GENERAL INFORMATION

This course examines law from the point of view of social theory. It looks at general themes concerning law and community, class, capitalism, history and modernity. It considers the role of law in a liberal society when faced with questions of power, empire, totalitarianism and ‘legitimation crisis’.

The course will be taught in weekly two hour lectures and one hour tutorials. There will be a strong emphasis throughout on student-led learning. As a result, it is imperative that you attend lectures and tutorials fully prepared, having read carefully and considered the materials cited below. For each week we have devised a set of required readings. They are manageable and will be made available either via Keats or distributed in hard copy a week before they will be discussed.

Assessment will be by one essay (up to 4,000 words, 40% of final mark) and one exam (3 questions in 3 hours, 60% of the final mark). In addition, you will be required to submit one class essay in the first semester.

Key course materials will be posted on Keats. You can find a schedule of tutorials at the end of this syllabus.
LIST OF LECTURE TOPICS

Semester 1

Week 1  Introduction & Kant’s *What is Enlightenment?* (CK)

A. Conflict and Rationality: Classical Theories of Law and Society
Week 2  Marx: Law, Legal Form, Modes of Production (CK)
Week 3  Durkheim: Law, Moral Solidarity and Individualism (CK)
Week 4  Weber: Legal Rationality, Subjectivity and Capitalism (CK)
Week 5  Bourdieu: Habitus, Symbolic Power and Legal Culture (CK)

Week 6  Reading Week

B. Law and History, Reason and Dialectics:
Week 7  Hegel I: Law and Dialectics (CK)
Week 8  Hegel II: Law and History (CK)
Week 9  Kojève: the End of History (CK)

C. The End of Man:
Week 10 Nietzsche: Crisis of Liberal Consensus and Roots of the Postmodern (CK)
Week 11 Schmitt: The Challenge to Liberal Law (CK)
Week 12 Derrida: Liberal Law and the Deferral of Ethics (CK)

Semester 2

Week 1  *no UG teaching*

D. Law, Power, Identity
Week 2  Foucault: Power and Identity (CK)
Week 3  Radical Feminist Legal Theory (CK)
Week 4  Postcolonialism (CK)

E. Law, Ethics and Ideology
Week 5  Frankfurt School: Tolerance and the Changing Function of Law (CK)
Week 6  Habermas: Law and Ethics, The Relation Affirmed (CK)

Week 7  Reading Week

Week 8  Blumenberg: the Legitimacy of Modernity (CK)

F. Selected Issues in Law and Social Theory
Week 9  Cotterrell, The Sociology of Legal Meaning and Legal Truth (DN)
Week 10  Law, Culture and Legal Culture (DN)

Week 11  Revision
INTRODUCTION: MODERN LAW AND SOCIAL THEORY

There are various ways in which different kinds of theories seek to illuminate the nature and working of law. Natural law theory, for example, seeks to relate legal forms, premises and principles to underlying moral principles, which may be present in given laws or lacking therein. Positivist legal theory seeks to identify generalizable features of all legal experience. Social theory of law in a way seeks to do both these things, but insists, against natural law and legal positivism, that you cannot understand either the moral or legal quality of what we call law without relating these to the nature of law as a social and historical phenomenon. The way law operates and the experience it reflects depends on the kind of society in which it is produced.

In the first section, we will be considering three main questions: (1) what are the salient features of modern western societies in terms of shaping the character and forms of modern law? (2) What does it mean to say we live in a liberal society, and how does this claim reflect the nature of law and our understanding of it? (3) If liberal law has moral value attached to it, for example in ideas of freedom and equality, how can the tradition of social theory illuminate the nature and dilemmas of such claims?

The classes in this section are on the classical social theorists who contributed to our understanding of law: Marx, Durkheim and Weber. These theorists set the scene for much that is to follow in terms of thinking about the nature of modern society, its economic, political and legal forms, and its moral and ethical character. While these are very different theorists, who would have and sometimes did disagree radically with each other, what they have together accomplished provides a strong basis for theorising law.

We will however begin in a slightly different place. In much of the course, we will be referring to the ‘legacy of the Enlightenment’ in modern thinking, and certainly the tradition of social theory was founded in relation to this legacy. All of the authors that we will be discussing throughout the academic year have a strong and pronounced stance towards the project and legacy of enlightenment. To consider what this legacy was, we will start the course with two brief essays written by Immanuel Kant in 1784 which indicate something of what the Enlightenment meant at the time and still does today.

