JOURNAL OF GLOBAL TRADE, ETHICS AND LAW

Volume 2 Issue 2, 2024

THE COMMON LAW AND ADAM SMITH'S WEALTH OF NATIONS

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Abstract. Adam Smith developed a theory of the 'four-stage' advancement of society as England was entering the Industrial Revolution (the fourth stage) and becoming the leading commercial centre in the world. That transition was raising new and novel legal issues that required legal solutions more complex than the earlier three stages in human advancement, as innovation gave rise to new technologies and ways of working. He and other juridical thinkers saw the debate about whether legislation could effectively drive that transition as the central question of their time, the answer to which would, in the long run, affect the fate of nations and Empire. They had a clear view on this, informed by the study of thousands of years of human history. For them, the common law was vastly superior.

This article examines the debate that took place on these issues, the Benthamite revolution that followed and the modern basket of rights that obfuscate the key question that policy-makers should be asking in our generation: if the common law was so successful in driving the Industrial Revolution, what confidence can we have in a legislated approach as we move into the fifth stage, the Technology Revolution? This is one of the most important issues facing the world as societies decide what legal framework(s) will regulate humanity's move into a digital society and the efforts to discover and invent the technologies that will support us on that journey.

Keywords: Common Law, Legislation, Adam Smith, Hume, Free Markets, Liberty, Bentham, Hayek, Leoni, Sartori, Kames, Mansfield, Niall Ferguson.

JEL: B11, B12, B13, G38, K15, O11, O31, P1

https://doi.org/10.70150/ggra8t94
Journal of Global Trade, Ethics and Law
ISSN 2977-0025 (Online).

'I have reason to assure myself … that Long Experience makes more discoveries touching conveniences or Inconveniences of Laws then is possible for the wisest Council of Men at first to foresee.' (Hale 1922-66, 5:504)

Introduction

I believe that we increasingly have the concept of liberty wrong. At this point, it is looked at primarily as an economic concept or in a confused assessment of a basket of issues that should more properly be viewed under a larger umbrella. This is essentially because lawyers, with a few exceptions, and most particularly the common lawyers, have left the field of debate.

The consequences of this are significant. Policymakers have forgotten the debate that took place as England entered the Industrial Revolution, the decision that was made to use common law to foster the development of a legal system to support global commerce, the framework thus given to liberty to drive invention and progress, and the warnings given about the use of legislation.

Understanding the relative effectiveness of common law and legislation led systems is plainly relevant as the UK unshackles itself from the regulatory system of the European Union and as discussions take place on Hong Kong's future as a common law jurisdiction to service China's financial markets and international trade. However, there are much bigger shifts in the world that move this issue to a level of fundamental importance.

Adam Smith developed a theory of the 'four-stage' advancement of society - from hunter-gatherer to herder, then agricultural and finally commercial society. He developed this theory at a time when England had substantially transitioned out of the agricultural stage, through what became known as the Agricultural Revolution, into its role as the seat of the Industrial Revolution and the leading commercial centre in the world. He, and other juridical thinkers of the time, saw the debate about whether legislation could effectively drive that transition as the central question of their age, the answer to which would, in the long run, affect the fate of nations and Empire. They had a clear view on this, informed by the study of thousands of years of human history. For them, the common law was vastly superior.

Some places in the world are transitioning into what appears to be a fifth stage of society, a Technology Revolution, where we must reassess our relationship with social platforms, virtual reality and complex AI-driven, semi-autonomous systems. As was the case for England as it provided the engine for the Industrial Revolution, and while billions of people are benefiting from this, it is only a few places in the world that are driving the transition to this fifth stage.[1] The jurisdictions that are at the forefront have, at least to this point, provided an environment more supportive of invention, more accepting of experimentation and more willing to allow inventors freedom to succeed.

[1] In fact, the Industrial Revolution was a uniquely English event for 5 or 6 decades until, finally, in the 1820s, it started to spread to Europe, first in Belgium then Germany, France and elsewhere.

We are now witnessing attempts by the Europe Union and some other jurisdictions to impose legislation in digital markets and AI of a breadth and reach that has never before been seen. The EU is pushing for more jurisdictions, including common law jurisdictions around the world, to follow with their own legislated approach. This is one of the most important issues facing the world as societies decide what legal framework(s) will regulate humanity's move into a digital society and the efforts to discover and invent the technologies that will support us on that journey.

This article examines the debate that took place on these issues at the time that England was going through the Industrial Revolution, the Benthamite revolution that followed[2] and the modern basket of rights that obfuscate the key question that policy-makers should be asking: if the common law was so successful in driving the Industrial Revolution, what confidence can we have in a legislated approach to the Technology Revolution?

1. The Economic Perspective

For economists, prominence is given to the concept of free markets and Adam Smith's invisible hand. The focus is on economic freedom, which is seen as the bedrock of broader liberties.[3] The concept of an invisible hand guiding market activity is generally seen as synonymous with the notion of laissez-faire, although Smith never used the term.[4] Proponents of laissez-faire, reflecting the foundations of the Physiocratic school, advocate that government should stay out of the economy and that markets would naturally be competitive if left alone. Thus, the concepts of free markets, laissez-faire and minimal government intervention are generally seen, from an economic perspective, as apparently fundamental components of liberty.

The economic assessment of the relative effectiveness of legislation and the common law draws heavily on the concept of efficiency. Posner argued that common law tends toward efficiency, and thereby sought to justify its superiority over legislation and civil

[2] On Bentham's role in the move to legislation and the administrative state, see, for example, (Brebner 1948, 61) in which Brebner describes Bentham as "the archetype of British collectivism" [at 61] and "*the formulator of state intervention for collectivist ends*" [at 61]. See also (L. J. Hume 1967, 361-75) : "*... two broad issues have been raised ... the influence of Bentham's ideas, their impact on contemporaries and ultimately on legislation and administration ... [and] the question of how far Bentham, in the Constitutional Code, provided a 'blueprint' for a collectivist or administrative state*".

[3] Indeed, significant policy initiatives have been driven in recent decades by a belief that people who have economic freedom will naturally demand, and get, broader freedoms. This thinking appeared to guide the US as Bill Clinton, serving as the 42nd President of the US at the time, opened the door to China's accession into the WTO, stating: "*By joining the W.T.O., China is not simply agreeing to import more of our products; it is agreeing to import one of democracy's most cherished values: economic freedom. The more China liberalizes its economy, the more fully it will liberate the potential of its people — their initiative, their imagination, their remarkable spirit of enterprise*" (Federal News Service 2000).

[4] Adam Smith did, it seems, use an English equivalent of the expression laissez-faire in lectures in 1749, (Viner 1927, 200). The term laissez-faire was coined by the French Physiocrats, including Quesnay, who some say adopted it from the Chinese concept of wu wei (無為).

law systems (Posner 2003). Nicola Gennaioli and Andrei Shleifer (2007) presented a quantitative model of lawmaking by appellate courts using a cost and benefit framework to provide a theoretical foundation for the evolutionary adaptability of common law under what they refer to as the Cardozo theorem.[5]

However, this elevates efficiency as some form of objective benchmark without recognising its limits. Efficiency is an obscure concept. It sweeps aside ethics, moral sentiment, self-determination and the aesthetic in favour of something that appears, for the most part, quite numerical and inhuman. The concept of efficiency clearly has some utility in measuring whether a process can be achieved in ways that reduce the required work or input (its traditional definition). Even in this role, it has limited application given the acknowledged difficulty measuring static and productive efficiency and the impossibility of measuring the far more important impact of dynamic efficiency, which drives innovation. The concept has no apparent utility in debates about the legitimate field of human endeavour and when, or to what extent, governments might impede individual liberty.[6]

Attempts to frame the concept of liberty as an argument for minimal government intervention have also led to confusion. An example is Jacob Viner's endeavour to reconcile Adam Smith's contribution to economic thinking with what he said about law and government, in which he concluded that Smith sought to extend the system of natural liberty by abolition of government regulation, but failed to bring the two strains together or to appreciate that government was part of the order of nature (Viner 1927, 221).[7]

[5] The authors state, in summarising the theorem: "*There exists a k >0 such that, for k ≤ k distinguishing of precedents is on average beneficial. As a result, at every π , k = 0 is socially preferred to k = ∞ .Irrespective of judicial polarization π , judicial activism (i.e., a low k) renders legal change desirable on average. To see why judicial activism (and thus legal change) is beneficial even in the presence of biased judges, compare the ex-ante social loss attained at k = 0 with that attained at k = ∞ . If k = 0 , judges are so activist that they always distinguish any initial precedent A i , thereby leading to a second period expected loss of A i 2 + (1 − A i) 2 E j Λ(A j) . Averaging such losses across all paths of legal change (i.e., across initial precedents), we find an ex-ante loss of: (16) If instead k = ∞ , judges are passive and never distinguish the initial precedent, thereby leading to an ex-ante loss of E i [Λ (A i)] . Since E i A i 2 + (1 − A i) 2 ≤ 1 , legal change is beneficial at every level of judicial polarization and k = 0 is socially preferred to k = ∞ . This is because the introduction of d into the law brings an informational benefit that on average overpowers the cost of bias. This result vindicates Cardozo's intuition for the presence of a "technological" force driving the evolution of precedent toward efficiency despite the vagaries of individual judges.*"

[6] For an interesting discussion of the application of efficiency to legal assessments and the attempt to reconcile efficiency with laissez-faire, see (Friedman 2000). See also (Hayek 2012, 64) : "*The myopic view of science that concentrates on the study of particular facts because they alone are empirically observable, and whose advocates even pride themselves on not being guided by such a conception of the overall order as can be obtained only by what they call 'abstract speculation', by no means increases our power of shaping a desirable order, but in fact deprives us of all effective guidance for successful action.*"

[7] Viner (1927, 220): "*From his examination of the operation of self-interest in specific phases of the economic order and of the consequences of government interference with the free operation of self-interest, Smith arrives at an extensive program for the extension of the system of natural liberty through the abolition of existing systems of governmental regulation, though he nowhere brings the several items in that program together.*" … "*But was not government itself a part of the order of nature, and its activities as "natural" as those of the individuals whom it governed? Smith is obscure on this point, and an adequate answer to this question, if possible at all, would require a detailed examination of Smith's position in the evolution of*

This work in the area of economics appears to have come from attempts to put an 'economic' framework around Smith's notion of liberty, the invisible hand and the concept of 'free markets'. However, Smith never looked at the issue this way. There is, and was for him, no such thing as a 'free' market. Adam Ferguson succinctly stated the point thus: "*Liberty or freedom is not, as the origin of the name may seem to imply, an exemption from all restraint, but rather the most effectual application of every just restraint to all the members of a free state, whether they be magistrates or subjects.*" (A. Ferguson 1792, 258). Indeed, such a thing could only exist in a state of anarchy. The framework that was envisaged by Smith to constrain and guide his invisible hand was a LEGAL framework.[8] Furthermore, it was a framework that encapsulated not just commerce, but all aspects of the law.

