

KEEPING THE SPIRIT OF THE COMMON LAW ALIVE*

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Western law has two great systems, the civil law and the common law. The system of civil law comprises a number of national or local laws, each of which has, at its core, a civil code based largely on Roman law. The common law is not contained in a code but is continually distilled from the stream of a large number of cases decided by the courts of law, at first exclusively in England but later in other parts of the Commonwealth and the USA. This judge-made law is again divided into two parts, which bear the technical names of 'common law' and 'equity', both of which are from time to time modified by local or national legislation.

Even centuries of Roman rule over Britain could not significantly change or give flavour to Britain or its people. The Roman occupation left "little permanent mark on the civilization and character of the island."¹

I. COMMON LAW – ITS SPIRIT

The common law has its origins in customs, which evolve into rules of conduct and the process of their enforcement creates legal rules.² The common law is not an expression connoting some specific idea. It is a whole, complex judicial system evolved over the centuries in England, showing great penchant for migration to other parts of the globe. Initially the term was used for the laws and customs that were applied by the royal courts, which had emerged after the Norman conquest and progressively replaced local laws and customs applied by sundry local courts.³ As the decisions of these courts came to be recorded and published, a practice developed whereby past decisions would be cited in argument before the courts and would be regarded as having persuasive value or even binding authority.

The common law is judge-made law, the continuing development of which is an integral part of the constitutional function of the judiciary. "The common law is a living system of law reacting to new events and new ideals and so capable of providing citizens with a system of practical justice relevant

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¹ J.B. BURY, THE CAMBRIDGE MEDIEVAL HISTORY VOL. I 370 (1911).

² THEODORE FRANK, THOMAS PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 342 (2007).

³ S.H BAILEY & M.J GUNN, SMITH AND BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM 4 (1991).

to the times in which they live”⁴ “Judicial development of the common law comprises the reasoned application of established Common Law principles in current social conditions”⁵ Rigidity in the operation of a legal system is a sign of weakness, not strength and it deprives the system of necessary elasticity. Flexibility is the prime virtue of common law. The genius of common law lies in its capacity for evolution and adaptability, as well as its resilience to cope with the demands of the times. This may be said to represent the spirit of the common law.

II. DISTINCTIVE FEATURES OF THE COMMON LAW

Sir Frederick Pollock has pointed out that English laws grew in rugged exclusiveness, disdaining fellowship with the mere polished learning of the civilians.⁶ The main areas of differences, or rather of shifts of emphasis are (1) the law making power of the judges; (2) the value and force of precedents; (3) the content of the inquisitorial element in jurisdiction; and (4) the concept of inherent power of the court and other traditional techniques of procedure. That the decisions of superior courts are a source of law in their own right is the single largest distinctive feature of the common law system.

III. PRECEDENTS AND INHERENT JURISDICTION

There is a marked difference between the institution of case law in England and the continental idea of precedents. The continental concept of precedent is a rule of practice established by a series or group of cases, in contrast to the binding authority of an individual case. The other distinction is the characteristic adversarial character of the common law system.

One difference of great importance is the extraordinary concept in the common law tradition called “the inherent jurisdiction of the court.”⁷ There is no equivalent to this peculiar English concept of judicial power in any European system.⁸ The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, mainly civil but also criminal, but not a part of substantive law. It is normally exercisable by the superior courts of law and to a limited extent by inferior courts, but not by tribunals.⁹ It is not derived from any statute or rule of law, but from the very nature of the court as a court

⁴ Kleinwort Benson v. Lincoln City Council, (1999) 2 A.C. 349, *per* Lord Goff.

⁵ *Id.*

⁶ SIR FREDERICK POLLOCK & BART, OXFORD LECTURES AND OTHER DISCOURSES 47 (1890).

⁷ SIR JACK ISAAC HAI JACOB, THE FABRIC OF ENGLISH CIVIL JUSTICE 60 (1987).

⁸ *Id.*, 60.

