

Review Essay: A “Non-modern” Approach to Law

**Bruno Latour, *We Have Never Been Modern*
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Modernity has often been characterised by reference to processes entailing the growing *differentiation* of spheres of life on the one hand, and the increasing subjection of life in each of these spheres to calculable and impersonal rules (or what is often referred to as their *rationalisation*) on the other. Law has been foremost amongst the objects of modern social analysis analysed in these terms — whether by doctrinal jurists whose whole project is implicitly premised upon the differentiation or autonomisation of law from other domains such as religion, morality, politics, and the need to systematise its rules by reference to a coherent and unified body of principles immanent to the legal realm; or by critical theorists who seek to develop general theories of *the* law, or this or that subbranch of law, in which it is analysed in terms of the realisation of some extraneous over-arching logic or principle, for example, class or patriarchal domination.

Such theorisations of law do less than justice to the empirical findings and research questions flowing from the substantial body of research carried out on law and legal institutions — especially criminal justice institutions — over the last 25 years. A great deal of this work depicts law as much more open, contingent, discretionary, and intermingled with other domains than is allowed for in the accounts of lawyers, jurists or critical theorists. To this rather heterogeneous and messy empirical reality the doctrinal lawyer simply turns a blind eye. Legal theorists and philosophers on the other hand frequently appear to think that law is too important as an instance of social ordering (or domination) to be left in the hands of empirical social scientists who dabble with surfaces and partial bits and pieces rather than getting to the essential nature of things.

Bruno Latour, in arguing that “we [in the west] have never been modern”, does not deny the importance of processes of differentiation and rationalisation to the shaping of the societies of the west. But he argues that this is only part, the “official” part, of the story. Latour writes from his background in the sociology of science and technology, but despite (or in part, because of) this, there are some valuable lessons for legal, and criminal justice, researchers and criminologists in his work.

Latour begins by arguing that currently, the international community is beset by a proliferation of what he calls “hybrids” — global warming, AIDS, the hole in the ozone layer, that is, phenomena in which culture and nature, human and nonhuman elements, are unavoidably mixed up. But he suggests every effort will be made in order to compartmentalise them into “as many segments as there are pure disciplines” (p3). This tendency, he suggests, is wholly characteristic of the “modern constitution” in which modern sciences divide the world up into natural objects (“things-in-themselves”), human communities (“people-amongst-themselves”) and discourse (language and texts). He contrasts this with the discipline of anthropology which is habituated to seeing “premodern” societies as “seamless” “nature-cultures” — societies in which social needs, nature, knowledge, law, and religion, are mixed up. By contrast moderns would have it that the fabric of “modern”

societies is no longer seamless and these societies are thus not susceptible to anthropological analysis.

So what does it mean to be “modern”?

Although there are multiple definitions and versions of modernity he suggests that the common thread tends to be a reference in some form to the passage of time, to the idea of a temporality that erases all before it (p10).

He argues that the “modern” designates two sets of different practices which must remain separate if they are to remain effective, but which in the proliferation of hybrids, referred to above, have begun to be confused. First, there are practices that by “*purification*” create entirely distinct ontological zones between humans and nonhumans, that partition nature and culture, that maintain a separation of spheres. Latour’s description of this set of practices — the “official” part of the “modern constitution” — accords with all those conventional characterisations of modernity in terms of differentiation, rationalisation, and so on. This is precisely what confronts us in debates about law referred to above — that law and each of its subfields can be approached as a system of rules (and perhaps interpretative communities and strategies) autonomous of other normative systems such as morality and religion, and of institutional machinery of control (organisation, technologies, institutional routines, architecture and buildings and systems of documentation). In the same vein it inspires the quest for the “general principles” of criminal law or some general theory of law and criminal justice. This involves peeling away and discarding the inessential details and institutional practices which are contingent and discretionary elements that muddy the image of unity and coherence. Latour calls this practice of purification “the modern critical stance”.

