# UNDERSTANDING THE IMPORTANCE OF THE PRINCIPLES OF COMMON LAW IN THE JUDICIAL DISCOURSE ACROSS THE COMMONWEALTH

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## ABSTRACT

The Commonwealth is one of the largest networks of countries which possess most customs in common, and the legal system followed in these countries is the Common Law system. The Common law system has proven to be one of the most efficient legal systems and probably the most followed as well across the world. Through this paper we have tried to understand the concept of Common law jurisprudence and its utilization within the judiciary as taught to the judicial officers at the time of judicial discourse. The understanding of the principles of Common law is of utmost importance keeping in mind the role of judges and the locus on hoe they apply the principles in order to tackle a case under the justice system. Hence the paper has actually compiled the foremost popular principles of law under the common-law system in order to better enhance the judicial system across the Commonwealth.


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## INTRODUCTION

The importance of understanding the principles and theories of Common Law is often found to be an analytical concept, which creates a lot of distortions in the minds of both lawyers and most importantly the judges, who slog through the due process during the dispensation of justice, with the lack of sound legal knowhow and its applicability leading to a state of legal handicap. Especially in dealing with statutory interpretations we see that there has been a substantive as well as materialistic decline within the scope of modern day judgments and the primary reason behind this in my opinion is the improper structuralizing of modules in judicial training which lacks the collection of legal skills in analyzing the statutory interpretations of the basic principles of Common law which has been polished by the judiciary since ages. This knowledge when not transferred during the training creates pillars of ignorance for the judicial officers, thus reflecting in the judicial pronouncements, leading to chaos because of conflicting viewpoints as there is lack of sound understanding which is missing while interpreting precedents and other sources of law.

Quoting Justice V.R. Krishna Iyer in this regard "What mutations in the law can be achieved by a socially sensitive, creative judge, while interpreting the laws is obviously to those who read legal history… judges are not born but made. … instead of leaving the law functionaries to cope with the inevitable gap between their mental kit and the knowledge and technology… imparting of judicial education, working knowhow is very important"[i]

## ABOUT COMMON LAW COUNTRIES

Most of the common law countries that once formed a part of England's dominion are in characteristic multicultural, multilingual and this needs to be recognized during the legislative process in these common law-abiding countries. Reasonability has been an old touchstone in the formulation of legislations, administration and judicial process. It was very difficult in those days for the judges to refrain from analyzing enactments through the vision of their social background ethnicity, gender and other such social parameters and thus this lead to an uniformity approach to clear the vacuum created by the conglomerate of diversity in the common law countries, thus narrowing down the scope of social variations among judicial officers within the judiciary and their duty towards their legal office.


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In theory the concept of judgeship as understood within the common law countries is one i.e. free from any sort of political intervention or executive influence because of the pursuance and practice of the Montesquieu's coveted theory of 'The separation of power' (Trias Politica) followed in these countries in cohabitation in consonance with the Dicey's Theory of The Rule of law. Within the system of common-law countries, the procedure for being appointed to a judicial office is very systematic and well structured.

It commences by the completion and attainment of formal legal education, that is a professional degree of law termed as 'Legum Baccalaureus' or 'Bachelors in Legal Education' after which the person applies pupillage or membership following which the person is given licensure to appear and plead before the Court of Law i.e. is making him an active part of the Bar where the person spends a significant amount of time in the practice of law or, public prosecutor.

Judges in most of the common law abiding nations are either appointed or elected to the judicial office; with exception to India and certain other countries having the system of appointment in the lower judicial cadre with the system of competitive examination also known as the judicial services. In England usually the appointive system is followed for all tyres of Judgeship within the United Kingdom, which also includes within the system the appointment of magistrates. The United States of America, also follows the appointive method with regards to the appointment of judges within the federal courts and also in certain provincial jurisdictions. Within the United States all appointments to the federal bench, and most appointments to the state judiciary, are done by the executive of the various states.

In common-law countries there are various avenues for a person to be appointed to the judicial office at all level commencing from the lower judiciary to the highest court of the country Indeed, even courtroom experience is not a prerequisite for a judgeship in the United States. There is no regular, common or fixed pattern of promotion. In some court's life tenure is provided through the concept of permanent judges and in the other courts there is a fixed tenure for retirement, sometimes subject to mandatory retirement at a fixed age. In others, tenure is limited to a stated term of years.