Recently, Paul Mahoney (2017) has advanced a more nuanced theory seeking to demonstrate that Smith is a "prophet of law and economics". He has catalogued a number of the jurisprudential points underpinning Smith's legal framework and Smith's connection with other important juridical thinkers of the time, such as Blackstone and Kames. He astutely observes how, as Positivism became the dominant school of thought in English jurisprudence, it overshadowed Smith and Blackstone's legal theories (Mahoney 2017, 228)[9] and he references the attacks that were being made on the English (and subsequently, the US) common law legal systems by reform-minded legislators (Mahoney 2017, 228).[10] However, ultimately, he returns to the rubric of law and economics theory to assess Smith's contribution to law.

political theory, especially with respect to the origin of government and the character of the state of nature in the absence of government. It is clear, however, that to Smith the activities of government in the maintenance of justice are an essential part of the order of nature in its full development, and that such activities are not interferences with the system of natural liberty."

[8] As Hayek noted ((Hayek 2012, 62)): "*Laissez-faire was never more than a rule of thumb. It indeed expressed protest against abuses of governmental power, but never provided a criterion by which one could decide what were the proper functions of government. Much the same applies to the terms 'free enterprise' or 'market economy' which, without a definition of the free sphere of the individual, say little.*"

[9] Mahoney (2017, 228): "*In Europe, Bentham won his point. Smith's and Blackstone's mixed methodology appeared much less attractive than Bentham's utilitarianism, and their substantive views about English law suffered the same fate. Positivism became the dominant school of thought in English jurisprudence. Under the contentious but influential views of John Austin, any reference to natural justice marked an unsophisticated thinker unable to distinguish "is" and "ought." At the same time, utilitarianism made possible a vision of political economy in which experts could advise governments how to improve on market-generated outcomes for the greater benefit of the whole society, making Smith's system of natural liberty seem equally naive.*"

[10] Mahoney (2017, 228) : "*Smith's influence lasted longer in the United States than in his native land. Nevertheless, belief in the existence of natural rights and their importance to the common-law method ultimately gave way in America, as it had in England, to the claims of reformers who pushed successfully for active legislative involvement in social and economic life.*"

2. The Legal Framework of Liberty

The question that should have been asked, but which seems for the most part to have been quite profoundly ignored since the end of the 18th century, is what form of legal framework Smith (and his contemporaries) contemplated.[11] This is somewhat surprising given the written record.

2.1. Smith and his contemporaries

Smith was, at the time of his death, working on a third book, on jurisprudence. As he lay on his death bed, he asked his colleagues to destroy all his manuscripts. However, he had presaged the book in the introduction to the last reprint of The Theory of Moral Sentiments (1817).

In his introduction to the 1828 reprint of the Wealth of Nations, J. R. McCulloch summarised how this third work fitted into Smith's intended trilogy: "*Mr. Miller, the distinguished author of the Historical view of the English Government, and professor of law in the University of Glasgow, had the advantage of hearing Dr. Smith's course of lectures on moral philosophy: of which he has given this account:- "his course of lectures was divided into four parts. The first contained Natural Theology. The second comprehended ethics ... which he afterwards published in his Theory of Moral Sentiments. In the third part, he treated at more length of that branch of morality which relates to justice ... Upon this subject he followed the plan that seems to be suggested by Montesquieu; endeavouring to trace the gradual progress of jurisprudence, both public and private, from the rudest to the most refined ages, and to the accumulation of property, in producing correspondent improvements or alterations in law and government. ... In the last part of his lectures, he examined those political regulations which are founded, not upon the principles of justice, but that of expediency, and which are calculated to increase the riches, the power, and the prosperity of a state ... afterwards published under the title of An Inquiry into the Nature and Causes of the Wealth of Nations.""* (Smith 1828, Preface iii).

Smith's views on the law have also recently gained broad accessibility with the publication of Smith's Lectures on Jurisprudence, following the discovery of a second,

[11] Some asked the question, yet few appeared to see the answer. See, for example, Viner (1927, 223): "*Smith assigned to government also "the duty of establishing an exact administration of justice." Unfortunately, Smith never succeeded in carrying out his original plan of writing a treatise on jurisprudence, and the scattered materials in the Wealth of Nations and the meager outline in the Lectures are insufficient to give us a trustworthy judgment as to what he would include under "justice.""*" This despite the fact that Viner did note the influence of various jurists on Smith's thinking, at [3]: "*The Roman jus naturale, through Grotius and Pufendorf, strongly influenced Smith's thinking. The Renaissance emphasis on the individual, the naturalistic philosophy of Shaftesbury, Locke, Hume, Hutcheson, the optimistic theism of the Scotch philosophers, the empiricism of Montesquieu, were more immediate and more powerful influence… Smith's major claim to fame, as I have said, seems to rest on his elaborate and detailed application to the economic world of the concept of a unified natural order, operating according to natural law, and if left to its own course producing results beneficial to mankind.*"

more comprehensive, set of student notes (Mahoney 2017, 228).[12] Delivered at the University of Glasgow in 1762-1763, the lectures give considerable insight into his theory of the rules by which civil government ought to be directed.

In any event, there is a wealth of contemporary writing in the works of William Blackstone, Lord Mansfield, Lord Kames, Daines Barrington, Francis Hargrave, Richard Burn, Adam Ferguson and others making it quite clear that the legal framework that these thinkers of the time considered to be consistent with liberty (and which guided Smith's invisible hand) was the common law.

The 18th century was a truly momentous time. Hanoverian England was growing out of its agrarian past into both an industrial nation (in the reign of George II, England had grown into the greatest manufacturing and commercial country in the world) (Campbell 1849, 402-3) and the largest and most expansive empire seen anywhere in the world since the mighty empire of Rome. From April 1775 until September 1783 the War of Independence was fought, leading to the establishment of the United States. And from 1787, the rest of the century witnessed the French Revolution.

In the legal field, the *"eighteenth century, according to the judgment of its current historians, was England's century of law … elevated during this century to a role more prominent than at any period of English history"* (Lieberman 1989, 1). Adam Smith maintained that in no other nation had law achieved such "*great exactness*" in execution (Smith 1978). Hume, when writing The History of England, said that English history delivered "*the most perfect and most accurate system of liberty that was ever found compatible with government*" (D. Hume 1983, 525). Blackstone had, more successfully than any of his predecessors in English common law history, drawn the numerous threads and complexities of the common law cases into a coherent body of principles, enshrined in his Commentaries on the Laws of England. Lord Mansfield sat as Chief Justice in England, almost single-handedly developing the law merchant to bring the common law into an age of industrialisation, commerce and global trade. Lord Kames sat as Chief Justice of Scotland, making similar advances in Scottish law and expounding on the inherent strengths of common law. Lord Hardwicke's twenty-year career in Chancery from 1736 to 1756 also brought considerable advances in settling equity as a system of case law, which marshalled it into a set of principles, designed to temper its hitherto tendency to arbitrariness. US statesmen were consulting with these common law intellectual giants on a constitution to guide and protect the liberty of the newly minted United States of America (Mahoney 2017, 228).[13]

There was, at this time, an important and fundamental discussion taking place on the rival claims of common law and legislation within the English legal system (Lieberman 1989, 2). On the common law side were writers such as Smith, Blackstone, Kames and others. On the side of legislation, Bentham emerged as the leading protagonist. We are fortunate to have a detailed examination of this discussion in David Lieberman's 'The

[12] Mahoney (2017, 228) : "*Because of the lapse of time and the fact that the most complete version of the Lectures saw publication only in the 1970s, scholars overlooked Smith's contributions.*"

[13] Mahoney (2017, 228) : "*Smith strongly influenced American legal and political thought during the founding era (Fleischacker 2002). Early American legal thinkers also looked to Blackstone for instruction on the common law and the natural rights of Englishmen (Waterman 1933).*"

Province of Legislation Determined' (1989). What is surprising is that there had been no recent survey of the general development of legal theory in the age of Blackstone and Bentham until Lieberman (Lieberman 1989, 4). Lieberman succinctly summarised the impact of this: "*our recent neglect of the juristic setting in which the debate on legal change and law reform first developed has greatly impoverished our notion of the "central questions of Anglophone political theory," and generated intellectual histories in which distinctive voices of English reform have been rendered unnecessarily mysterious*" (Lieberman 1989, 13).[14]

It is quite clear that Smith, Blackstone and indeed the vast majority of juridical thinkers at the time saw the common law as the legal framework consistent with, and responsible for, England's liberty (and its prosperity). Legislation, in the private law arena, was regarded as antithetical both to liberty and to common sense. The link drawn between the common law and liberty was, and had been for centuries, quite explicit: *"As Matthew Hale maintained, though the common law was "more particular than other Laws" and therefore "more numerous and less methodical," this still "recompenceth with greater advantages: namely, it prevents arbitrariness in the Judge, and makes the Law more certain." This belief in the relationship between English liberty and the distinctive certainty of English justice was also endorsed by more detached observers. Montesquieu, in the famous examination of the English constitution which had "political liberty" as its "direct end," stressed that the judgments of the courts were fixed "to such a degree as to be ever conformable to the letter of the law." Adam Smith concurred that "an other thing which greatly confirms the liberty of the subjects in England" was "the little power of the judges in explaining, altering, or extending or correcting the meaning of the laws"* (Lieberman 1989, 79).

