STUDIES IN JURISPRUDENCE*

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The following analysis of Legal Orders, and of Legalism in particular, derive from my study of jurisprudence and history, and from the three fields in which I worked as a lawyer – barrister; government lawyer and adviser, and as Head of the Papua New Guinea Office in the movement of Papua New Guinea to self-government and Independence.

Legalism is the central legal order of the western legal tradition, which itself is composed of two great legal systems – the English common law and the European civil law.

Historically, Legalism comprises two elements: (a) autonomy – that is, the legal system operating largely independently of the executive, whether King, Emperor or State bureaucracy and (b) the capacity of the independent system to develop and change the law through processes internal to it that are, or purport to be, logical and scientific.

The law-making element of Legalism is thus not characterised as legislative, because it is at all times thought to be constrained by the objectivity of legal science.

Legalism arose in Republican Rome and remained the predominant legal order in the last centuries of the Republic (450 BC – 27 BC) and the early Principate (27 BC – 284 AD).

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The element of autonomy was not formalised in the time of the Republic, but was conceded by the State to the responsa of the jurists, and to the edicts of the praetors.

In much the same way, the Judges of England, although deriving their authority from the Crown, were conceded independent authority to develop the common law through the doctrine of precedent.

The Scholars of the Universities on the Continent played a similarly creative role in transforming the Roman law of the Digest into the Ius Commune of Europe.

Legalism may be contrasted with two other legal orders.

'Self-redress – Mediation': This applies particularly in pre-state societies, in which, loosely described rules are based on custom.

The idea of retaliatory violence had a tenacious hold on pre-state societies consisting of kinship groups, such as those in pre-contact Papua New Guinea. It was the Group which required 'payback', because it was the Group which suffered loss through the death or injury of one of its members. Compensation, revenge and justice all merge in 'payback'. Mediation, often very imperfectly, was the only alternative to retaliatory group violence.

The third legal order is the 'Regulatory Legal Order':

Unlike Legalism, law, where the regulatory legal order prevails, is essentially public and bureaucratic. It was the legal order governing the law in the ancient Middle Eastern Empires -- and, in China and India, before European contact. In those societies, law comprises a series of commands dictated by the State; sometimes embodied in a code,

statute or other decree, and sometimes modified by custom. These commands were discrete in the sense that there is no logical, as distinct from possible administrative connection between the various commands.

Although, particularly during the colonial period, Legalism was transported all over the Globe and is present in many non-European countries, its origins are European. This substantially accurate statement needs qualification. Both Islam and Judaism relied upon legal science. Each faced the difficulty of relating a sacred text to new circumstances or to existing circumstances not specifically covered by the text. And each faced the difficulty of reconciling the reverence to be accorded the sacred text with adoption of legal science in its interpretation or exegesis, in order to deal with new or omitted circumstances.[1]

[1] From the Abbasid Caliphate (750 AD), authority in Islamic law devolved upon the jurists who replaced the Qadis or appointed Judges. Influenced by the newly discovered Greek logic, the jurists introduced the use of reason in the interpretation of both the Koran and the Sunna, and permitted, within limits, Ra'y, or, personal reasoning, in the development of doctrine. Qiyas or the use of analogies to ascertain a rule became permitted.

The liberality of interpretation which this entailed was opposed – sometimes vehemently – by the Imams, as a departure from the Holy Word of God. The Jurists became divided into four schools. Eventually, in the 10th century, these schools reached a compromise which had as its purpose the putting of an end to the further development of Islamic law by juristic processes. The 'gates of Ijtihad' were, as it was said, finally closed.

Jewish law may be said to have begun with the canonisation of the Torah in 445 BC by Ezra and Nehemiah. From the oral explanations of the Midrash in the synagogues a process of interpretation inevitably began but remained oral to distinguish it from scripture. The oral law was gradually committed to writing. The recording of the oral law in the Mishnah was unsuccessfully opposed by the Sadducees as desecrating the Torah. In the 2nd century, Judah Hanasi sought to canonise the Mishnah but his attempt to do this failed. In the 6th century, scholars were entrusted with writing down the Mishnah and Gemarra and these evolved into the Talmud, which governed Jewish law for centuries. Finally, in the 12th century the Rabbis closed further evolution of the Babylonian Talmud.

We see in this oversimplified description the continuing tension between text and interpretation, exegesis and the deployment of legal science.

