

1063

GENDER BIAS

Linda

Justice Kirby, could you tell me what is meant by the term gender bias?

Justice Kirby

Well, in the context of the judiciary I imagine it refers to the suggestion that judges are not neutral in their attitude to people on the basis of gender. That is to say that they show preference to men or show attitudes that are sympathetic to men and are unsympathetic to women. I imagine that if you take a broad view of what gender means it might also suggest that people, and in the context, judges, are unsympathetic to gays and to people of a particular gender, transgender people. So that I imagine that this is what is being talked of and the question is whether it is accurate or not.

Linda

Do you believe that it does exist in our legal system?

Justice Kirby

I believe that it exists in our society. I believe that there are attitudes towards women, towards homosexuals and bisexuals, towards transgender people in all walks of life and because the judiciary is in a sense a microcosm and a reflection of the whole of the community I imagine that from time to time particular judges do have attitudes which show prejudice. I would hope that it would normally be unconscious prejudice and that judges who have such an important role to play in the attainment of justice would ensure that as far as possible that they took control of their prejudices and simply decided cases on the basis of the evidence before them. But of course attitudes are learnt at our mother's and father's knees when we are little children, and they tend to accompany you to the grave therefore they affect the way in which you see the world, see the world's problems and see problems of people who come before you as a judicial officer.

Linda

So what steps are being taken to eradicate this from the legal system?

Justice Kirby

Well, in a sense just as judges are part of a microcosm of society they are reflecting the general re-education of society and its alert in sympathy to issues of gender neutrality, gender fairness, the removal of sexism and so on so that in that sense judges are simply reflecting the general shift in community attitudes that has occurred almost imperceptibly over the past twenty or so years. So that's the first way things are happening. That's happening in the family of judges, in their homes, in their relationships with their children, in their relationships with their peers, friends in clubs, in sporting occasions and so on. Judges, although they are bound to some extent to live a rather isolated and lonely life, also have families and they also

push strollers of their children or grandchildren and they meet people at supermarkets and so on so that is the general way in which things are being affected. The specific way in which in the judiciary problems of gender bias are being addressed is occurring in two ways. First of all, in terms of legal authority led by the High Court of Australia, which is quite sensitive on these questions, attitudes of gender bias are being slowly but surely eradicated from the substantive and procedural law so that precedents are being laid down which bind judges in their courts throughout Australia and which influence the way in which they decide cases. But as well as that, there are moves within the Australian Institute of Judicial Administration, which is a body established in Melbourne but with a national portfolio and obligations to engage in the study of this as a problem and to learn from societies, and in particular I should say Canada, in respect to the way in which judges can be informed about gender bias and can made more sensitive to the problem and can detect it when it occurs. Part of the problem here is that perhaps judges of an older generation really protest and feel most hurt when they're told that they're exhibiting gender bias. They're simply exhibiting the attitudes of the law as it's been handed down by generations of man made decisions. So that I think in these various ways, in the shift of the community and in the shift of judicial authority and in the shifting judicial education there is a growing awareness of the problem and a determination to respond to it.

Linda

So Justice Kirby, what are your views about those calls for the ongoing monitoring of judges attitudes and for judges receiving assistance in recognising gender bias?

Justice Kirby

Well I am in favour of judges receiving assistance and I am in favour of judges receiving information and having seminars and having materials made available to them and in particular information on what has been occurring in other jurisdictions and other countries, notably Canada, I am all in favour of that and I think that is a very healthy development and a good corrective and it is happening. I am a little more cautious about the notion that judges have to be sat in serried rows like naughty school children to receive instruction in a formal way from the executive government. That is to say that there has to be compulsory re-education of judges. We've seen compulsory re-education of people and of judges in the past and it tended to be confined to societies such as Hitler's Germany or Stalin's Russia or some of the newly independent societies of post-colonial era where official orthodoxy and political correctness were forced upon judges. One of the great strengths of our judiciary is the independence and the independent cast of mind of judges. Judges have to do brave and strong things against the executive government, the government of the day and against big business, big media and you've got to make sure that whilst we alert judges to the specific problem of gender bias, that we don't get into the problem which would be even worse of judges being given compulsory instruction in the

political orthodoxy of the day by the government of the day, it might begin with gender issues and then it might go on to political issues or to other attitudinal questions and in the end we would have judges who are simply doing supinely what the government of the day wanted that wouldn't be good for the judiciary and it wouldn't be good for Australia.