Week 1: Introduction & Kant's What is Enlightenment? (CK)

Prescribed Readings:

(1) I.Kant, ‘Idea for a Universal History with a Cosmopolitan Purpose’ in Kant, Political Writings ed H.S.Reiss (Cambridge University Press)

(2) I.Kant, ‘An Answer to the Question: What is Enlightenment?’, in Kant, Political Writings ed H.S.Reiss (Cambridge University Press)
A. CONFLICT AND RATIONALITY: CLASSICAL THEORIES OF LAW AND SOCIETY

A specifically sociological perspective on law first emerged in the second half of the nineteenth century and at the beginning of the twentieth, when its three classical proponents, Marx, Durkheim and Weber, all began to reflect upon the distinctiveness of western, European, liberal societies and on the reasons why they had taken the form they had. They were all struck by the fact that something new had emerged that was radically different from what had gone before, that was dynamic, and that was beset by its own specific problems.

All three in their different ways reflected seriously on the nature and role of law in holding such societies together, on the specific forms it assumed, and on what it could and could not do. Marx was not an academic, unlike both Durkheim (a French sociologist) and Weber (a German lawyer and sociologist). However, his writings were extremely influential and often operated as a foil for academic social theorists. Together, these writers represent the ‘founding fathers’ of a social-theoretical perspective on law, and their work raises different, conflicting, but also complementary views on the nature of modern law.

Week 2: Marx: Law, Legal Form, Modes of Production (CK)

Marx never produced a theory of law, but his work has been significant in terms of his understanding of the relationship between economic processes and institutional forms such as law. In his early writings, he was influenced by the radical side of the philosophy of the Enlightenment, and the idea that people under modern political and legal conditions are ‘alienated’ from their true nature. In his mature work, he was more interested in economic analysis, and the relation between economic, political, ideological, and legal relations. This is sometimes expressed in terms of the relationship between an economic ‘base’ and various ‘superstructures’ such as the law. There are many conflicting interpretations of Marx’s work, of the ‘base-superstructure’ metaphor, how it should be interpreted, how important it is to Marx, of the relationship between the early and the mature work, whether they should be regarded as one view, or whether there was a break in Marx’s thought, of the role of dialectical theory in his work – so there is no one correct view of what Marx thought. He himself once claimed, in the light of one interpretation of his work, that he himself was not a Marxist!

One way of linking the early and the mature work is found in his belief that the causes of modern alienation were ultimately economically based. An important feature of Marx’s analysis of law is that it is class based in the interests it reflects, but this may not be the most significant thing he had to say about law. He also recognised the importance of ‘legal form’ as universalistic and as apparently transcending narrower social interests. Holding these two ideas together presents a challenge.
Prescribed Readings:

(1) Karl MARX, ‘On the Jewish Question’ in Early Writings (London: Penguin)

Further Reading:

K.Marx, Capital vol 1, 88-9, 172, 547

Week 3: Durkheim: Law, Moral Solidarity and Individualism (CK)

Writing at the turn of the 19th century, Durkheim was concerned with the question of how modern society could sustain a sense of moral order and community under pressures that seemed to make this far more difficult than in past societies. Modern society seemed to be eroding collective moral sentiment in favour of a fragmenting individualism in which each person looked out for him or herself. The pathology of this condition Durkheim termed ‘anomie’, a condition of moral or normative drift, which has some parallel with Marx’s notion of alienation. His question was how a collective conscience could be sustained under modern conditions of an expanded economic division of labour and a resulting move to what he called ‘organic’ conditions of solidarity. In this shift, the changing nature of law in modern societies reflected the broader changes that were taking place, and modern law was an important means of recreating moral order or solidarity.

Prescribed Readings:

Further Reading:

R. Cotterrell, *Emile Durkheim: Law in a Moral Domain*, above, see generally

**Week 4: Weber: Legal Rationality, Subjectivity and Capitalism (CK)**

Max Weber has sometimes been characterised as the ‘bourgeois Marx’ meaning that his sociology of law tends to address the same issues as Marx, while arriving at less radical conclusions. Weber wrote extensively on law and its role in the development of European capitalism. He argued that what allowed capitalism to succeed there was a peculiar combination of entrepreneurial activity and a specific kind of rationality, which he associated with western law. Such law represented a specific form of ‘domination’, or authority, which he called formal rationalism. It contrasted with the ‘traditional’ authority of previous kinds of society or alternative ‘charismatic’ forms.

