THE UNITY OF THE CONSTITUTION AND THE COMMON LAW

Lesson from Kenya’s Experience in Comparative Context

A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF LAWS
AT
THE UNIVERSITY OF NAIROBI

BY

JACKTON BOMA OJWANG, LL.B., LL.M (Nairobi);
Ph.D. (Cantab); FKNAS; CBS; JUSTICE OF THE SUPREME COURT OF KENYA

2015
# TABLE OF CONTENTS

DECLARATION........................................................................................................................................ vi

ACKNOWLEDGMENT............................................................................................................................... vii

Chapter One: INTRODUCTION................................................................. 1

(a) Preamble................................................................................................................................. 1

(b) Letter and Spirit: The Kenyan Episode Inviting Enquiry......................................................... 1

(c) Injecting Life into Formal Law: Looking to the Common Law...................................................... 4

(d) The Thesis, in Profile .............................................................................................................. 6

Chapter Two: THE CONSTITUTION, PUBLIC POWERS, AND SAFEGUARDS: RESEARCH RECORDS................. 12

A. NOVEL DIMENSIONS.................................................................................................................. 12

B. THE THRESHOLD OF CONSTITUTIONAL MACHINERY: POLITICAL PARTIES.......................... 13

(a) Academic and Professional Questions.................................................................................. 13

(b) Argument, and Works of Scholarship.................................................................................. 14


(a) Introduction............................................................................................................................. 22

(b) Works of Scholarship............................................................................................................ 23

(c) Majoritarian and Non-Majoritarian Agencies of Safeguard: Appraisal............................... 27

D. THE JUDICIARY, AND THE NON-MAJORITARIAN ASPECT OF CONSTITUTIONAL SAFEGUARDS................. 28

(a) Introduction............................................................................................................................. 28

(b) Works of Scholarship............................................................................................................ 30
### E. “LOW” CONSTITUTIONAL LAW: FRINGES TO CORE POWER-ACTIVITY

(a) Introduction .................................................. 51

(b) Works of Scholarship ........................................ 52

### F. CONSTITUTIONAL SAFEGUARDS: ANCILLARY WORKS

(a) Introduction .................................................. 55

(b) Works of Scholarship ........................................ 56

---

**Chapter Three: THE JUDICIAL PHASE AND THE COMMON-LAW LESSON**

---

**A. INTRODUCTION** ............................................ 70

**B. THE TASK OF THE KENYAN COURTS: BUILDING UPON THE COMMON LAW’S CREATIVITY** ............................................. 71

**C. WORKS FROM THE BENCH** ................................ 75

(a) Relevant Questions .......................................... 75

(b) The Executive, and the Individual’s Safeguards:
    Muema v. Attorney-General and Two Others .............. 75

(c) The Legislative Competence, and the Constitutional Limits:
    Law Society of Kenya v. Attorney-General and Another ... 78

(d) The Judiciary’s Divers Competences in Spheres that Devolve to Other Organs:
    Gathungu v. Attorney-General and Six Others ............ 79

(e) Is the Domain of Private Law Available to the Executive Authority in Prejudice to Vital Individual Rights?
    Menginya Salim Murgani v. Kenya Revenue Authority .... 83

**D. CONCLUDING REMARKS** .................................. 89

---

**Chapter Four: THE CONSTITUTION – IN SCHOLARSHIP AND IN THE JUDICIAL PROCESS** ............................................. 93
A. CONSTITUTIONAL SCHOLARSHIP: THE PARADOX ....................... 93
B. WORKS OF SCHOLARSHIP IN SAMPLE ........................................ 95

C. THE CONSTITUTION AND THE JUDICIAL PROCESS:
   WORKS FROM THE BENCH ................................................................. 96
   (a) Preamble ..................................................................................... 96
   (b) Protecting Constitutional Trial-Rights: Fan Xi
       and Three Others v. The Attorney-General ..................................... 97
   (c) Redressing Tendentious Prosecutorial Action by
       the Executive Branch: Republic v. Joseph Zakayo Maithia
       and Four Others ........................................................................ 98
   (d) Limiting Discriminatory Practices by Government
       Authorities: Muslims for Human Rights (Muhuri) and
       Another v. The Registrar of Persons and Two Others .......... 99
   (e) Appraisal .................................................................................. 101

Chapter Five: THE COMMON LAW AS A COMMON THREAD ...... 104

A. GOVERNANCE-RELATED DISPUTE: THE CONSTITUTIONAL
   NORM, AND THE JUDICIAL FUNCTION ........................................ 104

B. THE COMMON LAW: FLEXIBILITY, AND SCOPE FOR CREATIVITY... 106

C. THE COMMON-LAW STYLE, AND THE CONSTITUTION:
   WORKS FROM THE BENCH ................................................................. 107
   (a) Recognizing Constitutional Principle while
       Resolving Ordinary Questions of Law:
       Luka Kitumbi and Eight Others v. Commissioner of Mines and Geology
       and Another ................................................................................ 107
   (b) The Common Law Sphere of Administrative
       Law attending upon Constitutional Principle:
       Republic v. Kenya Revenue Authority ex parte L.A.B. International
       Kenya Limited ............................................................................. 110
   (c) Constitutional Issues and Ordinary Issues, Are
these Treated Differently by the Same Court? - Archegono Africa Limited v. Jumba Holdings Limited and Two Others.... 112

(d) Common Reasoning under the Constitution, and by the Common Law: Gremmo Danielle and Another v. Kilily Spa.......................................................... 114

D. THE COMMON LAW IN THE KENYAN COURT:
GENERAL OBSERVATIONS .................................................. 115

Chapter Six: COMMON VALUES, COMMON METHODOLOGY:
CONCLUSION ................................................................. 117

ANNEXURE 1: CATEGORIZATION OF RELEVANT PUBLISHED WORKS................................................................. 121

A. CONSTITUTIONAL PRINCIPLES, CONTEXT AND MECHANISMS... 121
B. EXECUTIVE POWER........................................................................................................... 122
C. LEGISLATIVE FUNCTIONS............................................................................................... 122
D. BALANCING STATE POWERS, JURIDICAL SCHEMES, AND JUDICIAL PRACTICES............................ 123

ANNEXURE 2: OF LEGAL SCHOLARSHIP AND JUDGESHIP – INDICATIVE ANECDOTES.................................................. 125

A. LORD ATKIN ON THE RELEVANCE OF LEGAL RESEARCH TO DISPENSATION OF LAW.................................................. 125
B. THE ROLE OF LEGAL RESEARCH IN THE DISPENSATION OF LAW: AUTHOR’S FURTHER REFLECTION ......................... 125

ANNEXURE 3: TABLE OF CASES............................................................ 127

ANNEXURE 4: BIBLIOGRAPHY OF WORKS BY OTHER SCHOLARS................................................................. 129

ANNEXURE 5: AUTHOR’S CURRICULUM VITAE................................. 134

ANNEXURE 6: TEXTS OF RELEVANT PUBLISHED WORKS
[IN ACCORDANCE WITH ANNEXURE 1].............. 172
DECLARATION

The work contained in this Thesis has been carried out by myself and has not been submitted in this or any other form for a degree of any other University.

....................................................

JACKTON BOMA OJWANG
ACKNOWLEDGEMENT

This Thesis represents a crystallization of the essence of my research works in the domains of the Constitution and the law, over a period of time exceeding one generation. Without any doubt, the many studies bearing the core-issue now articulated in this work, substantially benefited from discussion and critique involving many scholars who are not readily identifiable by name. But I am deeply conscious of the fact that the thrust of dynamic research on the relevant issues was planted in me at a time of curious search for scholarly direction, by my resourceful and indefatigable research supervisor at the University of Cambridge, now Professor Sir Basil S. Markesinis who, after holding some of the most distinguished appointments in England and Europe generally, today occupies the Jamail Regents Chair in Law at the University of Texas at Austin, in the United States of America. Professor Markesinis’s direction guided me in my Ph.D. research and in my subsequent works, and has remained an influence upon me as I conceived and prepared this Thesis for a Higher Doctorate of my alma mater, the University of Nairobi.

In the course of my research work at Cambridge, I also benefited from enlightening discourse with Professor Yash Pal Ghai, who was then in service at the University of Warwick, at Coventry in England. He subsequently distinguished himself as counsellor on constitutional reform worldwide, apart from serving a number of Universities and, for the longest period, the University of Hong Kong, as Professor of Law; and he served as Chair of the Constitution of Kenya Review Commission, which made the initial recommendations (2002) now incorporated in the Constitution of Kenya, 2010.

I acknowledge the fruitful academic dialogues on constitutional and relevant issues, which I shared with colleagues at the University of Nairobi Law
School over a period of some two decades (1983-2003). In this regard I am indebted to the late Professor Hastings W.O. Okoth-Ogendo, for his rigorous engagement with legal pedagogy; and to Professors Charles O. Okidi, Patricia Kameri-Mbote, Francis D.P. Situma, Albert O. Mumma, J.M. Migai Akech, and Patrick L.O. Lumumba.

I acknowledge the privileged consultations and advice which I have over the years, shared with Professor Patricia Kameri-Mbote, currently the Dean of the University of Nairobi Law School.

Social dimensions of this undertaking have been answered to by my wife, Collette, to whom I owe a debt of gratitude.

I acknowledge my Law Clerks, Emily Nyiva Kinama and Rose Wachuka Macharia, who have shared with me recently in a wide range of legal-research issues, and who have been a vital source of support. And as always, I remain exceptionally indebted to my secretary, Annerita Murungi, who has worked energetically and with excellence, in handling the recording of my research work including this Thesis.


Chapter One

INTRODUCTION

(a) Preamble

My primary sphere of scholarly interest since the late 1970s has been public law in general, and constitutional development and constitutional law in particular. My works have focussed not only on the motions and interplays of the agencies and mechanisms of the constitutional process, and on the creation, operationalization and reformation of these, in the national and the comparative framework\(^1\) – what Professor Patrick McAuslan has typified as “High” constitutional law\(^2\) – but also on the implications of core constitutional motions for a wide range of phenomena: such as emerging political processes\(^3\); divers categories of human-rights claims\(^4\); extant social traditions and practices\(^5\); environmental integrity\(^6\); and the land-resource, as a factor in community interests\(^7\).

My entry into constitutional scholarship was started up by an incident which indicated common cause to the design and purpose of the Constitution and the common law: and, just as the journey began from that conjuncture, so does it close with a dedicated reflection upon that linkage.

(b) Letter and Spirit: The Kenyan Episode Inviting Enquiry

In 1963, Kenya, like the dozensome African countries that had for decades been part of the British empire, acceded to independence on the basis of a model Constitution\(^8\) founded on conventional democratic principles, and on the concept of constitutionalism\(^9\): national elections based on unrestricted political-party competition; a parliamentary agency comprising two chambers; an Executive
Branch answerable to Parliament; an independent Judiciary guided by the rule of law.

The Legislature’s mandate was to enact all primary legislation subject to the Constitution; to assert constant check on the conduct of matters of policy and administration by the Executive Branch; and to control the sourcing and management of public finances. By the operative practice of parliamentary government, members of the Executive Branch were concurrently Members of Parliament; and not only were they constantly held accountable, but they were collectively liable (in theory, at least) to removal through the Parliamentary vote of censure.

Being so crucial in the constitutional order, yet having to engage an Executive organ that held actual charge over the State’s implementation (and even coercive) machinery, the Legislature to be able continually to perform its checking role, required special safeguards for its processes.

The parliamentary function in the constitutional set-up of post-Independence Kenya was by no means a novelty; it was a carry-over from the colonial Legislative Council which had mainly served the British settler-community. As early as 1952 the Legislative Council had secured immunity for the conduct of its processes: through the Legislative Council (Powers and Privileges) Ordinance. This law of immunity remained important and, at Independence in 1963, became the National Assembly (Powers and Privileges) Ordinance; and with only minor amendments it became, at the time of accession to Republican status (1964), the National Assembly (Powers and Privileges) Act.

Notwithstanding the safeguard to the National Assembly proceedings by way of the privilege legislation, and without recourse to the judicial mechanisms of interpretation of law and of dispute settlement, the post-Independence Executive Branch, especially in the period 1967-1975, increasingly resorted to arresting and imprisoning Parliamentarians, on the basis of a late colonial-period statute, the Preservation of Public Security Act. The effect was to instil fear in
individual Parliamentarians and to disarm the Legislative body, severely undermining its autonomy and sense of purpose in the control of the exercise of Executive power, and thus, in the maintenance of the fundamental balances of the Constitution which ensured the free play of democracy and constitutionalism, in the post-independence dispensation.

Besides, the Executive Branch by circumventing the judicial process, avoided the critical function of the Courts as the foremost agency of constitutionalism in the emerging political order. The Executive’s immoderacy, in effect, reversed the gains of Independence under a more democratic constitutional dispensation. Not only was the letter and spirit of the Constitution undermined, but the vital agent of constitutionalism, the Courts\textsuperscript{16}, was denied the opportunity to apply the meritorious common law conventions and rules, for the purpose of assuring the orderly interplay of constitutional agencies and, thereby, securing the gains of the democratic dispensation.

This scenario raised for me an intellectual trepidation, which I thus expressed\textsuperscript{17}:

“The general expectation at independence was that Kenya would adopt and sustain the former suzerain’s domestic record of constitutional principles and practices. She was expected to forge a strong tradition of parliamentary government and provisions were made for such safeguards as parliamentary privilege.

“Post-independence realities have shown such expectations to have been misplaced. While the content of the enacted laws of privilege has remained fairly constant, the frequency with which the executive organ has undermined their rationale due to political [expediency] has underscored the fact that constitutional principles are a dynamic phenomenon which cannot be preserved by mere [enacted] provisions.”
I was intrigued, as it emerges from the foregoing perception, by both the written Constitution’s and the written law’s inability to give practical safeguard to a constitutional principle; and by the fact that all the progressive values associated with good governance, though embedded in the Constitution and the written laws, were destined to be of no effect, unless vital impetus was injected into them, through live agency.

(c) Injecting Life into Formal Law: Looking to the Common Law

In the evolution of the common law, which flowered from early foundations in England to consolidate the legal systems of many countries around the world, the Courts were invariably the crucible from which fresh breezes of constitutionality and legality flowed; and most of the recipient-countries can rightly be said, today, to provide the prototypes of good governance, with ideal institutional counterbalances, as well as normal standards of social equity, and of regular discharge of public duty.

Judicial independence, the basis of the vitality of the Courts in dispute settlement, was a core principle in Kenya’s Independence Constitution (1963)\(^1\), though it is much more clearly stated in the Constitution of Kenya, 2010\(^2\), which provides:

“In the exercise of judicial authority, the Judiciary...shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.”

While the patent aspects of the Judicial power flow plainly from the letter of the Constitution, the manifestations of that power, in their fullness, have historically issued forth from the workings of the common law, which is defined as\(^3\):

“...The body of law derived from judicial decisions, rather than from statutes or constitutions....”
If Judges stand true to their calling, they then have a legitimate basis for the elaboration of “Judges’ Law”, that is, the *common law*, which they construct from the facts and circumstances of the case laid out before them; and by virtue of which they establish solutions to disputes, where formal law is lacking, or where contradictions or inconsistencies or turmoil characterize the existing law\(^{21}\).

By their intellectual courage, and by their independence – an attribute *expressly safeguarded by the Constitution* – the Judges will be able to strike a proper balancing of the forces which may be bristling among the more overtly political entities.

In a relevant excursus into England’s judicial history, one finds the case of Sir Edward Coke (1552-1634) who at different times served as Attorney-General and Chief Justice, leaving an outstanding record of service to the common law tradition, by his sheer conviction and intrepidity. He exceptionally propounded and asserted judicial independence by *applying the common law to uphold endangered constitutional principles*. Of this scenario, Dr. John Hostettler writes\(^{22}\):

> “Without Coke’s knowledge and courage Parliament may well have wilted before royal tyranny. And the *common law*, which is older even than Parliament, might have been extinguished by Roman law that was preferred by [King] Henry VIII....”

Further example comes from India, which is one of the outstanding recipients of the common law tradition with its judicial foundations. One of the most outstanding Judges in this tradition was Chief Justice P.N. Bhagwati who in his book, *My Tryst with Justice*\(^{23}\), thus writes:

> “There are few institutions that form the very cornerstone of any democratic republic. [The] Judiciary is one such important and vital institution. Every
country committed to upholding democratic and egalitarian values must have a strong and independent judiciary. It plays a vital role in the maintenance of the rule of law and strengthening of democracy. Therefore, it is very important to delineate the role and function of a judge in a democratic society. It has been almost an archaic question whether the role of a judge is to merely interpret or declare the law or are they instrumental in [the] making of law? I call this question archaic as I believe that **law making is an inherent and integral part of [the] judicial process.** It is the role of a judge to provide meaning to what is expressed by the legislature as the text of law.”

Thus, from both deduction and anecdote, we perceive a clear common purpose between the Constitution and its structures, on the one hand, and the judicial process and its method of the common law – an empowering convention enabling Judges to uphold the Constitution while relying on principles of relatively open texture – on the other hand.

**(d) The Thesis, in Profile**

It is the said common purpose that lies at the centre of this Thesis. This theme will repeatedly beckon in Chapter Two, as I extract the essence of the works of both “High” and “Low” constitutional law that I have generated over the years. A summary-analysis of the theme at the end of Chapter Two, will lead to an account in Chapter Three, of its reflection in decided case law, and in the assembling process of the common law at the Superior Court Benches. From the consideration of case law, Chapter Three will conclude with a reflection on the potential of the common law as a device of the constitutional process.

In Chapter Four I make reflections on constitutional scholarship, especially as an aid to the conduct of the judicial process and the discharge of the
common law mandate; while Chapter Five reflects on the common law as a common thread in judicial processes set in motion by claims founded on the Constitution, or other norms.

Chapter Six is a concise appreciation of the essence of this work.

NOTES


2. McAuslan’s thesis is set out in his “Remarks made at the All Souls Public Law Seminar: Dicey and the Constitution”, Public Law (London, 1985), pp. 721-728. By this thesis, history has bestowed upon the Executive, the Legislature and the Judiciary the centre-stage in the theory and practice of the Constitution; and then, the sheer force of tradition has tended to commit scholastic methodology to a priority-setting focused on the three. What emerges from that scenario is “High” constitutional law, dealing with Parliament, the Cabinet, the Judiciary and the relevant principles. It contrasts with “Low” constitutional law (pp. 722-28):
“[This] embraces what would more familiarly be called the law of administration: how are all these powers vested in Ministers actually exercised; how does one challenge them; what does it feel like to be on the receiving end? ... [P]ublic lawyers have moved from the high centre stage to the lowlands of housing law, planning law, social security law, immigration law, civil liberties etc.”


10. This practice ended with the promulgation of the Constitution of Kenya, 2010 which established a Presidential system, with a separation of powers between the Legislative and the Executive Branches.


“The two major institutions of government ... – the executive and the legislature – have remarkable continuity. Introduced early as a result of settler pressure, they helped to influence and qualify official policy and promote political awareness. The settlers had been able to wield considerable influence even before the establishment of these institutions, and it is doubtful if they would have agitated for their establishment if they had foreseen the trends of their future development. For these two institutions – particularly the legislature – soon became one of the few ‘national’ institutions."


15. This had been published as Ordinance No. 2 of 1960, and was later adopted as the Preservation of Public Security Act (Cap. 57, Laws of Kenya). Under Section 4(1) of the Act, the President was empowered to “make regulations for the preservation of public security”, and purely by such executive regulations he could abrogate personal freedoms through *detention* of a person (s.4(2)(a)). It became habitual for the President to make his regulations, by virtue of which the restriction and detention of persons would take place: the Public Security (Control of Movement) Regulations, Legal Notice No. 43/1967; the Public Security (Detained and Restricted Persons) Regulations, Legal Notice No. 234/1978; Legal Notice No. 206/1986; the Public Security (Detained and Restricted Persons) Rules, Legal Notice No. 235/1978. Several decades later, in the light of the main thrust of world political developments, especially the resolution of the stand-off between the two ideological power-blocs, it became
untenable for African leaders to hold on to any immunity where they condoned violations of human rights. The retrograde element in the Preservation of Public Security Act could not be maintained, and the Executive Authority lost its liberty in rule-making for the limitation of personal freedoms. By the Statute Law (Repeals and Miscellaneous Amendments) Act, 1997 (Act No. 10 of 1997), Section 4(2) of the Preservation of Public Security Act was amended to declare: “Provided that no person shall be restricted on account of his political beliefs or activities.”


