

Judicial Landmarks in Modern Governance: The Contemporary Constitution in a Common Law Medium

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***Abstract:** Governance institutions evolve within historically-marked ‘frontiers’, but the judicial sector more so, in view of its sharper normative design. The motions of courts are shown to rest upon legal principles and patterns that draw cast and moulding from inputs of scholars and jurists nurtured in the common law tradition, and their heritage has constantly attended upon the conception and formulation of the modern codified Constitution, which constantly draws upon the same for its effectuation. The Constitution, therefore, rests upon the people’s sovereign mandate, and the direct legislative signals, just as it remains predicated upon regular interpretation and re-definition by the values of the judicial order, largely evolved under the common law tradition – and thus, dependent upon the inspirational works of ages, of distinguished jurists in that tradition.*

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I. Introduction

An expanded view of ‘works’ of law, over the long duration stretching back over the last seven or so centuries, reveals two schemes of purpose among jurists. The first, by the common law tradition,¹ is mainly to be associated with judges, especially those involved in complex dispute resolution – though also with certain distinguished scholars who were drawn by the designs and imperatives of court process. The second scheme finds expression in the words of Harry Lawson (1897-1983), the inaugural Professor of Comparative Law in the University of Oxford: ‘those general or comparative aspects of law, which

¹ See Eisenberg M, *The nature of the common law*, Harvard University Press, Cambridge, Massachusetts, 1988; Posner R, *Divergent paths: The academy and the judiciary*, Harvard University Press, Cambridge, Massachusetts, 2016; Schauer F, *Thinking like a lawyer: A new introduction to legal reasoning* (1st Indian reprint), Universal Law Publishing Co Pvt Ltd, New Delhi, 2010; Allan TRS, “Text, context, and constitution: The common law as public reason,” in Edlin D (ed), *Common law theory*, Cambridge University Press, Cambridge, 2007, 185-203.

lend perspective, significance, and splendour² – and mainly associated with the explication of phenomena and ideas pertaining to ordinary human activity.

Law, as the ‘regime that orders human activities and relations through systematic application of the force of politically organised society, or through social pressure, backed by force, in such a society’,³ necessarily holds an adjectival locus, in relation to such primary human activities and relations – a reality flowing from the prior existence of such elements.

As such a locus in institutional relationships is essentially quiescent, or response-oriented in its setting, it generally falls for ascertainment and determination at the time of dispute settlement, through the judicial process, which defines the pertinent motions of the law. Although the judge is not the formal bearer of the law-making mandate, and while the concept of judging lies squarely within the doctrine of the separation of powers, the judge, by virtue of their constant dispute-resolution mandate, frequently opens new frontiers upon the legal canvas – and in that context, is a legitimate and trusted law-maker. This profile is well depicted by Gerald Gunther:⁴

[The good judge] . . . recognizes that a felt need to act only interstitially does not mean relegation of judges to a trivial or mechanical role, but rather affords the most responsible room for creative, important judicial contributions.

Unlike the primary relations and activities, which have a more organic origin, the pertinent law, on account of its tertiary locale, grows not just by theories and ideas conceived in scholarship, but – more significantly – the fundamentals of its operations are lodged within institutional arrangements that revolve around the judge’s role.

Thus, for an objective appreciation of the functioning of the law, it is apposite to make recourse to the most outstanding ‘works’ of judges who have over the ages played a critical role in the task of consolidating legal structures, even as they adjudicated upon striking disputes in live cases. A distinction is to be drawn between such ‘works’, and the articulation of research standpoints, which has been the mark of modern legal scholarship.

² Lawson H, *A comparative lawyer looks at the civil law*, Greenwood Press Publishers, Westport, Connecticut, 1977, xii.

³ *Black’s Law Dictionary*, 8th ed.

⁴ *The Columbia Law Alumni Observer*, 31 December 1980, 8 (emphasis supplied).

This distinction has been the subject of a major study of merit by Richard Posner, a judge of the United States Court of Appeals for the Seventh Circuit, who also serves as senior lecturer at the University of Chicago Law School.⁵

Of the divide between the two spheres of engagement in ‘works’ of law, Posner writes that ‘there really is a gulf between these two branches of the legal profession, and the gulf has been growing’.⁶ Describing the nature of such a divide, Posner thus observes: ‘The judges have been entrusted with real power over people, as academics have not’⁷ Hew depicts the academic role in more specific terms:

. . . academics tackle questions they think they can answer – in other words they choose their targets – while judges perforce make decisions in cases that come to them randomly. The paramount judicial duty is to decide⁸

II. Judicial ‘works’: Law-making at common law

Although lagging behind the continental Civil Law tradition by as much as ten to fifteen centuries, the *common law*, which is woven through the judge-in-court, evolved to become as it is today, one of the two uncontested major legal traditions of the world. The common law gained such a status partly through sheer fortuity: through its foothold in medieval England, which grew to become the world’s leading imperial and seafaring nation, by dint of which capacity it transplanted the common law to populous, dynamic, and much internationally-engaged countries of the world; through the central role of *the judge* in all the evolving sectors of dispute settlement; through the uninhibited scope for the judge to make law, and to establish durable legal principles for like cases of the future; through the common law’s adaptability, and scope for equitable transformation to cope with the needs of the times; through the common law’s receptiveness to elements of the millennia-old Civil Law features which had long sustained important transactions in community and between nations;⁹ and

⁵ Posner R, *Divergent paths: The academy and the judiciary*.

⁶ Posner R, *Divergent paths: The academy and the judiciary*, xii.

⁷ Posner R, *Divergent paths: The academy and the judiciary*, 22.

⁸ *Ibid.* (emphasis supplied).

⁹ See Merryman J, *The civil law tradition: An introduction to the legal systems of western Europe and Latin America*, Stanford University Press, Stanford, 1969.

through *the common law's fundamental compatibility with progressive constitutional, and governance orientations of later times*.¹⁰ Thanks to these attributes, the common law remains today an established legal system of international repute, serving in concert with modern constitutional systems, and underlying some of the acclaimed standards and best practices in the international regime of law.¹¹

To appreciate the vital standing of *the judge* in the design and functioning of the common law, it is necessary to consider the *creative or expository role* of certain particular judges and legal scholars over the ages. The 'works' of such judges and scholars, as stands to be appreciated, bear compelling rationale, and give progressive signals today, just as they did in the past: consequently setting ideal reference-points for judges and scholars of the current generation.

Attentive consideration of the pivotal 'works' in the interweaving of this famed tradition of law, in our perception, will assign pride of place to the following innovators:¹²

- a. William Murray (Lord Mansfield) (1705-1795);
- b. Professor Frederic William Maitland (1850-1906);
- c. Justice Oliver Wendell Holmes, Jr. (1841-1935);
- d. James Atkin (Lord Atkin of Aberdovey) (1867-1944);
- e. Justice Benjamin Nathan Cardozo (1870-1938);
- f. Professor Stanley Alexander de Smith (1922-1974); and
- g. Alfred Thompson Denning (Lord Denning of Whitchurch).

It is necessary to highlight, in proper context, the main part played by such able and devout judges and scholars, in the erection of the pillars around which the common law evolved, as a serviceable and adaptable, modern legal tradition, which is destined to retain its utility and relevance well into the future.

¹⁰ See Strauss D, "Common law constitutional interpretation", 63 *The University of Chicago Law Review* 1, 1996, 877; and Wellington H, "Common law rules and constitutional double standards: Some notes on adjudication", 83 *Yale Law Journal* 1, 1973, 221.

¹¹ Eisenberg M, *The nature of the common law*; and Allan TRS, *The sovereignty of law: Freedom, constitution, and common law*, Oxford University Press, Oxford, 2013.

¹² This selection of leading jurists first appeared in the dissenting judgment of Kenya's Supreme Court Justice Jackton B Ojwang in *Raila Amolo Odinga & another v. Independent Electoral Boundaries Commission & two others*, Supreme Court Petition No 1 of 2017, para 224. The basis of choice was that the named jurists and scholars had most distinctly defined a compelling path of legal reasoning, such as merited priority over elective standpoints more readily associated with latent political suasions, in the application of electoral law in a particular case.

III. Erecting the pillars of the common law tradition: Role of the distinguished jurists

Historical experience shows human society to sustain its collective welfare through traditions and practices secured through institutions of evolving design and technique. So dependent upon extant needs and practicalities, such a scheme invariably holds on to proven pillars and rationales of past experience. It is in this context that the judicial institution, as the acknowledged mechanism of justice, rests on broad lines of continual historical application. Hence the pertinence today of the principles and benchmarks conceived by and for tribunals of the past. So today, in relation to the working of our judicial and legal systems, it is hardly possible to circumvent past attainments in the domain of law and governance.

In such a context, we have to take stock of the recorded experience, as a basis for better perception of any constructive setting of norms and practices for the sustenance of social progress. And so we must revert to the recorded works of indubitable merit, of the distinguished jurists of the past.

A. William Murray (Lord Mansfield) (1705-1795)

Of Lord Mansfield, who was privileged to serve as England's Chief Justice for a continuous term of 32 years (1756-1788), the following evaluation has been made by Edmund Heward, Master of that country's Supreme Court (Chancery Division):

He was prudent both on the bench and in politics and when occasion arose he *adapted the law to the needs of his day and laid down great principles which are followed with respect by judges of our own time*. He was without question the greatest judge of the 18th century and *one of the makers of English law*.¹³

Such an assessment is consistent with that of other writers. Philip Hamburger, for instance, makes a detailed appraisal, and observes that 'Lord Mansfield brought academic learning to bear on commercial law'.¹⁴ Commercial law is the sphere of law in respect of which Mansfield is reputed to have made

¹³ Heward E, *Lord Mansfield* (2nd Indian Reprint), New Delhi: Universal Law Publishing Co Pvt Ltd, New Delhi, 2011, 181 (emphases supplied).

¹⁴ Hamburger P, *Law and judicial duty* (1st Indian Reprint), Universal Law Publishing Co Pvt Ltd, New Delhi, 2010, 142.

his lasting contribution, consolidating the common law system, and the judicial engagement therein. This point is to be appreciated in the historical context: it was at the crucial moment of substantial growth in trade and economic prosperity, and the role of commercial law was thus enlarged, and calling for clear and effective governing laws.¹⁵

Mansfield's creative endeavours, however, were not free of resistance; he was criticised by other leading judges. Another Chief Justice, Lord Camden, for instance, thus reprobed Mansfield's initiative:

The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best it is oftentimes caprice, in the worst it is every vice, folly, and passion to which human nature is liable.¹⁶

Mansfield was, however, continuously guided by the known judicial role in the common law tradition, as thus depicted by Israel's Judge Aharon Barak:

... it is hard to deny the creative role of the judge in the common law. Judges created and developed the common law. Judges bridged the gap between law and society by giving expression to the fundamental principles of society. And judges are responsible for using the common law to fit solutions to life's changing needs ...¹⁷

In the sphere of commercial law, England had yet to benefit from the efficient dispute-resolution methods found in the European continent and elsewhere; and Mansfield found it proper to adopt such practices and incorporate them in the scheme of the common law. As Melville Bigelow observes:

The principles of the law merchant remained in a chaotic condition until Lord Mansfield assumed the Chief Justiceship of the King's Bench. It was the genius of this great judge ... that moulded the law merchant into a body of law with principles as fixed and as certain as those of the commercial law itself. He has justly been called the father of modern commercial law.¹⁸

¹⁵ Heward E, *Lord Mansfield*, x.