⁹ *Id.*, 60.

of law.¹⁰ The superior court is entitled to determine for itself questions about its jurisdiction. This is an aspect of the inherent power of the court. Inherent jurisdiction is the foundation on which the edifice of the common law is built. The power of superior courts as courts of record to punish for contempt flows from this concept. “Contempt of Court is undoubtedly one of the great contributions the common law has made to the civilized behaviour of a large part of the world beyond the continent of Europe where the institution is unknown”.¹¹

IV. TRANSITION TO THE MODERN ERA – SIR EDWARD COKE

The 16th century in England was a century of transition from medieval to the modern. It saw many great changes in all branches of private law. “It is not one of the least of the advantages of the system of common law that it enables lawyers to adapt to a new environment.”¹² Sir Edward Coke in his commentary on Littleton described the law of England as the golden metwand, whereby all men’s causes are justly and evenly measured. Indeed, Littleton’s work was a masterpiece. ‘Coke on Littleton’ was a masterpiece on a masterpiece. Coke’s writings were recognized in his own days by Bacon. “Had it not been for Sir Edward Coke’s reports ... the law by this time had almost been like a ship without a ballast.”¹³ Coke’s work was a fitting culmination of a process that had commenced in the 12th century. The establishment of the rule of law was mainly due to Coke’s insistence on the supremacy of the common law.¹⁴ Its acceptance by later generations of lawyers as a fundamental principle of English law was due to the manner in which he had stated and enforced them in his writings.¹⁵ The rule of law is the greatest gift of the common law.

Many other countries are now the inheritors of the common law system; they are not only proud of their inheritance, but even take pride in their preference. Common law broadly denotes rules derived from decisions of the superior courts, in contrast to those derived from statute. In all countries that have inherited the English legal system, the common law is the foundation of all laws and legal systems.¹⁶ The development of law in all common law countries is by codification, whether as a written Constitution or any other law – the

¹⁰ *Id.*, 60.

¹¹ Francis Mann, *Contempt of Courts in the House of Lords and the European Court of Human Rights*, 95 LAW QUARTERLY REVIEW 348 (1989).

¹² *Wason v. Walter*, L.R. 4 Q.B. 73.

¹³ ANON, THE LEGAL OBSERVER, OR, JOURNAL OF JURISPRUDENCE VOL. 6 436 (1833).

¹⁴ WILLIAM HOLDSWORTH, SOME MAKERS OF ENGLISH LAW 131 (1938).

¹⁵ *Id.*, 132.

¹⁶ QUEBEC RESEARCH CENTRE OF PRIVATE AND COMPARATIVE LAW, PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS 72 (1991): “Legal system of England and of those countries which have received English law, as opposed to other legal systems, especially those evolved from Roman law”.

basic elements of which are common law concepts as modified by indigenous ideas where necessary.

V. JUDICIAL CREATIVITY

Learned Hand says that our common law is an instance of a combination of custom and its successive adaptations.¹⁷ Judges receive it and profess to treat it as authoritative, while gently moulding it to fit changed ideas. Indeed the whole of it has been fabricated in this way like a coral reef, the symmetry of whose eventual structure the artificers have no intimation as they labour.¹⁸ “It is a structure indubitably made by the hands of generations of judges, each professing to be a pupil, yet each in fact a builder who has contributed his few bricks and his little mortar, often under the illusion that he has added nothing. ... [A judge] must preserve his authority by clothing himself in the majesty of an overshadowing past, but he must discover some composition with the dominant trends of his time – at all hazards he must maintain that tolerable continuity without which the society dissolves...”.¹⁹

There is an impression that judicial activism in the common law tradition in the sense it is now understood has been a phenomenon in the second half of the 20th century. But Prof. Wade points out that it has only “rekindled old fires.”²⁰ Creativity – judicial creativity is a hallmark of common law. For instance, speaking of judicial creativity, the doctrine of ‘Lost Grant’ was itself the result of judicial creativeness in common law. *Bryant v. Foot*²¹ sets out the judicial ingenuity and innovation involved in the fiction of the ‘Lost Grant’ in the following words:

“The Judges set their ingenuity to work, by fictions and presumption to atone for the supineness of the legislature and to amend, so far as in them lay, the law, which I cannot but think they were bound to administer as they found it. They first laid down the somewhat startling rule the rule that from the usage of a lifetime the presumption arose that a similar usage had existed from a remote antiquity. Next, as it could not but happen that in the case of many private rights, especially in that of easements which had a more recent origin, such a presumption was impossible, judicial astuteness to support possession and enjoyment, which the law ought to have invested

¹⁷ Learned Hand, *Is There a Common Will*, 28(1) MICHIGAN LAW REVIEW 46 (1929).