The important contrast in a judge's role when dealing with interpretation of statutes was also well understood: *"The relevant distinction between authentic positive law and the common law was carefully delineated by James Sedgwick in his Remarks on the Commentaries. Sedgwick observed that "in the administration of statutory law" the magistrate "has only to apply that law to the affair under trial." "In common litigations," however, "those general principles which are the essence of justice itself are to be resorted to, and the adjudged cases consulted, with a view to their application, so far as they are accordant with the spirit of equity, and not for the mere dictatum of the adjudged case itself"* (Lieberman 1989, 85).

It is necessary to put legislation in that period in context and Lieberman does this succinctly: *"Parliamentary statute was already a principal source of English law, and legal commentators could point to past occasions, like the statutes of Edward I, when the legal system had received extensive legislative addition. Few of the figures under*

[14] Lieberman (1989, 2): "*The background to the body of theory to be examined … lies in a surprisingly neglected consequence of the consolidation of parliamentary government in the years following the 1688 Revolution. Accompanying the establishment of a regular, annual parliamentary session was the dramatic increase of the King-in-Parliament's exercise of its constitutional powers to make law.*" At 14, he went on to observe: "*At mid-century, Blackstone noted that the English statute law had "swelled to ten times a larger bulk" since the time of Sir Edward Coke; at the end of the century, John Huntingford reported that the statute book had "nearly doubled in bulk" since the time of Blackstone. Nowhere was the growth of legislation more striking than in the area of penal policy.*"

discussion here believed there to be any formal improprieties in the eighteenth-century parliament's exercise of its legislative will. It is indeed during this period that constitutional lawyers have traditionally fixed the point at which parliamentary sovereignty came to be unambiguously identified with legislative omnipotence. Notwithstanding the much-remarked upon "swelling of the statute book," legal historians have long concluded that this was still an era when "legislation played a tiny part in the development of private law." (Lieberman 1989, 16)

It is therefore clear that legislation was not, at this point, pervasive. However, the battle lines were being drawn: the legislature had been declared omnipotent, but just how far should it go in wielding that power? *"The sheer volume of the legislation — at a scale, according to the tendentious estimate of the Lord Chancellor, beyond the mastery of even the most experienced lawyer — raised awkward implications for the standard "maxim of laws of England, that the want of knowledge thereof shall not excuse a man..." ... But what attracted the gravest concern was the perceived qualitative failures of this legislation and the damage thereby inflicted on the legal system overall."* (Lieberman 1989, 17)

2.1.1. Blackstone

Lieberman says that: *"[f]ew features of the Commentaries have suffered such unfortunate neglect as Blackstone's stated aim that his work should furnish guidance to "such as are, or may hereafter become, legislators."* ... *"The mischiefs that have arisen to the public from the inconsiderate alterations in our laws are too obvious to be called in question... For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the English, as well as other courts of justice) owe their origin not to the common law itself, but to innovations that have been made in it by acts of parliament."* (Lieberman 1989, 56)

He goes on to observe that: *"Blackstone claimed that parliament could build only upon "the foundation of the common law," and there was no place in his legislative science for "any great legislative revolution". ... "If, as Dicey suggested, the Commentaries supplied an early and authoritative account of parliament's legislative omnipotence, then what demands equal emphasis is the profound uneasiness with which Blackstone perceived the practical implications of this constitutional doctrine."* (Lieberman 1989, 66)

Blackstone was by no means alone in this view. Both Mansfield and Kames "*insisted on the inherent superiority of the courts over parliament as a vehicle for developing legal rules*" (Lieberman 1989, 71). The common law was, at the time, being particularly tested. Society in England was changing rapidly both because of advances in commerce and with the extended empire. The question was, rightly, being asked whether a law built in another age could adapt.

2.1.2. Mansfield

The common law developed dramatically under Mansfield, showing its ability to support industrialisation and international commerce. Lieberman observes that: *"[a]s*

with so many other features of English legal development, the peculiar history of the commercial law was largely the result of the resilience and durability of the common law system." (Lieberman 1989, 100) It is quite clear that these developments came through the common law courts. "*Not only had Mansfield founded a "system of mercantile jurisprudence," but this had been effected without major contribution from parliamentary legislation*" (Lieberman 1989, 121). … *"Mansfield's efforts operated in legal territory largely unoccupied by statute law. But he explained this by attributing to the Chief Justice the same motives Blackstone had perceived in the reforming enterprises of earlier common law judges. In his attempt to advance English law for "the concerns of a trading population," he had consciously avoided parliament. "Instead of proceeding by legislation," Mansfield "wisely thought it more according to the genius of our institutions to introduce his improvements gradually by way of judicial decisions.*" (Lieberman 1989, 121) … *"The success of Mansfield's court in refining and settling England's commercial law provided a most forceful vindication of the common law's continued capacity to develop legal remedies in response to new social needs. English legal theory, as authoritatively elaborated by Hale, explained how the incremental growth and steady process of correction in the methods of common law had produced in England an unmatched legal fabric, one in Blackstone's formula "now fraught with the accumulated wisdom of ages."* (Lieberman 1989, 122)

Mansfield's criticism of legislation was by no means limited to the arena of mercantile law. More broadly, Lieberman tells us of *"[t]he Chief Justice's often critical attitude to parliamentary legislation". ... "In his arguments in Omychund v Barker, the future Chief Justice insisted upon the superiority of common law over legislation as a mechanism for developing the rules, there presenting an argument that was later received as a classic pronouncement on the wisdom of the common law. On the bench Mansfield supplied further observations on the failures of parliamentary legislation. Many of these took the familiar form of complaints against the careless drafting and technical flaws in many acts of parliament. In a ruling of 1767, though, he returned to the broader issue of the rival claims of common law and statute, and again presented the record of the past as a clear demonstration of the superiority of common law"* (Lieberman 1989, 124). … *"Mansfield conceived the common law to be a system of legal usage which also encompassed among its sources the law of nature and nations and which, when properly " looked into," revealed its foundations " in equity, reason and good sense."* (Lieberman 1989, 131) … *"As for Blackstone, both law and equity were equally settled systems of legal art, where precedents served as evidence of law and where the application of settled rules was not suffered to violate the principles of reason and justice"* (Lieberman 1989, 132).

2.1.3. Kames

In Scotland, Kames shared Mansfield's views on the superiority of common law and the weaknesses inherent in legislation. Again, Lieberman does an admirable job bringing together the written record of the time. I can do no better than to set out some of his key observations and I hope the elucidation, and clear links they provide to Smith's legal thinking, will allow the reader to excuse me for their length.

Scotland's legal landscape was, at the time, going through perhaps even more dramatic changes than England, and Kames was a strong advocate for a judicial, rather than legislative, route to support that change: *"The legal writings of the Scottish judge and philosopher, Henry Home, Lord Kames, contain, amongst much else, one of the eighteenth century's most ambitious and articulate programs of judicial law reform. Kames's elaborate defense of the judicial route to legal improvement, as well as his more general approach to legal theory, owed much to the specifically Scottish setting in which he trained and professionally served, and no account of his career and corpus could afford to neglect this Scottish context"* (Lieberman 1989, 144).

Like Smith, Kames looked at the world from a broad frame of reference. By 1781, *"he had assembled a massive, if rather prolix, corpus of over twenty volumes that could serve as an index to nearly all of the intellectual pursuits of the Scottish Enlightenment, encompassing such topics as morals, religion, law, government, natural philosophy, political economy, education, aesthetics, and of course history"* (Lieberman 1989, 146).

It is also clear that Smith and Kames strongly influenced each other in their thinking and their views. Lieberman tells us that Kames "*... effectively promoted the academic fortunes of Adam Smith ..." and Adam Smith in turn observed that "we must every one of us acknowledge Kames for our master ....*" (Lieberman 1989, 146) In fact, Kames was patron not just to Adam Smith, but also to a number of the other most influential thinkers of the time, including David Hume and John Millar.

Kames is credited for having described the 'four-stage' advancement of society, from hunter-gatherer to herder, then agricultural and finally commercial society. This model was fundamental to the legal debate that was going on at the time. (It is just as important to the debate that is now taking place, as we move into a fifth stage, a technology driven society where we must reassess our relationship with social platforms and complex AI-driven, semi-autonomous systems). In the first two stages, no laws were considered necessary save for those issued by the family, clan or tribe head. The agricultural stage introduced new occupations and made the work of those individuals valuable to others, requiring the law to develop principles to guide these new relationships. The age of commerce (and, for the English, empire) created even more complex societal relations, requiring significant developments in the law to support these changes. Kames, like Mansfield, dismissed legislation as incapable of resolving these challenges and believed that the only effective solution lay in the development of the common law.

