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THE ROLE OF DIGNITY IN CANADIAN AND SOUTH AFRICAN GENDER EQUALITY JURISPRUDENCE

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This paper analyzes the use of dignity in the formation of tests for gender equality in the constitutional jurisprudence of Canada and South Africa. Recent gender equality cases in both countries are reviewed and considered in light of various critiques of the notion that dignity is a concept capable of underlying equality and determining instances of discrimination. A comparison between Canadian and South African commentators reveals many of the same concerns about a dignity-centered test for equality, concerns which often transcend national boundaries apply with equal force to gender equality cases in the other jurisdiction. While courts in both countries have expressed a preference for a substantive as opposed to formal approach to equality, and have focused on dignity in order to avoid entrenching pre-existing disadvantage through uniform treatment, it is argued that too great a focus on dignity has itself obscured considerations of group disadvantage and contributed to the very formalism dignity was supposed to overcome. Equating discrimination with violations of dignity has not furthered women's rights in either country, and has instead gone some way towards undermining them, suggesting that courts in Canada and South Africa should move away from dignity in formulating and applying a test for equality.

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I. INTRODUCTION

A comparative review of equality and its constitutional protection scarcely admits of a more striking similarity than the one between Canada and South Africa, both in terms of statutory language and jurisprudence. Not only are the equality provisions themselves largely textually comparable, but courts in both countries have adopted a substantive approach to equality which strongly associates – if not equates – equality with human dignity. Such symmetry should not be surprising, given the strong influence the *Canadian Charter of Rights and Freedoms*,¹ and its jurisprudence, has had on South Africa's *Bill of Rights*² and Constitutional Court. What is surprising, however, is the recurring charge that neither Court is applying the doctrine of substantive equality with much consistency or positive social effect.³ One reason for this may lie, somewhat paradoxically, in the focus on dignity as the criterion used to define equality. That is, the use of dignity as a normative standard for determining violations of equality has itself reinforced the very formalism it was supposed to overcome.

While associating dignity with human rights, and equality in particular, has had a long history, it has also come under increasing scrutiny and criticism as a means by which equality claims may be coherently judged. This paper will critically analyze the concept of dignity, to determine whether the analysis of equality as dignity has been given too much importance in recent equality jurisprudence. These criticisms will then be considered in the specific context of gender equality, an area for which the charge of inconsistency, and a return to formalism, is particularly apparent in Canada and South Africa. I suggest that a dignity-centred approach to equality is problematic for women as it shifts the focus from material disadvantage and

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11 [Charter].

² Chapter 2 of the *Constitution of the Republic of South Africa 1996*, No. 108 of 1996 (to be distinguished from the *Interim Constitution of the Republic of South Africa*, Act 200 of 1993).

³ See, e.g., Saras Jagwanth & Christina Murray, "Ten Years of Transformation: How Has Gender Equality in South Africa Fared?" (2002) 14 C.J.W.L. 255; Beverley Baines, "Using the Charter of Rights and Freedoms to Constitute Women" in Beverley Baines & Ruth Rubio-Marín, eds. *The Gender of Constitutional Jurisprudence* (Cambridge: Cambridge University Press, 2005) 48 at 72-74.

group vulnerabilities, which were at the centre of earlier jurisprudence in both countries, towards greater formalism. A review of the South African gender equality decisions in *President of the Republic of South Africa v. Hugo*⁴ and *S. v. Jordan*⁵ demonstrates the problems with this dignity-centred approach. Furthermore, the recent Canadian gender equality decision in *Trociuk v. British Columbia*⁶ produced an outcome that reveals, to anyone interested in using substantive equality to transform gender relations, the perils in applying the Canadian dignity-centred equality jurisprudence.

II. OVERVIEW OF THE LAW OF EQUALITY

South Africa's equality provision⁷ was influenced by s. 15 of the *Charter* as part of a larger trend of borrowing⁸ that was the first step towards a generally parallel progression of the two countries' equality jurisprudence. The first opportunity for the Supreme Court of Canada to consider equality under s. 15 of the *Charter* was in *Andrews v. Law Society of British Columbia*,⁹ a case which established the Court's substantive, as opposed to formal, approach to equality and its emphasis on disadvantage. *Andrews* dealt with a British man who alleged that a section of the British Columbia *Barristers and Solicitors Act*¹⁰ was discriminatory on the basis that it required lawyers to be Canadian citizens. The Court agreed, looking at the effect of the law on the applicant rather than its uniform application, it held that the imposition of burdens on groups based on immutable personal characteristics (e.g. place of birth) would almost inevitably amount to discrimination.¹¹

⁴ [1997] 6 B. Const. L.R. 708 (S. Afr. Const. Ct.) (SAFLII) [*Hugo*].

⁵ [2002] 11 B. Const. L.R. 1117 (S. Afr. Const. Ct.) (SAFLII) [*Jordan*].

⁶ 2003 SCC 34, [2003] 1 S.C.R. 835 [*Trociuk*].

⁷ S. 9 of the 1996 *Constitution* and s. 8 of the 1994 *Interim Constitution*.

⁸ See D.M. Davis, "Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African Experience" (2003) 1 Int'l J. Constitutional L. 181 at 186-187, 191.

⁹ [1989] 1 S.C.R. 143 [*Andrews*].

¹⁰ R.S.B.C. 1979, c. 26, s. 42.

¹¹ *Supra* note 9 ¶ 37.