While in office, judges enjoy great power and prestige including various state sponsored perks and immunities. A common-law judge, who usually holds the most coveted position to which most members of the legal profession aspire, is by law not at all subject to outside supervision


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and inspection by the legislature or executive nor is he liable to be transferred by such an official from court to court or from place to place.

The main managerial authority over Common law judges is practiced by legal partners, whose forces of the executives are commonly slight, being restricted to issues, for example, requiring occasional reports of pending cases and orchestrating brief (and generally consensual) moves of judges between courts when factors, for example, ailment or clogged schedules require them.

Just appointed authorities who take part in unfortunate behaviour (e.g., by manhandling their office) are at risk for disciplinary assents, and afterward typically just by method for criminal arraignment for the supposed wrongdoings or by administrative indictment and preliminary, bringing about expulsion from office. A definitive demonstration of control is reprimand. Prosecution, be that as it may, is an exceptionally bulky, slow, not well characterized, resolute, inadequate, and sometimes utilized technique. In the US, government judges might be expelled from office by methods for a denunciation by the Place of Agents and a conviction by the Senate. Not very many appointed authorities have been either denounced or indicted (one partner equity of the Incomparable Court, Samuel Pursue, was reprimanded yet was not sentenced). A few pieces of the US have grown increasingly quick techniques for legal order, in which senior appointed authorities are vested with the ability to force sanctions—running from censure to expulsion from office—on blundering associates.

They are additionally vested with the ability to resign judges who have become truly or intellectually unfit to release their obligations. In different pieces of the world, including Latin America, indictment has been systematized. In Argentina, for instance, a justice chamber explores legal unfortunate behaviour and may expel decided from office.

With the exception of at the most elevated investigative level, customary law passes judgment on are no less subject than their common law partners to redrafting inversions of their decisions. Be that as it may, redrafting audit can't decently be viewed as order. It is intended to secure the privileges of disputants; to explain, clarify, and build up the law; and to help and guide lower-court judges, not to censure them.


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## STATUTES IN COMMON LAW COUNTRIES

Though there is a very strong belief that common law is based upon judicial pronouncements but yet in the present scenario most laws have taken the statutory form within these countries, usually passed by the parliaments in a democratic manner, thus the first test whilst the legality of the legislations which poses as a challenge for the judiciary while dealing with the maintainability and base of such law the court shall find consonance with the principles of Common Law. Presently there has been a merger of the federal system with the common law but yet the mode of interpretation is still dedicated to the principles of the Common Law as it tends to run in uniform lines through the Doctrines of Starre Decisis – precedents.

***Different Facets of Statute law***

Herein we would be discussing about the various categories of Common Law statutes even though this understanding actually overrides the spirit of common law as the system that prevails is that of case laws and precedents.

These are statutes which are drafted, passed, gazette and thus finally left to be interpreted by courts in common law lines.

a) Preamble- The term preamble has been defined in the Black's Laws Dictionary as 'A clause at the beginning of a constitution or statute explanatory of the reasons for its enactment and the objects sought to be accomplished' According to the understanding of the Common Law system the preamble is an introductory statement to a statute mentioning the reasons behind the drafting and passing of the same and also its position with immediate effect from the date of the royal ascent[ii]. It is a key to the subject matter enshrined within the act and it also helps in the identification of the mischief's which the parliament intends to remedy while passing of such enactment, this in turn evolves to be one of the fine tools for judiciary in dispensation of Judicial Pronouncements.[iii]
b) Legislation- It is the utilization of enactments through bills, provisions of law regulations and other sections thus enshrined it is a body of law which is codified and remains in force for times to come.