¹⁶ *Doe v. Kersey* (CP 1765); Hamburger P, *Law and judicial duty*, 145-146.

¹⁷ Barak A, *The judge in a democracy*, Princeton University Press, Princeton, 2006, 89 (emphases supplied).

¹⁸ Bigelow M, *Bills, notes and checks*, 3rd ed, Little, Brown & Co, Boston, 1928; see *Grant v. Vaughan* (3) Burr. 1516, 97 Eng. Rep. 957, 1764.

Mansfield made constant effort to depart from countless incompatible precedents in commercial law, which showed no broad *principles*. His position on this point is thus expressed:

Strict search for precedent provides no absolute certainty because the difficulties of the search become more acute as precedents proliferate. If the principle can be sought at the outset, precedents can then be found to support the principles.¹⁹

Mansfield's concern for practical rationales in dispute settlement, and for *principle* as the guiding light, is clear from his stand in one case, *Zouch v Woolston*:

But there are no precedents which can stand in the way of our determining this case, as it ought to be determined liberally, equitably, and in accordance with the true intention of the parties.²⁰

Mansfield sought the *liberal, progressive orientation in the law*; and the Irish political theorist, Edmund Burke (1727 – 1797) thus wrote of him:

He sought to effect the amelioration of the law by making its liberality keep pace with justice and actual concerns of the world; and not restricting the infinitely diversified conditions of men, and the rules of natural justice, with artificial circumspections but *confirming principles to the growth of our commerce and our empire*.²¹

Mansfield's concern for objectivity in the conception of principle in commercial law, moved him to attach special value to the evidence of jurors. In *Lewis v Rucker* he observed:

They [the jurors] understood the question very well, and knew more of the subject than anybody else present; and formed their judgment from their own notions and experience.²²

To consolidate this line of development in commercial law in maritime matters, Mansfield would allow civil lawyers from Doctors' Commons to make submissions in court.²³ The effect of this collaboration between the courts and the merchants, established a more dependable foundation to business law,

¹⁹ Heward E, *Lord Mansfield*, 170.

²⁰ (1761) 2 Burrow, 1147.

²¹ Quoted in Heward E, *Lord Mansfield*, 178 (emphasis supplied).

²² *Lewis v. Rucker* (1761) 1 Burr 1167; see also *Hamilton v. Mendes* (1761) 2 Burr 214.

²³ Wiswall FL, Jr., *The development of admiralty jurisdiction and the practice since 1800*, Cambridge University Press, Cambridge, 1970.

generating very considerable confidence within the community of business persons.

A typical case in this category was in the domain of insurance: *Carter v Boehm*.²⁴ The Governor of Fort Marlborough had insured for one year, against the risk of capture – effective from 16 October 1759. Eventually the French captured the fort; and the insurers refused to pay, claiming a vitiation by concealment of information. It was averred that the Governor had written two letters (16 and 22 September 1759) signalling the weaknesses of the fort and expressing fear of attack, but that these letters were concealed from the underwriter. Mansfield found insufficient evidence of concealment, in view of overall perceptions:

Good faith forbids either party, by concealment of what he alone knows, to draw the other into a bargain which he would certainly avoid if the information were equal. But *either party may innocently be silent as to matters upon which both may equally exercise their judgment*

The question, therefore, must always be whether there was, under the circumstances, at the time the policy was underwritten, *a fair representation, or a concealment*, either fraudulent or undersigned, varying materially the subject of the policy and . . . changing the risk [anticipated]

He held the underwriters liable to make payment under the policy.

Mansfield held that the *principle of certainty* was crucial in commercial transactions. His stand on this point is clearly expressed in *Valleji v Wheeler*:

The greater object should be certainty; and therefore, it is of more consequence that a rule should be certain than whether the rule be established one way or the other; because speculators in trade then know which ground to go upon.²⁵

With regard to quasi-contract, a significant legacy of Mansfield is the current *doctrine of unjust enrichment*, which requires a defendant in certain circumstances to refund monies, on the basis of justice and equity.²⁶ In *Sadler v Evans*,²⁷ Mansfield held that action for money had and received was a liberal standpoint founded upon crucial principles of equity, where the defendant cannot conscientiously retain the money.

²⁴ (1766) 3 Burr 1905 (emphases supplied).

²⁵ (1774) 1 Cowp 143.

²⁶ See *Moses v Mcferlen*, (1760) 2 Burr 1005, 1012.

²⁷ (1766) 4 Burr 1984, 1986.

Mansfield endeavoured to inject the imperative of *moral obligation* into the law of contract, by compelling a party to do what ought to be done. He thus stated in *Hawkins v Saunders*:

When a man is under a moral obligation which no court of law and equity can enforce, and promises, the honesty and rectitude of the thing is consideration. As if a man promises to pay a just debt, the recovery of which is barred by the Statute of Limitations; or if a man after he comes of age, promises to pay a meritorious debt contracted during his minority but for necessaries.²⁸

A clear picture emerges that, according to Mansfield, *principle was the bedrock of the common law*. In *Rust v Cooper* he observed: “The law does not consist of particular cases, but in **general principles** which run through cases and govern the decision of them.”²⁹

Mansfield, unlike the great theoreticians of law, shared more with the profile of Lord Atkin; rather less with that of Lord Denning; but much less with that of Holmes or Cardozo: his juristic bequest rests squarely within the *court system*. Mansfield’s glowing contribution, however, assumes a substantial literary profile through the numbers of scholastic *oeuvres, by others*, upon his contribution to *the common law heritage*. In this regard we may cite examples: (i) Sir John Bayley, *A Short Treatise on the Law of Bills of Exchange, Cash Bills and Promissory*;³⁰ (ii) James Allan Park, *A System of the Law of Marine Insurances*;³¹ (iii) Charles Abbott, *A Treatise on the Law Relative to Merchant Ships and Seamen*,³² (iv) John Millar, *Elements of Insurance Law*;³³ and (v) Arthur C. Schreiber, ‘Lord Mansfield: The Father of Insurance Law’.³⁴

B. Professor Frederic William Maitland (1850-1906)

It is a truism that the due discharge of the judicial function, as a primary constitutional task, requires clear view of the law’s trajectory as a dimension of governance. Only with a full perception of this path, is the court able to so

²⁸ (1782) 1 Cowp 288.

²⁹ (KB 1777) 2 Cowp 629 (emphasis supplied).

³⁰ E Brooke, Dublin, 1789 [on bills of exchange].

³¹ His Majesty’s Law Printers, London, 1787 [on marine insurance].

³² Butterworth, London, 1802 [on merchant shipping].

³³ J Bell, Edinburgh, 1787 [on insurance law].

³⁴ *Insurance Law Journal* (1960), 766 [on insurance law].

position itself as to play its part in the sustenance of constitutional government. As Archibald Cox observes, the court's command of consent, such as flows not from majoritarian vote-casting, must come

[f]rom the continuing force of the rule of law – from the belief that the major influence in judicial decisions is not fiat but principles which bind the judges as well as the litigants and which apply consistently among all men today, and also yesterday and tomorrow.³⁵

Maitland's consistent contribution throughout his career as a lawyer and scholar, was to point to the essence of the durable points of law and principle, in a framework of historical progression, and of social, economic and political change – which should guide the course of dispute resolution through the judicial process.

By his scholarly interest, Maitland had focussed attention on the *common law*, from its earliest phase, through centuries-long time spans up to more recent times, when this tradition of law had notable *impacts upon the workings of modern constitutions*. The common law with its pragmatic conventions, has weathered the storm of time and change, thanks to its inner principles.

Just as Frederick Schauer typifies this tradition of law as 'defeasible',³⁶ its architects have been modest, but highly contemplative professional and intellectual innovators, of a distinctly public-spirited orientation. And their works have been moved either by the concern for justice and fairness in community, or by sheer intellectual curiosity, or a combination of these factors of fortitude.

It is from such a background, that the main developments in law bear a timeless orientation, apart from providing an adaptable scheme such as will keep responding to the thrust of social change – and thus being accommodative to *progressive social motions*.

On that account, the more recent considerations of law and legal process are mostly served, not by subjective or heedless inclination, but by duly-informed recourse to the fundamentals of legal thought, as evolved from the rich and adaptable foundations which *spawned the common law, and kept this tradition serviceable*

³⁵ Cox A, *The Warren Court: Constitutional decision as an instrument of reform*, Harvard University Press, Cambridge, Massachusetts, 1968, 22.

³⁶ Schauer F, *Thinking like a lawyer: A new introduction to legal reasoning* (1st Indian Reprint), Universal Law Publishing Co Pvt Ltd, New Delhi, 2010, 104-105.

right through to modern times, now marked by a growing preference for the *elaborate, textual constitution*.

It is in such a context, that the scholarly contributions of Maitland are to be appreciated. Over the years, reflections of clear objectivity have been made on Maitland, as a legal scholar whose primary object centred on the interplay between law and the social order, and on the path of the law over prolonged durations of history. In a review of a major study on Maitland,³⁷ Sanford Katz thus remarks: ‘Maitland’s chief impact on scholarship has been, we should . . . say that Maitland brought law to bear on history and history to bear on law.’

Katz cites Maitland’s elemental perception of law, in the prevailing institutional arrangements, as integrally attached to the socio-economic manifestations, such that it was impractical to view these phenomena separately.³⁸ He cites passage in *Maitland’s Collected Papers* (1911):³⁹ ‘[I]he fact remains that, before we can get at the social or economic kernel of ancient times, we must often peel off a legal husk that requires careful manipulation.’ Such a depiction is given also by one M.S. in a journal article:

Law is the central and most important part of the social order; the legal sanction, the sanction of social force, is put behind those arrangements which are really fundamental and those rules which are the necessary conditions of social existence. This is what Maitland substantially indicated⁴⁰

A similar perception comes from Patrick Wormald:

Above all, Maitland was not so interested in law [all by] itself. His great discovery about legal history was that here the *history of government intersected with that of society*. He aimed to dig out the social life ‘concealed within the hard rind’ of the law’s records⁴¹

Such a perception is no less clear from M.S.:

³⁷ Katz S, review of Schuyler RL (ed), *Frederic William Maitland Historian: Selections from his writings*, University of California Press, Berkeley and Los Angeles, 1960, in 49 *The Georgetown Law Journal* 1, 1961, 803.

³⁸ Katz S, review of Schuyler RL (ed), *Frederic William Maitland Historian: Selections from his writings*, 803.

³⁹ At 459.

⁴⁰ MS, “Frederic William Maitland”, 22 *Political Science Quarterly* 1, 1907, 293.

⁴¹ Wormald P, “Frederic William Maitland and the earliest English law”, 16 *Law and History Review* 1, 1908, 24 (emphasis supplied).

