Right to Have Rights: Supreme Court as the Guarantor of Rights of Persons with Mental/ Intellectual Disability

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Introduction

One of the distinctive features of the Indian Constitution is that it guarantees specified fundamental rights of every citizen. The Supreme Court amongst its other duties is charged with interpreting the Constitution, and in that capacity, is the legal institution that determines when in the course of governmental actions a fundamental right has been transgressed and needs to be upheld. One such instance presented itself to the Supreme Court when it heard a petition to stop the imminent termination of pregnancy for a woman with intellectual disability. The Supreme Court rose to the occasion and prevented the governmental authorities from proceeding with the abortion and thus protected a fundamental right, which can be described as the right to bodily autonomy for the woman. The woman subsequently gave birth to a healthy child and both the mother and child are doing well.

My main purpose in bringing this story to your notice is to examine how and by what reasoning the Supreme Court (hereinafter referred to as SC) was able to reach this outcome. I wish to argue that the SC missed an opportunity to articulate a sound jurisprudence of rights for persons with mental/intellectual disability. Unfortunately it did not engage with the connection between rights and legal capacity and thus made no normative advance in ensuring that the rights of persons with disabilities are actually guaranteed.[1] However, it is not sufficient to only to point out that the SC judges could have reached a different outcome. Instead my wider aim is to argue that in situations where substituted decision is necessary the SC (other courts of the world) as the guarantor of fundamental rights claims the exclusive authority to be the decision maker. Hence, the medical experts or those caring for the person are denied this decision-making role in

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1 For the purposes of this paper I will disregard the procedural technical issue whether a court granting injunctive relief is under an obligation to give detailed reasons for its decision. In view of the argument I wish to develop it would be imperative that the court explain the basis on which it reaches a decision.

the name of protecting the rights of the person. The suggestion is that whenever the fundamental rights of a person incapable of making a decision are involved in a course of action it is only the impartial judges who can be entrusted with the responsibility of making the right decision.

If the courts are to discharge this responsibility in a principled manner it is essential that there is an open discussion of the grounds on which the court is assumed to have the necessary expertise or authority to uphold or override the fundamental rights of any person. Therefore, I wish to explore whether the concept of legal reasoning can be understood in a manner that makes it the responsibility of the judges to reach a fair and just conclusion in every case. This will require a review of the contemporary theories of the judicial task. The mainstream theoretical discussions of the judicial task of interpretation rely on the concept of legal reasoning and are in turn critiqued by others. I aim to argue for a conceptualization of the nature of the judicial task in a manner that brings into focus the point that every judgment requires a choice to be made. Once it is accepted that choice is an integral part of the decision making process, it follows that the decision maker is responsible for the consequences of the choice he makes.

The article is divided into three main parts. In part one, the decision of the SC is discussed especially in relation to the decision of the High Court of Punjab and Haryana (HC from now on). Part two analyses the concept of legal capacity and the link between capacity and rights. In part three the argument that the judicial task ought to be conceptualized as a task about exercising judgment and that judges carry the responsibility of interpreting legal provisions in a manner that reaches fair and just outcomes is developed.

Part One

Supreme Court as a Protector of Persons with Intellectual Disabilities

Kajal has intellectual disability and a sad history of misfortune.[2]

2 She is referred to as the 'victim' in the judgment of the High Court of Punjab, Haryana and Chandigarh to protect her but I have chosen to use her name in order to avoid treating her as a non-person. Kajal was born on 8th December 1991. She became an orphan and eventually was placed under the guardianship of New Delhi Missionary of Charity until December 1998 and transferred to another institution in Chandigarh. Kajal ran away from this institution in March 2005 but was brought back by the police to yet another institution, Nari Niketan. From here she was handed over to a woman who claimed that Kajal was her lost daughter but then 'returned' her to Nari Niketan. In March 2009 she was shifted to Ashreya, a new institute. It was at this institute that she was raped and became pregnant.

She eventually finds herself pregnant and it turns out that she was raped at the institution where she was staying. She does not quite understand the implications of being raped but is emphatic that she wants the child. The Chandigarh Administration approached the High Court of Punjab and Haryana to ask for permission to terminate her pregnancy. Her institutional caretakers think that she is not capable of looking after herself or her child and it is in her best interests that she should abort the fetus.

There is a statutory and a constitutional aspect of this issue. Indian law regulates the availability of abortion under the combined operation of the Indian Penal Code and the *Medical Termination of Pregnancy Act, 1971*(hereinafter referred to as MTPA). The legal issue is whether her situation is covered by the MTPA and if yes, the fact that she has intellectual impairment raises the question of who should be able to take this decision on behalf of Kajal. The Constitutional issue is whether the fundamental rights of persons with mental or intellectual disabilities can be subordinated to other considerations.

Since persons with disabilities are often deemed to lack legal capacity it is assumed that the 'experts' can make decisions on behalf of such persons and in the process at times override their rights. Thus the legal and constitutional issues are inextricably linked.

The HC decided the question about the application of the MTPA on the basis of the legal capacity (or the lack thereof) of Kajal[3] Significantly, the HC did identify the constitutional issue, that is, whether the right to bear a child is a fundamental right and if yes, can it be curtailed by anyone and on what basis? However it eventually decided to resolve the issue before it as a legislative interpretation exercise.[4] The HC described its decision as adopting a holistic approach in interpreting the MTPA, particularly in view of the progressive purpose of the disability related laws.[5] It declined to accept the proposition that the MTPA requires the consent of the woman even if she has intellectual disability.[6] Moreover, it held that despite the clear

3 Chandigarh Administration v Nemo, (2009) 156 PLR 489.

4 *Supra* n 3.

5 The two statutes discussed are the *Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* and the *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999*.

6 The term mental retardation in the legislation is conventionally used to indicate intellectual disability and it is meant to distinguish intellectual disability from mental illness. This distinction is claimed to be progressive as it is meant to safeguard the rights of persons

language of Section 3(4) of the MTPA, every court in exercising its *parens patriae* jurisdiction is competent to act or appoint a guardian ad-litem of a woman with mental retardation, for the purpose of deciding whether to terminate a pregnancy.[7] In this case it was in the best interests of the woman that her pregnancy ought to be terminated.

