KS Puttaswamy* (n 36) Para. 107 (for the view that the Court relates privacy to liberty, dignity, and autonomy).

⁴¹ Chandrachud J, in *KS Puttaswamy*, Para. 3(E) [Conclusion]. Such a link between dignity and privacy was proposed in some of the earliest scholarly debates on privacy. See Edward J. Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’, *New York University Law Review* 39 (1964): 962.

⁴² Chandrachud J, in *KS Puttaswamy* Para. 169.

⁴³ Pritam Baruah and Zaid Deva, ‘Justifying Privacy: The Indian Court’s Comparative Analysis’, in *The Indian Yearbook of Comparative Law 2018* (Singapore: Springer, 2019).

humiliating members of the Dalit community by publicly denying their equality as human beings.⁴⁴ The attempted humiliation and its contestation are public in nature and involve questions of dignity without raising privacy issues. It might therefore be the case that the Court's statement means that every violation of privacy led to subjecting an individual to indignity, rather than the other way around.

The relationship between dignity and privacy becomes further complicated when the Court states that 'the right to privacy is an element of human dignity' and that 'the sanctity of privacy lies in its functional relationship with dignity'.⁴⁵ If one were to read this statement along with the previous ones quoted earlier, privacy appears to be the core element of human dignity, and the relationship between the core of dignity and its other elements is a functional one where 'privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion'.⁴⁶ What, however, begs examination is precisely what these 'inner recesses' are and why they are related to dignity.

One way of understanding the relationship is perhaps that privacy enables a person to lead a dignified life by preventing certain indignities brought about by unwanted intrusions.⁴⁷ Dignity is the core value that deserves protection, and privacy is instrumental in doing so. Given the possibility of dignity being violated in ways that do not involve questions of privacy, privacy in those cases cannot share a functional relationship with dignity, and neither can it therefore be the core of dignity, conceptually, without further explanation of the content of both concepts.

4.1 *Individualistic and Communitarian Dignity*

It might be alleged that expecting such exacting explanations from courts is neither pragmatic nor desirable. However, in the Indian experience with dignity in the right-to-privacy case, lack of more specific reasons has been counterproductive. Soon after the privacy decision, the Court pronounced its decision in the challenges to the AADHAAR Act that had made the reference about the right to privacy. In the AADHAAR case, a five-judge bench of the Court upheld the validity of most of the provisions of the Act.⁴⁸ Justice Sikri authored the majority opinion, which relied extensively on dignity again but proposed a novel proposition that sits oddly with the privacy decision.

The privacy decision relied on dignity and individual autonomy to articulate privacy as a private inviolable zone for the individual immunized from interferences by the state and society. This individual-centric view was echoed in several other

⁴⁴ 'Upper Caste Men Attack Dalit Groom for Riding Horse in Rajasthan,' *The Wire*, 30 April 2018, <https://thewire.in/caste/upper-caste-men-attack-dalit-groom-for-riding-horse-in-rajasthan>.

⁴⁵ Chandrachud J, in *KS Puttaswamy* (n 36) Para. 113.

⁴⁶ Chandrachud J, in *KS Puttaswamy* Para. 113.

⁴⁷ Baruah and Deva, 'Justifying Privacy'.

⁴⁸ *KS Puttaswamy v. Union of India*, Writ Petition (Civil) No. 494 of 2012 (2020). Hereafter '*KS Puttaswamy* (5-judge)'.

decisions including the concurring opinions by Justice Sikri in cases recognizing the rights of transgender persons and legalizing passive euthanasia.⁴⁹ In these decisions, Justice Sikri had articulated the three elements of the fundamental right to dignity as personal autonomy, self-expression, and the right to determine.⁵⁰ In the AADHAAR decision, however, Justice Sikri's opinion added a further element that militates against this very view. He held that there was a communitarian aspect to dignity: 'Dignity as a community value . . . emphasizes the role of the state and community in establishing collective goals and restrictions on individual freedoms and rights on behalf of a certain idea of the good life.'⁵¹ The fundamental elements of dignity were now therefore 'intrinsic value, autonomy and community value'.⁵² Justice Sikri added that individualistic and communitarian values of dignity were to be balanced by the test of proportionality.