¹⁸ *Id.*

¹⁹ Learned Hand, *Mr. Justice Cardozo*, 39(1) COLUMBIA LAW REVIEW 9 (1939).

²⁰ Mr. Justice M. N. Venkatachaliah, Chief Justice of India, *M.C. Bhandari Memorial Lecture Indian Judges as Law makers: Some Glimpses of the Past*, (1995) 1 SCC (Jour) 1.

²¹ (1867) LR 2 QB 161.

with the character of rights, had recourse to the questionable theory of lost grants.

Juries were first told that from user, during living memory, or even during twenty years, they might presume a lost grant or deed; next they were recommended to make such a presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither Judge nor jury, nor anyone else, had the shadow of a belief that any such instrument had ever really existed.”²²

Judicial law-making is a broad feature of the common law legacy. “There was never a more sterile controversy” said Lord Radcliffe, “than that upon the question whether a judge makes law. Of course he does. How can he help it?”²³ And Lord Reid said: “There was a time when it was thought almost indecent to suggest that judges make the law. They only declare it... But we do not believe in fairy tales any more.”²⁴

“The *raison d’être* for judicial law-making is said to be that by its very nature the law is a laggard. It does not search out as do science and medicine. It merely reacts, post-facto, to social needs and demands and is never abreast of the needs of the times.” The adaptability of the common law is said to be the answer to the inadequacy of the tardy pace of reformatory legislation. Judicial law making is seen as the effective system. It proves to be an ameliorative substitute.

It is said that judge-made law must be within narrow and clearly defined limits. But the trouble is that those who make the law themselves claim the right to set those limits. Prof. Jaffe asks, “By what warrant and in what sense, is the judiciary authorized to make law? What, if any, are the effective limits upon the exercise of judicial power? What problems flow from its being an ad hoc decisional process? Can the judiciary be trusted to move in the right direction?”²⁵

Jaffe also said that the English common law had suffered a menopause; but Lord Edmund Davies made a vigorous protest. He said, “If there ever was a menopause in judicial law-making, all I can say is that it must have

²² *Id.*

²³ LORD RADCLIFFE, NOT IN FEATHER BEDS 215 (1968).

²⁴ Lord Reid, *The Judge as Lawmaker*, 12 J. SOC’Y PUB. TCHRS. L. 22 (1972-1973).

²⁵ L. L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS 35 (1969).

been of truly remarkable kind. For not only it is over and done with, but conception has assuredly been resumed and is clearly proceeding at a brisk pace".²⁶

Concepts of common law have enriched and helped the growth of both public law and private law.

VI. COMMON LAW FOUNDATIONS OF JUDICIAL REVIEW

The concepts of judicial review and unconstitutional statutes may be said to owe their origin to common law. Constitutionalism i.e., limited government under a fundamental law, has its religious roots in the idea of divine law, its philosophical roots in the idea of natural law, its specifically Anglo-Saxon legal roots in the common law tradition and its institutional roots in the idea of the balanced state. It emphasizes the conception of a written constitution as 'higher law'²⁷ to be interpreted ultimately not by natural or common reason but by those versed in the 'artificial reason of the law'.²⁸

That the power of judicial review essentially has its roots in common law is reflected in the famous dictum of Chief Justice Coke in *Dr. Bonham's case*.²⁹ It was said that the common law would control Acts of Parliament and the court could declare an Act of Parliament void if it was against common right and reason or repugnant or impossible to be performed.³⁰ This was before the glorious Bloodless Revolution, which established the supremacy of Parliament. It is significant that Coke himself did not follow this view later and has not mentioned *Bonham's case* in his Institutes. This, however, had immense influence across the ocean in America where it found fertile ground with a written constitution, leading to the review role of the Supreme Court with the concept of a fundamental higher law i.e., the Constitution as a restraint on both executive and legislature.³¹

²⁶ VENKATACHALIAH, *supra* note 20.