In effect, the decision of the HC amounts to saying that the institutions of care are not safe places for women with intellectual disabilities. Since we cannot ensure their safety and it is a sad reality that the woman has been subjected to sexual assault the best outcome is that she should have an abortion. The fact that she wants to have the child is unfortunately irrelevant, as she does not have the capacity to look after herself or the child.

The friends of the woman approached the SC to stop the medical termination and the SC did grant the injunction.[8] However, in giving the reasons for its decision the SC confined itself to a technical analysis of the scope of the provisions of the MTPA and lost an opportunity to give a definite answer whether women with intellectual disability have the right to bear children. I will analyze below the reasoning adopted by SC with a view to identifying whether it established any principles that could be applied in subsequent decisions. The SC as the highest court in the country is ideally suited to develop a sound jurisprudence about the rights of persons with mental and intellectual disabilities. Unfortunately the SC in this instance let the opportunity pass.

The SC based its decision on two considerations first, whether consent is required for a procedure under the MTPA and second, even if it is assumed that the woman suffers from mental illness could the court's *parens patriae* jurisdiction be exercised in the best interests of the woman. On the first point the SC held that a plain reading of the MTPA necessitates that a medical termination of pregnancy can only

with intellectual disabilities, who may require assistance in exercising their rights rather than require medical treatment. Moreover, intellectual disability may not necessarily mean that the person lacks legal capacity.

7 Traditionally the court's *parens patriae* jurisdiction is an aspect of public policy that the court must protect the interests of persons unable or incapable of doing so themselves. In Common law doctrine it is an inherent power of the courts and although initially it was exercised for persons suffering mental incapacity it gradually extended to protecting children as well. See Sallyanne Payton, 'The Concept of the Person in the Parens Patriae Jurisdiction Over Previously Competent Persons' 1992, 17(2) *Journal of Medicine and Philosophy*, pp. 605-645.

8 Suchita Srivastava and Another v Chandigarh Administration,, AIR 2010 SC 235.

happen with the consent of a woman who does not suffer from any mental illness. Moreover, the difference between mental illness and mental retardation is significant. This distinction between mental illness and mental retardation is present in the MTPA and it was discussed by the High Court as well. In rejecting the HC's interpretation the SC emphasized the legislative intent behind the 2002 amendment of the MTPA. In the amendment the definition of a mentally ill person in Section 2(b) specifically excludes 'mental retardation' from its scope and thus indicates that the Parliament wanted to narrow the class of persons for whom their guardians could make decisions. A similar distinction is maintained in the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act*, 1995 where mental illness and mental retardation are treated as two different forms of disability.[9] The significance of maintaining the distinction is that it shows a legal trend toward according greater autonomy to persons with mental retardation.[10]

The SC therefore went on to say that under the MTPA while a guardian could make decisions on behalf of a 'mentally ill' person the

9 Section 2(i) defines disability as including mental illness and mental retardation, sub section (q) defines mental illness as any mental disorder than mental retardation and sub sec (r) defines mental retardation. *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999* uses a similar definition of mental retardation.

10 However, the disaggregation between mental illness and mental retardation was introduced in the *Mental Health Act of 1987*,that defined a mentally ill person as a person in need of treatment for any mental disorder other than mental retardation. The rationale for this disaggregation was to underscore that the treatment provided to persons with mental illness should not be extended to persons with mental retardation. In fact persons with mental retardation require education and training and not treatment. In order to underscore this point the above definition was adopted with the inadvertent consequence that persons with mental retardation were not only ousted from the care and treatment part of the *Mental Health Act* but also from the guardianship segment. Insofar as there was no law providing for guardianship of adults, the *Mental Health Act* did not recognize the legal capacity of persons with mental retardation it put them in a legal vacuum where they were neither possessed of legal capacity nor were any substitute arrangements made for their exercise of legal capacity. This limbo situation continued till 1999 when the *National Trust Act, 1999* was enacted which provided a system for the appointment of guardians for persons with mental retardation. The Statement of Object and Reasons to the Medical Termination of Pregnancy Amendment Act 2002 just baldly states that the word "lunatic" has been replaced by "mentally ill person" without informing why the exercise was undertaken. Insofar as the MTPA was being amended to professionalize the carrying out of medical terminations, the health ministry and the medical profession was involved in the exercise. It is reasonable to speculate that the change signified no more than using modern non-stigmatizing terminology. The legal consequences of the change were not really appreciated by the legislators and they created a situation very similar to what they did when they amended the Mental Health Act.

same could not be done for a person with mental retardation. Therefore, the State must respect the personal autonomy of a woman with mental retardation and deny the permission to terminate her pregnancy without her consent. The Court invoked Article 21 of the Constitution of India and observed that 'reproductive choice' is a dimension of personal liberty and the woman's right to privacy, dignity and bodily integrity should not be restricted. However, in the light of this constitutional guarantee the enactment of the MTPA requires an explanation.

The SC decided that it is explainable, as there is an exercise of the state's compelling interest in protecting the life of the child to be born. Thus even though the law puts some restrictions on the exercise of reproductive choices by the woman it is compatible with the right to liberty.[11] That being the case the State must respect the personal autonomy of a mentally retarded woman and not override her decision to carry a pregnancy to term. The SC thus said that it could not permit the dilution of this requirement of consent, as it would otherwise amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim.

However, the SC made no effort to engage with the fraught issue of the interdependence of legal capacity, mental/intellectual disability and rights. I will return to this issue later after deliberating on the limitations of relying on the technical rules of statutory interpretation to reach a just outcome. The technical reading of the MTPA as distinguishing between mental illness and mental retardation allowed an outcome in this case that turned out to 'protect' the right of Kajal to have a child. However, it is doubtful indeed whether this decision can be read as laying down a principle of law, which holds that a woman with mental retardation has full legal capacity and whether it follows that she can exercise her rights like any one else.