While *"Kames presented one of the first published versions of the "four stages" theory of societal development ... Meek argued that ... he probably learned the theory from Smith's lectures on jurisprudence"* (Lieberman 1989, 149, fn 25, Meek 1976, 102-7). Indeed, the links between Kames and Smith went much further than this and their views on law and jurisprudence were at the centre of their thinking: *"As in the case of other contemporary Scottish philosophers, jurisprudence provided the disciplinary context and much of the structure for Kames's explorations in social theory. It was in his essays on law that he first revealed many of the same general sociological interests displayed by Adam Smith in his Lectures on Jurisprudence or by John Millar in The Origin of the Distinction of Ranks. The distinctive concern of this body of eighteenth-century legal speculation, according to the testimony of John Millar in his An Historical View of*

English Government was the attempt to reformulate the natural law jurisprudence of Grotius and his successors as a "natural history of legal establishments." To this end, "speculative lawyers" were led to examine the formation and growth of "civil society," the "cultivation of arts and sciences," the "extension of property in all its different modifications," and their combined influence "upon the manners and customs, the institutions and laws of any people." In Millar's judgment, the leading practitioners of this genre of "natural history" were Montesquieu, Smith and Kames - Montesquieu having first "pointed out the road" and Smith representing "the Newton" of "this branch of philosophy." (Lieberman 1989, 147)

Kames, like his contemporaries, emphasised that the strength of the common law came from the process: *"Unlike the legislature, Kames explained, the courts only arrived at "a general rule" through the "induction of many cases," each "adapted to particular circumstances." Through such a steady and gradual process of legal growth, customary law achieved a standard of excellence unavailable in other forms of law-making. According to the frequently invoked formulas of English common lawyers, by such means England's unwritten law (in Mansfield's words) "work[ed] itself pure" by refining rules "drawn from the fountain of justice." And the natural result was a body of common law "superior to an act of parliament."* (Lieberman 1989, 162)

It is important to recognise that this was not a singularly English phenomenon. As Lieberman tells us: *"... it would be a mistake to limit its relevance to the English legal tradition. An eighteenth-century Scottish lawyer, for example, would have encountered much the same doctrines in Stair's Institutions. There Stair likewise stressed the superior virtues of legal custom "wrung out from... debates upon particular cases," in which "the conveniences and inconveniences thereof, through a tract of time, are experimentally seen." And as Kames was later to do, Stair immediately contrasted this with the situation in statute law, where "the law-giver must at once balance the conveniences and inconveniences," and therefore "may, and often doth, fall short.*" (Lieberman 1989, 162-63)

Lieberman concludes: "*For Kames, no less than for Bentham, utility featured as a critical principle of legal modernization. But, the reformers to whom Kames directed the principle were enlightened judges and not scientific legislators. Kames reminds us how in this period a commitment to the methods and institutions of customary law need not be taken to indicate any lack of commitment to law reform. Indeed, for Kames as for so many of his English contemporaries, the most important and recently confirmed lesson of English law was the clear superiority of the courts over the legislature in orchestrating legal development. It was this lesson which made Lord Mansfield, the period's most illustrious judicial reformer, the proper figure for Kames to invoke at the outset of the Principles of Equity. And it was this lesson which, in turn, suggested that the judges of the Court of Session were the ideal agents for lifting Scots law into the modern order of commercial society. This was a lesson in the wisdom of the common law that scarcely could be lost on a philosopher-judge whose devotion to improvement, in John Ramsay's apt phrase, "was almost apostolical."*" (Lieberman 1989, 175)

2.1.4. Mackintosh

Mackintosh, in 1799, published 'A Discourse on the Study of the Law of Nature and Nations' (Mackintosh 1835). It continues to this day to be regarded as one of the seminal post-Classical works on international law. What is less observed is the views Mackintosh expressed on the common law and legislation. He emphasised the traditional common law view that liberty is "*the object of all government*" and observed that in "*most civilised states the subject is tolerably protected against gross injustice from his fellows by impartial laws, which it is the manifest interest of the sovereign to enforce*" but that "*some commonwealths are so happy as to be founded on a principle of much more refined and provident wisdom … the will of the sovereign is limited with so exact a measure, that his protecting authority is not weakened. Such a combination of skill and fortune is not often to be expected, and indeed never can arise, but from the constant though gradual exertions of wisdom and virtue, to improve a long succession of most favourable circumstances*" and in *"unmixed forms of government, as the right of legislation is vested in one individual or in one order, it is obvious that the legislative power may shake off all the restraints which the laws have imposed on it. All such governments, therefore, tend towards despotism, and the securities which they admit against mis-government are extremely feeble and precarious."* (Mackintosh 1835, 62)

Mackintosh clearly embraced the common law tradition. For him, there was not "*in the whole compass of human affairs, so noble a spectacle as that which is displayed in the progress of jurisprudence; where we may contemplate the cautious and unwearied exertions of a succession of wise men through a long course of ages; withdrawing every case as it arises from the dangerous power of discretion, and subjecting it to inflexible rules; extending the dominion of justice and reason, and gradually contracting, within the narrowest possible limits, the domain of brutal force and of arbitrary will.*" — "*The science of jurisprudence, the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of ages combining the principles of original justice with the infinite variety of human concerns.*"

In his Discourse, Mackintosh exemplified the "*progress of law, and illustrate those principles of universal justice on which it is founded, by a comparative review of the two greatest civil codes that have been hitherto formed—those of Rome and of England*" (Mackintosh 1835, 77).

2.1.5 Hume

The reference by Mackintosh at this point to Rome and England is not surprising to those versed in David Hume's great History of England. Hume wrote this 6 volume work from 1754–62, with the object of tracing the history of law and liberty. Perhaps most well known today as a philosopher, by his contemporaries, he was regarded as one of the finest historians of his generation. His work on the history of law was of particular importance.

For Hume, society reached its pinnacle about the age of Augustus (around 27 BC), as Rome transitioned from Republic to Empire. From that point, it went into decline. *"The irruption of the barbarous nations, which soon followed, overwhelmed all human knowledge, which was already far in its decline; and men sunk every age deeper into*

ignorance, stupidity, and superstition; till the light of ancient science and history had very nearly suffered a total extinction in all the European nations. ... The period, in which the people of Christendom were the lowest sunk in ignorance, and consequently in disorders of every kind, may justly be fixed at the eleventh century, about the age of William the Conqueror... " (D. Hume, The Progress of English Liberty 1761).

However, Hume writes that: *"there was no event, which tended farther to the improvement of the age, than one, which has not been much remarked, the accidental finding of a copy of Justinian's Pandects, about the year 1130, in the town of Amalfi in Italy."* This is, of course, a reference to what is often referred to as the Codex Justinianus, codified by Emperor Justinian in the Byzantine Empire in a process starting in 529 AD: the written record of Roman law, lost to history during the Dark Ages and then rediscovered.

Rome's law started with a code (the twelve tables) around 449 BC, and it ended in a code, Justinian's Pandects, compiled in Byzantium from 529-565AD. Roman law now forms the basic framework for civil law, which is the most widely used legal system today. However, the important point is what happened in Rome in the thousand years between 449 BC and 529 AD. In the period between about 201 to 27 BC, Rome developed a highly sophisticated common law system, which further developed over the next 250 years, as Roman common law reached its highest levels of development.

It was only many hundreds of years later, when the Empire was in the late stages of decline, that this body of common law was codified by Justinian, then, following the collapse of the Empire, eventually lost. Europe plunged into ignorance, lawlessness and superstition. This is what Hume is explaining to us. When rediscovered in Amalfi by Roman Catholic priests in the 1100s, the discovery dragged Europe out of its decline, and set western society on a path to increased liberty and prosperity.

However, Europe and England took very different paths. While Europe adopted a codified, legislation led system, based on Justinian's Pandects, England developed its common law system. In Hume's words: *"though the close connexion, which without any necessity they formed between the canon and civil law, begat a jealousy in the laity of England, and prevented the Roman jurisprudence from becoming the municipal law of the country, as was the case in many states of Europe, a great part of it was secretly transferred into the practice of the courts of justice, and the imitation of their neighbours made the English gradually endeavour to raise their own law from its original state of rudeness and imperfection"*.

This supported England through the Agricultural Revolution, a critical first step out of the Dark Ages. But England was rapidly changing in the 18th Century, becoming the most industrial and commercialised centre in the world, with extensive territories and foreign commerce. This is what led England, at this point, to adapt the common law system. This puts in context the debate about whether England should legislate for these changes in society. Blackstone, Smith, Kames and, importantly, Mansfield, who was England's Chief Justice at the time, having this perspective on Roman history, rejected legislation as clumsy, ineffective and arbitrary.

2.1.6 Smith's Wealth of Nations and the common law

For Smith, regarded as the "Newton" of this branch, Hume's work helped to frame his view on the superiority of common law and it was this framework within which he contextualised England as he wrote the Wealth of Nations. Hume had shown how the discovery of Justinian's codex pulled Europe out of the Dark Ages, giving Europe codified systems of law built on the Roman common law experience. Life in Europe was most certainly improved by this discovery. However, Smith would have been acutely focused on how the principles from Roman common law had been secretly infused into English common law, helping England to pull ahead of Europe and the rest of the world.

There was no such thing as a free market in Smith's mind. English society functioned, and achieved accumulation of wealth, through the highly sophisticated application of a legal system so far superior to legislation that it propelled England into the Industrial Revolution.

Adam Smith famously said in the Wealth of Nations: "*But though the profusion of government must undoubtedly have retarded the natural progress of England towards wealth and improvement, it has not been able to stop it. The annual produce of its land and labour is undoubtedly much greater at present than it was either at the Restoration or at the Revolution. The capital, therefore, annually employed in cultivating this land, and in maintaining this labour, must likewise be much greater. In the midst of all the exactions of government, this capital has been silently and gradually accumulated by the private frugality and good conduct of individuals, by their universal, continual, and uninterrupted effort to better their own condition. It is this effort, protected by law, and allowed by liberty to exert itself in the manner that is most advantageous, which has maintained the progress of England towards opulence and improvement in almost all former times, and which, it is to be hoped, will do so in all future times.*" (Smith 1828, 153).

3. Bentham and Legislation

The legislature did not heed the warnings from Smith, Blackstone, Mansfield, Kames and others. Indeed, following the publication of the Commentaries, the pace of legislation increased and its use, ultimately, became pervasive across the common law world, with an exponential acceleration from the end of the 19th century. Lieberman goes through the debates that ensued at the time as to potential statute consolidation. For interested readers, there is a wealth of information. However, my focus is on what was happening in the conflict between the common law and legislation, and so we turn to Bentham.

It was in the 1770s that Bentham started looking at the rival claims of common and statute law. Lieberman tells us that he was, at that time, entering a *"well rehearsed argument. For him, as for Blackstone and his contemporaries, the relationship between common law and legislation represented a basic problem for legal theory, and a focus for more practical questions regarding the appropriate instruments for legal improvement in England"* (Lieberman 1989, 219).