²⁷ Thomas Grey, *Do We Have An Unwritten Constitution*, 27 STAN L. REV. 703 (1974-75): "For the generation that framed the Constitution, the concept of a "higher law," protecting "natural rights," and taking precedence over ordinary positive law as a matter of political obligation, was widely shared and deeply felt. An essential element of American constitutionalism was the reduction to written form-and hence to positive law- of some of the principles of natural rights".

²⁸ Edward Coke, Conference between King James I. and the Judges of England (1612) 12 Rep. 63: "To which it was answered by me that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature ; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it".

²⁹ Thomas Bonham v. College of Physicians, (1938) 54 L.Q.R. 543.

³⁰ *Id.*

³¹ GREY, *supra* note 27.

In 1798 in *Calder v. Bull*,³² Justice Samuel Chase drew support from the principles of a higher law and judicial review to enforce limitations outside the written constitution (extra constitutional limitations) on legislative power. He declared, “an Act of the legislature contrary to the great first principles of the social compact cannot be considered to be rightful exercise of the legislative authority... the general principles of law and reason and forbid them.”³³ Then in 1803, Chief Justice Marshall said in *Marbury v. Madison*,³⁴ “It is the duty of courts when confronted with a conflict between an act (i.e., a statute) of the mere agents of the people (i.e., of the ordinary legislature) and the act of the people themselves (to wit, the Constitution) to prefer the latter.”

Marshall was not and never claimed to be the originator of the doctrine. In 1973, Spencer Roane, a great judge of the Virginia court said in *Kemper v. Hawkin*,³⁵ “If the legislature may infringe this Constitution (of Virginia), it is no longer fixed ... and the liberties of the people are wholly at the mercy of the legislature.”

Edwin Corwin, in his paper, ‘The Higher Law Background of American Constitutional Law’,³⁶ to which all later writers are indebted and in his lecture, ‘The Debt of American Constitutional Law to Natural Law Concepts’,³⁷ explains the great contribution of the common law tradition to the ultimate development of judicial review in America. The dictum in *Bonham’s case*³⁸ became, in Corwin’s words, “the most important single source of the notion of judicial review.”³⁹ The principle is that all laws are to be tested on the touchstone of a higher law which in earlier times was the natural law and the common law, and whose role today is ordinarily filled by a constitutional document. The idea of judicial review is anterior to a written constitution.

VII. IMPRESS OF THE COMMON LAW ON CONSTITUTIONAL LAW

The greatest impress of English common law upon the American constitution was upon the Bill of Rights, which trace their origin to the Magna Carta. Notwithstanding some difference in perspective, the common objective between the English common law rights and liberties and the American Bill of Rights is that both were intended as bulwarks against arbitrary powers and the

³² 3 US 386 (1798).

³³ *Id.*

³⁴ 5 US 137 (1803).

³⁵ 1 Va Cas 22 (1793).

³⁶ Edward S Corwin, *The Higher Law Background of American Constitutional Law*, 42 HARVARD L.R. 149 (1928-29).

³⁷ Edward S Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 42 NOTRE DAME LAW 258 (1949-50).

³⁸ BONHAM, *supra* note 29.

³⁹ CORWIN, *supra* note 36, 379.

American courts did not forget their common law inheritance in interpreting and giving content to the constitutional guarantees and rights. As Chief Justice Taft observed in *Grossman*,⁴⁰ “The language of the (American) Constitution cannot be interpreted except by reference to the common law and to British institutions ... the statesmen and lawyers of the Convention, when they put their conclusions into the form of a fundamental law, expressed them in terms of the common law, confident that they would be shortly and easily understood.”

