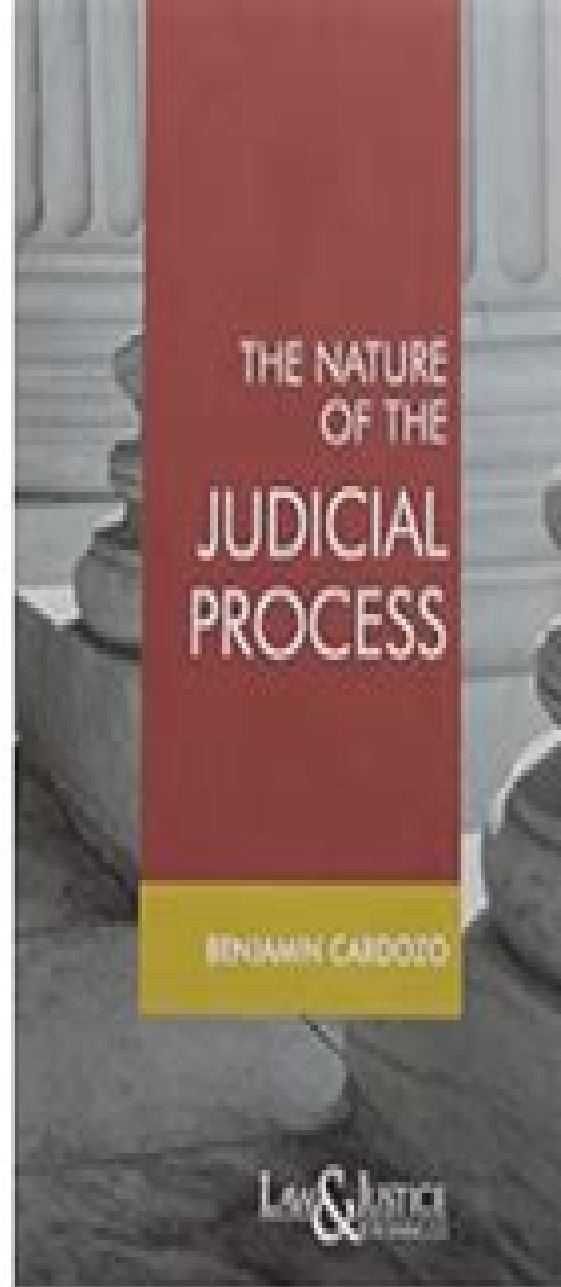




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The Nature Of The Judicial Process

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Lecture IV Adherence to Precedent The Subconscious Element in the Judicial Process Conclusion THE system of law making
by judicial decisions which supply the rule for transactions closed before the decision was announced would indeed be
intolerable in its hardship and oppression if natural law in the sense in which I have used the term did not supply the main
rule of judgment to the judge when precedent and custom fail or are displaced Acquiescence in such a method has its basis in
the belief that when the law has left the situation uncovered by any pre existing rule there is nothing to do except to have
some impartial arbiter declare what fair and reasonable men mindful of the habits of life of the community and of the
standards of justice and fair dealing prevalent among them ought in such circumstances to do with no rules except those of
custom and conscience to regulate their conduct The feeling is that nine times out of ten if not oftener the conduct of right
minded men would not have been different if the rule embodied in the decision had been announced by statute in advance In
the small minority of cases where ignorance has counted it is as likely to have affected one side as the other and since a
controversy has arisen and must be determined somehow there is nothing to do in default of a rule already made but to
constitute some authority which will make it after the event Some one must be the loser it is part of the game of life we have
to pay in countless ways for the absence of prophetic vision No doubt the ideal system if it were attainable would be a code at

once so flexible and so minute as to supply in advance for every conceivable situation the just and fitting rule But life is too complex to

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Table of Contents The Nature Of The Judicial Process

1. Understanding the eBook The Nature Of The Judicial Process
 - The Rise of Digital Reading The Nature Of The Judicial Process
 - Advantages of eBooks Over Traditional Books
2. Identifying The Nature Of The Judicial Process
 - Exploring Different Genres
 - Considering Fiction vs. Non-Fiction
 - Determining Your Reading Goals
3. Choosing the Right eBook Platform
 - Popular eBook Platforms
 - Features to Look for in an The Nature Of The Judicial Process
 - User-Friendly Interface
4. Exploring eBook Recommendations from The Nature Of The Judicial Process
 - Personalized Recommendations
 - The Nature Of The Judicial Process User Reviews and Ratings
 - The Nature Of The Judicial Process and Bestseller Lists

5. Accessing The Nature Of The Judicial Process Free and Paid eBooks
 - The Nature Of The Judicial Process Public Domain eBooks
 - The Nature Of The Judicial Process eBook Subscription Services
 - The Nature Of The Judicial Process Budget-Friendly Options
6. Navigating The Nature Of The Judicial Process eBook Formats
 - ePub, PDF, MOBI, and More
 - The Nature Of The Judicial Process Compatibility with Devices
 - The Nature Of The Judicial Process Enhanced eBook Features
7. Enhancing Your Reading Experience
 - Adjustable Fonts and Text Sizes of The Nature Of The Judicial Process
 - Highlighting and Note-Taking The Nature Of The Judicial Process
 - Interactive Elements The Nature Of The Judicial Process
8. Staying Engaged with The Nature Of The Judicial Process
 - Joining Online Reading Communities
 - Participating in Virtual Book Clubs
 - Following Authors and Publishers The Nature Of The Judicial Process
9. Balancing eBooks and Physical Books The Nature Of The Judicial Process
 - Benefits of a Digital Library
 - Creating a Diverse Reading Collection The Nature Of The Judicial Process
10. Overcoming Reading Challenges
 - Dealing with Digital Eye Strain
 - Minimizing Distractions
 - Managing Screen Time
11. Cultivating a Reading Routine The Nature Of The Judicial Process
 - Setting Reading Goals The Nature Of The Judicial Process
 - Carving Out Dedicated Reading Time
12. Sourcing Reliable Information of The Nature Of The Judicial Process
 - Fact-Checking eBook Content of The Nature Of The Judicial Process
 - Distinguishing Credible Sources
13. Promoting Lifelong Learning

- Utilizing eBooks for Skill Development
- Exploring Educational eBooks

14. Embracing eBook Trends

- Integration of Multimedia Elements
- Interactive and Gamified eBooks

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