Linda

So the introduction of compulsory training wouldn't be an acceptable solution?

Justice Kirby

Well judges already have various forms of training and amongst the magistrates it is, as I understand it, compulsory in New South Wales, amongst the judges in the Supreme Court, it's optional and it's available, and materials are distributed which they can either read or ignore, and most judges do attend these courses. I was in Melbourne at the weekend and I was there at a conference on HIV AIDS and one of the judges of the Supreme Court of Victoria who was chairing the session had actually elected to go to a university course on feminist legal theory because, as he explained it to me, that was not around when he went to law school. So that I think that it is very important not to stereotype judges and to say "Oh well, they're just a lot of silly old troglodyte's who are all biased and have all got horrible attitudes and are all living in the past, that doesn't tend to be so, judges are being appointed at younger and younger ages and they tend to reflect the changing values of the community. But compulsory education has to be handled with some care because otherwise we will reduce judges to being just another public servant, and if that was so they may not have that independent cast of mind which is necessary to have somebody who will stand up against big government and big business and big media.

Linda

I see. Justice Kirby, could you tell me a little bit about what sort of factors prevent women from having equitable access to the law?

Justice Kirby

Well, women have in terms of the theory of the law, the same access to justice as any other person, any other citizen. A male citizen, migrants, people of different minorities - everybody in the theory of the law is equal before the law. As against that, the realities of ordinary life are that many women are in a disadvantageous position. They're often just too busy looking after the children, when they get access to courts or to the law they often find that the substantive rules were laid down in earlier times and didn't always reflect a fair principle so far as women were concerned. Now these things are changing but part of the problem I think is the self-conception and courage on the part of women and assertion on the part of women with the assistance of women's groups and others including men who are feminists to ensure

that women come forward when they have problems. I believe that we have made important strides in this regard in the last twenty years, for example, police have to some modified their procedures and courts have also modified their procedures. Judges have modified their conduct in relation to people who complain that they've been the victims of sexual assault and we are seeing increasing numbers of cases coming into the courts of women, young girls who have been assaulted by members of their families, it's really a major component, unfortunately, of the work of the courts that deal with criminal cases and courts of criminal appeal. So that the answer to your question is that in theory women, like every other group and like minorities have equal access to the law, and once they get there I believe, generally speaking, they will be treated equally and fairly and not disadvantaged because of their gender. But on the other hand, a number of the rules that they find when they get there are rules fashioned in earlier times and those rules are themselves being changed, such as the common law rule that a man could not rape his wife in law, that has been declared by the High Court of Australia in the case of the Queen v L about two or three years ago, no longer to be the law of this country. So that the substantive rules are changing but in part the basic problem is the economic disempowerment of women and I think that so many problems that we face in the world, including not least of which our response to the AIDS epidemic, will be solved if only we can find the ways to empower women and to make sure that they assert and maintain and secure their rights and if necessary go to court in order to do so.

Linda

So the process of reception of the Westminster system has had quite an effect on the disadvantage that women have experienced in our legal system, would that be correct?

Justice Kirby

I don't think you can blame the Westminster system, the Westminster system as it's called is the system of parliamentary democracy by which the government of the day is elected from the lower house of parliament, from those members of the lower house who are in the majority or the majority party or coalition of the party's. So I don't think we can really blame them for the problems of gender bias in the law. It's true that until very recently women were grossly under represented in the federal, state and even local governments of Australia. It's also true that there have been some correctives in that regard and all the major political parties now realise how important it is to ensure that women do get a fair opportunity to represent their parties in the federal and state and local government sectors. But I don't think you can blame the Westminster system nor do I think you can blame as such the English common law. The English common law is in fact a great guardian of liberties and it has within it an enormous resource for correcting itself when it is found to be out of touch with the values of each succeeding generation. In this respect the English law as we have inherited it in Australia is a much more flexible system of law than the legal system

of continental Europe, which tends to be much more authoritarian and just as sexist if not more sexist than the common law of England. So I don't think it helps us to be blaming England or blaming Westminster we have got to look into ourselves for our faults and make sure that within Australia we build our legal system and our parliamentary and judicial systems in a way that is much more sensitive to half of our people, the women.

Linda

Thankyou very much for your comments Justice Kirby, we appreciate your time.