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Equality as a Basic Human Right:
Choice and Responsibility

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The recent Senate review of the SDA became the occasion for asking whether the legislation is adequate for the task of eliminating discrimination and promoting gender equality. The Senate however, did not ask the initial question of how is the aim of the SDA to be ascertained and how do we measure its effectiveness. These are recurring questions in legal scholarship and as yet remain unresolved. In this paper, instead of focusing on measuring the effectiveness in quantitative terms I propose to focus on the normative effect of / the aim of anti-discrimination legislation.

There is robust discussion in legal scholarship whether law can be a means of intentional and progressive social change. A related stream of thought questions whether legislation is required or effective and suggests instead that education is a better tool of social change. I take these as non-issues for this paper because no one can deny the normative effect of legislation. Therefore, as a starting point I wish to address the narrower issue of what kind of equality legislation should the law aim for. In the Senate committee review of the SDA this issue was framed in part as whether we need an Equality Act. There were arguments on both sides and the recommendation was for a further wider enquiry. The following argument is my effort to identify some of the issues that must be a part of this debate.

The initial question of what concept of equality should be pursued in legislation is in part answered by asking why equality is desired. It is uncontroversial that the demand of equality is a manifestation of the desire for non-discrimination/fairness/dignity of every human being. Legislation that will capture these aspirations best will not be limited scope legislation like the current SDA. An Equality Act can serve as the shorthand way of describing the human rights aim of the legislation. That said the actual legislative formula remains to be developed. Moreover, there is always a large gap between the aims and their actualization and it is reasonable to expect that the EA would be no different in this regard.

Therefore, two separate issues need to be addressed: the design of the legislative provisions and the interpretation and application of these provisions. In brief, I wish to argue that it is important to formulate the legislative provisions as clearly and succinctly as possible but however perfect the legislative formulations are they will nevertheless be interpreted by the judiciary. Therefore, focusing merely on designing better legislative provisions is an insufficient remedy for the identified shortcomings of the law. Instead it is essential that we also address the jurisprudential theories of how the courts can and should interpret these provisions. The two tasks, e.g. design of the legislation and re-conceptualization of the judicial role require simultaneous attention.

In part this re-conceptualization of the judicial role is supported by the poststructural theories of the constructed nature of all knowledge. However, it is not simply a matter of theoretically re-conceptualizing the judicial role. Such ideas need to be adopted by the legal professionals and thinkers alike. Therefore, for this re-conceptualization to succeed the transformative potential of legal education needs to be deployed. New ways of theorizing the connections between ideas and responsibility for the consequences flowing from those ideas will only ever come from the young legal scholars trained to be independent thinking agents.

The following paper is divided into three broad parts: the first part analyses the debates about the definitions of equality that the law should incorporate. I argue that equality should be conceptualized as a basic human right. The second part analyzes the debates about the appropriate role of the judiciary in implementing legislation. I argue that the conventional theories about the nature of judicial reasoning need to be revised in order to pin the responsibility on the individual judge for choosing an interpretation. In this manner the illusory distance between the decision maker and the decision can be bridged. The third part will develop an argument for re-conceptualizing legal education for training law students as independent and ethical thinkers who firmly grasp the relationship between choice and responsibility.

PART I

Legislative Definition of Equality

There exists extensive philosophical literature on the concept of equality but this is not the focus of my paper. Sex equality debates extended these original arguments about equality to women but feminist thinkers are also the ones who have problematized the concept of equality more than any other group of thinkers. Perhaps unsurprisingly this abundance of discussion has as yet not brought a resolution about the meaning of equality that every one can agree upon. There is however, a big difference from the early feminist efforts when the struggle was to gain acceptance for the concept of gender justice itself. In the contemporary context it is widely accepted that inequalities of sex, race, age, sexuality, ability etc are all illegitimate and the debate is about which strategies to use to eradicate them. Thus Squires says that it means that gender equality advocates are expected to pursue gender equality within a wider equalities framework with attention given to the intersection of various axes of inequalities. This concern is more accurately described as a concern with diversity.