The method in *Andrews* of looking to whether a law fosters harm was taken up again in *R. v. Turpin*,¹² a case which suggested that the purpose of s. 15 was protecting disadvantaged groups since discrimination would, in most cases, require that pre-existing disadvantage be established.¹³ In that case, an Ontario resident had alleged that the crime he was charged with was discriminatory because the option of choosing a judge over a jury was only available in Alberta. The Court denied the claim on the basis that those charged with the crime outside of Alberta do not constitute a historically disadvantaged or vulnerable group.¹⁴ *Weatherall v. Canada (Attorney General)*¹⁵ further reinforced the idea that equality is not synonymous with equal treatment, as the Court focused on the disadvantaged position of women compared to men and concluded that subjecting men and women prisoners to different frisk searches did not constitute discrimination. An action had been brought by a male prisoner who alleged that only subjecting men to cross-gender searches constituted discrimination, but the Court allowed for differential treatment on the grounds that historical, biological and sociological differences made cross-gender frisk searches on women more threatening.

A similar approach was taken in the early South African equality case of *Brink v. Kitshoff*,¹⁶ where the Court chose a contextual and historical approach and focused on equality as a means of overcoming harm and social disadvantage. In *Brink*, a woman challenged a section of the South African *Insolvency Act*¹⁷ that treated men and women differently when it came to the maximum amount claimable on an insurance policy. The section was struck down as being a relatively clear instance of discrimination, though the decision is perhaps most noted for its contextual approach and focus on pre-existing discrimination.¹⁸

¹² [1989] 1 S.C.R. 1296 [*Turpin*].

¹³ *Ibid.* ¶ 50.

¹⁴ *Ibid.* ¶ 52.

¹⁵ [1993] 2 S.C.R. 872 [*Weatherall*].

¹⁶ [1996] 6 B. Const. L.R. 752 (S. Afr. Const. Ct.) (SAFLII) [*Brink*].

¹⁷ Act 24 of 1936.

¹⁸ Jagwanth & Murray, *supra* note 3 at 279.

The introduction in Canada of dignity into the analysis of equality did not occur until *Egan v. Canada (Attorney General)*.¹⁹ L'Heureux-Dubé J., in her dissenting judgment, held that human dignity was at the heart of s. 15.²⁰ The majority of the South African Constitutional Court in *Hugo* were persuaded by this dignity centred approach, quoting²¹ the following passage from L'Heureux-Dubé J.'s judgment in their own:

Equality, as that concept is enshrined as a fundamental human right within s. 15 of the *Charter*, means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.²²

The majority of the Court in *Hugo* concluded that the purpose of the protection in the South African Constitution against discrimination lay not in avoiding discrimination against disadvantaged groups, but in the recognition that "all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."²³

L'Heureux-Dubé J.'s conception of equality as the recognition that all human beings are equally deserving of "concern, respect and consideration" soon made its way into Canadian equality jurisprudence through the Supreme Court of Canada's decision in *Law v. Canada (Minister of Employment and Immigration)*.²⁴ There the Court dealt with the question of whether distinctions based on age with regard to entitlement of survivor's benefits under the *Canada Pension Plan*²⁵ amounted to discrimination. A young

¹⁹ [1995] 2 S.C.R. 513 [*Egan*].

²⁰ *Ibid.* ¶ 36.

²¹ *Hugo*, *supra* note 4 ¶ 41.

²² *Egan*, *supra* note 19 ¶ 36.

²³ *Hugo*, *supra* note 4 ¶ 41.

²⁴ [1999] 1 S.C.R. 497 [*Law*].

²⁵ 1985, R.S.C., c. C-8, ss. 44(1)(d) [am. c. 30 (2nd Supp.), s. 13], 58(1)(a) [am. *idem.*,

widow claimed that the scheme's remittance of fewer benefits for those under the age of 45 violated her right to equality, but the Court failed to find such a violation.

Both Canada and South Africa currently employ a three-part test to analyze equality issues derived from *Law* and the Constitutional Court of South Africa's decision in *Harksen v. Lane No*²⁶ respectively. In both countries the first part deals with distinctions. The Canadian claimant must show that the law either draws a formal distinction with others on the basis of personal characteristics, or fails to consider her already disadvantaged position within Canadian society resulting in substantively differential treatment. The South African claimant must only show some differentiation, as a violation of s. 9(1) is established where the differentiation cannot be rationally connected to a government purpose. Where a rational connection does exist, the Court must proceed to s. 9(2) and determine whether the differentiation amounts to unfair discrimination. The second step is to determine whether the distinction or differentiation was made on one of the grounds enumerated in the equality section, or a ground deemed by the Court to be analogous. Although dignity plays a role in the second part of both tests for unenumerated grounds, as discrimination based on sex is an enumerated ground, it is the third part of each country's test that is of primary concern.

In *Law*, discrimination (or "unfair discrimination" as it would be characterized in South African jurisprudence) is found where the differential treatment imposes a burden or withholds a benefit in a way that "reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration."²⁷ This issue is considered in light of four factors: 1) pre-existing disadvantage, 2) correspondence between the ground of the claim and actual need, 3) the ameliorative purpose of the

s. 26].

²⁶ [1997] 11 B. Const. L.R. 1489 (S. Afr. Const. Ct.) [*Harksen*].

²⁷ *Supra* note 24 ¶ 88.

law on disadvantaged persons, and 4) the nature and scope of the interest affected.

In *Harksen* the Constitutional Court of South Africa considers similar factors in determining unfair discrimination: (1) past discrimination, (2) purpose of law, and (3) impairment of fundamental dignity. And while dignity is compartmentalized as one factor to consider, courts have largely equated unfair discrimination with the violation of fundamental human dignity. For example, the Constitutional Court in *Hoffmann v. South African Airways*²⁸ noted that “dignity was impaired when a person is unfairly discriminated against.”²⁹ Relevant considerations for determining unfair discrimination included the three stated in *Harksen* as well as an additional consideration similar to that found in *Law*, namely the extent of the affected interest. Ultimately, the Court in *Hoffmann* referred back to *Hugo* and concluded that “[at] the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity.”³⁰

These equality tests from *Law* and *Harksen* have since been applied to gender by both countries’ courts: in *Trociuk* in Canada and the cases of *Jordan* and *Bhe v. Magistrate, Khayelitsha*³¹ in South Africa. At issue in *Trociuk* was the validity of legislation allowing birth mothers not to acknowledge the child’s father on birth registration. The Supreme Court of Canada held that not allowing a father to have his particulars included amounted to a violation of his dignity and thus ran contrary to s. 15 of the *Charter*. The question of dignity was likewise at issue in *Bhe*, where the South African Constitutional Court held that primogeniture rules in customary laws of succession, which preclude women from inheriting from anyone intestate, were in violation of s. 9 (right to equality) and s. 10

²⁸ [2000] 11 B. Const. L.R. 1235 (S. Afr. Const. Ct.) (SAFLII) [*Hoffmann*].