18. Chapter X – on the Judicature.

19. Article 160 (1).


   “So integrally does the common law form one package with the regime of constitutional law, the High Court has disallowed unwarranted attempts to separate the two.”


Chapter Two

THE CONSTITUTION, PUBLIC POWERS, AND SAFEGUARDS: RESEARCH RECORDS

A. NOVEL DIMENSIONS

The main part of my works, in hindsight, has been intimately informed by Lord Acton’s reputed aphorism: “Power tends to corrupt, and absolute power corrupts absolutely.” It is, arguably, the foundation of the primary task of Constitutions: defining the structures and functions of governance agencies, and securing the adherence of official decision-making to the broad lines of principle; to the terms of regular law; and to directions issued by dedicated tribunals of dispute-settlement.

The prescribed counterbalances in governance are constantly relevant; and the procedures of legality, as overseen by the judicial organ, occupy a special plane of constitutional moment. This is, indeed, the justification for the Judiciary – though not a direct agent of active public power and, by nature, not lodged at the hub of political arrangements – invariably occupying a central position in the scheme of the Constitution.

It is from these foundations that my works on the Constitution have evolved, both in scholarship and in justiceship, centring on the three main State agencies as they interact, and as they bear impacts upon citizens and citizen-interests in a wide range of matters.

While such a line of inquiry has marked the study of Constitutions from time immemorial, it remains, from the lawyer’s standpoint, largely unexplored, in the case of nascent political frameworks of comparably new States such as
those of Africa. It is in this regard, and with respect to one State, Kenya – being viewed frequently in a comparative context – that my works claim originality in the first place.

This perception attains more clarity in the full context of this Thesis, and particularly in the light of the detailed account of the research record in this Chapter, and of the scheme of juristic innovation exemplified in Chapters Three, Four and Five; and such innovation itself is a novelty that validates the main argument – that the common law’s scheme is an ideal complement to the Constitution’s precept.

B. THE THRESHOLD OF CONSTITUTIONAL MACHINERY: POLITICAL PARTIES

(a) Academic and Professional Questions

Although for most African countries, independent statehood took its formal instruments in the shape of a written Constitution, and of specific dedicated State agencies – namely the Legislature, the Executive and the Judiciary – it remained unspecified how far those formal units related to a certain vital “extrinsic” element – the political party.

The term “political” means: “relating to the government or public affairs of a country.” This leads to the definition of “political party”: “An organization of voters formed to influence the government’s conduct and policies by nominating and electing candidates to public office.”

How would the constitutional and legal structures established, interact with such a dynamic but amorphous civil entity the sole object of which was to influence the discharge of governance tasks, and to galvanize the engagement process for the occupancy of governmental offices?
The uncertainty in this respect later proved to be a fundamental source of misunderstanding between the majority of the people, and the governing elites wielding the machinery of power. The political-party question presented the first obstacle in the process of gaining political legitimacy by the occupants of the main Executive and Legislative offices. While no transparent forum emerged to clarify to the people the proper status and role of the political parties, the elites in power latched on to ill-organized and covertly-managed political parties, as the veritable power-concentration device, and as the mechanism of selection and empowerment for the preferred individuals at the central platform of political power.

The few State officers with power-leverage in the political parties, besides, ensured a systematic disjuncture between the party systems and the regular process of the law: the effect being that the Courts’ jurisdiction was entirely circumvented; and the parties, for the most part, operated outside the scheme of the rule of law.

Such intimate role of little-regulated party machinery in governance, running in parallel with limitations to the conventional legal process, is the baseline from which my works in constitutional law have proceeded; and the puzzle itself is examined in some of my original studies.

(b) Argument, and Works of Scholarship

In an article, “Constitutional Law and Political Change: Recent Developments in Zambia and Kenya”, I considered questions of law as they touched on the contemporary African political party as it held sway in Zambia and Kenya, drawing insights from settled democratic practices in the Western countries. Comparing the political-party scenarios in the two countries, on the one hand, and in the Western countries on the other, I recorded my observation as follows:
“...given the glaring differences of institutional practice between Africa and the West, the frequent recourse to such concepts [i.e., concepts of parliamentarianism, democratic representation and party-pluralism] invariably discloses a lack-of-fit. Perhaps the most striking instance of this is with regard to constitutional practices, which in the West, rest upon a certain notion of party politics. It is an established condition in the West that constitutional processes, which are a major normative manifestation of the ideology of liberalism, rest in a framework of economic, social and political diversity pointedly expressed in multi-party systems7.”

It emerges that, whereas in the typical Western context there exists a groundwork of economic and social conditions that dictate the constitutional path, alongside multi-party democracy, in the African context the omnipresent political party is, by and of itself, the vital determinant of the constitutional path, as well as of its own assured role in the design of political reform. On this point I had observed8:

“In both cases [Zambia and Kenya], the party is the principal instrument of change, and even the parliamentary act which sanctifies the political change emerges from the original decision of the party.”

The party’s position, and more particularly in the case of one-party systems which were in vogue in Africa of the 1970s and 1980s, held the entire initiative for any project of transformation. On this question I had observed9:

“In both cases [Zambia and Kenya], the party’s monopolistic hold on power and the decision-making machinery makes it, for all practical purposes, the appropriate public organ to initiate and manage fundamental changes with clear implications for the character of the
Constitution, and the fundamental rights of citizens therein set-out. Perhaps no ‘practitioner’ would have challenged this phenomenon – which in reality, represents the pragmatic Constitution – for the reason that those taking the initiatives were divesting themselves of authority and power, making these available for reallocation to a plurality of new centres. They were deemed to have been acting in good faith, since they were acting against their own interests.”

In both Zambia and Kenya, which at the time were one-party States, all Parliamentarians were members of the sole party: and therefore, any constitutional path they chose was more attributable to the dynamics of the party, than to the regular play of mechanisms of constitutional-legal process flowing from the operative conventions of the parliamentary system, as such. The party’s extra-juridical dynamics, thus acquired a special role in the process of constitutional change – a scenario that featured in my work, as I attempted to perceive the meta-juridical characteristics of the party as it linked up with proper jural phenomena. On this scenario I had observed:

“however... such changes once initiated, gather their own momentum; and they attract consequential constitutional and legal changes – in spite of the initiator of the original change. The phenomenon, thus, becomes increasingly juridical and self-regulating – and this may partly explain why such changes are not easy to reverse11.”

From the interplay of the original party-factors and the personal freedoms being created, another sphere of legal focus and of constitutional order was being introduced: elections. And of this phenomenon I made the following observation12:
“Spontaneity and free volition in the choice of representatives and directors of government business, must follow hard on the heels of political changes. This dictates uninhibited election, as the avenue to political office-holding. Free election is thus a logical next step, and a step that takes African political practice marginally closer to the established traditions of Western countries.”

The Constitution, thus, was assuming a life of its own, and would no longer be merely a set of technicalities to accord a face of validity to unlimited Executive power. Of this scenario I had thus written:

“...it becomes plain that [Zambia and Kenya] have advanced in nationhood to the point that it ill-suits them to use the Constitution as a mere set of rules for regulating certain troublesome technicalities of administration. The Constitution has now become an organic phenomenon, to be harmonized with the common political goals – as well as internally in its provisions – so as to vindicate those goals.”

I had related such political and constitutional trends to established democratic practices in the Western countries, and I endeavoured to illuminate the place of the legal process and the judicial function in such a scenario:

“Western constitutional theory rests upon a number of principles: popular participation in governance through unrestricted franchise and open candidature; the primacy of clear rules and principles in the process of governance; the free play of diverse centres of interest, and of stable constitutional agencies in mutual restraint, in the exercise of governmental authority; the organic place of parties in the political and
constitutional processes; and the reservation of the arbitral function, in respect of justiciable disputes, to an autonomous judiciary”.

This line of scholarship had featured also in an earlier work which I co-published with Phoebe Okowa. The starting point in that study is: the claims of the political party versus the claims of the individual, as regards personal choices. The nature of the question had emerged some twenty years earlier, before the American Supreme Court17. Is it proper in law that the Democrats and the Republicans should hold a monopoly over the political life of the Americans? The answer came in the opinion of Mr. Justice Black:

“There is ...no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet responsible requirements for ballot position, just as the old parties have had it in the past.”

We ascertained that the decision well reflected the prevailing political philosophy in the Western countries: that political parties in their plurality, “provide alternatives upon which the life of the State can be moulded and shaped.” Upon this ideological orientation, legal structures and constitutional regimes have been constructed which bear the principle that the exercise of any public power likely to have impacts on the rights of the individual, is to comply with the substantive law and the procedural law, superintended by virtue of the judicial mandate, and with the application of recognized yardsticks.
Against the foregoing background we perceived, in our work, a *doctrinal and practical linkage* having been established in the Western experience, in the operation of political parties, within the prevailing constitutional framework. This condition in the Western experience, constitutes an institutional heritage received by present generations of citizens, politicians, lawyers and scholars. The outlook in that tradition has been to secure a political framework that sustains a regular *legal system* devised to secure the rights of the individual: and it is recognized that the constricted base to the organization of political-party activity will entail a constraint upon the exercise of public liberties.

In our study we set out from that hypothesis, and took note of the fact that “all African countries which once formed part of the British Empire, have inherited the *common law system which rests on the role of the Courts*, in the determination of principles affecting the exercise of private rights21.”

This is one of the points at which the *scheme of the common law, as a forum of the judicial process, fuses into the broader issues of the Constitution as purveyed under the motions of the political order*: and so we arrive at the point where the Courts have clear jurisdiction to define the terms of application of fundamental principles born of the political order. As we observed in our article22, “apart from the express provisions of the written Constitution, which gives rights, and confers jurisdiction upon the Courts, the *ordinary regime of administrative law also applies, giving further protection to the individual*, through provisions of the substantive law, and through procedural requirements.”

The main focus of our article was a distillation of essential characteristics of law from the rather nebulous spectacle that is the political party, as well as an attempt to subject this phenomenon to more focused mechanisms in the lawyer’s stock-in-trade. Of the real appearance of the political party, we thus observed23:
“...the political party, in its essence, is a broad organization of people set up for the purpose of articulating ideological preferences, and constituting these into a public platform for claiming control [over] the vital machinery of government. At this level, such an organization is a creature of politics, and may have little juridical quality in its make-up. Such a position is likely to remain true whether or not the party is a monopolistic one.”

From that threshold we considered the interplay between the political party and the Constitution, making our observation as follows24:

“The role of the party has a fundamental bearing on the constitutional-legal set-up. It is clear that the very raison d’être of the party is to gain ascendancy into the regular executive and legislative machinery of the State, and thus to take charge of the implementation of the vital legal instrument which is the State’s Constitution. Attainment of this end will inevitably place the party in a strategic position which allows influence (to varying degrees) over the Executive, and Legislature and the Judiciary.”

In such a perception, we are fortified by the work of Professor Maurice Duverger, Political Parties25:

“The degree of separation of powers is much more dependent on the party system than on the provisions of the Constitution. Thus the single party brings in its train a...close concentration of powers, even if the Constitution officially prescribes a marked separation: the party binds very closely together the various organs of government. Its role is no different in a pluralist system, but simply less marked26.”
It validates my argument developed two decades after Duverger’s study (in 1984):

“[R]egular constitutional machinery never comes into [operation], unless and until a prior act, a prior decision, has been taken by some [person or entity] on the basis of discretion. Now discretion...obviously is not, unlike the constitutional machinery in question, described in an enactment. Discretion [in that sense] must, thus, be exercised in a ‘political context’, with political authority, and with political common sense.

“Which at one ushers in the party, as the proven organ of political arrangements, of political decision-making.”

My works on the priority-setting in political parties, structurally unfolding into the direct mechanisms of legal and judicial characteristics, came down to a conclusion as follows:

“In so far as their ultimate purpose is the regulation of public power, Legislatures, Executives, Judiciaries and Ombudsmen are political phenomena, and the most basic problems involved in their operations are political. Such problems emerge from questions pertaining to the art of government, but the basic problem will have various levels of refinement. In quest of solutions, institutions (of varying degrees of technique-orientation) have been designed which enhance or lessen the openly political character of the relevant matters. Thus, certain institutions, such as judicial tribunals, would claim to be founded upon a straightforward legal scheme, to the exclusion of other phenomena. Lawyers will label certain public matters or institutions as juridical even though these phenomena, in real life, will not entirely cast away their other characteristics. So it is that the Legislature is no less-eminently a political phenomenon than it is an aspect of the constitutional and legal order.
“The degree of technical refinement varies from one constitutional organ to another. There will, moreover, be a variation in the degree of refinement that can be achieved in the case of any particular constitutional organ, as between one country and another – depending on the peculiar history and social context of each country. At the very foundation of all the public institutions is the political element; it is this which...relates every major problem to the party system.”

I propose the foregoing formulation as a conclusive statement issuing forth from my studies, on the relevance of political organization through parties, to the critical structures of the constitutional order, and to the primary mechanisms of those structures – including the Judiciary with its armoury of juristic principles, concepts and technicalities.

Such is the context in which I now consider (in Section C of this Chapter) the position of the Legislature and the Executive – as it emerges from my written works.

C. THE LEGISLATURE AND THE EXECUTIVE: WHO CONTROLS WHOM?

(a) Introduction

The paradoxes in the sphere of democratic values, and the attendant question of power-balances flowing from the heterodoxies of the common African-type political party, led me to the attendant question: to what extent was the Executive Branch amenable to the checks-and-balances mechanisms in the form of the Legislative Branch and the Judicial Branch? Only a systematic inquiry on this issue would lead to a proper conclusion on the status of government – as one founded, or not, on the principle of constitutionalism. And whether or not, in contemporary times, governance founded upon constitutionalism has been
achieved, is the threshold for reforms in quest of lawful and legitimate practices. The question, therefore, goes beyond academic inquiry, and beyond conventional professionalism; it invokes broader values for ensuring democracy and good governance.

(b) Works of Scholarship

A central theme in my studies on constitutionalism has been the degree to which the checks-and-balances principle is achieved, in African countries in general, but more specifically, in relation to the Kenyan experience.30

After considering the relevant constitutional provisions and the detailed law forming the functional apparatus of Parliamentary control of operations within the Executive Branch, in a comparative context, I came to the following inference:

“But if the great democracies of the West have witnessed a marked decline in the position of the legislative organ, this has been so to an even greater degree in the States of the Third World, many of which have attained independent statehood on model Constitutions derived from the West. With severe problems of economic development, of often widespread disunity among the subjects, and with the imported governmental institutions as the main basis of legitimate authority, the leaders of these countries generally found themselves pursuing a course of power centralization. Many of them, in their search for a stable political order, have adopted highly centralized structures in which the legislative organ is often relegated to a much reduced role – a phenomenon which has been termed, aptly perhaps, ‘la minorisation du Parlement’.”

In that work I noted that Parliament’s primary constitutional mandate is the making of laws which set the ultimate direction for all activities and all
persons, as may be specified. But Parliament’s powers then go beyond that level:

“For, the process of application of laws once passed, necessitates the exercise of even further powers by the Legislature....[If] the Legislature has the ‘right’ to ensure the execution of the laws which it has made, this, clearly, implies that it has a general power of control – control against abuse by the Executive of its own power, in breach of law...; against waste of public resources....”

Thus, as a matter of constitutional theory the following powers would normally vest in the Legislative Authority: (i) powers of law-making; (ii) powers for the restraint of bad administration; and (iii) powers to investigate the application of public resources by the Executive Branch.

I further inquired into the Legislature’s frame of operations, and its capacity for pursuing the various lines of power-control. And I found that there were, in practice, great difficulties in executing the required controls over the Executive Branch:

“The expanse of the Executive Power in the new States is striking. Unlike the stable nations of the West, the African States...have generally lacked a base on which to construct liberal institutions of public law; and with their fragile economic structures they have relied on the political leadership, the Executive Authority, for help in the creation of a measure of stability. These States, with their little-developed cohesion of common purpose and the consequent lack of harmony in political motion, have tended to look to the Executive for direction and patronage. In these circumstances, such institutions as are currently evolving will do so under conditions in which the Executive Authority holds a special position of influence. Accordingly, although one may study such institutions in their
own right as organs of governmental authority, it is important to recognize that none of them, in the framework of public law, could approximate to the Executive organ in terms of power and influence.”

From a systematic evaluation of the Kenyan experience alongside the position obtaining in Francophonic Africa, with regard to the standing of the Executive in the post-colonial period, I thus concluded:

“The immediate realization arising from this study is that the Executive’s power and influence pervades and dominates the public life in the countries in question; that this experience boasts an historical continuity from the very beginning of the modern State, with the advent of colonialism, to the present. If the omnipotent Executive was essential to the colonial order by the very definition of that order, it has proved equally vital to the post-independence regime....”

From the foundations in the two studies, I followed up with a still more focussed inquiry on Legislative Control of Executive Power. This inquiry was inspired, besides, by the findings made by Professor Maurice Duverger, who had thus written:

“The importance of Parliament is much greater than that of legalistic or consultative bodies...: not only because of the scope of its powers of decision-making, but more so because Parliament, alongside the President of the Republic [in France], is the sole State organ that is elected in direct, universal suffrage and, therefore, that embodies national sovereignty.”

Duverger’s study, which was focussed on the French experience, was noteworthy for its emphasis on the majoritarian element in the Parliamentary
institution, as the basis of elevated status under the Constitution. Although the argument has merits in terms of the presumptive legitimacy of public agencies, it has emerged from my study that such a perception was not reflected in the operational relationships, in the typical African experience, among the primary organs of the constitutional structure.

In my study I considered the specific devices and mechanisms employed by Kenya’s Parliament, under its Standing Orders, in the power-control process⁴⁰; and I came to the conclusion that only a marginal power-control situation had been attained by the Legislature⁴¹:

“To what extent then has Parliament succeeded in holding the executive authority to its ‘positive obligations’? From the several examples given..., it will be seen that the legislative authority has played a valuable role in calling the attention of the executive to the latter’s obligations. But, as we have seen also, Parliament has in many cases been unable to compel the executive to perform what are seen as its responsibilities. Parliament’s failure is particularly striking in the sphere of individual liberty. It is hardly to be doubted that the vigorous attention of the National Assembly to the subject of human rights would have helped both to educate the public and to discourage any possible excesses on the part of the executive; yet it remains true that in this sphere, and, especially, with regard to the freedom of the person and of movement, the parliamentary voice has often had little effect....”

This outcome was indistinguishable from that in respect of the République de Côte d’Ivoire, which I had used as a comparative reference⁴²:

“The general style adopted by the Assemblée Nationale in the control of Executive Power is well described by M. Yacé: ‘[In] [Côte d’Ivoire], in
view of the Presidential régime, the methods of control available to Parliament are designed simply to obtain information, and lead to exchanges of views without sanctions. It will not, therefore, be possible for the Assemblée to compel the performance of any particular obligations of the executive. All that the deputies could hope to achieve would be, by persuasion, to get the executive to take what appears to be a necessary course of action. It must follow also, therefore, that Parliament’s role as a safeguard for individual liberty disposes of no independent character, and will in all probability turn on the stand taken by the party and on the influence which the executive authority may exercise upon the public sentiment through its control of party machinery.”

(c) **Majoritarian and Non-majoritarian Agencies of Safeguard: Appraisal**

The essence of my works on the mutual-check relations between the Legislature and the Executive, is that even though the former has been able to examine a wide range of issues of public interest it is, firstly, subject to the availability of relevant information – much of which lies with the Executive; and secondly, its impact on the Executive’s discharge of public responsibility has been limited. And the factor common to the two entities, of elective legitimacy, is precisely what, through the organizing-machinery of party systems, erodes the capacity for effective power-checks, as between these “majoritarian” constitutional agencies.

This paradox led me in my studies, to devote attention to the “non-majoritarian” dimension of the constitutional checks-and-balances. Consequently, the special focal point of my researches has been the functioning of the Judicial Branch, and its jurisdiction in safeguarding guaranteed rights and freedoms, and in holding the power of Government accountable under the
constraints of the Constitution and the ordinary law. I will in this Chapter, lay out the essence of my works in this other aspect of the control of the exercise of public power.