This shift in conceptualization of equality is to an extent a function of the advent of poststructural way of analysis and thus carries the tendency to valorize diversity. The broadening of the concept of gender equality goes hand in hand with a reluctance to rank in importance various kinds of discrimination. It follows that no arguments are made (or can be made) for eradicating particular forms of discrimination as a priority. Nor is it possible logically to argue for directed social change as no concept of justice or fairness can be justified. The relativism of this way of thinking may be logical but it is not essential. I wish to argue that since all concepts of equality are equally constructed in discourse rather than treating them all as equally relevant the focus must be to explain why one construct is to be preferred over another and what are the consequences of such choices.

Anti discrimination law is a manifestation of the aspiration that law should help in achieving a fair society although one that is very regularly defeated by the judiciary. A

plausible response to this outcome is that the legislative definition of non-discrimination or equality should be changed. The suggested course of action **assumes** that legislative drafting can fix the problem. Even if, for argument's sake, this explanation is accepted changing the definition requires a prior articulation of what is or should be the aim of the legislation. Without being cynical the desire to be fair can be seen as an uncontroversial aspiration and with that starting point it is easy to argue that equality should be given a substantive rather than a formal content in the legislation. One way of proceeding is to conceptualize equality as a basic human right.

The human rights model for Equality:

I draw upon the literature on the American ERA to argue that we require an overarching principle that discrimination is unacceptable and this can best be achieved by a constitutional guarantee of equality. Some of the objections to ERA are a good indicator of the importance of such a norm. The objections are instructive in that they identify the areas that the opponents of ERA do not want to be covered by the equality guarantee. For example, the opponents of ERA did not wish equality to govern the organization of military, marriage or other issues of privacy, including abortion and homosexuality. As we now know, over time public acceptance of the principle of non-discrimination on some of these grounds has come about. But discrimination on the other remaining grounds continues to persist. The point being that the rationales for discrimination on particular grounds continue to be arbitrary as ever despite the increased acceptance of the non-discrimination principles. It is in this context that the introduction of an EA has the potential to create a normative force for treating *all* discrimination as suspect.

Therefore we need a legislation that guarantees equality and such an equality right can operate as akin to a constitutional guarantee and thus broaden the scope of the right to include both state policies and individuals' actions. It will also be a blanket guarantee

rather than picking and choosing which grounds of discrimination are to be proscribed but with a drawback of reduced visibility for gender as a separate ground.

Australia has a protracted history of unsuccessful efforts to introduce a constitutional bill of rights and the current move to introduce it as a statutory measure is the most recent 'compromise' development. Given this shift in focus of the human rights movement it might be argued that the EA can be part of such human rights legislation and there is no need for a separate Equality Act. While there is an overlap between the human rights discourse and the demand for equality, there are important reasons for treating equality as a distinct issue for the time being. It is also important to remember that the traditional scope of human rights has been different than the demand for equality. In human rights discourse it is more a case of upholding equality of various identified rights described as fundamental or human rights. Treating equality itself as a human right requires a conceptual shift but it is a necessary shift if genuine non-discrimination is the legislative goal. This goal can be better achieved through a stand alone Equality Act. The design of such an equality legislation must be overarching like a constitutional guarantee but it must be embodied in separate legislation.

In making this proposal I am fully aware that human rights are not a panacea where other legal rights have well documented shortcomings. Nevertheless, as argued by various minority scholars, legal rights are primarily critiqued by the mainly privileged scholars. With all their shortcomings legal rights are still valued and pursued by the relatively more oppressed minorities in the same Liberal and developed societies. Moreover, as argued by Lacey rights are not transcendent or objective but a product of contestations and they can be seen as 'an emergent critical force within modern societies' and 'as a framework within which new political ideas can be articulated'. The critiques of law and rights in particular operate to demonstrate the contingency of our normative concepts, including the concepts of rights, justice, and equality; and by implication indicate that these concepts can be re-defined in radically different ways. Therefore, the main focus of the rest of my argument is on how such reconstruction of the concept of equality might happen.

