The Role of Dignity in Equality Law: Lessons from Canada and South Africa


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The Role of Dignity in Equality Law: Lessons from Canada and South Africa

Abstract

This paper examines the link sometimes made between the concept of dignity and substantive equality. The paper notes that dignity can have very different definitions. Often dignity does not play a substantive role in the resolution of decisions. Sometimes the understanding of dignity does matter and in all cases, judges should avoid the temptation to rely on unarticulated value judgements or subjective notions of dignity. If judges refer to dignity, they should articulate the values underpinning their conception of it.

1. Introduction: empty vessels and unassailable concepts

Equality is a difficult concept: the Chief Justice of Canada labels it the “most difficult right”. Courts in many different jurisdictions have had difficulties grappling with it. In the United States, an apparently clear three-tier approach to equal protection law has been confounded by the emergence of “rational scrutiny with bite” and “sliding scale” approaches to equal protection. Canada has seen repeated efforts since the 1990s to

1 I am grateful to colleagues in the Human Rights Centre, Queen’s University of Belfast, Fiona O’Connell and participants at the Equality and Social Inclusion conference in Queen’s, February 2006 for comments on an earlier draft. Responsibility for any inadequacies is mine alone.


5 For a contrast of the US and Canadian approaches to equality, see Claire L’Heureux-Dube, Realizing equality in the twentieth century: the role of the Supreme Court of Canada in comparative perspective, 1 INT’L J. CONST. LAW 35 (2003).
define an approach to equality; an apparent reconciliation of views in 1999\(^6\) has not prevented serious disagreement among judges as to the application of the equality test.\(^7\) The same is true, if not quite to the same extent, in South Africa, where the Constitutional Court, early in its history, set out a test for equality\(^8\) that has seen important split decisions in its application.\(^9\)

Some of this controversy may reflect the criticism that equality is an essentially empty concept, a point made with vigour by Peter Westen in the 1980s.\(^{10}\) The formal conception of equality – that likes should be treated in a similar manner and those which are unlike treated differently according to their difference – is, as Westen argued, a meaningless concept, for everything depends on the substantive rule by which one defines what is alike. The emptiness of formal equality makes it tempting to flesh out equality with more substantive concepts. Sandra Fredman identifies specific values which can be used to develop a conception of equality: distributive justice, remedial aims, participation, and dignity.\(^{11}\) In this unpromising context, some judges and commentators have turned to “dignity” to provide guidance. This is especially so in Canada and South Africa (countries often suggested as models for equality law)\(^{12}\) though it has also

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\(^8\) Set out in President of the Republic of South Africa v. Hugo (CCT 11/96) and Harksen v. Lane (CCT 9/97) at paras. 50-53.

\(^9\) In Hugo and Harksen themselves, but also in City Council of Pretoria v. Walker (CCT 8/97); Robinson v. Volks (CCT 12/04) and others.


\(^11\) Sandra Fredman, INTRODUCTION TO DISCRIMINATION LAW, (Oxford University Press 2002), 17-23; Denise Reaueme, Discrimination and Dignity, 63 LA. LAW REV. 645 (2003), 647.

\(^12\) Evadne Grant and Joan Small, Disadvantage and Discrimination: the emerging jurisprudence of the South African Constitutional Court, 51 NORTHERN IRELAND LEGAL QUARTERLY 174 (2000).
attracted attention from commentators elsewhere, and recent European directives on equality refer to the aim of protecting dignity.

Dignity is an unassailable value, and is such a powerful notion that it may serve as an irrefutable argument. It is also an ambiguous concept that conceals very different ideas on what constitutes a life with dignity. Despite this ambiguity, courts have resorted extensively to the concept. It is a constitutional right in Germany, Hungary, Israel and South Africa among others, while the European Convention on Human Rights’ prohibition of “inhuman and degrading treatment” may be seen as a negative formulation of the right to dignity. In some of these jurisdictions, dignity may serve as the springboard for a series of rights. Dignity is stated as a guiding principle in other constitutions and in international human rights law, while some scholars discern a

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16 Dietrich Ritschl, Can Ethical Maxims be Derived from Theological Concepts of Human Dignity, in DAVID KRETZMER and ECKART KLEIN (eds.) THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (Kluwer 2002), at 93.
18 Article 1, 1949 German Constitution. See EDWARD EBERLE, DIGNITY AND LIBERTY (Praeger 2002); Christian Starck, The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions, in D. KRETZMER and E. KLEIN, supra note 16.
19 Article 54 Hungarian Constitution, CATHERINE DUPRE, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS: THE HUNGARIAN CONSTITUTIONAL COURT AND THE RIGHT TO HUMAN DIGNITY, (Hart 2003), Ch. 3.
21 Section 10 1996 South African Constitution.
24 See DUPRE, supra note 19, pp. 67ff.
25 Preamble, 1937 Irish Constitution; Section 1 and 7 1996 South African Constitution.
26 1948 Universal Declaration of Human Rights, Preamble, Article 1, Article 22, Article 23.
commitment to dignity in statutory policy. Judges of the US Supreme Court including Justice William Brennan, Justice Antonin Scalia and Justice Anthony Kennedy have referred to dignity. Whether stated as a right or a principle, dignity may be invoked to justify limiting other rights. The focus in this paper is on one specific use of dignity – as a value which can be used to “ground” or give direction to the concept of equality.

