

# Foucault Studies

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## REVIEW

**Jacopo Martire, *A Foucauldian Interpretation of Modern Law. From Sovereignty to Normalisation and Beyond*, Edinburgh: Edinburgh University Press (2017), ISBN 978 1 4744 1192 9 (hardback).**

Professor Jacopo Martire's book, *A Foucauldian Interpretation of Modern Law. From Sovereignty to Normalisation and Beyond*, deserves careful attention. The book represents the author's project of making Foucault's thought compatible with modern legal theory. Dr. Martire (from the University of Bristol) tries to put together and reconcile two seemingly incompatible approaches to understanding the workings of modern society. Jürgen Habermas's forceful critique of Foucault still looms large. Other traditional interpretations of Foucault's work have emphasized "the expulsion thesis," that is, the fact that Foucault, relying too much on discipline and governmentality, effectively expelled law from the locus of power and excessively downplayed the role of law in our times.

Martire's project is a recent attempt at reconciling Foucault and legal theory. The author devotes some attention to previous efforts, from Rose & Valverde to Golder & Fitzpatrick (pp. 9-21), and highlights what he sees as the shortcomings of such efforts. Martire's project forcefully contributes to overcoming such interpretations with a powerful work where he operates a logical and *genealogical* alignment of Foucault and modern law by postulating at the outset that power and freedom are "co-extensive" rather than opposite. This Foucauldian insight (originating in Nietzsche) is one of the core ideas of the book and one of the keys to understanding this book's project.

Consequently, Martire postulates that "law and modern (biopolitical) regimes of power are not to be seen as incompatible or heterogeneous" [...] "they both evolved isomorphically as normalizing technologies of government of the living, and exist in a relationship of co-production: law creates the universal subject of rights, who is reflected in the normal subject of biopolitical regimes, and viceversa" (p. 3).

In order to avoid a characterization of the legal field that would fall prey to the expulsion thesis, Martire proposes to approach Foucault's theoretical toolbox by highlighting the complex intertwining of power, truth, knowledge, subjectivity and freedom. In Foucault, these terms are not "concepts" that can be neatly defined and separated from one another but rather overlapping *fields* (my term, not Martire's) in an epistemological sense.

Taken together, these terms constitute an epistemological regime, a logical *relational* (again, my term) ensemble to be attributed to complex strategic situations, that allows an understanding of modern society's conditions of possibility. Martire also focus on a discussion of Foucault's legal texts – his Rio and Louvain lectures (p. 21).

"Law," according to Martire, "should be studied as a *sui generis* apparatus which, working along the lines of jurisdiction/veridiction, inscribes subjectivity within a triangle formed by power, knowledge and truth" (p. 27). Law is that particular apparatus which, in modernity, establishes the political truth of the subject by making visible her interests. Normalization did not make law a relic of the past; law adopted the underlying logic of contemporary biopolitical regimes (which for Foucault are *normalizing*). Under normalization, law ceased to be only a sign of power and became the general discourse of power in modern societies (p. 29), institutionalized in the State, and characterized by generality, abstraction, equality and freedom (p. 33).

Chapter two offers a genealogical analysis of law as an apparatus that makes visible the political truth of the individual by analyzing key philosophers (Aquinas, Bodin, Grotius, Hobbes, Locke, Rousseau, Kant and Hegel). The chapter is devoted to the formation, in the history of political theory, of the idea of political legitimation, and how this idea gradually abandoned its metaphysical foundations and "was gradually conceived in a secular way focusing on individual interests seen through the prism of the paradigm of the norm and the dynamics of normalization" (p. 37). Law slowly ceased to be conceived as a set of commands issued by a supreme sovereign to become chiefly a body of worldly norms generated by the individuals themselves.

In chapter three, Dr. Martire discusses law as an apparatus that makes visible the political truth of society by scrutinizing the British (p. 77-84), American (p. 84-90) and French (p. 91-101) revolutions. These are the key historical events and discursive practices that led to the emergence of the "constitutional horizon of modernity" (p. 72) that establish that governments should have powers limited by laws. By focusing on the three revolutions, Martire shows how "the modern legal discourse embraced the paradigm of the norm and how the relationship between law, society, power and truth was reshaped" through these events (p. 73). The author's ideal-typical reconstruction highlights the fact that each revolution had to face a different system of legal absolutism; generality, abstraction, equality and freedom only appear in full in the French revolution. Each revolution, however, contributed to the building of a system "that not only limits power under the paradigm of the norm but, most importantly, makes power manifest through the paradigm of the norm" (p. 102).