Second, there are practices which by “*translation*” create mixtures of entirely new types of beings, hybrids of nature and culture, what he calls “networks”. Latour, and his colleagues within the sociology of science and technology, have undertaken careful empirical studies of such “socio-technical” networks, such as subway systems, electrification, the organisation of the work of scientists and engineers and technologists. The larger insights from such studies, which Latour is concerned to draw out, are not confined to the realm of the technological, of things. Rather, approaching objects taken to be technical in nature and realising that they are both technical *and* social has led to the conclusion that objects (such as law) which are habitually seen as “social” are also both social *and* technical. There is a need then to restore or recognise the place of machines and technology in the study of “the social”, for as John Law (like Latour) points out, “to the extent that ‘society’ is held together at all, this is achieved by heterogeneous means ... the social is not purely social at all”.¹ The “social glue” is impure; the social order is really a “socio-technical” order. Therefore, from the social/humanist side of the “two cultures” we need to overcome an habitual prejudice against the “technical” and machines in which they are either relegated to the background (taken-for-granted artefacts of a merely instrumental nature) or depicted as a hostile force threatening to fragment human culture, purposes and meaning. It is remarkable just the extent to which humanist intellectual traditions have managed to ignore or deride the technical dimensions of the great apparatuses such as education, public health, and law, to deny the technical within the cultural (and vice versa), as if the faculties and practices of reason, critique and communication could somehow float free of all technical apparatus.

1 “Introduction: Monster, Machines and Socio-technical Relation” in Law, J (ed), *A Sociology of Monsters: Essays on Power, Technology and Domination* (1991) at 7.

The modernising project in law, its rationalisation or purification, seeks to make of the law, or particular subfields of law, an autonomous body of legal doctrine, unified and coherent. Even as it undertakes this process, however, it depends on the creation of other agents, procedures and objects which are exogenous to the bodies of doctrine they are to administer. The power, effects and reach of these systems of law depend precisely on the complex networks of agencies, procedures, objects and knowledges of which they are a part, but which they simultaneously keep separate. Thus the underside of the rationalisation and autonomisation of law is the production of hybrids of elements — not just human agents, but offices, documentary records, physical structures, techniques for dividing up space and deploying agents within it, methods for collecting and storing information and similar devices and techniques. The work of Foucault and others on discipline and “governmentality” has also been instrumental in reminding us of the critical importance of these mundane, technical aspects of power, law and governance.²

The two sets of practices, purification and hybridisation, that Latour argues constitute the “modern” depend on each other, but he says that it is only as long as we consider the two separately that we are truly modern, that we subscribe to the critical project even though that project is developed only through the proliferation of hybrids in the unofficial part of the modern constitution. As soon as we consider both together we cease to be wholly modern and we stop having been modern. We are confronted with rethinking the divide, or our presumption that there is a qualitative divide, between “modern” and “pre-modern” societies and the idea of a temporality that erases all before it.

If the work of purification — the partitioning of domains — in the “official” part of the “modern constitution” produces an internal divide within modern societies, he suggests that it also produces an *external* divide, the “Great Divide” between “modern” and “pre-modern” societies. Thus, he suggests that moderns have been unable to conceptualise themselves in continuity with the premoderns, that they have found it necessary to think of themselves as absolutely different.

So what are the differences? He argues:

To undertake hybridisation, it is always necessary to believe that it has no serious consequences for the constitutional order. One way of taking this precaution is to bracket off entirely the work of hybridisation on the one hand and the dual social and natural order on the other. Moderns insure themselves by not thinking at all about the consequences of their innovations for the social order. But if anthropologists are right, premoderns dwell endlessly on these connections between nature and culture. To put it crudely, those who think the most about hybrids circumscribe them as much as possible whereas those who choose to ignore them by insulating them from any dangerous consequences develop them to the utmost (p41).