Church law in Europe was heavily influenced by legalism. It did not however face the same difficulty as Judaism and Islam, in reconciling use of legal science with the sacred character of the text. Christianity never intended to override secular law. From the outset the separate spheres of God and Caesar were

The Jurists and Praetors introduced Legalism into Rome. But Legalism gradually gave way, under the Dominate, to regulatory tendencies and eventually became replaced by a Regulatory Legal Order. To some extent, if for different reasons, this transformation has been paralleled in the case of European Legalism during the 20th century.

Roman Law occupied a central role in the introduction of Legalism into continental Europe and in the struggle, ultimately successful, of subduing custom. And, Roman law played an important part on the Continent in the 19th century movement for Codification. But, on the Continent, Legalism faced difficulties with the supremacy claimed by natural law reason, on the one hand, and the claims of nationalism, on the other.

An initial question of some importance arises – why was it, that Legalism penetrated public law in England but failed to do so in Rome?

This is important because of the part Legalism was to play in England in the emerging concept of the Rule of Law.

Legalism did not originate that concept. The concept -- the idea, that law could control Kings and executive power generally, was Germanic in origin. It was based on the significance, and indeed, the supremacy of custom among the German Tribes.

The fusion of the idea of the Supremacy of Law with Legalism was the work of the common law.

recognized, see, David and Brierley, *Major Legal Systems in the World Today*, 2nd edit.p.429. In the 12th century Gratian, a Bolognese monk collected all the laws of the Church into a single work, *A Concordance of Discordant Canons*. It was the first comprehensive and systematic legal treatise in the West since Rome. The method was thoroughly legalistic. It was 'systematic' in the sense of breaking up the law into interrelated categories -- divine Law, natural law, the law of the church, the law of Princes, custom etc. It was, without question, one of the major works in European legalism.

The common law courts exercised their control of executive power in the first instance through the issuing of writs or commands, which were not directed against the Crown – the Executive—but against the Crown official personally.

The writ of habeas corpus enabled any man, who claimed he was being unlawfully detained, to be brought before the court so that the legality of his detention might be established. Thus, the writ was not confined to state officials, but could be issued and enforced against private individuals. It was the writ of habeas corpus which was used to free the slave Somersett from the hulk in the Thames; Lord Mansfield, in setting him free -- saying, 'the air of England is too pure for any slave to breathe. Let the Black go free ...'.[2] Hence, through the writ against a private individual, slavery became unlawful in England.

What is important is that in determining whether the writ should be issued, the courts were able to define the principles of personal freedom in English law.

In the same way, the ordinary actions of trespass and false imprisonment enabled the powers of arrest by constables and other persons to be defined. It was, in the course of these cases, that the Courts rejected State necessity as a defence to justify arbitrary arrest or seizure. And it was the Courts, in England, which defined the principles restricting the powers of police interrogation and which rejected torture, notably and initially in *Felton's* case.[3]

[2] Somersett 20 St. Tr. 1

[3] Felton 3. St. Tr. 371; Ibrahim v R (1914) A.C.599. "And with respect to the argument from state necessity, on a distinction being made aimed between state offences and others, the common law does not understand that kind of reasoning, nor do our books understand that distinction." Lord Camden, Erskine v Carrington, 19 St. Tr. 1153.

The Magistrates, in Roman Law, played no part in controlling executive power. Executive authority in Rome was embodied in the Consular Imperium. It was unlimited during the Consul's year of office, extending to all areas of government, and to leadership of the Army.

When the Praetorship was created in 367 BC, the jurisdiction assigned to the Praetor formed part of the Consular Imperium – the jurisdiction, to decide civil disputes. Unlike the Judges of the Royal Courts of England, the Praetors never detached themselves from the Executive and never claimed independent authority to exercise the executive power of the Consuls – each Praetor's period of office was limited to one year.

The real problem of abuse of executive power in Rome lay in the Provinces, as evident in Cicero's famous prosecution of Verres, the Governor of Sicily.[4]

At the risk of some over-simplification, it may be said that, 'to Roman law we owe the origins of Legalism; to the common law we owe the fusion of Legalism with the rule of law'.