Formal rational legality permitted the predictability required for entrepreneurial activity at the core of capitalism and gave rise to a form of ‘legitimacy’ that was central to western societies. Weber was a supporter of such law, but he also reflected on what he regarded as its limits. In particular, formal rationality could become an ‘iron cage’ for modern human beings in which their need for ‘enchantment’ and capacity to experience it would be lost. He predicted the possibility that the increasingly calculated, utilitarian and bureaucratic qualities of modern life might provoke a return to charismatic forms of leadership, eerily anticipating what was to happen in his own country.

Prescribed Readings:


Further Reading:

A. Hunt, Sociological Movement in Law, above, ch 5
Bourdieu sought to move beyond what he saw as a Marxian and neo-Marxian theory that centred too exclusively on the economy. Intrigued as were so many Marxists of the 1960s by the failures both of the revolutions envisioned by Marx to materialize and also of humans to resist the excesses of both Nazism and Stalinism, Bourdieu also felt a need to conceptualize more richly the processes by which human consciousness is shaped in the quotidian.

In his work, Bourdieu brings culture to centre stage without giving up ideas of social class, conflict and struggle. He shows that much of our world such as social structure and institutions are complex webs of cultural practices, including legal rules and styles, and that these practices influentially shape not only our behaviour but what we are as persons. To characterize the person, Bourdieu paints a portrait of the ‘habitus’ or repertoires of ways of acting that make us each unique. In a world consisting of power relations, both tangible and symbolic, Bourdieu depicts self-reflexive beings engaged in processes of improvisation as they struggle to control their fates. Such power to direct one’s life and events in desired directions, Bourdieu calls ‘capital’. Far from being a solely economic concept, he argues that it may take cultural or social as well as economic forms. As they struggle to overcome inequality, the practices they undertake, paradoxically, yield the unintended consequence of reproducing the structures of exclusion and difference that they challenge. Thus, for Bourdieu, one of the primary dynamics of history is the social reproduction of inequality.

Bourdieu’s work directs our attention to law and legal culture. In his work Bourdieu distinguishes between rules and regularities claiming that the lawyer’s world is one of rules. Bryant Garth and Yves Dezalay have drawn on Bourdieu’s work to analyse the development of international commercial arbitration. They show the role played by lawyers’ cultural and social capital in shaping new practices that fundamentally influence conflict resolution, distribution of wealth and the nature of politics.

Prescribed Reading:

1. Pierre Bourdieu, *Distinction: A Social Critique of the Judgment of Taste*, ‘Introduction’; ‘The Aristocracy of Culture’ (Ch. 1, pp. 11-18 only); ‘The Choice of the Necessary’ (Ch. 7) and ‘Culture and Politics’ (Ch. 8, pp. 397-426 only).

Further Reading:


M. Lamont, ‘Slipping the World Back In: Bourdieu on Heidegger,’ *Contemporary Sociology* 18, no. 5: 781-83.

Questions for Consideration:

1. On what does Bourdieu’s distinction between rules and regularities depend? Do you agree with his characterization of the world of law?
2. Compare Bourdieu’s conception of the person with that of Marcuse. In what ways is the vision of each strong or weak?
3. In what ways has Bourdieu’s influence shaped Dezalay and Garth’s interpretation of change in international commercial arbitration? How might their study differ had they based their analysis instead on Gramsci’s work?

**Week 6: Reading Week**

**B. Law and History, Reason and Dialectics**

Having established a basis in classical socio-legal theory for thinking about the relationship between the social developments that constitute modern western societies and the moral and practical nature of modern law, we now move to consider in closer detail the relation of law and history. In order to do that we are going to have two sessions on the work of GWF Hegel and one on the work of Alexandre Kojève.

**Week 7: Hegel I: Law and History (CK)**

Writing as the contours of modern liberal society were becoming increasingly clear, Hegel’s *Philosophy of Right* is an attempt to think through the ethical quality of modern forms of law and their relationship to the other institutions of modern society. It views legal institutions like property, contract, tort and crime as reflections of a specifically modern form of individual self-consciousness, though it argues that the individual must also be
understood as part of an ethical totality that includes family, social welfare, corporations and guilds, the police and the state. Of particular interest are Hegel’s conceptions of freedom and of ethical life, which are very much linked to one’s community. He is accordingly hard to place in terms of any modern account of what it means to be a ‘liberal’, a ‘conservative’ or a ‘socialist’.