The decision in the AADHAAR case adds a novel element to the understanding of dignity in Indian constitutional law. Earlier decisions on dignity as a source of rights clearly spoke of dignity as a value that justified individual rights. Similarly, a string of decisions in 2018 (discussed in the following section) also speak of individual dignity as the foundation of Fundamental Rights as well as the very basis of the Constitution itself. The idea of community dignity therefore stands out as tangential in Indian constitutional law.

4.2 Dignity, Anti-Exclusion, and the Transformative Project

In 2018, the Court made extensive use of dignity as a foundational constitutional value in cases on decriminalization of homosexuality, legalization of passive euthanasia, and gender-based discrimination. These cases continued in the same vein as the right to privacy decision in terms of identifying equality, liberty, and dignity as building the 'edifice of the constitution'.⁵³

In *Navtej Singh Johar*, the Court, in a decision running over 300 pages, read down section 377 of the Indian Penal Code to decriminalize consensual sexual acts between adults of the same gender.⁵⁴ It held that, for LGBT communities, sexual orientation was 'intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy'.⁵⁵ Chief Justice Deepak Misra's opinion stated that gender identity was inalienable, and this was guaranteed by the right to life and liberty with dignity.⁵⁶ The Court not only held dignity to be one of the founding promises of the

⁴⁹ *Common Cause v. Union of India*, 5 SCC 1 (Supreme Court of India 2018); *National Legal Services Authority v. Union of India*, 5 SCC 438 (Supreme Court of India 2014).

⁵⁰ Sikri J in *National Legal Services Authority v. Union of India* (n 49) para. 206.

⁵¹ Sikri J in *KS Puttaswamy v. Union of India*, Writ Petition (Civil) No. 494 of 2012, para. 116 (2020).

⁵² Sikri J in *KS Puttaswamy* (n 51) para. 116.

⁵³ *Navtej Singh Johar and Ors v. Union of India*, 10 SCC 1, para. 416 (2018).

⁵⁴ *Navtej Singh Johar and Ors* (n 53) para. 416.

⁵⁵ Chandrachud J, in *Navtej Singh Johar and Ors* (n 53), para. 610.

⁵⁶ *Navtej Singh Johar and Ors* (n 53), para. 10.

Constitution but also related it to the importance of human dignity in the UDHR, implying that the concept of dignity had a similar foundational role in the Indian Constitution.⁵⁷ Across its opinions, the Court lay emphasis on how dignity was an anathema to social exclusion of identities including sexual orientation.

In the same year, in *Common Cause v. Union of India*, the Court legalized passive euthanasia in cases of terminally ill persons. Dignity figured prominently in the decision of the Court, sometimes as a constitutional value and sometimes in mysterious metaphors:

Human dignity is beyond definition . . . To some, it may seem to be in the world of abstraction and some may even perversely treat it as an attribute of egotism or accentuated eccentricity . . . Dignity . . . is a combination of thought and feeling . . . and, as stated earlier, it deserves respect even when the person is dead and described as a 'body'.⁵⁸

Notwithstanding the metaphors, the Court was consistent about dignity being a fundamental value that was a part of the right to life and that recognized all human rights that a person enjoyed.