Canada and South Africa have detailed constitutional guarantees of equality. Section 15 of the Canadian Charter of Rights and Freedoms reads:

“15. (1) Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.”

Under Section 1 of the Charter, a measure which violates Section 15 may still be saved if it satisfies a proportionality test: restrictions on a right that can be shown to be necessary to pursue a legitimate state interest are constitutional.

27 CONOR GEARTY, PRINCIPLES OF HUMAN RIGHTS ADJUDICATION (Oxford University Press 2004), Ch. 5.
29 Criticizing affirmative action in Richmond City v. JA Croson (1989) 488 U.S. 469, 527 (citing Bickel).
31 The European Court of Human Rights dismissed a claim that the judicial decision to abolish the common law rule that a husband could not rape his wife was inconsistent with the principle that criminal laws are non-retrospective. The Court relied upon the serious threat to human dignity posed by rape in justifying its decision: R. v. United Kingdom (1995) 21 E.H.R.R. 363, para. 42.
32 Section 1 reads: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free
The Constitution of South Africa provides more guidance on equality. Section 9 states:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (2). National legislation must be enacted to prevent or prohibit unfair discrimination.

5. Discrimination on one or more of the grounds listed in subsection (2) is unfair unless it is established that the discrimination is fair.

As in Canada, in principle a measure which violates Section 9 can be justified if it is satisfies a proportionality test.33

33 Section 36.1 of the South African Constitution:
This paper examines how judges in Canada and South Africa have referred to the concept of dignity in developing equality law. It argues that, in many instances, the concept does not serve a useful legal purpose, and suggests that there are dangers in introducing the ambiguous concept of dignity into equality analysis.

2. The meaning of dignity

That dignity is difficult to define is a commonplace.\textsuperscript{34} There is a danger in relying on a reflexive approach to dignity, which could cover almost any imaginable moral or ethical position and be no more than a “gut reaction” or an unarticulated reliance on what judges perceive to be socially desirable or acceptable.\textsuperscript{35}

Dignity has a long history, with antecedents in religious thought\textsuperscript{36} and early Western philosophy.\textsuperscript{37} It has had many different interpretations in that long history, including connotations of social status\textsuperscript{38} or personal honour.\textsuperscript{39} Also encompassed is the notion of the dignity of humanity as a species, which is often invoked in discussions

\begin{itemize}
  \item b. the importance of the purpose of the limitation;
  \item c. the nature and extent of the limitation;
  \item d. the relation between the limitation and its purpose; and
  \item e. less restrictive means to achieve the purpose.
\end{itemize}

\textsuperscript{34} See e.g., FREDMAN, supra note 11, 19.

\textsuperscript{35} “Dignity is said to be vague to the point of vacuous and, therefore, too easily useable to dress up decisions based on nothing more than conservative gut reaction or excessive deference to Parliament.” Reaume, supra note 11, at 646 summarising the views of critics of dignity.

\textsuperscript{36} Perry disputes the possibility of separating “dignity” from religious origins: MICHAEL PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS (Cambridge University Press 2006).

\textsuperscript{37} Bloch traces it in different guises to the ancient Greeks and Romans, while others specify Cicero as a Roman source later made popular by Pufendorf in the 17\textsuperscript{th} Century: ERNST BLOCH, NATURAL LAW AND HUMAN DIGNITY (MIT Press 1988).

\textsuperscript{38} Discussed in Michael Meyer, Dignity as a Modern Virtue, in D. KRETZMER and E. KLEIN, supra note 16.

\textsuperscript{39} This idea may still be reflected in defamation or related civil wrongs.
about genetics,\textsuperscript{40} end-of-life decisions and reproductive technologies.\textsuperscript{41} Such a view of dignity may have force even after the death of a person,\textsuperscript{42} or before birth.\textsuperscript{43}

What is essential to the human species or nature is controversial. For many years, Irish courts limited the application of equality law to distinctions that affected the “essential attributes” of the human person. This produced some very odd decisions, including a first-instance ruling that excluding women from juries was non-discriminatory because jury service was not an essential human attribute.\textsuperscript{44}

“Dignity” may refer to a life that is led according to an ethical ideal of the virtuous or “good life”, an approach which may again be controversial. Beyleveld and Brownsword give the example of German and French cases where courts prohibited “peep shows” and the carnival practice of “dwarf throwing” relying on the idea on dignity,\textsuperscript{45} while more recently a French court invoked dignity to ban a controversial Benetton ad.\textsuperscript{46} In one South African case, judges held that prostitution is a diminution of human dignity and violates the principle that the human body should not be made into a

