CHAPTER FOUR

HUMAN DIGNITY AND ITS ROLE IN THE EQUALITY JURISPRUDENCE

The fact that human rights and human dignity precepts have been implemented and interrelated by Supreme Court decision-makers, however, does not exhaust inquiry into jurisprudentially based approaches to implementation. This is especially true when theories of implementation normally remain unarticulated in the opinions of the justices who utilize human right standards.

Jordan J. Paust

In the last chapter, we saw that the concept of dignity carries profound content. The idea itself is both historical and philosophical whose interpretation is closely related to one’s worldview. To what extent dignity is possessed by all human beings and whether it can be lost or diminished depends on whether it is a descriptive or normative concept. Because dignity is associated with an individual, a group or the human species as a whole, it can be viewed subjectively or objectively. Applying dignity potentially pulls a decision-making in different directions depending on from which perspective it is evaluated, hence its universal appeal should be evaluated in light of its fluid nature. Terms like “intrinsic worth” and “self-respect” cannot satisfactorily help clarify its meaning but only illuminate the fact that the beauty of dignity lies in its beholder. Therefore, as much as it inspires and affirms our commitment to human rights, Feldman suggests that dignity should be treated as one of the guiding principles rather than an unquestionable ground of fundamental rights.

Case law on same-sex marriage, as discussed in the last chapter, however, shows that the jurisprudential trend is moving in the opposite direction. Following a line of decisions in which the Canadian Supreme Court used dignity impairment as proof of inequality, the Ontario Court of Appeal held that excluding same-sex couples from

marriage impairs their dignity and violates equality. This approach was followed by the Constitutional Court of South Africa in its decisions concerning equality rights, in particular, the right to same-sex marriage. For all we have seen about the indeterminacies of dignity and in light of Feldman’s remarks, this development raises questions on the jurisprudential basis of using dignity to justify equality and whether it risks diluting the distinctiveness of the two concepts.

This chapter does three things. First, it traces the developments of equality jurisprudence in Canada and South Africa through a series of landmark cases decided under the dignity-based approach. It attempts to highlight the extent to which judges disagreed among themselves over whether the claimant in each case had indeed suffered dignity impairment thus deserved vindication under equality. Secondly, in view of the haphazard way in which dignity is interpreted and the opposition from critics of the Canadian approach, I question the basis upon which the courts relied on in declaring that excluding same-sex couples from marriage violates equality because of the impairment to their dignity. Lastly, despite various criticisms, I observe that the dignity-based equality doctrine retains its appeal particularly in the South African context. While acknowledging its limitations, its proponents believe the dignity-based approach still holds great promise.

No matter how people interpret dignity and equality; and no matter how they disagree with each other on their meanings, the debate over whether there is a right to same-sex marriage pertaining to equality and dignity will not go away. When arguing over who gets the interpretation right seems to get us nowhere, I ask whether deliberative democracy may provide hope for people to move forward in settling their disagreements.

**The Canadian way: human dignity and substantive equality**

In *Halpern v Canada*, the Ontario Court of Appeal considered whether the common law definition of marriage violated equality under s 15(1) of the Canadian Charter. The section provides that “[e]very individual is equal before 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.”

---

3 *Halpern v Canada* [2003] 65 OR (3d) 161 (CA) [*Halpern*].