This line of thinking about dignity was again affirmed in the temple-entry decision.⁵⁹ The decision stands out in its application of dignity as it employs the concept to deny claims based on the right to freedom of religion. In this case the Court was faced with the constitutionality of a practice that prohibited menstruating women from entering a Hindu temple. It held that the practice was not protected by the right to religion as it violated the dignity and equality of women. Individual dignity was given primacy over social customs and the Court held that 'the rights guaranteed under Part III of the Constitution have the common thread of individual dignity running through them'.⁶⁰ Customs and usages could not escape constitutional scrutiny, as that would 'deny the constitutional vision of ensuring the primacy of the individual'.⁶¹ In a particularly metaphorical phrase, the Court states that 'the primacy of individual dignity is the wind in the sails of the boat chartered on the constitutional course of a just and egalitarian social order'.⁶² Given the emphasis on individual dignity, the decision in this case is difficult to square with the decision in the AADHAAR decision where community dignity was a basis for curtailing individual rights. In fact, in the temple-entry decision, the Court unequivocally stated that, where there was a conflict between community beliefs such as religious ones and individual dignity, the latter has preference as the purpose of the Constitution 'is

⁵⁷ Navtej Singh Johar and Ors (n 53), para. 139.

⁵⁸ Dipak Misra (CJI) in *Common Cause v. Union of India*, 5 SCC 1, para. 156 (2018).

⁵⁹ *Indian Young Lawyers Association and Others v. State of Kerala & Ors* Writ Petition (Civil) No. 373 of 2006 (2018).

⁶⁰ *Indian Young Lawyers Association* (n 59), para. 95.

⁶¹ *Indian Young Lawyers Association* (n 59), para. 101.

⁶² *Indian Young Lawyers Association* (n 59), para. 102.

to ensure a wider acceptance of human dignity and liberty as the ultimate founding faith of the fundamental text of our governance'.⁶³

These lines of cases, culminating in the temple-entry case in 2018, unequivocally prioritize dignity as a constitutional value, despite holding that dignity, liberty, and equality 'constitute the trinity which defines the faith of the Constitution'.⁶⁴ For instance in the same case the Court holds:

The founding faith upon which the Constitution is based is the belief that it is in the dignity of each individual that the pursuit of happiness is founded. Individual dignity can be achieved only in a regime which recognizes liberty as inhering in each individual as a natural right.⁶⁵

Dignity is held to be the 'unwavering promise of the Fundamental Rights'⁶⁶ that enables the exercise of liberty.⁶⁷

The extensive use of dignity in these decisions has also sharpened its application in constitutional adjudication. Apart from acting as a justification, it has led the Court to articulate principles that have a practical edge. In *Navtej Singh Johar* and the temple-entry case, the Court has employed dignity to articulate an 'anti-exclusion principle' that makes any form of social exclusion of identities constitutionally suspect.⁶⁸

The Court also takes dignity to be central to the transformative project of the Indian Constitution: "The fundamental freedoms which Part III confers are central to the constitutional purpose of overseeing a transformation of a society based on dignity, liberty and equality."⁶⁹ This implies that dignity will be invoked in Fundamental Rights cases that challenge existing social exclusions and stereotypes and that involve appeals to liberty and equality.

What, however, brings all this into question is that the temple-entry decision is currently under review by a nine-judge bench of the Court. The decision is likely to have implications for how dignity is understood. The precise reason for review is that the Court will re-examine whether collective ideals of the good life in the form of religious beliefs are defeated by interests based on human dignity, liberty, and equality. Which side the Court leans will determine the status of dignity in Indian constitutional law, a question that has hitherto gone unnoticed.

5 THE STATUS OF DIGNITY: ABSOLUTE OR LIMITED

In articulating the relationship between dignity, equality, and liberty, the Court, especially in the privacy case and the cases in 2018, employed terms such as

⁶³ Indian Young Lawyers Association (n 59), para. 12.

⁶⁴ Indian Young Lawyers Association (n 59), para. 49.

⁶⁵ Indian Young Lawyers Association (n 59), para. 12.

⁶⁶ Indian Young Lawyers Association (n 59), para. 15.

⁶⁷ Indian Young Lawyers Association (n 59), para. 15.

⁶⁸ Indian Young Lawyers Association (n 59), para. 8.

⁶⁹ Indian Young Lawyers Association (n 59), para. 11.