I will analyze the implications of this stand of the SC for ensuring the rights of persons with intellectual disabilities. One must note that if mental retardation were irrelevant in assessing legal capacity, it would not occur as a phrase or a concept in so many legislations dealing with

11 It is surprising that the SC failed to consider the effect of IPC provisions that criminalize abortion and the fact that the HC had earlier analyzed the relationship between the provisions of IPC and the MTPA. Thus the observation of the SC that the MTPA puts 'legitimate' restrictions on the woman's right to liberty in matters of procreation seems at the very least inaccurate.

disability related rights. Therefore it is important that the SC take the lead in creating a discourse about the rights of persons with intellectual disabilities in the context of the continued relevance of constructing legal capacity. It is thus the first ground of decision that will be the main focus of the analysis below but before that I will briefly discuss the second ground.

The SC had said that the *parens patriae* jurisdiction can only be exercised for the best interests of the person. Conventionally the only reason for a court to exercise *parens patriae* jurisdiction is when the person is unable to look after their own rights and interests. If however, in the context of the MTPA, the distinction between mental illness and mental retardation is applied in a strictly technical manner and the woman is not a minor, no scope remains for the court to exercise this jurisdiction.[12] Since the SC adopted this position I am not even sure why it went ahead to examine and reject the HC's interpretation of what constitutes the best interests of Kajal.

Coming back to the main ground of decision, both courts have focused on the interpretation of the MTPA. The HC had rejected the literal approach and instead adopted a purposive approach in interpreting the MTPA and held that the legislative object of this enactment has to be understood in the context of the IPC treating medical termination as a criminal offence. One of the objects of the MTPA was to permit termination on humanitarian grounds when the pregnancy was caused by rape or intercourse with a lunatic woman.[13] The HC asserted that in addition to having the plenary and inherent jurisdiction to act as a custodian of the fundamental human rights of all citizens it also exercised the *parens patriae* jurisdiction and had to protect the rights of the 'guardee'. Another reason given by the HC for adopting this approach to interpretation was that when one considers the specific enactments that deal with the rights of persons with mental disabilities and illness it is clear that the legislature intended to extend the positive benefits to both categories of people - defined either as suffering mental illness or mental retardation.[14] The common

12 *Supra* n.10.

13 The phrase 'lunatic woman' was replaced by an amendment in 2002 but which prior to the amendment included mentally retarded pregnant woman also. Therefore the interpretation of the section should adopt a liberal approach.

14 The two Acts are *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* and *The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.*

aim of all these legislations is to pursue the welfare of persons with mental illness as well as with mental retardation. Therefore, in the MTPA the exclusion of mentally retarded persons from the category of mentally ill persons is not absolute. It should not be read to mean that the court could not appoint a guardian to determine the consequences of continuing the pregnancy for a woman with mental retardation, specially when exercising its *parens patriae* jurisdiction.

The SC described the above reasoning in the HC decision as that court agreeing that a literal interpretation of the MTPA provisions would lead to the conclusion that a woman with mental retardation would need to give consent for termination of a pregnancy. The SC quietly overlooked the fact that the HC invoked the *parens patriae* jurisdiction to go beyond the literal interpretation of the statute as well as to reach the conclusion that the best interests of the woman would be served by the termination. Thus the SC in less than accurate terms implied that the reasoning and the eventual judgment of the HC are contradictory.

More pertinently however, the issue for us is about the judges making choices. The choice of the rules of interpretation is notoriously discretionary and the interpretation of a concept like the 'best interests' is similarly left to the judgment of the decision maker. Significantly the SC did not and I suggest, could not say that the HC made a mistake of law in choosing to interpret the statutory provisions in a non-literal manner. The SC being the superior court did replace the choice made by the HC with it's own choice.[15] However, it is not possible to extract from the SC judgment any principle of law as to the correct rule of statutory interpretation that ought to be adopted or the most appropriate or definitive understanding of the 'best interests' concept.

I will briefly compare this approach of the SC with that adopted by the High Court of Australia in a roughly similar situation. In *Marion's case* the High Court of Australia (HCA from now on) was asked by the Family Court to pronounce the guiding legal principles that would be used by the courts cases involving women with intellectual disabilities.[16] The specific questions the HCA had to decide

15 Significantly there is no mention of the conventional rules regarding exercise of discretion by the courts and the strict conditions in which the superior court is permitted to override the discretionary judgment of a lower court.

16 Secretary, Department of Health and Community Services v JWB and SMB (Marion's case) (1992) 106 ALR 47; In this case the person involved was a minor girl with severe intellectual disabilities and her parents wanted her to undergo a hysterectomy.

were whether the medical procedure of hysterectomy could be performed on intellectually disabled women or girls. If yes, who would be competent to make that decision? The HCA addressed the issue as one about consent to medical treatment. The HCA famously held that in case the person cannot make a medical treatment decision and where the proposed medical procedure is invasive and irreversible, only the courts could exercise the authority to consent to that procedure on behalf of the person. Significantly the decision had to be that of the court and not of parents or the medical experts. This stand asserts that persons with intellectual disabilities are as entitled to the right to bodily integrity as any other person. If however, the decision-making capacity of the individual is impaired it is the responsibility of the law that their rights are protected and therefore the scrutiny of the court is imperative.

This decision has been hailed as a right step towards the recognition of the personhood of people with disabilities.[17] There are two issues of particular relevance for our present purpose and even though *Marion's* case dealt with a minor, the status of minority and disability both have a bearing on the determination of legal capacity.

First, the HCA asserted that people with disabilities are entitled to dignity and respect and thus to bodily integrity. Secondly, the court held that it is important to assess in each individual case whether the person with intellectual disability or mental illness has the capacity for decision- making rather than assuming that the disability equals legal incapacity. It is this second step that makes meaningful the first step of acknowledging that individuals with disabilities are entitled to rights. Therefore, the jurisprudential task is to examine how the construction of legal capacity plays a complimentary role to the ever-wider trend of recognizing rights.

Part Two

Legal Capacity and Agency

In this sub section two distinct but inter-connected issues are discussed – first, an increasing trend towards recognition of the rights of people who were formerly denied the status of being persons and the function of the concept of legal capacity; second, the connection

17 Melinda Jones and Lee Ann Basser Marks 'Valuing People Through Law – Whatever Happened to Marion?' 2000, 17(2) *Law in Context* 147-180.

between rights and responsibilities which requires elaboration.