D. THE JUDICIARY, AND THE NON-MAJORITARIAN ASPECT OF CONSTITUTIONAL SAFEGUARDS

(a) Introduction

On practical considerations, majority-choice, as entry-point for good governance, is conventional wisdom, and is thus a foundation in the functioning of modern Constitutions. This is the operative principle in the Constitution’s assignment of primary governance roles to the Legislative and Executive Branches. But the lesson of history shows that the logic of majoritarianism has itself to be moderated by a set of safeguards. That this must be so, confirms the validity of Montesquieu’s observation in 1748:

“Lorsque dans la même personne ou dans le même corps de la magistrature, la puissance législative est réunie à la puissance exécutive, il n’y a point de liberté parce qu’on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement”44

Law-making and the implementation of laws, if perceived as sheer majoritarian functions, as is clear from scholarship records, are destined to devolve to just one State agency which then holds a blank cheque, posing grave risk to the checks-and-balances of the Constitution. This is typified by L. S. Amery in resigned tone:45

“Parliament is not, and never has been a legislature, in the sense of a body specially and primarily empowered to make laws. The function of
legislation, while shared between ‘King, Lords and Commons in Parliament assembled’ has always been predominantly exercised by Government which, indeed, has never allowed Parliament, as such, to take any active initiative in one of its most important fields, that of finance”.

Such historical experience is consistent with modern-day trends, in which the political party, as the electioneering intermediary, assures that in the pragmatics of governance, the base of the Executive Branch that conceives and pursues certain shades of ideology, ends up managing both the Executive and the Legislature: and on this account the majoritarian path is fraught with the very hazards which Montesquieu had identified.

The non-majoritarian establishment, which takes the form of the Judicial Branch in the first place, has proved itself as the most dependable framework of restraint to extremes of majoritarianism.

It is in such a context of play in the public-power institutions, that the essence of my research work has been conceived. Unlike the power-centralizing tendencies of the Executive Branch, which come covertly through political parties and related informal practices in politics, the non-majoritarian scheme is invariably anchored on express terms of the Constitution – a fact which accords the juridical safeguards plain transparency, and patent constitutional legitimacy. So vital is this category of legitimacy in good governance, it is indeed a condition to the realization of progressive governance as perceived in Africa’s modern Constitutions, including the Constitution of Kenya, 201046. The progressive element in the modern Constitutions reflects the ideals of “constitutionalism”, thus typified by B. O. Nwabueze47:
“Constitutionalism recognizes the necessity for government but insists upon a limitation being placed upon its powers. It connotes in essence therefore a ‘limitation on government; it is the antithesis or arbitrary rule; its opposite is despotic government, the government of will instead of law’48. Arbitrary rule is government conducted not according to pre-determined rules, but according to momentary whims and caprices of the rulers; and an arbitrary government is no less so because it happens to be benevolent, since all unfettered power is by its very nature autocratic. A dictatorship is thus clearly not a constitutional government, however benevolent it may be and a totalitarian régime is even less so.”

My research interest in the judicial function has been inspired by the perception that: this sphere of constitutional activity will provide the main antidote to the hazards of majoritarianism – a notion that may at first sight, appear to cast bleak coloration upon democratic principle. The practice of popular election, however, all by itself, may not coincide with the principle of constitutionalism. For, as Nwabueze observes49:

“... free elections based upon universal franchise do not of themselves alone create constitutional government. For as Wheare has pointedly observed, ‘universal suffrage can create and support a tyranny of the majority or of a minority or of one man’50.....”

Such intriguing scenarios in the interplay of vital constitutional agencies, have led to my specialised studies on judicial functions – studies subsequently turned to account in the cause of actual dispute settlement50a.

(b) Works of Scholarship

I bear primary responsibility for the design and preparation of an article
entitled “Judges and the Rule of Law in the Framework of Politics: The Kenya Case”\textsuperscript{51}, published in 1979. This study marks the opening of my inquiry on the role of the judicial process as player in the maintenance of the checks-and-balances of the Constitution. In that work we set out by illuminating the vitality, in fact and in historical experience, of the judicial organ – notwithstanding its non-majoritarian design – in the workings of the constitutional order.

The non-majoritarian element is essentially in respect of the engagement process: unlike those engaged by majority electoral resolution, the Judges, generally, belong to a ‘selected’ group. John Hart Ely, a scholar who devoted much attention to this notion\textsuperscript{52}, posits that non-majoritarianism is an essential legal check to governance otherwise founded solely on the casting of votes:

“... constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can”\textsuperscript{53}.

Ely’s argument is that checks-and-balances are vital, in good governance – a perception more colourfully depicted by Richard A. Posner\textsuperscript{54}:

“... the label, invented by Alexander Bickel\textsuperscript{55} and now standard, that has been affixed to the tension between democracy and judicial review: ‘the counter-majoritarian difficulty’.... ‘Counter-majoritarian?’ A euphemism for undemocratic. It would be more candid to say that the Constitution is a mixture of democratic, oligarchic, and autocratic government, with the House of Representatives being the democratic branch and the Senate quasi-democratic (basically democratic, but with a hint of oligarchy), the Presidency the autocratic branch, and the Judiciary the oligarchic branch. Each is a check on the others, so that the system as a whole is not dominated by the democratic, the oligarchic, or the autocratic principle.”
In any study of constitutional law – and my works are in this category – the watchword is *checks-and-balances*, as expressing the ideal standards of progressiveness in governance. This principle is reflected in our opening to the study of 1979:

“The judicial institution has been a constant feature in both the ‘home’ models and the exported versions of the Western governmental systems. Not only has it stood out as an immutable characteristic of the national constitutions in such cases; the judiciary – in particular such of its putative attributes as ‘impartiality’ and ‘independence’ – has been deliberately held out as the beacon of political civilization. It has been seen as the ultimate custodian of the cherished rule of law concept and by that fact the very hallmark of constitutionalism. These popular views proceed on the supposition that through its independence and impartiality the judiciary is the most suitable public device for the control of public power and the vindication of the rights of individuals, or such values as the society may hold essential to its integrity”.

The article portrays the conventional focus on the judicial function as being by no means purposeless, but rather, a safeguard for the social ideology of the individual-at-liberty to “fulfil himself [or herself] within the liberal economic and political philosophy” – an end realizable only where an independent constitutional organ holds the active agencies of governance to settled paths of the law.

Our finding, however, was that Kenya’s immediate post-independence Judiciary was not in a position to assure fulfilment of the goals of freedom for the individual: for the prevailing conflicts of social interests were set to impair the
scope for impartial decision-making by the Courts. We thus described the scenario:\(^{58}\):

“... beneath the façade of the legal structure provided for independence, there simmered many primarily political variables. There was, for instance, the problem posed by inequalities in business and land ownership. There were racial barriers; and there were restrictions on the enjoyment of personal freedoms. At the same time there were dominant-minority fears which were entrenched in the Constitution with the judiciary as their watch-dog. All these placed the judges in a position of ‘persuasion-strain’, the key factors of which were political dynamics”.

The immediate post-independence Judiciary in our perception, enjoyed “only limited accessibility and legitimacy”\(^ {59}\); for “the colonial orientation was likely to continue for at least some transitional years in the post-colonial era”\(^ {60}\) – and such was not a scenario conducive to the attainment of “the rule of law”\(^ {61}\). We perceived “the rule of law”, in this regard, as entailing more than mere formality of compliance with prescribed rules: the rule of law had come, as we argued, to bear new meaning, with fresh ingredients in the form of “certain minimum standards of human rights”\(^ {62}\). Modern instruments adopted under International Law, such as the Universal Declaration of Human Rights (1948) had given new, progressive meaning to “the rule of law”\(^ {63}\).

Our study showed substantial failure by the Judiciary to apply the letter and spirit of the law, in a manner that enhanced the fundamental rights and freedoms of the individual. We thus noted\(^ {64}\):

“Even as the political direction of the new nation became clearer, with greater identity in majority and minority goals as represented by a one-party State\(^ {65}\), there was evolving a judicial tradition of general inactivity in
certain areas of litigation. Where a case involved a test of powers as between the governmental organs, the judges would assume a low profile, rationalizing their inaction on the theory that the rule of law enjoined conservatism on their part. In a way the post-independence years were progressively revealing that the area of common mundane interests between the judges and the executive authority was much broader than that of their differences over abstract issues of governmental morality. Whenever it was that the judges did exercise a measure of control on public power this was generally only in ‘marginal areas’.

We reached a conclusion, regarding the profile of the Judiciary upto 1979 – which gave a starting-point for my later works. We thus remarked:

“From the case law of the 1960s and 1970s there seems to have been a remarkable continuity in judicial thought-process amongst the judges. Generally they have consistently found for the executive authority in matters of fundamental rights. The reasoning has tended to be overwhelmingly technical to the exclusion of issues of logic and substance. The general view of the judges would appear to be that litigation in most areas of constitutional law will raise ‘political questions’ which must be avoided in the interests of political expediency. As a result the judges have shown a disturbing inability to exercise any meaningful checks whatsoever on public powers. At the same time they have rarely given support to government endeavours to enforce a measure of egalitarianism in public institutions”.

Such an orientation rendered the judicial role indifferent to the consolidation of the Bill of Rights forming part of the Constitution:
“If... the Bill of Rights must be seen as a crucial aspect of the rule of law, it will be clear that the judges have hardly played the active role normally assigned to them in the fulfilment of that concept”.

We concluded with a hope, in our study, that has been re-evaluated in my more recent works (as I will show further on):68

“It remains to be seen what structural and personnel changes will be made within the higher echelons of the judiciary and how far such measures will facilitate a more sturdy commitment to the rule of law.....”

The constancy of the rule of law in modern conceptions of governance was the subject of another co-authored article on “The Rule of Law in General and Kenyan Perspectives”:69

This study departed from the threshold that “one inquiring into the reality or otherwise of the rule of law in Kenya would have to address oneself to the kinds of laws passed, their manner of execution, and the style of redress in the event of conflicting claims”:70. We then examined the criminal law; the ‘public security law’; and the law relating to individual rights and freedoms. We came to a conclusion which has a bearing on the judicial process as it was then evolving, in the Kenyan experience:71:

“In essence our view has been that the rule of law is a philosophic conception, much wider than the bare requirement of conformance with specific laws. It places a duty on the lawmakers, the law-executors, and the adjudicators. The cardinal requirement is that all these organs ought to predicate their strategies and initiatives on the ultimate goal of human equality. The Legislature and the Executive must make and apply laws that
will vindicate the dignity of [men and women]. The Judiciary must enforce these laws with independent will and resourcefulness, and with the goal of human dignity always in mind. This is the essential philosophy of the common law....”

The Kenyan Judiciary at the time, as we noted from the case law, had not professed its legitimate responsibility for holding public agencies to account on the rightful standards; and its operational deportment had been distinctly on the side of complacency. As we remarked72:

“...so far as case law would show, there has tended to be a reluctance to take conflicts centering on the Bill of Rights to the Judiciary for redress. Though one might partly attribute such an attitude to want of a general sensitization of the wider public to processes of law, and [to the] unavailability or expensiveness of forensic service, it is perhaps a more important contributory factor that the courts have not seen themselves ... as the chief guardians of ... individual rights under the Constitution.”

My studies ranged between, and blended themes on, fundamental issues of theory, comparative experience, and the African and Kenyan forum of judicial activity in the context of constitutional norm. In 1988 I authored such a coalescent article by the title, “The Supremacy of the Constitution – in Comparative Context”73 Building a foundation of basic legal principle to judicial restraint of political power, I adopted the American Supreme Court’s position in Marbury v. Madison74, as articulated by Chief Justice Marshall:

“The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States ....
“That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

“This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

“The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.”

Such a profound explication of the Constitution, as the foundation and governing basis for the entire political and social set-up, today expresses the juridical framework for the primacy of the judicial function, notwithstanding its non-majoritarian orientation, in the validation of governance activity. In the words of Chief Justice Marshall:

“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to
the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”

Remarking the historic importance of Marbury v. Madison, and signalling its comparative relevance, I had thus observed76:

“There appears ....to be a fortuitous element in today’s unique American brand of constitutional jurisprudence, in which the courts are the unquestionable interpretive authority, and to this extent, the other organs have to recognize what Professor Terence G. Ison77 calls ‘the sovereignty of the judiciary’. History does not necessarily follow a logical course; and, logical or not, this American experience has had considerable influence, acknowledged or unacknowledged, on the theory and practice of the supremacy of the Constitution, in other countries with written Constitutions.”

Upon such a perception of the foundation of principle on the Judiciary’s interplay with other States agencies, I proceeded in my article to consider the state of the Constitution in the African context, with a focus on the Kenyan experience.

The notion that the Constitution’s principles, as interpreted by Judges, are the foundation of public governance, is postulated in, and linked with Kenyan case law, in which, in one case78, it was thus held:

“It is quite clear that the Constitution of Kenya is paramount and any law, whether it be of Kenya, or of the [erstwhile East African] Community or any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of that conflict. The Courts are
the guardian of the Constitution and their duty is in all circumstances to enforce its provisions as they are interpreted in the Courts ....”

Notwithstanding such a background of constitutional principle, my article confirmed, from Kenyan case law up-to-then, the prevalence of an essentially conservative judicial approach, that had emerged in the earlier studies. Such an approach had been founded on the rationalization that the Constitution of Kenya prior to 2010, had been one that allowed the Legislature unlimited powers of effecting amendments to the Constitution itself; and that the Judiciary’s remit in the circumstances, was only a limited one.

Indeed, the Constitution of Kenya, 1969 with its numbers of subsequent amendments, bore a minimalist orientation regarding the Judiciary’s charge in the prevailing balance of powers. Of this scenario, I thus noted79:

“Ultimately, ... it is the constitutional function of the Judiciary to test ordinary legislation, for validity, against the governing yardstick of the Constitution. But whereas the American Supreme Court is presented as the supreme arbiter in constitutional questions, the Kenyan Court expressly acknowledges that Parliament has the last word, if – and only as long as – it complies with the stipulated procedure of amendment [Section 47 of the Constitution of 1969]....”

Such a judicial approach not only missed out on the progressive comparative judicial experience, but also overlooked the tradition of best practices which had evolved in international human rights law. I had made this observation in another work79a:

“We have treated the various constitutional concepts that touch on the domestic implementation set-up, as well as considering relevant constitutional decisions, and analysed the pattern of jurisprudence that
emerges from the process of human rights litigation. A general, if somewhat disquieting, message issuing forth is that the broad scenario of human rights at the international level, narrows down considerably, owing substantially to the operative judicial technique at the locus of ‘consumption’ of the individual State. This raises a major challenge as to how best to integrate the more liberal international law scheme into the domestic one, and in a harmonious manner that will enable the municipal enforcement set-up to fully capture and give effect to the obligations of international law.”

In a more elaborate work, I again undertook a study on the Kenyan Judiciary, and on its place in the power-balances of the Constitution.

My study analyzed the range of executive powers falling due for judicial restraint as, firstly, the stipulated powers of public agencies entrusted with specific spheres of administration; and secondly, the broad powers asserted by the Executive, which had impacts on the individual’s civil and political rights safeguarded in the Bill of Rights of the Constitution. The “administrative law” dimension being routinely regulated by judicial methods, had evolved over the years and was the subject of numerous precedents – thus presenting less complication than the issues flowing from unpredictable conduct of the Executive, set against the individual’s civil and political rights. It is this latter category, however, that truly defines the stature of the Judiciary as a constitutional check-and-balance agency, as had become apparent in my earlier works. I would note in particular in this regard, the jointly-authored study published in 1988. The study showed the judicial process to incline distinctly in favour of public power, rather than of the individual’s claims under the Bill of Rights; we thus observed:
“...individuals stand on inferior ground, as compared to the State, and... what they may claim as theirs must emanate from the interstices of the State’s apparatus.”

The study in Constitutional Development confirmed my earlier findings on the stature of the Judiciary, in the context of fundamental-rights guarantees, in the light of encroaching trends within the Executive Branch, in the entire post-independence period up to the developments culminating in the promulgation of a new Constitution on 27 August 2010. In that work I had portrayed the prevailing judicial approach as follows:\textsuperscript{84}:

“On the whole, such a judicial approach is a ‘restraint-approach’, and from the case law reviewed, its strengths and weaknesses have become apparent. This approach is unlike the activist one, which has been described as ‘constitutive in theory, liberal in conception and teleological in essence’\textsuperscript{85}. It is literal, assigns a passive role to the courts, and generally takes a preference for proceduralism”.

The relentless struggle for an opening-up of Kenya’s entire governance machinery, that flared up in the 1990s and after, and the socially-disruptive consequences of the electoral crisis of 2007, led to the adoption of a radically different Constitution which has, since then, rapidly established itself as the basis for principled governance in a new, progressive dispensation. This, for the scholar in constitutional development, revealed the standing urgency of inquiring into the play of political power, and in particular, the interplay between the main agencies of the governance-machinery.

In this context comes my more recent work, Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order\textsuperscript{86}. The said work claims originality not just because it is one of the very
first researches into the judicial system following the remarkable political transition, but because it takes the theses of the earlier studies a step further; and also because it is constructed around scholarship alongside judicial practice. My decades of academic engagement led on to a Bench career in 2003, in the course of which I have rendered judicial decisions; adjudicated – both collegiately and individually – upon constitutional issues; and observed from close-range the dynamics of judicialism and constitutionalism. This recognition is conveyed in the preface to my book:

“With a practical experience that has richly complemented my academic preoccupations, I, as citizen, subject and agent of the law, perceive the judicial function as a special governance undertaking, insofar as it bears directly on the resolution of ordinary disputes and, therefore, on peace-building in community; and more significantly, inasmuch as the judicial function plays a fundamental role in relation to the mode of exercise of power by the Executive Branch”.

My work, Ascendant Judiciary reflects the spirit of the Constitution of Kenya, 2010 and the accompanying democratic political dispensation which, by all perceptions, bears a firm and steady momentum. As I remarked in the introductory chapter:

“The course of history today shows...in particular in the light of constitutional trends in some African countries – that the Judiciary is not eternally consigned to the rear-end rank. In modern trends in democratic governance, the principle of constitutionalism is constantly running in parallel and in attendance, while prescribing the judicial statement as the final word. Therefore, the fact that the elected Legislature ordains the beacons of sacrosanct law, and that the duly-empowered Executive regulates public affairs in accordance with those beacons, accords these branches of government no superiority, in relation to the Judiciary”.
The study proceeds to account for this new perception of the mutual standing of the main arms of government, in the Kenyan context. The work posits that it is the Judiciary that has the advantage of entertaining the crisp issues of power-conflict, and of dispensing resolution “with finality”; whereas both the Legislature and the Executive proceed rather ponderously where the subject-matter is ill-defined – apart from continually running the risk of a possible contest to their actions; such contests coming up before the Judiciary with its definitive yardsticks founded on assessments of fact and law, alongside dispensations of privileged judicial discretion.

Indeed, acts of the other two State organs are comparably mitigated – for:

“so many a legislative or executive act often takes such numerous inputs of information or resolution by others, that, in the end, the ensuing ‘instrument’ is hardly recognizable as a reflection of the original design and intent: so it takes long to bring them about, creating many openings for challenge, occasioning reversal, and the outcome, in the process, ceases to be identifiable as a clear-cut exercise of constitutional power....”

Clearly, then, a special power devolves to the Courts from the interpretive competence; and of this power I had written:

“The judicial remit of interpretation of law is all-important, in any perception of governance powers under the Constitution. That the law is the substratum of all lawful governance-action is axiomatic. It is precisely this principle that assigns to the Judiciary the vital role of guardian of constitutionality and legality – and thus accords this organ the most treasured role in the design of the constitutional process.”
That perception has a new reality in Kenya’s constitutional dispensation founded on her Constitution of 2010, which is “generally acknowledged as one of the model instruments of democratic governance in Africa”\textsuperscript{92} – a point elaborated in my work\textsuperscript{93}:

“No\textsuperscript{t}able as a central theme of the Constitution constantly falling within the judicial mandate, is its longest Chapter, on the Bill of Rights [Chapter 4]. The Bill of Rights, indeed, is \underline{the main bond in the Constitution that creates the integrality of the judicial function and the process of democratic governance}.”

I have further elaborated the foregoing point, squarely invoking the judicial mandate as a vital element\textsuperscript{94}:

“No\textsuperscript{t} only is the subject of human rights always part of the \textbf{Judiciary’s agenda}, but the Constitution now lodges it in an enlarged judicial mandate – by rationalizing its protection as occasioned by the object of ‘preser[ving] the dignity of individuals and communities and [promoting] social justice and the rationalization of the potential of all human beings’\textsuperscript{95}. Such an elaboration of the mandate for the protection of human rights, necessarily extends the judicial mode of work beyond technical legalism, to perceptions in the social and political context.”