‘inalienable’, ‘the core of Fundamental Rights’, ‘natural rights’, and the ‘founding faith of the Constitution’ to describe the nature of dignity. This suggests that dignity is understood as an absolute value. In contrast, the Court’s consistent view has also been that dignity is a part of the right to life and personal liberty under Article 21. This poses a textual dilemma. If dignity is a part of the right to life, then the restrictions on the right would apply to dignity. At least in *Francis Coralie Mullin*,⁷⁰ the Court unequivocally stated that any deprivation of human dignity would constitute a violation of the right to life and that such deprivation would have to be in accordance with reasonable, fair, and just procedure established by law. Dignity in Article 21 was therefore not absolute. It could be limited by the due process of law, as several landmark decisions held that the words ‘procedure established by law’ in Article 21 mean ‘due process of law’. Due process of law meant that the law must be just, fair, and reasonable. The limitable nature of dignity was also implied when the Court stated that ‘the magnitude and content of the right [to life with human dignity] depends on the extent of economic development of the country’⁷¹ but must include the right to basic necessities and ‘the right to carry on such functions and activities as constitute the bare minimum expression of the human self.’⁷² The Court also stated that the right to live with human dignity is a part of personal liberty.⁷³

In the cases after *Francis Coralie Mullin*, both views in a sense have been abandoned. Dignity is no longer understood as limited to questions of personal liberty. It has been extensively employed in socio-economic rights cases and in cases of non-discrimination that involve questions of socio-economic justice and equality. Dignity is also no longer seen as a specific right to a dignified life within the confines of Article 21. As the discussion in Section 4 demonstrates, dignity is employed both as a part of Article 21 as well as a value that unites all Fundamental Rights and articulates the ‘founding faith’ of the Constitution.

Despite the clarity about the foundational role of dignity, the dilemma posed by the *Mullin* case does not disappear. In fact the idea of a right to life with dignity as a limited right finds support in the decision of the Court upholding the constitutionality of the death penalty.⁷⁴ In that case, the Court recognized the limited nature of the right to life under Article 21, and dignity was conspicuously absent from the reasoning of the Court. Recognizing dignity simultaneously as a limited right under Article 21 and as an absolute value that justifies the entire Constitution will violate the principle of non-contradiction, unless Article 21 is read as an absolute right or dignity is clearly understood to have two constitutional locations with different

⁷⁰ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, 1 SCC 608 (1981).

⁷¹ *Francis Coralie Mullin* (n 70), para. 8.

⁷² *Francis Coralie Mullin* (n 70), para. 8.

⁷³ *Francis Coralie Mullin* (n 70), para. 11.

⁷⁴ Anup Surendranath, ‘Life and Personal Liberty’ (n 21), p. 764 (for a discussion of death penalty cases in India).

status: the right being limited by due process of law; and the value being absolute in it being the very foundation of the Constitution. In terms of how the law has developed after *Mullin*, dignity has mostly figured as an absolute value, even though sometimes articulated as a right.

For example, in *M. Nagaraj v. Union of India*,⁷⁵ the Court held that dignity was akin to principles such as reasonableness, fairness, and social justice that inform and connect various Fundamental Rights, particularly Articles 14, 19, and 21, which were beyond the reach of the state. Similarly, in *Mehmood Nayyar Azam v. State of Chhattisgarh*⁷⁶ it was held that the right to life with dignity includes within itself the right against torture, especially by public authorities, and, though other Fundamental Rights could be restricted, this right could never be stripped away. In *In Re Inhuman Conditions In 1382 Prisons*,⁷⁷ the Court held that prisoners cannot be denied their Fundamental Rights under Art. 21 despite being detained in prison. Though there may be certain restrictions on one's movement and behaviour, their basic human dignity guaranteed under Art. 21 could not be taken away.

These cases concerning the rights of persons in police custody unambiguously hold dignity to be a value that is absolute. Perhaps this is so given the severity of the grievances brought before courts, which highlight the importance of the protection of citizens from the abuse of the coercive powers of the state. In protecting basic civil and political rights of individuals in such cases, the Court relies on the content of dignity as the intrinsic worth of all individuals by an appeal to inalienable natural rights that form the basis of rights guaranteed by the Constitution. Interestingly, a similar trend is noticed in cases that involve egregious violations of socio-economic rights not only by the state but also by other individuals.

