Book Reviews

Law, Modernity, Postmodernity

Brendan Edgeworth
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Last Autumn, I was asked to address a group of British and German academic lawyers on the topic of 'The Task of the Jurist in Today's Society'. What, I wondered, was the significance of 'today's society'? Is *today's* society significantly different to *yesterday's* society? Or, should the emphasis be on *society*? Is it the transformed nature of *society* itself that distinguishes today from yesterday? And, how do the answers to these questions bear on what we believe to be the distinctive role of the jurist? Taking an approach that was more Enlightenment than postmodern, I suggested somewhat tentatively that the tasks of jurists today are threefold: first, to develop an understanding of legal systems (such as those in both Britain and Germany) that are now located in social settings that stretch beyond the boundaries of the nation state; secondly, to contribute to the articulation of rational regulatory measures in a rapidly changing context of local, regional, and global legal interaction; and, thirdly, to clarify the virtues of the rule of law as a distinctive mode of global governance. Alas, at the time of this talk, I had not then had the advantage of reading Brendan Edgeworth's fine book. Had I done so, I would have been encouraged to have heard some echoes of the views that I was hesitantly advancing. Far more importantly, however, thanks to Edgeworth's hugely impressive synthesis of a raft of commentaries on the emergent postmodern condition, I would have had a very much clearer sense of the transformed social environment in which law operates today. Accordingly, whilst Edgeworth's book might not have passed across my desk at quite the right time, in every other sense, it is a most timely publication.

Edgeworth opens his account by remarking on the widespread impression that today's society truly represents a break from the past, an impression which is commonly aired by saying that we 'live in a "global age", a "digital age", or a "computerized society"' (1). However, by the end of Chapter Two, these fleeting references to information technology, if not to globalisation, have been overtaken. In their place, Edgeworth (drawing,

in particular, on the work of Bauman, Lash and Urry, and Harvey) paints a panoramic sketch of the changes that he sees as characterising the transformation of late modernised society into a postmodernised social environment. In the latter, the role of the nation state is diminished (it is a 'contracting' state in more than one sense); in the economy, Fordism has given way to production by smaller and more flexible units; and, in civil society, consumers and an ethic of consumption replace the work-ethic, trade unions, and traditional class-based politics. Moreover, in the larger global picture, supra-national bodies assume regulatory powers; and markets are globalised, as is production and consumption.

Prior to postmodernisation, there was modernisation and modern law. According to Edgeworth,

> modern law is marked by a shift from a polycentric to a monocentric legality as sovereign nation states [assume] exclusive lawmaking power, and a unified judiciary as part of the state apparatus gradually [acquires] sole authority over legal interpretation (69).

Within this paradigm, modern law is capable of expressing various shades of liberal and welfare values; and, indeed, the displacement of the liberal expression of modernity by a welfare version was one of the principal features of the changing nature of law upon which 20th century jurists commented in detail. To hold on to Edgeworth's coat-tails, however, it must be appreciated that these are changes *within* the larger paradigm of modern law; far from challenging the modern paradigm, the enlarged welfare state underlines its tendency towards centripetality and monocentricism. To grasp the transformed nature of the social environment in which law now operates, Edgeworth argues that it is unproductive to explore movements *within* the modern paradigm (even large movements between the poles of liberalism and welfarism); even the most insightful commentaries (such as those by Friedmann, Habermas, Teubner, Unger, Nonet and Selznick et al) on the re-working of, or crises within, the modern paradigm are of limited assistance. The fact of the matter is that the world has moved on; its understanding requires the construction of a paradigm beyond modernity — a paradigm that recognises 'the reconfigured power of the nation state, globalized economic and political institutions, postindustrialism, and a starkly reconstituted class system and civil society' (119).

Midway through the book, Edgeworth picks out five aspects of the prevailing context for governance, each of which speaks to the transformation of the legal order. These features are privatisation, deregulation and marketization, the drawing back of the state's welfare role (including in relation to the provision of legal services), the rise of informal justice, and the influence of supranational norms. To some extent, the preference for markets and contract rather than big government might be

seen as no more than a move back towards the liberal version of modern law. However, Edgeworth clearly reads more into it than this. Thus:

> In general, the transformation of the welfare state in each of the dimensions examined so far in this chapter — privatization, deregulation, the attenuation of welfare rights, and the re-direction of access to justice strategies — reflects the general, dwindling faith in the bureaucratic centralism of the welfare state organized along national lines. A more fragmented, contractualized and pluralistic legal order has started to make a clearly identifiable institutional appearance. This novel 'legal polycentricity'... is resonant of the broader fragmentation, or disorganization, characteristic of advanced capitalist societies... Support for this conclusion is provided by another recent element in the reconfiguration of modern law ... [namely] the rapidly growing penetration of domestic law by supranational legal norms. (175–6)

In other words, we are witnessing the monocentric state in decline. In its place, we have polycentric law — and most obviously (but not exclusively) so where the source of the normative order lies beyond the boundaries of the nation state (whether that source is an international treaty or agency, a regional law-making body, or international custom such as that represented by the *lex mercatoria*).