The foregoing argument is developed further, with a focus on the new profile of the Judicial Branch\textsuperscript{96}:

“Apart from the Constitution expressly anchoring itself in the Judicial Branch, it further empowers the Judiciary by expressly creating vistas for \underline{law-making by the Courts}. Firstly, the Courts are enjoined not to resort to inaptly-limiting technicalities. The Constitution provides that
‘justice shall be administered without undue regard to technicalities’ and this opens the door to a broad-based judicial approach consistent with creativity, as the operative law is ascertained’.

It is, indeed, precisely this interpretive empowerment to the Judges, that establishes the critical link that forms the crux of my Thesis: the common cause in the Constitution and the common law. The new Constitution declares in Article 259(1):

“This Constitution shall be interpreted in a manner that –
(a) promotes its purposes, values and principles;
(b) advances the rule of law, and the human rights and fundamental freedoms of the Bill of Rights;
(c) permits the development of the law; and
(d) contributes to good governance”.

The effect is to endorse the conventional judicial competence at common law, and to approbate the judicial role in the State’s law-making capacity in all spheres – including those of major constitutional processes and safeguards.

Of this scenario, I thus remark in Ascendant Judiciary in East Africa:

“Since the Courts are not called upon to take evidence on what ‘contributes to good governance’, it follows that the Judiciary has been empowered to take judicial notice of progressive and laudable tenets such as are known and, on that basis, to render decisions that serve the positive causes specified or signalled in the Constitution. In that regard, the Courts have been empowered to make an original contribution to the shape of the laws in force”.
By the commanding position in adjudicating on fundamental rights, as established by the Constitution, coalescences have arisen between constitutional rights as such, and ordinary laws of public administration such as have in the past, fallen squarely under administrative law as a common law category. This new reality led to the following observation in my book:\(^9\):

“The Constitution has opened up, and strengthened, the existing statutory framework for the exercise of the Judicial Review jurisdiction of the High Court”.

Of relevance to this observation is my further remark\(^1\):

“... if in the exercise of public power any agency fails to address itself to the ... ‘national values and principles of governance’, the resulting action or decision becomes prima facie irregular, improper, and contestable as an instance of bad administration; and therefore, the remedy of Judicial Review may be resorted to, with the object of having the decision quashed, or of compelling the public officer concerned to take a proper decision according to law, or, in a proper case, of prohibiting a cause of action that will be contrary to law”.

The effect is to define, in an original mode, the indistinct dividing line between constitutional adjudication and Judicial Review in contemporary Kenya, as contrasted with the conventional understanding. Of this scenario, I have observed\(^1\):

“If in the case of the English experience in which the formal written Constitution is alien, Judicial Review...is understood to carry a constitutional significance, this is distinctly more so in Kenya, with its comprehensively written Constitution which imposes obligations of
good governance on all public agencies and officers – thus making the executive domain and the scheme of public administration the focal points of legal controls asserted by the Courts. This, at one remove, attracts Judicial Review, and at another remove, invites constitutional adjudication. One, therefore, expects a vigorous invocation of the judicial process under the new Constitution, both within the framework of Judicial Review and of constitutional adjudication”.

My work has underlined the enhanced intimacy of the judicial role, and of the recognized practice of Judges – notably in the substance of common law tradition – in the entire scheme of constitutional governance, whether conducted by the Legislature or the Executive.

The common law, though historically of English origin, has proliferated throughout the world, establishing itself as a legitimate juridical tradition, and settling itself ‘organically’ on the Kenyan scene. This scenario of propagation is thus described in my work:\textsuperscript{102}:

“... when once this legacy was institutionalized and set in motion by the logic of the resilience of governance institutions, and by the stamina of norms attending social situations, it settled as a local baseline of law which could not be rapidly re-configured or discarded. This body of law became, in every sense, part of the law of recipient-countries; and by successful transplantation, the English common law had become part of the local law”.

Not only had the dynamic common law tradition provided an assured anchorage for judicialism in East Africa, but, in the contemporary times with the adoption of elaborate and vibrant constitutional profiles, that tradition has given just the requisite framework for new tasks falling to the judicial process.
Thus we have a true point of convergence between the scheme of the common law, and that of the governance charter embodied in the Constitution – a point which I have thus expressed:

“The common-law method, by entrusting so much initiative to the Courts, has played out in tune with trends in the making of democratic Constitutions, as such Constitutions reserve a special and pivotal role to the Judiciary, in the overall scheme of governance”.

To the theme of the common law’s convergence with judicial competence in the power-balances of the Constitution, I have returned in a more recent work, which portrays another dimension of the common platform on which the settled functioning of the common law squarely interlocks with the fundamental safeguards of the Constitution.

Throughout history, one constant sphere of the Courts’ involvement was property rights, and land-related claims. That theme, upon examination, is found to touch on certain issues central to the fundamental-rights guarantees of the Constitution:

“Land, as the baseline of all material property of the commonest utility, constitutes the beginnings of rights which crystallize into fundamental elements in the Constitution – the predominant basis of the legal system”.

And, of this pervasive factor – land – in its defining impacts upon judicial activity, I had thus written:

“Land, in its uniqueness as a category of property, provides the model operational transect-chain, not only between the core concepts to private law, but also between the spheres of private law and public law”.

I also observed:
“Land, in most African countries in which the economy rests directly upon it, has a **public significance that sets it at the centre of the governing constitutional arrangements**. The Courts are called upon to deal with this subject both in the conventional setting of dispute settlement, and by the terms of special constitutional arrangements which embody ‘the spirit of the times’...”

I arrived at a conclusion as follows:

“The common law, with its strength as an established legal tradition, comes in handy: first, by its concepts, principles and rules; and secondly, by providing room for **new initiatives of interpretation and construction, based on broad principles of the new Constitution**. The stage is, thus, set for a rebirth and reinvigoration of the common law”.

My researches show that the common law method is the established judicial approach to certain fundamental issues now provided for in the Constitution. A notable illustration is in the sphere of the “right to environment”. The Constitution of Kenya, 2010, Article 42 provides that:

“**Every person has the right to a clean and healthy environment....**”

By the common law as applied in comparative jurisprudence, rights of an environmental nature have been perceived as an aspect of the right to life, so that safeguards for the two spheres are interpreted on the same lines. The Indian Supreme Court, in *Subhash Kumar v. State of Bihar and Others*, thus held:
“Right to life is a fundamental right under Article 21 of the Constitution [of India] and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water and air which may be detrimental to the quality of life”.

Now as the Constitution of Kenya provides\textsuperscript{111} that “Every person has the right to life”, it may be inferred that Kenya’s Courts have an obligation regarding “right to environment” which, by the common law method, they may interpret as referring to “right to life”.

My relevant works in this regard, further advance the thesis of common cause to the common law and the Constitution.

In a co-authored article, “The Right to a Healthy Environment: Possible Juridical Bases”\textsuperscript{112}, I had thus argued\textsuperscript{113}:

“… this right can reasonably be placed alongside rights recognized under international law – such as \textbf{right to life}, to liberty and the security of the person, to human dignity, to privacy…”

Of this interplay between “right to environment” and “right of life”, I had written\textsuperscript{114}:

“Human survival and the good life are directly nourished by economic and social activity, both of which place a constant strain on the carrying capacity of the environment and its resources. Intensive levels of social and economic activity undermine the environment, firstly, by eating into scarce ecological resources that have only a limited capacity to expand; secondly, by constantly producing wastes that pollute the environment and further depress its regenerative capacity; and thirdly, by distorting
the aesthetic order of the environment which is, by itself, a precious amenity for human life and health”.

My researches on issues of environmental rights, on their bearing in the Constitution, and on the scope for redress, establish that requisite solutions to relevant disputes will invariably be found to lie in the unrestricted motions of the common law tradition.

E. “LOW” CONSTITUTIONAL LAW: FRINGES TO CORE POWER-ACTIVITY

(a) Introduction

The focal point of the author’s works lies with a vital agenda of constitutions: namely, taming governmental power, by way of safeguards for fundamental rights and values, and by legitimate declaration of a status of legality in each instance. These works also illuminate the emerging lines of solution as coalescing with the conventional judicial scheme of the common law.

Works on such a path of preoccupation, unavoidably centre on the primary power-agencies of the Constitution, and necessarily falling within the category of ‘High’ constitutional law. Yet, the concerns of good governance ultimately focus on a variety of questions and subjects, some of which may not relate directly to the core agencies in the State machinery. This sphere of inquiry would fall under the mould of ‘Low’ constitutional law. Ultimately, however, both facets of the discipline are concerned with use or abuse of public power. This is the background to my works of scholarship, which have addressed both dimensions of the subject, and which have consistently signalled the judicial dimension, and the common law experience.
(b) Works of Scholarship

In an early study based on field research and analysis of works of record, I had appraised together the customary dispute-settlement process, and the State’s modern mechanisms of governance: in effect, underlining the vital characteristics of the judicial function which have been signalled in the course of my researches throughout. This picture is reflected in the following passage:

“Procedures and philosophies of dispute settlement are a function of the character of societal organization; this determines the nature and frequency of conflict occurrence. In the simplex societies of the pre-colonial era, with only local, subsistence economies, and minimal extra-tribal interactions, the occurrence of disputes and consequent [need for] settlement remained limited. Informal procedures were sufficient to cope with virtually all social conflicts. With the advent of colonialism a new society was introduced which changed the character of dispute settlement by increasing the frequency of human interactions and the areas of potential conflict. Since then, the values and institutions of the rural folk have been subjected to increasing external influence. The problem of the rural [person] has been that of developing his [or her] lot within the context of such values as modern education, health, employment, etc. The concepts and tools of self-fulfilment in such a context have been those conceived in a different legal tradition [from] the customary one. *Modern progress is tied to many rules of legal rights. The principles of redress of these rights are of a foreign origin, but with the imprimatur of the State. The principles of redress have thus ostensibly emanated from the State. They have then been zealously implemented by the Courts of law. The State has exercised its influence both through the Courts and the administrative hierarchy. As various customary institutions have*
atrophied, their places have been taken by lower echelons of the administration. The ubiquity of the administration in the process of conflict settlement has been enhanced by the active role played by the Government in rural development. While such a trend may be normal, it should be noted that State methods of conflict resolution will not always be consistent with the true aspirations of the rural folk as expressed in customary norms.”

This is a clear depiction of the designs of State power; its impacts on the claims of the individual in a rapidly-transforming social context; and the place of the modern judicial process in the context of individual rights.

My other works in the sphere of ‘Low’ constitutional law mainly turn on the rapidly-evolving sphere of environmental rights which, as already noted, are shifting to the centre-stage of direct constitutional claims, touching on the exercise of power by the Executive Branch, vis-à-vis the claims of the individual.

In my work of 1996117, it was noted that ‘right to environment’ had three alternative foundations: the Constitution; statute law; and the common law. In the Kenyan case, Wangari Maathai v. The Kenya Times Media Trust118, which pre-dated the current Constitution, the Court denied the applicant permanent injunction against the construction of a multi-storey building in a public recreation park, on the basis that she lacked locus standi. Her case would stand or fall on the judicial stand; and the doctrine as applied, disposed of it.

My work119 departs from such a restrictive approach to environmental-rights claims, and proposes a scheme of interpretation founded on the progressive scheme of international law. As I wrote120:
“To what extent does such a framework [as adopted by the Court in the Maathai case] provide space for claims of ‘right to environment’? The traditional basis of legal rights is the individual, who must have a tangible interest in the subject-matter of the claim. Environmental phenomena, by contrast, nearly always affect large areas, occupied by considerable numbers of people. This tends to give the environmental grievance a collectivist character, which is not contemplated by established doctrine. Moreover, those who do clearly have environmental needs will not always be able to show a definite property interest which they hold; and thus the problem of locus standi inevitably arises when they have a claim to make. In these circumstances, a ‘right to environment’ can hardly be brought to the test of the traditional criteria of legality.

“However, this right can reasonably be placed alongside rights recognized under international law – such as right to life, to liberty and the security of the person, to human dignity, to privacy, etc. Rights of this kind are not self-evident on the basis of ... [extant] legal doctrine; rather they are a policy-oriented category of rights, deliberately recognized by the relevant political authority on sheer principle”.

This perception is significant at two levels – both touching on the fundamentals of this Thesis. Firstly I perceive in our work a constructive common law orientation, which foresees the Judge’s interpretive inclination as broadening the scope of ‘right to environment’. Secondly, our perception today coincides with ‘right to environment’ as provided for in Article 42 of the Constitution:

“Every person has the right to a clean and healthy environment, which includes the right –
(a) to have the environment protected for the benefit of present and future generations through legislative and other measures...”;

and Article 70(1) which provides that:

“If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter”.

Thus, the environmental-rights question, which in 1996, appeared as not being central to legal claims bearing on the general functioning of the Executive’s mandate, has today become a vital issue in the interplay of constitutional agencies. This phenomenon, besides, advances further the thesis herein: there indeed is common cause between the Constitution, the common law and the judicial remit.122.

F. CONSTITUTIONAL SAFEGUARDS: ANCILLARY WORKS

(a) Introduction

The mainstream of my works, the focus of which lies in the power-balances of the Constitution, and the career of the judicial process and its conventions in that context, has continuously rested on a cushion of legal and constitutional principle derived from broad spans of history, and from the comparative lesson. The cardinal question of checks-and-balances to the exercise of public power, is an age-old one: save that it bears relative novelty, and comes in shapes of only recent experience, in the context of newly-transforming constitutional systems such as those found in Africa.
Inevitably, therefore, the scholar’s perception of solutions will incorporate well-worn theories and principles. And thus, in my studies, I have had to lay a foundation of ideas evolved by others, and practised elsewhere, to inform my perception and reasoning in respect of Kenya’s and Africa’s governance-scenarios. The extraction and profiling of such constitutional principles falls, in every sense, within the scope of an original scheme of work. I have on that basis, formulated works that turn to account, in developing the argument of my Thesis.

**(b) Works of Scholarship**

In a study of the late 1970s¹²³, I had related to the calls of international law, and the perceptions of earlier scholars, the fundamentals of Africa’s contemporary concern with constitutional checks-and-balances, in these terms¹²⁴:

“The growing international spirit, which began to register [with] the formation of such organs as the United Nations, was addressing itself to the old fundamental question of the needs and goals of mankind. The human rights debate was on.

“The United Nations Charter, in its original form, was silent on the question of human rights. This hiatus was, however, filled by the Universal Declaration of Human Rights and Freedoms adopted in 1948....*This Declaration provided a model formula for individual-State adoption for purposes of national institutional organization. Its essential spirit.... was one of human dignity and equality.* It enjoined adopting States to make normative and [securely-] guaranteed arrangements for the sanctity of human life, liberty, freedom of conscience, freedom of speech and association*.”
To the body of international law, as a reference-point in the making of Constitutions, I had in another work\textsuperscript{125}, annexed the common law and the attendant juristic practices of the Western countries, as a benchmark in the construction of African governance systems\textsuperscript{126}:

“When the cake of [local] custom crumbles, a hiatus is exposed in the entire social order, which must, perforce, be filled by some agency of stability, of normative authority. This need is primarily met by the statute law – a regime of law founded upon Western law. The new legal order (partly constituted also by such elements of Western law as common law and equity) is obviously vital to the normal working of the society”.

Such works illuminate the pertinence, in Kenya’s constitutional transformation, of those progressive political values and operational safeguards incrementally lodged in Western governance structures – a phenomenon of which I had thus written\textsuperscript{127}:

“The Judiciary, as an important player in the constitutional balance of powers, was a major element in the negotiations attending the process of decolonization in Africa. Firstly it was viewed as one of the vital elements in the political civilization of the West, and which ought to be bequeathed to new African States; and secondly, the Judiciary was regarded as the main restraint upon the exercise of power by the Executive, and as the core of the principle of constitutionalism as a factor in post-colonial administration.”

The Judiciary and judicialism, plainly, are the very essence of governance-civilization in the constitutional settings of the Western countries – a perception recorded in one of my earlier studies\textsuperscript{128}:  

57
“In the British experience, which at independence had influenced the content of a number of African Constitutions, the basis of legal rights is the common law..., which is the source of most of the most important principles guiding the Courts in the protection of individual rights whether these be constitutional or other. This aspect of English law was received only in part by African countries, which provided for constitutional rights in modified form with specified procedures of enforcement. The African approach was more similar to the framework of rights under the American Constitution which, however, gives the Courts a much larger power of interpretation of the express safeguards of the Constitution.”

NOTES

1. John Emerich Edward Dalberg Acton, First Baron of Acton (1834-1902), the historian and moralist who thus expressed the opinion in a letter to Bishop Mandell Creighton in 1887; see file://D:\absolute-power-corrupts-absolutely.html. (It is plain from the evidence in this work that Lord Acton was merely expressing a perception amply explicated in scholarly works).


   “Western institutional theorists have concerned themselves with the problem of ensuring that the exercise of governmental power, which is essential to the realization of the values of their societies, should be controlled in order that it should not itself be destructive of the values it was intended to promote. The great theme of the advocates of constitutionalism...has been the frank acknowledgement of the role of government in society, linked with the determination to bring that government under control and to place limits on the exercise of its power.”

“When a court invalidates an act of the political branches on constitutional grounds..., it is overruling their judgment, and normally doing so in a way that is not subject to ‘correction’ by the ordinary lawmaking process.”


8. Id. (n.5), p. 333 [emphasis supplied].

9. Ibid.

10. Id. (n.5), at p.334 (emphasis supplied).

11. The changes, for instance, over time, ushered in the Constitution of Kenya, 2010 – a comprehensive new formula of governance with a Bill of Rights making up the longest Chapter [Chap.4] with as many as 40 Articles [Arts. 19-59] safeguarding *inter alia*, freedoms of expression [Art.33]; the media [Art. 34]; access to information [Art.35]; association [Art.36]; “assembly demonstration, picketing and petition” [Art. 37]; political rights [Art.38]; economic and social rights [Art. 43]fair administrative action [Art. 47]; fair hearing [Art.50].
This trend had been anticipated in my work nearly two decades earlier [Id. (n.5) (p.334)]:

“An outstanding beneficiary, in terms of the safeguards of the Constitution, from the recent constitutional change in Zambia and Kenya is the freedom of assembly and association. The gains made in this regard are, moreover, not terminal gains; they will, by virtue of their design, constitute a regenerative framework for yet more change, in the direction of still greater liberties.”

12. Id. (n.5), p. 337 (emphasis supplied).

13. Of the Constitution as inherently a document of principled direction to governance, ultimately under the watch of the Judiciary, there is comparative support to my perception. Writing bout the American Constitution and America’s Supreme Court, Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court (New York: Anchor Books, 2008) [p.351] thus remarks:

“...the grist of Supreme Court work – constitutional law....[T]he majestic generalities of the Constitution.”


15. Id. (n.5), p. 349.

16. My co-author, a first-rank student in the University of Nairobi Law School’s class of 1984-87 which I taught, later studied under the late Professor Ian Brownlie, obtained the D. Phil. and is currently on the senior academic staff of Queen Mary College, University of London. The publication appears as: “The One-Party State and Due Process of Law: The Kenya Case is Comparative Perspective,” The African Journal of International and Comparative Law, Vol. 1 Part 2 (1989), pp. 177 – 205.


18. 393 U.S. 23 at p. 32.


22. Ibid. (emphasis supplied).

23. Id., p. 182.

24. Id., p. 183 (emphasis supplied).


26. That such is a situation found in different political experiences, emerges so plainly from the classic study by Jeffrey Toobin (op.cit.). He writes (at p.322) of the Republican desire to maintain a Supreme Court Bench that was single-mindedly beholden to the conservative ideology, during the Presidency of George Walker Bush:

“No issue mattered more to Cheney [Vice-President] (and to Bush...) than preserving the power of the President, especially with regard to what the President called global terror. International obligations, and especially the Geneva Conventions, drew sneers in this White House. The Vice-President believed that since the Nixon years the Executive Branch had steadily ceded authority to Congress, the Courts, and even international institutions, and he made it his mission to arrest that decline....As important as abortion was to the outside conservative groups, the issue of Executive Power – and stopping the meddling of liberal Judges – was to Cheney.”