I argue that legal analysis needs to focus on the specific sites of construction of meaning and in common law jurisdictions that is pre-eminently judicial interpretations.

PART II

Judicial Interpretation and Responsibility

Legal literature on assessing the anti-discrimination laws is replete with analyses suggesting interpretations that are plausible and desirable but very often are not the ones adopted by the judges. Thus there is a gap between the ideal and the actual and despite the exhortations of the scholars the judges mostly seem unable to do anything about it. While every one else seems to be able to understand equality as symbolizing fairness or non-arbitrariness, the law scholars and judges tie themselves in knots about interpreting the meaning of equality. My argument is that a genuine rethinking about legal equality requires a deconstruction of the contemporary methods of legal interpretation. What I mean by this is best illustrated with the help of the story of SDA. This Act, as all other anti-discrimination laws, was enacted as recognition of the inadequacy of the formal equality guarantee of Liberal legal systems. That is, even though Liberal legal systems are premised on the equality of all legal subjects feminists successfully illustrated the relevance of gender differences in legal discourse and the disadvantages in law suffered by women. As a result SDA was enacted to rectify this flaw in formal legal equality but once enacted it ended up being interpreted as a guarantee of formal equality. Why the judges are unable to see the absurdity of this situation is hard to explain – except by deconstructing the mechanism of judicial/legal reasoning.

It is not my intention to attribute *mala fides* to the judges rather I am more inclined to ask why it is so? What is it about being a superior court judge that prevents one from seeing the discrimination in the alleged situation? Moreover, what can be done to make the enterprise of interpretation a socially responsible enterprise? These are the

very questions usually silenced by the mainstream jurisprudential insistence on claiming that

- i) the judicial task is one of applying the law;
- ii) professional reasoning is different than ordinary reasoning; and
- iii) institutional role responsibility is separate from personal responsibility

These claims of conventional jurisprudence create the possibility of deflecting attention from the choice or discretion exercised by the judges in every instance of interpretation. Recognizing this is an initial step towards conceptualizing the judicial act of interpretation in a manner that emphasizes choice and thus the agency of the judges in attributing meaning to legal rules. Once the element of choice is acknowledged the responsibility for that choice becomes inevitable. It follows that judges would strive for socially just outcomes if they are the ones exercising choice.

Function of conceptualizing the judicial task as one of applying the law

It is an article of faith in Jurisprudence writings to conceptualize the judicial task as one of applying the law and more specifically as one of not making the law. While the mainstream jurisprudential writings give extensive reasons for a conception of judicial authority as constrained reasoning, also described as legal reasoning it is also true that critical theorists have demonstrated the extensive discretion that judges exercise and in doing so are inevitably influenced by an array of extra legal factors. Moreover, the nature of language and how it operates forms the core of PS analyses that explain how interpretation requires attributing meaning. The obvious conclusion of such analyses challenges the conventional view of legal reasoning. I will not discuss this critical legal literature or its own set of shortcomings here as the more important issue for now is that despite such extensive critical scholarship the dominant view about the nature of the judicial task remains unchanged. Therefore it is worthwhile to focus on how, by using which legal concepts, the mainstream legal scholars as well as judges in particular manage to steer clear of this literature.

I argue that primarily it is the particular conception of legal reasoning, the idea that judges ‘apply’ the law and that there is a division of authority between the legislature and the judiciary, which enables the mainstream thinking to persist. This conception of legal reasoning has the consequence that it distances the decision maker from their decisions because it is not ‘their’ decision. It is also a logical conception in view of the positivist understanding of law that disassociates law and morality. The legislators can do so but are not compelled to and if the legislator has failed to create a just or fair law the judge must remain agnostic. Thus it means that there is no possibility of expecting the judges to strive for just or fair results as they are ‘constrained’ by law and not free to pursue their own preferences. Although there is abundant evidence that there is no pre-constituted law waiting to be discovered and applied by the judges, the mainstream jurists object that any other conception of the judicial task will ‘give’ judges too much power.