Legalism involves some degree of separation of those who administer the legal system from the executive organs of government. It will also be apparent that this separation was at all times relative because the autonomy of the Roman jurisconsults, the English barristers and continental scholars to develop the law, represented a concession by the state. But the degree of institutional independence allowed to them, was nonetheless vital to the future development of the European ideal of the rule of law. This was so because it meant a body of rules -- the law – (upon which such an ideal was dependent), could be developed separately from official decrees and regulations.

[4] *Cicero Against Verres*, Penguin, *Cicero—Selected Works*, Grant, p.41.

Legalism enabled formal law to subdue feudal law and custom largely by formalising the customary rule, and then, by incorporating it.

This was so, for example, with maritime law. Thus, in Roman law, the customs known as the Maritime Law of Rhodes were adopted into law. This was the same in the common law. "The law merchant ... is ... neither more nor less than the usages of merchants and traders ... ratified by the decisions of the Courts of Law", as stated, in 1875, by the House of Lords.[5] On the Continent, France attempted the codification of the coutumes.

One particular problem faced by Legalism, was how a legal order of this kind would cope with statutes and codes. On the one hand, these legal instruments are imposed externally to the autonomously created law which is the essential characteristic of Legalism but, on the other hand, they have acknowledged paramountcy.

Statutes may be, but are not necessarily inconsistent with the autonomous system presupposed by Legalism. In the case of the common law, we find early statutes on the law of property integrated into the law and principles of tenure and estates upon which that law was based. Medieval statutes such as the *Statute of Quia Emptores* (1290) forbidding subinfeudation, and the *Statute de Donis Conditionalibus* (1285), by which a donee could alienate land to bar the right of nominated issue to take, were indeed very important to the law of property and had to be fitted into the medieval law of property by judges and property lawyers. The only medieval attempt to alter the system radically by statute was that introduced by Henry VIII in 1535, when, in need of revenue, he sought to extinguish trusts by the *Statute of Uses* (1534). Within a century, the system

[5] Adoption of the Maritime Law of Rhodes; House of Lords [1875] Goodwin v Robarts (1875) L.R. 10 Ex.337, affd.1 H.L 476.

rebelled, so to speak, and by the device of a Use upon a Use, restored Trusts, in *Sambach v Dalston* (1634).[6]

The *Settled Lands Act* 1882 was a much later example of a major change in the law of property without a change in the system. Land was tied up in settlements. The life tenant in possession had all the appearance of ownership, but he could not dispose of any interest in the land, at least beyond his own death. The *Settled Lands Act* met this problem by allowing the life tenant to sell, but ensured that, in substance, the fund resulting from any sale was held upon the interests set out in the settlement. In short, all the incidents of the law of property were preserved. Only, a power of sale was conferred by statute.

We see the same integration in other fields of law. Thus the *Wrongs Act* (1846), in effect, overruled *Baker v Bolton*, so as to confer limited protection for dependants on the death of a near relative.[7] Such legislation merely corrected an anomaly in the law of torts.

And, in the law of contract, there was the statutory abolition of the rule that, where a contract was discharged by reason of 'frustration', 'the loss lay where it fell'.

None of these involved a change in the juristically developed common law.

This does not mean the Statutes were unimportant – the abolition of the doctrine of common employment had very significant implications for industry – but in terms of the judicially created common law system, they were mere correctives.

The rise of the democratic principle in the 17th and 18th centuries seemed, though, to accentuate greatly the apparent tension between the paramountcy of statute, and the

[6] Sambach v Dalston [1634] 3 Tothill 188
[7] *Wrongs Act* (1846) overruled Baker v Bolton (1808) 1 Camp.p.493.

systematic evolution of the common law and of the civil law. Lex emanating from democratically elected Legislatures had a superior legitimacy – a legitimacy which judicially evolved law or law deriving from doctrine, could not rival.

But this did not, in the event, lead to the Judiciary in Europe being relegated to subordination. Concurrently, with the rise of the democratic principle was the new doctrine of the Separation of Powers, as reflected in the Act of Settlement of the United Kingdom, the United States Constitution and the French Declaration of the Rights of Man, guaranteeing the Courts independence and exclusive authority in the exercise of the judicial function.

Theoretically, it may have been supposed that this development would allow the courts plenary authority in the strictly judicial field, to apply the 'law' and decide controversies, but at the same time forbidding any development of the law by juristic processes. Law creation would, on this hypothesis, have belonged solely to the legislator, and the Judiciary would have been confined to the interpretation and application of laws made by the Legislature.