29. This argument is borne out by the premium that American political parties have, over the centuries, placed on influencing nominations to the Supreme Court Bench. Of this strife over control of candidature for the apex Court Bench, Jeffrey Toobin, op.cit. (n.13, at p. 395) writes:

“So one factor – and one factor only – will determine the future of the Supreme Court: the outcomes of Presidential elections. Presidents pick Justices to extend their legacies....The days when Justices surprised the Presidents who appointed them are over....

“[T]he Court is a product of a democracy and represents, with sometimes chilling precision, the best and worst of the people. We can expect nothing more, and nothing less, than the Court we deserve.”

31. Id., p. 297.

32. This phrase in French, in essence, means “the disempowerment of Parliament.”

33. Id., p. 311.

34. Id., pp. 311-312.


36. Id., p. 319.

37. Id., p. 336.


42. Id., pp. 542-543.


44. My translation: “When, in the same person or governing body, the law-making power fuses into the dispatching power, it’s the death knell for liberty: for it’s apprehended the same overlord or lawmaker will craft oppressive laws, enforced oppressively.”


46. Promulgated on 27th August, 2010, replacing the Constitution of Kenya, 1969 which had been repeatedly amended and which itself had come as the climax of radical amendments to the original Independence Constitution of 1963.


49. Id., pp. 1 – 2.


50a. See Chapters 3, 4, 5.


53. Id., p. 183.


56. At p. 254 (emphasis supplied).

57. Id., p. 263.

58. Id., p. 267.

59. Id., p. 279.

60. Ibid.
61. Ibid.
62. Ibid.
63. Id., pp. 279-280.
64. Id., p. 280.

65. The democratic template embodied in the multi-party system of the Independence political dispensation (1963) had been undermined by the dominant power-groups, Kenya becoming first a *de facto* (1970) then a *de jure* (1982) single-party State; but against this, the civil society’s forces of pluralism triumphed in 1992, in a dynamic movement of reform which culminated ultimately, in the modern political dispensation underwritten in the Constitution of Kenya, 2010. My works of constitutional scholarship have laid their beacons in such a context of *historical progression*.


66. Id., p. 281.
67. Ibid.
68. Ibid.


70. Id., p. 118.

71. Id., p. 126 (emphasis supplied).

72. Id., pp. 126-127 (emphasis supplied).


74. 5 U.S. 137 (Cranch) (1803) (emphasis supplied). The more-or-less universal authority of *Marbury v. Madison* merits explication. This case, both for Bench-work, in the construction of juridical profiles, and for the scholar in quest of logic in the resolution of power-related disputes, provides a base-line, even though the fact-scenarios occasioning it were *American*, and were lodged in a
localized political context. The decision amounts to an authentic constitutional baseline, bearing a legitimacy founded upon historicity.


75. 5 U.S. 137 (Cranch) (1803) [emphases supplied].


83. Id., p. 49.

84. Id (n.8), pp. 170-171.


87. Ibid., p. 23.

88. Ibid., p. 25 (emphasis supplied).

89. Ibid.

90. Ibid. (emphasis supplied).


93. Id., p. 27 (emphasis supplied).

94. Ibid. (emphasis supplied).

95. Article 9(2).

96. Id., p. 28.

97. Article 159 (2)(d).


99. Id., p. 63.

100. Ibid.

101. Ibid., p. 72 (emphasis supplied).


103. *Ascendant Judiciary in East Africa*, op.cit. (p.84).

105. Id., Chap. 7. ....

106. Ibid. ....

107. Ibid. ....(emphasis supplied).


“Property is an essential foundation of all legal systems. The relationship between man and things, the right in relation to property, vary in different systems and different juridical contexts, such as inheritance, possession, finding, tort. It is these rights that are the traditional subject matter of litigation and are the defined and precise tools most easily used by the judiciary. Consequently, in establishing an interest in locus standi issues, rights arising from property often serve as the measurement of such an interest.”


111. Article 26(1).


116. Id., p.83 (emphasis supplied).


119. See note 117, supra.


121. Note 117, supra.


124. Ibid., pp. 113-114 (emphasis supplied).
125. J.B. Ojwang, “Legal Transplantation: Rethinking the Role and Significance of Western Law in Africa,” in Peter Sack and Elizabeth Minchin (eds.) *Legal Pluralism* (Canberra: Australian National University, 1986), pp. 99-123.

126. Id., p.113.


THE JUDICIAL PHASE AND THE COMMON LAW LESSON

A. INTRODUCTION

My researches illuminated the conflictual terrain in the functioning of the main constitutional organs, but also signalled the special potential role of the Judiciary, in such a state of discord. It emerges from my works that, in spite of State acknowledgement of primary governance-values advocated by international law, and espoused in the comparative lesson, Kenya’s Executive had carried its mandate with minimal inhibition; and the judicial task as regards the Constitution’s safeguards, had largely been imperfect, under the first Constitution of 1963 and (in particular) the succeeding Constitution of 1969.

The common law theme has been canvassed as the concept by which the Kenyan Judiciary, notwithstanding impediments perceived as flowing from the letter of the Constitution, could have adopted more progressive interpretations such as would sustain the requisite power-balances.

The common law comes with an apt tradition which, as this Thesis posits, places the Judiciary squarely in charge of conflict-resolution and power-balancing – adopting progressive schemes of interpretation, under the express terms of the Constitution of Kenya, 2010. This Constitution by its democratic cast and by its recognition of individual and group rights of many categories, has laid for the Judge a multifaceted platform for independent and principled interpretation of the law; for pronouncement on fundamental rights; and for a declaration of power-balance status.

Such a scenario brings forth a second level of inquiry: that of constitutional scholarship alongside judicialism. The author’s opportunity to research into the interplay of governance entities, and to identify its operational and intellectual
dilemmas, has taken a more focussed dimension, with an appointment to the Superior Court Bench, at which relevant points are invoked, and canvassed, and judgment dispensed. Taking on the essential theme of my academic research (as depicted in Chapter 2), I will highlight the lines of reasoning and perception that have led me in some of the constitutional matters coming up before my Court. In this way, I propose to further advance my thesis of the common cause between the Constitution and the common law, by exhibiting my selected “works from the Bench.”

B. THE TASK OF THE KENYAN COURTS: BUILDING UPON THE COMMON LAW’S CREATIVITY

Instances of intractability on the part of the Executive notwithstanding, it is the standpoint of this Thesis that it is not mere pious hope, to look to the common law as the operational framework for power-balances under the Constitution.

In governance practice in the received tradition of constitutionalism, the Judges have, by necessity and by recognized mandate, charted the path in all justiciable dispute settlement – via the common law process. Just as it was not in those circumstances, possible for any other State entity to run alternative schemes of detailed law-making, so does the Constitution of Kenya, 2010 recognising that it falls to the Judiciary to apply its judicial methods in rendering justice in the name of “the people”, and in ensuring that “the purpose and principles of this Constitution shall be protected and promoted.” The Constitution empowers every person “to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention.” And when the Court is so moved, it shall interpret the relevant provision of the Constitution:

“in a manner that –

(a) promotes its purposes, values and principles;
(b) advances the rule of law, and the human rights and fundamental freedoms of the Bill of Rights;
(c) permits the development of the law; and
(d) contributes to good governance.”

The Constitution’s trust in the Courts as the purveyors of the safeguarded rights is reinforced by the charge that, they are to apply operational juristic methods to consolidate the law relating to fundamental rights – without necessarily referring to any other State organ that deals with laws or law-making. Article 20(3) thus stipulates:

“In applying a provision of the Bill of Rights, a court shall –
(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

The trust in the judicial method thus declared, is further assured in Article 20(4):

“In interpreting the Bill of Rights, a court, tribunal or other authority shall promote –
(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
(b) the spirit, purport and objects of the Bill of Rights”.

It is my argument that this definite latitude entrusted to the Courts, firstly, has a bearing on the power-balances under the Constitution: insofar as, to sustain the various rights-safeguards is, intrinsically, to limit such powers as would tend to compromise them; and secondly, the Courts are being invited to apply the
juristic method that they have perfected over the years – namely, the \textit{common law}.

The Courts perfected the common law over a period of centuries, as their emblem in the resolution of most justiciable disputes; and it is this very emblem that they will apply to the dispensation of justice under the constitutional law.

The judicial style is abundantly illustrated in numerous cases decided throughout the common law world, over the years. A typical instance is the remarkable decision of the English House of Lords\textsuperscript{1b}, \textit{Donoghue v. Stevenson}\textsuperscript{1c}.

The question in that case was whether the manufacturer of an article of food or medicine sold on a large-scale, \textit{via} a plurality of agencies through contract and sub-contract, owed any \textit{duty of care} in respect of product-quality, to the ultimate consumer. Despite any moral inclination to the contrary, there had been no provision of the law creating an \textit{obligation} between such a manufacturer and the many anonymous consumers of the product. The Court, in performing its mandate of rendering justice upon being moved, called in aid the common law convention, laying down the law which remains operative to-date\textsuperscript{1d}. The core principle comes in the remarkable phraseology of Lord Atkin of Aberdovey\textsuperscript{1e}:

\begin{quote}
“\textquote{At present I content myself with pointing out that in English law there \textbf{must be}, and \textbf{is}, some general conception of \textit{relations giving rise to a duty of care}....The liability for negligence...is no doubt based upon a \textbf{general public sentiment of moral wrongdoing} for which the offender must pay. But acts or omissions which any moral code would ensure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this \textbf{way rules of law arise}}\”
\end{quote}
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, in law 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.”

The principle thus articulated was then applied to the relevant fact-scenario:

“...by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.”

Such a standpoint of the English Judiciary, in the setting for the dispensation of justice, is also the standpoint of the Kenyan Judiciary, in the design of the Constitution. Kenya’s Judiciary has been entrusted with express mandate by the Constitution, to enlarge the common-law template, and to give fulfilment to the declared values, principles and safeguards.
C. WORKS FROM THE BENCH

(a) Relevant Questions

What is the manifestation of the power-play between the primary State organs, in matters that come up before the Courts? To what extent are the Courts able to maintain the safeguards of the Constitution, by calling the powerful agencies of State – be it the Legislature or the Executive – to order?

(b) The Executive and the Individual’s Safeguards:

Muema v. Attorney-General and Two Others

This is one of the pivotal cases, centring on the inclinations of the Executive Branch as against the individual’s safeguards under the law, that I had occasion to hear and determine from the Bench.

The plaintiff had been recruited into the Kenya Armed Forces in 1975 and, in the course of 1993, the third defendant (the Commissioner of Police), acting at the behest of the political authorities of the Executive Branch, initiated prosecution against him, in a case that turned out to have had no supporting grounds. But that case provided the pretext for the second defendant (the military Commander) to compel the plaintiff to resign his commission in military service; and he was then subjected to criminal process in the civilian Courts – circumventing the court-martial procedure (with its established safeguards) which applied to those in military service. The civilian Court, quite conscientiously, dismissed the charges and affirmed the plaintiff’s rights and liberties. So this citizen, the plaintiff, had been manoeuvred out of his career-stationing on entirely sham grounds. Apprehensive of this injustice, the plaintiff moved the High Court, and appeared before me, pleading that “he had been unjustly treated by the defendants who had wrongfully arrogated...the functions of the President and the Service Commander and thereby [caused] him to suffer illegal arrest, malicious prosecution and financial loss”. As reported:
“The plaintiff asked the Court to issue a declaration that his removal from his military employment was illegal, null and void and that his arrests and prosecutions were illegal and malicious. He sought general damages for these wrongs as well as for illegal removal from office, loss of promotion, injury to reputation or general damages for unlawful termination of employment....”

Full evidence was adduced in Court, and formed the foundation of my judgment of 2 June 2006: this began from a synthesis of the plaintiff’s and the defendants’ cases as pleaded, to an analysis of the content, tenor and effect of testimonies; to an evaluation of the submissions⁴; to an appraisal of the relevant civil and military law; to a consideration of relevant case-authorities.

The burden of the defendants’ case was captured in their Advocate’s submission⁵:

“We humbly submit that there is no protection [against] removal [from military service] under the Constitution....There is no specific constitutional provision that prevents the removal of an officer [by virtue of military law].”

Such was, in the Court’s perception, a distinctly formalistic view of the relationship between the safeguards of the Constitution – which are broad and all-embracing – and the limited-profile terms of specific, ordinary statutes and regulations. I perceived the Constitution as a document of safeguards, of principle, and of overall authority, placed under the interpretive competence of the High Court – this Court being able to apply the free scope for just redress in the common law style. On that basis I thus held⁶, in relation to the Advocate’s contention:

“This is a strange submission. Firstly it entails the admission...that [the plaintiff] had been removed from military service; and secondly it
introduces the Constitution for the first time, albeit without developing [an] argument regarding the Constitution’s terms. I must hold that the [point] about the Constitution is an invalid one; for it is within the terms of the Constitution that the military law exists; and the military law lays down the governing procedure for dealing with the kinds of allegations which had been made about the plaintiff.”

On the primacy of the Constitution’s safeguards in this matter, the Court held:

“To all the spheres of law just mentioned, in jurisprudential and functional terms, there is one foundation, namely the Constitution of Kenya. The Constitution is the supreme law, and by Section 3 [i.e. of the 1969 Constitution] thereof, any law – written or unwritten – in conflict with it stands to be declared null, by the High Court in the first place. Subject to this imperative, all enactments of Parliament, any subsidiary regulations made thereunder, and any applicable unwritten law, represent the law of the land; and as amongst the many statutes in force, none is superior to the other, and the Legislature’s intent is that each shall be regularly enforced by the body or person charged with responsibility therefor.

“If it were to be found that a civil law statute and a military law statute applied simultaneously to a given matter, how would the two be enforced? ...[If] the two statutes are silent on the matter, then the responsible officials must take proper advice from the State Law Office, or seek a judicial interpretation. Where advice is sought from the State Law Office there is a legal duty (subject to the superintendency of the High Court) to render it conscientiously, dutifully and truthfully, being guided by the established common law principle of ‘general purpose of
the law; selective design must in that case be avoided, as it would corrupt the configuration of the law.”

A comprehensive appraisal of the merits of the case led me to a decision laying burdens on the governmental authorities, and resolutely upholding the plaintiff’s rights:

“It is clear to me that the plaintiff’s suit must succeed, and I hereby give a decree in the following terms:

(1) I hereby declare that the plaintiff’s removal from his employment in the Armed Forces was unlawful, null and void.

(2) I hereby declare that the arrests and prosecutions made by the Police against the plaintiff were illegal and in violation of the provisions of the law.

(3) I hereby declare that the several prosecutions lodged against the plaintiff and subsequently terminated in one way or another, were actuated by malice....”

(c) The Legislative Competence, and the Constitutional Limits: Law Society of Kenya v. Attorney-General and Another  

The Court’s interpretive competence that entrusts it, ordinarily, with the corrective intervention in situations of power-conflict or deadlock, is further shown in a constitutional matter before me in the High Court, the Law Society of Kenya case.

The petitioner filed a petition by virtue of the 1969 Constitution, and the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. The petitioner was Contesting the validity of certain sections of a
newly-enacted statute, the Work Injury Benefits Act, 2007 (Act No. 13 of 2007), and seeking annulment of the same by virtue of the High Court’s jurisdiction based upon the terms of Section 3 of the Constitution.

The Court, in the judgement, analysed the essence of the claims and responses, and considered the submissions of learned counsel, as well as the relevant authorities. The ultimate determination was that certain provisions in the contested enactment were a nullity:

“On the basis of this assessment of the merits of the pleadings, the written and oral submissions, and the persuasive authorities noted, I find that the Work Injury Benefits Act, 2007... failed to meet the professional standards of draftsmanship and scrutiny, and ended in the Statute Book as an enactment that is inconsistent with certain provisions of the Constitution. The particular sections of the said Act which stand in contradiction to the Constitution are set out...in the declaration which pronounces them to be null.”

(d) The Judiciary’s Divers Competences in Spheres that Devolve to Other Organs: Gathungu v. Attorney-General and Six Others

The Courts’ strategic role in unlocking impediments to the Constitution’s power-roles, in principle, emanates from the constitutional document itself; but in its pragmatics that assure certainty, this role rests upon the common-law interpretive orientation, which has traditionally cushioned judicial pronouncements in a cover of juristic legitimacy. By virtue of this endowment, tenents of judicialism place the Courts in a position of trust, with regard to contested questions – be it in relation to ordinary claims, to fundamental causes founded upon the Constitution, or to situations transcending the national domain.
An example in this regard is the *Gathungu* case, which related to international law issues. As the State, through the Executive Branch, signals its presence in, and association with international-law fora through the domestic foreign-affairs remit, issues in this domain place the Judiciary at the crossroads of international and transnational law, on the one hand, and the power-arrangement of the national Constitution, on the other hand.

In the *Gathungu* case, which came up before me in the High Court, a petitioner moved the Court, contesting emerging directions in the conduct of judicial processes initiated abroad, and founded upon international legal obligations entered into by Kenya.

The petitioner made an indictment of the operations of the International Criminal Court in Kenya, launched in the aftermath of an outbreak of violence, and consequential destruction to life and property, following the general elections of December, 2007. He was challenging the legality of the International Criminal Court’s activities in the country. The applicant contended that:

> “...the involvement of the [International Criminal Court] in the affairs of Kenya in general, and in particular in the investigations and possible prosecutions of the perpetrators of the post-2007 ‘general-elections violence’ violated Articles 1, 2, 3, 23, 159 – 170..., 258 and 259 of the Constitution of Kenya [2010].”

The Court’s decision relates only to the preliminary stage, as the matter was resolved within the framework of an early objection.

The petitioner’s case was that the mechanisms of international law be not allowed to take effect in Kenya:

> “...that Kenya’s new Constitution [2010] had instituted an iron-clad judicial set-up, emanating from the sovereign will of the local electorate, which peremptorily ruled out any role for the [International Criminal Court], in
redressing any criminal acts occurring in Kenya. The application acclaimed the genius of the new Constitution, and extolled its organic linkage to the sovereignty of the people, urging that insofar as the Constitution did not expressly provide for the Rome Statute which established the [International Criminal Court], the [International Criminal Court] formed no part of Kenya’s criminal justice system, and its operation merely offended the Constitution”.

After hearing learned argument from counsel, the Court rendered a decision which, again, underlines the juristic liberty coming with the common law tradition, which Judges have, in relation to contested matter before them, whether these be founded upon the constitutional document or on principles of international law, or on ordinary local issues. The Court thus pronounced itself:

“It emerges from the submissions of counsel....that whether under the 1963 or the 1969 or the 2010 Constitution, Kenya remains a member of the community of nations, and subject to the governing law bearing upon states as members of that community.

“Therefore, the Constitution of 2010 is not to be regarded as rejecting the role of international institutions such as the [International Criminal Court]. Indeed, from the express provisions of the Constitution, ‘the general rules of international law shall form part of the law of Kenya’; and Kenya remains party to a large number of multilateral international legal instruments: and so, by law, Kenya has obligations to give effect to these. One of such conventions is the Rome Statute which establishes the International Criminal Court”.

81
The Court went further to signal its mandate of appreciating, articulating and purveying the essential values of the Constitution, and of incorporating these in its interpretive determination of legal and constitutional status:

“A scrutiny of the several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by a ‘social orientation’, and as its main theme, ‘rights, welfare, empowerment’, and the Constitution offers these values as the reference-point in governance functions. Such a public-values orientation, in my opinion, readily interfaces with the objectives of international law, such as are integrated in the Rome Statute, as regards intractable crimes such as those of genocide, war crimes, and crimes against humanity”.

The Court, while declaring the essence of the legitimate values to accompany its edicts, correlated this disposition with the express terms of the Constitution, which proclaims “national values and principles of governance” – and these include:

“human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized”.

The Court, guided by the foregoing principles, dismissed the petitioner’s case in limine:

“Therefore..., the applicant’s challenge to the operations of the [International Criminal Court] has no legal foundation, apart from invoking a jurisdiction which is not available”.
A last example of the Court’s place as ideal arbiter in legal rights-safeguard situations is the *Menginya Salim Murgani* case: save that the outcome on appeal\(^2\) casts doubt as to the recognition of a progressive path of principle for safeguarding the individual’s rights against the intrusions of State power.