Maitland was free from . . . professional insularity . . . , which regards law as a thing apart, self-begotten, self-satisfying, serving its own ends [H]e saw that law is not merely a product of the social life but also a factor in the social life. As soon as a custom has obtained legal sanction, as soon as a social institution has become a legal institution, it starts upon a new and largely independent existence and in its subsequent and purely legal developments it may react upon and modify social ideals as well as social conduct.⁴²

It is by pursuing this interplay between law and the social order that Maitland squarely touched on the place of the *common law tradition*, when he underlined the judge's role in the processes of governance. His position is thus recalled by Katz:

[W]hat is required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a *knowledge of medieval law as interpreted by modern courts to suit modern facts*. A lawyer finds on his table a case about rights of common which sends him to the statute of Merton. But is it really the law of 1236 that he wants to know? *No. It is the ultimate result of the interpretations set on the statute by the judges of twenty generations*. The more modern the decision the more valuable for his purpose. *The process by which old principles and old phrases are charged with a new content, is from the lawyer's point of view an evolution of the true intent and meaning of the old law*⁴³

Maitland, thus, is concerned with *the progressive reconstruction of the true intent and meaning of the old law* – a task which falls to *the judges*, recasting the law in specific instances of dispute coming up for adjudication.

The logic of Maitland's standpoint is clear enough from his works, such as *The constitutional history of England: A course of lectures delivered*,⁴⁴ in which he thus expresses his perception:

Common law is in the first place unenacted law; thus it is distinguished from statutes and ordinances. In the second place it is common to the whole land; thus it is distinguished from local customs. In the third place, it is the law of the temporal courtsCommon law is in theory traditional law – that which has always been law and still in law, in so far as it has not been overridden by the statute or ordinance.⁴⁵

⁴² MS, "Frederic William Maitland", 292-293.

⁴³ Katz S, review of Schuyler RL (ed), *Frederic William Maitland Historian: Selections from his writings*, 803 (emphasis supplied).

⁴⁴ Maitland F, *The constitutional history of England: A course of lectures delivered*, Cambridge University Press, Cambridge, 1919.

⁴⁵ Maitland F, *The constitutional history of England*, 22-23.

It is plain to us that modern governance can only be sustained, in its integrity, by functional institutions – a vital one of these being *the courts*: courts entertain each case entailing disputed matters, and, perfectly by the yardsticks of the common law tradition, *interpret all relevant norms*, applying the same on the basis of requisite criteria as they so conceive. It devolves to the judges, guiding themselves by criteria well-recognised at common law, to see to the play of justice in each case; and to apply requisite balances between the working of statutory clauses on the one hand, and the claims of justice and fairness signalled by each and every case. There is, thus, a definite scope for the precious exercise of discretion, which the common law has always entrusted to *the judge* – and which remains applicable *even with the advent of the elaborate, written constitution*.

Such exercise of discretion has to address certain sensitive variables, requiring conscientious attention. As Cox has noted, the sphere of constitutional adjudication calls for still more careful attention:

In times of economic, social, and even moral upheaval the danger of exaggerating the importance of certainty and stability as elements of law is probably greater than the risk of valuing it too lightly. There is also the danger that fascination with the lawyer's art may divert us from the human goals of the enterprise.⁴⁶

Maitland not only recognised the court-focus of the common law, as an adaptable element in the scheme of justice, but also endeavoured to illuminate the main juristic phenomena, and their constant interplay with social motions, in a historical context. His thoughts as a jurist are constructed around *the adjustable essence of the common law*, which, to-date, guides the functioning of the judicial process in different countries. The main scenario of law depicted by Maitland, in our perception, *will continue to provide relevant reference-points for the workings of the judiciary, in the context of the written constitution*.

By the merits of Maitland's contribution to jurisprudence, the common law is destined to retain its place alongside the judicial process, as much under the written constitution as under the unwritten constitution.

C. Justice Oliver Wendell Holmes, Jr. (1841-1935)

The eminence of Justice Holmes in jurisprudence, falls squarely within the ambit of *the common law*; and on this account, turns on the contentious

⁴⁶ Cox A, *The Warren Court*, 21-22.

question as to the borderline between the direct law-making spheres of the *political agencies*, and the continual, informal law-maker, namely the *court of law*.

The very essence of Holmes's works may be seen as the propounding of the place of law in the social context, and the development of the philosophical pillars of the law. He thus defined the broader context of the law:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions and public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.⁴⁷

Such profound elucidations of law's place in society underlay Holmes's perceptions and works, as he adjudicated individual party-disputes, within the scheme of the common law tradition. His focused engagement upon the two planes of the legal phenomena, casts light on persistent questions of law such as: What is the share of responsibility as between the designated law-maker, and the dispute-settlement agencies? In what measure do the courts contribute to the standing, and authority of the law? What is the share of responsibility for the merits and quality of law, as between the courts – which determine causes and pronounce edicts – and the academic forum – which devotes itself to reflection and theorising about law? Answers to such questions are important for the functioning of the judicial process.

The judicial process, though primarily concerned with the emerging dispute, entails a 'power scenario', with constitutional implications for the legal mandates of state machinery. Therefore, judicial operations and methods invariably raise questions which require not only the input of the functionary set on a defined path, but also the reflective assessment thereon – associated with the academic forum. This scenario is well depicted by America's Chief Judge Judith Kaye: 'Parties do not necessarily have in mind the sensible, incremental development of [the law] Academic writers therefore become genuine partners in the courts' search for wisdom.'⁴⁸

⁴⁷ Holmes O, *The common law*, 1881, 1.

⁴⁸ Kaye J, "One judge's view of academic law review writing", 39 *Journal of Legal Education*, 1989, 319.

The same perception is pointedly expressed by the late United States Supreme Court Justice, Ruth Bader Ginsburg: ‘In addition to scholarly commentary, law professors aid courts, and can set good examples for students . . . by descending from the podium and appearing on the firing line.’⁴⁹

In the same vein Charles Fried observes:

Judicial opinions are not quite the exclusive diet of scholars and law teachers that they used to be, but we still teach much of the law out of case books excerpting judicial opinions. Legal scholarship is still largely about judicial opinions. Theories about what law is . . . are still mainly about what judicial opinions have said about law.⁵⁰

This is the context in which the works of Justice Holmes stand: and he is clearly a pioneering judge who shed vital light upon the legal process, and on the judicial function as it related to its evolved pillars, and to the constitution and the modern law. Holmes, considering that ‘*the common law came about incrementally*’,⁵¹ recognised the judge’s role in the process of moulding, rationalising, and properly adjusting the legal concept and principle, as vital in the scheme of the rule of law. Such a standpoint necessarily perceived *common cause between the terms of the written constitution, and the recognised judicial role under the common law tradition*. This is the stand also propounded by Skelly Wright, who thus urges:

Surely it is altogether proper for legal scholars to urge the court to strive for the rational ideal As a matter of fact, I would argue that *constitutional adjudication may properly proceed as does the common law*.⁵²

The same principle is stated with equal clarity by David Strauss:

Although everyone agrees that the text is in some sense controlling, in practice constitutional law generally has little to do with the text. Most of the time, in deciding a constitutional issue, the text plays only a nominal role. The issue is decided by

⁴⁹ Ginsburg R, “On the interdependence of law schools and law courts”, 83 *Virginia Law Review*, 1997, 883.

⁵⁰ Fried C, “Scholars and judges: Reasons and power”, 23 *Harvard Journal of Law and Public Policy*, 2000, 808.

⁵¹ Wright S, “Professor Bickel, the scholarly tradition, and the Supreme Court”, 84 *Harvard Law Review*, 1971, 778.

⁵² Wright S, “Professor Bickel, the scholarly tradition, and the Supreme Court”, 778 (emphasis supplied).

reference to ‘doctrine’ – an elaborate structure of precedents built up over time by the courts – and to considerations of morality and public policy.⁵³

Strauss underlines the place of the common law in constitutional interpretation as follows:

There is, prominent in our legal tradition, a method – the method of the common law – that both resolves the central puzzle of written constitutionalism and makes sense of these apparently problematic aspects of our settled interpretive practices. The common law method has not gained currency as a theoretical approach to constitutional interpretation because it is not an approach we usually associate with a written constitution, or indeed with codified law of any kind. But our written constitution has, by now, become part of an evolutionary common law system, and the common law – rather than any model based on the interpretation of codified law – provides the best way to understand the practices of American constitutional law.⁵⁴

Holmes’ philosophical orientation will be found relevant to-date – be it in the context of the synoptic Constitution of the United States, or of the modern, substantially-detailed Constitution such as that of Kenya, or South Africa. All such constitutions declare *broad values essential to human rights*, which have to be construed in the social, economic and political context – and *the judge* becomes the exemplary agent of such interpretation. Hence the well settled style of the *common law* remains the ideal medium within which the constitution must be interpreted. ‘It is the merit of the common law’, Holmes had observed, ‘that it decides the case first and determines the principle afterwards’.⁵⁵

Today’s written constitutions, for a constructive interpretation in context, are so much the richer, with the antecedent works of inspirational judges and scholars. Such works had evolved from the *defining medium of the common law*, and, as Frederick Schauer observes:

The characteristic feature of the common law in its purest form . . . is the absence of a master code of laws To speak of a rule of the common law, therefore, is to refer to a rule that is extracted from a collection of judicial opinions.⁵⁶

⁵³ Strauss D, “Common law constitutional interpretation”, 63 *The University of Chicago Law Review*, 1996, 883.

⁵⁴ Strauss D, “Common law constitutional interpretation”, 884-885.

⁵⁵ Holmes O, “Codes, and the arrangement of the law”, 5 *American Law Review*, 1870, 1.

⁵⁶ Schauer F, *Thinking like a lawyer*, 104.

The platform of law's development, thus, rested squarely upon the common law; and this was the forum of the most learned contributions by certain pioneering judges. This legal tradition holds its place as a crucial adjunct to current law in its totality – including the constitutional law.

The common law sets the medium for giving effect to the constitution, as well as to the statutory law in general. The rationale of this position is readily appreciated from the standpoint of Frederick Schauer:

Not only are common law rules created in the process of deciding specific cases, but they are also defeasible. That is, any common law rule is tentative, remaining continuously open to defeat in a particular case or subject to modification as new situations arise. It is characteristic of common law method that judges have the power to change the rules in the very act of applying them, typically in the context of a hitherto unforeseen situation in which the existing rule would produce a poor outcome.⁵⁷

The scheme of precedent, which was always one of the pillars of the common law, today remains a governing norm, even under the modern written constitutions. The 2010 Constitution for instance, thus provides: 'All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.'⁵⁸

This rule sustains the systematic stand of the courts, on the general application of the decisions of the apex court. Schauer makes a pertinent observation, in such a context, as follows:

The judge is indeed a central figure in the common law, and judicial decisions, by virtue of a system of precedent, are a common touchstone for common-law legal argument. Even in interpreting detailed statutes, the common-law mindset typically persists, and judicial interpretations of statutes become as important as the statutes themselves.⁵⁹

That is precisely the tradition within which Holmes spawned his philosophy declaring that *the law* was not affixed to some analytical, unchanging path, but was shaped progressively *in accordance with life's experience*. Holmes thus observed that 'the life of the law has not been logic: it has been experience'.⁶⁰

⁵⁷ Schauer F, *Thinking like a lawyer*, 104-105 (emphasis supplied).

⁵⁸ Article 163(7).

⁵⁹ Schauer F, *Thinking like a lawyer*, 106.

⁶⁰ Holmes O, *The common law*, 1.