\textsuperscript{40} Deryck Beyleveld and Roger Brownsword, Human Dignity, Human Rights and Human Genetics, 61 MODERN LAW REVIEW 661 (1998).
\textsuperscript{41} Feldman, (1999) \textit{supra} note 17 at 684. See the European Court of Human Rights case where a woman wanted to use stored fertilized ova, but was prevented because her estranged husband denied his consent. Dignity was invoked both to defend and condemn the restriction in the European Court of Human Rights: Evans v. UK (Application no. 6339/05), para 89 of the judgment and para. 13 of the joint dissenting opinion.
\textsuperscript{42} Such a conception of dignity may apply in situations where an individual is dead; as the German Federal Constitutional Court puts it: “It would be incompatible with the constitutional commandment that human dignity is inviolate … if a person, possessed of human dignity by virtue of his personhood, could be degraded or debased… even after his death”. Mephisto case (1971) BVerfGE 30, 173; found in DONALD KOMMERS, CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (Duke UP, 1997), 302-3.
\textsuperscript{43} The European Court of Human Rights suggests that the capacity of a foetus to become a person “require[s] protection in the name of human dignity”: Vo v. France, Application no. 53924/00, para. 84. See also the German Abortion decisions in KOMMERS, \textit{supra} note 42, at 336-359.
\textsuperscript{44} The ruling was overturned on appeal. See JOHN KELLY, GERARD HOGAN AND GERRY WHYTE, THE IRISH CONSTITUTION (Butterworths 1994), 719.
\textsuperscript{45} Beyleveld and Brownsword, \textit{supra} note 40 at 662. The French law was approved by the United Nation’s Human Rights Committee in Wackenheim v. France, Communication No 854/1999 (cited in Moon and Allen, \textit{supra} note 13, at 642).
commodity. A substantive or “thick” conception of the “good life” may be problematic in constitutional law if it requires judges to choose between competing conceptions of the good life, or restricts another value linked to dignity, namely, autonomy.

Kant’s moral writings link dignity, equality and autonomy intimately. A rational being has the ability to act morally. This capacity to act morally confers a worth on the rational being which is beyond price and this “unconditioned and incomparable worth” is termed dignity. This leads to one version of the categorical imperative: that persons should not be treated merely as means, but rather as ends-in-themselves. For Kant, “Autonomy is therefore the ground of the dignity of human nature.”

One interpretation of this idea may put the emphasis on the free choice of the individual regardless of circumstances. Dignity as autonomy has often been criticised as being too individualistic. The notion may lead to a justification for a minimalist laissez-faire state – Nozick explicitly invokes the Kantian categorical imperative in developing his notion of a minimalist state. An excessive focus on autonomy as free choice may condemn social protection measures as limiting free choice and so failing to respect dignity.

47 Jordan v S. (CCT31/01), at para. 74, per Justices O’Regan and Sachs.
48 Michael Walzer, Thick And Thin (University of Notre Dame Press 1994).
49 Immanuel Kant, The Moral Law (Hutchinson, 1948), 434-440 (Royal Prussian Academy pagination).
50 Kant, ibid., 436.
51 Kant, ibid., 429, 434. For a South African judicial reference to the Kantian ideal see Dodo v. The State (CCT 1/01), para. 38. This version of the categorical imperative underpinned the decision of the German Constitutional Court to invalidate a law authorising the shooting down of hijacked airliners: Oliver Lepsius, Human Dignity and the Downing of Aircraft, 7 German Law Journal 761 (2006), 767.
52 Kant, ibid., 436.
Although an individualistic emphasis on free choice may be one interpretation of Kantian dignity, it is not the only one. Rawls connects Kant’s notion of treating persons as ends in themselves\textsuperscript{56} to the “bases of social respect”- how an individual feels valued in his or her community.\textsuperscript{57} This is essential to an individual’s self-respect, without which life may seem to lack value or meaning. Public arrangements that express contempt or indifferent\textsuperscript{58} to an individual’s life plans are not acceptable. This more social notion of dignity incorporates both a subjective element (how the individual feels valued in the society)\textsuperscript{59} and a more materialistic conception: for Rawls, an individual’s self-respect may be devalued if social goods are unequally distributed (unless an unequal distribution works to the benefit of the least advantaged in society). Such a view, rather than questioning the legitimacy of social protection measures, regards them as intimately linked to dignity.\textsuperscript{60}

A final, more materialistic, conception of dignity again relates it to social goods. It eschews the subjective question of how a person feels; rather it asks whether social goods are equally distributed to everyone’s material benefit. The spirit of this is best captured in international human rights texts, which invoke “human dignity” in the sense of our common humanity,\textsuperscript{61} to ground human rights and equality. Such texts then condemn any “distinction, exclusion or restriction” that nullifies the “recognition, enjoyment or exercise” of rights in the “political, economic, social, cultural, civil or any other field” on the grounds specified in the international texts, such as sex, race, or

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\textsuperscript{56} Teuber explains how Nozick and Rawls interpret Kant differently on this point: Andreas Teuber, Kant's Respect for Persons, 11 \textsc{political theory} 369 (1983), 370.

\textsuperscript{57} \textsc{John Rawls}, \textsc{A Theory of Justice} (Oxford University Press 1972) 62, 178, 440.

\textsuperscript{58} \textsc{Rawls, ibid.} at 338. This is closer to Kant’s own views, see \textsc{Kant, supra} note 49 at 423.

\textsuperscript{59} Commenting that dignity is perplexing in having these subjective and objective dimensions, see Feldman, (1999) \textit{supra} note 17 at 685-6.

