Week Two: 3rd of August – 9th of August

The social theorists most commonly referred to in current legal research include Foucault, Habermas and Luhmann, so we will begin by looking at the work of Foucault. In a sense it is remarkable that his ideas have been taken up to the extent that they have in legal studies, since he wrote very little directly about law. The implications of his work for the study of law emerge more from his more general analysis of the operation of *power* and *knowledge*, both central to legal institutions. This week we will examine his approach to these two questions, as well as his analysis of modernity as a 'disciplinary society', the concept of 'governing through freedom', and we will look at a case study, which attempts to draw on Foucault's work to explain a particular example of contemporary mechanisms of governance.

➢ Lectures Three and Four

· Definitions

- Legal formalism defined as: A theory that legal rules stand separate from other social and political institutions. According to this theory, once lawmakers produce rules, judges apply them to the facts of a case without regard to social interests and public policy. In this respect, legal formalism differs from legal realism. Either theory can be understood in descriptive way, prescriptive way, or both ways at once

- Social governance: Environmental, social and governance (ESG) refers to the three main areas of concern that have developed as central factors in measuring the sustainability and ethical impact of an investment in a company or business

- Law: a written body of general rules of conduct applicable to all members of a defined community, society, or culture

- Governmentality: a Foucauldian standpoint of the law, the broader implications of law – a principle site with other links ripe for analysis – the way in which power operates as an institution; judicial power, economic power (Marxist influence)

· Foucault, Power

- Power is repressive, it produces power and subjects and can therefore create regimes and coercive force, power as constitutive, power as subversion, diffusion of power (grass roots power, decentralised power, informal power)

- Kriekan says that other forms of power within law is moving away from the judge and the court room and out towards other institutions, e.g. legal centres, communities etc.

- Attacks teleology and the idea of progression, the idea that we're not going towards an end goal but rather asks what ideas do we prioritise and what ideas get thrown out

- His town was in the occupied zone during WWII – a perfect example of repressive power, power is not always top down, power is all around and coercive

- Governmentality: (government + mentality) not a narrow sense of a political structure and management of the states, but rather, the act and art of conducting/directing/guiding/calculating/reasoning, the

conduct of one's self and behaviour

- Power operates in other ways than just top-down, more than just the law, there are other forms of power that act coercively in our life – similarly, top down power does not always work, e.g. do people always follow the law?

- The exercise of power that marks the emergence of a distinctly new form of thinking about and exercising power in so certain societies – emerges in Western Europe in the early modern period (18th c) and when the forms of knowledge and techniques of the social sciences become integral to it

- Growing focus on populations and the disciplining of individuals, the regulation of populations (bio power) to produce good order (policing) populating is the members of s state or nation were seen to need to be controlled nut how to control

- Growth of science, particular social sciences like psychology, developed specialised knowledge emanating form universities and professional bodies on populations and groups and these professionals also offered to apply this knowledge to address problems

- Micro-power: rules and regulations about how you conduct your individual behaviour; the conduct of conduct; moving away from the law as being the only instrument of coercion

- Government as a domain "not just a matter of imposing laws on men, but rather disposing things, that is to say to employ tactics rather than laws, and if need be to us the laws themselves as tactics... the instruments of government, instead o being laws, now come to be a

range of multiform tactics. Within the perspective of government, law is not that important" (Foucault)

· The Law as Negative/Positive Power

- O'Malley: "The approach [to Governmentality] is characterised by two primary characteristics...." The first is a stress on the dispersal of 'government', that is, on the idea that government is not a preserve of the state' but is carried on at all levels and sites in societies – including the self and the government of individuals, the second is the deployment of analytic stance that favours 'how questions' over why

- Negative: the law is about power – substantially it is a site and a dynamic of negative or repressed power, it prohibits

- Negative: a site of dynamic sovereign power it has a capacity to guarantee truth, it is analytic; Foucault uses a dramatic metaphor to demonstrate the negative power of the law "we still have not cut off the head of the king" [in reference to the French Revolution]

- Positive: it produces social relations, subjects and institutions – the law from this perspective of governmentality sees it as a product – even in negative context e.g. suppressed groups like lesbian and gay people can have ideas produced around them through the body of the law