Common law is an aid to constitutional interpretation; it is a tool to bring the legal order in tune with the constitutional philosophy and is the vehicle for translating constitutional phrase into reality. For instance, the principles of natural justice are based on common law maxims and doctrines; so also the presumption of innocence and immunity from self-incrimination. To quote Lord Morris, “natural justice, it has been said, is fair play in action nor do we wait for directives from Parliament. The Common Law has abundant riches: there may we find what Bytes J. called the ‘justice of the common law.’”⁴¹

The common law has humanized the law. Be it in the field of public law or criminal law, common law concepts have their influence. That the punishment should be commensurate with the offence – the proportionality doctrine – finds its earliest echoes in the Magna Carta (1215) and the Bill of Rights (1689). Also based on this principle, the Privy Council recently invalidated a mandatory death sentence, in a case from the Bahamas.⁴² Our Supreme Court invalidated a similar provision (Indian Penal Code, §303) in 1983 drawing support from Art. 21 of the Constitution.⁴³

VIII. ADAPTABILITY, APPLICATION AND DEVELOPMENT IN OTHER AREAS

Great judges who have developed common law have displayed a perceptive sense of legal history and responded to the felt needs of times. As Lord Roskill said, “what direction should this development now take? ... The answer is ... to follow that route which is most consonant with the current needs of the society and which will be seen to be sensible and will pragmatically thereafter be easy to apply ... the Law Lords will continue to be the targets for those academic lawyers who will seek intellectual perfection rather than imperfect pragmatism. But much of the common law and virtually all the criminal law ... is a blunt instrument by means of which human beings are governed and subject to which they are required to live and blunt instruments are rarely

⁴⁰ *Ex Parte Grossman*, 267 US 87 (1925).

⁴¹ *Wiseman v. Borneman*, 1971 A.C. 297.

⁴² *Bowe v. The Queen*, 2006 UKPC 10 (P.C.) (Bahamas).

⁴³ *Mithu v. State of Punjab*, (1983) 2 SCC 277.

perfect intellectually or otherwise. By definition they operate bluntly and not sharply.⁷⁴⁴

One of the reasons why Justice Cardozo was rated among the greatest judges, despite his short tenure of six years in the Supreme Court, was his great faith in the potential of common law to adapt itself and meet the challenges of the growing times and changing needs of society. Lord Denning used the process of development of common law to great effect. The tort of spoil holiday was one of his innovations.⁴⁵ Then again, a three hundred year old English common law rule, that in law, a husband is incapable of the offence of rape on a wife during the subsistence of the marriage changed in the very case to which the changed rule was applied.⁴⁶

Cases where the concept of 'strict liability' and 'reasonable care to one's neighbour' are enunciated are instances of judicial law making. So also is the practice of the court examining the reasonableness of the terms of a contract even though it may interfere with the freedom of contract. The concept that the Crown can do no wrong has been effectively answered judges cannot enforce the law against the Crown as the monarch because the monarch can do no wrong, but the judges enforce the law against Crown as the executive and against the individuals who, from time to time, represent the Crown.

One sterling example in India is Justice Mahmood who, in 1981, enunciated the essentials of natural justice and the consequences of its non-observance. In a dissenting opinion in a full bench case, he held that a criminal appeal under §420 of the Code of Civil Procedure against conviction could not be decided without hearing the imprisoned accused in person if he was unrepresented by a lawyer because without that requirement the appeal could not be treated as heard.⁴⁷ Justice Vivian Bose in the Nagpur High Court held that a forest officer was engaged in a commercial activity of the State and the defence of sovereign immunity was not available in a case of tort committed by him;⁴⁸ that uninterrupted settled possession of even less than 12 years was a defence to protect possession, except against a true owner;⁴⁹ and the signature on a document being admitted or proved, the burden shifts to the signatory to avoid the consequences of the document, because no one is known to append his signature to a document without agreeing to be bound by it.⁵⁰ In the Supreme Court, he was the first to hold that any action which is not 'reasonable, just and fair'

⁴⁴ Lord Roskill, Presidential Address to Bentham Club at University College of London: Law Lords, Reactionaries or Reformers (February 29, 1984).

⁴⁵ *Jarvis v. Swan Tours Ltd.*, 1973 Q.B. 233.

⁴⁶ *R v. R.*, (1992) 1 A.C. 599.

⁴⁷ *Queen Empress v. Phopi*, ILR XIII All. 171.

⁴⁸ *Secretary of State v. Sheoramjee*, AIR 1952 Nag 213.