On the Continent, an attempt was made in the 18th century Prussian Code and in the French Revolutionary statutes, to give effect to this idea of strict demarcation of function, by specifically curtailing the powers of the Judiciary. But these attempts were abandoned quite early, as it became apparent that a division between the legislative and judicial function could never be clear-cut. Within limits, law-making was inherent and inescapable in the very process of expounding and applying the law.

In England, the common law system continued to develop and the nineteenth century was to be a period of great judicial creativity.

But there was never to be any repetition of Coke's 17th century dicta that the common law could 'control' statutes.[8]

The common law at all times thereafter conceded it was subject to statutes, but held that the Judges were vested with exclusive authority to interpret them. In that task, they would not permit anything extrinsic to the statute which the Government might express or declare in an attempt to influence its interpretation. The Courts would interpret the statute, as it stood, and as enacted by Parliament, although in their interpretation they would rely upon certain presumptions.

One presumption was that, in the absence of clear language to the contrary, Parliament did not intend to overthrow the common law, and statutes creating criminal offences were interpreted to harmonise with common law principles, such as that of mens rea.

Parliament and the common law Judges shared similar values and, until the presuppositions upon which these were based, were shaken as the Victorian era proceeded, few Statutes sought to revolutionise the common law. At most, statutes were supplementarily corrective or, like the *Goods Act* (1893), formed a codification of the common law in a particular area. In either event, the system was allowed to continue with juristic development by the Judges.

We turn to consider the next Legal Order which we have touched on, and described, briefly above – Regulatory Law.

Regulatory Law may be described, generally and, only somewhat inexactly, as 'official law', law made by officials. The purpose of regulatory law is to give effect to policy of a

[8] Coke – 17th cent. Dicta in Bonham's case, 8 Co. Rep 118, but see his later contrary comment in Case of Prohibitions,12 Rep.65.

public character. The law will have no necessary – that is, logical, connection with any other law, although, it may, of course, be prudent to link laws administratively so that there is uniformity and consistency in administration.

The content of a regulatory law will typically be related to some public question. That is, it will not be concerned with a definition of private rights or obligations inter se. Thus, a penal element may be introduced into a law relating to disputes between individuals which, under Legalism, would be resolved by civil remedies.

It may be useful to consider, by way of contrast, the way in which Legalism and a Regulatory Legal Order, would treat a particular case.

First, let us consider the approach of Legalism:
At common law, the tort of nuisance gives rise to rights and obligations between occupiers of land; thus, for example, if an occupier wrongfully allows the escape of a deleterious thing from the land occupied into the land of an adjacent occupier. The tort of nuisance did not derive from statute but evolved judicially from precedent. It is directed only to private rights and obligations between occupiers.

Second, the Regulatory approach: This approach reflects a public interest criterion. Thus, a Town Planning Scheme is directed to the public interest as to the way the land should be used – and this, quite independently of harms to individual occupiers by the manner of use. It does so by zoning the land and enforcing the prescribed public action.

We see analogous extensions of regulatory legislation in environment law, product liability, consumer protection and competition law.
Ancient China represents a classic example of a predominantly Regulatory Legal Order.

The great Codes of Imperial China merely represented a convenient way of consolidating administrative instructions and identifying punishments for their disobedience. The Chinese Codes did not specify the rights and obligations of citizens between themselves. They embodied Instructions to Magistrates and specified penalties for any infraction of the Code's commands. There was no logical interrelationship between the rules of the Codes. Legal science was starkly absent.

The Regulatory law of Imperial China and of the centralised States of Asia, such as the Mughal Empire, extended legal control to the outer reaches of their vast empires for public works and for military and revenue purposes. Nevertheless, they were quite relaxed in the control of private law, unless it was feared that private disputes might lead to disorder.

It would be a mistake, though, to assume from this, that the problem of the interaction between policy-forming and executive action did not exist in ancient China or was concealed by absolute imperial control.

The potential for conflict in this, led to a remarkable institution, the Censorate, which continued and evolved until Ming times to deal with complaints and petitions by citizens into administrative abuse and also into criticisms of policy. At one level, the Censorate was administrative, at another quasi-judicial – a kind of ombudsman-like institution.[9]

The third Legal Order identified and, briefly described at the outset, is '*Self-redress—Mediatory'*.