Within his concerns for social values as a constant element in the legal process, Holmes held that, as a general rule, such values as were insufficiently developed, and did not elicit recognition and agreement, ought not to be introduced into the legal system through the judicial path.⁶¹

Holmes's perception of the judge's interpretive function as bringing the common law's rationale into the functioning of constitutions and written laws, is well illustrated by others. Judge Aharon Barak thus writes:

In both constitutional and statutory interpretation, a judge must sometimes exercise discretion in determining the proper relationship between the subjective and objective purposes of the law. Indeed, a theory of interpretation cannot be construed without interpretive discretion as its foundation. *Interpretation without judicial discretion is a myth. Any theory of interpretation – internationalism, originalism, purposivism, and so on – must be based on an inherent internal element of interpretive discretion.* Discretion exists because there are laws with more than one possible interpretation. In such circumstances, the judge undertakes “the sovereign prerogative of choice”,⁶² bounded by the fundamental views of the legal community.⁶³

Holmes's trust in the judicial method, in the common law tradition, has been perceived as bringing him within the category of judges who recognised *pragmatism* as the ideal course in dispute settlement. That his concern for the social dimension as a controlling factor in law stood on recognised factors of merit, is plain from the assessment of leading members of the legal community. In this category is C. Sankey of the English Bar, who thus observed, on the occasion of his 90th birthday:

No American judge of modern times is more widely known or more deeply venerated. His profound analytic power, his consummate scholarship, his deep sense of social welfare, have combined to make him a jurist whose name is entitled to rank with those of Mansfield, Jessel and Bowen. Everyone concerned with the history of the common law knows the supreme importance of his contributions in the field. I value no less the way in which his work has been throughout permeated by a philosophic grasp of first principle, on the one hand, and of changing social conditions on the other. In this sense he has taught us all the manner in which law must be adapted to new needs and new purposes.⁶⁴

⁶¹ Holmes O, “Law and the court”, in *Collected legal papers*, 1952, 210; 239; 291; 294-295.

⁶² Holmes O, “Law in science and science in law”, in *Collected legal papers*, 1952, 210 and 239.

⁶³ Barak A, *The judge in a democracy*, Princeton University Press, Princeton, 2006, 146 (emphasis supplied).

⁶⁴ See Hughes C, “Mr. Justice Holmes”, 44 *Harvard Law Review*, 1931, 680.

Of the several jurists so closely involved in weaving the strands of the common law tradition – which have stood out as pillars of modern constitutionalism – Holmes held a lone niche: that of a legal scholar committed to judicial work, and as a judge, gave of his best towards the scholastic development of the law.

For just several months in 1882, Holmes was the holder of the Weld Professorship of Law, at the prestigious Harvard Law School; but on 8 December of that year, he cheerily moved on, becoming a judge of the Supreme Court of Massachusetts – becoming Chief Justice of that Court in 1899. And then, some three years later, he moved on to become one of the nine Justices of the Supreme Court of the United States of America. He served there for three decades, being succeeded in 1932 by another pioneer jurist, Cardozo.

Holmes's interface of scholarship and judicialism is underlain by his writings and his bench decisions: a typical example being *Schenck v United States*,⁶⁵ a war-time matter in which a balance had to be struck between public safety on the one hand, and the safeguarded personal liberties on the other. He held that the guaranteed constitutional right did not protect 'a man in false shouting fire in a theatre and causing a panic'.⁶⁶ He conceived the doctrine of 'clear and present danger', to distinguish protected advocacy from unprotected incitement of violent or illegal conduct:

The question in every case is whether the words used are used in circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.⁶⁷

D. James Richard Atkin (Lord Atkin of Aberdovey) (1867-1944)

Atkin is certainly one of the beacons in the path of evolution of the common law, which has retained its progressive cast in modern jurisprudence. His contribution confirms the place of the judge in the determination of the law in operation at any given time. Atkin's contribution, and his approach to the law,

⁶⁵ 249 US 47 (1919).

⁶⁶ *Schenck v United States*, 249 US 47 (1919), 52.

⁶⁷ *Schenck v United States*, 249 US 47 (1919).

are in all respects memorable. His legacy stands out today as a reference-point for the courts, throughout the common-law world.⁶⁸

Unlike the scholar-judges who theorised upon, apart from applying the law, Atkin's singular platform was at the Bench: and at this forum, he rendered vital judgments which provide meritorious instance of the integrity of judicialism.

The hallmark of Atkin's legacy is represented by the case of *Donoghue v. Stevenson*,⁶⁹ in the sphere of civil claims under the law of tort. The facts of this case are straightforward. On Sunday, 26 August 1928 at 8.50 pm, Mrs Donoghue met a friend, at Wellmeadow Café in Paisley, Scotland. The friend bought her an ice-cream, served in a glass, and ginger-beer to fill up the glass. The ginger-beer bottle was of translucent design, and its content not fully visible. As the friend was topping up the glass for the second time, a decomposed snail flowed out of the bottle, with a nauseating impact on Donoghue, who later fell ill. The physician diagnosed a case of gastroenteritis.

Legal action against the cafe owner appeared ill-advised: for the ginger-beer bottle had been delivered with its original factory sealing. This ruled out the possibility that the cafe-owner would spot the disgusting content of the opaque bottle. Donoghue decided to file a claim for damages against the *brew manufacturer* whose name appeared on the ginger-beer bottle: David Stevenson of Glen Lane, Paisley. She claimed for shock, and for gastroenteritis, which required medical consultation. The manufacturer denied liability, invoking the essentials of the *law of contract*: that no contract existed, and so, no liability to Donoghue.

The law as it stood then, was that liability would arise from but two bases: (i) sale of dangerous goods, or withholding knowledge of defect in potentially dangerous goods; and (ii) *contract* – between supplier and purchaser. The ginger-beer had been purchased by *a friend*; and Donoghue had no contract with the manufacturer, directly or indirectly.

The legal basis for a claim by Donoghue was still more tenuous. Three weeks earlier, the Second Division of the Court of Session⁷⁰ had dismissed a

⁶⁸ So in East Africa, a region that became a beneficiary of the common law tradition, the courts are today so much the more dependable for drawing on such a jurisprudential endowment. See the *Constitution of Kenya*, 2010, Articles 1(3)(c); 10(1); 10(2); *Giella v Cassman Brown & Co Ltd* [1973] EA 358; *Suleiman v Amboseli Resort Ltd* [2004] 2 KLR 589; *Kiumjuri v Mwangi & two others* [2008] KLR 525; *Republic v the Industrial Court and another, exp Kenya Bus Services Ltd.*, Nairobi HC Misc Civil Application No 161 of 2004.

⁶⁹ [1932] AC 562.

⁷⁰ *Mullen v. AG Barr*, 1929 SC 461.

similar case – where claims were made upon mice being found in bottles of ginger-beer made by a Glasgow company, AG Barr Ltd. The Court in that case declined to attribute negligence, holding that no duty of care in tort law was owed to the ultimate consumer. The crucial factor in the dismissal of the claim, in that case, was that the dispute-terrain was uncharted, with *no existing law or precedent*.

Donoghue's case came up before Lord Alexander Moncrieff, the Lord Ordinary in the Outer House of Scotland's Court of Session, on 27 June 1930; and he held that there was a general duty owed to the victim by the wrongdoer. Aggrieved, Stevenson appealed to the Second Division of the Court of Session, which applied the *Mullen* judgment, and overturned Moncrieff's decision: whereupon the matter came up before the House of Lords in London. A call was made for the adoption of a *more equitable principle*, in relation to goods which, while intended for human consumption, were sold to the public in a form not permitting investigation or scrutiny.

The House of Lords found in favour of Donoghue, in a *landmark judgment*, with Atkin epitomising the judiciary's unique endowment as guardian of justice and humane values, in the legal process. Atkin held that even though Donoghue herself had *no purchase contract* for the ginger-beer, and was unrelated to Stevenson contractually, the latter must bear *responsibility for the integrity of his product*. And *duty of care* must stand as a requirement of the law: *where a manufacturer packages his product, so as to sell it to an ultimate consumer in the very form in which it comes, he bears a duty to the consumer – to take reasonable care to ensure such goods bring no harm*.

Atkin encapsulated a new principle of the *law of negligence*, by formulating the 'neighbour principle', extending the tort beyond the tort-feasor and the immediate bearer of injury. He drew upon a source reflective of the general socio-spiritual orientation in British society, the Holy Bible:

In this way, rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is my neighbour?

The answer seems to be persons who are so closely and directly affected by my act

that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.⁷¹

Applying such a perspective to the case which was under consideration, one beholds a *progressive and dynamic outlook*, which great judges have brought to the forum of justice. Donoghue had not purchased the ginger-beer (hence *no contract* existed), but had received it as a gift. Although she was no party to a contract with *the manufacturer*, she was a ‘neighbour’ in law, to the manufacturer: and the manufacturer was under duty in the *law of tort*, to desist from injuring her welfare.

Donoghue v Stevenson is the typical case in which *the judge* endeavours to close the gap between *law and morality*: and in this manner, certainly, the judge has contributed to the *law-making process* – a scenario that bears effect whether in a lacuna of law, or where a statutory terrain is in place.

Atkin’s creativity as a judge is well illustrated in still other landmark cases. His integrity in the discharge of the judicial remit, in our perception, bears relevance *for the present no less than the past*. The same rectitude is called for today, in our country as in other countries, in relation to judicialism, which *incorporates the fundamentals of the written constitution*.

Contemporary perceptions of constitutionalism, as the law’s ideology attendant upon democratic practices, will find no better foundations than those conscientiously evolved and promoted by Atkin.

Atkin’s *tour de force* dissent in *Liversidge v Anderson*⁷² was *avant-garde*, at a time when the law of England would endorse Executive orders that denied fundamental personal rights. Mr Liversidge had moved the court, challenging a ministerial order of preventive incarceration. The majority held that the detention order was immune from disclosure of grounds, this being a matter of national security, and so, devolving to the Executive mandate. Atkin’s position was that *personal liberty* was a *fundamental value*, and that an unqualified obligation fell upon the person taking it to justify such action. Atkin’s stand was clearly stated:

I view with apprehension the attitude of judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more Executive-minded than the Executive.

⁷¹ [1932] AC 562, at.580.

⁷² [1941] 3 All ER 338.

In this country, amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war as in peace. It has always been one of the pillars of freedom and one of the principles of liberty for which, on recent authority, we are now fighting that judges are no respecters of persons and stand between the liberty of the subject and any attempted encroachments of his liberty by the Executive, alert to see that any coercive action is justified in law.⁷³

Such a stand signals a course towards *progressive norms, embodied in solemn judicial edict*, and bearing timeless relevance for modern constitutional governance.

E. Justice Benjamin Nathan Cardozo (1870-1938)

Justice Cardozo distinguished himself as one of the historic, intellectual custodians and innovators of the legal process, when he served firstly in the New York Court of Appeals (for some 18 years), after which he ascended to the American Supreme Court Bench in 1932, taking up the vacancy left by another legal luminary, Holmes.

Cardozo provides an apt example of the role of the judiciary in law-making, in the common law experience – notwithstanding that the scope for judicial law-making, in the case of the United States of America, has narrowed considerably over time, in the light of enhanced activities of legislation, Executive rule-making, and the adoption of professional-group guiding statements in the legal sector.⁷⁴

⁷³ *Liversidge v Anderson* [1941] 3 All ER 338, at 362.

