

Rejecting rights and responsibility as the basis of the rule of law

I must warn you from the outset that my argument will be controversial, even highly counter-intuitive, although admittedly, a little tongue-in-cheek. After all, as my title suggests, I seek to reject the most established and enshrined legal principle of all: that in an idealized legal system, whose agents subscribe to axioms of an equitable balance, one can enjoy rights and suffer obligations under a rule of law applied equally to all.

In Shakespeare's Henry IV Parts I and II, Shakespeare provides a sustained image of the unifying function of law in a disjointed society (see Paul Raffield, *The Ancient Constitution, Common Law and the Idyll of Albion*). One wonders, all these years later, whether there is a sustained image of the disjointed function of law in a unified society. Albion, it would seem, has become inverted and chaotic where rights and responsibility no longer provide the Idyll, but rather deliver misery, misrepresentation and consequential social blindness on a scale that will leave people thinking of this period not as the age of austerity, but rather the age of inadequacy. I do not intended to sound negative, but it would seem that I am unable to avoid doing so in the context of this particular paper, so I apologise in advance.

With an ever-increasingly complex democracy which not only delivers more and more "layers" of representation to consumers already bombarded with a myriad of choices, but also delivers more and more "systems" of legal processes targeted at different classes of individual citizens and organisations, it would appear that the very purpose of the rule of law has been fundamentally undermined, by its own dominant majesty.

For example, human rights are routinely exercised, not only by humans, but ever increasingly by corporations on commercial grounds seeking to force changes to statutes produced by the democratically accountable Parliament. For example, see AXA General Insurance Ltd & Ors, *Re Judicial Review of the Damages (Asbestos-Related Conditions)* [2010] ScotCS CSOH_02 or Royal College of Nursing & Ors, *R (on the application of) v Secretary of State for the Home Department & Anor* [2010] EWHC 2761.

Furthermore, human wrongs are routinely punished, not by seeking to punish at all, but rather by seeking to justify socially unacceptable behaviour in an ever increasingly "tolerant" society. For example, it is widely accepted that it is, unfortunately, socially acceptable to discriminate against the disabled (even before they are born). This is a well established principle and widely acknowledged as accepted, but discrimination itself is generally socially unacceptable, see, for example, Learning Disability Scotland research which found that over half of those polled (51%) felt disabled people were the most discriminated against group in society, or Lindsey Lee's "My Life As A Disabled Teenage Girl". Ironically, it would seem that discrimination against the disabled unifies the rest of society in a twisted and radical way, and yet the rule of law with all its good intentions feeds this divisions and puts the disabled (and other parts of society) in their own "city state", separate from everyone else with their own rules and outcomes.

Local government, regional government, national government, international government, a massive and poorly coordinated infrastructure of competing processes, systems, jurisdictions and revenues operating across a nation united in its commonality and ever increasingly being forced by the rule of law to become more apathetic to rules, laws and judgments which as an overall package are wreaking havoc the Idyll on a scale not seen since the Norman conquest. Yet, to most, blinded by the endless media tirade of gossip and gimmicks, entertainment and distraction and the tiresome bureaucracy involved in some of the most basic functions, one wonders whether there is any real coherent structure left. For example, a non-heterosexual cannot "marry" but can enter a "civil union", which a heterosexual cannot. Who cares! Isn't the whole point about two people getting together? As long as there's no bigamy going on, then what difference does it make, honestly! Yet, the unity of the populous is clear, based on the human condition and the established norm of entering into a relationship and evolving that relationship into marriage. Xunzi (Chan, 1963a: 122) argued passionately that

"Instead of regarding Heaven as great and admiring it,
Why not foster it as a thing and regulate it?
Instead of obeying Heaven and singing praise to it,
Why not control the Mandate of Heaven and use it?"

This logic seems appropriate when considering how the rule of law which imposes rights and responsibilities on individuals and organisations, apparently with the authority of the electorate who give

a mandate to law-makers to create the rules and accept the agents of the systems, lawyers and judges, as being mandated through the constitutional arrangements to manage and enforce those rules. It is this “independence of the judiciary” and the general acceptance, through long standing tradition, of the rule of law that has consequently resulted, though evolution rather than design, the current divisive jigsaw of “city-states” that are layered upon each other throughout the nation.

In *The Rights of Refugees in International Law* (Cambridge University Press 2005), Hathaway when exploring the sources of “universal rights” postulated

“Most obviously, because relatively consistent state practice is an essential element for the development of custom, it surely follows that significant inconsistent state practice undermines reliance on customary international law as a source of universal human rights.”