[9] See *The Legacy of China*, Raymond Dawson (1964), *The Chinese Art of Government*, E.A. Kracke, pp. 319-320.

Self-redress -- Payback -- or, more precisely, the threat of it -- which was the only means of enforcing order in the absence of the State. Its imperfect operation was evident in such societies, as those of pre-independence Papua New Guinea.

To a European observer, Payback appears to represent anarchic violence. But the unspoken object was to maintain the peace by fear of reprisal through fear of payback revenge.

It would seem societies, such as these, sensed the dilemma of trying to keep the peace by the threat of revenge and devised certain means of side-stepping the blood feud whilst attempting to maintain its coercive effect.

Thus, the magarada, among the Australian Aborigines of Arnhem Land, -- in which the blood feud is carried out theatrically and concluded with minimal violence: another, was the 'shouting matches' carried out by the Siane people in Papua New Guinea: and then the Tagba boz, in which the opposing sides lined up with hands clasped behind their backs, kicked each others' shins until the other side withdrew.

Other means were adopted, before the advent of the State.

In Anglo–Saxon society, Tribes were based on kinship – the maegth, was the basic descent group – and it was sought to do away with the blood feud by the payment and acceptance of compensation.

And so, Ethelbert, King of Kent, in the 6th century, specified, in his laws, the customary wergild, and the nature of the wrong for which its payment was to be made.

Another step designed to prevent self-help, was to delay it. Thus, Alfred [871-899] forbade a complainant from attacking an opponent in his home, until he had besieged him for 30 days and sought justice from the King.

But the main substitute for self-help in Anglo-Saxon England was to encourage settlement by mediation and arbitration.

Kentish laws in the seventh century set out the procedures for arbitration before folk moots. There was no attempt in these folk moots to sift the evidence. The aim was to achieve a settlement.

A major problem was to ensure disputants would arbitrate. They were forced to do so. Athelstan [895-939] decreed that if anyone failed to answer a summons by a plaintiff to three successive Borough courts, it was for the leading men of the borough to ride to him and 'take all that he owned and put him under surety'.

What we are seeing is the gradual movement from kinship to 'state' enforcement, but as yet, the 'state' was far from strong enough to superimpose its authority on the kin. For many wrongs, there came to be a double payment – the wer for the kindred, and the wite for the King.

These gradual modifications in self-help came slowly with the evolution of the State and Justice provided by the King.

Historically, there may be a social change from one of these three Legal Orders into another of them, as, for example, Legalism into a Regulatory Legal Order, or either of them superseding Self-Redress and Mediation.

In such a case, there is no mere change in the law or in the political system of the kind, which may result from conquest, war or revolution.

A Legal Order may change as a result of these, but that is not necessarily the case.

Colonial conquest of pre-state societies will almost inevitably result in a changed Legal Order because of the introduction into those societies of the State in a fully developed form. At its most extreme, the colonial power may claim to supplant totally, any existing 'native' tribal law or custom: in the case of Australia, this involved Cook treating the whole of the East coast as terra nullius, as if it were uninhabited, with the result that prior to European conquest, no law of any kind would have existed.[10] In 1994, the High Court of Australia rejected this and held that the pre-existing rights in the land held by the Aboriginal people, continued.[11]

But colonial conquest can also involve an attempt to introduce a Legal Order such as Legalism, but to modify it, by accepting the pre-existing pre-state modes of dispute settlement and, at the same time attempting to 'legalise' them, by incorporating them into the introduced colonial or post-colonial legal system.

This was the case with self-governing Papua New Guinea.

[10] Terra nullius – See Henry Reynolds, *The Law of the Land*, 1987, Penguin, pp.12-13. See also *The Life and Voyages of Captain James Cook*, C.G. Cash, Blackie & Son, pp 60-61:
"As I was about to quit the eastern coast of New Holland ... to which I am sure no European had ever seen before, I once more hoisted English colours, and though I had already taken possession of several particulars, I now took possession of the whole of the eastern coast from latitude 38 degrees to this place, 10½ degrees south, in right of His Majesty King George the Third, by the name of New South Wales, with all bays, harbours, rivers and islands. We then fired three volleys of small-arms, which were answered by the same number from the ship. Having performed this ceremony upon the island, which we called Possession Island, we re-embarked in our boat and returned to the vessel."
[11] Mabo v Queensland (No. 2) (1992) 175 C.L.R.