Thus it is the moderns very bracketing off of the work of hybridisation that allows it to continue apace. The Hindmarsh Bridge affair in South Australia might be taken as a revealing example. Contrast a royal commission’s claim to produce truths which are rational and universal and the instruments which support this — an “open” inquiry utilising techniques (including interrogative strategies, buildings, particular spatial arrangements, systems of documentation) designed to bring “all the facts” together in one place, the publication and circulation of a printed report, press releases, and so on — with the intermingling in the

2 See Burchell, G, Cordon, C and Miller, P. *The Foucault Effect — Studies in Governmentality* (1991); Rose, N and Miller, P, “Political Power Beyond the State” (1992) 43 *British Journal of Sociology* 2.

local Aboriginal community of nature and culture, of notions of truth and rules of inquiry and disclosure with spiritual obligations to land, places and people.

The "truth" produced by a royal commission is however no less local and specific, no less a product of particular hybrids of human practices and things, than Aboriginal secret women's business. The "truth" is not some pre-existing datum that awaits discovery by rational means. Its effects are extended, and limited, by the network of practices and instruments within which it is produced and disseminated. As regards the Royal Commission, the reach and effects of this network are made possible by the prior bracketing off of the notion that an official public inquiry, the objectification of truth in printed reports and their publication could have any harmful consequences for the social and natural order. The exercise in producing and disseminating inquiry reports, like the enterprise of building bridges (both of them involving the production of new hybrids in which things, or technologies, are added to human activities) is widely understood and represented as unproblematic by those who have long since learned to think about things and people, nature and culture, truth and spiritualism, in separate compartments. Others, for whom the social and the natural orders are necessarily mixed up together, approach such projects with the utmost caution. For confident moderns such beliefs appear as so much superstitious hocus-pocus. But if, as Latour argues, modernism is losing its confidence in the face of threatening phenomena like global changes in the weather and other ecological events, we (moderns) are perhaps being forced to revise our habitual compartmentalisation of society and nature, and hence our complacent indifference to things like bridges and roads.

But as long as connections are denied and the compartments maintained, moderns are free to create novel and more extended networks of people, land and technology. It is not the modern capacity to reason, to assign society and nature to their correct ontological pigeon holes, however that explains the success of the moderns but on the contrary their preparedness to mix together "much greater masses of humans and nonhumans without bracketing anything and without ruling out any combinations" (p41). The differences are important, but viewed from a "nonmodern" stance they do not constitute any sort of a fundamental rupture. Collectives (all collectives) are composed of the same raw materials of nature and culture. Rather the differences are quantitative. They reside in the "size and scaling effects of mixes of human and nonhuman elements" — in the production of hybrids and the extension of networks that are permitted (because denied) by the modern constitution. These effects of scale however tend to be turned into massive differences (the "great divide") and assigned profound causes.

When we cease to be modern — when we consider the work of purification and the work of hybridisation together — we will be better able to appreciate that "we have never left the old anthropological matrix behind" (p47). As the idea of ceasing to be/of having never been modern implies, this involves not a new departure but a revision of precisely that notion of temporality — of "time that passes irreversibly and annuls the entire past in its wake" — that is the hallmark of modernity. This is not therefore an exercise in denunciation and transcendence of modernism. On the contrary, the nonmodern stance "deploys instead of unveiling, adds instead of subtracting, fraternizes instead of denouncing, sorts out instead of debunking" (p47). It is primarily concerned with the careful description of networks.

This stance should not be confused either with antimodernism on the one hand or post-modernism on the other. Moderns and antimoderns, for all the wrangling between them, share this idea of modern temporality. They assign different values to the outcomes, but the idea of revolutionary change, which is to be pursued or resisted, is still maintained. Postmoderns on the other hand, whilst sceptical about the temporal and epistemological framework of modernism, nevertheless claim to evaluate modernism (usually in negative

terms) from a vantage point beyond it and after having rejected the epistemological tools (those of modernism) that would confidently permit them to do so. Latour, although scathing about postmodernism in places, obviously shares its scepticism about the modern critique. However, for him postmodernism is a cul de sac because “instead of moving onto empirical studies of the networks that give meaning to the work of purification it denounces, postmodernism rejects all empirical work as illusory and deceptively scientific” (p46). One otherwise very useful survey³ of processes of modernisation and “postmodernisation” illustrates in part the point Latour is making. “Postmodernisation” is analysed in terms of processes of “dedifferentiation”, and “debureaucratisation”, that is, by reference to the fate of those tendencies represented as definitive of modernity in the “official” part of the modern constitution. This is without asking whether this has ever been the full story and without exploring the networks that have always existed side by side with the differentiation and rationalisation of social life.