²⁹ *Ibid.* ¶ 27.

³⁰ *Ibid.* See also Justice Yvonne Mokgoro, “Constitutional Claims for Gender Equality: A Judicial Response” (2003) 67 Alb. L. Rev. 565.

³¹ [2005] 1 S. Afr. L.R. 580 (S. Afr. Const. Ct.) (SAFLII) [*Bhe*].

(right to dignity).³² Finally, the Constitutional Court in *Jordan* considered, in part, the constitutionality of a provision that criminalized commercial prostitution but not the act of solicitation by the client. The majority in *Jordan* held that there was no gender discrimination since the language was couched in gender neutral terms, though the dissent took up the question of whether dignity was infringed in both s. 9 and s. 10. These cases will be discussed more fully in due course.

III. DIGNITY AND ITS ROLE IN THE EQUALITY TEST

Recent scholarship on the relationship between dignity and human rights suggests that while the term dignity is itself of ancient origins, its connection to equality has been a matter of historical progression. One of the first references to the “dignity of man” or *dignitas*, has been attributed to Cicero, who used the term in two senses. While dignity referred to “rank or worth”, it was also universalized: dignity was said to reside in human nature and nature gave reason to all human beings.³³ Dignity was similarly defined in Christian theology where it was both universal, in that all humans are made in the image of God, and based on rank.³⁴ The evolution towards our present egalitarian conception of dignity did not occur until the Enlightenment, when, in response to the French Revolution and Protestant Reformation, hierarchy lost much of its ideological legitimacy and dignity became grounded exclusively in natural rights and human reason.³⁵ This

³² Indeed, the very fact that the South African Constitution includes a freestanding right to dignity brings into question why dignity should form the basis of the right of equality in particular.

³³ Hubert Cancik, “‘Dignity of Man’ and ‘Persona’ in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* I, 105-107” in David Kretzmer & Eckart Klein, eds. *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Martinus Nijhoff, 2002) 19 at 19-27.

³⁴ Joern Eckert, “Legal Roots of Human Dignity in German Law” in Kretzmer & Klein, *ibid.*, 41 at 43-44.

³⁵ *Ibid.* at 44-46.

shift has been partly credited to Immanuel Kant,³⁶ who proclaimed that man is “obligated to acknowledge ... the dignity of humanity in every other man.”³⁷ Human dignity is inherent in that it is an “intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human.”³⁸

This narrative of intrinsic worth is thought to have been reinforced in the 20th century by numerous international human rights instruments as a response to the horrors of National Socialism and the Holocaust.³⁹ And yet contemporary thinkers in this liberal tradition have themselves offered different conceptions of how human dignity is to be understood in relation to equality and treatment by the state. Charles Taylor, for example, views the Kantian conception of dignity and its emphasis on autonomy as unfortunate in that it mandates identical treatment and values individual rights over collective rights.⁴⁰ Ronald Dworkin, by contrast, associates equality with equal dignity, suggesting that dignity need not mean equal treatment.⁴¹ Distinguishing between the right to equal treatment (an equal distribution of an opportunity, resource or burden) and the right to be treated as an equal (to be treated with the same respect and concern as anyone else), Dworkin asserts that the right to treatment as an equal will not always entail a right to equal treatment.⁴² It is the right to be treated with equal respect and concern that is fundamental for Dworkin, a view of dignity and equality which is reminiscent of the language of judges in both Canada and South Africa.

³⁶ *Ibid.* at 46.

³⁷ Immanuel Kant, *The Metaphysics of Morals*, trans. by M.J. Gregor (New York: Harper Torchbooks, 1964) at 132.

³⁸ *Ibid.*

³⁹ Yehoshua Arieli, “On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights” in Kretzmer & Klein, *supra* note 33, 1 at 1-3. In particular, Arieli points to the Preamble of The Universal Declaration of Human Rights (UNGA Res. 217 (III), UN GAOR, 3rd Sess., Supp. No. 13, at 71, UN Doc. A/810 (1948).

⁴⁰ Charles Taylor, *Multiculturalism and The Politics of Recognition: An Essay* (Princeton: Princeton University Press, 1992) at 37-44 and 56-58.

⁴¹ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) at 226-27.

⁴² *Ibid.*

The view that equality rights should be based on human dignity has met with a good deal of criticism from legal commentators, based in part on the question of whether dignity is too individualistic a term from which to judge equality rights. Sheilah Martin notes, for example, that “dignity belongs more to the realm of individual rights than to group based historical disadvantage,”⁴³ suggesting that it may be ill-equipped to provide a substantive equality analysis. Substantive equality presupposes pre-existing group disadvantages that must be recognized and overcome, often by means of differential treatment, whereas dignity, one might argue, presupposes a classical liberal view of individual autonomy and agency antithetical to such group-based analysis.

