REVIEW ARTICLE*

Foucault and Law: Towards a Sociology of Law as Governance by ALAN HUNT and GARY WICKHAM (Pluto Press, 1992), pp i-viii + 1-148. (ISBN 0 7453 08414).

The title of Alan Hunt's and Gary Wickham's text accurately describes the contents of a short book that really comprises two even shorter books: namely, one on 'Foucault and Law' and one on the 'Sociology of Law and Governance'. I will refer to these two completely distinct efforts as 'Book One' and 'Book Two' respectively.

The first part of Book One provides a general introduction and analysis of Foucault's social theory as a whole.[1] The second part of Book One explores the way this work deals with legal phenomena together with the relevance of this work for the sociology of law.[2] Taken as a unity, Book One adheres closely to Foucault's texts in order to judge their relevance and salience for a social, theoretically informed understanding of contemporary law.

Book Two, in contrast, departs from the safe terrain of an exposition and analysis of Foucault's writings in favour of theory construction on the basis of the work of Foucault and others. These 'others' include, predictably and appositely, contemporary theorists who seek to use, expand upon and apply the master's teachings (including Jacques Donzelot, Nikolas Rose and Colin Gordon); and less appositely, a disparate bunch of past masters who sit uncomfortably together; including Nietzsche, Durkheim, Weber, Parsons and Althusser. The central thrust of Book Two is programmatic; it seeks to sketch the outlines of a new paradigm for sociology in the form of a theory of "governance"[3] and, for law, in the form of a "sociology of law as governance".[4]

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1 A Hunt, G Wickham, *Foucault and Law: Towards a Sociology of Law as Governance*, Pluto Press (1992) pp 3-36.

2 *Ibid*, pp 39-71.

3 *Ibid*, pp 75-98.

4 *Ibid*, pp 99-132.

In virtue of the remarkable chasm in content and mode of presentation that separates the two enterprises embarked on in Books One and Two, it is difficult to pronounce a judgment on the text 'as a whole'. However, I do not think it is being uncharitable if I say that Book One is clearly a modest success, even though its central contentions are mistaken, while Book Two is a spectacular failure notwithstanding the interest value of much of what it is trying to do.[5] In the light of this assessment, I will essentially confine myself to commenting on Book One. For it is here, in the attempt to come to terms with some of the key insights of one of the most important yet illusive contemporary thinkers, that the real value of the authors' endeavours lies.

The basic theme of Book One, 'Foucault and Law', is that despite the numerous insights for legal and social theory that Foucault's genealogical framework reveals, its localisation of the place and function of law in modern/postmodern societies is ultimately deficient. This deficiency results from the theory's inability to account for key, empirically verifiable developments in contemporary law; a difficulty ameliorated, but never sufficiently offset by its truly fecund critical potential. In relation to the latter, it would seem that Foucault's extraordinary capacity to problematize the previously unproblematized resides in his principled refusal to abide by the rules of the prevailing 'disciplines'. The result of this philosophical non-compliance is a series of fruitful insights opened up from the oblique angle of refraction of the genealogist's detached viewpoint. Foremost amongst these, in the context of law, are Foucault's radically decentred notion of power and his nascent theory of governmentality.

In line with many poststructuralist thinkers, Foucault starts with the fact that contemporary western societies are radically polycentric. One of the key conditions of the possibility[6] of this polycentricity is the paradigmatic shift in the type of social and political *power* that is prevalent in these societies. According to Foucault, power in modernity is no longer concentrated principally in large, integrated institutions (in particular states and governments) but is gradually diffused among a multitude of low level and local sites, such as schools, hospitals, professional associations and even the family. In order even just to get a glimpse of this decentred power, one has to set aside all traditional associations of power with tangible force and oppression. One has to grasp the way power is not a thing that persons and institutions yield, but a practice that people participate in. Of pivotal significance here is the fact that power is a practice governed by a logic that is implicitly non-egalitarian and asymmetrical. The purpose of Foucault's famous excursus on Jeremy Bentham's design for the Panopticon penitentiary is precisely to illustrate this logic of micro-power in its purest form. By virtue of a specific spatio-normative configuration of persons, a certain self-regulated subjectivity is moulded such that the controller (here the prison warden) need not

5 The heart of the problem with Book Two is that it simply fails to convince. This failure is not due to the tendentious character of the arguments, but to the lack of argument *tout court*. The structure of the presentation in terms of a series of propositions or 'principles' does not, despite appearances, provide the substance necessary to fill this discursive void.

6 As Hunt and Wickham note inquiry into the "conditions of the possibility" of phenomena is a key component of the genealogical method, see note 1 *supra*, p 6.

be physically present. Through the *knowledge* that one is being constantly supervised 'big brother' is gradually internalised until people become their own and each others' controllers. They do so via normative practices that exhibit the asymmetical logic of supervision which, having gradually retreated behind the opaque veil of the humanistic disciplines, operates ironically as the 'will to truth'. Exemplary in this sense are all the explicitly moral-practical discourses connected with the apparently non-forced giving and acceptance of counsel, such as psychology, medicine, education, law and pastoral care (social workers, counsellors, clergymen, etc).