This argument, that consistency in law is essential for the development of custom and inconsistency undermines reliance on custom, is reflective of the underlying issue that the rule of law has. Why should I be subject to a different process, with different rules, different judicial discretions and different outcomes for the same factual or circumstantial event in my life than someone else with the same factual or circumstantial event in the same country, merely because the rule of law has placed them and I in different “city states”? When I was thinking about this, I actually thought that the criminal justice system was the primary candidate for consistency and represented the last vestige of the traditional Idyll. Have never practiced criminal law, I had a perception that regardless of who I was or where I was from or what I had been accused of, I would be innocent until proven guilty, be entitled to legal representation, have the security of a fair hearing for bail and would be judged by a jury of my peers. However, it seems, that even in the criminal justice system, the rule of law has created several “city states” where actually the universality of rights and obligations is being eroded by the construction of “city states”. There are different rules and outcomes for suspected terrorists who are treated differently (Guantanamo Bay comes to mind). There are circumstances where trials take place without juries, or in secret. And what if I am accused of a crime when I am awaiting citizenship, so that I am not even legally a citizen of the country I live in?

Indeed, given the apparent chaos arising out of the trend away from universality towards targeted particularity, is it any wonder that the country (that is the people who live here) is united in its lethargy to this endless process called the rule of law that has no apparent overriding objectives or focus and many more disgruntled “victims” than it does happy “customers”. In his essay on youth apathy, Jake Gordon quotes Forrias & Goran who said “... Individualisation is increasing and class solidarity is decreasing; various categories of people are being erased and replaced by individual differences”. Ok, at this stage you might be thinking that I am auditioning for a column in the Daily Mail or something, but take a step back and look around. Look at all the rules and regulations and processes and systems and statutes and ask yourself one simple question: is everyone really equal under the rule of law? Are one set of rights balanced as against another set of responsibilities, or indeed another set of rights? Is the individualisation that has been taking place the catalyst for the rule of law adapting to create individualistic rules and processes? It is generally also accepted that there has been a decline in membership of membership organisations, whether political, educational, social, charity – membership is falling as it becomes harder to engage with an increasingly apathetic population.

The consequences of the apathy and the individualisation culminating in a de-universalising rule of law has led to regular headlines in the papers about non-heterosexual’s rights trumping the rights of particular religious groups, or of the rights of particular religious groups trumping other particular religious groups, or the obligations of parents being undermined by the “nanny state” or the rights of patient’s being undermined by the necessities of financial accounting and so on are reflective of the divisive rather than inclusive effect of the rule of law and its fading universality in place of more recent legal city states.

Has the rule of law not allowed, through its majestic authority, institutional and social inequality to develop for different classes of people? Well, if it has, then maybe its time that we abandoned the rule of law and instead opted for something more appropriate. Don’t get me wrong, I’m not about to launch into some philosophical discussion about class or Plato’s Republic or anything like that, or suggesting that the anarchists should get their way. There has to be social order, but why can’t it be honest and transparent social order. I’m just looking at the big picture, taking a step back. What I see are old people treated with no respect at all who have no real quality of life, rotting away in “death hotels” which increasingly they are forced to pay for if they don’t “qualify” for the public funding they were promised for paying all their taxes for decades. I see young people, despite record GCSE and A Level results every year, who can’t read, write, type or even articulate themselves sufficiently without the use of

profanity and with aspirations not to better themselves and society but rather aspirations to be popular and pretty as if that is a social status all of its own from which fulfilment by money simply handed to them because they are so cool will come. Now, don't get me wrong, I am not making a judgment about the way society actually is. After all, it's a better place than most countries in the world. What I am talking about is why the rule of law is heralded and clung on to so enthusiastically because of the perception that it has a universality that protects people and serves to bring order to our society, when in reality it appears that actually it is nothing of the kind and ought to be abandoned as such to bring a true sense of evolution and clarity to our society. Now I may be wrong, I often am. It may be that I have been unlucky in my life and when I have stopped to take a step back what I have seen has been the same unrepresentative niche rather than a true reflection, which I cannot ignore a real possibility, but I can only talk about what I have seen and how I perceive what I have seen.

Now don't get me wrong, I am not seeing these things because I am trying to look for them, I am seeing them because they are right in front of me, everyday, wherever I go in the country. I see discrimination against disabled people, both in law and socially as well as in terms of the care they get. I see discrimination built into the legal process against non-heterosexuals, who are herded together and labelled accordingly, categorised and stamped. I see discrimination against the old, the fastest growing class of people, but whose savings, pensions and tax contributions have not provided them with the future they envisaged, but rather a future which they would have expected to have avoided. I see discrimination against the unemployed, forced to jump through the most ridiculous hurdles for the sake of such an insignificant amount of money. I see discrimination against the privately employed, denied (in general terms) from exercising the rights the law gives to public sector workers because of the intensifying pressure of the thought of unemployment. I see discrimination against business, through a combination of regulatory measures which often have conflicting objectives that starve business of the opportunity to properly compete in a global marketplace. Yet, above all of these things, I see the rule of law, fractured and divisive, autocratic and unaccountable, self indulgent and obese in the volumes it fills on shelves and in megabytes of data.