If this is the postmodernized environment within which law now operates, should jurists be looking to the intellectual leaders of postmodernism to find their bearings? Edgeworth gives the postmodernists two opportunities to assist, first (in Chapter Two) by developing a sketch of the transformed context for law and, secondly (in Chapter Six) by advising on how it should be addressed. On both occasions, Edgeworth finds postmodern theory in general wanting; and, on the second occasion, postmodern legal theory in particular is judged to fare no better. Given that (as Edgeworth reads it) the postmodernism of Foucault, Derrida and Lyotard represents an 'elaborate theoretical [assault] on totality, utopia, and science' (207), there is a sense of inevitability about his conclusion that postmodern jurists, by self-consciously disabling themselves from writing grand theoretical narratives, have little to offer to his project.

If the triple bottom-line of postmodernism engenders a reluctance to speak to the larger issues raised by law in a postmodernised context, Edgeworth feels no such inhibitions. In a relatively short concluding chapter, he identifies three principal lines of inquiry (one analytical, one sociological, and one normative) awaiting the attention of today's jurists. First, where the conceptualisation of law is modelled on the 'municipal legal system' (as it famously is in the work of Hart and his successors), the demise of the nation state as the spatial frame of reference for law (or, at any rate, for particular legal systems) needs to be addressed. Secondly, the stage for the sociology of law is no longer that of the ring-fenced nation

state. Accordingly, jurists need to address the 'webs, linkages and networks of influence' (272) that shape the processes of law both outwith and within the nation state. Thirdly, in a context of increased paper commitment to a one-world community of human rights, but also of a plurality, and fragmentation, of moral communities, the normative agenda presents a considerable challenge. What does it mean for legal institutions to be more just and how might this be achieved? Edgeworth (combining process with substance) concludes that a 'reconfigured responsiveness in law offers a way forward, but only if legal systems in their present polycentric forms respond at all levels to the needs and interests of the many, rather than the few' (278).

In offering these closing thoughts about the lines of inquiry to be written into the jurisprudential prospectus for the 21st century, Edgeworth explicitly eschews indulging in 'legal futurology' (263) of the kind that identifies an inescapable teleology in the development of the law. In the spirit of speculation, therefore, let me tap into two strands of Edgeworth's discussion to suggest that he has passed over what might prove to be the most radical change to the environment within which postmodern law operates but also the most significant challenge to law as a mode of ordering human conduct. The first of these strands is Edgeworth's early observation that our sense that the social world is undergoing transformational change is encouraged by the development of digital technology; and the second is his pervasive theme concerning the waning significance of the nation state, particularly its implications for the way in which we conceive of law.

To start with the second of these strands, it is surely right to say that the nation state no longer presents a self-selecting platform upon which to build the normative pyramids of legal positivism. No doubt, the positivists will continue to build their pyramids elsewhere, locating their platforms in more complex regional and international regulatory arenas. However, these larger-scale building operations divert attention away from two much more important points about the nature of law. First, legal positivism, so I would suggest, is barking up the wrong conceptual tree — law is an essentially *moral* action-guiding enterprise. Secondly, even if the idea that legal reason (properly conceived) is essentially a species of moral reason is too much to swallow, the idea that it is action-guiding invites a much less (nation) state-specific view of law. Forget the scale and elegance of the normative pyramids; instead, think about law as an instrument for channelling human conduct (after the fashion of Karl Llewellyn) or in terms of the subjection of human conduct to the governance of rules (as Lon Fuller expressed the general nature of the legal enterprise). In this light, the polycentricity of law is largely regulatory business as usual; municipal law is just one zone, or Zone One, of rule governance. Whether the zones of law should be thought

of as overlapping or as concentric (or in some other way) is an important question as is the matter of the interaction between these zones (these 'interlegalities' as Boaventura de Sousa Santos terms them). At all events, if we are prepared to treat the monocentric model of law as just one instantiation of the more general concept of law, postmodernized law is not so much a transformed concept of law as a transformation of the context in which law (as a rule-governed enterprise) is instantiated.

Now, recall the first strand. Having highlighted modern information and communication technology on the first page of the book, Edgeworth scarcely mentions it again. Insofar as the focus of the book is the transformed context in which postmodern law operates, this is understandable. After all, it has been trade rather than technology that has driven the globalising agenda. And, although the regulability of new technologies in a global context is a nice test-case for questions of legitimation and compliance, this might be thought to be the limit of their relevance to the discussion. However, my guess is that modern technologies (including the ICT that Edgeworth mentions but also biotechnologies, robotics and the like) will become increasingly important, not as targets for regulation but as regulatory tools. Where these technologies are deployed to encourage compliance or to assist enforcement — for example, by the use of CCTV or DNA profiling and so on — this is a significant cultural shift; but the modern paradigm of law is not challenged or transformed. It is where technology as a regulatory tool moves to another level that the sea change takes place.