By charting the power-knowledge nexus that is concealed within all normative discourses, Foucault is able to expose the micro-physics of power that is constitutive of modern social control. As Hunt and Wickham note, the most perturbing feature of Foucault's prognosis for modernity is that by locating power in practices that are foundational for modernity (namely, the scientific and humanistic disciplines borne of the Enlightenment) the asymmetries of power become completely endogenous. That is to say, in view of its constitutive (as opposed to repressive) character, normalizing power embeds itself in the social fabric in such a way that *all* social reform partakes of the logic of control. Illustrative in this context are examples as diverse as the functional production of delinquency,[7] to the capacities for social control endemic to the 'liberating' discourses on sex, deviance and personal development.[8]

Before turning to the authors' analysis of the implications of this understanding of disciplinary power for law it is necessary to make reference to Foucault's sketchy but influential ideas on governmentality. For as Foucault portrays it, governmental rationality is really the macro-social flip side of the micro processes appertaining to the political technologies of the body. Here at the level of societies writ large, Foucault, in typically oblique fashion, shifts the focus from the 'big politics' of sovereignty and maintenance of power to the diverse practices whereby governments 'get the job done' in a whole host of mundane and pragmatic ways. It is with this shift in focus that Foucault is able to sidestep the whole discourse of politics stemming from Machiavelli and Hobbes which sees government as an institutional domain with an intrinsic and *sui generis* logic. Of course, the big politics of attaining and holding onto power still remains a part of government - hence the ongoing relevance of questions of sovereignty - but it not the *raison d'être* of politics. Instead, Foucault shows the confluence of the practice or 'art' of government with the methods of management associated with the political economy of civil society and the private realm. Seeing politics as being geared to attaining specific tasks, rather than the open ended maintenance of power-in-general, Foucault is able to reconnect politics to the mundane practices of everyday life and thus see the interconnection between macro and micro power that the traditional discourse is systematically precluded from apprehending.

The crux of Hunt and Wickham's argument in Book One is that Foucault's emphasis on the pragmatics of micro and macro power leads him mistakenly to

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7 See M Foucault, *Discipline and Punish*, Penguin (1977) pp 257-92.

8 See M Foucault, *The History of Sexuality, Vols 1 and 2*, Penguin (1990).

shift law from its hitherto apparently central position in the maintenance of social integration and control. As they put it, Foucault "expels" law from modernity, an expulsion that is grounded in his inability to apprehend the empirical and systematic significance of the character and role of contemporary law. *Empirically*, they point out, that far from a decrease in legal regulation there is today an explosion of law as more and more areas of life are legally colonised. Yet Foucault is unable to account for the imperialistic expansion of law because his concept of power, grounded as it is in the decentred, micro-pragmatics of impersonal domination, is *systematically* blind to the multiple forms of legally sanctioned, personal and institutional domination that abound in contemporary societies. However, upon a closer examination I believe these criticisms both (i) miss their mark and (ii) fail to grasp the real problems endemic to Foucault's concepts of disciplinary power and governmentality.

In relation to (i), notwithstanding the authors' valid criticisms of the ambiguities surrounding Foucault's concept of law and "the juridical", they themselves fail to see that modern law, no matter how it is conceived, far from being supplanted by disciplinary power, actually works in tandem with it. Indeed law, for Foucault, becomes one of its conditions of the possibility in that there is no way that the asymmetries of bio-power could flourish without operating behind the veil of legal regulation grounded in the normative suppositions of equality, liberty, fairness and reciprocity. Or put even more pessimistically, there is no way that the ideals underpinning the rule of law would be able to attain an apparent foothold in contemporary empirical reality were it not for the fact that the disciplines create and maintain the self-regulated subjectivity (self-discipline) that hold in place otherwise free and equal individuals. Thus in so far as disciplinary power and law reciprocally constitute each other, Foucault does not expel law from modernity. On the contrary, he embeds it even deeper into its constitutive socio-logic, since legal regulation now functions as the normative cement that underpins and binds together the diverse practices by which persons are rendered "subjects" in Foucault's "carceral archipelago".

The fact that Foucault portrays law as the silent and perhaps even unwitting foundation of contemporary unfreedom leads to my other criticism of Hunt and Wickham's thesis. For (ii), far from offering no account of how the "disciplines are aggregated into [the] pessimistic and negative utopia of the Gulag",[9] Foucault's conception of modern law, as I have just noted, succeeds in this task all too well. And its very success should lead us to be rather wary of a theory that, like so many before it,[10] plunges modernity into the one way street of a dialectic of despair. The real problem with Foucault's diagnosis of our times is not, as the authors suggest, that he indiscriminately assimilates too many practices to the logic of the panopticon, or that this logic is itself not the key source of our contemporary social ailments. Such criticisms, even though they evince a degree of *empirical* veracity, overshoot the *systematic* weakness of Foucault's position which lies in its structural incapacities to grasp, what another social critic has termed, the

9 Note 1 *supra*, p 69.

10 For example, T Adorno and M Horkheimer, *The Dialectic of Enlightenment*, Herder & Herder (1972).

"normative content of modernity".[11] Were Foucault able to comprehend the immanent possibilities of the present, in a manner that does not foreshorten all normativity into instrumental control, then a less homogeneous and richer picture of social and political power could come into view. A role for law could be glimpsed which could underpin modes of self-determination that do not endogenously turn into their opposite. Since Hunt and Wickham themselves do not seem to catch a glimmer of this richer normative content that resides in the interstices of social practice, they are not only precluded from grasping the implications of Foucault for law in this somewhat harsher light, but worse still they perpetuate these weaknesses in their attempt, in Book Two, to construct a complete sociology of law on such shallow foundations.

11 J Habermas, *The Philosophical Discourse of Modernity*, MIT Press (1987) pp 336-67.