The arguments may have been well rehearsed. However, Bentham's position was radical. He claimed that common law did not even exist. *"It was only the existence of statute law which made it possible to conceive of common law in misleading terms as a body of laws: ...there is no possible means of explaining what it is that shall be understood to make up an article of Common Law of a given description, but by imagining some corresponding article of Statute Law that shall represent it. The Common Law is but the Shadow of the Statute Law, although it came before it. Before the appearance of the Statute Law even the word " Law" could hardly have been mentioned... As a system of general rules, the Common Law is a thing merely imaginary: and the particular commands which are all that (in the way of command) there ever was of it that was real, can not every where, indeed can seldom, be produced... Once more, to give a gross idea of it, what is the Common Law? What, but an assemblage of fictitious regulations feigned after the images of these real ones that compose the Statute Law. Bentham reached this conclusion on the basis of his positivist legal doctrines, which characterized law, properly so called, as a command issued by a sovereign will."* (Lieberman 1989, 222)

Bentham's theory is striking. The concept of liberty is absent and, for Bentham, the object of law is not to reflect just outcomes in consensual interaction of individuals in society or to respect the customs that had grown and been recognised through centuries of examination by judges of the rights and wrongs in cases that came before the courts. Rather, the object is to subject them to commands from a centralised legislature to reflect 'Sovereign will'.

In this way Bentham turned people from individuals with the power of self-determination into vassals of the legislature to be commanded how to act and what objectives to seek. In Lieberman's words: "*Bentham believed that once the legal positivist position was disclosed, it became possible to dismiss pre-emptively a wide range of " pseudo-laws " under the simple formula that* "e*very thing that is not a Command therefore is not a Law*." (Lieberman 1989, 223) … "*As with common law, the case against natural law generally began by invoking the positivist premise that all authentic law was a species of command. The laws of nature could not be genuine laws since a "real Law is a command, a command...an expression of the will of some person, and there is no person of whose will the Law of Nature can be said to be the expression.*" (Lieberman 1989, 225)

The references to positivist and natural law theory are familiar to modern jurisprudence. However, in modern commentary and academic debate, the attack made by Bentham has generally been mischaracterised. It was not just an attack on natural law theory, but an attack on the common law system itself. In Lieberman's words: "*Bentham's hostility to natural jurisprudence comes as no surprise, as Benthamic legal positivism is regularly received in Anglo-American jurisprudence as the historically decisive response to natural law theory. What has been less observed is the extent to which Bentham's critique of natural law formed a part of the attack on common law*" (Lieberman 1989, 224).

Lieberman concludes: *"For Bentham, there was one fundamental solution for this philosophical and moral bankruptcy in English law. What was required was "to mark out the line of the subject's conduct by visible directions," which could only be achieved "by*

transforming the rule of conduct from Common Law into Statute Law" (Lieberman 1989, 239-40).[15]

4. History lost, and then found

It is surprising how quickly the notion caught popular support, and how the memory of the common law view expressed by Blackstone, Smith and their contemporaries faded into history. When writing his introduction to the first English translation of Cicero's Political Works (comprising his Treatise on the Commonwealth and his Treatise on the Laws) in 1842, Francis Barham said: *"... we cannot help lamenting that the science of jurisprudence or universal law, properly so called, should be so little studied in our British state at present. When we look into the history of literature, we find times have been, in which men of the most consummate genius devoted that genius with the most ardent perseverance and the most mathematical precision, to the study of jurisprudence in its very loftiest and widest bearings. They hesitated not, through many years in incessant labour, like Grotius abroad and Seldon at home, to study the vast system of moral obligations. In order to make themselves jurisconsults worthy of the name, they studied the divine laws handed down in Scripture, and developed in the ecclesiastical policy, ancient and modern. They studied the law of nature and nations, as explained by its oriental and classic commentators. They studied the civil laws of all states and commonwealths, and by a kind of comparative analysis, elicited the spirit of laws among all peoples, and confirmed just regulations by examples derived from the catholic experience of men in all ages and countries, and defeated the blunders of legislation, by showing their pernicious consequences, under every variety of circumstances. Such men still appear occasionally in Europe and America. A few may still grace the colleges, and the inns of court, or the open walks of literature; but their number has become deplorably limited."* (Barham 1841-42, 16-17)

4.1. Leoni

[15] Lieberman (1989, 239-40) "In his call for a common law Digest Bentham had stood the English legal tradition on its head. Underlying much eighteenth-century legal speculation was the broad consensus that the primary defect in English law was parliamentary statute. Reforming the law was a matter of controlling legislation, and most often the arguments for such reform were advanced by contrasting statute law's failures with common law's triumphs. As Bentham observed of Blackstone, " he magnifies Common Law at the expense of Statute. " Bentham likewise recognized the defective state of the statute book, perhaps in a manner more comprehensive than any of his contemporaries. But in terms of the broader question regarding the relationship between common law and statute, Bentham starkly repudiated the conventional wisdom. Not only was common law bad law, it was "not law." The common law's presumed rival, legislation, was its true savior: The truth is, take [common law] all together, it is not yet in a condition to be known. The business is to put it into such a condition. To do this it must be digested by authority: the Common Law must be digested into Statute. The fictitious must be substantiated into real."

It took nearly 160 years for the debate about legislation and the common law to re-surface in the mainstream and, in that time, the growth in legislation had been exponential, to such an extent that the concept that private law should (or could) be discovered in the court room would now be met by most people with disbelief, or even ridicule.

In 1958, three of the leading free market thinkers of the time - Milton Friedman, Friedrich von Hayek and Bruno Leoni - delivered a series of lectures at what is now Claremont College in California. The importance and subsequent influence of these lectures cannot be overstated. They laid the foundation for Friedman's 'Capitalism and Freedom', Hayek's 'The Constitution of Liberty' and Leoni's 'Freedom and the Law' (Leoni 1991).

It is the third of these books, Freedom and the Law, that picks up on the debate about legislation's role in a free society. Hayek would also, after much discussion with Leoni, later publish 'Law, Legislation and Liberty', in a revision to the views he expressed in The Constitution of Liberty. What is striking about these books is both the common theme of superiority of the common law over legislation, but also the apparently limited reference to the debate on this issue that had taken place in the 18th century, when Smith was publishing the Wealth of Nations and his Theory of Moral Sentiments.

Leoni had a very simple, but immensely important proposition: the source of our laws determines whether markets are 'free'. Leoni started with the now well-established proposition that "... *a centralised economy run by a committee of directors suppressing market prices and proceeding without them does not work because the directors cannot know, without continuous revelation of the market, what the demand or the supply would be* ..." (Leoni 1991, 19). The case for this conclusion has been admirably made by economic theorists since Smith first published the Wealth of Nations.

What set Leoni apart was that he went on to say that this "*conclusion may be considered only as a special case of a more general realization that no legislator would be able to establish by himself, without some kind of continuous collaboration on the part of all the people concerned, the rules governing the actual behaviour of everybody in the endless relationship that each has with everybody else.*" (Leoni 1991, 20) To put it another way, the question, for Leoni, is not how to get good legislation or avoid bad legislation. The question is much deeper than that. In Leoni's terms, "*[i]t is a question of deciding whether individual freedom is compatible in principle with the present system centred on and almost completely identified with legislation*" (Leoni 1991, 11).

Leoni built his argument convincingly, but mainly by reference to historical examination of the common law system that was the foundation of the great Roman Empire. Leoni certainly drew parallels with the English common law, but it does not appear to have been the mainstay of his arguments.

Leoni started by considering one of the critical fallacies in legislation, that it gives legal certainty. Certainty is often conceived of as connected with the idea of a definitely written formulae - the idea that we write our laws down so they must be certain. But this overlooks the question whether we are looking for certainty over the short or the long run. As Leoni put it: "*The certainty of the law, in the sense of a written formula, refers to the state of affairs inevitably conditioned by the possibility that the present law may be replaced at any moment by a subsequent law. The more intense and accelerated is the process of law-*

making, the more uncertain will it be that the present legislation will last for any length of time. Thus the certainty of the law in this sense could be called the short-run certainty of the law." (Leoni 1991, 80)

So in one sense, written laws are certain. We can read the words. But it is a short run sense of certainty. There is no guarantee that the rules in place one day will be there the next. This makes business planning over the longer term extremely challenging. Leoni is, of course, in looking at legal certainty in this way, also echoing the views of the great English common law jurists and focusing on what they saw as one of the key foundations of law: "*The great object" in "mercantile law," Mansfield frequently declared, "is certainty," and this required that "the grounds of decision be precisely known.*" (Leoni 1991, 115)

Roman private law, like English common law, was not a written legal system for the most part. Whilst public law (the body of rules that regulates the administration of government) was legislated, private law (i.e. the law that governs private activity of people in their interactions with each other in society) did not rely on legislation.

Some people might find this a startling proposition. But for students of Roman law, it is no surprise. It is often said that Rome's law started with a code (the Twelve Tables) and ended with a code (Justinian's Corpus Juris). However, the point that is important is what happened in the intervening period. Legislation in the private law arena when Rome achieved its most spectacular success was practically unknown. In fact, Leoni says, and he is perhaps right in this, the most useful thing that a student of Roman legal history can take from his study of that great system, is this one salient point: "*We probably are so used to thinking of the Roman legal system in terms of Justinian's Corpus Juris, that is in terms of a written law book, that we fail to realise how Roman law actually worked. A large part of the Roman rules of law was not due to any legislative process whatever.*" (Leoni 1991, 81)

Even when Justinian started his massive process of codification in AD529 he was not seeking to re-write the private law, but rather to bring together in codified form the various propositions that had emerged from discoveries of the Roman jurists over the centuries of the Republic and the Empire.

This had an enormous impact on the concept of legal certainty. As Leoni put it: "*The Romans accepted and applied a concept of the certainty of the law that could be described as meaning that the law was never to be subjected to sudden and unpredictable changes. Moreover, the law was never to be submitted, as a rule, to the arbitrary will or the arbitrary power of any legislative assembly or of any person, including senators or other prominent magistrates of the state. This is the long-run concept, or, if you prefer, the Roman concept of the certainty of the law.*" (Leoni 1991, 83-84)

In this quote, we see echoes of Smith in his last revision to The Theory of Moral Sentiments: "*In all well-governed states ... not only judges are appointed for determining the controversies of individuals, but rules are prescribed for regulating the decisions of those judges; and these rules are, in general, intended to coincide with those of natural justice. ... It does not, indeed, always happen that they do so in every instance. Sometimes what is called the constitution of the state, that is, the interest of the government;*

sometimes the interest of particular orders of men who tyrannize the government, warp the positive laws of the country from what natural justice would prescribe."