The face of the Executive Branch in this matter is the Kenya Revenue Authority, the public body charged with the mandate of collecting taxes to sustain the operations of government\(^{23}\). This agency came before the Court as public-authority-employer; while the plaintiff came as a senior public officer who had been dismissed, and had thus lost a career and its attendant benefits. The plaintiff had been employed by the defendant as a Senior Research Officer in 1996, on permanent and pensionable terms; and in the course of 2001 he was promoted to the rank of Senior Assistant Commissioner, his terms of service being subject to the defendant’s Code of Conduct. Save for an eventuality of dismissal on grounds of misconduct, the plaintiff who was in his thirties, was to remain in employment until retirement at the age of 55 years. The terms of employment provided, in the alternative, that the plaintiff’s service could be determined by a six-month written notice on either side, or in lieu thereof (in the case of the employer), a payment of six months’ salary. The employer, however, failed to adhere to those terms, and abruptly dismissed the plaintiff on 9 March 2001, with loss of employment benefits. The plaintiff sought general damages for loss of his working career, resting his case on principles recognized in public law, and on the private law regimes of tort and contract.

The defendant’s case was that it had not been in breach of *contract*, and had committed no *wrong*, and had merely taken disciplinary action against an employee in accordance with its Code of Conduct. The defendant contested the
plaintiff’s case that he should have been accorded a formal hearing before the decision to dismiss him was taken. For the plaintiff, it was urged that fair procedure should have been applied in this matter, as he stood to lose his special interest expressed in employment status – something analogous to property rights.

Counsel for the plaintiff relied on principles that I had enunciated in an earlier decision, when a person in public employment had his status casually terminated. I had in that case held:

“Employment in the public service both provides a machinery of serving the public interest, and benefits the employee who is compensated by approved methods, for work done. The employee, thus, acquires an interest that evolves into a legal right, within the terms of employment. It is in the interest of both the public, to whom services are rendered, and the employee, who has a personal relationship with the working arrangements, that the governing law affecting continued productivity in public office, is given fulfilment.”

The plaintiff’s stand, in the Menginya case, was that the defendant had acted unlawfully and intentionally to remove him from employment; and that, by the common-law tort of misfeasance in public office, the plaintiff would be entitled to damages for “the destruction of his career”.

As the defendant was a public authority established under statute, and as it was entrusted with public power, counsel urged that, a distortion of that power would constitute a tort recognized at common law – misfeasance in public office. It was urged that this tort had indeed been committed, as the defendant had been aware that it had an obligation to comply with rules of natural justice, and also aware that a failure to observe these rules would lead to the destruction of the
plaintiff’s career. But the defendant contended that the plaintiff was just “an ordinary employee” who could be dismissed if his services were thought to be unsatisfactory.

I found no merit with the defendant’s case, holding thus:

“Such an argument [as to the plaintiff being a mere ordinary employee], for any category of employees, would be flawed, especially with regard to a public institution such as the defendant, and bearing in mind the special relationship which inevitably comes to exist between employer and employee. Insofar as the employee spends the bulk of his or her time in the service of the employer, little other livelihood, in most cases, is earned by the employee outside the framework of the employment relationship. Of this fact, this Court takes judicial notice; and it must then be considered that the status quo of the employment relationship inherently vests in the employee both normal rights, and legitimate expectations. In a public institution, invariably, there will be codes of management which lay down the rights and expectations of employees, as well as procedures of discipline and termination of employment. Disciplinary procedures in public bodies are ‘tribunal matters’, requiring fair procedures of resolution – these being expressed in particular, in rules of natural justice.”

I awarded damages to the plaintiff, after determining that:

“...the plaintiff’s employment was terminated with scant regard for the binding rules of natural justice. And it is clear that the defendant, as it fell into that impropriety, either knew, or ought to have known that serious employment and career damage, with consequential losses, would be occasioned to the plaintiff”. 
The foregoing case-examples would indicate my decisional inclination at the Bench, in the context of the compelling constitutional and juridical issues which have attended the functioning of the vital power-structures, and which I have examined in my Thesis.

However, even as my Thesis focusses on the special contribution of the Judiciary to constitutional power-balances, I have, in respect of the *Menginya Salim Murgani* case, beckoned the scope for ambivalence in the pattern of judicial perceptions of the main power-centres of the constitutional order; and of the implications thereof for safeguarded rights and liberties. Such a concern arises from the terms of the Court of Appeal’s final decision.25

The Court of Appeal reversed the High Court decision, on grounds which in their essence, may be listed *seriatim*:

(i) “[The High Court] right from the outset purported to import into the contract both the rules of natural justice as it understood them including incorporating into the contract of employment the provisions of Section 77 of the Constitution. The requirements of a fair hearing or the right of hearing under Section 77 of the Constitution and the rules of natural justice were two ideas which formed part of the respondent’s counsel’s submissions and which the superior court accepted hook, line and sinker, and ultimately incorporated...into the Code of Conduct. With respect, this was a serious misdirection or misapprehension of the applicable law and of the factual position on the part of the [High] Court”.

(ii) “[I]t is not the business or function of a Court of law to rewrite a contract for the parties by prescribing how the organs entrusted with disciplinary matters in a contract must operate, or to introduce terms and conditions extraneous to the contract. Secondly, it is for
the parties to provide in *the contract* how such organs should operate and how the hearings, if any, are to be conducted. A Court of law cannot in our view, import into *a written contract* of service rules of natural justice and constitutional provisions relating to the right of hearing.”

(iii) “Section 77(9) of the Constitution is inapplicable to the organs of discipline or tribunals which have been specifically provided for in *a contract* of service by the parties.”

(iv) “Without recording the appellant’s evidence as it did in respect of the respondent’s case, the record shows that the Court in its judgment immediately started demolishing the appellant’s case and the appellant’s counsel’s submissions on the basis that the appellant’s counsel did not address the cause of action and [the] law concerning the application of tortious liability to a contract of service!”

(v) “It is axiomatic that *contracts* of service have a *mutuality of rights and obligations for both parties* because a *contract* of service is *not a yoke of slavery or contract of servitude*. This is the reason why *either party is allowed to terminate the contract* by giving the stipulated notice or reasonable notice if not specifically stipulated in the contract...”

(vi) “Indeed, *a contracting party does not have to rely on a misconduct in order to terminate a contract* of service and *a party can terminate such a contract without giving any reason!***

(vii) “It follows therefore that the concept of...destruction of the respondent’s career and the...arbitrary application of the tort of misfeasance in public office *just because the appellant was a [State
corporation] had, with respect, no basis in fact or law because whatever powers the appellant was exercising in dismissing the respondent stemmed from a contract of service between it and its employee and did not with respect spring from the statutory power conferred on the appellant by the statute creating it...In our view, for purposes of entering into a contract of employment, a [State corporation] is just like any other employer, and there cannot be any legal basis for creating a distinction between contracts of service entered into by private companies with their employees, and those entered into between [State corporations] and their employees”.

(viii) “[The] superior Court’s findings that the appellant was exercising statutory power was a serious misdirection in law which in turn led to the Court’s erroneous findings that in the circumstances, the tort of misfeasance in public office had been committed by the appellant”.

It emerges that the Court of Appeal would not recognize the Executive Authority’s primary agent of monetary power, endowed with statutory authority to deploy public resources and to make compelling demands upon all-and-sundry, as an entity in respect of which the individual required safeguards of law; that the Court of Appeal would not conceive of the applicability of basic rules of natural justice, when the individual incurs prejudice issuing forth from the decisions of such an agency; that the Court of Appeal would regard the employment-relationship in such a situation as one founded on pure private contract between equal contracting parties; that the Court of Appeal would not recognize the functional link between the employee’s contractual interest, on the one hand, and on the other, the public interest in the due discharge of the relevant services; that the Court of Appeal would not bring into account the
“public ownership” of all resources entrusted to the defendant State Corporation; that the Court of Appeal would attribute “private ownership” to the resources and powers statutorily entrusted to the defendant State Corporation; that the Court of Appeal would overlook the limitless opportunity existing for the defendant to ill-use or privatise the substantial public resources placed under its charge; and that the Court of Appeal would be reluctant to take into account the imperatives of good governance and the rule of law, in the management of the affairs of the defendant State Corporation.

If, therefore, such a pivotal State Corporation were to become an instrument of distortion of the constitutional power-balances within the State machinery, then by the Court of Appeal’s decision, this matter would fall outside the jurisdiction of the Courts: thus disabling the Judiciary as a mediator in the conflict-of-power setting; and circumventing the regular play of the progressive conventions of the common law. By the clinical and technicist notion of “contract” espoused by the Court of Appeal, an escape-route from State responsibility for individual rights, would have been ordained; and such would be not only contrary to constitutional and common-law principles, but also, in distinct violation of the “national values and principles of governance” under the current Constitution.

D. CONCLUDING REMARKS

I have argued in my Thesis, which is a convergence of my scholarly writings of decades, that the primary constitutional question in Africa and elsewhere, is the distortion of the checks and balances of the Constitution; and potentially, the promise of redress is held by the judicial organ, which through its yardsticks of justice and equity, and by its sharp-edged instruments, offers the ideal framework for justiciable dispute settlement.
Such a perception, however, is inconsistent with all postures of undue deference to legal technicality, that are divorced from the broad context of values and ideals. A generation ago, Lord Denning in England was concerned by this very affliction that ails some in the law fraternity; he wrote:

“That approach is all very well for the working lawyer who applies the law as a working mason lays bricks......But it is not good enough for the lawyer who is concerned with his responsibility to the community at large. He should ever seek to do his part to see that the principles of the law are consonant with justice. If he should fail to do this, he will forfeit the confidence of the people. The law will fall into disrepute; and if that happens the stability of the country will be shaken. The law must be certain. Yes, as certain as may be. But it must be just too”.

Given the value-laden frame of the Constitution of Kenya, 2010 and its commitment to the cause of justice, equity and human rights, the path of decision-making embodied in the Court of Appeal’s decision in the Menginya Salim Murgani case is unlikely to enhance the cause of the evolution of a fresh and dynamic growth to the common law, in tandem with modern jurisprudence.

The case-examples in this Chapter, as I perceive, underline the argument that the Judiciary occupies the crossroads of governance structures, facilitating their functioning by resolving conflicts, and ensuring the due operation of the safeguards made for the private and public rights and interests of the people.
NOTES

1. Article 159 (1)(d) and (e).
1a. Article 258(1).
1b. Converted into the Supreme Court of the United Kingdom in October, 2009.
1f. Id., at p. 599 (emphasis supplied).
2. Id., p.399.
3. Ibid.
5. Id., p. 433.
6. Ibid.
7. Id., p. 434.
8. Id., p. 441.
10. Legal Notice No. 6 of 2006.
11. Id., at p. 84.

15. Ibid.
16. Id., p. 388.
17. Ibid.
18. Article 10.
19. Article 10 (2)(b).


22a. This is, in every respect, the resource base that keeps Government machinery in motion.


Chapter Four

THE CONSTITUTION – IN SCHOLARSHIP AND IN THE JUDICIAL PROCESS

A. CONSTITUTIONAL SCHOLARSHIP: THE PARADOX

‘Scholarship’, in this sense, bears the dictionary meaning\(^1\): “learning of a high level”. Such level comes by notable progression the basics of which, in the case of governance institutions, would comprise only primary structures, bare formations, and elemental motions. The Constitution, in scholarship, is concerned with the manner in which varying practices and ideas of governance are attuned to norms and values that embody principle and directive, as well as the sacrosanct beacons of public affairs.

Elaboration of this picture is found in the learned work by M.J.C. Vile\(^2\):

“[Constitutional theory]...is based upon the assumption that not all States are ‘constitutional regimes’, for in the constitutional State there must be a set of rules which effectively restrains the exercise of governmental power.”

‘The Constitution’, thus, as a subject of scholarship, goes beyond the core definition as\(^3\):

“[the] fundamental and organic law of a nation or State that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and liberties.”
Such a definition all by itself, could well symbolise what Vile refers to as “nominal and façade constitutions⁴”; but the ‘high level’ of constitutional scholarship will address matters of theory and reality, and will examine the vital forces of the political order buffeting the constitutional pillars, values, principles and mechanisms intended to guide the conduct of government. The Constitution in scholarship, thus, forms a layer in the scheme of inquiry over norms, practices and mechanisms allied to the whole governmental process.

It is in the context of such an interconnected disciplinary profile that I have, in my works, examined governance scenarios – opening out from privileged minority-group designs, to the control of elective power, and to the configuration of majoritarian public organs which cast impacts upon the balance-of-power arrangements under the Constitution. Such a coalescence of juridical and meta-legal phenomena has featured in my academic and judicial works, leading to relevant determinations from the Bench; as I thus held in one case⁵:

“This application opens an important new chapter in the operation of the Constitution of Kenya, 2010 which was promulgated on 27th August, 2010. Even as public attention has mainly been focussed on the formal institutions of governance and on their operations in the implementation of the Constitution, there has been concern, ...expressed in the instant application, about the functioning of the political organization which leads...to the electoral process for two main organs of the Constitution, namely the Legislature and the Executive.

“The dynamics of the electoral process is a subject governed by political parties. The applicants are concerned with the political party known as Kenya African National Union (KANU), and the extent to which it is currently complying with the law put in place under the new Constitution. The petitioners apprehend that KANU may cease to play its
intended political role, if it fails to comply with the law and is, in consequence, deregistered....

“The petitioners have come to Court under the provisions of the Constitution of Kenya which relate to the implementation of that Constitution, founding their case on the principle that their party... is an instrument of political expression, which is safeguarded under the Constitution.

“In my opinion, these are valid concerns which must find accommodation within the judicial process. A prima facie case is made....”

Such a continuum of meta-legal scenarios have been shown in my works, to constitute the main challenge to the efficacy of constitutional law, in the juridical sense.

B. WORKS OF SCHOLARSHIP IN SAMPLE

My works have depicted the operational continuum incorporating the social order, the political situation, and the organs of the constitutional structure – signalling the intrinsic problematic of achieving clear-cut controls through the legal schemes of power-balancing. In one study\(^6\) I had thus observed:

“It bears restating that, the degree to which the ideal object of securing the accountability of executive power can in practice be achieved, is largely dependent on the operative social structure, and on the attendant political condition – much more so than it is dependent on the instituting of legal strategies. On this account, the constitutional lawyer’s initiatives are unlikely to be successful if they fail to address the social reality and only concern themselves with juristic concepts and technicalities. Such technicalities cannot arrest the intractable motions of executive power, as
the former have a somewhat dormant and artificial tendency, while the latter are usually dynamic and effective7.

It is in the sphere of safeguards for certain positive values and interests, that most African countries, including Kenya, have had the greatest challenge to the norm of the Constitution; and of this situation I have thus written8:

“There are certain worthy universal goals to which all nations must commit themselves and give reality through their instruments of governance including the Constitution, law, policy and practice. The most important such goals are: respect for human rights, commitment to international law, international co-operation in the conservation of the environment, promotion of the social and economic welfare of the people, involvement of the people in public choices and governance processes, and acceptance of guidance by the legitimate will of the people.”

C. THE CONSTITUTION AND THE JUDICIAL PROCESS: WORKS FROM THE BENCH

(a) Preamble

From academic research it emerges that, the values of the Constitution and of constitutionalism, clear as they may be, have only a limited scope for realization, unless constitutional norms standing as a recognized limit to the motions of public power, are instituted. Now the main argument of this Thesis is that such a constraining effect, is best offered by the firm motions of a legitimate, regular, and just, judicial process. A sampling of my works from the Bench will provide illustration of the scope and possibilities of judicial checks to public powers that would compromise the rights and values enshrined in the Constitution.
(b) Protecting Constitutional Trial-Rights: Fan Xi and Three Others v. The Attorney-General

The applicants moved the High Court by virtue of their trial rights guaranteed under Sections 72, 77 and 78 of the Constitution of Kenya, 1969. They were asking the Court to annul charges lodged against them before a Subordinate Court. They deposed that they had been arrested and detained for minor offences (misdemeanours), but without any reason being stated as required by the Constitution, for delayed prosecution; that they had been denied a fair hearing as required by the Constitution; that they had been detained beyond the statutory period without being formally charged.

This was a straight case of abuse of the prosecutorial powers entrusted to the Executive Branch – to the detriment of individuals in their safeguarded rights; and so there was a clear basis in the Court’s empowerment, for calling the Executive to order and affirming the rights and freedoms of the individual.

Such a case depicts the typical circumstance in which a Court of law, properly and conscientiously conducted, would in my perception, uphold the intent of the Constitution as against the power-distorting acts of the Executive Authority – and thus assert a positive power-balancing mandate. And in such a cause I had the opportunity, from the Bench, to articulate the essential reasoning that justified the Judiciary’s countermanding orders:

“[The] foregoing aspects of [the Immigration Officer’s] affidavit, I would hold, show firstly that no reasons existed for the arrest and detention of the applicants; and secondly, that the arrest and detention was executed in a thoughtless manner that showed no recognition for the appellant’s trial-rights.

“Since explanation is an exception to the general rule of Section 72(3)(b) of the Constitution, regarding the time that may be taken before a suspect is arraigned in Court, it is important to define the nature of the
explanation that must be given. Firstly, such an explanation is to carry elements of objective reasoning. Secondly, the explanation must make sense, in the light of the special circumstances of the case. Thirdly, the explanation must be made bona fide, and not merely as a technicality in aid of the prosecution case. Fourthly, the explanation should show such operational difficulty as may have prevented timeous arraignment of the suspect in Court. Fifthly, the explanation should show clearly that the arresting authority did exercise genuine professional care, in conducting the investigations preceding the arrest. These are all factors that will be taken into account, as the Court forms an impression on the circumstances in which arrest and detention had taken place.”

This line of reasoning led to a determination in favour of the applicants, as follows:

“It emerges from the evidence and the submissions...that the Immigration authority had no credible explanation for their failure to bring the applicants before the trial Court within the [prescribed] time-limit. It is a case of the most blatant transgression of the guaranteed constitutional rights of the applicants..., such that the Court has an uncontestable evidentiary basis for making appropriate redressive orders at this stage.

“[The] said criminal cases brought against the four applicants respectively, are hereby quashed. Each of the...applicants is hereby discharged.”

(c) Redressing Tendentious Prosecutorial Action by the Executive Branch: Republic v. Joseph Zakayo Maitha and Four Others

The State instituted murder charges under Sections 203 and 204 of the Penal Code, against five persons. It was alleged that the accused, on 31 March 2005 at
Tassia Estate in Nairobi, murdered one Mutuku Mukanga. At the end of the hearings which commenced before me on 25 January 2007, it emerged that the evidence failed to show the accused persons’ role in the fatal incident. This evidence, as I observed, was “equally remarkable by its complete and utter failure to reveal inculpatory incidents that could even remotely suggest that any of the five accused, was associated with the circumstances in which the deceased was killed.”

The Court’s appraisal of the Attorney-General’s conduct of the case was as follows:

“...[I]nitiation of prosecution...was the mandate of the Attorney-General. But the Attorney-General’s exercise of that discretion required responsibility and good faith, and the custodian of those values is the Court.

“Since there was no evidence which the Attorney-General could place before the Court, in support of the prosecution case, it follows, firstly, that the High Court was moved in vain; secondly, that the prosecutorial power...was not exercised in good faith; and thirdly, that the constitutional rights of the accused persons were unlawfully curtailed.”

The Court declared the accused persons to have been unlawfully detained, and that they were entitled to compensation by the State, in accordance with Section 72(6) of the Constitution of Kenya, 1969.

(d) Limiting Discriminatory Practices by Government Authorities: Muslims for Human Rights (Muhuri) and Another v. The Registrar of Persons and Two Others12

The applicants perceived as discriminatory and transgressive of their constitutional rights, the course of conduct adopted by the Executive Authority’s
Registrar of Persons, in the issuance of vital documents of personal identity. They sought restraint orders against the respondent “issuing, applying, or in any way sustaining a circular, requirement, direction, demand or practice seeking from any persons applying for an identification card the production of grandparents’ identity cards or their certificates of birth, as proof of such grandparents’ citizenship.” The applicants asked that “the respondents be directed to process all applications for national identity cards on the basis of uniform requirements throughout the country, for all applicants, without requiring Asians, Arabs or Muslims to produce additional documentation which other Kenyans are not required to produce.”

The merits of this matter were considered on the basis of depositions and the submissions of counsel, the crucial normative reference being the Constitution of Kenya, 2010 and its guarantees of fundamental rights and freedoms. The state of fact, in the Court’s finding, was as follows:

“On the merits, I found that in the category of documents listed in the [Government] circular, as requirements before registration is granted, are both ordinary and extraordinary items; the ordinary ones being: parents’ identity cards; birth certificates; clinic-attendance cards; school leaving certificates; affidavits for late registration; and, age assessment from a Government hospital. Obtaining a document in this category takes simple arrangement, and no exceptional effort or difficulty is involved.