⁴⁹ *Pannalal Bhagirath Marwadi v. Bhaiyalal Bindraban Pardes Teli*, AIR 1937 Nag 281.

⁵⁰ *Dalchand Mulchand v. Hasanbi*, AIR 1938 Nag 152.

is violative of Art. 14 and that the plea of ‘act of state’ is not avoidable against its own citizens.⁵¹

The *Ratlam Municipality case*⁵² offers a shining example of how the existing legal provisions were made meaningful and put to effective use by judicial innovation. Payment of compensation for torts by public authorities is again a striking innovation.

Another great contribution of common law and an instance of its creativity and resilience is the evolution of ‘the reasonable man’. The common law of England has been laboriously built about a mythical figure – the figure of ‘the reasonable man’. He is an ideal, a standard, the embodiment of all those qualities, which we demand of a good citizen. The standard of the reasonable man has come to stay as the accepted standard to pass judicial scrutiny. Whether it is in the field of contract or tort or in the public law domain, ‘reasonableness’ and the ‘reasonable man’ occur frequently and play a vital role. For instance, in the case of negligence, the court examines whether there was reasonable care i.e., whether the course of action is one that a reasonable prudent man would have taken. Then again, in matters like obscenity and defamation what is to be seen is whether the sensitivities of a reasonable man would be offended. In judging the unconscionability of the terms of a contract, it is the standard of the reasonable man that is applied. In a broad sense, the various significations of ‘reasonable conduct’ might be described as the behaviour of the ordinary person in any particular event or transaction. This, of course, is an abstraction. Lord Bowen visualized the reasonable man as “the man on the Clapham omnibus”.⁵³ The reasonable man is a fiction – he is the personification of the court and the jury’s social judgment. He is the personification of public opinion on a legal issue. In an illuminating passage, Lord Radcliffe said that before ‘the reasonable man’ enters the stage, the actual parties would become disembodied spirits and from their ashes there rises like a phoenix the figure of the fair and reasonable man who really is the anthropomorphic conception of justice and that is the figurative role of the court itself.⁵⁴ “It is an idea to help judges and juries locate an accessible, unbiased standard.”⁵⁵

In the days to come, with cataclysmic changes taking place in the world, the quest for truth and justice will become more courageous and the role of the court more sophisticated and complicated. ‘The reasonable man’ of the future will present the judge who is to enact him on the stage more elusive than ever.

⁵¹ State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.

⁵² Municipal Council, Ratlam v. Vardhichand, AIR 1980 SC 1622.

⁵³ Tichborne v. Lushington in the Court of Common Pleas Westminster from May 10 to July 7, 1871.

⁵⁴ Davis Contractors Ltd. v. Fareham Urban District Council, (1956) UKHL 3.

⁵⁵ *Id.*

The doctrine of prospective overruling has taken root in some of the common law countries. People generally conduct their affairs based on their understanding of the law. The retrospective effect of a change of law can have disruptive and seemingly unfair consequences. Prospective overruling is a judicial tool fashioned to mitigate the adverse consequences. The doctrine was first evolved and applied in the USA – *Great Northern Rly. Co. v. Sunburst Oil & Ref. Co.*,⁵⁶ *Linkletter*,⁵⁷ and *Chevron Oil Co.*⁵⁸ In India, it was first applied in *Golak Nath*,⁵⁹ confining it to constitutional cases and to be applied only by the Apex Court. Reference may also be made to *India Cement Ltd.*,⁶⁰ *Orissa Cement Ltd.*⁶¹ and the recent case of *P.V. George v. State of Kerala*.⁶² In England, the doctrine has been invoked in a well reasoned, illuminating and elegantly written judgment in *Re Spectrum Plus*.⁶³ The doctrine has been applied by Luxembourg and Strasbourg Courts also.⁶⁴

Another doctrine evolved in constitutional adjudication in India is the basic structure theory. It was held in *Kesavananda Bharati*⁶⁵ that while the power of amendment under Art. 368 is plenary and no provision is immune from amendment, it does not include the power to abrogate the Constitution or amend its basic structure, features or framework. It was the responsible response of an anxious activist court to the working of the Constitution for the first three decades. If the doctrine is not accepted and applied, the tumultuous tides of democratic majoritarianism may engulf and deluge the entire system. Basu stated in his commentary that “the doctrine of basic features had been invented by the Supreme Court in order to shield the Constitution from frequent and multiple amendments by a majoritarian Government”.⁶⁶ The doctrine is now invoked and applied in other jurisdictions also.