There are two different issues that arise out of this insistence of mainstream jurisprudential view. Firstly, despite this objection it is obvious that the judges are making choices and deploying their expertise, intelligence, good conscience et al to make reasonable decisions and not saying so does not change the facts. Secondly, the gains made by artificially constraining judges are lesser than the loss of opportunity to engage the judges in striving for justice and fairness in the law. For if it could be openly acknowledged that judges exercise discretion in interpreting legal rules one could then focus on how best to do so.

It is difficult to acknowledge that judges exercise discretion in every task of interpretation because it raises the question as to why the judges can be entrusted with this authority. Or put differently, what is the basis of judicial authority? This is an unstated and unresolved issue of contemporary jurisprudence. The earlier common law understanding of law and judicial task were complimentary in so far that common law was seen as the expression of natural reason and the judges who were confined to applying this law were thus upholding the fair and just natural law. However, with the contemporary positivist understanding of law the same confidence in the judge’s capacity is achieved by the concept of ‘constraint’, that is the judge is not free to do

whatever. The judge is bound by the law. The problem of course is that the law as enacted by the Parliament is now anything at all (that has the correct pedigree). The fiction of the democratic control of parliament does nothing to ensure that laws made are just laws. If so, by insisting on the constrained role of the judge any possibility of aspiring for justice or fairness in law is written out of possibility.

In the meanwhile, judges engaged in ‘applying’ the law nevertheless have to choose between at least two interpretations of the same law. It thus becomes at least problematic to assert that judges have no more to do than ‘apply’ whatever the legislature enacts. This conception of the judicial task may give reason to believe that judges are constrained and thus prevented from abusing their power by imposing their personal views. But it simultaneously prevents the judges from aspiring for justice, fairness or non-discrimination.

Dworkin has tried valiantly to rescue the legitimacy of judicial authority by postulating that judges are constrained in exercising their discretion and therefore can be trusted to uphold the law rather than create it anew. The law so upheld is a combination of rules and principles and the judges are the final authority on what weight to give to any principle. The obvious problem with this conception of the judicial task is that there is no way of knowing which principles are relevant and what weight they will carry before the judge decides. The judge remains the ultimate arbiter of meaning, exercising choice but this time with the dubious guarantee the law constrains the judge.

I do not know of any satisfactory resolution of this problem as the critical theorists answers are equally even if differently problematic as analyzed below.

Critical theorists and the basis of judicial authority

With slight variations all PS critiques are pointing out that knowledge is constituted and in turn constitutes reality. That being the case how law is constituted becomes the initial question for such theories. Even though the analyses are of law in general their

focus invariably is on the judicial pronouncements. Moreover, all of these theorists seem to be mesmerized by the desire to disprove the claims of law as being about fairness, equity or its objective and principled nature. As examples of this kind of analysis one only has to point to the extant literature that explicates the 'force of law' or the 'racism of law' etc. That such analyses are a necessary challenge to the mainstream view of the law is not in doubt but neither is it enough to stop here. Any analyses that show how law is the very means of oppression and discrimination but stop there do not leave any avenue to explore whether law could also be the means of achieving non-discrimination.

At the very least this kind of analysis makes the status quo look inevitable. Surely PS scholars must accept responsibility for the fact that if their analyses, that all meanings are relative and contingent, imply that it is non-sensical to talk about law's role in bringing about social change or justice, they are legitimizing the continuation of a status quo that is less than ideal, fair or just. The effect of this kind of theorizing is as exclusionary and debilitating as that of the mainstream theorizing it was meant to critique. The response that the function of critique is not to provide alternatives is simply not good enough because critique for the sake of critique is only self serving for the critics.