“But in contrast is the other category of documents: religious certificates. And, still more problematic is the birth certificates of parents and grandparents – not only because it may be difficult to obtain these, but in particular, because this requirement is limited in its application to Asians and Arabs.”
The evidentiary stage was, thus, set for appropriate power-balance, and rights-safeguard edict of the Court, which was thus conceived:

“Whereas the requirement of the first category of documents is, in character, a plain administrative function and is not necessarily limiting to the rights of applicants, depending on the [course] of practice, the second category touches the applicant more directly, within the framework of constitutional safeguards for personal rights. Religion, the belief in and worship of a superhuman power, is a personalized and inherently-informal commitment, also apt to change and take forms which ought not to be the basis of mandatory documentation for the formal institutions of Government, in a secular State such as Kenya. For this country’s public governance institutions to depend on informal records of the religious sector, will, in my opinion, be an infringement of the ‘National Values and Principles of Governance’ as specified in Article 10 of the Constitution of Kenya, 2010.... Recourse to religious certificates while discharging the fundamental-rights-related function of dispensing the national identification document, stands in contradiction to the call for transparency as an aspect of good governance; such a practice is plainly unconstitutional and any decisions or acts resulting therefrom, stand to be declared null.

“Now the very provision of the Constitution [on national values and principles of governance] also outlaws discrimination: so it is manifest that the impugned circular, insofar as it singles out Asians and Arabs as the communities members of which must supply parents’ and grandparents’ birth-certificates, in order to be issued with national identity cards, is in that respect a nullity.”

(e) Appraisal
This Chapter indicates a meeting-point between the academic and the operational perspectives, in the Judiciary’s scope for asserting power-balances in governance, and for exercising this so as to sustain the imperatives of the constitutional norm. This advances the argument of the Thesis, that the Courts, by their interpretive mandate, stand in a position to give fulfilment to the intent and purpose of the Constitution.

The safeguards of the Constitution, as shown in the case-examples, bear common principle in the domains of civil and criminal law. The Court’s response is by applying the libertarian spirit and style of the common law tradition. The common law, thus, provides the congenial medium for giving effect to the letter and spirit of the Constitution.

NOTES


5. Abdulrahman Ahmed Abdalla and Three Others v. The Hon. Uhuru Kenyatta and the Registrar of Political Parties, Mombasa High Court Petition No. 17 of 2010 (Ojwang, J.) [emphases supplied].


9a. These rights and safeguards are now found in Article 49 of the Constitution of Kenya, 2010.


12. *Muslims for Human Rights (Muhuri) and Another v. The Registrar of Persons and Two Others*, Mombasa High Court, Petition No. 1 of 2011 (Ojwang, J.).
Chapter Five

THE COMMON LAW AS A COMMON THREAD

A. GOVERNANCE-RELATED DISPUTE: THE CONSTITUTIONAL NORM, AND THE JUDICIAL FUNCTION

Tranquility in the social condition, as an aspect of the human civilization, requires the legitimate settlement of such disputes as may occur from time to time. Legitimacy, in this regard, is essential, whether the discord be a private one involving individuals, or families, or business settings; or a public one pitting private persons or entities against the State, or against public bodies linked to Government – but the latter kind of dispute is of a special kind, insofar as failure of the legitimacy test, in that regard, is apt to bear wider implications for civil order and political stability. Therefore, dispute-resolution entailing the State or public authority on the one hand, and the private domain on the other, may be regarded as fateful, in terms of good governance. Such a dispute touches on the constitutional order. Hence its relevance in my Thesis, which focusses on constitutional checks-and-balances to public power.

The proposition evolving in my works of constitutional law, over the years, is that there is a focal point in the power-balancing scheme under the Constitution – and it is located at the Judicial Branch. My argument, in essence, has proceeded as follows:

“It is a truism that ...the epoch of good governance has landed: its essence is management of public affairs by rational institutional arrangements; limiting executive power, and de-emphasizing the individual-official’s
remit in decision-making...; establishing a framework for rationality in the exercise of executive power; empowering adjudicative organs guided by principle and law; subjecting disputes to a judicial process. The overall principle describing this mode of governance is constitutionalism. The political order...is being reformed, to vindicate the principle of checks and balances founded on regularity, legality and constitutional process: the new ideology is constitutionalism.

“Even as constitutionalism lays down a respectable path of governance, judicialism follows hard on its heels, with the Judiciary as a front-line player, guided by constitutionality and legality, jurisdictional rules, procedural rules, natural justice and equity. Though not popularly elected, the Judiciary is, and ought to be, the storehouse of humane values which the public yearns for....”

There is a basis, therefore, for identifying the Judicial Branch, aside from the entire range of organs of State, with the essential character of the Constitution, and with dedicated stewardship in the due discharge of constitutional mandates.

It is, thus, by no means heretical that it devolves to the Judiciary to conceive the rules of interpretation of the Constitution; and on this account, the other branches of government should recognize the judicial determination, save for the emergence of a plebiscitary position, or of a duly-enacted framework, resolving the matter.

It is clear from my works, as from many other distinguished studies on the judicial process², that it is not in the nature of Court process duly-conducted, to arrogate arbitrary, or self-serving interpretive capacity. The Courts will rest their stand upon legitimate rules that command social respect and juridical integrity;
and their findings will be conscientiously, reasonably and methodically arrived at. It is not without effect, in this regard, that the judicial body is invariably set in a plurality of ranks – a mechanism for self-rectification.

B. THE COMMON LAW: FLEXIBILITY, AND SCOPE FOR CREATIVITY

Hence the relevance of the common law tradition which, as my Thesis posits, shares common cause with the Constitution itself.

The common law tradition has for centuries, defined the juristic path of the judicial practices that devolved to many countries throughout the world. The spread of the common law system from its base in England, was by no means a bare imposition; rather it was a normal growth of legal systems. The adoption of the common law in Kenya, besides, had a more formal foundation. The legislature laid for it a prescribed foundation by way of the Judicature Act, which remains in force, thus stipulating:

“...the common law, doctrines of equity and [English] statutes of general application shall apply...as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances render necessary.”

The common law settled-in gradually, but tenaciously, as the Kenyan Judiciary’s hallmark in work-orientation. This is the medium in which the Courts have exercised the interpretive mandate under the Constitution. Beginning with legal concept as defined in English, the Courts have proceeded to signal their juristic paths by common-law reasoning and orientation. This has been, and remains, the functional judicial culture: and by all appearances, it is safe from any risk of dislodgement from its place in Kenya’s machinery of justice.
It happens that the Constitution, in its design and express provisions, is a charter of positive values and principles – the very aspect which qualifies it as a progressive dispensation. As the ultimate interpretive voice is that of the Courts, the flexible common law mandate comes in handy, to give room for a progressive approach to interpretation.

C. THE COMMON-LAW STYLE, AND THE CONSTITUTION: WORKS FROM THE BENCH

I will illustrate the argument of this Thesis, on the common cause of the Constitution and the common-law style, by means of my own works from the Bench.

(a) Recognizing Constitutional Principle while Resolving Ordinary Questions of Law: Luka Kitumbi and Eight Others v. Commissioner of Mines and Geology and Another

This was, in the first place, a question between individuals and Government authority: so at that level, it exemplifies the checks-and-balances role of the Judiciary, as well as, in the second place, its role in sustaining the safeguarded individual rights.

More significantly, however, the case aptly illuminates the common social purpose of the Constitution and the common law.

The applicants sought orders of injunction to halt trespasses upon their fenced, but as-yet unsurveyed parcel of land, situate at Dighai Village, Mwachambo Settlement Scheme in Mwatate District, in the Coastal Region of Kenya. While the said settlement scheme was in the process of surveying and demarcation, the first respondent proceeded unilaterally to grant the second respondent a mining licence, to enter and mine within the suit property. The applicants contended that such grant of mining licence was illegal, as it was in
disregard of their interests as persons occupying, possessing and residing upon
the said land.

On the basis of evidence tendered in the form of depositions, the respondents’
learned counsel founded her case on the technicality that the cause as filed, ought
to be terminated, for failure to comply with the terms of Section 13A of the
Government Proceedings Act. The State Counsel further urged that the
applicants lacked “exclusive ownership” necessary to found a trespass case at
common law; and furthermore, she urged that by the statute law, injunctive
orders would not lie against the Government.

The Court declined those submissions, guiding itself on principle as
follows:

“The preliminary objections [to the suit and the attendant application]
raised herein must be resolved not in the traditional mode, of
assessing the compliance of a suit with standing statutory technicalities
such as those set out in Sections 13A and 16 of the Government
Proceedings Act. The judicial task has since 22nd and 23rd July, 2010 when
the matter was heard, come to a compelling turning point, with the
promulgation of the Constitution of Kenya, 2010 on 27th
August, 2010 which stipulates [Sixth Schedule, Clause 7(1)] that –

‘All law in force immediately before the effective date [27th August,
2010] continues in force and shall be construed with the alterations,
adaptations, qualifications and exceptions necessary to bring it into
conformity with this Constitution.’

So, a new obligation is placed upon the Judge, who, though
beginning from the established judicial practice and the known principles
of interpretation, must assess any cause coming up before him or her in
relation to the imperative terms of the new Constitution.
“For the foregoing reason, the Court must rethink the relationship between the old statute law and the requirements of the new Constitution; the Court must reconsider some of the authorities cited by the parties....There will, therefore, be no preordained path that must lead to the determination of the suit and the application now before the Court, just on the technical objections being raised by the defendants.”

The Court proceeded to expound the principle of the new Constitution, as contrasted with earlier Constitutions:

“I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary. It will not be possible, I think, for the Judiciary to determine causes such as the instant one, without beginning from the pillars erected by the Constitution of Kenya, 2010.”

The mode of application of the terms of the Constitution, in this instance, gives the practical demonstration of the common purpose of the Constitution as the basic norm, and the conventions of the common law. The Court, in an unconstrained manner, addressed the diffuse values proclaimed in the Constitution, and came to a decision resting on definitive lines of merit. The relevant passage thus reads:
“What are those ‘purposes and principles’ [referred to in Article 159 of the Constitution]? They are set out in Article 10, under the heading ‘National Values and Principles of Governance’, which ‘bind all State organs, State officers, public officers and all persons whenever any of them... (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions’...

“Since ...the land in question was trust land at the material time, it was... protected by the Constitution of Kenya, 2010 as community land; such land, by Article 63(1) of the Constitution, ‘shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest’...

“Against this background, I hold that the entitlement to the suit land attaches to the plaintiffs; and I must then come to the conclusion that the first defendant had no right, in law and on constitutional principle, to assume powers over the suit land, and to assign the same for any purposes whatsoever, to the second defendant.

“I hold, besides, that the statute law upon which the first defendant purported to rely, gave him no authority to exercise an expropriatory power over the plaintiffs’ lands. It follows that the second defendant who poses as the beneficiary of such unconstitutional confiscation, is devoid of any title whatsoever, and is, in fact, a trespasser. The second defendant’s continued trespass is a violation of the plaintiffs’ constitutional rights....”

The applicant moved the Court, seeking the judicial review order of mandamus, against the Executive Authority’s tax-collection agency, on the ground that a refund of monies, in the sum of Kshs.35,187,432/82 had been wrongfully withheld. The applicant maintained that “the respondent [had] irregularly used its powers to deny the applicant its entitlement”, and that “such conduct amounts to an abuse of the respondent’s powers [and] a direct violation of Article 47 of the Constitution [which safeguards the right to ‘fair administrative action’]”.

In the evidence presented by deposition, the respondent invoked inadequacies in its own operational procedures in its interactions with Government departments – these routinely occasioning delays. The respondent’s counsel urged that “...the respondent...does not have withdrawal powers on the revenue it collects and [pays] into the Consolidated Fund and the Exchequer”; and he submitted that “the operations of the respondent are tied to the directions of the Minister for Finance.”

Applying recognized principles at common law, the Court incorporated constitutional principle, thus holding:

“The respondent’s operational linkages to the Minister for Finance and to other Government bodies have, in my opinion, been invoked in vain: for, firstly, by Article 47 of the Constitution of Kenya, 2010 persons such as the applicant have a right to fair administrative action, which must not be denied whether by the respondent, or by the other Government agencies and mechanisms to which the respondent may happen to be operationally attached; the whole set of those agencies, which are statutory and public bodies, are subject to Article 10 of the Constitution which, under the head ‘national values and principles of governance’, requires ‘good governance, integrity, transparency and accountability’
[Article 10(2)(c)]. If those agencies to which the respondent is operationally related are baldly invoked as governing premise to justify the respondent’s non-delivery, the effect would be to nullify vital private rights safeguarded under the Constitution: that cannot be permitted by this Court, which is under obligation, by Article 159(2) (e)....to protect and promote ‘the purpose and principles of the Constitution’.”

In a more specific reference to the role of the common law alongside the Constitution, the Court held as follows:

“The common law, in its evolution, had defined the rules of conduct for a public authority taking a public decision, entrusting the overall control-jurisdiction in the hands of Courts of law; but for Kenya, such a general competence of the Courts is now no longer confined to the terms of the statute law and subsidiary legislation, but has a fresh underwriting in the Constitution of Kenya, 2010, Article 47, which imposes a duty of fair administrative action, and [Article 10(2)(c)] demands ‘good governance, integrity, transparency and accountability.”

It was thus, on the dual reference-points of the Constitution and the common law, that the Court arrived at its determination:

“From the facts of the instant case, it is clear to this Court that the respondent failed to deal with the applicant’s claim of [tax] refund in the context of fairness, transparency, accountability or good governance....”

(c) Constitutional Issues and Ordinary Issues, Are these Treated Differently by the Same Court? – Archegono Africa Limited v. Jumba Holdings Limited and Two Others

112
Contention arose in respect of two matters relating to the same property and the same parties, contemporaneously lodged before the same Court. Somehow, orders were made indiscriminately, over time, on the two files one of which related to the substantive civil claim while the other carried a constitutional petition. Learned counsel for the defendant, Dr. Khaminwa sought priority for the constitutional matter, at a time when the petitioner had failed to comply with consent orders for rent payment recorded earlier, on the civil file. Counsel submitted that the constitutional question regarding the status of distress for rent, was so overwhelmingly transcendent that, the consent orders must be relegated to a lower level of urgency.

Had such an argument been allowed, a dissonance would have resulted as between the motions of the Constitution and those of the common law, with regard to the same parties, same property, same grievance.

This case is a poignant instance reflecting the stand of the Kenyan Court, in relation to the common law and the constitutional platforms. The Court's position was thus stated:

“Although learned counsel...urges that the constitutional question regarding distress for rent is so overwhelmingly superior and transcendent, that the consent orders must be relegated to a lower position, I will be guided by different principles which commend themselves to me.

“In operational terms, it is the Court which forms the very scaffolding upon which the implementation of the Constitution rests – quite apart from the fact that the Court structure and authority is a central pillar in the design of the Constitution itself.

“On 2nd July, 2010 [Mr. Justice Ibrahim] made vital orders for resolving the disputes herein, in accordance with the Constitution. Compliance with those orders is a constitutional obligation – and it
will not, in principle, be allowable for the petitioner to open a new front of litigation before the High Court, the agency of the Constitution, before complying with the constitutional obligations created by the Court on 2nd July, 2010.

“For the Court to keep in charge of the discharge of its constitutional mandate, it must have the first authority and jurisdiction to regulate all processes affecting a plurality of files at the same time: parties cannot take away this competence of the Court….

“The effect is that the later orders of 9th September, 2010 which reaffirmed the earlier orders of 2nd July, 2010 were well within the terms of the Constitution and the law.”

(d) Common Reasoning under the Constitution, and by the Common Law: Gremmo Danielle and Another v. Kilily Spa

The case law shows a common pattern of reasoning, without special regard to the category of case coming up before the superior Courts – whether such cases be ordinary, or of a constitutional nature. Of this fact, I had observed in the Gremmo Danielle case:

“…claims through litigation are historically set on contours defined by deserts, rights and obligations – a matter of judicial notice.”

Such are the very essence of contested questions turning on the Constitution, just as with other kinds of claims.

From both academic research and the Bench experience in the application of law, I would come to the conclusion that, before the Courts, a common element
marks most claims, whether based on the Constitution, or on other foundations of law.

**D. THE COMMON LAW IN THE KENYAN COURT: GENERAL OBSERVATIONS**

The Judiciary in Kenya, with its strategic role in the balancing scheme of governance-powers under the Constitution, has but one assured juristic armoury for the discharge of its mandate: *the common law*. In the common law, the Courts have a platform for the resolution of all causes lodged before them. In the common law, the Courts have the legitimate foundation of principles for all dispute resolution. By the common law, the Courts are empowered to oversee compliance with the broad principles and values of the Constitution. By the common law, the Courts have the mandate and the capability to restrain violations of human rights, or of the fundamental safeguards of the Constitution. So in every sense, it is by virtue of the yardsticks and conventions of the common law, that the Judiciary is able to sustain the essential checks-and-balances of the Constitution. The common law’s methodology of identification of relevant fact, of eliciting the gravamina in a dispute, and of dispensing the benchmarks of justice and equity, bestows unassailable legitimacy to the judicial process, as the truly propitious forum of anchorage for the processes of governance.

---

**NOTES**


3. Professor Alan Watson has demonstrated that, in the history of governance institutions, transplantation of laws has been the most recurrent basis of the growth of legal systems; see: Alan Watson, *Society and Legal Change* (Edinburgh: Scottish Academic Press, 1977); Alan Watson, *Legal Transplants* (Edinburgh: Scottish Academic Press, 1974).


5. *Luka Kitumbi and Eight Others v. Commissioner of Mines and Geology and Another*, Mombasa High Court, Civil Case No. 190 of 2010 (Ojwang, J.).


7. Emphases supplied.

8. Emphases supplied.

9. Mombasa High Court, Misc. Civil Application No. 82 of 2010 (Ojwang, J.).

10. See: *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation* [1947] 2 All E.R. 680 (at pp.682-683, per Lord Greene, MR): “The law recognizes certain principles on which...discretion must be exercised, but within the four corners of those principles the discretion [of the decision-making public body] is an absolute one....”


● Chapter Six ●

**COMMON VALUES, COMMON METHODOLOGY: CONCLUSION**

This Thesis, grounded on my research initiatives in constitutional law, and with the Kenyan scene as the focus, has had invariably to learn and draw inspiration from the comparative lesson¹. Such an approach was unavoidable, in view not only of the commonality of primary issues of constitutional law but, more significantly, of the historical connectivity of the local public-law institutions to the experience elsewhere – in particular, the Western experience of governance.

In this context, my study has articulated the critical question of constitutional law, namely, the checks-and-balances to governmental power, and the bearing of such checks upon the fundamental safeguards for the rights of ordinary persons.

My works have converged, ultimately, on the special role of the Judiciary as a device of checks-and-balances, and upon its part in the safeguarding of the protective scheme of the constitutional norm. From this, I perceive as the emerging juristic contribution, this work’s portrayal of the *judicial method* in addressing the checks-and-balances mandate, and in assuring the rights-safeguards of the Constitution. This aspect has been pursued to the point of identifying the common course of the Constitution and the common law, as interpreted and determined by the Judiciary.
The Judges, who are educated and inducted in an ethos rooted in the common-law background, remain true to their philosophic orientation, irrespective of the categories of dispute coming up in Court. Before these Judges, the constitutional dispute invariably entails an admixture of norms – applicable to civil, or criminal, or other category of claim – and the relevant questions fall for resolution in the same claim. No matter the issues for resolution, the position remains just as it was thus expressed by Justice Benjamin Cardozo in America²:

“The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision....Courts are to ‘search for light among the social elements of every kind that are the living force behind the facts they deal with’....”

The judicial voice of legitimacy in all categories of dispute settlement, thus, flows from this preoccupation with social reality, which speaks to the critical issues in the life of the people – irrespective of their classification as social, economic, political, spiritual, or constitutional. This scenario gives, as Professor Archibald Cox urged⁴,

“the general acceptance of the courts as forums for resolving a wide variety of judicially cognizable cases and controversies – a role to which constitutional adjudication is readily acceptable as an appendage....”