4.2. Hayek

Hayek provides probably the most comprehensive contemporary review of the debate on common law and legislation since the time that Smith was writing. He notes the way that the modern economists' defence of liberty has failed to be framed in legal terms: "*The economists … at least after the time of David Hume and Adam Smith, who were also philosophers of law, certainly showed no more appreciation of the significance of the system of legal rules, the existence of which was tacitly presupposed by their argument.*" (Hayek 2012, 68) And he is critical of the purported appeal to economic considerations and laissez-faire used to justify the turn to legislation: "*… when we examine the reason regularly given by the lawyers for the great changes that the character of law has undergone during the last hundred years. Everywhere, whether it be in English or American, French or German legal literature, we find alleged economic necessities given as the reasons for these changes.*" … "*These accounts invariably speak of a past laissez-faire period, as if there had been a time when no efforts were made to improve the legal framework so as to make the market operate more beneficially or to supplement its results"* (Hayek 2012, 68).

Hayek, like the juridical thinkers of the 18th century, was quick to highlight the dangers of legislation, but also to note how recent was the conception that a sovereign could legislate to command society: "*Legislation, the deliberate making of law, has justly been described as among all inventions of man the one fraught with the gravest consequences, more far-reaching in its effects even than fire and gun-powder. Unlike law itself, which has never been 'invented' in the same sense, the invention of legislation came relatively late in the history of mankind. It gave into the hands of men an instrument of great power which they needed to achieve some good, but which they have not yet learned so to control that it may not produce great evil. It opened to man wholly new possibilities and gave him a new sense of power over his fate. The discussion about who should possess this power has, however, unduly overshadowed the much more fundamental question of how far this power should extend.*" (Hayek 2012, 72)

Hayek traced the evolution of the debate on common law and legislation, from the earliest debates in classical Greece, through to Rome and explained how it was that England nurtured its much-cherished liberty under common law as Europe adopted its civil law system built of the Justinian codes.

In respect of Greece, he said: "*… we find in the Athenian democracy already the first clashes between the unfettered will of the 'sovereign' people and the tradition of the rule of law; and it was chiefly because the assembly often refused to be bound by the law that Aristotle turned against this form of democracy, to which he even denied the right to be called a constitution. It is in the discussions of this period that we find the first persistent efforts to draw a clear distinction between the law and the particular will of the ruler.*" (Hayek 2012, 82)

As with Leoni, Hayek focused on how Rome was built on the common law and the obfuscation of this important fact that has come from undue focus subsequently on the codification of Rome's common law by Justinian: "*The law of Rome, which has influenced all Western law so profoundly, was even less the product of deliberate law-making. As all other early law it was formed at a time when 'law and the institutions of social life were considered to have always existed and no-body asked for their origin. The idea that law might be created by men is alien to the thinking of early people.' It was only 'the naive belief of later more advanced ages that all law must rest on legislation.' In fact, the classical Roman civil law, on which the final compilation of Justinian was based, is almost entirely the product of law-finding by jurists and only to a very small extent the product of legislation. By a process very similar to that by which later the English common law developed, and differing from it mainly in that the decisive role was played by the opinions of legal scholars (the jurisconsults) rather than the decisions of judges, a body of law grew up through the gradual articulation of prevailing conceptions of justice rather than by legislation. It was only at the end of this development, at Byzantium rather than at Rome and under the influence of Hellenistic thinking, that the results of this process were codified under the Emperor Justinian, whose work was later falsely regarded as the model of a law created by a ruler and expressing his 'will'*." (Hayek 2012, 82-83)

Hayek's review of England and how it preserved and built on the ancient concept of common law is important for at least two reasons. He convincingly demonstrates the connection between common law and liberty. Importantly, he also draws out the distinction between England's concept of natural liberty and the natural law theory of Europe which was the primary target of the positivist attack: "*The only country that succeeded in preserving the tradition of the Middle Ages and built on the medieval 'liberties' the modern conception of liberty under the law was England. This was partly due to the fact that England escaped a wholesale reception of the late Roman law and with it the conception of law as the creation of some ruler; but it was probably due more to the circumstance that the common law jurists there had developed conceptions somewhat similar to those of the natural law tradition but not couched in the misleading terminology of that school. … England avoided the fate of Europe under its highly centralised absolute monarchs. What prevented such development was the deeply entrenched tradition of a common law that was not conceived as the product of anyone's will but rather as a barrier to all power, including that of the king-a tradition which Edward Coke was to defend against King James I and Francis Bacon, and which Matthew Hale at the end of the seventeenth century masterly restated in opposition to Thomas Hobbes. … The freedom of the British which in the eighteenth century the rest of Europe came so much to admire was thus not, as the British themselves, were among the first to believe and as Montesquieu later taught the world, originally a product of the separation of powers between legislature and executive, but rather a result of the fact that the law that governed the decisions of the courts was the common law, a law existing independently of anyone's will and at the same time binding upon and developed by the independent courts; a law with which parliament only rarely interfered and,, when it did, mainly only to clear up doubtful points within a given body of law.*" (Hayek 2012, 84-85)

The distinction that Hayek draws between the natural law theory of Europe and the English concept of natural liberty based on common law helps put into context Lieberman's observation as to how it has been generally overlooked that Bentham was attacking not just (the predominantly European concept of) natural law theory but also the common law and, within that, the English concept of liberty.

4.3. Sartori

Sartori, like Hayek and Leoni, was very focused on explaining the inherent superiority of common law over legislation. Sartori astutely observed, writing in 1976, that political freedom does not ensure other freedoms: *"... we ought to resist the temptation to treat political freedom as if it were, in itself, a complete liberty ... If we have so often failed in our search for liberty, the main reason is that we have expected more from participation than it can give"* (Sartori 1976, 11). For Sartori, responsive government is important but he is quick to highlight that political freedom does not translate to juridical freedom.

Sartori starts by examining the nature of political freedom: *"Political freedom is "absence of opposition," absence of external restraint, or exemption from coercion. Whenever man asks or has asked for political liberty (outside of a small community like the polis, he means that he does not like constraint, and specifically the forms of constraint associated with the exercise of political power. In other words, political freedom is characteristically freedom from, not freedom to"* (Sartori 1976, 8-9).[16]

Sartori then moves to consideration of the role of the law and, within this, what is meant by the rule of law. *"What we ask of political freedom is protection. How can we obtain it? In the final analysis, from the time of Solon to the present day, the solution has always been sought in obeying laws and not masters. As Cicero so well phrased it, legum servi sumus ut liberi esse possimus, we are servants of the law in order that we might be free. And the problem of political freedom has always been interwoven with the question of legality, for it goes back to the problem of curbing power by making it impersonal"* (Sartori 1976, 8-9).

He then traces the way in which these principles developed through Athens, Rome and, finally England and the United States (Sartori 1976, 14).[17] Sartori observes that the Greeks understood the need not to be ruled by tyranny but that they made the mistake of

[16] Sartori (1976, 8-9): "*Let this point be very clear: (i) To speak of political freedom is to be concerned with the power of subordinate powers, with the power of the power-addressees, and (ii) the proper focus to the problem of political freedom is indicated by the question: How can the power of these minor and potentially losing powers be safeguarded? We have political liberty, i.e., a free citizen, so long as conditions are created that make it possible for his lesser power to withstand the greater power that otherwise would or at any rate could- easily overwhelm him. And this is why the concept of political freedom assumes an adversative meaning. It is freedom from, because it is the freedom of and for the weaker.*"

[17] Sartori (1976, 14): "*There is, then, a very special connection between political freedom and juridical freedom. But the formula "liberty under law," or by means of law, can be applied in different ways. The idea of protection of the laws has been understood, by and large, in three ways: the Greek way, which is already a legislative interpretation; the Roman way, which approaches the English rule of law; and the way of liberalism, which is constitutionalism.*"

placing popular sovereignty above the law. In his view, that "*is the reason why our juridical tradition is Roman, not Greek*" (Sartori 1976, 15). The Roman Republic was never a democracy of the Athenian kind and so "*did not make a direct contribution to the specific problem of political freedom*" but, in Sartori's view, it "*did make an essential indirect contribution by developing the idea of legality whose modern version is the Anglo-Saxon rule of law*" (Sartori 1976, 15). His focus then turns to the third juridical solution, the English, which "*found its most successful written formulation in the Constitution of the United States, and is expounded in the theory of "constitutional garantisme" and, in this sense, of the Rechtsstaat, the State based on law*" (Sartori 1976, 15).

It is at this point that Sartori turns his focus to the critical distinction between common law and legislation: *"The originality and value of the approach of classical liberalism can be seen if we compare it with previous attempts to solve the problem. Basically, the legal solution to the problem of freedom can be sought in two very different directions: either in rule by legislators or in the rule of law."* (Sartori 1976, 15-16) … *"Rousseau's aim was to free man from his bonds by inventing a system that would obstruct and curb legislation. And this was because he felt that the solution of the problem of securing freedom lay exclusively in the supremacy of law, and, furthermore, in a supremacy of law concerned with avoiding the legislative outcome of the Athenian democracy, that is, the primacy of popular sovereignty over the law."* (Sartori 1976, 24) … *"There is an essential condition that qualifies Rousseau's formula, namely that the people are free so long as they do not delegate the exercise of their sovereignty to legislative assemblies."* (Sartori 1976, 25).

Sartori was well aware of the command theory that lay at the centre of Bentham's support for legislation: "*It seems to us perfectly normal to identify law with legislation. But at the time when Savigny published his monumental System of Actual Roman Law (1840-1849), this identification still was inacceptable to the chief exponent of the historical school of law. And we can appreciate its far-reaching implications today very much more than was possible a century ago. For when law is reduced to State law-making, a "will conception" or a "command theory" of law gradually replaces the common-law idea of law, i.e., the idea of a free lawmaking process derived from custom and defined by judicial decisions*" (Sartori 1976, 37).