In *People's Union for Democratic Rights v. Union of India*,⁷⁸ the Court was seized with the matter of multiple violations of labour laws that occurred during the Asian Games. The Court held that certain rights such as those protected by Art. 17, 23, and 24 protect the individual against the world in general and essentially help in protecting the individual's right to life with human dignity.⁷⁹ Human dignity, according to the Court, could not be violated under any form, even under the garb of a voluntarily entered contract.

These cases indicate that, in the case of the violation of both civil-political and socio-economic rights, it is the concept of dignity as the intrinsic worth of the individual that has found favour with the Court. The intrinsic worth of the

⁷⁵ *M. Nagaraj & Others v. Union of India & Others*, 8 SCC 212 (2006).

⁷⁶ *Mehmood Nayyar Azam v. State of Chhattisgarh*, 8 SCC 1 (2012).

⁷⁷ *In Re Inhuman Conditions in 1382 Prisons*, 3 SCC 700 (2016).

⁷⁸ *People's Union for Democratic Rights v. Union of India*, 3 SCC 235 (1982).

⁷⁹ Article 17 abolishes the practice of 'untouchability' that was a part of the caste system whereby certain castes were treated as untouchable, and proximity and bodily contact with them was considered impure. Article 23 deals with prohibition of traffic in human beings and forced labour. Article 24 prohibits employment of children in factories and other hazardous activities.

individual has also been held to be absolute and non-derogable in nature, as it cannot be violated under any condition.

6 CONCLUSION

The extensive application of dignity by the Court throws up critical issues about its content, status, and role in constitutional adjudication. Close attention to content was absent in the numerous decisions prior to 2017. The Court employed dignity in an unanchored manner, without either citing literature on dignity or carefully working out its application to facts. Dignity was almost axiomatic for any discussion on the right to life. Since 2017, the Court has referred to dignity in an uninhibited manner, citing a wide range of academic literature on dignity that has emerged in law and philosophy. In the decisions on the right to privacy, the AADHAAR Act, and the temple-entry case, the Court has devoted entire sections to reviewing literature on dignity. Philosophers including Immanuel Kant, Ronald Dworkin, Jeremy Waldron, and Michael Rosen figure in the Court's literature review, in addition to the voluminous legal scholarship on dignity that has emerged in the past two decades. How that literature has been employed, however, is controversial, especially because of the tension between individual and community dignity that was pointed out in Section 4. The trend of uninhibited application of dignity also raises questions of method. How does the Court choose which philosophical and academic materials to invoke? Does the Court sufficiently analyse the views it invokes in a structured manner (e.g. by addressing objections to them)? Can the Court be accused of cherry-picking literature that suits predetermined conclusions?

These questions regarding method legitimately arise as the Court settles on views without enough attention to opposing views. For example, in Justice Sikri's opinions in the passive euthanasia and AADHR cases, Ronald Dworkin's views are easily accepted, and so is the view that dignity has a communitarian aspect. In political and moral philosophy, the two views would be considered incompatible unless there has been a resolution of the perennial debate between individualism and communitarianism. In the AADHAAR case, the Court employs both traditions in a single breath and controversially states that the doctrine of proportionality must be employed to adjudicate between these two philosophical views.