Determination of constitutional discord, I have posited, requires the legitimate forum; and the society’s such forum is the Judiciary, which has also been entrusted with the mandate of resolving all other serious disputes. The Judiciary is the legitimate forum on account of its inherent character; its induction-experience; and its essential methodology for dispute settlement – the common law tradition. Of this sui generis standing of the Judiciary, in the constitutional order, Justice Cardozo observed⁵:

118
“The judge, even when he is free is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or goodness. **He is to draw his inspiration from consecrated principles.** He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life’....”

Cardozo urged that the Judges be trusted as faithful interpreters of the mores of their day; for “this power of interpretation must be lodged somewhere, and the custom of the Constitution has lodged it in the judges.”

The overriding ethical goals of fairness, justice and equity, are constantly the watchwords, before the Courts.

The common law substantially rests on precedents emanating from the superior Courts; and these apply uniformly to new causes, 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 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.’
Hence my argument in this Thesis: in Kenya, and indeed in much of the common-law world, the unity of the Constitution and the common law is to be acknowledged and extolled; for it represents a juristic achievement, to be nurtured and perfected. This is the Thesis constructed around my works of scholarship, as borne out at the Bench – the forum of practical application of the law.

NOTES


5. Loc. cit. (p.141) (emphasis supplied).


ANNEXURE 1: PUBLISHED WORKS

This Annexure gives a framework for the selection of research contributions that have, progressively, crystallized the idea lying at the centre of this Thesis. In assembling these works, an attempt has been made to provide vantage-point by categorizing in sets:

(a) **Constitutional Principles, Context and Mechanisms**;
(b) **Executive Power**;
(c) **Legislative Functions**;
(d) **Balancing State Powers, Juridical Schemes, and Judicial Practices**.

The selected publications are appended to this Thesis as **Annexure 6**.

A. CONSTITUTIONAL PRINCIPLES, CONTEXT AND MECHANISMS


(iv) J.B. Ojwang, “Legal Transplantation: Rethinking the Role and significance of Western Law in Africa”, in Peter Sack and Elizabeth Minchin (eds.), *Legal Pluralism* (Canberra: Australian National University, 1986), pp. 99-123.

(vi) J.B. Ojwang, “Constitutionalism – In Classical Terms and in African
Nationhood,” in N.S. Rembe and E. Kalula (eds.), Constitutional
(1990), Vol 6 No. 1, pp. 57-74.

Ojwang (ed.), Transnational Law and contemporary Problems: A Journal of the University of Iowa College of Law, (Fall 2000),
Vol.10 No. 2.


(ix) J.B. Ojwang, “The Application of the Comparative Method in the Domain of
Public Law: Some Reflections”, Revue de Droit international de
sciences diplomatiques et politiques (Geneva), Vol. 60 No. 3 (1982), pp. 199-225.

B. EXECUTIVE POWER

(i) J.B. Ojwang and P.N. Okowa, “The One-Party State and Due Process of Law:
The Kenya Case in Comparative Perspective”, The African Journal of
pp. 177-205.

(ii) J.B. Ojwang, “The Nature and Scope of the Executive Power in English and
French-speaking Africa: A Comparative Perspective”, Versassung und

C. LEGISLATIVE FUNCTIONS

(i) J.B. Ojwang, “Parliamentary Privilege in Kenya: The Role of an Imported


**D. BALANCING STATE POWERS, JURIDICAL SCHEMES, AND JUDICIAL PRACTICES**


A special aspect of the subject of this Thesis is its information-base, which transcends the conventional academic plane of inquiry, and introduces the corresponding operations of formal dispute settlement. That the functioning of such a constitutional mandate would benefit from the academic forum, is by no means a novel concept.

The common law, which is central to this work, owes its landmarks to the research and intellectual enterprises of many Judges in different countries, over the ages. The Judge defining the scope of duty-of-care in the law of negligence, Lord Atkin (pp. 74, 92), was one of the architects of the common law; and of him, a distinguished law scholar thus wrote:

“the revived interest in the expounding of the law as one of the humanities is due in very large measure to his inspiration and encouragement.”

B. THE ROLE OF LEGAL RESEARCH IN THE DISPENSATION OF JUSTICE: AUTHOR’S FURTHER REFLECTION

This theme is closely reflected in the instant work; and my own perception has been thus articulated:

“The beacons of a judgment are laid out in the law; but this law, though frequently conspicuous in form, quite often has to be discovered through learning and further inquiry. This, precisely, is how legal academia gives a helping hand to the judicial process. Although the Judge has direct access to the evidence adduced; to the statutes of immediate relevance; and to cases of precedent-value, in many cases further light needs to be shed on such material,
so as to open up the rational course of decision-making; and recourse to legal scholarship will, in such cases, be the solution....

“The Bench, in rendering judgment on disputes entailing ‘national values and principles of governance’, is not dealing with a trodden path in which precedents abound: it has to draw on the directions of legal scholarship, as a basis for rational and legitimate judgment. Such is the case too, with the complex issues arising from the human rights provisions of the Constitution.”

_____

NOTES
_____


ANNEXURE 3: TABLE OF CASES

A
Abdala and Three Others v. The Hon. Uhuru Kenyatta and the Registrar of Political Parties, Mombasa High Court Petition No. 17 of 2010 [Ojwang, J].................................95,103

Archeongo Africa Limited v. Jumba Holdings Limited and Two Others, Mombasa High Court Const. Petition No. 9 of 2010 [Ojwang, J].........................................................114


D
Danielle and Another v. Kilily Spa, Mombasa High Court Civil Suit No. 82 of 2008 [Ojwang, J]...................................................................................................................115, 118


E

G

K
Kenya Revenue Authority v. Menginya Salim Murgani, Court of Appeal; Civil Appeal No. 108 of 2009 [Omolo, Waki, Nyamu, JJ.A]............................................................87-89, 91

Kitumbi and Eight Others v. Commissioner of Mines and Geology and Another, Mombasa High Court Civil Case No. 190 of 2010 [Ojwang, J].............................108-111, 117


L

Maathai v. The Kenya Times Media Trust, Nairobi High Court Civil Case No. 5403 of 1989

Marbury v. Madison, 5 U.S. 137 (Cranch) (1803)

Mburugu v. Attorney-General, Nairobi High Court Civil Case No. 3472 of 1994 [Ojwang, J.]


Murgani v. Kenya Revenue Authority, Nairobi High Court Civil Case No. 1139 of 2002 [Ojwang, J.]

Muslims for Human Rights (Muhuri) and Another v. The Registrar of Persons and Two Others, Mombasa High Court Petition No. 1 of 2011 [Ojwang, J.]


Williams v. Rhodes, 393 U.S. 23; 21 L.Ed. 24 (1968)

ANNEXURE 4: BIBLIOGRAPHY OF WORKS BY OTHER SCHOLARS

A


B


Bickel, Alexander M., The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962).


C


D


E


F


G


H

I

J

M


N


**Y**

ANNEXURE 5: AUTHOR’S CURRICULUM VITAE

THE HON. JUSTICE (PROF.) JACKTON B. OJWANG

Address:

(i) P. O. Box 21773-00505,          (ii) Supreme Court of Kenya
Nairobi, Kenya                   P. O. Box 30041-00100
NAIROBI
Tel: 020-2221221

info@judiciary.go.ke; www.judiciary.go.ke

Email:

jbojwang@gmail.com

[up-dated to 4th September, 2015]

SUMMARIZED BIOGRAPHY

The Hon. Justice (Prof.) Jackton B. Ojwang was appointed, on 16th June, 2011 to the inaugural Bench of the Supreme Court of Kenya. He previously served as a Full Professor of Law at the Faculty of Law (now School of Law), University of Nairobi where he worked for a total of 27 years, holding various academic ranks, and also served as the Chair of the Department of Private Law, Dean of Faculty, Director of the University Board of Postgraduate Studies and member of the University Senate. In early 1982 he had served as Visiting Associate Professor of Law at the J. Reuben Clark Law School, Brigham Young University, Provo, Utah, USA.

The Hon. Justice (Prof.) Ojwang studied law at Nairobi and Cambridge Universities and has carried out research, taught and served as external examiner in reputable universities around the world. He is an accomplished legal scholar and academic with
vast experience nationally, on the African continent, and globally. He brings to the Bench the unique knowledge and experience from both the Common Law and Civil Law jurisdictions. He is fluent in English, and has a working knowledge of French.

Recently, Justice Ojwang, who holds the Ph.D. in law of the University of Cambridge (1981), has developed a Higher Doctoral Thesis from his continual research and publication, for which he earned the Doctor of Laws (LL.D.) degree of the University of Nairobi on 4th September, 2015. This original analysis depicts the thread in his legal works, and bears the title, *The Unity of the Constitution and the Common Law*.

The Hon. Justice (Prof.) Ojwang has served the public in different capacities as a scholar and a judicial officer. He has also contributed to the development of law as a member of Government Commissions and as an advisor to Government bodies.

The Hon. Justice (Prof.) Ojwang has also consulted for a wide range of agencies. He is a prolific academic and legal scholar who has authored many works. His research interests include: Legal theory/Jurisprudence; Constitutional law; Comparative Law; Environmental Law and Intellectual Property law.

The Hon. Justice (Prof.) Ojwang’s deeply cultivated foundations in advanced legal research and scholarship have been fully implanted in judicial dispute-settlement, a sphere in which he derives distinct intellectual and professional fulfilment.

### PERSONAL DATA

**Date of Birth:** February 10, 1950  
**Place of Birth:** Kisii Town, in the western part of Kenya  
**Citizenship:** Kenyan  
**Personal status:** Married, with children

### EDUCATION AND RELATED MATTERS

1. Higher Doctorate in Law (LL.D.), University of Nairobi, 4th September, 2015. LL.D.
Thesis entitled: *The Unity of the Constitution and the Common Law.*


   “Legislative Control of Executive Powers: A Comparative Study of the British and French - derived Constitutions of Kenya and Côte d’Ivoire” (under the supervision of Professor Sir Basil S. Markesinis).

*Places of Ph.D. research work*

- The University of Cambridge;
- The University of Oxford;
- The School of Oriental and African Studies, University of London;
- The British Library, London;
- Université de Paris 1, Panthéon-Sorbonne;
- Université Nationale de Côte d’Ivoire, Abidjan, Côte d’Ivoire.


   Courses Taken

   - Comparative constitutional laws
   - Jurisprudence
   - Taxation
   - Company law

   LL.M. Thesis title

   “The place of Executive Power in Independent Kenya’s Constitutional Context”


   Upper Second Class Honours

   [Shell Prize, University of Nairobi, 1972]

5. Secondary & High School Education (1965 -1970) – Homa Bay School; Thika High School

6. Primary Education (1957-1964) – Anjego Primary School; Osogo Intermediate
PROFESSIONAL QUALIFICATIONS

Advocate of the High Court of Kenya and member of the Law Society of Kenya, from September 1983.

AREAS OF RESEARCH INTEREST

a. Legal theory/Jurisprudence  
b. Constitutional law  
c. Comparative law  
d. Environmental law  
e. Intellectual property law

ACADEMIC AFFILIATIONS AND ASSOCIATIONS


2. Associate Member of the Society of Public Teachers of Law (U.K) from September, 1982.


5. Appointed a member of the IUCN (The World Conservation Union) Commission on Environmental Law (May 1994).

LANGUAGES

English: Excellent  
French: Fair
WORK EXPERIENCE

The Judiciary

(i) Judge of the High Court of Kenya (from 28th October, 2003 to 16th June, 2011)

(ii) Justice of the Supreme Court of Kenya (from 16th June, 2011)

The University of Nairobi

Full Professor of Law (August 9, 1990 – October 28, 2003)
Associate Professor of Law (March 3, 1987 - August 9, 1990)
Senior Lecturer in Law (June 3, 1983 - March 3, 1987)
Lecturer in Law (August 3, 1976 - June 3, 1983)

Service in University Management

- Chairman, Department of Private Law, and member of Senate, May 15, 1986 - May 15, 1989;

- Director, University Board of Postgraduate Studies and member of Senate, May 18, 1989 - May 17, 1992;

- Chairman, Department of Private Law and member of Senate, October 1993 - October, 1996; October, 1996 - October 1999.

- Dean, Faculty of Law, University of Nairobi (from August 18, 2000 – October 28, 2003).

J. Reuben Clark Law School, Brigham Young University, Provo, Utah, U.S.A.

Visiting Associate Professor of Law (January - April 1982) (on leave of absence from the University of Nairobi).
SUBJECTS TAUGHT

As Lecturer (August 3, 1976 – June 3, 1983)

1. Comparative Law (at BYU)
2. Legal Problems of Emerging Nations (at BYU)
3. Law of Evidence, and Public International law to LL.B. students;
4. Law for Engineers as service course to Mechanical Engineering students;
5. Administrative and Local Government Law as service course to Land Economics students;

As Senior Lecturer (June 3, 1983 - March 3, 1987)

1. Constitutional Law to LL.B. students;
2. Supervision of research for LL.B. dissertations.

As Associate Professor (March 3, 1987 - August 9, 1990)

1. Comparative Constitutional Laws to LL.M. students;
2. Constitutional Law to LL.B. students;
3. Supervision of research for LL.B. dissertations.

As Full Professor (August 9, 1990 – October 28, 2003)

1. Social Foundations of Law to LL.B. students;
2. Constitutional Law to LL.B. students;
3. Supervision of research for LL.B. dissertations;
4. Comparative Constitutional Laws for LL.M. students;
5. Supervision of research for LL.M. dissertations;
6. Child-care Law to LL.B. students;
7. International Intellectual Property Law to the students of the
Widener (USA) Summer Law School Programme, University of Nairobi.

AWARDS

(a) University of Nairobi Staff Merit Award, in recognition of outstanding contribution towards the University’s Mission (October 16, 2001).

(b) Chief of the Order of the Burning Spear (CBS), Republic of Kenya -

[The Kenya Gazette, 11th December, 2012 – Special Issue].

(c) East African Law Society Senior Lawyer of the Year Award, 2013 “for an outstanding and distinguished legal and judicial career”.

SUPERVISION OF POSTGRADUATE RESEARCH


2. T. Nyimbae, LL.M. dissertation for the University of the West Indies, Cave Hill, on the "The Kenyan Law of Citizenship" (1988)


EXAMINATION OF POSTGRADUATE THESIS

Doctoral Theses

1. D.V. Williams, “The Use of Law in the Process of Colonisation: An Historical and Comparative Study with Particular Reference to Tanzania (Mainland) and New Zealand” (1983) - as a member of the Examiners' panel held at the Department of Law, Research School of Social Sciences, Australian National University, Canberra, to examine for the University of Dar-es-Salaam (September 8, 1984).

2. H. Randa, Juris Dok thesis of the University of Lund, Sweden, Member of the Board of Examiners at the public defence of the thesis, which was on “Customary law in Kenya”, June, 1987.


External Examiner for the University of the Western Cape, South Africa (April, 2014).

**LL.M. Theses**


7. L. Muleya, "*The Effect of the Zambia Land Tenure System on Agricultural Development*”, for the University of Zambia Law School, March 1990.


11. G.W. Tomushabe, "*The Legal Aspects of the Control and Management of Toxic Chemicals in International Trade*”, for Makerere University, Kampala,
PUBLICATIONS

Books and Monographs

1. Law and the Public Interest (editor and contributor with J.W. Kabeberi) (University of Nairobi, I.D.S. O.P. No. 52 May, 1988) (68 pp).


**Scholarly Articles, Papers and Contributions to Collected Works**


18. "Legal Transplantation: Rethinking the Role and Significance of Western Law in Africa", in P.G. Sack and Elizabeth Minchin (eds), Legal pluralism: Proceedings of the Canberra Law Workshop VII (Canberra: Australian National University, 1986) pp.99-123.


26. “Innovation and Sovereignty” (with C. Juma), in *Innovation and Sovereignty*, op cit., pp.7-27 (Chap.1.).


---

**Academic Book Reviews**


34. *Foreign Law and Comparative Methodology: A Subject and a Thesis* 


**Contributions in Other Journal-Categories**


---

**NOTABLE CONFERENCES, WORKSHOPS & LECTURES**

1. Address on "The Independence of the Judiciary in Modern Africa" - Faculty of Law Seminar, Monash University, Melbourne, Australia, September 12, 1984.

2. Address on "The Independence of the Judiciary in Modern Africa", Faculty of Law Seminar, the University of New South Wales, Sydney, Australia, September 18, 1984.


**SERVICE AS EXAMINER FOR NATIONAL AND FOREIGN UNIVERSITIES**

*University of Botswana*


*University of Dar-es-Salaam*


*Makerere University, Kampala*

5-12 August, 1996; June, July 1998; August, 2001

*University of Malawi (Chancellor College)*

20-27 June, 1986; 1-7 July, 1988
Moi University, Eldoret

June, 1991 (Department of Prod. Tech; Wood Sc. & Tech)

November, 1992 (Department of Prod. Tech; Wood Sc. & Tech)

December, 1993 (Department of Prod. Tech; Wood Sc. & Tech)

July, 1996 (School of Environmental Studies)

June 1997 (School of Environmental Studies)

June 1998 (Faculty of Law)

August 1998 (School of Environmental Studies)

May 1999 (Faculty of Law)

June 1999 (School of Environmental Studies)

September 1999 (Faculty of Law)

June 2000 (Faculty of Law)

University of Swaziland


5. Participation in the Intergovernmental Expert group Meeting on the Draft African Charter on the Rights and Welfare of the Child (held under the auspices of the


13. Assessment of staff works for promotion to rank of Associate Professor (Makerere University, Kampala) (February, 1996).

14. Assessment of staff works for promotion to rank of Associate Professor (University of Ghana (July, 1996).
Member of the Council of Legal Education from March, 1996 - 2003.

Member of the National Council for Law Reporting, 2000 - 2003.


Assessment of staff works for promotion to rank of Associate Professor (Makerere University, Kampala (March 1997)).


Assessment of staff works for promotion to rank of Associate Professor (Makerere University, Kampala (March, 1998).

**CONSULTANCY & CONSULTANCY-RELATED CONTRIBUTIONS**


11. Research Associate with the "Climate and Africa Project" (1993-1994) conducted under the auspices of the African Centre for Technology Studies (ACTS) and the Stockholm Environment Institute (SEI), for the purpose of preparing an African basis for negotiation at the Conference of the Parties to the Climate Convention.

12. Preparation and presentation of papers on the need for African countries to ratify Sub-Regional, Regional and Global Environmental Agreements, for the African Ministerial Conference on the Environment (AMCEN), under the auspices of the UNEP Regional Office for Africa (ROA) (August - October, 1994). The conference took place in Nairobi from March 6-8, 1995.


16. "The Legal Framework Concerning Desertification in the IGAD Member Countries: Analysis of Existing Policy and Development of Recommendations"– Sub-Regional Report presented before the Meeting of Intergovernmental Legal Experts and Policy Makers, under the auspices of IGAD and UNEP, Nairobi, July 1996.


**RECORD OF WORK DONE WHILE SERVING AS A JUDGE OF THE HIGH COURT**

**Appointment**

- Appointment as Acting Judge of the High Court: 28th October 2003.

- Confirmation (retroactive) as Judge of the High Court: December 2004.
Service in Different Divisions & Stations of the High Court

- High Court at Mombasa: July, 2009-2011 – handling civil, constitutional, commercial, admiralty, probate & administration, family, and criminal proceedings.

Decisions in the Printed Versions of the Law Reports


166


Scholarly and Professional Papers and Articles


**Significant Conferences & Workshops Attended**


4. Chairing session (on African Institutions and Ideals) of Strathmore University’s Annual Ethics Conference, 30th October, 2008.

**Special Tasks in aid of the Judicial Service**


3. Chairman of the National Community Service Orders Committee – appointed by the Chief Justice under s.7(1)(a) of the Community Service Orders Act, 1988, with

4. Member of the Judiciary Training Institute’s Curriculum Review Committee (appointed by the Chief Justice on 11th June, 2008 – up to 2009).


Current Appointment

- Justice of the Supreme Court of Kenya – from June 16, 2011,

[Updated to 4th September, 2015 – J. B. OJWANG]
ANNEXURE 6: TEXTS OF RELEVANT PUBLISHED WORKS [IN ACCORDANCE WITH ANNEXURE 1]

[[A.(i),(ii),(iii),(iv),(v),(vi),(vii),(viii),(ix)]]
[[B.(i),(ii)]]
[[C.(i),(ii),(iii),(iv),(v)]]
[[D.(i),(ii),(iii),(iv),(v),(vi),(vii),(viii),(ix),(x),(xi),(xii)]]