In Sartori's view, this move to a legislative model has led to a massive inflation in legislation, but also, echoing the views of the 18th century common lawyers, to bad quality laws because "*... legislators are poor lawmakers, and this is because the system was not designed to permit legislators to replace jurists and jurisprudence.*" (Sartori 1976, 37) This escalation in legislation undermines certainty, calling to mind for Sartori what happened in Athens, where "*laws were certain (that is, precisely worded in a written formula) but nobody was certain that any law, valid today, could last until tomorrow.*" (Sartori 1976, 38) Perhaps of even more concern is how legislation changes they way people think and behave: it "*accustoms those to whom the norms are addressed to accept any and all commands of the State … It follows from this that the passage from liberty to slavery can occur quietly, with no break in continuity - almost unnoticed.*" (Sartori 1976, 39-40)

5. Quantitative observations

Natural law theory may, as Mahoney observes, have fallen out of fashion in modern times, but the common law is most certainly still in fashion, and very much sought after. If any quantitative analysis of the sort favoured by empirical economists could usefully be brought to the issue, it might be deployed on an analysis of how common law economies have fared compared to others.

The common law demonstrably drives growth and the generation of wealth. It is no coincidence that the two largest and most sustained empires in the last two and a half thousand years, Rome and England, were built on common law. As observed earlier, England had, under the common law, developed by the end of the 18th century into the greatest manufacturing and commercial country in the world. While the start and end date are heavily debated, many would say the Industrial Revolution took place from 1760-1840. It needs to be remembered that, until the 1820s, it was a singularly English phenomenon and many of the technological and architectural innovations were of English origin.

As Paul Kennedy has observed: "*The root cause of these transformations, it is clear, lay in the staggering increases in productivity emanating from the Industrial Revolution. Between, say, the 1750s and the 1830s the mechanization of spinning in Britain had increased productivity in that sector alone by a factor of 300 to 400, so it is not surprising that the British share of total world manufacturing rose dramatically—and continued to rise as it turned itself into the "first industrial nation." When other European states and the United States followed the path to industrialization, their shares also rose steadily, as did their per capita levels of industrialization and their national wealth*" (Kennedy 1987, 148).

As the effects of the Industrial Revolution spread from its birthplace in England around the world, the results were dramatic. Economic historian Angus Maddison, at the University of Groningen, spent his life estimating gross domestic product ("GDP") figures for the world over the past two millennia. The conclusion is startling: "*Between 1800 and 1900, GDP per person per year rose from $1,140 to $2,180. In other words, humanity made over twice as much progress in 100 years as it did in the previous 1,800 years. In 2008, the last year in Maddison's final estimates, average global income per person per year stood at $13,172. That means that the real standard of living rose by more than tenfold between 1800 and 2008*" (Maddison, 2023).

Niall Ferguson, in his book Empire, carried out a detailed historical examination of what it was that underpinned the success of the British Empire (and, by extension, the US colonies, subsequently the United States). He identified six key aspects, with England's laws and institutions being key (N. Ferguson 2004, 303).

Even today, as common law systems have been so degraded by the intrusion of legislation into the private law arena and, in the UK's case, even further by its integration of European law after it joined the European Union, there seems to be general coalescence of opinion that common law jurisdictions are a preferred legal system for commerce. It is no coincidence that the top three finance centres in the world - London, New York and Hong Kong - are common law jurisdictions. To attract business and establish itself as a

business hub in the Middle East, the UAE set up an economic area using common law. It is not the only one. Tom Bell has, in a recent review of common law zones, pointed to four such initiatives (Bell 2021). China also flirted with the idea in Shenzhen when establishing the Qinhai Free Trade Zone, contemplating a common law system based on Hong Kong law. The 2023 Fraser Institute Economic Freedom of the World Annual Report is consistent with this view. It is notable that eight of the ten top ranked jurisdictions in 2023 were common law jurisdictions (Gwartney, Lawson and Murphy 2023).

Not only has Ferguson looked at what built the British Empire. He has more recently written about what is tearing it down. In his book, The Great Degeneration, he says "*... the causes of our stationary state ... is inspired by Smith's insight that both stagnation and growth are in large measure the results of 'laws and institutions'. Its central thesis is that what was true of China in Smith's day is true of large parts of the Western world in our time. It is our laws and institutions that are the problem. The Great Recession is merely a symptom of a more profound Great Degeneration.*" (N. Ferguson 2014, 10) The law that Ferguson is referring to is the common law, in the sense that it was understood by Smith and his contemporaries: "*And these pillars of the English rule of law, as A. V. Dicey had pointed out in 1885, were the products of a slow, incremental process of judicial decision-making in the common law courts, based in large measure on precedents. There were no 'grand declarations of principle', just the interplay of judicial memory and statutory innovations by Parliament.*" (N. Ferguson 2014, 81)

The statutory innovations Ferguson references should not be misunderstood. He is not referring to a legislation-led system. For "*Blackstone, the process [of development of England's liberty] had depended throughout on Parliamentary interventions in support of the common law, and its history could be charted through a series of momentous enactments - Magna Carta; the Charter of Forests; the Petition of Right; and especially the legislation that accompanied the Restoration of the Stuart monarchy, such as the statute abolishing military tenures and the Habeas Corpus Act (which together formed 'a second magna carta'), the Triennial Acts and the Test and Corporation Acts*" (Lieberman 2006, 11). However, this view was not without its critics. Daines Barrington's Observations on the More Ancient Statutes (1766) reminds us, through his research, of the damage done to English law in this period by legislation. A key focus for Ferguson is the modern basket of issues that are attributed to legal systems that are considered more likely to support growth and, as we see increasing polarisation in world politics, to what is being referred to as the 'rules based order'.

6. The modern-day basket of issues

In the opening paragraphs, I referred to two principal ways in which liberty generally appears to be viewed in contemporary thinking. The first, the economic view, I have already discussed. It is time to now turn to the 'basket of issues'.

Here, as in so many other aspects, Sartori again provides us with a frame of reference. After reviewing the political and legal systems of Athens, Rome, England and the US, Sartori turned to an examination of the direction being taken by modern common law jurisdictions. Sartori plainly saw continuing differences in common law and civil law systems: "*There are, to be sure, many significant differences among our constitutional systems. If we refer to the origins, the unwritten English constitution was largely built upon, and safeguarded by, the rule of law; the American written constitution formalized and rationalized British constitutional practice, thereby still leaning heavily on the rule of law; whereas written constitutions in Europe, for want of common law, were based from the outset on the legislative conception of law.*" (Sartori 1976, 16) However, he clearly anticipated Ferguson's Great Degeneration when he observed that: "*... these initial differences have been gradually reduced, since there is at present a general trend -even in the English-speaking countries-in favor of statutory law.*" (Sartori 1976, 16)

Despite Sartori's obvious concern about this move to legislation, he did see a glimmer of hope. He went on to say: "*Despite this trend, however, we cannot say as yet that present-day constitutions have lost their raison d'etre as the solution that combines the pros and obviates the cons of both the rule-of-law and the rule-of-legislators techniques. ... Even though our constitutions are becoming more and more unbalanced on the side of statutory lawmaking, so long as they are considered a higher law, so long as we have judicial review, independent judges, and, possibly, the due process of law: and so long as a binding procedure establishing the method of lawmaking remains an effective brake on the bare will-conception of law-so long as these conditions prevail, we are still depending on the liberal-constitutional solution of the problem of political power.*" (Sartori 1976, 16)

In this, we start to see the modern basket of rights that many now associate both with the common law and the broader concept of liberty: an effective system of judicial review to ensure the Executive branch acts within the power given by legislators, independent judges to give faith in the integrity of the judicial process, and due process, which is found in common law rules of procedure and echoed by jurisdictions around the world that have signed up to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) and within the US Constitution.

Tom Bell has sought to identify what he regards as various core values in common law systems, focusing on "*judicial independence, individual rights and the rule of law*" (Bell 2021, 60).

Ferguson makes reference to what he refers to as the "seminal' 1997 article, in which La Porta, Lopez-de-Silanes, Shleifer and Vishny argued that common law systems offer greater protection for investors and creditors. "*Summarizing their theory of the determining role of legal origins, the authors write: Legal investor protection is a strong predictor of financial development . .. [as well as] government ownership of banks, the burden of entry regulations, regulation of labour markets, incidence of military conscription, and government ownership of the media . . . In all these spheres, civil law is associated with a heavier hand of government ownership and regulation than common law . . . [These are in turn] associated with adverse impacts on markets such as greater corruption, larger unofficial economy, and higher unemployment . . . Common law is*

associated with lower formalism of judicial procedures . . . and greater judicial independence . . . Common law stands for the strategy of social control that seeks to support private market outcomes, whereas civil law seeks to replace such outcomes with state-desired allocations . . . Civil law is 'policy implementing', while common law is 'dispute resolving'." (N. Ferguson 2014, 85-87) He then concludes: "*This brings us back to where we began, with the notion that there is greater 'flexibility of judicial decision-making under common law', because 'common law courts [can] use broad standards rather than specific rules.*" (N. Ferguson 2014, 87-88)

Ferguson argues based on examples such as the 1854 case, Hadley v Baxendale, that common law could adapt and that this was, and is, one of its core advantages for modern common law economies. He says it is: "*the authentically evolutionary character of the common law system … rather than any specific functional difference in the treatment of investors or creditors, that gave the English system and its relatives around the world an advantage in terms of economic development*". The conclusion resonates with what we have seen in the example Lord Mansfield provided us in the mid 18th century. Adaptability was a strength of the common law as he and, in Scotland, Lord Kames revolutionised the common law and developed the law merchant to adapt to an age of commerce and global trade. What is not immediately apparent from Ferguson's review of the common law's adaptability (which is set 100 years later) is the debate that was raging in Mansfield's time about whether legislation could play any useful role and the dramatic shift to a more legislation-driven system that had taken place by the 1850s. Nevertheless, 'flexibility' is seen as another ingredient in the modern basket.

If we step back a degree from these primarily economic assessments and look at the broader modern concept of liberty, the Cato Institute's Freedom Index is a good example, perhaps one of the most comprehensive, setting out the perceived basket of rights. Cato has done an admirable job trying to identify the key components that drive freedom. These include: rule of law, security and safety, size of government, legal systems and property rights, freedom to trade, breadth of regulation, sound money and civic rights such as freedom of religion, association and expression.