\textsuperscript{60} In Germany, dignity requires the provision of a social welfare safety net: Starck, \textit{supra} note 18, at 192-3. South African courts have emphasised the interrelationship between dignity, social security and equality: Khosa v Ministe\textsc{r of Social Development and Others} (CCT12/03).

disability.62 Aside from the role of dignity in providing a foundation for our sense of common humanity, the concept may do little further work in this conception.63 The focus is rather on an approach which, according to Justice Albie Sachs, “acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved.”64

Judicial considerations of dignity do not always clarify which conception of dignity is being preferred. In the landmark case of Law v. Canada, the Supreme Court of Canada was faced with a claim by a thirty-year old woman that a statute denying her survivor’s benefits because she was under 35 was discriminatory. Justice Frank Iacobucci discussed the idea of dignity in the context of Section 15 of the Canadian Charter, elaborating a three-stage test for determining whether a measure was discriminatory:

- Did the case involve a formal distinction or a differential impact?
- Was it based on one of the grounds mentioned in Section 15 of the Charter or an analogous ground?


64 More fully, Justice Sachs says:

“Rather …[the substantive approach to equality] focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved. In this respect, the context in which the measure operates, the structures of advantage and disadvantage it deals with, the impact it has on those affected by it and its overall effect in helping to achieve a society based on equality, non-racialism and non-sexism, become the important signifiers.”

Minister of Finance v. Van Heerden (CCT63/03) para. 142. Justice Sachs’ approach to substantive equality in this passage does not refer to “dignity”, though he later mentions it. He invokes it in different senses, including referring to the establishment of “national dignity” achieved through the creation of a just society: para. 145.
If so, did it violate the purpose of the Charter? 65

In the third part of the three-stage inquiry, Iacobucci J. explains that human dignity becomes crucial to the purpose of the Charter:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law? 66

This passage sets out a detailed analysis of what dignity means in the Canadian context but it does not eliminate scope for disagreement. Justice Iacobucci combines different conceptions of dignity. 67 The test mentions laws “premised upon personal traits”, which would offend autonomy. It asks how the claimant “feels” he or she has been treated and whether that feeling is “legitimate”, whether there is a reasonable basis for a feeling that one’s dignity has been assaulted. It refers to responding to the “needs, capacities and merits” of persons and avoiding marginalisation. This omnibus approach allows for much

66 Id. At para 53.
disagreement; scholars claim that the concept is too “abstract” \(^{68}\) and even “broad, malleable and loaded.” \(^{69}\) In several equality cases discussed below, the differences among the judges may be explained by the emphasis that some give to dignity as autonomy and others to the more social or materialistic conceptions of dignity. \(^{70}\)

3. The concept of dignity in equality law

Dignity, in all its varying iterations, can be used in different ways in an equality jurisprudence. \(^{71}\) It may have a largely symbolic role, in emphasising the importance of equality and non-discrimination. Judges also may invoke dignity to identify the groups or classifications that equality jurisprudence should concern itself with and dignity may be used as a threshold mechanism for determining when a distinction becomes unacceptable. In cases where a non-symbolic use of dignity is suggested, the concept often adds little to the legal analysis, which is based on more concrete notions (e.g. the need to combat particular forms of prejudice and stereotypes).

Canadian and South African judges have referred to the concept of dignity to expand the scope of their equality clauses. Section 15 of the Canadian Charter of Rights and Freedoms comprises a comprehensive guarantee of equality, outlawing discrimination on a number of “enumerated grounds” (race, religion, sex, age, etc.). Grounds “analogous” to these enumerated ones are also covered, and in *Corbiere v. Canada*, the Supreme Court held that a ground is “analogous” if it is used in a way to impair human dignity.

The first inquiry is whether the distinction is made on the basis of an enumerated ground or a ground analogous to it. The answer to this

\(^{68}\) Grabham, *supra* note 6 at 654.

\(^{69}\) Greschner, *supra* note 6 at 312.

\(^{70}\) See Section 4 of this paper.

\(^{71}\) Other uses of dignity include extending discrimination law to cover harassment, or in deciding cases where rights conflict. Moon and Allen, *supra* note 13 at 631, 644; Rosa Ehrenreich, Dignity and Discrimination, 88 *Georgetown Law Journal* 1 (1999). Fredman also discusses the role of dignity in avoiding “levelling down”: FREDMAN, *supra* note 11 at 18.
question will be found in considering the general purpose of s. 15(1), i.e. to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote a society where all persons are considered worthy of respect and consideration. 72

In Corbiere, a statute denied Aborigines living off a reserve any voting rights relating to the reservation. The Supreme Court ruled that the status of being an “off reserve Aborigine” was a ground analogous to those enumerated in Section 15 and therefore suspect. Like the enumerated grounds, it was a status that was often used in stereotypes and was not based on merit or personal circumstances but rather on a feature that is “immutable or changeable only at unacceptable cost to personal identity”.73 Finding there was a distinction based on an analogous ground was not the final step in determining whether there had been improper discrimination.74 The next step was to examine whether the distinction was discriminatory in a substantive sense, that is, whether it impaired dignity as outlined in Law v Canada.75 The majority held that the statute was discriminatory in the substantive sense, and was not justified under the limitations test in Section 1, because a complete ban on participation by off-reserve Aborigines participating in the reserve political process was more than a minimal impairment of the right.76

The Constitutional Court of South Africa also considers distinctions, beyond those enumerated in Section 9 of the South African constitution, if they are based on grounds, directly or indirectly, that have the potential to impair human dignity.77 If there is a distinction based on such a ground, then the court must consider whether it is unfair.

