

COMPLEXITY AND CHAOS

“You cannot impose order on a fundamentally chaotic universe.” This is the pay-off line in my *Equity & Trusts* textbook – I believe it to be true. Chaos is the best description of the fundamental nature of our universe – at root, there are no building-block atoms but rather, at the real roots, there are pulses of energy in the form of particles which we do not yet fully understand. The metaphor of atoms was comfortingly stable and enabled, I would suggest, much of positivism to speak up confidently, and for social scientists (let alone natural scientists) to use it to create models with which to understand our world. Now that we know that chaos and complexity theories describe the world better than Cartesian structuralism, we can reach out other types of social theory which are not only post-structural (as considered elsewhere on this site) but also open-textured in the manner which they approach social problems. My theory of equity takes such an approach – assuming that the world will continue to throw up chaotic and complex problems, equity must be built on principles which address the human condition at its most basic level because it is only at this level that we can hope to adapt to change whilst also meeting the challenges of the present.

Chaos and complexity theory as a means of understanding reform of the legal system¹

There is a need to be careful in using scientific concepts to support social scientific points. Therefore, it should be made clear that what follows is a metaphor. The metaphorical use of chaos and complexity is in the pursuit of the idea of hyper-complexity. The thing called “society” (itself a term whose content is at issue) is a tangled web requiring a subtle politics to reflect and appeal to the various collections of aspirations contained within it. A proliferation of power centres and social systems outwith the direct control of central government, but theoretically subject to the rule of law, generates chaos. “Chaos” not in terms of anarchy or sedition, but rather “chaos” in the sense of an amalgamation of numerous actions and reactions, actors and systems, generating socially observable but frequently inexplicable phenomena. Included in this category are phenomena like the growth of single issue politics and protest uniting working and middle classes; and an intensifying lack of respect for politicians and political institutions.

As with the development of quantum physics, it is possible to identify simple events arising from an accumulation of unrelated episodes. Examples given are the well-known butterfly flapping its wings in Beijing and beginning a chain reaction which causes rain in New York. Other examples are the dripping tap which, despite the maintenance of a

¹ This discussion is culled from AS Hudson, *Towards a Just Society*, 1999, London: Pinter.

steady flow of water, lets water fall at occasionally irregular intervals as a result of random and chaotic factors outwith the control of the scientist-observer (James Gleick, *Chaos*).

In terms of law, and other social phenomena, it is useful to consider the role of chaos as generating events which cannot be readily explained in the Cartesian affection for cause and effect. Capra uses this metaphorical trick to explain a post-Cartesian, Zen account of social relations and the need to adopt holistic approaches to everything from medicine to social relations (Fritjof Capra, *The Turning Point*). Law is an important device with which to meet this chaos. Rather than continue to allow this chaotic generation of events, the justice system provides a means for individual, chaotically arising disputes to be addressed and resolved. Law is a force for order at this level. Rather than a build up of unresolved issues leading to large scale upheavals, individual issues can be addressed with the comparatively scalpel precision of dispute resolution, as opposed to the drawn-out and blunt instrument of political change. Constitutional reform more generally is usefully seen as a means of permitting chaotic episodes to be addressed where individual dispute resolution cannot cater for issues which exist on a larger scale.

The theory of complexity is then a useful understanding of how a reactive, responsive justice system can operate in the context of a hyper-complex society. In scientific terms, complexity considers the way in which simple phenomena can lead to complex results. One frequent starting analogy is the simple phenomenon of wind leading a complex and unpredictable pattern of waves crashing onto land. Complexity is said to indicate the natural tendency for physical and biological systems to take this complexity and nevertheless produce regular patterns from it. In short, a tendency for plants and animals to generate order out of chaos.

The generation of common law perhaps responds to this metaphor. A complex and largely unpredictable mass of litigation comes to court and leads to a complex web of judicial decisions. However, those decisions are not entirely responsive solely to the dispute brought before the tribunal but rather by reference to an overarching structure of decided case law. A semblance of order is thus made of the chaos.