There is also much debate as to whether he should be seen as a defender or as a critic of modern society. To the view that he was a defender of modern liberal society, it can be responded that he viewed society critically and without illusions, and that what he really wanted to do was to lay out the values, but also the conflicts and problems, that dog that society. Alternatively, it can be suggested that, while he was critical of modern liberal society, he did at the same time want to control and contain the more radical aspirations of the Enlightenment, as represented in the figure of the ‘beautiful soul’ in his earliest writings.

Prescribed Readings:

(1) GWF HEGEL, *Introduction* to the ‘Lectures on the Philosophy of History’
(2) GWF HEGEL, *Excerpts* of the Phenomenology of Spirit
(3) Robert FINE, *Political Investigations*, chs 2 and 3

Further Reading:

G. Hegel, *Philosophy Of Right* (Oxford: OUP, 1952), paras 4, 33, 36, 40, 92, 100, 165-6, 218 (incl. addition), 220, 241-6, (incl. addition to 244 p.277), 257-8 (incl. addition to 258 p.279), 260-1, 273, 279-281, 303-6
C.Taylor, *Hegel* (Cambridge: CUP, 1975), parts 1,2,4

*Week 8: Hegel II: Law and Dialectics (CK)*

Prescribed Reading:

(1) GWF HEGEL, *Excerpts* (§§1-82) from the Encyclopaedia of the Philosophical Sciences (1830)
(2) GWF HEGEL, *Excerpts* from the Elements of the Philosophy of Right
(3) C KLETZER, Custom and Positivity
**Week 9: Kojève: The End of History (CK)**

Modern liberal law and the constitutional state are not only successful and highly attractive models, but, according to Alexandre Kojève, their historic advent is an event of such magnitude that it completes a struggle, which has been going on throughout the entire known history, namely, the struggle for universal and mutual recognition. Now the completion is of such a thoroughness, Kojève says, that it actually completes history itself: history has been nothing but the struggle for recognition and since in the modern state this recognition has been achieved, history itself has come to an end. All the going-ons around us, Kojève would say, are sub-historic happenings or simply the ‘alignment of the provinces’.

With his anthropological reading of Hegel, his analysis of history and desire and his ‘right-wing Marxist’ ideas, Kojève has influenced an entire generation of French philosophers and has by many been called the father of postmodernism and post-structuralism. His works not only help us better understand the philosophies of the likes of Derrida and Foucault but also shed a clarifying light on the ‘hisotric a-historicity’ of our modern political and legal institutions.

Prescribed Reading:

1. A KOJÈVE, In Place of an Introduction
2. A KOJÈVE, Summary of the First Six Chapters of the Phenomenology of Spirit
3. C KLETZER, Alexandre Kojève’s Hegelianism and the Formation of Europe

Further Reading:

F Fukoyama, The End of History and the Last Man
M Lilla, The Reckless Mind: Intellectuals in Politics
S Drury, Alexandre Kojève: The Roots of Postmodern Politics
V Descombes, Modern French Philosophy

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**C. The End of Man**

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**Week 10: Nietzsche: Crisis of Liberal Consensus and Roots of the Postmodern (CK)**

As we have seen, it stands to reason that engaging in philosophy, i.e. in the rational inquiry into what is, is not in itself neutral in terms of the legal and political ideas it produces but that there is some kind of intrinsic drift towards advocating the liberal constitutional state governed by the rule of law. What precisely this link between metaphysics, reason and liberal constitutionalism is, is still hotly debated today.
But however this debate may turn out in the end, in the 19th century philosophy itself turned its attention away from reason and towards history and made suspect the very nature of the self-vindicating powers of reason and rationality.

Friedrich Nietzsche was one of the most articulate, yet perplexing voices of this new style of philosophy, a philosophy which does not anymore attempt to lay foundations but which instead tries to subvert these foundations. In his genealogical turn to history Nietzsche not only drew into question the foundational concepts of metaphysics (truth, essence, etc.) but also those of morality and legality (freedom, responsibility, etc.).

His powerful philosophic moves, his grandiose style of arguing, his intellectual wagers and bets have all prefigured a lot of what we have more recently seen in post-modern philosophic, legal and social thought.