74 Corbiere at para. 7-8.
75 Corbiere at para. 8-11, referring to Law v. Canada (Minister of Immigration) [1999] 170 Dominion Law Reports 4th 1.
76 Corbiere at para. 21.
77 Harksen v. Lane (Case 9/97), para. 46.
In deciding whether a specific distinction on an unenumerated ground is unfair, one of the factors that the court consider is whether the measure impairs the dignity of the persons affected.\textsuperscript{78}

While these courts mention dignity in expanding the scope of equality law, it is not clear that the concept does any work in furthering the courts’ reasoning. The majority in \textit{Corbiere} refers to the concept of dignity, but the substantive work in deciding whether “off reserve Aborigines” should have voting rights is done by deciding whether the ground for distinction is based on an immutable characteristic, or a personal characteristic that is difficult to change and which is used to stereotype some people harmfully. These concepts can be explained without referring to dignity.

One of the main uses of dignity in comparative constitutional equality jurisprudence is \textit{as a threshold requirement}, to separate distinctions that are constitutionally improper from those that are not. The South African Constitution, for instance, does not prohibit discrimination generally, only unfair discrimination; in determining what is unfair, dignity is “an underlying consideration”.\textsuperscript{79} For example, a distinction among the owners of land in different areas for fire-control purposes does not affect human dignity and so does not constitute unfair discrimination.\textsuperscript{80}

This use of dignity comes across in the guidelines developed by the Canadian Supreme Court in \textit{Law v. Canada}, the case dealing with survivor’s benefits discussed above.\textsuperscript{81} Integrating diverse strands from earlier cases,\textsuperscript{82} the court developed the three stage test explained above. The third inquiry – the purpose of the Charter - embodies the

\textsuperscript{78} Id., para. 51.
\textsuperscript{79} Robinson v Volks, para. 79, per Ngcoco J., concurring.
\textsuperscript{80} Prinsloo v. Van der Linde, and the Minister of Forestry and Water Affairs (CCT 4/96) para. 41.
\textsuperscript{81} Law v. Canada (Minister of Employment and Immigration) [1999] 170 Dominion Law Reports 4th 1, [1999] 1 SCR 497.
idea of dignity. Justice Iacobucci identified a range of factors to consider under this heading, including pre-existing disadvantage, the relationship between the grounds and the claimant’s “need, capacity or circumstances”, the ameliorative purpose of the legislation, the nature of the interest concerned, and whether the law otherwise demeaned the dignity of the claimant.

In *Law* the distinction was based on the enumerated ground of age. Under the third stage of the test, the Court found there was no violation of human dignity because young people (without disability or dependent children) had a better chance to obtain employment. There was no improper stereotyping of people under 35, but rather a distinction related to the reality that a young person has a better opportunity to replace the lost income. While “dignity” provides the rubric, the concrete application of the third stage of the *Law* inquiry does the substantive work

These Canadian and South African cases illustrate the ways in which judges typically refer to dignity at different stages of equality cases. Although “dignity” is largely symbolic, this is not so in all cases. As the next section demonstrates, when judges rely on dignity to provide the reasoning for a decision, then the inherent ambiguities and resulting dangers of the dignity concept become manifest.

### 4. The dangers of dignity in an equality jurisprudence

Judges decide equality based on specific articulations of ideas about stereotyping, personal characteristics and the like. “Dignity”, on the other hand, is largely symbolic and leaves much room for unarticulated value assumptions to enter into judicial decision

83 “It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom ....” Para. 51.

84 Paras. 59-75.

85 Para. 75.

86 Paras 101-103.
making.\textsuperscript{87} What one person regards as an intolerable assault on human dignity, another may see as incidental, part of every day life.\textsuperscript{88} What one person may see as a racist denial of dignity, another may see as legitimate affirmative action. Several Canadian and South African cases are illustrative.

In some cases, it is the relationship between dignity and autonomy that is problematic. For example, both South African and Canadian courts have dealt with allegations of discrimination against unmarried cohabiting heterosexual couples vis-à-vis the rights granted to married cohabiting heterosexual couples. In the Canadian case of \textit{Nova Scotia v. Walsh}\textsuperscript{89} the distinction was a statutory presumption that matrimonial property should be equally divided between the spouses at the end of marriage; this presumption did not apply to unmarried cohabiting couples. In South Africa, in \textit{Robinson v. Volks}, where a statute provided that a married spouse, on the death of a partner, could apply for maintenance to be paid to her or him out of the deceased’s estate; this possibility did not exist for unmarried cohabiting couples.\textsuperscript{90} Both courts, over strong dissents, found there to be no unfair discrimination.\textsuperscript{91} The majority stressed the need to respect autonomous choices: where a person or couple chose not to get married and accept the legal incidents of marriage, these should not be imposed by a court.\textsuperscript{92} The dissenters in both cases pointed out that free choice in this sort of situation was often an illusion. In particular, as Justice Albie Sachs wrote in the South African case, structures of gender discrimination which disadvantage women are not unique to marriage but also

\textsuperscript{87} \textsc{Fredman}, \textit{supra} note 11 at 19.