It is undoubtedly true that in recent decades there has been a global trend towards recognizing the rights of persons who previously were considered to have fewer rights by reasons of mental incapacities whether as a consequence of age or disability. This development is evident both in international and state legal systems. It is now common to assert that the connection between rationality and rights is not inevitable and personhood in law is granted on many other bases. One obvious manifestation of this trend is that the 'rights of the child' discourse has gained wide acceptance. It is no longer acceptable to deny children certain rights on the presumption of their minority.[18] Similarly the rights of people with disabilities, especially of a mental or intellectual nature is increasingly being recognized.[19] While this is a welcome trend that is underpinned by a desire to treat all human beings as equals it is also important to emphasize that the rights of any person are intertwined with the concept of legal capacity. Unless this link between rights and legal capacity is brought into sharp focus the benefit of rights cannot accrue to the full extent.

The law relating to legal capacity struggles between ascribing status and actually assessing the abilities in each individual case. Although it is understandable that categorization by reference to particular criteria is a pragmatic necessity it is nonetheless imperative that rights of individuals are not subordinated to practical contingencies. Amita Dhanda has written extensively on this connection between rights and the concept of legal capacity.[20] She argues that it is important to understand the significance of legal capacity for the realization of rights for persons with disabilities. In the national laws of India the issue of legal incapacity is determined

18 'Gillick competency' is a short hand term for using the test of competency laid down by the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (HL).

19 At the international level this trend is manifest in the making and the growing ratification of the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

20 For the following discussion I am primarily relying on her article 'Legal Capacity Module' in *Legal Capacity Handbook*, Office of the High Commissioner on Human Rights, Geneva, forthcoming; see also A Dhanda, 'A CRPD Evaluation of Indian Mental Health Law' in *The Convention on the Rights of Persons with Disabilities in India*, Ministry of Health, Government of India, forthcoming; For an assessment of the advances made in the CRPD see Amita Dhanda, 'Legal Capacity in the Disability rights Convention: Stranglehold of the Past or Lodestar for the Future' 2006-2007, 34 *Syracuse Journal of International Law and Commerce* 429-461

by reference to many mechanisms. She identifies four different ways in which identity and agency get interlinked for persons with impairments. 1. Status based incapacity arises when a person with disabilities or impairment is attributed legal incapacity because of their impairment[21]; 2. in certain laws legal capacity is allowed to persons with impairment provided they act in socially approved ways[22]; 3. Construction of legal capacity is linked to the legal function required to be performed[23]; 4. It is made imperative that a legal determination is made on the capacities/incapacities of the person with disabilities but it is a global determination and not for each function.[24]

All these tests end up being over inclusive because they operate in the context of a *de facto* presumption of incapacity and thus operate more like status tests.[25] Successive law reforms have attempted to change the legal norms and introduce better tests of functional capacities. For example, the burden of proof has shifted as laws now assert that all persons with disabilities possess legal capacity and it is for those asserting the incompetence to prove the claim. It is also explicitly provided that in arriving at a decision of incompetence the decision makers should only consider the capacity to reason rather than the kind of decision made by the person. So too the distinction between the ability to make decisions and the ability to communicate must be maintained so that the lack of communication skills does not

21 For example, blind persons cannot operate a bank account or access net and telephone banking; persons with intellectual disabilities cannot adopt a child; leprosy cured person cannot stand for elections and persons with hearing impairments cannot obtain a driving license.

22 For example, a person with mental illness is deemed capable of voluntarily seeking medical/psychiatric treatment but the competence of the same person can be questioned and their decision overruled if they decide to discontinue the treatment. In other instances the socially unpopular decision itself is seen as evidence of mental impairment and the consequent lack of capacity. Examples of this abound in cases dealing with divorce when an inability to cook, accord respect to elders, or being overly familiar with strangers is tendered as evidence of the unsoundness of mind of the woman.

23 For example, whether a person with mental or intellectual impairment can enter into a contract will be determined by reference to their functional capacity. Not every one with mental or intellectual impairment will be deemed to lack the requisite capacity but since it is the fact of impairment that leads to the assessment of capacity this test puts every one with impairment under scrutiny.

24 However, since there is a global investigation rather than an enquiry from function to function, a finding of incompetence with regard to one function actually ends up as the justification of creating the status of global incompetence for that individual.

25 Amita Dhanda argues that even though forensic psychologists have tried to improve the reliability of the tests to fulfill the requirements of the law, as they have been more focused on the accuracy of tests they have not questioned the legal presumptions informing the tests.

lead to a finding of functional incapability.

Moreover, an obligation is placed on the state to provide assistance where the person with disability needs assistance in making decisions. This obligation on the state leads to many experiments in the methods of giving assistance. Traditionally the law has responded to the lack of competence of a person to make decisions by appointing a guardian of person or property. The guardian has the authority to make decisions of behalf of the person with the incapacity.

In contrast the reform efforts aim to support rather than supplant the decision of the concerned person. However, the power of making substitution arrangements has been retained. Dhanda continues that these are no doubt moves in the right direction but it still remains the case that while the courts have guarded against wrongfully placing non-disabled persons into guardianship they have not shown an equal concern when the guardians for persons with disabilities are appointed. Disability continues to be the threshold condition, as the functional capacities of only those with disabilities become an issue while the persons without disabilities do not have to subject themselves to similar scrutiny and possible denial of rights.

Similarly Donnelly argues that while in general health care decision-making upholds the autonomy of the patientthere is clear legislative insistence that the right to refuse treatment for a mental disorder must be restricted.[26] This is irrespective of the decision-making capacity of the person. This is starkly illustrated in cases dealing with medical consent in relation to invasive and radical surgical procedures. In Australia the issue has come to be defined as the permissibility of sterilization of girls with intellectual disabilities. The courts have struggled to be fair and protect the interests of this most vulnerable section of society but even the High Court has ultimately held that it is permissible to sterilize young women or girls with intellectual disabilities for other than therapeutic reasons only. As explained above the decision to allow the medical procedure would be that of the High Court as presumably even of the parents who have the responsibility of looking after the person cannot be trusted to rise above self-interest. This is precisely what happened in *Marion's case* discussed above.