A related critique is offered by Albertyn and Goldblatt,⁴⁴ who argue that the equation of equality with dignity has, in the South African context, caused courts to ignore group disadvantage. They note that while the first equality case, *Brink*, focused on disadvantage, there was a shift in *Hugo* whereby Goldstone J.’s description of equality as “according equal dignity and respect” reduced equality to dignity. This signalled a shift away from a group-based understanding of material disadvantage such that by the time equality was given a complete analysis in *Harksen*, disadvantage became only one of three criteria to consider. The replacement of disadvantage with dignity is said to amount to a return to a liberal and individualist conception of equality, individual personality being emphasized over issues of material systemic vulnerability. To illustrate this, Albertyn and Goldblatt note the decision in *Harksen*. While O’Regan J., writing for the minority, emphasized group disadvantage and vulnerability stemming from marriage as an institution in South Africa, Goldstone J., writing for the majority, was said to have lost sight of the infringement to equality as a result of his focus on dignity.⁴⁵

⁴³ “Balancing Individual Rights to Equality and Social Goals” (2001) 80 Can. Bar. Rev. 299 at 329.

⁴⁴ See Cathi Albertyn & Beth Goldblatt, “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) 14 S.A.J.H.R. 248.

⁴⁵ *Ibid.* at 258-9.

Albertyn and Goldblatt have also suggested that the right to substantive equality should be given a meaning independent of the value of dignity, one based on the value of equality.⁴⁶ This is based on the idea that equality can be understood as two separate concepts, as a right and a value, and so it is important to consider what values are to inform a right. Sophia Moreau makes such a distinction when she argues that the concept of dignity, while helpful for understanding *why* we value equality, cannot provide an answer as to the substance of equal treatment. To treat dignity as the test for equality is, in other words, to conflate the reason for valuing something with the thing itself. She illustrates this by means of an example from property law, noting that the value of freedom explains the right to property and alienation, but we would not derive a test for when someone has successfully alienated a piece of property by looking at the value of freedom. Dignity is a value, and as one underlying all *Charter* rights generally,⁴⁷ it cannot be expected to be of particular assistance to s. 15.⁴⁸ Greschner makes the same point, noting that since human dignity as a concept informs the entire Charter, equating equality with dignity would not allow one to differentiate equality rights from other *Charter* rights.⁴⁹

A different approach is taken by Anton Fagan, who tries to eliminate any connection between dignity and equality on the basis that the latter is actually devoid of substantial or moral content.⁵⁰ As a comparative standard to be understood on the basis of either a partial infringement of independent constitutional rights or constitutionally grounded principles,

⁴⁶ *Ibid.* at 249.

⁴⁷ Sophia Moreau, “The Promise of *Law v. Canada*” (2007) 57 U.T.L.J. 415.

⁴⁸ The same criticism could be made in the South African context, where dignity is considered to be the basis of all constitutional rights. See Arthur Chaskalson, “Human Dignity as a Foundational Value of Our Constitutional Order” (2000) 16 S.A.J.H.R. 193.

⁴⁹ Donna Greschner, “Does *Law* Advance the Cause of Equality?” (2001) 27 Queen’s L.J. 299.

⁵⁰ It should be noted that many of those opposed to a dignity-centred approach to equality acknowledge that some sort of normative standard is advantageous. For example, Greschner, *ibid.*, proposes a focus on the belonging of individuals in communities: courts should draw on the history of anti-discrimination and the treatment of groups in society to determine whether particular groups are being treated as second-class citizens.

equality is analytically distinct from dignity as a concept in the sense that the latter is not a component of the former.⁵¹

What these views share, however, is the idea that the concept of dignity, whatever its value, is not analytically capable of determining what equality is or when it has been infringed. That is, even those who admit some connection between equality and dignity emphasize that dignity is simply too broad a value to itself be capable of making any definitive pronouncements on the content of equality as a right.

There are also a number of difficulties with respect to the indeterminacy of the term dignity. In addition to calling the third part of the *Law* test “vague, confusing and burdensome to equality claimants,”⁵² Peter Hogg has noted several problems with the inclusion of dignity in the equality test. Firstly, it reverts to the idea that only unfair or unreasonable distinctions violate s. 15, which was rejected in *Andrews*, since distinctions that impair dignity will largely be the same as unreasonable or unfair distinctions. By incorporating s. 1 concerns (e.g. demonstrating a rational connection between the impugned law and its objective) into s. 15, the onus on the claimant becomes greater and courts will consequently find fewer s. 15 violations.⁵³ This problem has been borne out in practice, as Réaume notes that the vast majority of post-*Law* cases have used dignity to find that s. 15 has not been violated.⁵⁴

A second concern of Hogg's is that courts could use three of the four contextual factors to reintroduce the relevancy test introduced by Gonthier in *Miron v. Trudel*⁵⁵ and applied by LaForest in *Egan*. The test, which holds that a law will not violate equality as long as the legislative classification is functionally relevant to the values underlying the legislation, is particularly

⁵¹ Anton Fagan, “Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood” (1998) 14 S.A.J.H.R. 220.

⁵² Peter W. Hogg, *Constitutional Law of Canada: Student Edition* (Toronto: Carswell, 2001) at 1014.

⁵³ *Ibid.* at 1007-15.

⁵⁴ Denise G. Réaume, “Discrimination and Dignity” (2003) 63 La. L. Rev. 645 at 670.

⁵⁵ [1995] 2 S.C.R. 418.

problematic in that the underlying values need not themselves be in keeping with equality values.⁵⁶ The indeterminacy of the dignity test has also been noted by Greschner, who is concerned that the judicial discretion involved in applying the dignity standard means that discrimination will devolve to more of an assertion than an argument.⁵⁷ Davis has made a similar charge in the South African context, stating that the Constitutional Court has rendered the value of equality meaningless by giving dignity a content and scope “to be used in whatever form and shape is required by the demands of the judicial designer.”⁵⁸ The statement was made amidst a critique of *Hugo*, which Davis criticized for introducing the principle of dignity into the equality analysis based on a dissenting opinion in *Egan*, a Canadian decision, and without any definition of the term.