Prescribed Readings:


Further Readings:

On Nietzsche's relevance to law see Volume 24 of the Cardozo Law Review (2003) which represents the result of a conference on Nietzsche and Legal Theory held in October 2001 at the Yeshiva University, Cardozo School of Law. For more general introductions to Nietzsche’s thinking and relevance see:


Leiter, B., and J. Richardson, eds., Nietzsche (Oxford: Oxford University Press, 2001)


Week 11: Schmitt: The Challenge of Politics to Liberal Law (CK)

Carl Schmitt was a German jurist and legal theorist. Although he lived through much of the 20th century and continued working into old age, it is for his writings during Weimar and Nazi Germany that he is most remembered. Schmitt was discredited after the war for the support that he was seen to have given the Nazis. Despite being a ferocious critic of liberalism, he is now widely read again. This recent awareness of his work derives from first, the resurgence of interest in state theory and states of exception, and second, the value liberal scholars find in working through his critique of liberal theory. Schmitt's most famous work was 'The Concept of the Political' but he also wrote extensively about public law (*Staatslehre* and *Verfassungslehre*) and about the problems of post WW1 German Weimar Constitution.
Prescribed Readings:


Further Readings:

D. Dyzenhaus ed, *Law and Politics*, above

**Week 12: Derrida: Liberal Law and the Deferral of Justice (CK)**

A more nuanced view of the dilemmas of liberal justice is provided by Jacques Derrida. One of the most influential philosophers of the last 20 years, Derrida’s philosophy of deconstruction involves a way of reading (critiquing, unpacking) ‘texts’, and an insistence on an understanding of justice as a quality that is mysteriously both present and not present in existing liberal ideas. Justice, he says, is endlessly ‘deferred’ in modern practices and theories. He describes his own idea of justice as ‘mad’, ‘mystical’ and ‘messianic’. While this seems initially unpromising, there is no doubting that these ideas have had an extraordinary resonance in liberal societies, so there is a sense in which he must be onto something!

At the core of his approach to reading texts (including legal texts) is an insistence that there is always more to the text than what it seems on its face to be saying. We should always bear in mind an idea of justice that lies ‘beyond’ the justice represented in the text, and which can help us to understand the limits of the justice with which we are presented. This is deconstruction as justice, as ‘the Other’ in our practices. These ideas have struck a chord with those who find legal justice to be too limited or exclusionary in its forms, for example amongst women who find traditional, rationalistic conceptions of justice to favour a masculine standpoint. We can ask what kind of critique Derrida is engaged in: are the problems of liberal society based in a failure of its ethics, or does the failure in its ethics relate to its particular social and political characteristics?

More generally, Derrida, like his contemporary Jean-Francoise Lyotard, can lead us to think about the kind of society we live in, and the ways that liberal society induces a sense of justice and legitimation, respectively, that are not captured in liberal forms. In particular,
they question the presumption of universalism that underlies liberalism. (The liberal legal subject is a theme that will be taken up specifically later in the course.) Lyotard’s concern is that the ‘postmodern’ collapse of metanarrative has produced a crisis of legitimation. Where Derrida highlights text, textual reading and violence as a foundational basis of legitimation in law, Lyotard emphasises language and engagement as a response. The world of postmodern knowledge, for Lyotard, is a game of language where speaking is participation whose goal is creation of new and ever changing linkages. Legitimation, as he sees it, lies in performativity.

Prescribed Readings:


Further Readings:

A.Norrie, ‘From Critical to Socio-Legal Studies: Three Dialectics in Search of a Subject’ 2000 Social & Legal Studies 9, 85-115
P.Fitzpatrick, Modernism and the Grounds of Law (Cambridge: CUP, 2001)
In MacKinnon’s ‘feminism unmodified’, power is understood largely as a commodity held by some (men) and denied to others (women). Contemporary critiques have developed a more complex understanding of the operation of power, as something which permeates social living and which can be obtained, not only through revolution, but also through more subtle tactics of resistance and subversion. Power is also a phenomenon which operates biopolitically through the place of the body which has and continues to transform the landscapes of power in our societies and our world. Much of this modern analysis owes a debt of gratitude to the works of Michel Foucault and of Gilles Deleuze. In these lectures, we will examine Foucault’s ideas about power, identity, and freedom and Deleuze’s work, which built on and extended that of Foucault. In particular, we will look at Foucault’s analysis of the disciplinary function of modern power, of its implications for legal regulation and governance, and of the biopolitical dynamics of its impact upon the body as a site of power struggle. We also examine Deleuze’s work on control society. We will contrast these ideas against the conception of power as a commodity that dominates in the work of MacKinnon and, indeed, Marx.