\textsuperscript{88} For instance in the South African case, City Council of Pretoria v. Walker, the Council adopted a policy of not prosecuting residents of more deprived areas for non-payment of utilities charges, but did prosecute residents of more affluent (predominantly white) areas. The majority found this policy to affect white residents “in a manner which is at least comparably serious to an invasion of their dignity” (para. 82), but Justice Sachs, dissenting, “simply [could not] see how the complainant’s rights were affected or his fundamental human dignity impaired by his receiving a summons to pay for something that was due.” (para. 127). City Council of Pretoria v. Walker (CCT 8/97).


\textsuperscript{90} \textit{Robinson v Volks} (CCT 12/04).

\textsuperscript{91} \textit{Walsh} at para. 43; \textit{Robinson} at paras. 51-58, per Skweyiya J., and at paras. 81-87 per Ngcobo J.

\textsuperscript{92} \textit{Walsh} at para. 43; \textit{Robinson} at para. 93, per Ngcobo J.
affected unmarried cohabiting couples. The dissenters, arguing the unreality of the choice existing in such cases, emphasised the needs and welfare of disadvantaged persons in concluding that it is unfair to hold persons accountable for their decisions where their autonomy is more theoretical than real. This tension between dignity in the sense of autonomy (free choice) and dignity as consideration of needs and welfare reflects a significant disagreement in the understanding of the term.

These cases highlight the possibility of tension between dignity understood as protecting autonomy (free choice) and dignity understand as protecting people’s needs and welfare. Any human rights jurisprudence will require judges to make significant moral choices. The competing interpretations of dignity – autonomy versus need and welfare – are set out, and the judicial choice between them can be analysed and criticised. In other cases, the amorphous nature of dignity allows unarticulated value judgments to determine a decision.

The Canadian case of Gosselin is instructive. Between 1984 and 1989, Quebec operated a social welfare scheme for the unemployed which paid two-thirds less welfare to people under the age of 30 than to those over the age of 30. Persons under 30 could increase their welfare payments by participating in one of three government designated work activity or education programmes. The aim of this legislative distinction was to encourage the young unemployed to acquire education or training to better equip them to rejoin the work force. The claimant sought to make the provincial government to compensate fully people under 30. A divided Supreme Court of Canada rejected this claim, focusing on whether the distinction violated the purposes of the Charter.

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93 Robinson at para. 163.

94 The tension is not limited to the equality context. One can imagine a case where an individual refuses medical treatment but doctors are allowed to invoke dignity to override that expression of free choice. Feldman cites a case like this from France: Feldman (2000) supra note 17 at 68. Similarly one can imagine different views based on dignity as to whether a prisoner on hunger strike should be force fed: Starck, supra note 16, at 187-192.

95 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Duckworth, 1978), 134-137; RORY O’CONNELL, LEGAL THEORY IN THE CRUCIBLE OF CONSTITUTIONAL JUSTICE (Ashgate, 2000).


97 Para. 19.
Applying the factors listed by Justice Iacobucci in the Law case, Chief Justice McLachlin found that young people did not suffer from a history of disadvantage; and were probably better off in terms of access to employment. Further, there was a relationship between the ground of distinction and social reality: there was a problem of youth unemployment based partly on the lack of skills among some young people. As far as ameliorative purposes were concerned, McLachlin found this criterion to be neutral. As to the nature of the interests, McLachlin held that the legislature was trying to help younger people to develop skills and was to “promote the self-sufficiency and autonomy of young welfare recipients”. She concluded that the statute did not impair the claimant’s dignity.

The dissenting judges dealt very differently with the third principle of the Law test. Justice Michel Bastarache gave a detailed overview of the claimant’s circumstances: she had to move house frequently, sometimes ate at soup kitchens or her mother’s home, and suffered a string of medical problems. He noted that the social assistance scheme was premised on the problem of youth unemployment, indicating young people who suffered pre-existing disadvantage. He observed an underlying assumption in the legislation that young people needed “punitive measures” to encourage them to take up training opportunities. Because the law expected young people to survive on an income below the official subsistence level, exposing them to the threat of “deep poverty”, which might lead to malnutrition or even more dire circumstances, the dissenters found a violation of Section 15. Both the majority and dissenters said they

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98 Para. 32.
99 Para. 34.
100 Para. 40.
101 Para. 59.
102 Para. 65.
103 Paras. 164-170.
104 Para. 238. See also L’Heureux- Dube J. at para. 137.
105 Para. 250.
106 Para. 254.
107 Paras. 130-1.
were addressing the same question, namely whether a reasonable young person under the age of 30 would experience the same impairment of dignity as an older citizen when denied subsistence benefits.\(^{108}\)

There are similar issues in another age discrimination case from Canada: *Canadian Foundation for Children, Youth and the Law v. Canada*.\(^{109}\) This case concerns Canadian Criminal Code Section 43 which permitted parents and teachers to use reasonable force to discipline children. The Supreme Court upheld this defence to a charge of assault under the third stage of the Law test, while narrowing the scope of the statute. The majority interpreted the law to prohibit corporal punishment of infants under two or teenagers, to prohibit the use of instruments, to prohibit the use of blows directed at the head,\(^{110}\) and to limit teachers to use of force only when restraining a child or removing a child from the classroom.\(^{111}\)

