

Lecture on “The Utility and Limits of Legal History in Constitutional Adjudication”

Gandhinagar, December 23, 2020: Gujarat National Law University (GNLU) organized a lecture on “The Utility and Limits of Legal History in Constitutional Adjudication”. The lecture was delivered by Honorable Justice Michael Kirby AC CMG, an international jurist and Former Judge of the High Court of Australia for 13 years. The High Court of Australia is the highest court in Australia akin to the Supreme Court in India.

“Courts serve as an umpire for democracies, interpreting the Constitution with the changing times and context,” remarked Justice Kirby as he delved into the importance of legal history in Constitutional adjudication. He explained how the Originalist Theory dissociates from the idea of interpretation being a concept based on the perception of judges and dictates words to be speaking for themselves, as intended to be interpreted by the constitution-makers themselves.

“But this is often difficult,” he remarked. “English as a language, due to its mixed origins, rarely allows for unambiguity in words and phrases. He further elaborated that English is a West Germanic language that originated from Anglo-Frisian dialects brought to Britain in the mid-5th to 7th centuries AD by Anglo-Saxon migrants from what is now northwest Germany, southern Denmark and the Netherlands. After the Norman conquest of England in 1066, Anglo-Norman, a northern dialect of Old French with limited Nordic influences, was introduced as the language of the ruling classes in England. Many Norman and French loanwords entered the English language in this period, especially in vocabulary related to the church, the court system and the government. The mixed influence of German and French often poses a problem in the interpretation of certain words and phrases of the English language.

He explained how this is just one of the many problems that courts come across while adjudicating based on words in their original context. “Another problem that surrounds this idea of interpretation is the changing times. The Rights as we see in 2020 are very different from what they were a century ago and thus Legal History plays a very important role.” he opined. Acknowledging that an analytical and technical application would often result in a disparity between law and society, he mentioned how Legal History bridges this gap and allows for the study of previous laws, based on context.

Stressing on the importance of legal history, Justice Kirby said, “Knowing the text is the first step courts need while interpreting the constitution but Legal History comes a close second, to keep the Constitution as a living document and studying it in the contextual understanding of the word.”

In reply to a question, Justice Kirby said that the Indian constitution is easier to amend as compared to the constitution of most other common law countries, i.e. the countries that were former British colonies or protectorates, including the United States. It is very difficult to amend the constitution in Australia or the United States. For example, The Australian Constitution can only be altered by referendum. In a referendum, all Australians of voting age vote yes or no for the proposed changes.



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To succeed, a majority of voters nationwide and a majority of States (four out of six) must approve the changes. Over the years, there were 28 proposals to amend the constitution in Australia, but only six of them succeeded. The easy amendability of the Indian constitution was perhaps one of the factors leading the Supreme Court of India to lay down the Basic Structure Doctrine in the Kesavananda Bharati case, which means that while the parliament had vast powers to amend the Constitution, no part may be so amended as to "alter the basic structure" of the Constitution. It is unamendable.

In his welcome address, GNLU Director Prof. (Dr.) S. Shanthakumar spoke about the importance of the Originalist Theory of interpretation and its relevance not only in the Indian context but in Constitutional adjudication across legal systems.

The lecture was organized under the aegis of the GNLU Centre for Legal History, Philosophy and Tradition. This was the inaugural event of the Centre.

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