Against the modern idea of time and the passage from one era to the next Latour argues:

Today, the very idea of revolution strikes us as exaggerated, since revolution is only one resource among many others in histories that have nothing revolutionary, nothing irreversible, about them. ‘In potentia’ the modern world is a total and irreversible invention that breaks with the past ... Seen as networks, however, the modern world, like revolutions, permits scarcely anything more than small extensions of practices, slight accelerations in the circulation of knowledge, a tiny extension of societies, miniscule increases in the number of actors, small modifications of old beliefs. When we see them as networks, western innovations remain recognisable and important, but they no longer suffice as the stuff of saga, a vast saga of radical rupture, fatal destiny, irreversible good or bad fortune (p48).

By way of example he asks how would we locate the rise of Islam or developments in Eastern Europe in terms of “the regular flow of time”. We might add the question of how the recent electoral success of former (?) communists in Poland and Russia is to be regarded — is it a triumph of progressivism or reactionism? These events perhaps demonstrate how quickly our old political divisions and certainties can be thrown into disarray and perhaps therefore how fragile (and how much a matter of faith) they have always been.

Moderns, Latour suggests, have simply invented longer networks and the task is to follow these networks rather than depicting them as “systematic totalities”. He takes the example of a railroad and asks whether it is local or global. Neither is his answer: it is local at all points (there are sleepers, tracks, stations, railway workers), yet it is global in that it stretches over large areas, but it is not global to the extent that it can take you everywhere. He says when we think about technical (or what are really socio-technical) networks like railroads, or gas lines, or the Internet, we have no problem reconciling global and local aspects. They are “nets thrown over spaces. They are connected lines, not surfaces. They are by no means comprehensive, global or systematic (p118). But when it comes to ideas, knowledge, law we tend to fall back into a model of diffusion and universalism, assuming that they “can spread everywhere without cost”. We fail to see that “the aggregates are not made from some substance different from what they are aggregating” (p122), that power (or domination) is not the explanation, or cause of such a network of forces but an effect of its composition.

We do not resort to the careful description of networks, nor to the continual progression of an inquiry, but rather, are inclined to search for profound and abstract causes. This

3 Crook, S, Pakulski, J and Waters, M, *Postmodernisation* (1992).

inclination arises because we note enormous effects which we seek to attribute to causes such as capitalism, imperialism or patriarchy. These essentialisms, however, are ontologically different from and prior to the effects and practices they are claimed to engender. As Latour suggests:

The very size of a totalitarian state is obtained only by the construction of a network of statistics and calculations, of offices and inquiries, which in no way corresponds to the fantastic topography of the total state (p122).

What political conclusions might be drawn or are drawn by Latour?

Like Foucault, Latour is arguing against the modern predisposition to hyperbole, to paranoia, to talk in apocalyptic terms — to dwell on terms like crisis and disenchantment, to engage in self-flagellation, to don the hairshirt as he puts it at one stage — and to see ourselves and our present as so dramatically different from others and from our past. He says we need to be restored to a sense of our “ordinariness”. “With misdeeds as with domination, with capitalisms as with sciences, what we need to understand is the ordinary dimension: the small causes and their large effects” (p122).

But as he says:

Demonising may be more satisfying for us because we still remain exceptional even in evil; we remain cut off from all others and from our own past, modern at least for the worst after thinking we were modern for the best. But totalisation participates, in devious ways, in what it claims to abolish. It renders its practitioners powerless in the face of the enemy, whom it endows with fantastic properties. A system that is total and sleek does not get divided up (p125).

Criminology and criminal justice studies have tended to be richly empirical and to defy ready compartmentalisation into the traditional disciplines of the human sciences. One of the lessons from Latour is that these are strengths to be celebrated, that far from reaching for new (or old) frameworks of totalisation, we should follow with even more rigour and openness the “impure” networks which criss cross these fields.

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