Moreover, this is a problematic outcome even for the post-structuralists because contrary to the tenets of post structuralism it provides an essentialist answer as it makes the law appear as if it was a pre-discursive object and one with an invariable content and effect of oppression. But even if it is acknowledged in PS analyses that no law is pre-discursive and the mechanisms of oppression in law are ever changing the overall import of such analyses remains that law is oppressive rather than emancipatory. This predominant message of post structural theories in turn helps avoid focusing on the question why it is that law cannot be emancipatory.

For instance, this is illustrated well in the analysis of law provided by Stanley Fish. He sees the judge as free to attribute meaning to the rules of law as all rules are texts waiting to be interpreted. This is because he insists that any critique of institutional

practices depends on invoking an essentialist view that pure knowledge or truth is possible and accessible. It is against this standard that the critics argue that institutional practices are problematic. However, if all knowledge is historically contingent there is no basis for suggesting that such an ahistorical or universal standard is available as the measure of criticism. It follows in the argument of Fish that dominant perspectives can be explained but not replaced with supposedly neutral or objective views. Importantly, Fish does not concern himself with the issue of how to replace a problematic or dominant perspective, and it is this choice that makes a PS analysis unsuitable for connecting law and justice/fairness/non-discrimination.

In conclusion the relativism of most post structural analyses of the judicial task is no more convincing than the mainstream claim that it is principled. The debate between Stanley Fish and Ronald Dworkin to me exemplifies the shortcomings of both ways of thinking. Thus all contemporary analyses of law are neglecting a central issue: that is any meaning is attributed, created, attached. If so, those involved in such construction must take the responsibility for their choices. That there is a choice in any formulation about the nature of law must become the starting point of any analysis.

Choice and responsibility

It is not possible or desirable to go back to pre PS way of understanding the construction of meaning but we definitely need to move beyond what Foster describes as the postmodernism of reaction to a postmodernism of resistance. I understand this to mean that there is a need to extend the PS insight about the constructed nature of knowledge and link it with the responsibility of those 'doing' the construction. The legal scholars are not only responsible for providing PS analyses of law that demonstrate the indeterminacy of meaning but that they also must acknowledge their power to attribute meanings. There is an undeniable nexus between the institutional location of the thinkers and the authority attributed or accorded to their views. The very fact that not all theorists or analyses are equally influential is cause for asking

how certain readings get accepted as authoritative while others get marginalized and ignored. It is not simply a function of the merit of an argument. In some ways, the mainstream legal scholarship that manages to ignore PS insights is exhibiting this very nexus between knowledge and power that PS is so good at postulating. More specifically the PS way of thinking requires us to focus on how interpretation is a matter of attaching meaning and always involves making choices. This fact of making choices is effectively obscured in legal scholarship and thus the responsibility for the consequences flowing from those choices does not attach to the decision maker. In the following section I analyze how responsibility is conceptualized in legal scholarship.

The concept of responsibility is used in various disciplines other than law and has different meanings than in law. Cane has argued and I agree that the concepts of responsibility play an important role in both law and morality yet philosophers pay little attention to the legal version of such concepts. However, a careful study of the legal concept of responsibility and legal practices associated with it could be useful to understand responsibility in general.

The idea of responsibility and legal philosophy have a long connection but a very cursory survey of legal scholarship on the concept of responsibility shows that most of the writers are engaged in discussing when the law does or should attach responsibility to a legal subject. Primarily these discussions relate to the individual's responsibility in Criminal law, responsibility in civil law is discussed to a lesser extent. What I found missing was any discussion of the responsibility of lawmakers and more particularly of judges for their views. Here I focus only on the lack of scholarly attention to the responsibility of judges. No doubt this is because of the prevalent conventions about judicial role that these are not their own but decisions necessitated by the conventions of legal reasoning that they as professionals have to follow. However, as discussed above there are serious problems with this view and I take help from Cane who has argued that the distinction between law and morality also enables us to draw some contrasts between 'moral reasoning' and 'legal reasoning' as techniques for generating normative conclusions about responsibility. Once it is acknowledged that normative conclusions about legal reasoning follow from the

particular concept of legal reasoning it must be possible to argue for re-conceptualizing legal reasoning.