The index is certainly an informative gauge as to general trends in freedom. However, the structure, categorisations and, importantly, critical omissions in the index mean that the over-arching issue that defines liberty is clouded and obscure. The starting point is in the concept of the rule of law which, for 18th century jurists, including Smith, was coextensive with the common law. The modern conception is more politically focused on separation of powers (and independence of the judiciary). Linked to this is a lack of focus on the dangers inherent in legislative systems and the omission of any tracking of the extent of legislative intrusion into the common law. In this way, the index compilers have fallen into the trap Sartori warned of, in placing too much emphasis on democracy and, incidentally, no apparent emphasis on other forms of responsive government of the sort, for example, that drove Hong Kong's spectacular success after the 2nd World War.[18] In this regard, the index runs headlong into the awkward inconvenience of Hong Kong being an 'exception', ranked for many years as the freest society in the world, but somehow

[18] Readers interested in more details on Hong Kong's success may refer to Neil Monnery's excellent account: (Monnery 2017).

achieving that without democracy. But as the old saying goes, the exception should prove the rule. Ferguson observed some years ago, "*If the rule of law, broadly defined, is deteriorating in the United States, where is it getting better? I have already mentioned the marked improvement in institutional quality in Hong Kong.*" (N. Ferguson 2014, 102)

Ferguson identifies a list of six factors. He also makes reference to the economic historian David Landes who drew up a list of measures which 'the ideal growth-and-development' government would adopt (N. Ferguson 2004, 307): *"Such a society would … for example,*

1. *Secure rights of private property, the better to encourage saving and investment.*
2. *Secure rights of personal liberty—secure them against both the abuses of tyranny and private disorder (crime and corruption).*
3. *Enforce rights of contract, explicit and implicit.*
4. *Provide stable government, not necessarily democratic, but itself governed by publicly known rules (a government of laws rather than men). If democratic, that is, based on periodic elections, the majority wins but does not violate the rights of the losers; while the losers accept their loss and look forward to another turn at the polls.*
5. *Provide responsive government, one that will hear complaint and make redress.*
6. *Provide honest government, such that economic actors are not moved to seek advantage and privilege inside or outside the marketplace. In economic jargon, there should be no rents to favor and position.*
7. *Provide moderate, efficient, ungreedy government. The effect should be to hold taxes down, reduce the government's claim on the social surplus, and avoid privilege."*

Ferguson and Landes both observe that, although by no means perfect, the British Empire, in its heyday, came closer than any alternative to providing these essentials. Ferguson has also, more recently, highlighted how Hong Kong moved ahead as the US has continued to fall behind: *"Evidence that the United States is suffering some kind of institutional loss of competitiveness can be found not only in Porter's work but also in the World Economic Forum's annual Global Competitiveness Index and, in particular, the Executive Opinion Survey on which it is partly based. The survey includes fifteen measures of the rule of law, ranging from the protection of private property rights to the policing of corruption and the control of organized crime. It is an astonishing yet scarcely acknowledged fact that on no fewer than fifteen out of fifteen counts, the United States now fares markedly worse than Hong Kong."* (N. Ferguson 2014, 100)

Many economists and other commentators generally fail to consider the central importance of the legal aspect. However, I would like to suggest that it cannot be a coincidence that Hong Kong's success coincided with a strong commitment to the common law under a responsive government.

Hong Kong was fortunate to inherit a common law legal system, one that focused on long-run legal certainty. This was an accident of history. However, beyond that stroke of good luck, the design of its legal institutions was no accident. Various people who had a defining role in the development of Hong Kong's policy through the last century knew

Bruno Leoni and Friedrich von Hayek, or took counsel from people who knew them - people such as Milton Friedman. Hong Kong's policy reflected this. Hong Kong's judiciary was, as in other common law jurisdictions, independent of government and bound by centuries of tradition. However, unlike other post war common law jurisdictions, which pursued industrial planning driven by extensive and expanding legislative mandates, Hong Kong saw the cornerstone of private law in its reliance on common law. Hong Kong consciously adopted a policy of minimal regulation and sought to keep bureaucracy (legislation and other regulations) to a minimum.

Neil Monnery, in his historical account of this remarkable city sums up the effects (Monnery 2017, Foreword): "*At the end of World War II, Hong Kong lived up to its description as 'the barren island '. It had few natural resources, its trade and infrastructure lay in tatters, its small manufacturing base had been destroyed, and its income per capita was less than a third of that in its mother country, Britai n. As a British colony it fell to a small number of civil servants to confront these difficult challenges, largely alone. But by the time of the handover of Hong Kong to China in 1997, it was one of the most prosperous nations on earth. By 2015 its GDP per capita was over 40 per cent higher than Britain's. How did that happen? Around the world, post-war governments were turning to industrial planning. Keynesian deficits and high inflation to stimulate their economies. How much did the civil servants in Hong Kong adopt from this emerging global consensus? Virtually nothing. They rejected the idea that governments should play an active role in industrial planning, instead believing in the ability of entrepreneurs to find the best opportunities. They rejected the idea of spending more than the government raised in taxes, instead aiming to keep a year's spending as a reserve. And they rejected the idea of high taxes, instead keeping taxes low, believing that private investment would earn high returns, and expand the long-term tax base.*"

An observer from the law and economics school looking at this summary would see economic success driven by minimal government intervention and a commitment to free markets and trade. An observer looking at this same summary through the eyes of Adam Smith and other 18th century juridical thinkers would agree. However, they would also see a society that had a much higher commitment to the rule of law as it was traditionally understood, with effective constraints on the degradation of common law by legislation. Putting it another way, in the post-World War II period, Hong Kong's success was certainly driven by a commitment to minimal government intervention and free trade. However, that success was underpinned by a stronger commitment to its common law system than was seen in other common law jurisdictions, including the UK and the US.

The modern basket of issues identifies rule of law as a fundamental criterion of free societies but does not identify within that the relevance of the common law and seems to misunderstand that common law and the rule of law were seen as synonymous in 18th century England. The contrasting point has also been lost, that systems built on legislation were seen as antithetical to the rule of law. In this context, it is important to remember that Europe, as it joined the Industrial Revolution in the 19th century, generally derived its rule of law from using codified civil law systems build on Justinian's codification of Roman common law. So, although a codified system, it had inherent strengths deriving

from the common law. In this way, the modern basket, as with the economic approach to liberty, fails to identify the fundamental importance of juridical freedom.

As legislative bodies increasingly intrude into every aspect of life in common law jurisdictions around the world, we see Smith's conception of the rule of law being degraded at an alarming rate. I do not have the confidence Sartori appeared to have in the power of independent judges and judicial review to hold back the tide. History over the course of thousands of years shows us that our society and our institutions will inevitably degrade, the further we move away from the common law system. Inevitably, the legal arena will also become more politicised, particularly in democratic societies, as the contest to control law-making, and thereby to command and impose one's own legislative will becomes more heavily contested.

7. Conclusion

As Smith and Kames developed their theory of the 'four-stage' advancement of society, from hunter-gatherer to herder, then agricultural and finally commercial society, England was emerging as the leading commercial centre in the world. They saw the debate about whether legislation could effectively drive that transition as the central question of their time. They had a clear view, informed by the study of thousands of years of human history. For them, the common law was vastly superior. England's role as the seat of the Industrial Revolution and the subsequent success of the US, with a constitution tailor-made to enshrine these principles, suggest that they were right.

The world is now transitioning into a fifth stage of society, heavily technology driven, where we must reassess our relationship with social platforms, virtual reality and complex AI-driven, semi-autonomous systems. This transition is prompting renewed debate about whether our existing laws remain fit for purpose and the legal framework that should drive that transition.

For jurisdictions that seek to position themselves as drivers of the world's leading technologies, fostering innovation and increasingly cutting-edge technology driven solutions, history suggests that the legal system most capable of delivering on these goals is the common law, not legislation.

It is no surprise that the European Union, a union of jurisdictions that has, in modern history, been predominantly legislation-led, decided on a legislative model, with its recent introduction of digital markets and AI regulation.

The EU is pushing for other jurisdictions, including common law jurisdictions around the world, to follow their legislated approach. However, other jurisdictions may ask themselves whether that model will deliver the greatest benefits to their own economies. There is much in the jurisprudential debate that took place as England transitioned to a commercial society, to advocate that the common law should be left to adapt the guiding principles in the same way that it successfully developed the common law to support England's, and later the world's, move into the Industrial Revolution and global commerce. Arguments were being made in Smith's time that common law was too slow

to manage the rapid change that was taking place in society. This argument is, again, being made today. However, the inherent limitations in legislated solutions have not been resolved and the features of the common law that allowed it to drive the Industrial Revolution remain unchanged, including flexibility to adapt as technology changes, minimal just restraints so as to give liberty to invent and the wisdom of cases built on ages of experience and careful reflection by impartial judges.

This is one of the most important issues facing the world as societies decide what legal framework(s) will regulate humanity's move into a digital society and the efforts to discover and invent the technologies that will support us on that journey. The technology that we are talking about can deliver more effective healthcare, treat disease and disabilities that are beyond our current expertise, wean the world off fossil fuels, reverse environmental degradation and solve many more pressing challenges the world faces. However, as Elon Musk has observed, it is not inevitable that we will keep advancing. Invention and technological advancement are only possible "if a lot of people work very hard to make it better" (Musk 2017).[19] The challenge facing us, one which has been profoundly ignored since the Industrial Revolution, is what legal framework gives societies the freedom to do that. For Smith as he was writing the Wealth of Nations, the answer was very clear: it is the common law.

Funding

The research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

Conflicts of interest

The author(s) states that there is no conflict of interests.

[19] Musk (2017): "We're mistaken when we think that technology just automatically improves. It does not automatically improve. It only improves if a lot of people work very hard to make it better. And actually it will, I think, it by itself degrade actually. We look at great civilizations like ancient Egypt and they were able to make the pyramids and they forgot how to do that. And the Romans they built these incredible aqueducts. They forgot how to do it." Available at https://electrek.co/2017/05/01/elon-musk-on-boring-company-semi-truck-mars-ted-talk-transcript/.

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