⁷⁴ Aldisert R, in his article “The role of the courts in contemporary society”, 38 *University of Pittsburgh Law Review*, 1977, at 450 thus writes:

Still another development in the American judicial function must be examined if we are to appreciate fully the role of the courts in contemporary American society. Phenomenally and somewhat paradoxically, as the courts have enlarged their lawmaking roles, so too have the legislatures enacted laws vesting the courts with greater responsibilities. At times the growth in the statutory law – individual acts as well as comprehensive codes – has seemed exponential. Simultaneously the courts have been called upon to interpret volumes of exasperatingly detailed regulations promulgated by the Executive Branch. And where the legislature or the executive has not acted, prestigious private organizations – notably the American Bar Association and the American Law Institute – have suggested voluminous codes of substantive and procedural law which, while not possessing the sanctions of positive law, have exerted a potent, often persuasive, effect on the state and federal judiciaries.

Still, one must acknowledge the guiding hand of the court, in the effectuation of the law in its totality: for, to the court belongs the interpretive mandate, in addition to the ordinary matters of dispute-settlement, in which the court has the unqualified remit of dispensing justice. It is in this unlimited domain of rendering justice, squarely committed to the courts, that the common law has evolved; and it is therein, that the judges have distinguished themselves as law-makers.

It is in such a context that Cardozo's pioneering role is to be seen. And we attach primacy to such of his role as he forges the path to guide the judicial process in the succeeding, the present and the future epochs.

From such evidence as emanates from case-law records,⁷⁵ as well as cogent scholarly accounts, Cardozo was one of the pioneers in laying the secure canvas upon which the continual process of judicial law-making has been unfolding. Relevant in that context is the observation by Justice William Douglas:

Cardozo was the artist who shaped relics from the past, put new raiments on them, and, when reconditioned, made them do service in today's practical affairs – a law that responded to modern conditions. He made useful tools out of ancient stuff – useful in the sense that they were adaptable to the needs of an industrial society.⁷⁶

Justice Douglas further remarks:

Cardozo worked in the great common law tradition and made each case the occasion to take new bearings, to alter the direction necessary for justice in the run of cases, and to leave guides as to the thrust and limitations of the rule as refashioned.⁷⁷

Professor Walton Hamilton attributes to Cardozo the ingenuity which entailed the recourse to *modifications and adaptations which benefited from the wisdom of the past*, even as it *adjusted the law to match the current situation*.⁷⁸ Hamilton thus observes:

. . . a decent restraint attends the jurist's freedom. In judgement, in ratio decidendi, and even in obiter dicta, he must respect the wisdom which the centuries have brought.

⁷⁵ See: *Palsgraf v. Long Island Railway Co.*, 248 N.Y. 339, 162 N.E. 199 (1928); *Hynes v. New York Central Railway Co.*, 231 N.Y. 229, 131 NE 898 (1921); *Wood v. Duff-Gordon* 222 N.Y. 88, 118 N.E. 214 (1917); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 NE 1050 (1916).

⁷⁶ Douglas W, "Mr. Justice Cardozo", 58 *Michigan Law Review*, 1960, 550 (emphasis supplied).

⁷⁷ Douglas W, "Mr. Justice Cardozo"(emphasis supplied).

⁷⁸ Hamilton W, "Cardozo the craftsman", 6 *The University of Chicago Law Review*, 1938, 3.

He accepts here, qualifies there, distinguishes yonder, and fabricates an opinion whose lines run out into the general fabric of the law.⁷⁹

He finds merit in Cardozo's approach to decision-making:⁸⁰

[Cardozo's] strength lay in his "judicial mind", his capacity for staying judgment until the case was in, his skill at analysis, his command of common sense, his capacity to turn his understanding into a verbal currency that passed easily from mind to mind.

Such a perception of Cardozo's definition of the court's role in law-making emerges clearly too, in his own classic work, *The nature of the judicial process*, in which he thus observes:

My analysis of the judicial process comes to this . . . : logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in [the court's action] that savours of prejudice or favour or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent.⁸¹

Such are only broad guidelines, as Cardozo does not propose a uniform path for a court resolving a particular dispute. In this sense, his contribution to the judicial process is limited to signalling vital reference-points for the court. Such a perception is affirmed by Justice Shirley Abrahamson:⁸²

Although . . . neither Cardozo nor any other judge or scholar can offer a coherent theory that frees a judge from the agony of judgment, Cardozo makes the judges and those judged more comfortable with the uncertainty inherent in the judicial process. *Although stability is a social interest, so is progress. Cardozo saw that the law calls for the balancing of stability and progress; liberty and constraint; promotion of individual rights and protection of public interest; and 'adherence to general rules and dispensation of individual equity'*⁸³

Cardozo's enduring bequest is not limited to the meritorious disposal of the disputes coming up before him; still more important was his taking the

⁷⁹ Hamilton W, "Cardozo the craftsman" (emphasis supplied).

⁸⁰ Hamilton W, "Cardozo the craftsman", 6.

⁸¹ Cardozo B, *The nature of the judicial process*, Yale University Press, New Haven, 1921, 112 (emphases supplied).

⁸² Abrahamson S, "Judging in the quiet of the storm", 24 *St. Mary's Law Journal*, 1993, 971 (emphasis supplied).

⁸³ Bodenheimer E, "Cardozo's views on law and adjudication revisited," 22 *Davis Law Review*, 1989, 1122.

occasion to formulate *legal principle* – attended with clear depiction, consolidating the principle as *live reference for later generations*.

Indeed, more. Cardozo earnestly held a view of law as a semantically-demarcated phenomenon, as contrasted with visually-reckoned phenomena; in his words: ‘there can be little doubt that the sovereign virtue for the judge is clearness’.⁸⁴

Judge Richard Posner, in a special study, has attributed certain elements to Cardozo’s contribution such as accord his contributions the quality of longevity in law-making effect.⁸⁵ Michael E. Parrish thus observes:

. . . next to Holmes, [Cardozo] was our greatest legal rhetorician – a poet – with an unparalleled ability both to structure an opinion for maximum dramatic impact and to formulate conclusions in exquisite prose. In the words of Posner:

‘The best of them are memorable for the drama and clarity of their statements of fact, the brevity and verve of their legal discussion, the sparkle of their epigrams, the air of culture, the panache with which precedents are marshalled and dispatched, the idiosyncratic but effective departures from standard English and prose style. The opinions have a charm that is literary, essayistic – at times theatrical and eventually musical. The charm owes nothing to the briefs; it is the product of Cardozo’s own literary skill . . .’⁸⁶

Of the second attribute in Cardozo’s legacy, Parrish thus observes:

. . . in both his major contracts and torts decisions, Cardozo strove *to bring formal legal rules closer to the lay community’s evolving sense of justice and fairness*. The legal system ought to serve human needs, not mandarin preferences.⁸⁷

Thirdly, Parrish thus remarks: [Cardozo] wrote *opinions that broaden liability* He can be claimed, therefore, by judicial liberals and activists as well as by traditional or neo-conservatives.⁸⁸

Cardozo perceived the typical judicial pronouncement as serving a controlling function in the legal system – legitimately so, and attended with the

⁸⁴ Quoted in Mous A, “The speech of judges: A dissenting opinion,” 29*Virginia Law Review*, 1942-1943, 638.

⁸⁵ Posner R, *Cardozo: A study in reputation*, Chicago: University of Chicago Press, Chicago, 1990.

⁸⁶ Parrish M, *Constitutional commentary*, Vol.8 (1991), 510.

⁸⁷ Parrish M, *Constitutional commentary*, 510.

⁸⁸ Parrish M, *Constitutional commentary*, 511 (emphasis supplied).

sustaining effect of the *doctrine of precedent*. Thus, while still in service at the New York Court of Appeals, he remarked that:

[t]he labour of judges would be increased to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.⁸⁹

And of that rendition, Professor Fredrick Schauer aptly observes:

[a]nd in this pithy phrase [Cardozo] captured that human beings can only do . . . so much, and that doing some things well requires that we treat other things as best left for another time.⁹⁰

It was Cardozo's perception that *law*, even as it stood as a central element in the normative and institutional setting for the sustenance of civilized society, lay in certain distinct instances, several removes from the rigidities of science and mathematics, and shared certain vital affinities with *philosophy*,⁹¹ *fiction* and literature: and so, its essence, for better reflection, would be embodied in *clear and well-configured expression*.

Cardozo invariably encapsulated points of law in rich and artistic idiom, such as categorically signalled the proper ambit of law. So in *People v Deford* he thus depicted the applicable law, where the police infringed upon the rights of an arrested person: "The criminal is to go free because the constable has blundered."⁹²

In another case, he thus depicted the relationship between a wrongdoer and a deliverer:

Danger invites rescue. The cry of distress is the summons to relief . . . The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.⁹³

And Cardozo signalled the proper mode of construing metaphors that occurred in expressions of legal design: "Metaphors in law are to be narrowly

⁸⁹ Cardozo B, *The nature of the judicial process*, 149.

⁹⁰ Schauer F, *Thinking like a lawyer*, 43.

⁹¹ Defined as "the study of the fundamental nature of knowledge, reality and existence": *Concise Oxford English Dictionary*, 12th ed.

⁹² 242 NY 13, 150 NE 585, 587 (1926).

⁹³ *Wagner v International Ry*, 232 NY 176, 133 NE 437 (1921).

watched, for starting as devices to liberate thought, they end often by enslaving it'.⁹⁴

Cardozo's commitment to judicial service saw him define, in abiding terms, *the judge's role in the constitutional order*, as well as contribute to the pillars of precedent which have remained a reference-point in the conduct of judicial duty in the common law tradition. In his classic work, *The nature of the judicial process*, Cardozo thus remarked:

The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it enduresThe good remains the foundation on which new structures will be built. *The bad will be rejected and cast off in the laboratory of the years. Little by little the old doctrine is undermined.* Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside the ground charted anew.⁹⁵

In such a spirit, Cardozo stood for orderly reform of the foundations of the law, conducted within the restraints of precedent in the judicial process. Of precedent, he thus observed:

In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception [T]he labour of judges would be increased almost to breaking point if every past decision could be reopened in every case⁹⁶

Does the judge have a place in the formal law-making process which devolves to the political agencies of the constitutional set-up – in particular, the designated *legislature*? Cardozo considered the judicial and the legislative domains to be complementary, and hence, *both vital, to the functional design of the constitution*. He thus observed:

All history demonstrates that legislation intervenes only when a definite abuse has disclosed itself, through the excess of which public feeling has finally been aroused. *When the legislator interposes, it is to put an end to such and such facts, very clearly defined, which have provoked its decision.*⁹⁷

⁹⁴ *Berkeley v Third Avenue Ry*, 244 NY 84, 155 NE 58, 61 (1926).

⁹⁵ Cardozo B, *The nature of the judicial process*, 178 (emphasis supplied).

⁹⁶ Cardozo B, *The nature of the judicial process*, 149.

⁹⁷ Cardozo B, *The nature of the judicial process*, 144 (emphasis supplied).