Prescribed Readings:

1. V. Munro, ‘On Power and Domination: Feminism and the Final Foucault’ (2003) 2
   (1) European Journal of Political Theory 79

Further Reading:

A. Hunt & G. Wickham, Foucault and the Law (Pluto, 1994), esp. Part II
Week 3: Radical Feminist Legal Theory, Postmodern Feminism and Queer Theory (CK)

If ‘law as a veneer’ serves to mask fundamental contradictions and internal inconsistencies, then one implication of this is that law, at least in the context of liberalism, fails to live up to its own embedded promise of equal treatment. Yet the difficulties which this realisation presents to ‘sceptical’ approaches are by no means easily overcome. In these lectures, we will examine one school of thought which argues that law operates to the systematic disadvantage of certain of its subjects, namely women. In addition, we will look at the difficulties faced by such feminist analysis in securing an adequate means of redress through the law.

In particular, we will consider the radical position of Catharine MacKinnon. According to MacKinnon, all women are fundamentally disempowered at the hands of men. Many feminists have challenged the ‘essentialist’ and ‘deterministic’ implications of this approach. These lectures will also examine their insight that the differences between women make the very idea of a shared female experience problematic.

Building on a Foucaultian understanding of power as relational and pervasive, and of resistance as requiring subversion rather than revolution, many theorists of gender and sexuality began more recently to adopt a ‘postmodern’ approach. In the context of feminist analysis, this has led to a view of the nature of ‘gender’ identity as constructed through performativity, to a rejection of mono-causal explanations of gender inequality, and to a scepticism regarding the role of law as providing potential for change."

Many of these ideas have also been developed in the area of queer theory. This approach, as its name suggests, addresses and theorises the experience of ‘queers’ (lesbian, gay, bisexual, trans-sexual) in society and in law. Like other categories of critical thought, queer theory maintains that western liberal language systems create meaning through a series of binaries, including heterosexual/homosexual, and then rely on these boundaries to signify differential levels of value and protection.

Although these binaries may appear fixed, queer theory illustrates the extent to which they are in fact contingent and socially constructed, with each side of the binary only gaining its
meaning in relation to its opposite. According to Carl Stychin, this dynamic must be subverted, and law's function in promoting and legitimating such categorization and stratification must be challenged. Thus queer theory is about more than just uncovering and protesting against isolated instances of legally sanctioned homophobia – it is also an examination of law's function in constructing heterosexual identity and affirming its value in the face of alternative practices and lifestyles.

Prescribed Readings:

(1) Catharine MACKINNON, ‘Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence’ (1983) 8 Signs 635.


Further Readings:

P. Cain, ‘Feminism and the Limits of Equality’ (1990) 24 Georgia Law Review 803 (available via hein on line – through kcl library link)
R. West, ‘Jurisprudence and Gender’ (1988) 55 University of Chicago Law Review 1
J. Butler, Undoing Gender (Routledge, 2004), esp. Chapters 2 & 10
B. Hooks Ain’t I a Woman? (Boston: South End Press 1997).
Although globalisation may have been around as a force to be reckoned with since the Roman Empire and beyond, our awareness of it today is sharper than ever. It also differs from previous waves of globalisation in being more sharply economic and in having highly developed transport and communication links. These changes impel us to ask what role does/can law play in globalisation and also how global processes challenges our theories of modern law?

Successive generations of anti-colonial and post-colonial theorists have contributed significantly to our understanding of imperial formations. We begin by reflecting on some of the ways in which legal scholarship can draw on the work of these theorists to elucidate the role of law in relation to European colonialism – its constitution, its retreat, and its many and varied afterlives – and to what some term neo-colonialism today.

Traditional legal theory (such as the positivism of Hart and Kelsen) may not be very helpful in the context of globalisation, in which the roles for, and types of, law are so varied and multiple that we need a richer more pluralist theory to cope with them.

An important alternative to Hardt and Negri’s critical political theorising of Empire highlights the idea/ideal of a cosmopolitan order. In the 1990s David Held began to develop an account of cosmopolitan democracy with international law (especially international human rights law and international criminal law) at its heart. This and similar interventions sparked considerable controversy -- for some analysts cosmopolitanism mystifies the imperial dimensions of global politics and law today.

Prescribed Readings:


Further Readings:


Herbert Marcuse and Franz Neumann were writers, along with Jurgen Habermas, of the Frankfurt School. They worked originally in Germany and then fled to Western Europe and/or the United States when the National Socialists under Hitler came to power during the 1930s. One primary focus of their work was to explore why, despite exploitative social conditions and even widespread access to the franchise in many societies, the revolutionary change that Marx had envisioned had not come to pass and Europe experienced instead the rise of fascism. As part of their inquiry, they worked to elaborate the theory of consciousness in Marxian-inspired social analysis by incorporating Freudian psychoanalytic theory into their work. In this way, they diverged from Jurgen Habermas who moved...
toward the philosophical pragmatism of Dewey and Pierce and the anti-introspectionist social psychology of Mead as a basis for his communication-based theory.