In the right to privacy, decriminalization of homosexuality, and temple-entry cases, the Court states that dignity, liberty, and equality are intrinsically connected. Its articulation of this trinity of values has surely favoured individual rights over claims by the community and the state. However, its assertion of the connectedness of the three values reveals little about the individual content of dignity. What comes forth is that the three values are connected, not how so. For instance, the Court does not articulate the Kantian object formula to demonstrate how in any of these cases individuals are treated as mere means to an end; nor does it identify how unequal treatment in terms of intrinsic worth is distinct from other unequal treatment, if

there is such a distinction. It is arguable that the Court's view of dignity militates precisely against any such distinction. On the Court's view, every violation of liberty, equality, or dignity perhaps involves all three. This view runs a risk of rendering the three values incomprehensible in that their distinct contribution to questions of rights is unascertainable. Indeed, constitutional scholars have pointed out how indiscriminate recourse to dignity might result in losing grip over it.⁸⁰

This risk of losing grip over dignity is real in India due to the inconsistencies in judicial reasoning about dignity pointed out in this chapter. It is therefore worth asking why such inconsistencies have arisen in the first place. One set of answers emerges from institutional reasons. Arguably, heavy workload reduces the time available for individual decisions that would otherwise have allowed for a careful development of dignity doctrine. Another set of answers stemming from the nature of values is already popular: that values are necessarily vague in being essentially contested, interpretive, or evaluative concepts, and thus determinacy of content is impossible. Despite being popular, this view does not go deep enough to provide a compelling argument for why values are necessarily vague.⁸¹ Indeed, there are accounts that articulate the content of values including dignity, just as there are others that articulate the content of justice or autonomy.⁸² In any event, characterizing values as necessarily vague does not aid judges in employing them in reasoning with values. Though it may be debated whether the vagueness of values like dignity is beneficial for judicial reasoning, at least in the Indian context, lack of determinate content has led to problematic inconsistencies about what decisions dignity requires.

A final set of answers that may explain the inconsistencies pointed out in this chapter arise from expertise-based concerns. Judges in India can claim expertise over legal knowledge as they are appointed based on their training and experience in law. The procedure for appointment of judges to the higher judiciary in India is exclusively through elevating counsel before high courts and the Supreme Court and through promotion of judges from the lower judiciary. Their claim to expertise over law is thus legitimate in that the law as a discipline has dense and rich legal materials that justifiably constitute a distinct body of knowledge over which cognitive expertise may be claimed. When adjudication is faced with extralegal areas of knowledge, courts either consult authoritative texts in those disciplines or constitute expert committees. When it comes to constitutional values, however, the question of

⁸⁰ Horst Drier, 'Human Dignity in German Law', in *The Cambridge Handbook of Human Dignity*, edited by Marcus Düwell, Jens Braarvig, Roger Brownsword, Dietmar Mieth (Cambridge: Cambridge University Press 2014), 375.

⁸¹ For criticisms of ascribing a generally vague character to values, see Pritam Baruah, 'Are There Any Interpretative Concepts', in *Dignity in the Legal and Political Philosophy of Ronald Dworkin*, edited by S. Khurshid, L. Malik and V. Rodriguez-Blanco (Oxford: Oxford University Press 2018), pp. 130–60; Pritam Baruah, 'Human Dignity in Adjudication: The Limits of Placeholding and Essential Contestability Accounts', *Canadian Journal of Law and Philosophy*, no. 27 (2014): 329.

⁸² For example, John Rawls on Justice, Joseph Raz on autonomy or Immanuel Kant on human dignity.

expertise does not arise in the absence of a critical mass of legal materials that may ground a claim to expertise.

In the case of dignity, there is limited legal material that lawyers can claim cognitive expertise over. Literature on dignity is found in disciplines outside law, such as philosophy, and bioethics. Even if some legal philosophers argue that law is the proper starting point for discussions on dignity, such practice-based views need strong justification given the historically significant philosophical materials on dignity.⁸³ In this sense, recent decisions in dignity are a welcome start to acknowledging literature in other disciplines. However, the future challenge remains in providing structure in invoking such materials in judicial decision-making. At the least, this involves lawyer-turned judges being acquainted with literature on constitutional values such as dignity, and further thinking on how judicial reasoning should function in non-autonomous legal contexts (i.e. in contexts where legal materials do not support a claim to legal expertise).

⁸³ Jeremy Waldron, 'Dignity and Rank', *European Journal of Sociology* 48, no. 2 (2007), doi:10.1017/s0003975607000343.