26 Mary Donnelly, 'From Autonomy to Dignity: Treatment for Mental Disorders and the Focus for Patient Rights' in Bernadette McSherry Ed *International Trends in Mental Health Laws*, Sydney, The Federation Press, 2008, 37-61

One just needs to pause and consider whether such a determination would be countenanced by anyone with regard to young women or girls who did not suffer from intellectual disabilities. The significant difference between the two scenarios is the disability and the association of incapacity with disability. My argument here is not denying that young women or girls with intellectual disabilities may lack certain capacities but the point is that their disability opens the possibility for the decision makers to subordinate their rights to other considerations. Similar lack of capacities in non-disabled person would not ever be a concern of the law and thus the threat of denial of rights will not accrue either. It is not enough to say that the incapacities are the result of their disabilities because this very assumed connection is the source of the problem. If the actual capacity for making decisions was the threshold test for upholding rights for everyone and some were denied the rights that would be understandable. However the legal systems in liberal societies do not adopt this stance, as certain rights are considered fundamental and inalienable. It is in the light of this, the different attitude towards persons with disabilities is problematic.[27]

When the SC in the case of Kajal confined itself to a reading of the MTPA to exclude the decision makers supplanting her consent with their own consent it contributed nothing to securing the rights of persons with intellectual disability. It chose to read the MTPA as excluding those with mental retardation from the scope of provisions authorizing substituted decision-making in this particular legislation. It is no doubt a progressive move to distinguish between mental illness and intellectual disability and I am not suggesting that intellectual disability is an illness. However, the bigger issue for the present purposes is whether those with intellectual disabilities are entitled to basic human dignity and rights without having to establish their functional capacities. Even as an exercise in statutory interpretation the response of the SC is inadequate as it does not concern itself with the existence of the category of mental retardation in this very

27 Therefore, the general depiction of the CRPD article 12 as providing recognition for the need to assess the legal capacity and thus the rights of persons with disabilities still does not remove the discrimination. For even if particular assessment of capacity is made it is only ever done for a person with mental disability. For the rest of the population lack of capacity is never made a testable issue; see Annegret Kampf, 'The Disabilities Convention and its Consequences for Mental Health Laws in Australia' in Bernadette McSherry Ed *International Trends in Mental Health Laws*, Sydney, The Federation Press, 2008, 10-36 at 31.

legislation. It is not suggested by anyone that since the handing down of this decision by the SC full legal capacity is now attributed to persons with mental retardation. And this brings me to the second point mentioned above.

The second important point is that the rights and responsibilities go together and the exercise of capacity carries with it certain consequences. Traditionally the lack of legal capacity excused the person from being held responsible for their actions. For example, the defense of mental incompetence in criminal law serves this function. Thus the concept of capacity simultaneously served two functions: it could be used to deny rights to the person deemed to lack legal capacity but it also worked to absolve that person from having to take responsibility for the consequences of their actions. It may be argued that the latter consequence is a paternalistic response and any benefit it gives is a dubious gain as it undermines the autonomy of the person. Nevertheless, in the context of this discussion it does point to a logical connection between rights and responsibilities. This connection is yet to be fully articulated in the context of moving to the tests of functional capacity for determining legal capacity. Thus if a 'minor' is judged to be capable of making legally relevant decisions presumably it follows that they will also be responsible for the consequences of those decisions or actions. In most instances that may be unproblematic but at times it will create moral dilemmas.[28] More importantly it can serve as an excuse for not providing facilitative services for the exercise of these functional capacities by the 'minors'.

In an earlier article I have argued that the movement for the granting or recognition of children's rights has to confront and address the link between rights and responsibilities.[29] As long as the category of 'minors' continues to be deployed to assess the legal capacity of young persons it is necessary also to analyze the interdependence of the granting of rights with responsibility of the rights holder for their actions. Thus it is not simply a matter of replacing status-based tests of capacity with individual assessments of functional capabilities but also requires an articulation of whether the individual can now be held responsible for all consequences of their actions or their status is still relevant in other instances.

28 The obvious difficult area is when underage children are convicted of serious crimes.

29 Archana Parashar, 'Equality and the Child' in Swati Deva Ed *Law and (In)Equalities: Contemporary Perspectives*, Eastern Book Company, India, 2010, 55-72.

The trend towards greater recognition of functional capacities of people who were conventionally denied legal capacity has not done away with the status categories. That being the case, a plausible question is why does law still ascribe status? Obviously there remains some truth underlying the assumptions that are used in ascribing status and consequent legal capacity or incapacity. Thus despite the recognition of the rights of the child and reliance on the functional capacities test, the legal category of 'minor' or 'child' has not disappeared. This points to the undeniable reality that children lack certain capabilities and maturity and the mere finding of a relevant functional capacity does not necessarily entail full maturity. Therefore, the continued use of the status category of 'child' (or 'intellectually disabled') indicates an acceptance in law that the child may require 'different' treatment than an adult person. However, the exact scope of this different treatment remains to be determined and justified.[30] It is therefore, not surprising that even when the child is given specific 'new' rights the exercise of those rights is constrained by the overarching authority of the court to accept or override the choices made by the child[31].

Evidently with the move towards using the functional capacities test the only thing that has changed is that the test of classifying children is now more fluid and flexible. This flexibility shifts the onus of making the call about capacity to the court rather than leave it for the legislature. The question however is whether the judiciary is equipped to discharge this responsibility? Secondly, it remains the case that a determination about functional capacities may not necessarily translate into attaching moral or legal responsibility to the person.

It is a missed opportunity in that the SC relied so heavily on the technical point that the MTPA makes a distinction between mental illness and mental retardation. One just needs to state it to realize that a different judge occupying the bench could have as easily reached a conclusion that allowed the state administrators to proceed with the termination of pregnancy in this instance. However that is not a guarantee of a fundamental right for a woman with intellectual

30 See also Bernadette McSherry, 'Protecting the Integrity of the Person: Developing Limitations on Involuntary Treatment' in Bernadette McSherry Ed *International Trends in Mental Health Laws*, Sydney, The Federation Press, 2008, 111-124.