I will discuss this point in the context of the analysis of Law and responsibility provided by Veitch. He has argued eloquently that judges are not held responsible in their individual capacity because they are acting in the role of the judge. The institutional role of the judge is created precisely so that disputes are decided by reference to the law rather than by reference to the values of the judge as the individual decision maker. Veitch makes this argument as an aspect of his broader argument that law, by design, and not incidentally, dissociates the legal actor from the responsibility for human suffering. The legal norms define what injury is and also define by exclusion, that which may be damage but not injury. Thus suffering caused by the former (damage) is legally speaking legitimate. The legal actor's responsibility is transferred to the legal norm and it is the norm that decides when there is an obligation or responsibility. As long as the legal actor is conforming to the legal norm he or she is guiltless because responsibility stops with fulfilling the legal obligation. This is an effect of legal categorization compartmentalizing responsibility, so that the legal actor, the judge, is only a conduit of legal authority. The judge is not personally responsible for the judgment as it is the state of law that is responsible; it is the decision's legal reasoning, and not the reasoning of the actual person, that must do the work of justifying the outcome.

Veitch goes on to argue that even if the judges have discretion they are merely the mouthpiece of the law and their personal views are legally speaking irrelevant. According to him this is the reason the judge is not personally responsible because legal responsibility in accordance with the law and the legal role is non-responsibility for the person. The role usurps the autonomy of the person because when it comes to human beings acting in legal roles, there is only one living person who can act and if the law determines what the right action is the person can not independently decide otherwise.

At one level this is a persuasive analysis but I wish to extend it by asking what exactly does it mean to say that the 'law' determines what the right action is? If this was a straightforward matter there would be no occasion for the issue to come before the judge. The very existence of the judge is an indication that 'the law' is not unambiguous and an exercise of judgment is required to ascertain what the 'law' is. To hold otherwise moreover, goes against all the PS insights about the nature of meaning and how interpretation is attributing meaning to terms and concepts. It also goes against the obvious fact that 'not only the wording of the positive law makes up the positive law in force at the time; there is also the interpretive practice of the time.' The judge necessarily has to exercise a choice in deciding what 'the law' in any particular instance demands. Once however, this determination is made the judge is not free to disregard the law as Veitch persuasively argues. The institutional role to that extent usurps individual autonomy. But this last step in no way dispenses with the need to attribute meaning to 'the law' in the first instance. It is by focusing on this prior issue it becomes clear that judges have to exercise choice in deciding the meaning of the terms used in law.

This argument can be easily illustrated in the context of anti-discrimination legislation and the interpretations adopted by judges at various levels of the judicial system. For example, in the case of Purvis, the judge who can not understand the disruptive behaviour of the child as an aspect of his disability is no more objective or correct than the judge who sees it otherwise. It is therefore, not a simple matter of the law determining what the 'right action' is and the judge implementing that. Whether the action of the school is in accordance with the law or not is the very issue that the judge must decide. And to do this the judge must first ascertain what the law demands. The interpretation is that of the judge and it is for the judge to choose which interpretive practice to adopt. Whether one describes it as role responsibility, institutional role or any thing else it is ultimately a task that demands an exercise of choice.

Moreover, this exercise of choice is a matter of judgment and I would like to argue that the judges, in deciding whether a practice is discriminatory or not, are as aware of the demands of justice and fairness as the next person. Their inability to name the

unfair or unjust practice as 'discrimination' is to a large extent a function of being able to distance themselves from 'their' decisions in the name of upholding the law.

Conceptually also it needs to be acknowledged that the task of interpretation is a matter of exercising judgment rather than merely performing a mechanical task. Even in the mainstream conception the judges are choosing an interpretation but they are able to distance themselves from the determinations in the name of their professional responsibility to act according to law rather than acting according to their personal values.