There have also been a number of legal commentators, however, who have supported the close association of equality with dignity. Susie Cowen has insisted that dignity is better suited to inform equality than the value of equality itself. Given that equality is a comparative concept and dignity a substantive one, only the latter can provide the kind of normative conception of equality needed to overcome formalism.⁵⁹ She also eschews the idea that dignity is too individualistic a term by noting that dignity has been foundational to international human rights, both individual and collectivist in nature, and informs both civil and political as well as economic and social rights.⁶⁰

Arthur Chaskalson has also pointed to international human rights documents⁶¹ as justifying the correlation between dignity, which is a founding value of the South African Constitution,⁶² and rights generally in South Africa. He also asserts a close link between dignity and equality on

⁵⁶ Hogg, *supra* note 52 at 1007-15.

⁵⁷ *Supra* note 49 at 312-13.

⁵⁸ D.M. Davis, “Equality: The Majesty of Legoland Jurisprudence” (1999) 116 S.A.L.J. 398 at 413.

⁵⁹ Susie Cowen, “Can ‘Dignity’ Guide South Africa’s Equality Jurisprudence?” (2001) 17 S.A.J.H.R. 34.

⁶⁰ *Ibid.* at 50.

⁶¹ *Supra* note 48 at 196.

⁶² See *Constitution of the Republic of South Africa 1996*, *supra* note 2, s. 1.

the grounds that it is required in order to overcome a purely formal meaning of equality that would entrench rather than dismantle past discrimination. Equality must include an equality of worth, says Chaskalson, and this requires that everyone be treated with equal respect and concern, as conceived by Ronald Dworkin.⁶³

Errol Mendes likewise appeals to Dworkin to suggest that dignity encompasses collective rights, concluding that “[t]he fact that all human [sic] belong to the human collectivity gives them the inherent right to human dignity”. This is because “[t]he core of human dignity ... is the ability of human kind to *collectively* understand compassion and *collectively* understand the need for justice to remedy unnecessary suffering”, any one individual not needing to be imbued with reason to possess dignity.⁶⁴ Denise Réaume makes a similar argument for collectivity, arguing that dignity refers to the capacity of a person to have a conception of the self and the capacity to conceive of the good, both of which are engaged in relationships with others.⁶⁵

These remarks are not persuasive enough to counteract the critiques of dignity. To say that the human characteristics which make up dignity are undertaken in groups is not particularly helpful given that many individual rights are undertaken with others (e.g. expression). In fact, Réaume explicitly links dignity with autonomy, personal fulfilment and the exercise of capacities in order to realize one’s dreams,⁶⁶ highly individualistic language that denotes a classical liberal conception of agency antithetical to substantive equality and its focus on the treatment of disadvantaged groups.

References to Dworkin are perhaps more fruitful, given that his conception of dignity offers greater nuance than the Kantian tradition and allows for differential treatment. That said, understanding dignity as something collectively attributable to humanity universally does not *ipso facto* entail a

⁶³ *Supra* note 48 at 202-03.

⁶⁴ Errol P. Mendes, “Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity” (2000) 12 N.J.C.L. 3.

⁶⁵ *Supra* note 54 at 677.

⁶⁶ *Ibid.* at 673.

consideration of historical vulnerabilities or group disadvantage. The fact that international human rights documents mention groups in relation to dignity, for example, does not say anything about how these rights will be conceived in practice. Article 26 of the *International Covenant on Civil and Political Rights*⁶⁷ has generally been read as mandating formal equality by the Human Rights Committee. A good example of this is the decision in *Ballantyne v. Canada*,⁶⁸ where the Committee had to determine whether a Quebec law banning all commercial signs in English constituted discrimination. The Committee denied any Article 26 violation, but did so on very narrow reasoning. Contrary to the applicants' position that they, as English speaking entrepreneurs, were put at a disadvantage relative to their French counterparts, the Committee insisted that the applicants were not discriminated against since French speakers were equally unable to advertise in English. The decision treated English and French speakers in an identical fashion rather than looking to the pre-existing disadvantages of French speakers in Canada or the potentially negative effect of the law on English businesses in Quebec. The question, therefore, is ultimately not whether it is analytically possible to conceive of dignity in sufficiently collective terms to engage in a substantive equality analysis, but whether such an outcome will be likely. The use of dignity by courts will need to be analyzed further in order to help make such a determination.

IV. APPLICATION TO GENDER AND CASE LAW

Apart from the suggestion that dignity makes equality violations more difficult for the claimant to prove generally, any large-scale departure from a focus on group disadvantage may be particularly problematic for women. Such a shift increases the susceptibility of courts to slip back into

⁶⁷ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 26, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

⁶⁸ U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev. 1 (1993).

a more formal analysis of equality, thereby ignoring pre-existing power imbalances between men and women. When context is ignored and men and women are treated in an identical fashion, the potential for using constitutional rights as a mechanism of social change and greater equality in women's everyday social reality is diminished.

This problem will be particularly acute for women where legislation seeks to grant women a certain privilege that men may question as an affront to their dignity. The focus on dignity may also be particularly problematic in the area of economic and social rights, as courts are often less inclined to equate unequal divisions of property, welfare rights, and other economic rights with dignity and self-worth. In South Africa, an example of this is *Harksen*, where it was held that subjecting surviving solvent spouses to onerous and invasive burdens not applied to others involved in the insolvent estate did not amount to a violation of dignity. A Canadian example is *Gosselin v. Quebec (Attorney General)*,⁶⁹ where a scheme providing only one-third of welfare benefits to those under 30 years of age was held not to be discriminatory. The dignity of young persons was not thought to be infringed even though the scheme created an economic situation that was a serious risk to the claimant's basic subsistence. These cases reinforce the critique that a focus on dignity obscures the actual burdens being experienced, a problem that is particularly acute for women given 'the feminization of poverty'. The effects of a dignity-based test have also been directly at play in a number of gender equality cases, including *Jordan*, *Bhe* and *Trociuk*, which will be considered in turn.