Unlike the legislative approach which *is singular*, and sparked by specific incident, the judicial role, as Cardozo depicted it, is *continual, broad-based*, and directed by the *common good*. In his own words:

We [judges] do not pick our rules of law full-blossomed from the trees. Every judge consulting his own experience must be conscious of times when a free exercise of will, directed of set purpose to the furtherance of the common good, determined the form and tendency of a rule which at that moment took its origin in one creative act.⁹⁸

On no account, Cardozo considered, would the formal law of the political agencies dispense judge-made law. In his words:

It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided.⁹⁹

Such outstanding obligations, running alongside the enacted or codified body of norms, Cardozo perceived, could only be resolved within the broad *interpretive mandate*, which fell squarely to the remit of the judge.

The judge's answer, in all such cases, came forth *not in a framework of neutral scientific formula*, but rather, in a context of safety standards and more general considerations – all conceived within the constraints of inherent personal limitations. In Cardozo's words:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in [William] James's phrase of "the total push and pressure of the cosmos", which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.¹⁰⁰

⁹⁸ Cardozo B, *The nature of the judicial process*, 103 and 104.

⁹⁹ Cardozo B, *The nature of the judicial process*, 14 (emphasis supplied).

¹⁰⁰ Cardozo B, *The nature of the judicial process*, 12 and 13. Of relevance in this context is the concept of 'judges' priors', which Judge Posner in his work, *Divergent paths: The academy of the judiciary*, Harvard University Press, Cambridge, Massachusetts, 2016, 17, thus defines: 'A prior is a belief or inclination,

This synoptic account recalls Cardozo's significant role in illuminating the place of the judge in the functioning of the law and the legal process – especially in *countries of the common law background*. Cardozo is destined to retain his special place in legal history: in his capacity as law-maker, by virtue of his landmark decisions from the bench; and as a legal scholar who bequeathed a meritorious record of his thoughts on the law-making process, and on the constitutional standing of *the judge*, in the formulation and reformulation of the law.

F. Professor Stanley Alexander de Smith (1922-1974)

The social, economic and political setting of the British constitutional order, in the context of protracted history dating back to the medieval period, was by no means as complex and varied, as was the case with the US: a country of quintessential diversity of geographic, demographic, economic and social manifestations. England's historical portrait merited Frederic William Maitland's observation:

We may speak of more Danish and less Danish countries; it was a matter of degree; for rivers were narrow and hills were low. England was meant by nature to be the land of one law.¹⁰¹

It is in the context of such unity of national design, that the *makings of the common law* began – casting their impacts around the world, and notwithstanding the great diversities prevailing in different countries. In such a context, the influential works of the common law's architects are to be seen.

That is also the context in which the works of De Smith are to be appreciated. His bequest was in the form of principles bearing crucial directions of *constitutionalism*, and its association with the discharge of the *judicial mandate*. In 1962 he reflected upon the judicial process, as it related to the context of countries sharing political experience with England, in these terms:

I am very willing to concede that constitutionalism is practised in a country . . . where there are effective legal guarantees of basic civil liberties enforced by an

conscious or (frequently) unconscious, that one brings to an issue before obtaining any evidence concerning it.'

¹⁰¹ Maitland W, "English law (History)", 9 *Encyclopaedia Britannica*, 11th ed.

independent judiciary; and I am not easily persuaded to identify constitutionalism in a country where [this condition] is lacking.¹⁰²

Such are fundamental concepts regarding a vital pillar of the constitutional and legal order – no less so today than in any progressive, past dispensation. In the constitutional pillars of governance, as in other critical spheres of society, hardly any merit attends a reinvention of the wheel. De Smith was reflecting upon cardinal virtues of the governance process bearing upon the judicial process, which had crystallised over the years: notably through the foresighted works of devout, *individual* judges. It is not the mere accident of history surrounding such individual judges that brings merit to the constitutional role of the judge today. It is attended with a rational process – as flows from the following observation by Professor Bradley Miller:

A brief summary of Waluchow’s argument from necessity: (1) the circumstances of rule-making require that we have a decision-maker to resolve difficult rights-based questions, (2) legislators lack the necessary independence from the electorate to safeguard rights; (3) *the judges of the common law courts have proven themselves able to resolve controversial questions*, (4) *adjudication under a bill of rights is not different in any relevant sense from common law adjudication*, (5) *judges, because of their training and independence, are qualified to resolve controversial rights-based questions*, therefore (6) judicial review is our best option for resolving controversial rights-based questions.¹⁰³

Hardly any better example, and with regard to the judicial factor in governance, will be found than the fundamentals posited earlier still by Sir Mathew Hale (1609 – 1676), England’s Lord Chief Justice of the King’s Bench (1671 – 1675). Hale, thus depicted by Richard Baxter – ‘that unwearied student, that prudent man, that solid philosopher, that famous lawyer, that pillar and basis of justice, who would not have done an unjust act for any worldly price or motive, the ornament of his Majesty’s government, and honour of England, and pattern to all the reverend and honourable judges’,¹⁰⁴ had set the path of upright judicialism by proposing *principles* which, to this day, no progressive, good-willed lawyer, individual or agency, would conscientiously contest. *The distant past, in that sense, has set the right, just, and progressive judicial path for today and tomorrow, and for*

¹⁰² De Smith SA, “Constitutionalism in the Commonwealth today,” 4 *Malaya Law Review*, 1962, 205.

¹⁰³ Miller B, “Review essay: A common law theory of judicial review by WJ Waluchow”, *Research Gate*, February 2008, 7 (emphasis supplied).

¹⁰⁴ Baxter R, *Reliquiae Baxterianae* (1925 ed.): see Hostettler J, *The red gown: The life and works of Sir Matthew Hale* (1st Indian Reprint), Universal Law Publishing Co Pvt Ltd, New Delhi, 2008, 144-145.

all places – especially those countries with legal systems drawn from the common law background.

Those benchmarks lie in ‘rules for a judge’,¹⁰⁵ the essence of which runs as follows: (i) the due conduct of administration of justice is the just deserts of the citizen; (ii) such dispensation of justice is to be effected uprightly; deliberately; attentively; objectively; resolutely; (iii) the dispenser of justice is to take leave of *personal passions*, and of any *pangs wrought by provocation*; (iv) the *dispenser’s time and priority-setting* are to be squarely devoted to the agenda of resolving the question in hand; (v) the dispenser is to *bear both sides fully*, with equal attention; (vi) the dispenser’s mind is to be *free of prejudice*, from beginning to end; (vii) the dispenser is to have the *public interest* at heart, and is not to be won over by pity for any party; (viii) the dispenser, where issues diffuse in nature arise, is not to adhere rigidly to a single line; (ix) *pre-set mental inclinations*, such as compassion for poor or rich, are for exclusion; (x) *quest for applause* in court or outside, is not in keeping with goals of justice; (xi) for the *grave criminal matter*, the path of the law be inclined towards mercy; (xii) for the *minor criminal matter*, the moderate course does not constitute injustice; (xiii) the dispenser is to abhor all private solicitations aimed at pre-determined verdict; (xiv) *familiar individuals in court corridors* are to bear no influence on the course of justice; are to collect no more than the prescribed *fees*; are to desist from facilitating *priority disposal* of particular matter; are not to favour any *counsel coming in aid of the court*; and (xv) the dispenser is to maintain a *light and unburdened life-style*, such as will not prevail over time and service-commitment to judicial tasks calling.

Here is an *individual judge*, moved by sublime conscience such as bears validity and relevance *through the ages*, proffering a precious foundation for the due discharge of the *constitutional mandate* resting squarely upon the platform of *the judicial sector*.

De Smith builds upon such foundations, resting his faith upon *the judiciary* as a vital aspect of the constitutional edifice, and proceeding to propose concepts and principles for sustaining and fortifying the judicial mandate.

The original home of the modern common law, England, is the focus of De Smith’s most elaborate work, *Constitutional and administrative law*.¹⁰⁶ In that work, the learned scholar sets out his reflections on the judiciary as a constitutional agency. De Smith’s object in his work was stated as: ‘to provide

¹⁰⁵ Hostettler J, *The red gown*, 80-82.

¹⁰⁶ de Smith SA, *Constitutional and administrative law*, Penguin Books Ltd, Harmondsworth, 1977.

an accurate, up-to-date account of those areas of constitutional law which were of contemporary significance.¹⁰⁷ He underlined the vital dynamics of the judicial function, as regulated *by conventional norms and practices*, even in the context of the expressly-worded constitutions of modern times:

In these countries where courts have power to inquire into the compatibility of legislative and administrative action with the constitution, books and lecture courses on constitutional law will include a lot of material about judicial review. This is the position in, for example, the United States, Canada, Australia and India. In the United States today it would be absurd to consider the meaning of constitutional expressions such as ‘freedom of speech’, ‘due process of law’, and ‘the equal protection of the laws’, *except by scrutinising recent judicial interpretation, which happens to be far more significant than what the framers of the Constitution and its amendments meant by those expressions*. Similarly, in Canada the general power of the Federal Parliament to make laws for the ‘peace, order and good government of Canada’ loses its deceptive simplicity when viewed in the context of restrictive judicial decisions. In Australia the meaning of the important constitutional guarantee of absolute freedom of inter-state trade and commerce has been *moulded by the High Court in a series of leading cases by a process of unavowed judicial legislation*.¹⁰⁸

De Smith explicates that judicialism, by its *inherent constitutional mandate*, ultimately assigns binding signification to the express language originating from the policy conception and legislative formulation of vital constitutional norms – *even though no express term has defined the judicial path*. He, in this way, *vindicates the conventional common-law modality*, which obligates the judge to be guided by certain essential conditions, but subject to which *the judge is the immediate determinant of legal validity*.

By De Smith’s works, those who conduct the judicial process, as well as those affected by the law, can appreciate that the terms of the written constitution do extol and safeguard *values*, the precise import of which *awaits ascertainment, on a case-by-case basis*. This establishes an essential conjuncture *in the scheme of the modern constitution and the convention-based judicial heritage* – a scenario well depicted by Allan:

[T]he common law provides a constitutional foundation for legitimate government. It embodies a tradition of governmental compliance with the rule of law, subjecting official decisions and actions to independent scrutiny. The evolution of common principles, prompted by changing moral attitudes within society at large, provides for

¹⁰⁷ Preface by Street H to de Smith SA, *Constitutional and administrative law*, 11.

¹⁰⁸ Preface by Street H to de Smith SA, *Constitutional and administrative law*, 16 (emphases supplied).

the adaptation of traditional values to present conditions. It enables the abstract clauses of a ‘written’ constitution to acquire a new meaning and gives an ‘unwritten’ constitution its principal legal content.¹⁰⁹

It thus stands the test of scrutiny, that the constitution, comprehensive or not in its design, presupposes the less-defined *judicial input*, with its features largely founded upon the *common law* experience. A typical example is Kenya’s 2010 Constitution, with its 18 chapters, 264 Articles and six schedules. This Constitution declares broad ‘national values and principles of governance’,¹¹⁰ such as:

- (i) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;¹¹¹
- (ii) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;¹¹²
- (iii) good governance, integrity, transparency and accountability;¹¹³ and
- (iv) sustainable development.¹¹⁴

The full meaning and content of such values has not been, nor can it ever be, conclusively determined by formal wording; and thus, a duly-empowered agency, suitably equipped for the purpose, bears responsibility for assigning *meaning*. That agency is the *court of law* – the proper guiding path of which is not to be obstructed. Only the courts, with their tradition of *objectivity, equity, justice and fairness* – just as Hale perceived in the 17th century – have the capacity to assign meaning to such values. Moreover, by the 2010 Constitution itself the people’s sovereign power, in respect of justiciable matters, is expressly vested in ‘the Judiciary and independent tribunals’;¹¹⁵ and it is thus provided: ‘Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by this Constitution.’¹¹⁶

¹⁰⁹ Allan TRS, “Text, context, and constitution,” 185.