If it is argued that the conception of the judicial act in this paper seems to free the judge of any constraint and therefore has the potential to lead to an unfettered exercise of power, the solution for that problem lies in conceptualizing the exercise of authority in a responsible and meaningful manner rather than trying to constrain artificially the judge. A conception of legal reasoning that is more conducive to acknowledging the choices made by judges in interpretation can have a definite advantage. I take support from Alexy who has argued in a different context that the mere availability of a concept of law, whether positivist or anti-positivist can have a bearing on the law makers' behavior. Similarly, the availability of a conception of legal reasoning that focuses on the reasonableness or fairness of choices made can create the conditions for judges to adopt interpretations that connect law with justice.

The difference between this conception and that of Dworkin lies in making the judge accountable for their choice of interpretation. The judge would no longer be the ultimate and inscrutable arbiter of the meaning of any rule of law. Instead they would need to justify their choice in terms of its discriminatory or non-discriminatory effect. This conception of the judicial role is also in accord with the PS analysis as unlike the mainstream theorists the PS theorists explain any judgment as an effect of judicial choice. However, it extends the PS insight in that it demands of the judges that they will exercise their judgment in a responsible manner. Working with this conception of the judicial task if the judge gives an interpretation of an anti-discrimination rule that denies or diminishes human dignity of the complainant it would be incumbent on them

to explain the choice of that interpretation. Importantly such an explanation would no longer be of the kind that absolves the judge of the responsibility to reach a fair/just/non-discriminatory solution.

In another context Postema has argued persuasively that there is a distinction between the professional responsibility and the responsibility of a lay person but the professional nevertheless has the responsibility to act in a moral way. He relies on Aristotle's concept of practical judgment to argue that judgment is neither a matter of simply applying general rules to particular cases nor a matter of mere intuition. Rather it is that in judgment general principles and particularities of a case both come into play. General principles provide the broader framework and a target but not the final outcome. The ultimate decision takes into account the particular circumstances and resolves the conflict of values. Thus morality is not merely a matter of getting things right but of relating to people in a special and specifically human way. Professionals have to act in specifically moral ways but what can be done is to conceptualize this moral responsibility in a broader sense. This professional responsibility can be linked to understanding the professional role as not a fixed role. A 'recourse role' conception of the professional role allows for the possibility that such a role requires "the agent not only to act according to what he perceives to be the explicit duties of the role in a narrow sense, but also to carry out those duties in keeping with the functional objectives of the role".

Functional objectives of the role of the judge

The fact that so many judges cannot see the wrongness of discrimination in the actions of the respondents is not an indication of their lack of moral values. Rather it is a function of a lack of agreement about the functional objectives of the role of the judge, e.g. whether the judges are constrained or free to exercise their judgment. If as argued above there is no 'law' pre-existing the determination made by the judge it seems obvious that in a disputed case the judge has to ascertain the meaning of the law, in the form of a rule or concept. Thus a legal rule which says that less favorable treatment

on the basis of disability is prohibited, at the very least requires the judge to decide whether a particular conduct constitutes less favorable treatment. That is, what the law demands is the very issue in dispute and it is only the judge who has the authority to decide. The contemporary judicial practices *give the judge an option* to focus on the technical aspects rather than the substantive outcomes of the matter. If however, the interpretive practice demands a focus on the substantive outcome of the interpretation it will make for the possibility of judges making more realistic determinations.

In a slightly different context Judith Butler's argument about gender as 'performative' needs to be invoked in the context of law – it is not a natural category, it is constructed and when judges, among others, engage in interpretation they are attributing meaning. Similarly when scholars explain the nature of law they too are conceptualizing rather than describing a pre-existing reality. A theory of judicial task that conceives the judge as personally responsible for their decision would make it inevitable that the judge does not formulate the dispute in technical terms. If the judges could make this understanding of law their starting point it is possible to imagine that discrimination issues would be resolved to achieve genuine non-oppression. For example, the dispute in the case of Purvis or of Amery if decided under this conception of the judicial task could have had a very different outcome.