Before considering gender cases that apply the current dignity focused equality analysis, it is worth discussing the decision in *Hugo*, a high-water mark in the South African Constitutional Court's focus on dignity. At issue was the constitutionality of a presidential act which remitted the prison sentences of certain mothers of children but not of fathers. Writing one of the decisions for the majority, Goldstone J. held that while the act was discriminatory, it did not violate s. 9 as unfair discrimination because "it cannot be said that it fundamentally impaired their rights of dignity

⁶⁹ 2002 SCC 84, [2002] 4 S.C.R. 429 [*Gosselin*].

or sense of equal worth.”⁷⁰ The dissent approached dignity differently, Kriegler J. holding that dignity was violated on the basis of the gender stereotypes that the law presupposed, namely that women were primary caregivers. Dignity, says Kriegler, is about “seeking to protect the basic choices [people] make about their own identities”, and generalizations based on gender inequality and patriarchy “stunt the efforts of both men and women to form their identities freely.”⁷¹ Mokgoro J.’s dissent provided a similar rationale, though focusing exclusively on the infringement of men’s dignity. Stereotypical assumptions about men’s aptitude at child rearing is an infringement of their equality and dignity, Mokgoro J. held, as it fails to recognize the equal worth of fathers that are actively involved in their children’s lives and treats them as less capable parents. The only written decision not to appeal to dignity was that of O’Regan J., who, writing a concurring majority opinion, agreed with Goldstone J. on the outcome but provided divergent reasons as to why equality had not been violated. Noting that gender stereotypes do not themselves make discrimination unfair, O’Regan J. held that unfairness requires looking at the group being discriminated against and the effect of the discrimination: the more vulnerable the group and the more invasive the discrimination, the more likely it is that it will be unfair. The discriminatory harm here was neither severe nor to a traditionally disadvantaged group, so no unfair discrimination was thought to exist.⁷²

The *Hugo* decision is odd in that while it emphasizes a strong connection between equality and dignity, the case could have been decided entirely without it. Indeed, it would have simplified matters immensely, given that although five separate and largely divergent decisions were given, O’Regan J.’s decision did not appeal to dignity yet still found that s. 9 had not been violated. O’Regan J.’s focus on the harm and disadvantage of the complainant group achieved the same end as the majority generally, which was to allow differential treatment between men and women in instances where a positive benefit is provided to women and, at the same time, men are not unduly harmed. By contrast, both the majority decision written by

⁷⁰ *Hugo*, *supra* note 4 ¶ 47.

⁷¹ *Ibid.* ¶ 80.

⁷² *Ibid.* ¶ 112-15.

Goldstone J. and the minority decision by Kriegler J. focus on dignity, but there is disagreement as to whether the law infringed the complainants' dignity. Kriegler J. tied dignity to choices about individual identity, while Goldstone J. simply asserted that human dignity was not infringed at all. This emphasizes the vagueness and indeterminacy of the term: it can be used to come to any number of conclusions, as was noted by Davis, and illustrates that the Court lacks any unified conception of what dignity means. The decision reached in *Hugo* was positive for women in that it granted a privilege that likely would have been withheld had the state been forced to provide it to everyone. However, the focus on dignity by the South African Constitutional Court remained problematic in that it minimized any analysis of actual disadvantage, an issue which became more apparent for women in the *Jordan* decision.

The majority decision in *Jordan*, written by Ngcobo J., concluded that a law criminalizing sex workers but not their clients did not constitute gender discrimination since it applied to "any person" and was thus facially gender neutral.⁷³ Ngcobo J. also held that there was no indirect discrimination on the grounds that there is a qualitative difference between prostitutes and clients: the former are in the business of prostitution whereas the latter may not be repeat offenders. Since the purpose of the law is to outlaw commercial sex, it made sense to target prostitutes.⁷⁴ Conversely, the dissenting judgment written by O'Regan J. and Sachs J. held that the law caused indirect discrimination, the effect of the law being to discriminate against women since the vast majority of prostitutes are female and the vast majority of clients are male. As the law reinforced stereotypes and assumptions about gender behaviour that had the "potential to impair the fundamental human dignity and personhood of women,"⁷⁵ the discrimination was also held to be unfair and thus a violation of s. 9. Going through the three factors from *Harksen*, the dissent concluded that unfair discrimination had been made out since women prostitutes are a vulnerable group that are negatively impacted by stereotypes and criminalization. However, when it came to the right to dignity under s. 10,

⁷³ *Jordan*, *supra* note 5 ¶ 9.

⁷⁴ *Ibid.* ¶ 10.

⁷⁵ *Ibid.* ¶ 65.

O'Regan and Sachs J. had a very different view of dignity. Here the female prostitute was *not* stripped of her dignity by the law, and so s. 10 had not been violated, any diminishment of dignity was the result of engaging in prostitution itself and the commodification of the body that such work entails.⁷⁶

The majority decision in *Jordan* has been criticized for failing to apply a substantive equality analysis, thereby failing to properly take into account the reality of prostitution in South Africa.⁷⁷ Treating dignity as a criterion when analyzing equality effectively masks group disadvantage and the actual burdens felt. Such a critique helps to account for the failure of the Court to fully consider issues of social disadvantage in the context of prostitution. For the majority to suggest that there is no indirect discrimination is, firstly, to ignore the social reality of women as a disadvantaged group who are disproportionately affected by the law. Secondly, it is to fall into an analysis like the validity test from *Egan* that Hogg warns us about, a mistake which occurs when a Court decides to read the contextual factors associated with dignity in a manner that counters the equality claim. Here the Court dismissed the claim to indirect discrimination by pointing to the objective of the legislation (outlawing commercial sex), forgetting that legislation can serve a rational purpose and still amount to unfair discrimination.⁷⁸

Yet, the minority's discussion of dignity is even more troubling. It is, first of all, inconsistent, in that it applies dignity to contrary ends. Whereas the law violated dignity through gender stereotyping, the right to dignity is thought not to have been violated since it is the individual choice of women to engage in prostitution that violates their dignity, not the system that in some circumstances severely limits women's capacity to make any other choice. This equivocation suggests that the content or meaning of dignity is unclear and susceptible to much political and normative manipulation. Secondly, the analysis uses an understanding of agency that subverts the claims of marginalized women while at the same time undermining the

⁷⁶ *Ibid.* ¶ 74.