It was evident that customary modes of dispute settlement, in which rules may be extended, restricted or not applied so long as the dispute is 'patched up' to clan satisfaction, were unsuited to a decolonised 'nation state', which Papua New Guinea was destined to become. Such a State would inevitably consist of large aggregations of unrelated people living in cities, like Port Moresby, who would engage in non-personal contractual arrangements -- lending, borrowing, investments and the like.

Nevertheless, many people would continue to live in villages and their kin group would continue to be the basic social unit, to which they attached loyalty and, in the event of a wrong, would look to that group for revenge or satisfaction.

Accordingly, it was necessary for the Law not only to meet national needs with a national law but if, law and order, were to be preserved, disputes at village level had to be resolved in a way leading to peace and, hopefully, harmony. Indeed, that also was a national need.

It was thus proposed, at Independence, to introduce a system of 'Village Courts' to deal with minor non-criminal disputes – mostly over minor acts of violence -- digging up gardens, fights over infidelity etc.

Village Courts have been operating very extensively in Papua New Guinea since 1975.[12]

There have been other interactions between Legal Orders arising out of Colonialism of a benign nature, such as Macaulay's Code, based on Legalism introduced into British India,

[12] *Village Courts Act* 1975

and establishing legal equality where previously a Brahman could not have been convicted on the word of a Sudra, nor a Muslim on that of an unbeliever.[13]

But even without the imposition of Colonialism -- in the era of westernisation, Legalism has been introduced and adopted voluntarily; thus, in Japan, following the Meiji restoration, the adoption of a Code based on the French Code of Napoleon.

A Legal order, even one that has existed for a long time, may change.

Thus, a legal system in which Legalism is dominant will become displaced by a Regulatory Legal Order when the autonomy of the system, inherent in Legalism, and its capacity for internal development have become replaced by legislation or other externally imposed laws.

In the case of Rome, regulatory transformation happened gradually with the steady accretion of authority in the Emperor and increasing imperial legislation – it also developed with the formation of a permanent imperial civil service.

The first step was the conferral of the right to give a response auctoritate principis by Augustus on the opinions of certain favoured Jurists, as a result of which, these opinions were given highly persuasive authority. It would have been generally recognized that this higher authority could only have derived from the Emperor. It was thus Regulatory, insofar as the additional authority given to these jurists was introduced into the system from without. But, it is equally true, that, on the face of it, it was designed to preserve the underlying system and authority of the Jurisconsults and Praetors.

[13] Macaulay's Code "established the great principle of equality of all before the law" in India, K.M. Pannikar, *A Survey of Indian History*, Asia Publishing House, p.206.

In the Republic, Leges had become law through their adoption by the Assemblies—the Comitia or the Concilium Plebis, whose plebiscita bound not just the plebs, but, after the Lex Hortensia [287 B.C.], the whole community.

In form, Augustus never sought to legislate directly, but the Lex de Imperio opened the way for increased imperial legislative power by recognizing that the imperium of superior magistrates permitted them to issue Edicta. It followed that the Emperor, as supreme Magistrate, could do the same. Thereafter, there was a period, when legislative power passed to the Senate whose members were substantially nominated by the Emperor.

Finally, by the third century, the Emperor was untrammelled by any competing authority. He was the sole legislator.

There had been a gradual but fundamental change. The 'jurists', or 'jurisconsults', had, by Augustus's reign, ceased to have their dominant role in Roman Law.

At the time of the Republic, they had not been legal practitioners, as we would describe them, nor did they appear in court. They were authoritative advisers. They belonged to the patrician class. They exercised their role voluntarily. They might give a written opinion, or advice in the course of a walk in the Forum.

What had been basic, during the Republic, was that the Jurists were independent. They were not public officials.

Civil proceedings in Rome, during the Republic, were more akin to what we would think of as Arbitration and, at all stages, the parties, the Magistrate and the Iudex were dependent for legal advice and for the decisions on the law, upon the legal advice of the Jurists. The office of Praetor was created in 367 BC when the administration of justice

was separated from the office of Consul. In time, with the great influx of non-citizens into the Roman world, the Praetor initiated a new procedure, the formulary system, which enabled non-citizens to seek justice without relying upon the strict Civil law.