31 See my 'Equality and the Child' pp. 70-71 above n 27 for examples of such actions by the judges in family disputes in the Australian context.

disability. For a realistic guarantee what is required is an articulation of how the rights of persons with mental disabilities can be safeguarded and upheld in routine decisions that are made at all levels of governance. For that it is essential to articulate a norm of human dignity that is equally available to all persons with mental disabilities and the SC is uniquely placed to perform this task. When the SC decided the appeal in favor of allowing Kajal to bear her pregnancy to full term, it demonstrated empathy for her, and that is desirable.[32]

However, it should have also formulated the principles that would serve as the standard for all subsequent decision makers. In its decision the SC ignored the developing trend of assessing functional capacity of persons formerly considered to lack legal capacity. It ignored the obvious issue that someone would need to assess the capacities of persons with intellectual disabilities. In not formulating any useful guidelines for subsequent decision makers it failed to protect the rights of persons with intellectual disabilities.

The trend in international norm development with regard to the rights of persons with disabilities provides a sound basis for the SC to develop a link between the bases of granting legal capacity and certain rights. The formulation and widespread acceptance of the *Convention on the Rights of People with Disabilities* has managed to create a discourse of legal capacity for persons with disabilities. Amita Dhanda argues that the novel feature of this Convention is that it reaffirms that people with disabilities have the right of recognition of personhood in law but also that they enjoy legal capacity on an equal basis with others in all aspects of life.[33] This right to legal capacity is designed to remove formal legal barriers to the full participation of people with disabilities and paragraph (3) of Article 12 further requires that the state should provide all necessary support for people with disabilities to be able to exercise their legal capacity. This legal model was available to the SC to articulate a jurisprudence of human rights and dignity for people with intellectual disabilities but it declined to engage with the issues.[34]

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32 For an argument that reason and passion are not antithetical to each other and judging requires both see Martha Minow and Elizabeth Spelman, 'Passion for Justice' 1988, 10 *Cardozo Law Review*, 37-76.

33 Article 12 of the *Convention on the Rights of People with Disabilities;* analyzed by Amita Dhanda in the UN Study above n 18.

34 For an argument that developments in International law are relevant for interpreting domestic constitutions see Michael Kirby, 'International Law – the Impact on National Constitutions' 2005, 21 *American University International Law Review* 327-364.

In conclusion I believe that I have established that it is incumbent upon the SC judges as the interpreters of the constitution to develop an interpretation of legal capacity that would uphold a basic human right for women with mental or intellectual disabilities. The question that arises is why the SC judges should be told what they ought to do and more importantly why would they feel inclined to listen. These questions invoke ideas about judicial independence and the nature of the judicial task as one requiring legal reasoning that I aim to address in the following section.

Part Three

Judges and Responsible Exercise of Judgment

Judicial independence is supposed to be a corner stone of 'rule of law' societies.[35] It is commonly asserted that the apolitical judges are responsible for applying the law in an impartial manner and it follows that they are not to be dictated to by anyone as to how to perform this job. In this context it becomes problematic to suggest that the judges ought to pursue a specific goal (worthy though it might be). Moreover, as Mark Tushnet has argued, legal academics have very little influence on shaping judicial opinion.[36] However, the following discussion is based on the assumption that the academic task is a broader task than that of influencing individual judges. The importance of this task lies in analyzing how the judicial task is conceptualized. For it is this analysis that can yield alternative ways of formulating the theoretical bases of judicial authority and the nature of the interpretive task performed by the judges.[37] Moreover, in the present context it is imperative that the judges, who claim the authority to be the final arbiters of the issue of whether to uphold or override

35 Ian Shapiro Ed, Rule *of Law*, New York, New York University Press, 1994; Richard Bellamy Ed *The Rule of Law and the Separation of Powers*, Ashgate, Dartmouth, 2005.

36 Mark Tushnet, 'Academics as Law Makers?' (2010) 29(1) *University of Queensland Law Journal* 19-28; in this article Tushnet also cites Pierre Schlag, 'Clerks in the Maze' (1993) 91 *Michigan Law Review* 2053 and Richard Posner, 'The Decline of Law as an Autonomous Discipline' (1987) 100 *Harvard Law Review* 761 as works that make similar arguments.

37 Cf Cass Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press, New York 1996 is referred to for the argument that judicial activity can and should proceed with the help of incompletely theorized agreements. He is responding to Dworkin's theory and makes a nuanced argument that I cannot detail here. However, I do wish to emphasize that any conception of judicial activity is ultimately based in a theory of the nature of that task and often in a theory of the nature of law. Simply not articulating those ideas does not make the role of theory irrelevant. Moreover it is the contemporary dominant theories of judicial activity that inform the worldviews of the judges themselves.

human rights of persons with diminished capacity to make decisions, should be self reflective as well as accountable for their decisions.

The common law judges enjoy immense authority to interpret and develop law. They constantly develop precedents and are the final arbiters of the meaning of any legal rule. However, in a democratic polity such authority of the judges runs the risk of attracting the counter-majoritarian charge.[38] The conventional understanding in Common Law is that such authority of the judges is justifiable, as they remain constrained by legal reasoning.[39] That is, under the doctrine of separation of powers judicial authority extends only to applying the law, as it is not for them to decide whether the outcome is just or unjust. In this way it follows that the jurisdiction of courts for interpretation and judicial development of doctrine is legitimate. It is in this context that I wish to argue that a reconceptualization of the judicial task that emphasizes the choice exercised by the judges can reconnect law and justice. In so arguing I disagree with both the mainstream understanding of 'legal reasoning', and the post-structural understandings of the nature of the judicial task. A brief identification of the shortcomings of both provides the basis to re-conceptualize the judicial task as one of making responsible choices.

The concept of legal reasoning, used extensively to denote the idea that the interpretive task of the judiciary is a legitimate task in a democratic polity[40] is equally relevant in understanding the nature of the task both in interpreting legal rules in legislative instruments or in previous precedents. For statutory (and constitutional) provisions, there are of course rules of interpretation that purport to guide judges in understanding the meaning of any legal rule[41]. For identifying precedents and more importantly in developing them the judicial task is not so easily constrained. Nevertheless it is expected that the judges remain within the constraints imposed by the injunction that they apply the law (rather than make it). It is a particular characteristic of

38 See for a collection of essays M Tushnet et al, 'Symposium on "Democracy and Distrust": Ten Years On' 1919, 77 *Virginia Law Review* 631.