⁷⁷ Jagwanth & Murray, *supra* note 3.

⁷⁸ Denise Meyerson, "Does the Constitutional Court of South Africa take rights seriously?: The Case of *S v Jordan*" (2004) *Acta Juridica* 138 at 146.

very human rights tradition that dignity is said to inform. Meyerson explains this by appealing to Dworkin's understanding of what it means to treat all individuals as being worthy of the same respect and concern in the context of the state power to criminalize conduct. For Dworkin, violating dignity is a matter of treating groups as less than full members of the human community by translating external preferences into the law rather than focusing on general public ends. Focusing on criminalizing prostitution over solicitation constitutes just such a preference for Meyerson, who concludes that the minority judgment in *Jordan* does not apply dignity in keeping with Dworkin's conception. The larger problem, however, is that the Constitutional Court has applied Dworkin's conception of dignity in the past,⁷⁹ suggesting that dignity is being applied selectively and contrary to women's interests.⁸⁰

Moving to the Canadian context, the first post-*Law* decision of the Supreme Court of Canada on gender equality was *Trociuk*, which, as noted, unanimously held that legislation allowing birth mothers not to acknowledge the biological father on birth registration violated s. 15. Applying the third part of the *Law* test, the Court began by holding that the interests affected were important. Parents have a significant interest in meaningfully participating in the lives of their children and the inclusion of one's particulars on a birth registration is "an important means of participating in the life of a child."⁸¹ Next, the Court held that the distinction had a strong negative effect on the dignity of fathers. While admitting that *Law* considered historical disadvantage to be "probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory,"⁸² and that fathers did not constitute a historically disadvantaged group, the Court concluded that "it does not follow that the absence of historical disadvantage is a compelling factor against a finding of discrimination."⁸³ It is unclear how this follows

⁷⁹ See *S. v. Makwanyane* [1995] 6 B. Const. L.R. 665 (S. Afr. Const. Ct.) (SAFLII). In this case, the Constitutional Court held that the death penalty was a violation of the right to life as well as the right to dignity: see paras. 83-84, 144.

⁸⁰ Meyerson, *supra* note 78 at 149-154.

⁸¹ *Trociuk*, *supra* note 6 ¶ 16.

⁸² *Ibid.* ¶ 20, citing *Law* para. 63.

⁸³ *Ibid.*

given that, while discrimination can exist absent its most compelling indicia, surely such an indicium in favour of discrimination would, in its absence, at least be a compelling indicium against discrimination. Instead, the Court noted that a reasonable father would perceive the legislature as “sending a message that a father’s relationship with his children is less worthy of respect than that between a mother and her children”, “a negative judgment of his worth as a human being.”⁸⁴ Moreover, equating fathers who want to create a symbolic tie with their children with those who do not was said to create false and pejorative associations similar to stereotypes or prejudices. While there may be compelling reasons for permitting a mother not to acknowledge a father at birth, the Court did not think these reasons could justify the possible disadvantages that a father may face.⁸⁵ Finally, the Court considered proposed ameliorative purposes or effects of the legislation on more disadvantaged groups, namely women and children. The Court acknowledged that the legislation encourages mothers to report the birth, providing the certainty of non-disclosure for those mothers who have valid reasons for not acknowledging the father. Yet the Court concluded that, even where a legislative distinction serves a relevant ameliorative purpose, the reasonable claimant may still perceive that his dignity has been infringed.⁸⁶

Trociuk exemplifies many of the worries expressed by critics about the potential problems with dignity. While the Court goes through the various considerations from *Law*, each criterion is read explicitly through the lens of dignity in a way which minimizes the actual disadvantage of women *qua* mothers and the potential burdens they face. It in fact does make sense to treat women and men differently in the context of child birth since the biological mother necessarily bears a burden that the biological father, insofar as he is compared simply as the biological father and not as a potential contributor to the child’s upbringing, does not. Whereas the mother has a relationship with the child in virtue of the pregnancy itself, a biological father need not have any connection with the child apart from his genetic contribution. And yet the Court’s approach resembles a pure

⁸⁴ *Ibid.* ¶ 21.

⁸⁵ *Ibid.* ¶ 25.

⁸⁶ *Ibid.* ¶ 29.

“same treatment” or formal equality analysis wherein mothers and fathers are decontextualized as parallel contributors of genetic material such that sex discrimination exists to the extent that they are treated differently.⁸⁷ The fact that males are not a vulnerable or disadvantaged group is effectively ignored, while the valid reasons a mother may have for not wanting a father on the birth certificate are downplayed.

The analysis in *Trociuk* also illustrates the malleability of “dignity”: just as it is by no means apparent how including a father’s name on a birth certificate constitutes “meaningful participation” in the child’s life, it is equally unclear on what basis its exclusion would amount to “a negative judgment of his worth as a human being”. The concept of dignity is used to justify an outcome that it could just as easily have opposed. That is, one could likewise envision the Court holding that the inclusion of information on a birth registration has nothing whatsoever to do with dignity, or, what is more, that requiring such an inclusion would infringe the dignity of the mother. The decision in *Trociuk* would have almost certainly been the opposite had the Court been forced to use the earlier test as outlined in *Andrews* and elucidated in *Weatherall* and *Turpin*. These latter cases allow differential treatment while all but ensuring that discrimination will not be found absent pre-existing disadvantage, respectively, and biological

fathers do not constitute a vulnerable or insular minority. Given that the differential treatment in *Trociuk* would not violate equality where discrimination is largely equated with harming disadvantaged groups, the fact that s. 15 is violated under the *Law* test reinforces the view of Albertyn and Goldblatt that a dignity-focused test emphasizes individual personality rights at the expense of remedying group disadvantage.