¹¹⁰ Article 10(2), *Constitution of Kenya* (2010).

¹¹¹ Article 10(2)(a), *Constitution of Kenya* (2010).

¹¹² Article 10(2)(b), *Constitution of Kenya* (2010).

¹¹³ Article 10(2)(c), *Constitution of Kenya* (2010).

¹¹⁴ Article 10(2)(d), *Constitution of Kenya* (2010).

¹¹⁵ Article 1(3)(c), *Constitution of Kenya* (2010).

¹¹⁶ Article 159(1), *Constitution of Kenya* (2010).

De Smith raises all the relevant considerations such as would ensure the judges stand firm in discharging their constitutional mandate: and *these are closely integrated with common law practice as evolved over the ages*. In his words:

Can we not at least agree that the protection of judicial independence in a liberal democracy demands that it should be unconstitutional for the Legislature to invade the domain of the Judiciary by pronouncing judgment . . . or reversing a judicial decision with retroactive effect, or enabling the Executive to designate which judges shall sit to hear a particular case, or abolishing a judicial office while it has a substantive holder, or reducing judicial salaries? In Britain such measures would generally be regarded, in the absence of extraordinary circumstances, as unconstitutional in the sense of being contrary to constitutional convention.¹¹⁷

De Smith's contribution goes beyond common law principles, and *incorporates modern constitutional values running in tandem with the settled legal tradition*. And he establishes firm intellectual and rational foundations of law, to inform and inspire progressive trends of judicialism. In this way De Smith, for his relatively short life, did indeed render meritorious intellectual foundations to the scheme of judicialism; and he merits inclusion among the architects of modern judicialism, which *coalesces the platforms of the codified constitution and the common law*.

G. Lord Denning of Whitchurch (1899-1999)

Unlike other renowned architects of the common law (notably Holmes and Cardozo), but like Mansfield and Atkin, Denning stands out as a judge *par excellence* – his contribution coming not so much by way of theory-formulation, as through authoritative, well-considered judgment on vital issues of law, expressed in unique style. At a certain level, Denning falls in a special class, as one of the most published judges ever, who reverted to the rationales of his innumerable judgments, explicating their juristic pillars, and articulating the interplay between these and the overriding goals of *justice* and *equity*. Thus, from the Bench, and from enlightened judicial standpoints, Denning stands out as, perhaps, one of the greatest jurists in history. Precisely for his focus on judicial practice through cases, Denning easily ranks as a leading participant and expositor in, and of the *workings of the common law*, and of its fundamental role in the *constitutional process*.

¹¹⁷ De Smith SA, *Constitutional and administrative law*, 354.

It is clear enough that the courts' charge of live dispute settlement avails to the novelties of the constitutional setting, the *established modalities and efficacies of the common law*. This point is aptly underlined by Justice Ruggero Aldisert of the United States, who plainly draws on realities from the Bench:

The genius of the common law is that it has proceeded empirically and gradually, testing the ground at every step, and refusing, or at any rate evincing an extreme reluctance, to embrace broad theoretical principles.¹¹⁸

Ascending to the Bench in 1944 and remaining in service at the superior courts for 38 years, Denning perfected his judicial credo founded upon the platforms of *justice and equity*, naturally earning the reputation of 'the people's judge', invariably ready to depart from precedent, and to render bold judgment as merited by the occasion. Denning, in this way, readily moulded the law to changing times and circumstances – contrary to the general inclination at the Bench.¹¹⁹

Denning's distinct hand in judicial law-making was favoured by his prolonged tenure, as Master of the Rolls, at the head of the Court of Appeal, which carried the main burden of appellate litigation; and in this context, he exerted a firm hand in the spheres of *contract, equity and commercial law* – spheres in which judicial law-making by way of case law, in the common law tradition, was the norm.

The courts' initiative and originality in such *private-law spheres*, well illuminated the judicial mandate in law-making; brought the merits of vital rights-issues before the judicial forum; and signalled the overall charge of the courts, *within the wider configuration of governance, and of the constitutional order*.

The conventional latitude for judges in common dispute-spheres of contract, in the domain of *private law*, evolved as the platform for broader principles such as would justify the courts' position in the development of the sphere of *public law* – with its more direct interplay with *constitutional questions*.

An example is to be found in Denning's early decision in *Central London Property Trust Ltd v High Trees House Ltd*.¹²⁰ In 1937, High Trees House Ltd leased a block of flats at the rate of £2,500 per year, from Central London Property Trust Ltd. Thereafter, wartime occurred, resulting in significant decline in

¹¹⁸ Aldisert R, "The nature of the judicial process: Revisited", 49 *Cincinnati Law Review*, 1980, 12.

¹¹⁹ See Lord Camden in *Doe v Kersey* (CP 1765); see footnote 16 and accompanying text.

¹²⁰ [1947] KB 130.

occupancy rates. It became necessary in 1940 to agree on reduced rent-payment. Neither party then, however, foresaw a return to normalcy at a predictable time; and so, reduced rent continued over a five-year period. As occupancy rates greatly improved thereafter, the lessor demanded the original rent, as from June 1945. This was contested by the tenant, who contended that reduced rent ought to apply for the whole duration of the lease, and that the plaintiffs were estopped from demanding higher rent.

Denning addressed his mind to three issues, which carried the makings of *general legal principle*: did the agreement of 1940 constitute a commitment to the reduced rent of £1250 per year? Were the plaintiffs estopped from claiming a rent exceeding £1250 per year? Had the plaintiffs committed themselves to a waiver of their rights to a rent higher £1250 per year?

The dispute was determined on the basis of the judicial perception of *justice* and *fair play* – as the criterion for assigning entitlement, according to law. It was held that a person who waives part of a contractual claim, is entitled to the reinstatement of that portion *if it would not be unjust to the other party*; and full rent was payable as from the time the ground for waiver lost validity – in mid-1945 when the apartments were now fully occupied. Denning held *considerations of justice* to entail that, the rent waiver was applicable only to the war period; and it was not unjust to restore rent-payment to the original amount, once the defendant had regained the capacity to pay at the original rate.

Denning concluded his decision with a significant *obiter dictum*, which underlined the thread of *equity* and *justice* as a matter of *legal requirement*; and, had the plaintiff claimed the full rent as from 1940, it would have been refused. For if a party leads another to believe that the original contractual entitlement would be forgone, such a commitment must stand. A promise intended to be binding, when duly acted upon, is for upholding. And this was the basis of a new legal principle for the advancement of the course of justice: *promissory estoppel*. Yet this principle was not to be converted into a strategy for defeating just claims; it was to be employed as a shield, and not a sword, as later clarified by Denning in *Combe v Combe*.¹²¹

It is such a conscientious and progressive approach that marks Denning's path of judicialism, and of the *consolidation of the common law system as a requisite response to the citizen's justiciable claims*. The many examples in this regard are

¹²¹ [1951] 2 KB 215.

studiously examined and explicated in the numbers of works of law which the judge published, right up to the time of his retirement (1983) and even after.¹²²

Worthy of citation is *Liverpool City Council v Irwin*,¹²³ in which, in a dissenting judgment, Denning maintained that the court ought not to wait on the Law Commission to improve the state of the law, where *injustice* was apparent in the existing state of the law. On the facts of the case, he held that a contractual obligation ought to be attributed to a city council which sought to collect rent from its tenants, but without safeguarding the interests of those tenants by keeping the buildings occupied by them under good repair:

I am confirmed in this view by the fact that the Law Commission in their codification of the law of landlord and tenant, recommended that such terms should be implied by statute . . . but *I do not think we need to wait for statute. We are well able to imply it now in the same way as judges have implied terms for centuries.*

Some people seem to think that now there is a Law Commission the judges should leave it to them to put right any defect and to make any new development. The judges must no longer play a constructive role. They must be automatons applying the existing rules.

Just think what this means. The law must stand still until the Law Commission has reported and Parliament has passed a statute on it: and, meanwhile, every litigant must have his case decided by the dead hand of the past. *I decline to reduce the judges to such a sterile role*, so I hold that there is clearly to be implied some such term as the Law Commission recommends.¹²⁴

Denning entertained no doubts that *the task devolved to judges to develop the law, on a case-by-case basis*, as had been the position in the past: so the litigants would have their causes resolved on the basis of *the law as it should be*, rather than of outdated law of the past. This stand is memorably reflected in *Midland Silicones Ltd v Scruttons Ltd*,¹²⁵ in which Lord Denning spoke of binding principles attending the doctrine of precedent as “false idols which disfigured the temple of the law”. And in his Holdsworth Lecture, Denning thus remarked:

I do not myself see why responsible comments or suggestions on the way in which Acts work, intended only in the public interest, should be regarded as an infringement of the sovereignty of Parliament. This applies not only in respect of law laid down by

¹²² See footnote 133 and accompanying text.

¹²³ [1976] QB 319.

¹²⁴ *Liverpool City Council v Irwin*, [1976] QB 319, at 332 (emphases supplied).

¹²⁵ [1962] AC 446, at 447.

judges or enactments of Parliament in ancient times, but also in respect of enactments in modern times¹²⁶

IV. Justice as Guiding Light: The Denning Model

Of the great architects of the common law, and thus of the *enveloping medium to the constitutional setting*, Denning stands out as one guided by the solitary principle, *ends of justice* – even though the precise content of this stock-in-trade would not be identical in the perception of all persons. Evidence to this effect is, for instance, found in the obituaries – in the *Daily Telegraph*:

Whenever Tom Denning was faced with a situation that seemed to him dishonest, unjust or wrong, all his ingenuity and erudition would be directed at finding a remedy, even if the wrongdoer appeared to have the law on his side. This was particularly the case when some powerful institution seemed to be oppressing a smaller body or institution.¹²⁷

The same point emerges with distinct clarity from the remarks of Lord Goff, who considered Denning as:

the most outstanding judge of this [20th] century in the common law world . . . he reminded a whole generation of lawyers that *the duty of the judge is not merely to apply the law but to do justice*.¹²⁸

Goff perceived Denning as having been a reformer of the law:

He taught us all that, if justice was to be done, the common law could not stand still – it must be developed to respond to the demands of justice in a living society.¹²⁹

Of the quality and juristic effect of Denning’s decisions from the Bench, Goff thus observed: ‘Lord Denning’s judgements will be read by generations yet unborn. His fame will reverberate down the centuries.’¹³⁰ Lord Irvine of Lairg, the then Lord Chancellor, thus perceived Denning’s contribution to law: ‘[The

¹²⁶ Lord Denning, “The independence of judges”, in Harvey B (ed), *The lawyer and justice: A collection of addresses by judges and jurists*, Sweet & Maxwell, London, 1978, 67.

¹²⁷ *The Daily Telegraph*, London, 6 March 1999.

¹²⁸ *The Daily Telegraph*, London, 6 March 1999: Lord Goff (Lord of Chieveley, Eton and New College, Oxford; Lord of Appeal in Ordinary 1986-2001) (emphasis supplied).