39 The concept of legal reasoning is a highly debated concept. For an introduction to these debates see Julie Dickson, 'Interpretation and Coherence in Legal Reasoning' in *Stanford Encyclopedia of Philosophy at* http://plato.stanford.edu/entries/legal-reas-interpret/

40 See for an introduction to the literature Aulis Aarnio and D. Neil MacCormick Eds *Legal Reasoning*, Aldershot, England, Dartmouth, 1992.

41 Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston Eds, *Interpreting Constitutions: Theories, Principles and Institutions*, Federation Press, Sydney, 1996, 13-30.

Common Law that the judges straddle the disparate tasks of applying the law and yet developing precedent.[42] It is however, more readily understandable if the history of the development of Common Law is kept in view.

Historically the basis of judicial authority came from the early idea that Common Law is the expression of natural reason. Just as the legislation was giving expression to natural reason so were the judges upholding this reason in giving their judgments[43]. Early on the judges claimed the authority to develop precedent or give judgments as they had proficiency in understanding the artificial reason of common law.[44] Their particular expertise combined with the understanding of law as expression of morality led to legitimizing of judicial authority for interpretation and developing of precedents. However, the ascendance of legal positivism in legal theory and scholarship has eclipsed the idea of law as an expression of natural reason. While natural law theories exist and are discussed by scholars, the actual practice of law officials(read judges) predominantly tends to be positivistic in its orientation[45]. One consequence of this ascendance of positivistic theory, for the purposes of my argument in this paper, is that the basis of judicial authority for interpretation or developing precedents has become more and more untenable.

The usual concept of separation of powers between the legislature and the judiciary is deployed but the artificiality of reasons put forward to justify judicial authority is epitomized in the concept of legal reasoning.[46] In brief the claim is that the judges can be trusted because they are not free to interpret the law as they like and they have to reason in a specifically constrained manner. Various theories (and rules) of interpretation set the parameters of the judicial task. The vast legal

42 See for example, Julius Stone, *Precedent and Law: Dynamics of Common Law Growth*, Sydney, Butterworths, 1985; see also Alastair McAdam and J Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia*, Butterworths, Sydney, 1998.

43 Roger Cotterrell, 'The Theory of Common Law' in *Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, Butterworths, 1989, 21-51.

44 A R Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, 4th edition, Sydney, Federation Press, 2006, p. 82.

45 For an interesting effort at linking the interpretation preferences and the particular theory of law adopted by the judges of the High Court of Australia see Rachel Gray, *The Constitutional Jurisprudence and Judicial Method of the High Court of Australia*, Presidian Legal Publications, Adelaide, 2008.

46 There is vast literature on the nature of judicial task but I will not discuss it here. For an introduction see A. Marmor, *Interpretation and Legal Theory*, 2nd edition, Oxford, Hart Publishing, 1995.

scholarship addressing the issue of the nature of interpretation exists but it is not my focus here.[47] In brief, the mainstream theories of judicial task extend from endorsing textualism or formalism to functionalism or purposivism, but they are all various versions of intentionalism.[48] That is, all of them are eventually trying to ascertain what is the intention of the legislature and whether it is expressed in the literal language or found in the function or purpose of the particular law.[49]

At the same time there exists vast legal literature broadly described as critical theory that challenges the mainstream view suggesting that meaning of any rule is discernable from the language used.[50] The post-structural insight, that meaning is constructed and attributed rather than discovered has no doubt created a space for arguing that the task of legal interpretation should be re-conceptualized.[51] What is remarkable about the mainstream legal scholarship however is that it is able to ignore the wider developments in the fields of hermeneutics or critical theory. While there are serious drawbacks in the post structural critique it nonetheless needs to be addressed.[52] The most obvious argument against post structural analysis of the judicial task is that it is necessarily relativistic. It allows no scope for criticizing an interpretation as inappropriate because there

47 See for an introduction A. Marmor Ed, *Law and Interpretation*, Clarendon Press, Oxford, 1995; see also JJ Spigelman, *Statutory Interpretation and Human Rights*, St Lucia, University of Queensland Press, 2008.

48 For an overview of mainstream theories of interpretation see William N Eskridge Jr and Philip P Frickey, 'Statutory Interpretation as Practical Reasoning' 1990, 42, *Stanford Law Review*, 321-384; see also Adrienne Stone, 'Constitutional Interpretation' in Tony Blackshield, M Coper and G Williams Eds *The Oxford Companion to the High Court of Australia*, Oxford University Press, Sydney, 2001, 137-139.

49 I develop this argument in greater detail elsewhere; see A Parashar, 'Responsibility for Legal Knowledge' in Amita Dhanda and A Parashar Eds *Decolonisation of Legal Knowledge*, New Delhi, Routledge, 2009, 178-204.

50 See for an overview Ian Ward *An Introduction to Critical Legal Theory*, Cavendish Publishing, London, 1998.

51 As a representative argument see Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies*, Durham, Duke University Press, 1989, 87-102.

52 It is no doubt the case that contemporary legal theory is post-structuralist in orientation and most of the literature in legal journals is critiquing the mainstream understandings of law. However, it is a testament of the tenacity of the mainstream view that it continues to be the dominant view of legal knowledge. As a result the overall message in legal education also continues to be that real law and real judging is about principles and applying the law respectively. It is therefore no surprise that the judges, who are the products of this training and education, think the same. The imperviousness of legal education to the challenges posed by contemporary legal theory is in turn addressed in legal scholarship but remains unable to change the dominant versions of legal knowledge.

are no final or universal standards of appropriateness that can be used as a measure. The judicial task thus potentially becomes completely subjective.[53]

While it is necessary to explore theoretically whether this total relativism of critical theory can be avoided, the response in the mainstream legal scholarship as well as the self-understanding of the judges about the nature of their interpretive task, as if all this critique never happened, is clearly inadequate. One way of avoiding the relativism of post structural conception of interpretation is to acknowledge that the judges have to make a choice between the available alternatives. It is this fact of choice that allows for pinning the responsibility for the consequences of a decision on the decision maker, the judge. It is this connection between choice and responsibility that is missing from both mainstream and critical analyses of the nature of judicial task. The mainstream theory tries to establish the choice is a constrained and therefore legitimate choice while the post structural theory explains it as a free choice and thus no different from any other political choice. Both of these alternatives, the mainstream theories or the critical theories, are inadequate accounts of the judicial task.