The majority found there was a correspondence between the circumstances and needs of children and the measure, when viewed in the overall context of state policy on corporal punishment, so that there was nothing arbitrary or demeaning in enforcing it. The court said:

> I am satisfied that a reasonable person acting on behalf of a child, apprised of the harms of criminalization that s. 43 avoids, the presence of other governmental initiatives to reduce the use of corporal punishment, and the fact that abusive and harmful conduct is still prohibited by the criminal law, would not conclude that the child's dignity has been offended in the manner contemplated by s. 15(1). Children often feel a sense of

\(^{108}\) Gosselin highlights the concern that dignity (whether related to autonomy or self-respect) may suggest an interpretation of equality which is more sensitive to symbolic violations of dignity rather than unequal distribution of material benefits. (I am grateful to Sonia Lawrence of Osgoode Hall Law School for this point.) The Kantian sense of dignity is “unconditional” and so in one sense is immune to being impaired by changes in material circumstances: Moreau, *supra* note 67 at 295. In the language of political philosophers, it may focus too much on recognition and not on redistribution (Nancy Fraser and Axel Honneth, *Redistribution or Recognition* (Verso 2001)).


\(^{110}\) Canadian Foundation for Children, Youth and the Law, at paras. 37, 40.

\(^{111}\) Canadian Foundation for Children, Youth and the Law at paras. 38, 40.
disempowerment and vulnerability; this reality must be considered when assessing the impact of s. 43 on a child's sense of dignity. Yet, as emphasized, the force permitted is limited and must be set against the reality of a child's mother or father being charged and pulled into the criminal justice system, with its attendant rupture of the family setting, or a teacher being detained pending bail, with the inevitable harm to the child's crucial educative setting. Section 43 is not arbitrarily demeaning. It does not discriminate. Rather, it is firmly grounded in the actual needs and circumstances of children.112

This view may be no more than a reflexive assertion of a social perception that children should expect some corporal punishment from their parents. If it is more than that, it may highlight the flaws in an approach that stresses autonomy in cases dealing with children, who are not treated as autonomous agents. The majority considers the subjective element of the dignity test. Whilst this is always an indeterminable approach, the majority explicitly emphasizes the viewpoint of the guardian rather than the child. There were dissenting opinions both as to the reasoning and the result. Justices William Binnie and Marie Deschamps, found that there was a violation of the equality clause: a law denying children the same protection of the criminal law offered to adults infringed the children’s dignity.113 (Justice Binnie, though, held that the distinction could be justified as a proportionate restriction on the right to equality, at least as regards parents.)114

It is not just in Canada that judges have relied on the concept of dignity to avoid articulating value judgments. In President of the Republic of South Africa v. Hugo, one of the earliest decisions of the South African Constitutional Court, the Court had to assess the validity of a presidential decision to pardon mothers of young children who were in prison, but not fathers. The president based this on the special role of mothers in looking

112 Para. 68.
113 Paras. 72, 220-232.
114 Justice Louise Arbour dissented on different grounds, finding the legislation violated the Section 7 right not to be deprived of life, liberty and security of the person “except in accordance with principles of fundamental justice”. Justice Arbour was very critical of the majority’s decision to reinterpret the legislative defence from the law of assault, imposing safeguards not found in the legislative text, or even in the case law: paras. 190-1.
after children\textsuperscript{115} (though he may also have been influenced by the undesirable spectre of releasing large numbers of prisoners in a society worried about crime rates\textsuperscript{116}). In upholding this decision, the Court observed that a constitutional ban on unfair discrimination reflected the constitutional purpose of achieving “establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups”\textsuperscript{117} but found no such discrimination. It said that the jailed fathers had had their liberty curtailed through conviction and not by the Presidential Act. While they were disadvantaged in being denied a benefit offered to mothers in jail, they could still apply for remission. Therefore, according to the majority found that the measure had not impaired the dignity of the jailed fathers.\textsuperscript{118} Justice Johann Kriegler dissented. He maintained that the State was relying on a stereotype about women’s position in society to justify the distinction in the Presidential decision. Relying on a sex-based generalization was itself an affront to dignity.\textsuperscript{119}

These cases suggest that the concept of dignity is sufficiently broad to allow judges, on unarticulated norms, to decide difficult issues. This may reinforce stereotypes and prejudices rather than combat them.