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## THE ROLE OF THE JUDICIARY

The basic function of the judiciary is to deal with the pronouncement on the legal interpretation of an enactment now it becomes important upon how and what derivatives the court might utilize to arrive at the legal meaning. It is also to be kept in mind that the judge while dealing with the case at hand shall not be influenced by extraneous considerations that would be bias and its kinds[iv], here especially in common law countries integrity towards the judicial office plays an absolutely imperative role in the functioning of the adjudicating system as Dworkin explains through his principle of integrity that the law wants judges to assume as far as possible, the structure of 'law is coherently a set of principles of justice, equity and fairness in the judicial process and thus it seeks an enforcement of these principles of fresh cases according to the party situation being fair and just. The ambition of integrity assumes to be a community of individual'[v].

According to Sir Carletom Kemp Allen the present requirement within the duty of the judiciary is Judicial Loyalty thus as an example the conduct of the judges should be to innovate as per the changed circumstances and requirements of the case. A judge's whole effort should be to find the law and not to self-legislate the same.

***Role of Judges- During settlement of Disputes***

The concept of legal policy has always been in a state of flux but yet has maintained a chronological relation with the past through the principle of precedent. Legal policy helps a judge to determine which legislation must be applied to which case at hand and also to understand the end turn effect or the remedy, outcome of such application. It becomes an effective tool during the adjudicating process as it also helps to identify the stake holders in the case that one is dealing with and also the validity of the legislation if contested[vi].

Retrospective Effect- Common Law Jurisdiction*:* One of the most obvious principle of legal policies is that it generally does not apply retrospectively however in certain circumstances that are made to further the ends of justice. In the context of retrospective law under common law jurisdiction it would be educative to quote Lord Bing Ham for the application of retrospective effect in Criminal Law "Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is very clear that you cannot be punished for something


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which was not criminal when u did it, and you cannot be punished more severely that you could have been punished at the time of offence" [vii]

In the context of Civil Law under the common law jurisdiction one does not condemn the retrospective effect to a strict extent. In this regard we find relevance through the citation issued by Isaac J "Upon the presumption that the legislature does not intend what is unjust rests the leaning against certain statues a retrospective effect"[viii]. In the case of Max Phill v Murphy the approach of the statutory interpretation of common law was reinstated by Dickson CJ where he opined that "The General Rule of the Common Law is that a statute changing the law ought not, unless the intension appears with reasonable certainly, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise effect rights or liabilities which the law had defined with reference to the past events"[ix]

***Nature of Judicial Pronouncement***

In historical times it is believed that the role of the judge was just to interpret the law through discovery and that it was not to make law. The legal maxim 'Jus dicere, et non jus dare' i.e., the province of a judge is not to make law but to declare it.

In the case of Marbury v Madison the court opined that it is emphatically the province and duty of the judiciary to declare what the law is. Those who try and apply this principle in particular cases must of necessity expound and provide an interpretation to that rule, thus it has to be remembered that if two laws are in conflict with one another the courts must analyze the extent of the conflict, the extent of repugnancy between the legislations if any and then should decide on the operation of each before pronouncing the adjudicating order. [x]

Blackstone in his commentaries opined "that the decisions of courts of justice are the evidence of what is common law", thus in the latest stages judicial opinion were treated as evidence of what the law is.

In the Common Law jurisdiction, the concept of judicial pronouncements attaining the force of law is identified through the Doctrine of Precedent, they are treated as a rich source of legal literature setting a patternistic judicial principle for the judiciary. According to John Chipman Gray a law is made of decisions in the form of rules laid down by courts. The fact that the court refers to judicial pronouncements is what makes them law and judges the discoverers of the law[xi].


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The nature of law laid down through judgments is to resolve disputes by using the forum to order a balance between the conflicting claims of the parties through the general application of law. It is thus important for a judicial order to be in consonance the principles of legislations under which the claim was brought before such court and also other judicial pronouncements within the same field as to avoid any conflict or contentious claim against the judgment and to uphold the string of chronology of legal principles, flowing through judicial pronouncements that can be identified under Common Law as precedent, consequently also because disobedience to a judicial order attracts contempt of court, thus if the soundness of order is not maintained creating a supervening impossibility on the compliance of the order as a result creating hardship for the party in return defeating the reason for which such order is passed.