Recall the games analogy beloved by the analytical legal positivists. Think, they said, of law and its doctrines as analogous to a game and its rules. When we play a game, we submit to the governance of rules; we speak the rule-governed language of rights and duties; we evince the game-player's internal attitude, and all the rest of it. So, it is with law — at any rate, so it is for those who choose to play. What this analogy tells us about the essential nature of law, however, cuts much deeper than the legal positivists appreciated. Famously, the Hartian legal positivists did not like the idea that legal obligations could be reduced to subjects being 'obliged' to comply any more than they liked the idea that the rules of law could be reduced to (optional) 'obey or pay' directives. In the former case, the idea of subjects being 'obliged' to comply misrepresented the choice (of compliance or non-compliance) typically facing subjects; and, in the latter case, 'obey or pay' misrepresented the attitude of the lawmakers who, far from being neutral on the matter, typically attached importance to subjects choosing to obey rather than to disobey and pay. In both cases, though, it will be noted that the idea of legal rules and legal obligations is predicated on subjects having a choice. If the legal ought implies a legal subject who can (that is, who has the capacity to comply) so too it presupposes a legal

subject who might not (that is, who has both the capacity and the opportunity to disobey). Hence the instructive premise of the games analogy — the context for rule-governed exercises, such as games and law, is one of agency, one of choice, one allowing for both compliance and non-compliance.

In this light, consider the digitised version of games, say, electronic chess. In principle, the software can be coded in such a way that it is not possible for the players to move a piece in a way that is prohibited by the rules of the game. The technology channels the behaviour of the players in a way that ensures that the background rules of the game are not breached. As a result, the players' behaviour corresponds to the rules but their 'compliance' is technologically secured. Whereas, in a traditional chess game, the players' conduct is regulated by what Lawrence Lessig terms East Coast regulation (that is, by the articulation of the rule), in the electronic analogue it is regulated by West Coast code. Whereas compliance in the traditional setting is achieved when the players have internalised the rules, in the electronic setting its achievement is, so to speak, internal to the technology. What I am suggesting is that the postmodern paradigm, which is still a version of East Coast regulation, itself is liable to be superseded by a paradigm in which the West Coast mounts a serious challenge to the East Coast.

Is 'techno-regulation', as I would term it, a version of 'law'? On the one hand, it involves the channelling of behaviour; it is end or purpose directed; and, as with the computerised game, it results in a certain simulation of a rule-governed activity. On the other hand, it does not allow for non-compliance; and the internal aspect of those who are the subjects of such a regulatory environment bears little resemblance to that evinced by the members of the Hartian legal community. Perhaps we should not spend too long worrying about this question because the more urgent issue is the normative one of whether such a mode of regulation is legitimate. If we could code (perhaps by some combination of genetic and environmental manipulation) for complete respect for human rights, or (less ambitiously) for some particular human right, what reasonable objection could there be? But, just a minute, in what sense would subjects 'respect' one another's human rights in an environment that is techno-regulated? In such an environment, as we have already said, the sense in which conduct is rule-orientated is attenuated; and, similarly, the sense in which (necessarily compliant) conduct evinces respect for another is attenuated. Again, though, we should not get side-tracked from isolating and addressing the fundamental normative questions.

What, then, are these fundamental questions? Two in particular spring to mind. First, does techno-regulation satisfy our rule of law standards of regulatory transparency? It is one thing, for example, to use

chip technology to block children having access to adult material on the Net; it is quite another thing to use chip technology to block some adults having access to material that other adults determine as unsuitable. It is one thing using technology as a mandated response to an identified and declared problem; it is quite another thing using technology to channel behaviour in a way that regulators find less problematic. Secondly, if we value human dignity, and if we think that the dignity of humans essentially resides in their capacity for choice, then techno-regulation threatens to compromise the conditions that are presupposed by this particular valuation and conceptual understanding. Paradoxically, while techno-regulation (in the hands of philosopher kings) might be able to guarantee that humans do the right thing, it undermines the value (or dignity) of doing the right thing by eliminating human choice in this matter. Unravelling this tension between potential (techno-regulatory) effectiveness and respect for the foundations of moral community (as well as legal rights and responsibilities) holds the key to whether hi-tech regulatory orders have a legitimate future.

Tying these threads together, it seems to me that the task of the jurist in today's (disorganised) societies is to maintain a map of global governance while pressing the virtues of the rule of law and rational (in the full moral sense) regulation. None of this is straightforward. The task of the cartographer is not eased by the polycentric nature of postmodern law; and the rule of law needs to be defended against various alternative cultures of governance running from the 'might is right' school of thinking through to the displacement of human rights or the over-ready derogation from the values of legality in 'emergency' situations. However, the thought that lawlessness might prevail needs also to be sensitive to a quite different, and much more insidious, danger. If, as I have suggested, the model of law as declared rules (or norms, principles, and standards) is challenged by techno-regulation, then our map will show another kind of law-less zone. Moreover, in such techno-regulated zones, we will scarcely have had time to say hello to the reconfigured responsiveness advocated by Edgeworth before we are waving goodbye to law and morality, as well as to custom and practice. If the transfer of rule-making authority away from the nation state militates against the abuse, if not the adoption, of techno-regulatory strategies — likewise, if the breaking up of regulatory monopolies presents a similar resistance — then postmodern law, with its centrifugal tendencies, might have rather more going for it than we presently appreciate.

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