- Disciplines and norms: the law is seen as the judge in the court room, it operates – however, there are notions and ideas that have been developed by different groups about how to regulate and specialize different groups, how to observe people and work on them – sometimes it

is related to the law but other times it is now

- When we are thinking about the law, we are often thinking about it in relation to the law – the law is colonized by other different institutions, previously we see the law and the sovereign; egalitarian juridical framework made possible parliament and representative regimes, but development and generalization of disciplinary mechanisms constituted the other dark side of these processes

- Professionalisms: other groups that emerge, who use knowledge and power within the framework of the law e.g. prison guards, the judge, the social-worker (party governmentality)

· Informal Justice

- A shift away from top down form of power, informal justice refers to dispute resolution outside or prior to formal legal processes and litigation

- These processes such as mediation have advanced considerably in liberal democracies since the 1970s, mediation arbitration and conciliation

- More action going on, more people engaging in forms of governmentality that are being regulated – an example is a fear of crime; Murray Lee (2007) "Inventing Fear of Crime"

- The fear of crime paradox – why is it that some of the most fearful of crime are also the least likely to be victims of crime, and regulate their own behaviour accordingly? Maybe to do with the disjunction between crime statistics (i.e. reported crime) and the reality of crime – the most

fearful of crime are those least likely to be the victims of crime

- Government is not understood in the narrow sense as simply political structures or the management of states, instead government Is the act and art of conducting (directing, calculating, reasoning) and the conduct of oneself (one's behaviour, self-guidance, one's moral self-guidance)

- Fear of crime: how is conduct shaped by fear of crime? For example in crime (victim surveys) "how safe do you feel walking alone in this area after dark?"

- Males between the ages of 18 and 30 are both the greatest perpetrators and victims of crime - but old people are often the most fearful demographic

- Neoliberalism: modern government increasingly relies on the exercise of government at a distance, one of Foucault's central tenets it that the self becomes the subject of one's own government

- The art of government is premised on the notion that the problem of population can be over come by the development of a grid of governmental techniques and tactics though which subjects are not only governed, but take an active role in their own governance (the conduct of conduct)

- These rationalities (or ways of thinking) have produced active subjects whose fear of crime becomes one's own responsibility to govern Murray Lee (2007) refers to this phenomenon as the development of fearing subjects (we are being controlled)

➢   Readings *Michel Foucault, 'Two lectures' (Lecture Two) Power/Knowledge: Selected Interviews and Other*

Writings, 1972-1977 (Brighton: Harvester, 1980) 92.

- The issue here can, I believe, be crystalized essentially in the following question: is the analysis of power or of powers to be deduced in one way or another form the economy? P. 88

- BY that I mean that in the case of the classic, juridical theory, power is taken to be a right, which one is able to possess like a commodity, and which one can in consequence transfer or alienate, either wholly or partially, through a legal act or through some act that establishes a right, such as take place through cession or contract p. 88

- This theoretical construction of political power obeys the model of a legal transaction involving a contractual type of exchange... p. 88

- Power is essentially that which represses p. 90

- What type of power is susceptible of producing discourses of truth that in a society such as ours are endowed with such potent effects? P. 93

- We are subjected to the production of truth through power and we cannot exercise power except through the production of truth p. 93

- It is only if we grasp these techniques of power and demonstrate the economic advantages or political utility that derives from them in a given context for specific reasons, that we can understand how these mechanisms come to be effectively incorporated into the social whole.

P. 101

- All this means that power, when it is exercised through these subtle mechanisms, cannot but evolve, organize and put into circulation a knowledge, or rather apparatuses of knowledge, which are not ideological constructs. P. 102

- The relationship of sovereignty, whether interpreted in a wider or narrower sense, encompasses the totality of the social body. P. 104

- Modern society, then, from the nineteenth century up to our own day, has been characterized on the one had, by a legislation, a discourse, an organization based on public right, whose principle of articulation is the social body and the declarative status of each citizen; and, on the other hand by a closely linked grid of disciplinary coercions whose purpose is in fact to assure the cohesion of this same social body. P. 106

- ... sovereignty and disciplinary mechanisms are two absolutely integral constituents of the general mechanism of power in our society p. 108 *Robert van Krieken, 'Legal informalism, power and liberal governance' (2001) 10 (1) Social & Legal Studies 5.*

- In general terms it is fair to say, however, that such critiques of formalism tended largely to produce a more differentiated legal figuration without having much impact on formal legal processes themselves. P. 7