But there was a significant change as Roman law became regulatory. During the Principate and especially the later Principate – and even more so during the Dominate – the Jurists not only received salaries but became public officials in the Concilium of the Emperor. *Note: The Republic 510 BC; The Principate, established by Augustus, 27 BC; The Dominate, established by Domitian, 284 AD and lasted until the collapse of the Empire 476 A.D.*

The Republic lacked any organized body of civil servants but, during the Principate, a trained and permanent service responsible to the Princeps was formed. The tendency of a bureaucracy is to concentrate development of the law within government offices and to codify the law.

This is what finally happened in Rome from the accession of Hadrian (117 AD). Hadrian codified the Edict and employed the leading Jurists as members of his Concilium.

The gradual transformation of Legalism into a Regulatory Legal Order in common law countries:

The common law was based upon certain principles – in civil law, liability based upon fraud, intent or fault and breach of contract and invasion of the right of private property; in the criminal law, proof of guilt requiring intent and personal responsibility; in the criminal process, protection of the individual against the power of the state; and in matrimonial law, upholding the sanctity of marriage, especially in relation to divorce.

A legal system underpinned by these values and committed to the principles deriving from them, would be concerned with disputes between individuals or between individuals and the State. It would not recognize an injury to a section of the public. Accordingly, there was no way consumers, as such, -- as a separate group – or the environment, as such, could be recognized by the common law.

During the 19th century, and especially in its latter half, very significant legislation was enacted, but it was not designed to supersede the system but to 'fit' into it. Sometimes, this was quite ingenious, as with the introduction of the Torrens system of Land Title. And, also, the modern stock company: Existing concepts, in common law and equity -- trust and agency – could not meet the need of industrialised economies for an entity, which permitted capital to be aggregated and individual liability to be limited to the amount of capital contributed. And so, the joint stock company, a legal person, separate from its members, was the statutory answer to this need. The *Companies Act* 1862 and its successors, allowed for extended juristic development of the new concept.

It is important to examine in greater detail, why the common law could no longer, as it had in the past, cope with this contemporary social change.

The common law had evolved by judicial precedent through a process of applying to the facts of the case in hand, a rule deduced from an earlier decision or course of decisions, each of which had been decided in a similar way.

The first step in that process was to decide whether the case before the court was *analogous* to the decision or course of decisions previously decided.

A decision made by a superior court in the hierarchy that is in point, will be imperatively binding. But the general task before a Court is to determine whether a previous decision is sufficiently *analogous* to be binding or is *distinguishable*.
But what decision was *analogous* and what was *distinguishable,* depended upon the *material* facts in the earlier decision and those of the case at hand?

That was the gap in the dyke through which the common law was able to adapt to social change. Adjustment of the law could be made in this way, within the limits of analogical logic as controlled by the doctrine of precedent, without jeopardising the predictability and certainty, which that doctrine was intended to achieve.

The question depended not on some vague similarity in the case to be decided and the facts of the earlier decisions but on the similarity or differences in the *material* facts.

This question -- what facts were or were not *material* flowed from the application of the principles which underpinned the common law.
These were:

- Each person was expected to bear his own misfortunes but if an injury was caused by another's fault, that was a different matter. Under the common law we have to bear our own misfortunes but not injuries inflicted by the fault of others.
- Persons enter into contracts – make promises – at their peril. They would be bound by them and it was immaterial that subjectively there was no true consent or that bargaining power was unequal.
- The common law assumed freedom of will and therefore placed a value on individual responsibility. Neither, congenital defect, nor economic hardship would affect legal guilt or substantially mitigate punishment. But, consistently

with that, the common law insisted upon intent as a condition of criminal liability.

- The common law recognized, almost without qualification, the right of private property. In 1895, the House of Lords held an owner not liable for intentionally intercepting by means of excavations on his own land the underground water that would otherwise have flowed into the adjoining reservoir of his neighbour's land, even though his only motive in doing this, was to cause his neighbour to buy his land, at his price.

But once values had changed so radically that it was not the individual, as such, but a section of the public, such as consumers, which society thought should be protected; or the environment generally; or that liability should, in some circumstances, arise independently of fault, it was clear that the common law could not cope.

Legislation was necessary. Legislation which did not necessarily draw upon the common law, but stood alone. It was increasingly, backed up by regulations and administrative guidelines. It could and did supersede the common law by virtue of parliamentary supremacy.

Legalism, as reflected in the common law and the autonomous development of the law, thus became increasingly replaced by a Regulatory Legal Order.