The fact that judges are so central in attributing meaning to the laws requires a more concerted effort by theorists to link the exercise of power with responsibility. The views of Gadamer can be useful in this endeavor.[54] His view of hermeneutics is very influential but is also subject to trenchant critiques.[55] Despite these critiques I believe that Gadamer, who is not primarily addressing the subject of legal interpretation, captures the complexity of the task of interpretation but more importantly provides for the linking of responsibility with choice. Eskridge has used Gadamer's ideas to propose a 'dynamic statutory interpretation' theory. He endorses Gadamer's starting point that truth is not reached by simply following a method and I agree that this is a particularly relevant corrective for the mainstream legal

53 Elsewhere I have argued against this outcome; see my 'Responsibility for Legal Knowledge' above n 47.

54 In the following discussion I rely on Eskridge's understanding of Gadamer; see William N Eskridge Jr, 'Gadamer/Statutory Interpretation' 1990, 90 *Columbia Law Review* 609-681; see also J Weinsheimer, *Gadamer's Hermeneutics: A Reading of "Truth and Method"*, Yale University Press, New Haven, 1985.

55 See Gayle Ormiston and A Schrift Eds *The Hermeneutic Tradition*, SUNY Press, Albany, 1990 for a collection of essays on Gadamer's writings.

theories' confidence in keeping the judges constrained to 'apply the law'.

The main elements of Gadamer's hermeneutics relevant for the present argument are that interpretation is a process that seeks the truth of a text. The meaning or truth is not so much the intended meaning or the interpreter's view of the text as a result of the interaction between the text and the interpreter. The interpreter is not disconnected from the text as it forms part of the tradition that constitutes the interpreter's being that makes her or his ontology intelligible. So too the viability of the text is maintained through the interpretive activity. It is pointless to try to capture the original meaning of any text through historical reconstruction of the conditions in which it was made because when we try to reconstruct the original meaning we do it from our current standpoint that is to a large extent constituted by our contemporary conditions. The meaning of the text is a product of the interaction between the interpreter and the text that mediates between the past and the contemporary context.

Our understanding is historically conditioned by our 'horizon'. Moreover, our horizons change with the passage of time and as a result of interpretive encounters with texts that challenge our pre-understandings; similarly a text's horizons shift with the passage of time as a result of the text's presuppositions being challenged through its encounter with interpreters. An interpretation is the 'fusion of horizons' and necessarily dynamic in nature. In conclusion as Eskeridge argues interpretation in addition to being ontological and dialogical is also critical. *Inter alia* the interpreter has to decide which of the various possible interpretations to choose.

If this understanding of interpretation were to inform the SC judges' decision in Kajal's case it is very likely that they would have reached the same decision but by a very different manner of reasoning. It must be noted that it is the manner of reasoning that is crucial in developing a jurisprudence of the rights of people with disabilities. In keeping with the insights about the nature of interpretive task the judges would need to develop an understanding of what does it mean to have a constitutional right to personal liberty, encompassing privacy, dignity and bodily integrity for a person with intellectual disability. It is an integral aspect of the constitutional interpretation task of the highest court that it has to attribute meaning to the rather cryptic language of the articles on fundamental rights. In doing so the SC

judges have to make a choice about the interpretive approach they will adopt.[56]

It is not plausible to portray this task as one determined by reference to technical criteria or in Gadamer's terms. That is not the method that leads to the true meaning. The difficulty of course is that if legal theory accepts this fact that the legitimacy of the judges, and of the law as being impartial and objective come under severe strain. However, this does not have to mean that the legal realists and many critical legal theorists stand vindicated that law is no different to politics and the decision makers are totally subjective. But neither are the judges automatons simply performing a mechanical task. It is possible and I suggest desirable to abandon the binary description of the judicial task as either perfect constraint or complete freedom. Instead it is time to acknowledge the very real choice exercised by the judges but at the same time also accept that interpretation is an act of judgment that requires explicit justification.[57]

For instance, if the interpreter (the judge) is necessarily in a dialogical relation with the text, he cannot but explore why the category of mental retardation is included in the MTPA. The answer to this question in turn requires one to grapple with the concept of rights in the context of the developing discourse of the significance of legal capacity for persons with disabilities. The judge would need to take notice of the international law developments in this regard but acknowledge that their task is not a simple one but requires them to choose between various alternatives. Once the fact of choice making is openly acknowledged the judge would be expected to justify the choice and should not simply repeat the incantation that they are applying the law.[58]

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56 For an introduction to the literature on constitutional interpretation see Jeffrey Goldsworthy Ed *Interpreting Constitutions: A Comparative Study*, Oxford University Press, Oxford, 2006.

57 See also Sandra Berns, 'Constituting a Nation: Adjudication as Constitutive Rhetoric' in Charles Sampford and Kim Preston Eds, *Interpreting Constitutions: Theories, Principles and Institutions*, Federation Press, Sydney, 1996, 84-120; Sandra Berns, *To Speak as Judge: Difference, Voice and Power*, Ashgate, Aldershot, 1999.

58 In particular this is entirely different from Dworkin's conception of the law and the judicial task because his definition of the law as a combination of rules and principles makes the judge the final arbiter of what these principles are and what weight to attach to them. As a result the choice made by the judge keeps them within the law and thus constrained. There is in effect no way the judge can be criticized or scrutinized for their choice. Ronald Dworkin, *Taking Rights Seriously*, Duckworth, London, 1978, chapter 4; also his *Law's Empire*, Harvard University Press, Cambridge, 1986.

This way of reaching a decision is much superior to the present recourse of the SC that involves latching on to a technicality in the legislation. It acknowledges that judges in the process of decision-making are necessarily making choices, but more importantly it attaches responsibility for those choices to the judges and not the impersonal and ephemeral law.[59] The law does not exist waiting to be applied and the very task of the judges is to give meaning to the law. The SC judges thus must give meaning to the Constitutional guarantee of personal liberty in a manner that every subsequent decision maker will be able to uphold the dignity and rights of persons who are unable to make the decision themselves.

59 See also J T Noonan and K I Winston Eds., *The Responsible Judge: Readings in Judicial Ethics*, Praeger Publishers, Westport, 1993.