¹²⁹ *The Daily Telegraph*, London, 6 March 1999.

¹³⁰ *The Daily Telegraph*, London, 6 March 1999.

name Denning was a] byword for the law itself. His judgements were models of simple English which most people understood.¹³¹

Such ultimate reminiscences well reflect Denning's juristic record which, apart from his numerous judgements, is articulated in numbers of published works.¹³² Denning's works are rich in jurisprudential milestones, and, in our perception, provide the *model illustration of the far-reaching scope of the judicial initiative in the due functioning of the modern documentary constitution*.

It is proper to take occasion to note some instructive elements from Denning's remarkable works of law.

Denning, in *Freedom under the law* (1949),¹³³ recorded his perception of such attributes of the judiciary as rendered it the proper constitutional entity to safeguard the *liberties of the individual*:

Herein lies the whole difference between a judicial decision and an arbitrary one. A judicial decision is based on reason and is known to be so because it is supported by reasons. An arbitrary decision . . . may be based on personal feelings, or even on whims, caprice or prejudice.¹³⁴

In his work, *The discipline of law* (1979), Denning underlines the bonds, in the motions of the legal system that connect the *common law's gains in private law* to the *dynamics of public law and the constitution*.¹³⁵ He thus writes: "This discourse would not have been complete unless I drew attention to another way in which an ordinary citizen can enforce the public law. It is when he has a private right."¹³⁶

In the same work, Denning extols the certainty in law which the doctrine of precedent brings, even as he maintains that the doctrine must be subjected to the test of *claims of justice and fairness in the particular case*:

¹³¹ *The Daily Telegraph*, London, 6 March 1999.

¹³² Sir Denning, *Freedom under the law*, Stevens & Sons Ltd, London, 1949; Lord Denning, *The discipline of law*, Butterworths, London, 1979; Lord Denning, *The due process of law*, Butterworths, London, 1980; Lord Denning, *The family story*, Hamlyn Paperbacks, Feltham, 1981; Lord Denning, *What next in the law*, Oxford University Press, Oxford, 1982; Lord Denning, *The closing chapter*, Oxford University Press, Oxford, 1983; Lord Denning, *Landmarks in the law*, Oxford University Press, Oxford, 1984; Lord Denning, *Leaves from my library: An English anthology*, Oxford University Press, Oxford, 1986.

¹³³ Sir Denning, *Freedom under the law*, 91-92.

¹³⁴ See Lord Hale's "rules for a judge": footnote 106 and accompanying text.

¹³⁵ Lord Denning, *The discipline of law*, 134.

¹³⁶ Lord Denning, *The discipline of law*, 134.

Let it not be thought . . . that I am against the doctrine of precedent. I am not. It is the foundation of our system of case law. This has evolved by broadening down from precedent to precedent. *By standing by previous decisions, we have kept the common law on a good course. All that I am against is its too rigid application – a rigidity which insists that a bad precedent must necessarily be followed . . . My plea is simply to keep the path to justice clear of obstructions which would impede it.*¹³⁷

In *The due process of law* (1980), again, Denning brings out the special element in the judicial process which makes it a vital ingredient *in modern constitutions*: ‘The Judges have better sight and longer sight . . . than other [public] bodies: especially in the practical working of the law and in the safeguarding of individual freedom.’¹³⁸

In *The closing chapter* (1983), Denning underlines the rationale of the common law technique in the resolution of disputes, urging that this scheme merits a constant place in the constitutional order. In his words:

. . . legislation in detail should be abandoned and replaced by legislation in principle. By this I mean that our statutes should expound principles in clear language and should leave the details, where necessary, to be worked out by some other means or in some other way . . . Even so, there are bound to be gaps – due to oversight or lack of foresight or to draftsmanship. *These gaps should be filled in by the judges according to their own good sense. They can and should be trusted thus far. They developed the common law in that way. They should be trusted, likewise, with the statute law.*¹³⁹

Denning thereafter published his *Landmarks in the law* (1984), which, much in the style of his earlier works, was an account ‘*of some of those great cases of the past which have gone to make our constitution*’.¹⁴⁰ This was yet another affirmation that *the common law* and its case precedents, was *inseparable from the content and motions of the constitution*.

¹³⁷ Lord Denning, *The discipline of law*, 314 (emphasis supplied)

¹³⁸ Lord Denning, *The due process of law*, vi; see also Lord Denning’s judgment in *Attorney-General v Mulholland*; *Attorney-General v Foster* [1963] 2 QB 477, at 487; see also Lord Denning, *The family story*, 8 and 95.

¹³⁹ Lord Denning, *The closing chapter*, 112 (emphasis supplied).

¹⁴⁰ Lord Denning, *Landmarks in the law*, v (emphasis supplied).

V. Conclusion

This analysis, in the light of cogent profiles rendered by other writers, will lead to certain definite propositions. Cardozo had posited that *judges* merit trust, as the faithful interpreters of the *mores* of their day, affirming: “this power of interpretation must be lodged somewhere, and the *custom of the constitution has lodged it in the judges*’.¹⁴¹ The salient link which Cardozo drew between the judge’s mandate and the design, purpose and intent of *the constitution*, incorporating the *common law medium* in which judicialism functioned, is convincingly configured by Barak, as follows:

The role of the judge is to interpret the constitution and the statutes, and the system of interpretation is usually determined by the judges. This implies that each branch of the state cannot devise its own interpretive system. The rule of law would be undermined if the system of interpretation accepted by the judges were not binding on the legislature and the executive

If one can rely on the objectivity, integrity, and balance that the judges employ as creators of the common law, why can one not rely on them to fulfil that same role as interpreters of the constitution and the statutes?¹⁴²

Barak posits that the modalities of the making of the common law, by the judges, ought to be reflected in the very same judicial initiative, in assigning meaning and content to the terms of *the constitution*. In his words:

Naturally, in our interpretive approach, we will not depart from the language of the constitution and statutes by giving them a meaning that their language cannot sustain. But within the range of possible linguistic meanings, and taking into account . . . the intentions of the authors of the constitution and the statutes, why do we not recognise that *when judges interpret the constitution and statutes, just as when they create the common law, they have a role to play in protecting democracy and bridging the gap between society and the law?*¹⁴³

Barak, in the course of his judicial work, had lucidly portrayed the judge and the judicial function as being lodged squarely within the *democratic platform*, which is a core pillar of the constitution itself; and hence the judicial scheme of common-law *genre*, as regards the interpretive discretion, is the very nub of *the constitution*. In his perception:

¹⁴¹ Cardozo B, *The nature of the judicial process*, 135-136 (emphasis supplied).

¹⁴² Barak A, *The judge in a democracy*, 90-91.

¹⁴³ Barak A, *The judge in a democracy*, 91.

Democracy is a delicate balance between majority rule and the fundamental values of society that rule the majority . . . [W]hen the majority deprives the minority of human rights, this harms democracy . . . [W]hen judges interpret provisions of the constitution and void harmful laws, they give expression to the fundamental values of society, as [these] have evolved throughout the history of that society. Thus they protect constitutional democracy and uphold the delicate balance on which it is based. Take majority rule out of constitutional democracy, and you have harmed its essence. Take the rule of fundamental values out of constitutional democracy, and you have harmed its very existence.¹⁴⁴

Barak's rational portrayal of the two phases of democratic practice – firstly, majoritarian expression; secondly, legal sustenance of individual fundamental rights – underlines the essence of judicialism, proceeding in the common law trajectory, and bearing the mandate of constitutional interpretation. This standpoint is incorporated also in our earlier study, which thus posits:

The common law substantially rests on precedents emanating from the superior courts; and these apply uniformly to new cases, be they constitutional or other. Thus, the hallmarks of the common law – precedent, *stare decisis*, the quest for equity – apply in respect of the constitutional case no less than in the other categories of cases. *The stage is thus set for the persistent motion of the common law method – be the contest one of constitutional law, administrative law, tort law or some other field of law.*

The focal point in the constitutional law contest, namely the power-balances, and their implication for safeguards, is, thus, constantly tested, within no other juristic setting than that of the *common law*. And the common law does not fail, thanks to its preoccupation with *fairness, justice, equity and proportionality*. This, truly, is a fitting judicial recourse, in dispensing 'constitutional justice'.¹⁴⁵

It is our hope that, by this article, we have clearly established the validity of certain propositions, of significance to legal process as it functions in the governance set-up: firstly, that within the positive attributes of constitutionalism, as a liberal and progressive societal ethic, is profoundly lodged the modalities of *judicialism*; secondly, that *judicialism*, as attached to the motions of *court process*, has its rootage in identifiable institutions, conventions, principles and practices well set in the *historical experience of humankind*; thirdly, that in the progressive judicial

¹⁴⁴ CA 6821/93 *United Mizrabhi Bank Ltd v Migdal Coop Vill* 49(4) P.D. 221, 423-424; see Barak A, *The judge in a democracy*, 93n (emphasis supplied).

¹⁴⁵ Ojwang JB, *The unity of the Constitution and the common law: Lesson from Kenya's experience in comparative context*, University of Nairobi, LLD Thesis (unpublished), 2015, 119 (emphases supplied).

practices adopted in growing numbers of political and constitutional systems – including those of East Africa – the guiding beacons are located within *the gains recorded in the course of evolution of the common law system*; fourthly, that it is *within the motions of the common law system, that the fundamentals of the modern written constitution have been established*; and fifthly, that the best intellectual and juristic foundations of the adaptable trends of the common law, are to be assembled from the brilliant, and conscientious works of certain great judges and scholars, right through from the upper Middle Ages, to-date.¹⁴⁶ In such works, today’s perceptive scholars, jurists and judges have a precious, indeed an inestimable, resource-base.

¹⁴⁶ We would note in this context the signs that some legal scholars may not have expressed their full concurrence. Professor Issa G Shivji’s stand is perhaps in broad agreement, as he perceives that:

“ . . . the new always partakes of what is good and meritorious in the old. Neither social transformations nor ideological breaks . . . begin from the clean slate” – Shivji I, *The concept of human rights in Africa*, Codesria Book Series, London, 1989, 71-72.

Such is not the case with Professor James Thuo Gathii, who perceives the yesteryears of the common law as having been unceremoniously debunked and cast away by the advent of the written Constitution of Kenya in 2010 – so the judges must abandon common-law notions, and apply some unspecified yardstick in interpretation. The learned Professor in his work, *The contested empowerment of Kenya’s judiciary, 2010-2015: A historical institutional analysis*, Sheria Publishing House, Nairobi, 2016, thus writes on page 58:

“By constitutionalizing administrative justice as a right and removing it from the common law, the 2010 Constitution has created a large new swath of judicial decision-making authority that is within the four corners of the powers of the Judicial Review Division [of the High Court].”

In the same vein Professor Gathii writes [in the same place]:

“In my view, Article 47 of the 2010 Constitution makes judicial review based on the common law outdated. Common law judicial review is very deferential – statutes are presumed to be constitutionally valid”

And he states again [once more, in the same place]:

“In the pre-2010 era, judicial review under the common approach involved minimal scrutiny of government conduct. Such deferential review was premised on the view that Parliaments legislate and Courts adjudicate – that adjudication and legislation are two separate spheres.”

The learned writer has not indicated whether any principle or common reference exists, to guide the many different judges and courts, as they apply the text of the Constitution.