***Principles of Judicial Interpretations:***

The concept of interpretation of statutes in most of the cases cannot be predetermined as if their lies an iota of doubt in the minds of judges while passing judicial pronouncements while pertaining to a particular statute then in these circumstances the interpretation which is best suited is applied, thus giving the judge a license of discretion on the applicability of the rules of interpretation contingent to the events placed before his court.

Ordinary meaning- Interpretation: This kind of interpretation is also termed as literal or plane meaning interpretation. Under this interpretation the usual grammatical understanding is accepted and the enactment under enquiry is capable of one meaning only. It is believed that while adjudicating this is the easiest kind of interpretation which is brought forth before the judges, thus judgments which are based on literal interpretation in most circumstances are sound and conclusive in nature.

***Effective Method of Judicial Discourse in Common Law Nations***

The concept of theoretical learning has been embedded within the legal fraternity since the time they started to receive formal legal education. It now becomes a challenging aspect for the judicial academies to convert the theoretical knowledge into an infirm reasoning based judicial officer who would in return be able to apply theoretical legal framework in the practical contest while delivering judicial pronouncements. This becomes a complicated development as studies prove that the pattern of judicial discourse in most Common Law countries is inadequate and


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deficient thereby creating a vacuum towards the resultant target of creating society ready judicial officers.

From the legal data base revolving around the commonwealth nations now covering various disciplines also create a vibrant effect on the method of judicial discourse. It is popularly believed that human beings continue to learn till the end of their lives. Learning is a tenant which is instinctive to the human brain and it is more often based on the confusion that is setup through the internal and external experiences of daily life. It is absolutely then based upon the reality and replacement theory of interpretation.

## IMPORTANCE OF DISCRETION- COMMON LAW INCENTIVE

For many centuries, there has been ardent confusions with regards to the applications of judicial discretion by the various courts within the common law jurisdiction. The concept provides, an equitable process by allowing the judges to give multifaceted dimensions to their judgements, especially under instances where the law is silent on the matter, as because discretion involves the application of mind for situational considerations but herein one must be cautious as the wrongful use of the principle of discretion may sometimes lead to gross miscarriage of justice.

One must herein, understand that the use of judicial discretion should never be exercised for the purpose giving effect to the will of the judge, but for the purposes of disseminating justice. The concept of individuality, is an essential quality where one can clearly state that there can be very less scope, where the ratio of two judges are similar, as decision of the judges is based on varied elements i.e., personnel views, background, moral values, application of judicial mind, etc.

Following are the guidelines that needs to be kept in mind while making discretions: -

1. Establishment of an understanding of the facts of case.
2. Application of the current law, in the consonance with the facts of the case.
3. Application of judicial minds in relation to the exercise of discretion.
4. Keep in mind the principle of Justice, Equity and Good conscience.
5. Contemplate upon the aftermath and impact of such judgement.
6. Draw clear logical nexus with law and the situation.


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The concept of discretion arises out of the philosophical understanding based on the principles of self-determination. The term discretion can have an amplitude or a range of divisions based upon various factors such as statutes governing the offence, present facts and circumstances of the case.

In the words of David Robertson, the concept of discretion as arising within a judicial decision makes the conclusion of judgement relative from judge to judge based on their personnel thoughts and ideologies.

The concept of implied discretion has lost its effectiveness, with the growing rate of implicit restrictions, created through precedents by case laws.

## CONCLUSION

As we are aware that Judge made law is one of the very unique features exalted to the common law' jurisdiction or legal system. It is a well-defined and logical system that is followed since antiquity in many countries – Canada, Australia, India, New Zealand and the USA, South Africa thus enabling this coveted system to evolve as one of the prime sources of legal knowledge.

This actually brings into light the rich contribution of the various judges through which a dynamic jurisprudence and rich law is created , most often termed as Judge made law , which clearly now indicates the importance of common law within the system for judicial discourse across the Commonwealth in order to ensure that qualitative justice is served to the mass.

It also means that most primary legal principles that have been made and developed by judges from case to case in what is called a system of precedent actually n the present era a clear source of law, sometimes much richer and efficient then statute law itself**.** Where the lower courts are bound by the principle of Precedent laid down by a superior or Appellate court, thus the application of Common-law principles is an absolute grundnorm in the judicial discourse across the commonwealth.


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