The view of consciousness developed by the early Frankfurt School led them to a critique of modernity, drawing on both Marx and Weber, which claims that the promise of ‘reason’ from the Enlightenment had been distorted and, then, supplanted by the rise of ‘instrumental reason’ in Western capitalist societies – a claim that has been queried by Joseph Raz. As a result of this distortion, they argue that the question of what goals were being pursued in light of values held tended not to be raised. Instead the modern woman or man focused merely on selecting means to achieve foreordained ends, or problem solving. Though humans constitute society, Marcuse contended, their psyches had also been reshaped by social experiences in ways such that it had grown very nearly psychologically impossible for true questioning to occur. Marcuse is, thus, suggesting in his work a psychoanalytically informed theory of ‘alienation’. Marcuse’s proposed solution to this dilemma made him the darling of the counterculture of the 1960s when he urged a return to the non-repressive, de-sublimated, libidinous, playful state of early childhood as a way to counteract the ‘repressive desublimation’ of the capitalist world and to free the imagination once again to ask basic questions.

At the same time, Max Horkheimer, like Marcuse also a member of the Frankfurt School, was, with Theodore Adorno, was approaching these same problems of conformity and the atomization of the individual through an emerging ‘critique of instrumental reason’. Horkheimer sought to articulate a cultural critique by contextualizing culture within social developments. Culture, once a source of avant-garde beauty and truth, was yielding to standardization. This was a consequence, he claimed, of the advance of modernity.

Horkheimer argued that art, which had once cultivated ‘individuality’ was being transformed into popular culture and a ‘culture industry’ that promoted conformity instead. In his work, he highlighted the ways in which the political consciousness of moderns was distracted and dissent was appropriated by this emergent ‘culture industry’. Part of the emerging consumerism of the day, the culture industry commercialised and diluted potentially persuasive and subversive avant-garde artistic expression to confirm rather than disrupt and to appeal to the lowest common denominators of mass taste. The political implication, in Horkheimer’s view, was to consolidate unfreedom since aesthetics lay at the basis of a new potentially liberating politics of authenticity.

Of course, the scholars of the Frankfurt School were motivated not only by an interest in the potential for revolutionary consciousness but also by the European experience of totalitarianism and holocaust during World War II. They post the same question that impelled Arendt to write about the banality of evil in ‘Duties of a Law-Abiding Citizen’ in Eichmann in Jerusalem. Why is it, they ask, that basically good people did not protest more strongly or actively resist the genocide against the Jews under Nazism during WWII? They extend their views of alienation to politics. Institutional politics is analysed as one of many forms of mastery and class-based domination. It was their study of politics that led Marcuse and several others to an interest in avant-garde art as a non-repressive form of expression and potentially subversive. It also inspired an effort to reconceptualize politics in a way that harked, in its roots, back to Kant – as akin to art which exerted its influence, not through dominance, but through persuasion.

Like Schmitt, Marcuse and Neumann were deeply concerned about the failure of the liberal politics of the Weimar to resist effectively the rise of National Socialism. In particular,
they grappled to understand the failure of the ‘rule of law’ to prevent, first, the decimation of civil and political rights and, finally, the humanity and lives of the Jews. Two works capture the quality of their lamentation as Marcuse and Neumann, each in his own way, struggle to come to terms with this low point in the history of the liberal rule of law – ‘Repressive Tolerance’ and ‘The Changing Function of Law in Modern Society’.

Prescribed Readings:


Further Readings:

Hollows, Joanne and Jancovich, Mark, ‘Mass Culture Theory and Political Economy’ in Approaches to Popular Film, Ch. 1, pp. 15-23.
Raz, Joseph ‘The Myth of Instrumental Rationality’.
Leni Riefenstahl’s classic film ‘Triumph of the Will’ is a controversial documentary that vividly depicts the role of ideology, symbols and institutions in bringing about the rise of German National Socialism and maintaining it in power for so long.