This is where the rule of law has brought us as a nation. Millions of regulations, thousands of statutes, tens of thousands of judgments, hundreds of treaties and no real universality of rights and obligations "equal before the law". It seeks to label, badge and package different groups of people together into neat little sectors with their own unique rules and processes, ignoring its own founding basis because it has lost sight of its function and purpose. We don't need 10 different sets of rules for 10 different groups of people, honestly, we only need one set of rules and a judiciary capable of judging when it is appropriate for the rules to be flexible to meet a particular set of needs or circumstances. That was what Albion was all about, the unifying force of the rule of law and the hope and security that it gave to everyone, regardless of their background, belief or circumstances. That is what was exported as a legal system all around the world as the panacea to social disorder.

Instead, we now have a rule of law which clearly needs to be abandoned along with all the reams of constantly changing regulations and processes that bring fear and despair to those it was meant to protect. There has been a revolution, it would seem, but nobody noticed and if it continues unchallenged and unchecked then the natural logical future that will arise will be one where we return to multi-layered city-states with their own unique laws and legal systems which are quite separate from each other. (See, Cotler, "Human Rights as the Modern Tool of Revolution"). Once allocated to a particular legal city-state it will not be permitted (or at least made near-impossible) to move to other city states where rules and processes which may be more attractive can be found. One will remain trapped in the allocated city state. These city states of which I speak are, of course, the legal processes themselves.

Please do not interpret what I am saying in any way as an attack on the law-makers or the judiciary. More often than not, they are themselves subject to the rule of law and find themselves trapped and unable to make any meaningful escape. It just happens. I doubt any of it is intentional or was conceived or planned. I do, however, believe that the rule of law has evolved over time and it is the consequences of that evolution that have given rise to the divisive and often patronising processes that come out from the good intentions that many a government policy may have had. Its just consequential, unexpected, perhaps largely unnoticed.

It is also generally accepted that generation to generation we are being dumbed down as education becomes broader and has less depth. Calculators and computers save us having to use our brains in the way we would have had to in the past. Degree results obtained by The Sunday Telegraph show six out of 10 students were handed either a first or an upper second in 2010, compared with just one in three graduates in 1970 and that the criteria for awarding degrees has changed dramatically - despite

complaints from many universities that grade inflation at A-level has made it hard for them to select candidates. Remember, they used to get lots of funding per head, so the better the graduate rates the higher the number of applicants they would get and the more funding. Although the funding side has come under pressure, the overall trend over the past 30 years is very suggestive.

The end result of all these different factors is the culmination of a system in which we are clearly being branded and commoditised into compartmentalised legal processes under the rule of law based entirely on nothing more than a combination of lifestyle “choices” and the lottery of life and only a very small minority are privileged enough to be allowed to move to a better city state: enough for everyone else to believe that anyone can, it would seem. You literally have to win the lottery or X-factor or be lucky enough to be a footballer. Whatever happened to Sir John Major’s “meritocracy” which, I believe, recognised the danger signs of the de-universalising of the rule of law and the increasing individualisation across society?

So on it goes, the rich get richer, the poor get poorer, public services cost more and deliver less, we have less security in ourselves and more anxiety and without any power or choice are categorised, labelled and placed in the appropriate legal city-state. The easiest things in the world are made overly complicated and we discover more and more labels and categories are applied to us for no discernable reason other than to herd us into legal processes which tend to demoralise and are tiresome.

It’s the blatant transparent dishonesty of it all that I find most compelling, “equality” is the new trendy word, but I have yet to either see any or to understand how exactly it can be achieved given the increasing divisive inequality in our society. I would rather be told upfront and directly that because I meet whatever the relevant criteria of genetics, health, age, race, intelligence, potential, achievement, beliefs, sexual preference, gender, or whatever else is used to measure me as an “equal” with everyone else, that I can expect a specific set of rights and obligations (which may or may not be superseded by another’s specific set of rights and obligations were there a conflict) and which may provide me with a different outcome judicially than I may otherwise have expected had I been eligible for a more desirable set of rights and obligations. At least I would have the comfort of certainty of knowledge and could focus my attention on worthwhile endeavours which would actually be rewarding, rather than chase the aspirations that just simply cannot be achieved and live a life of frustration and resentment that so many people end up with. Instead, the fallacy of the rule of law and my enduring equality with everyone else endures.

By now, hopefully you will recognise, at least a little, the general thread of what I am trying to say, but imagine if you will (yes, I know, Lennon) what our country would be like if the rule of law really was one rule for all. I believe it would be inclusive, more democratic and transparent and therefore more accountable. Perhaps we are not yet lost and can yet take control to rebuild Albion as it should be. In the words of Neil Marcus: “Disability is not a brave struggle or ‘courage in the face of adversity.’ Disability is an art. It’s an ingenious way to live.” So, in our tolerant, advanced, liberal-democracy, let’s stop trying to exclude people to legal city-states and include everyone in our nation under the rule of law equally or embrace wholeheartedly the legal city-states and abandon the universality of the rule of law based on rights and responsibilities being equal.