I suggest that if the judge, in Purvis, did not have the option of distancing himself from the judgment made, he would indeed be compelled to make a more reasonable judgment. Now I am not suggesting that the complainant will always be correct and the respondent wrong but only asking for it to be acknowledged that there are at least two interpretations and the judge has to choose between them. Since there is no compulsion to choose one interpretation over another it must be obligatory on the judge to explain their choice. If the judge in Purvis, holds that the school can exclude the student they must explain why it is not discrimination. The reasoning in the present judgment that the ground of exclusion is not covered by the legislation is a technical reason which does not deny that the action of the school will disadvantage the student. Instead it avoids the issue of disadvantage or unfairness of the action altogether. It is in this sense that Veitch is right that the compartmentalization of legal

tasks absolves the judge of the responsibility for the outcome of a decision. Does this mean that it is futile to expect justice from the law and the judges? If yes, is this not a deterministic analysis that portrays law as inherently incapable of delivering justice? How could it be otherwise?

One way out of this dead end is to acknowledge that the judge has to exercise choice in the pursuit of justice or fairness. It has to be the pursuit of these ideals and not the pretended neutrality that provides the legitimation of judicial authority. It is however, not simply a matter of making these ideals the legislative standard that the judges have to apply. Rather, it must be the requirement of the judicial role that the judges are the pursuers of justice. Justice according to which definition one may ask? It is easier to answer this question negatively and say that it is certainly not according to the 'neutrality of the judge' standard. It necessarily means that the judge has to articulate and justify their choice of interpretation as fair or just. The emphasis is on 'justify' and in my opinion this responsibility can only be discharged if we move away from the fiction of constraint on the exercise of discretion. However, that is not a license for relativism in the sense that judge is free to be totally arbitrary or idiosyncratic. The constraint in this conception of the judicial task comes from the judge's responsibility for pursuing justice or fairness. It also does not allow the judge to distance himself from the consequence of the decision and thus pins the responsibility of the consequences of the decision on the person making the choice. The disjuncture between the role responsibility and the personal responsibility is thus avoided and the person occupying the role of the judge can not leave their morals at home!

However, in a morally pluralistic society inevitably there would be disagreements about which morals are worth enforcing through the judiciary. This is an important issue but it is not one resolved by relying either on the fiction of constraint or giving in to the relativism of PS views. In the present context the accountability of the judge for the interpretation chosen is the best guarantee of non-arbitrariness. If combined with a sufficiently broad based legal education this conception has the potential for connecting law and justice in a principled as well as practical manner.

Part III (to be completed)

The obvious question of course is how can this view of the judicial task be made the mainstream view? I wish to argue that we need to refocus on the transformative potential of knowledge and especially of education as it is the site where knowledge is produced and disseminated. Education appropriately conceived can be the primary means of such re-conceptualization of the judicial task for creating just societies. I will use Legal education as my particular focus but the argument is wider in its scope and extendable to education in general.

Students can and ought to be trained to be independent and critical thinkers. Such critical thinkers who can capture their agency in the legitimation of ideas will of necessity also understand their role in making and unmaking social structures. Once the individual thinker is thus implicated in making sense of the social structures it should become that much harder for the theorists to propose ideas that leave out of the theory the responsibility of the thinker. That is, if the thinker is not simply describing the surrounding reality but also partly 'constitutes' it then it is logical to expect that the injustices of the contemporary arrangements ought not to be allowed to go on unchecked. Otherwise those 'constituting' such arrangements as inevitable are complicit in perpetuating them. Thus ethical responsibility ought to be inculcated as an integral aspect of education as it follows directly from the contemporary theories of knowledge. These students are the legal thinkers of tomorrow and if equipped to think for themselves they will act responsibly and morally.