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IS THERE A NEED FOR SEX-BASED EQUALITY LEGISLATION IN INDIA?

Inaugural Address
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New Delhi, India

The Hon. Michael Kirby AC CMG

INAUGURAL ADDRESS

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The Hon. Michael Kirby
Former Judge of the High Court of Australia

The inaugural address at the Consultation was delivered by the Hon. Michael Kirby. Michael Kirby thanked Mr. Anand Grover and Ms. Indira Jaising for their enormous contributions to justice for people in India and beyond. He considered the Consultation to be an opportunity for 'thought stimulation' by deriving analogies from other developments taking place within India and across the world. He also thanked Ford Foundation for their consistent pursuit of gender equality and other worthwhile international human rights activities.

Michael Kirby shared the fact that during the course of his research, he came across a paper written by Dr. Geeta Oberoi that emphasized the lack of women judges on benches across many courts within India. To date in the Supreme Court, only four women have been deemed appropriate to be appointed as judges[1]. He mentioned that

[1] Geeta Oberoi, "Role of Judicial Education in India" (2009) 35 *Commonwealth Law Bulletin* 496 at 519ff.

this situation had earlier been replicated in the courts of Australia, Canada and United States as well. For Michael Kirby, diversity meant having the bench comprised of judges from different backgrounds and life experiences. The same is to be true for diversity in the case of citizens or non-citizens who come before the judges. He gave the example of his own sexual orientation as being one of such different experience. Michael Kirby said that, on reading Professor Nussbaum's paper for the Consultation, he was slowly made angry over how people are discriminated against, on the ground of their gender and sexual orientation.

Stepping into the discussion over PIL, Michael Kirby inquired as to why there has been hostility towards PILs in Commonwealth countries. He remarked that these hostilities had been based on the law of standing, on the law of intervention and the practice governing receipt of submissions by *amici curiae*. There was a fear of intrusion of strangers into other parties' litigations and that hostility had sometimes manifested itself in the form of rebuffing intervention or imposing discouraging costs orders.[2]

The paper written by Professor Goonesekere reminded Michael Kirby of the case of *Al-Kateb* v. *Godwin*[3] that came before his court. This case pertained to the treatment of refugees. The government's argument was that, since the man was of Palestinian origins, he was stateless and thus, could not be sent back to his own country. In

[2] See M.D. Kirby, "Deconstructing the Law's Hostility to Public Interest Litigation" (2011) *Law Quarterly Review*, (London), forthcoming.

[3] (1989) 169 CLR 279; (1990) 64 ALJR 53 (HCA).

such a scenario, he might have to spend his entire life in detention. This view did not appeal to a minority of the Australian High Court judges, including himself. However, he said that hostility towards such ideas cannot be changed easily by debates at the public level. His main suggestion was that a big paradigm shift was required in the thinking of judges and lawyers - a challenge that this Consultation hoped to secure.

Mr. Kirby said that his understanding of the Australian law on sex discrimination was very similar to that reflected in Professor Sandra Fredman's paper. He cited the case of *Australian Iron & Steel Pty Ltd* v *Banovic*[4], in which an employer of a steel works adopted a principle of 'last on first off' to reduce the workforce during an economic turndown. Women workers challenged this principle stating it to be prejudicial towards them. Justice Mary Gaudron (writing with Justice William Deane) held that it amounted to a form of indirect discrimination. In Michael Kirby's view, this was clearly correct. The approach of the employer *appeared* to be neutral and impartial as between women and men employees. However, given the past pattern of female employment in the Australian steel works, it was *in fact* seriously discriminatory against women. The majority of the High Court of Australia had so held.

In conclusion, Michael Kirby emphasized that the main issue at the Consultation was whether India needed sex based equality legislation, to which he emphatically agreed that it does. He was

[4] (1989) 168 CLR 265.

clear on the point that implementation of broad sex equality legislation would encourage improvement in the structure of the society by laying down the applicable principles and providing machinery to receive and adjudicate complaints and to establish the principles by which discrimination would be gradually overcome, discouraged and prevented. The more difficult question was whether separate legislation on gender discrimination should be recommended rather than a general anti-discrimination law addressing all grounds of unequal treatment and discrimination. Although the latter approach was more conceptual and, in a way, more principled, it could delay the urgent challenge of tackling gender discrimination in India. For that reason, Michael Kirby favoured the priority introduction of a gender law to be followed by others later.

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