IX. HERITAGE

The common law is a great heritage and treasure. It is a potent weapon in the hands of wise judges. As in the past, the judges today would have to display a sense of proper perception and a fine balance between various conflicting interests and competing claims. They would have to carry the law forward wisely and steadily in the right direction. All this requires a great

⁵⁶ 287 US 358 (1932).

⁵⁷ *Linkletter v. Waller*, 381 US (1965).

⁵⁸ *Chevron Oil CO. v. Huson*, 404 US 97 (1971).

⁵⁹ *I.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643.

⁶⁰ *India Cement Ltd. v. State of Tamil Nadu*, (1990) 1 SCC 12.

⁶¹ *Orissa Cement Ltd. v. State of Orissa*, (1991) Supp (1) SCC 430.

⁶² (2007) 3 SCC 557.

⁶³ *Re Spectrum Plus*, 2005 UKHL 41.

⁶⁴ Sionaidh Douglas-Scott, *A Tale Of Two Courts: Luxembourg, Strasbourg And The Growing European Human Rights Acquis*, 43 Common Market Law Review 629, 641 (2006).

⁶⁵ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

⁶⁶ D. D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, 210-11 (1970).

amount of knowledge and sagacity, as also patience. A passage from Basu's Tagore Law Lectures appears apposite in this context:⁶⁷

“... How powerful and, therefore, onerous is the engine of Judicial Review at the hands of Judges of superior Courts and what depth of knowledge and faith in constitutionalism is indispensable for working that engine ... We cannot but emphasize the importance of proper personnel for the success of Judicial Review... If without any skill in the laws a judge will boldly venture to decide a question upon which the welfare and subsistence may depend, where, if he chances to judge wrong, he does an injury of the most alarming nature, an injury without possibility of redress. It may be added that in the sphere of constitutional law uninitiated decisions are likely... to bring... loss of confidence in Judicial Review, nay, in the Constitution itself, upon which rests the life and breath of the Nation.”

The judge should know his limitations and the limitations of the judicial process and that the law cannot offer relief from ‘the heart ache and thousand natural shocks that flesh is heir to’. The attitude of judicial humility is not an abdication of judicial power, but it is a true understanding and due observance of its limits. As Chief Justice Aharon Barak said, a judge's job requires balancing different values, “it requires balancing between the principle of majority rule and the values which even the majority may not undermine; between the needs of the collective and individual rights; between the rights of one individual and those of another. A judge must protect and maintain this delicate balance, something which requires some measure of activism and some measure of self-restraint”.⁶⁸

The exercise is delicate and challenging and calls for vision and statesmanship.

X. EPILOGUE

Dr. Radhakrishnan once remarked that it takes centuries to make a little history and centuries of history to make a tradition. Tradition, said Carlyle, is an enormous magnifier. But traditions are not like instant coffee. They would have to be imbibed and cherished by each generation. Today, we are the inheritors and guardians of common law traditions. And we may say with Learned Hand, “let us look up to the great edifice which our forefathers have built, of which we are now guardians and the craftsmen. Though

⁶⁷ D. D. BASU, TAGORE LAW LECTURES (1972).

⁶⁸ AHARON BARAK, THE JUDGE IN A DEMOCRACY 281 (2006).

severally we may perhaps be paltry and inconsequent, for the present it is we who are charged with its maintenance and growth. Descended to us, in some sort moulded by our hands, passed on to the future with reverence and with pride, we at once its servants and its masters, renew our fealty to the Law.”

Equipped with these qualities and moulded in these traditions the common law and lawyers can legitimately claim a place in the sun.

“... There is one way in this country in which all men are created equal – there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein and the ignorant man the equal of any college President. That institution is a court.”⁶⁹

⁶⁹ HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