Models attempting to create structures which permit these chaotic episodes to come to resolution and thus reduce complexity to harmonious social inter-action. The purpose of the models advanced in Part V “Models for Reform” in my *Towards a Just Society* are designed to meet the problems posed by hyper-complex social phenomena with responsive and democratically accountable structures which bring “law” closer to “the people” – that is, a structure which makes the justice system an engine for democratic renewal. Chaos and complexity indicate a necessary drive, nonetheless, towards order. That is better created and disseminated centrally than given over to accidental evolution.

Equity as the provider of equilibrium in private law²

² This discussion is culled from AS Hudson, *Equity & Trusts*, 3rd edn, Ch 37.

The psychology of order and chaos: common law and equity

The core argument is this: human beings crave order and are fearful of chaos.³ In a world that is fundamentally chaotic, equity permits sufficiently flexible claims and remedies to address this chaos. Having suggested that the world is more complex than ever it was, we turn now to consider how a legal system should address that added complexity and the extraordinary diversity of claims over which it will be required to sit in judgment.

Freud creates one of the most famous dialectics in modern thought: that between the ego and the id in the human psyche. A well-balanced psyche will achieve its equilibrium through a synthesis of the conscious and unconscious represented by ego and id respectively. This metaphor is reminiscent of the manner in which the English legal system seeks to arrive at the 'right answer' in civil law cases by balancing the common law with equity.⁴ Freud also posits the tendency of human beings to seek certainty as an instinct. This is said to be located in the awkward adaptation of human instincts (or human nature) to the cultural constraints of civilisation.⁵ The tendency then is to focus the rational mind on the pursuit of certainty in law-making and in other activities so that chaotic and anarchic forces are repressed.⁶ The balance is between order/ego and chaos/id: both are forces in the human psyche. Effective law-making would require a balance between formalism and flexibility, creating standards and accepting difference, synthesising common law and equity.

Reconstituting equity as a tool of social justice

Equity is applied (albeit carefully) in commercial cases and in cases involving homes more often than it is ever applied in cases involving social or personal welfare. The fiduciary categories of company director, agent, business partner and trustee are far more mature than are the comparable fiduciary duties in relation to the operation of public sector services. Equity has become a tool of commerce in the recent case law. Due to the inaccessible nature of the English legal system to most ordinary citizens,⁷ it is a head of claim deployed to prevent unconscionable behaviour between commercial people. In considering express trusts, most of the major cases have involved financial institutions over the last ten years. Aside from trusts of homes, few other cases involving trusts reach the High Court. The conscious express trust has all but extracted itself from mainstream equity; its terms are interpreted like a contract, as are the duties of its trustees.

The next stage for the law is to identify the way in which it can respond to the increased social complexity of the risk society. My books *Equity & Trusts* and *The Law on Investment Entities* have argued for an understanding of law as a facilitator of communal and communicative action,⁸ in the manner suggested by Durkheim.⁹ The models identified in those books can enable communities to act together. What is lacking

³ S Freud, *Civilisation and its Discontents*, 1930, Harmondsworth: Penguin.

⁴ While it is true to say that not all legal problems will require that both common law and equity be put to work; but not all psychological issues necessarily require psychoanalysis either.

⁵ Freud, 1930, esp 288 *et seq.*

⁶ So with Weber, for example, the development of rationality is expected to remove the need for casuistic decision making, permitting instead a bureaucratic formalism to hit upon the 'right answer' every time.

⁷ As a result of cost and the inaccessibility of legal aid for most citizens: see AS Hudson, *Towards a Just Society*, 1999: London: Cassell, 19.

⁸ J Habermas, *Theory of Communicative Action* (1981), 1984, Boston: Beacon Press.

⁹ E Durkheim, *The Division of Labour* (1894), 1994, London: Macmillan.

is a clearly defined understanding of the fiduciary duties at issue here. The issue is that of a different context from the well-understood family trusts and the sophisticated structures of commercial investment entities. Each context is significantly different. A one-size-fits-all approach to the legal treatment of these structures will not be sufficient. Rather, our new, more complex society requires the development of legal principles which will allow the courts to be responsive to context and to the needs of the human beings involved in disputes.