\textit{5. Conclusion}

The temptation to link dignity with equality is strong. Equality is a difficult concept to apply, which leads some writers to invoke dignity,\textsuperscript{120} but dignity has similar problems. In many cases discussed here, the real work has been done by concepts such as the need to

\begin{itemize}
\item \textsuperscript{115}President of the Republic of South Africa v. Hugo (CCT 11/96), para. 36.
\item \textsuperscript{116}President of the Republic of South Africa v. Hugo (CCT 11/96), para. 46.
\item \textsuperscript{117}President of the Republic of South Africa v. Hugo (CCT 11/96), para. 41.
\item \textsuperscript{118}Para. 47, per Goldstone J. Fagan has described the invocation of dignity in Hugo as a rhetorical flourish: Anton Fagan, Dignity and Unfair Discrimination: A value misplaced and a right misunderstood, 14 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 220 (1998), 223.
\item \textsuperscript{119}Para. 80, per Kriegler J.
\item \textsuperscript{120}Susie Cowen, Can 'Dignity' Guide South Africa's Equality Jurisprudence?, 17 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 34 (2001), 48, 55.
\end{itemize}
combat prejudice and stereotypes and to recognise the needs of members of disadvantaged groups. In some cases, “dignity” has a role to play but the malleability of the concept makes it controversial. Its malleable nature means that dignity, rather than resolving any ambiguities about equality, creates further problems.

Should we then jettison the concept of dignity, given that it often seems redundant or controversial? It may be too late. The concept may already be so embedded in case law and legislation that it must be addressed. If so, we will have to recognise its malleable nature and consider how to approach it.

Constitutional texts and jurisprudence are replete with concepts as vague as they are inspiring. Judges have a role to play in giving more detailed content to these concepts. The notion of dignity is a vague one and judges may be tempted to rely on it as shorthand for what they perceive to be socially acceptable distinctions. For the judicial role in constitutional law to be legitimate, judges should not rely on such unexplained concepts. This is especially so because, frequently, the task of a judge in constitutional law is to examine whether existing practices are constitutional. Judges should spell out in detail what their understanding of dignity is, rather than relying on implicit references to what they see as socially acceptable.

The definition offered by Justice Iacobucci, although detailed, is problematic in imagining how a person may legitimately feel, which includes a subjective element. As Fredman and Moreau have argued, this subjective approach does not give sufficient guidance to the content of dignity. It enables judges to make decisions based on what they think other people must be feeling. There is an air of unreality about the exercise by which a senior judge endeavors to understand how (e.g.) a non-national, child or prisoner feels. When, as a result of this exercise, the judge announces that the non-national, child

121 “… it is something of a loose cannon, open to abuse and misinterpretation; it can oversimplify complex questions; and it can encourage … paternalism ….” Beyleveld and Brownsword, supra note 40 at 662. In the Canadian Foundation for Children case, Justice Binnie similarly warned that dignity should not become an “unpredictable side-wind powerful enough to single-handedly blow away” the protection of the law; supra note 109, para. 72.


123 Fredman, supra note 61, at 72; Moreau, supra note 67, at 318-20.
or prisoner would not feel their dignity was violated by an impugned measure, some skepticism is called for. If dignity is to be invoked, such subjective approaches should be avoided.

Even where the norms underpinning a notion of dignity are spelled out, people may reasonably differ on how dignity should be understood. The South African and Canadian decisions show different understandings of dignity at work. Some judges respect dignity by stressing the role of free choice, e.g. the free choice of an individual not to take advantage of a legal status such as marriage. Other judges may see the idea of free choice as more problematic and believe respecting dignity requires that people be given the protection they need. These are value choices judges will have to make (and make explicit) if they are to flesh out the content of abstract concepts. In identifying different interpretations of the idea of dignity (as well as equality), judges should make public and clarify the normative basis for the law, and in so doing invite further public, political and academic commentary on the normative basis of the law.

If we must use the concept of dignity in equality law, then we need to avoid a focus on how someone feels, which makes it too easy for unreflective value judgments to influence the decision. In defining dignity, the importance of autonomy should be recognized, but the warning of the dissenting judges in Walsh and Robinson should be remembered, that autonomy is not a practical reality for everyone. The full realization of autonomy frequently requires attention to the forms of hierarchy and disadvantage that exist in society. The specific factors listed by Justice Iacobucci and Justice Sachs quoted in Section 2 above, may be useful in tackling problems of hierarchy and patterns of disadvantage (in the sense of systematic exclusion from community benefits). There are different ways in which a hierarchy may be developed (prejudice, stereotyping, unequal distribution of resources, etc.). A substantive equality jurisprudence must

124 Or self determination: see Moon and Allen, supra note 13, at 627.
125 See also Moon and Allen, supra note 13, at 648.
126 Reaume identifies three types of harm to her specific conception of dignity that are relevant to an equality analysis: prejudice, stereotyping and “exclusion from benefits or opportunities that are particularly significant because access to them constitute part of the minimum conditions for a life with dignity.” Supra note 11, at 672.
confront those mechanisms that promote hierarchy and instead promote the equal enjoyment of community benefits. Some judges have taken this difficult route, - not shrouding their value judgements behind the cloak of dignity, and instead focusing on real questions of disadvantage. If dignity is to be invoked, then it must be tied to these specific questions of disadvantage.

This paper does not argue against the right to dignity as such, much less against a right not to be subject to inhuman and degrading treatment. It argues that dignity may not be a helpful addition to the development of an equality jurisprudence. If judges refer to the idea of dignity, they should not use it as shorthand for what they see as socially acceptable standards but rather should spell out the norms underpinning their conception of dignity. When used to expand the scope of equality law, then the invocation of dignity may do little harm; the same is not true when treated as a factor to limit equality claims. Then, unless firmly anchored to ideas about prejudice, stereotypes and disadvantage, it may hinder the quest for substantive equality.