A review of these gender equality cases from Canada and South Africa suggests that a dignity-centred approach to equality has gone some way in undermining the very substantive equality that these countries’ Courts have championed. While *Hugo* applied the kind of contextual analysis

⁸⁷ William Black & Lynn Smith, “The Equality Rights” in Gérald-A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedom*, 4th ed. (Markham: Butterworths, 2005) 927 at 983-984.

befitting substantive equality, the same result could have been reached by replacing dignity with the analysis provided in *Turpin* as male prisoners are not an historically disadvantaged group. *Jordan* constitutes a far larger problem for gender equality since the decision's reliance on dignity is at least partly to blame for its contradictory interpretations and minimization of the actual conditions of women in South Africa. Yet *Trociuk* is arguably an even more problematic decision for gender equality and the goal of transcending formal equality. Not only did it fail to sufficiently address the female perspective, thereby regressing into an equal treatment view of equality, but it highlighted the disturbing flexibility with which the term dignity can be used by judges.

It is by no means obvious how the exclusion of a name on a birth certificate infringes dignity, while forcing young people to live on one-third of subsistence wages, a consequence of the law at issue in *Gosselin*, does not. Nor is it any more obvious why the exclusion is a greater offence to dignity than the de facto focus on criminalizing only women in the sex trade, as illustrated in the *Jordan* decision. Given that the women's movement has emphasized the need to provide clear language for rights in order to avoid political and judicial appropriation,⁸⁸ such divergent applications of the term should be troubling. If *Trociuk* ultimately amounts to the kind of analysis that results from a focus on dignity, then in a country like South Africa, where there is likewise great interest among many in using substantive equality to transform gender relations, there should be some wariness in equating equality with dignity.

The recent South African decision in *Bhe* may at first glance be viewed as an example of dignity being applied more favourably to women and substantive equality generally, though a closer look suggests that some qualification to that initial optimism is warranted. In that case, the Constitutional Court found that primogeniture rules in customary laws precluding women from inheriting intestate property violated equality,

⁸⁸ See, e.g., Beverley Baines & Ruth Rubio-Marin, "Introduction: Toward a Feminist Constitutional Agenda" in Baines & Rubio-Marin, *supra* note 3, 1 at 9; Horia Mosadiq, "The New Afghan Constitution: How Women Succeeded in Ensuring Certain Rights and What Challenges Remain" (2005) 3 Critical Half 28 at 30-31.

but did so without appealing to dignity. Instead, the Court simply noted that the rules entrenched past patterns of disadvantage among a vulnerable group.⁸⁹ Dignity was said to have been violated, though only in respect of the right to dignity under s. 10. The Court concluded that the implication that women were not fit to own property was an affront to dignity⁹⁰ in addition to equality. In other words, the Court restricted its discussion of dignity to the s. 10 right to dignity itself, avoiding the application of dignity to different ends that created such inconsistency in *Jordan*. So while the decision is certainly a victory for women's rights, it should not be taken as validation for the predominant view in South Africa's jurisprudence to date of associating equality with dignity. Moreover, the facts in *Bhe* presented a fairly stark instance of unfair discrimination that no doubt would have been found regardless of whether the Court applied dignity to its equality analysis or not. Part of the problem with dignity is that it can be applied to suit any end in more difficult factual scenarios, Hugo being a notable example. Nonetheless, it is heartening to see the Court in *Bhe* associate dignity with issues of socio-economics in a way that was lacking in *Harksen* (to say nothing of *Gosselin*, in the Canadian context), a move which suggests that South Africa's Constitutional Court – though more sympathetic to positive rights than its Canadian counterpart⁹¹ – may be taking substantive equality more seriously than the Supreme Court of Canada.

⁸⁹ *Bhe*, *supra* note 31 ¶ 91.

⁹⁰ *Ibid.* ¶ 92.

⁹¹ See Justice Zak Yacoob, "Some perspectives on the movement towards and the struggle for equality in our context" (2001) *Acta Juridica* 1 for a discussion of the relationship between socio-economic rights and dignity.

V. CONCLUSION

A review of the jurisprudence in Canada and South Africa suggests that the association of equality with dignity has not been advantageous for women. Such a conclusion is counter-intuitive – if not downright troubling – given both the desire for substantive equality by proponents of dignity, and the seemingly positive effect that dignity, or at least an equality test which incorporates the concept of dignity, has had for other disadvantaged groups (homosexuals in Canada and blacks in South Africa).⁹² And yet the critiques of a dignity centred test for equality have proven particularly prescient to issues of gender equality, courts in both countries shifting from substantive to formal equality in the case of women. Moreover, criticisms from Canadian legal commentators appear equally relevant to the jurisprudence in South Africa, and vice versa. For example, Hogg's critique applies to the *Jordan* decision just as Albertyn and Goldblatt's critique applies to the *Trociuk* decision, suggesting that problems with dignity are more inherent than the result of idiosyncrasies of a few specific judges. Moving away from dignity may appear difficult to square with a commitment to substantive equality and social transformation, particularly for a country like South Africa, whose history of apartheid almost cries out for its affirmation. And yet, recent Canadian jurisprudence affirms Moreau's view that while dignity can tell us why we value equality, it cannot determine when it has been violated, something South African Courts would do well to consider before looking to the Canadian perspective for guidance.

⁹² To say that a dignity-centred test has provided some benefits for one social group or another is not necessarily to conclude that the concept of dignity is itself the ideal standard with which to determine discrimination. A law or legal framework may be so overtly discriminatory that an equality violation can and should be found even where pre-existing disadvantage is not at the forefront of analysis.