**Week 6: Habermas: Law and Ethics, the Relation Reaffirmed (CK)**

Jurgen Habermas is another (still living) German theorist but of a less radical nature than Schmitt. Habermas started his career among the critical theorists of the Frankfurt school, writing in a leftist Marxist-influenced manner about politics and society. One of Habermas’ earlier achievements was to produce a study of communicative rationality, in which he claimed to be continuing the work of enlightenment thinkers, stressing the importance of rational communication (contrary to some postmodern writers, who were critical of the achievements and possibilities of so-called ‘reason’). Since his early days, Habermas has become somewhat less radical but has branched out, writing about all matters of contemporary interest, including globalisation and the European Union. This week we shall study his writing on law, most particularly elements of his large work, *Between Facts and Norms*. This huge work asks the question ‘How is valid law possible?’, given the tension between law’s need to be effective and efficient (which relies on coercion) and its claim to be valid or legitimate, which is often perceived to have some sort of moral basis (denied by positivists). We shall examine Habermas’ solution and see if he has provided a satisfactory answer.
Prescribed Readings:


(3) Robert PIPPIN, ‘Hegel, Modernity and Habermas’ in *Idealism as Modernism: Hegelian Variations* (CUP)

Further Readings:

J. Habermas ‘Introduction’ (12 Ratio Juris 1999) 329-325
J. Habermas ‘Paradigms of law’ in Rosenfeld and Arato ed *Habermas on Law and Democracy: Critical Exchanges* (California University Press 1996)
Introduction in Habermas *The Inclusion of the Other* ed Cronin & de Greiff (MIT, 1996)
W. Outhwaite, Habermas: a Critical Introduction, ch.9
Baynes, ‘Democracy and the Rechtsstaat’
Honneth, ‘The Other of Justice: Habermas and the ethical challenge of postmodernism’ both in White, *The Cambridge Companion to Habermas*
Scheuermann, ‘Between Radicalism and Resignation: Democratic Theory in Habermas’s Between Facts and Norms’

**Week 7: Reading Week**

**Week 8: Blumenberg: the Legitimacy of Modernity (CK)**

The idea that our legal concepts and forms are merely secularised variants of theological prototypes has come up in different guises and evaluations throughout the history of ideas in authors like Feuerbach, Nietzsche, Marx, Durkheim, Weber, Hegel, Kelsen, and Schmitt, to mention but a few. But whereas in these authors a diffuse ‘secularisation thesis’ was something of a side-current of their work, Hans Blumenberg and Karl Löwith drew it to the forefront of philosophic attention.

Now, even though the ‘Löwith-Blumenberg Debate’ does not focus explicitly on the law, it is nevertheless highly instructive for our understanding of law in modernity and post-modernity.

Prescribed Reading:

Further Readings:

L. Dickey, ‘Blumenberg and Secularisation’ in 41 New German Critique 1987
Joseph Ratzinger (Author), Jürgen Habermas, The Dialectics of Secularization: On Reason and Religion (Ignatius Press, 2007)
Owen Chadwick, The Secularization of the European Mind in the Nineteenth Century (Cambridge University Press 1990)
David Martin, On Secularization: Towards A Revised General Theory (Ashgate, 2005)
Steve Bruce, God is Dead: Secularization in the West (Wiley-Blackwell, 2002)

F. SELECTED ISSUES IN LAW AND SOCIAL THEORY

Week 9: Cotterrell, The Sociology of Legal Meaning and Legal Truth (DN)

In this class we engage with the issues arising out of debate started by Cotterrell’s claim that law must be interpreted sociologically. What is the force of this claim? Conversely, does it make sense to argue that law must adhere to its own epistemology and truth?

Prescribed Reading:


Further Reading:

Nelken, David (2009) Beyond the study of ‘law in context’, Ashgate
Questions for Discussion:

1. What does Cotterrell mean by saying that legal ideas MUST be interpreted sociologically? Do you agree with him?
2. How far can and how far should law attempt to incorporate the latest scientific findings? Would your answer be different if speaking of adjudication, legislation, policy making or regulation?
3. What role, if any, can and should sociology play in providing answers to moral questions about when to use law?

Week 10: Law, Culture and Legal Culture (DN)

Law and culture are connected in a variety of ways. In this class, however, we shall be mainly concentrating on the concept of ‘legal culture as a ‘term of art’ that refers to patterned connections between attitudes and behaviour in law and society. The term has been quite controversial in the sociology of law and comparative law. What are its strengths and weaknesses?

Prescribed Reading:


Further Reading:


Questions for Discussion:

1. What does the term legal culture mean?
2. Is it a useful concept (and for what purposes?)
3. Are there better alternatives?
4. Can legal culture be used to explain anything?

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