- Within this framework, the first central foundation of legal informalism is a pragmatic concern to improve the delivery of legal services, to 'let the forum fit the fuss', promising to relieve court congestion, decrease costs and improve access to legal dispute processing, and is

consistent with the earlier critiques of legal formalism. P. 7

- Informal justice can have the effect of displacing an engagement with fundamental social inequalities and wider processes of exploitation and domination onto an illusory hope that informal legal processes can actually address those problems p. 9

- It is not entirely correct to present Foucault as seeing power as simply 'denying the individuality of the subject; also thought some of his writing may have supported that

interpretation, on balance it is fairer to say that he regarded power as working precisely

through the 'individuality of the subject'. P. 11

- In distinguishing between two overall historical developments in western social life and political life: an increasing centralization of political power in the state, and a corresponding emergence of technologies and techniques of power oriented towards individuals, Foucault's emphasis was on the latter, because he felt that concentration on the state as a central source of power had led to a neglect of the finer networks or power that have spread beyond the state throughout the social body. P. 12

- We cannot understand contemporary liberal societies, Foucault argues, unless we closely examine not the state, corporations, 'the law' or the ruling class not the working class or 'the people', but hospitals, schools, prisons armies factories; and patients, children, criminals, conscripts, workers. P. 13

- Power this depends both on the recognition of those over whom power is exercised as possessing agency and on the opening up of a 'whole field of responses, reactions, results, and possible interventions'. P. 13

- My concluding proposal is that we should approach informal justice not in terms of pursuit of community liberation or individual freedom, but as a 'symbolic project' in which lawyers take a central, but not the only place, a narrative construction of an 'imagined community', in which conflict, its pathways (resolution, management) and the interrelationships of the various actors involved in its management are configured in particular ways. P. 17 *Harvey, David (2005) A Brief History of Neoliberalism. Oxford: Oxford University Press. 1-38.*

- Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. P. 2

- Neoliberalism has, in short, become hegemonic as a mode of discourse. It has pervasive effects on ways of thought to the point where it has become incorporated into the common-sense way many of us interpret, live in, and understand the world p. 3

- … it brings all human action into the domain of the market p. 3

- these technologies has compressed the rising density of market transactions in other space and time p. 4

- the uneven geographical development of neoliberalism

on the world stage has evidently been a very complex process entailing multiple determinations and not a little chaos and confusion. Why, then, did the neoliberal turn occur, and what were the forces that made it so hegemonic within global capitalism? P. 9

- [post-war period] Internationally, a new world order was constructed through the Bretton Woods agreements, and various institutions, such as the United Nations, the World Bank, the IMF, and the Bank of International Settlements in Basle, were set up to help stabilize international relations. P.10

- For much of the Third World, particularly Africa, embedded neoliberalization after 1980 entailed literal material change in their impoverished condition. P. 11

- [peak unemployment in 1975] Communist and socialist parties were gaining ground, it not taking power, across much of Europe and even in the United States popular forces were agitating for widespread reforms and state interventions. There was, in this, a clear political threat to economic elites and ruling classes everywhere, both in the advanced capitalist countries.... And in many developing countries.... P. 15

- .... The neoliberal turn is in some way and to some degree associated with the restoration or reconstruction of the power of economic elites p. 19

- Neoliberalization has not been very effective in revitalizing global capital accumulation, but it has succeeded remarkably well in restoring, or in some instances (as in Russia and Chine) creating, the power of an economic elite. The theoretical utopianism of

neoliberal argument

has, I conclude, primarily worked as a system of justication and legitimation for whatever

needed to be done to achieve this goal. P. 19

- Mont Pelerin Society p. 20

- [read to page 26]

➢ Tutorial One

1. How does Foucault approach the relationship between power and knowledge?

Define the terms: Foucault defines power as being repressive, something that has real effects, has a positive side (produces social relations, institutions, makes things happen) and a negative side

e.g. the prison system – through the law, says that these particular things are crime, and if you do those things we have the right to put you away, and we

therefore maintain our power / domination

e.g. the psychiatric war – these behaviours are classified as mental illness and if you exhibit them then you can be locked away which in turn alienates

you from the rest of society and thus maintains structures of power

2. We usually see power and freedom as opposed to each other; how does Foucault's concept of liberal governmentality frame the relationship between them differently?

Liberal governmentality: you are free but you are obliged to do things – are you really free? Have you been coerced into making the decisions that you perceive as rendering you a free agent?

3. Can you think of examples of social governance from the perspective of Foucault's work?