Chapter four analyzes how "modern law and apparatuses of normalization form a coherent self-feeding assemblage which, through a dynamic of co-production, inscribes the subject within an isomorphic space where the paradigm of the norm dominates both the legal and the socio-scientific dimension" (p. 35). The chapter offers (1) a detailed account of the generative syntax of modern law by showing its normalizing effects of subjectivation (pp. 106-113); and (2) a discussion of the relationship between the discourse of modern law and other apparatuses of subjectivation (pp. 113-119).

Also in chapter four, and following Bauman's idea of "liquid modernity" (and, implicitly, non-representational theory as posited by Nigel Thrift and others), Dr. Martire characterizes the individual increasingly as a "virtual entity" which is at odds with the normalizing paradigm that informs modern law; "otherness," according to the author, has started to progressively erode the image of commonality upon which universalistic claims of liberal legalism rest (pp. 119-125). Martire states the intriguing claim (pp. 126-134) that the emergence of control societies has brought us to the absolute limit of the normalizing complex; the vision of the subject as a virtual entity "indicates a growing awareness of the presence of an existential uniqueness, otherness, in everyone's life that challenges the attempts at conceiving the social body in terms of normality" (p. 105).

Whereas "modern law makes possible the workings of discipline/governmentality by prohibiting social divisions and creating universal subjects upon which biopolitical strategies can be effectively enforced," and whereas "discipline/governmentality constantly recodify the subject in a standardized fashion, thus concretely producing a normalized population which can be reflected in the universality of law" (p. 105), the current situation is one of blockage in legal thinking. The "normative and functional crisis of modern law" (pp. 134-140) means that "if it does not make sense, to use universal laws to regulate a radically xenomorphic social body, then also normatively there is no appeal in subjecting all to universal laws, since subjecting the Xenos (the Other, the alien) to universal categories means unjustly constraining her into a set to which she does not belong" (p. 140).

In the conclusions chapter, Martire contends that defenders (Habermas and Held, p. 142-151) and critics (Butler and Golder, pp. 152-160) of liberalism fail to understand the extent of the inherent and inescapable normalizing effects that modern law imposes on the subject, and thus are unable to offer viable solutions to the normative and functional crisis that modern law is suffering in the face of an increasingly liquid, non-normalizable social body. A Foucauldian approach to law (as perhaps the quintessential heterotopic space) offers a way forward to the structural discursive limits of modern law. The politics of law is increasingly questioned but the syntax of law, and its changing relationship with changing biopolitical forms of power, is left untouched. Focusing on rights (as Golder does in his recent book) misses the point, Martire argues.

The author concludes that there is no way out of the blockage in legal theory that he has identified. However, he believes that his genealogical study of law as a *sui generis* apparatus and his critique of the structural limits of modern law provide a problematic point for redefining the contours of our legal landscape. The problem to be addressed is stated as follows:

We need to imagine a way forward that breaks with our normalizing/representative legal discourse and addresses in a fresh and truly original way the problem of regulating a liquid society of virtual subjects. How can we restructure the syntax of law? How can we find ways out of the normalizing system in which modern law has been articulated?

How can law become an instrument capable of coping with the fluid demands of new biopolitical dynamics? (p. 162)

If “normalization” is exhausted, what would be the main features of the new syntax of law that Martire advocates? A few pages venturing into this territory would have been well received by readers. For example, would such a project need to include the Xenos of increasingly dominant non-Western societies such as India and China and their legal traditions?

*A Foucauldian Interpretation of Modern Law* offers a rigorous genealogical analysis of the evolution of legal theory and is largely successful in reinterpreting modern law according to Foucauldian normalization. In addition, this book poses very relevant questions about the adequacy of contemporary legal theory that will be at the forefront of upcoming debates and discussions in the field.

## References

- Bauman, Zygmunt, *Liquid Modernity*. Cambridge: Polity Press, 2000.
- Butler, Judith, *Giving an Account of One Self*. New York: Fordham University Press, 2005.
- Golder, Ben, *Foucault and the Politics of Rights*. Stanford, CA: Stanford University Press, 2015.
- Golder, Ben and Peter Fitzpatrick, *Foucault's Law*, London: Routledge, 2009.
- Habermas, Jürgen, “Some questions Concerning the Theory of Power. Foucault Again,” in *Critique and Power. Recasting the Foucault/Habermas Debate*, ed. Michael Kelly, 79-108. Cambridge, MA and London: The MIT Press, 1994.
- Held, David, *Models of Democracy*, Malden, MA: Polity Press, 2006.
- Rose, Nikolas and Mariana Valverde, “Governed by Law?” in *Social & Legal Studies* 7:4 (1998), 541-551.
- Thrift, Nigel, *Non-Representational Theory. Space, Politics, Affects*, London: Routledge, 2007.

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