Equity out of chaos in a risk society

The global economy is organised around risk. Risk in terms of financial speculation, risk in terms of the broader range of decisions and choices which face most of our citizens, and risk in terms of the increased hazard posed by the activities of international corporations. Social change is visible in the changed roles of women over the latter half of the 20th century; the decline of the institution of marriage in many Western societies, and the greater appreciation of post-Cold War environmental catastrophe through ecological risk. Mass unemployment, deterioration in structures of belief in common goals and organised religion are the flip-side of income mobility, broader national and international career opportunities, and a greater tolerance of a plurality of belief.

For Chomsky, these developments have occurred at great cost to the spiritual welfare of individuals with a late-capitalist economy generating the illusion of life-chances as a mask for the multinational corporate power which has assumed a morally ambiguous control over world politics.¹⁰

For Beck, the increase in social risk derives from both an increase in choices and also caused a displacement of politics from its traditional arenas to more localised forums and groups.¹¹ Thus risk offers both opportunity and threat.

For Giddens, the creation of what he terms ‘institutional reflexivity’ indicates both greater power in the hands of institutions and more profound existential problems associated with requiring individuals to make ever more complex lifechoices.¹² For all three there is a common link in their observation that the world has thrown greater risk on the individual citizen by means of increasingly powerful global economy facilitating new connections, new industries and new sources of social power outwith the control of national governments.

For sociologists like Giddens globalisation is something broader than the operation of financial markets across geographic boundaries.¹³ Globalisation refers to a systematic change in social relations. The range of options produced creates problems for the individual in a way which a lack of choice never did.¹⁴ It requires the individual to become bound up in investment activity through the structures discussed in this book in a number of ways – either through quasi-compulsory pensions arrangements,¹⁵ through a decision to invest personal capital, or (more fundamentally) simply by reliance on public

¹⁰ N Chomsky, *Profit Over People*, 1999, New York: Seven Stories.

¹¹ U Beck, *The Risk Society*, 1992: Sage.

¹² U Beck, A Giddens and S Lash, *Reflexive Modernization*, 1994, Cambridge: Polity.

¹³ A Giddens, *Beyond Left and Right*, 1994, Cambridge: Polity.

¹⁴ A Giddens, *Modernity and Self-Identity*, 1991, Cambridge: Polity.

¹⁵ That is, not compulsory private pensions schemes but schemes which the citizen is ever more likely to have to acquire because of the phased reduction in the level and availability of the state pension.

services which are provided by quasi-private sector investment structures like the PFI scheme or NHS trusts.¹⁶

The techniques, in the best postmodern tradition, are both simple and very complex. This analysis of the variety of treatments of trusts has shown English law to be caught between very simple, intuitive ideas and subject matter too complex to analyse closely. The role of equity is to address itself to that form of social realignment: to provide justice in a more difficult and more complicated world than the one which produced them originally.

Risk, investment and legal models

This is a world of increased risk of many kinds: opportunity and choice, hazard and danger. The legal treatment of trusts must recognise that: whether involved in social investment (as with charities, co-operatives and so forth), or private welfare through investment (as with pension funds, unit trusts and so forth). Investment is a means of speculating on the hazard and volatility inherent in the global economy. For a discussion of these models you are referred to AS Hudson, *The Law on Investment Entities* (Sweet & Maxwell, 2000). Investment is a modish form of public policy which reduces the burden on central taxation and places it instead on the enthusiasm of venture capitalists for infrastructural projects underwritten by government. Investment is also, however, a means of expressing a commitment to each other and to our communal welfare by means of co-operative activity.¹⁷ It constitutes a profoundly humane understanding of the need to nurture our most precious resource: the talents and the aspirations of ordinary people.¹⁸

¹⁶ AS Hudson, *The Law on Investment Entities*, 2000, London: Sweet & Maxwell, 309.

¹⁷ Maloney, Smith and Stoker, 'Social capital and human capital revisited', in Baron, Field and Schuller (eds), *Social Capital*, 2000, Oxford: OUP, 212.

¹⁸ Sentiments associated with John Smith, Foreword to *Strategies for National Renewal*, 1994, London: Vintage: 'The scourges of poverty, unemployment and low skills are barriers, not only to opportunities for people, but to the creation of a dynamic and prosperous society. It is simply unacceptable to continue to waste our most precious resource – the extraordinary skills and talents of ordinary people.'