

The Scope of Law Within the Interstices of Governmentality

Luis S. David, S.J.*

Insofar as he is a fabricated man, Leviathan is no other than the amalgamation of a certain number of separate individualities, who find themselves reunited by the complex elements that compose the State; but at the heart of the State, or rather, at its head, there exists something which constitutes it as such, and this is sovereignty, which Hobbes says is precisely the spirit of Leviathan. Well, rather than worry about the problems of the central spirit, I believe that we must attempt to study the myriad of bodies which are constituted as peripheral subjects as a result of the effects of power.¹

In Part 4 of Volume I of *The History of Sexuality*, to follow up on his elaborate discussion of the proliferate production of sexuality in institutional practices spanning the last two hundred years, Foucault makes the central distinction between the disciplinary and juridical models of power, in order, he explains, to establish the demise of the latter model of power which was tied to the monarchy, and to broker a new understanding of the ways in which in our own time all kinds of behaviors are positively produced by disciplinary power. For even if at some point in our history, the monarchy did conform to a conception of itself as a unified and unifying center of authority in a sea of "dense, entangled, conflicting powers, powers tied to the direct or indirect dominion over the land, to the possession of arms, to serfdom, to bonds of suzerainty and vassalage,"² which, by means of fundamentally law-like "mechanisms of interdiction and sanction,"³ such as the right to exact death from subjects, or to impose taxes, it had succeeded in regulating, arbitrating, and demarcating, the monarchic system of governance

* Associate Professor of Philosophy, Ateneo de Manila University (Loyola Schools); Professorial Lecturer at the Ateneo Law School, and Departments of Sociology and Philosophy at the University of the Philippines (Diliman); Professorial Lecturer at the Philippine Judicial Academy; Editor of *Budhi: A Journal of Culture and Ideas*.

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1. Michel Foucault, *Two Lectures, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* 97-98 (Gordon ed., 1980) [hereinafter Foucault, *POWER/KNOWLEDGE*].
2. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 86 (Robert Hurley trans., Vintage Books 1980) [hereinafter FOUCAULT, *HISTORY OF SEXUALITY*].
3. *Id.* at 87.

that is gone from our midst, and together with it, operations of power as fundamentally hierarchical and universal, radiating prohibitive force from "top to bottom," from State to individual, from parent to child,⁴ producing little more than "absences and gaps."⁵ Foucault writes:

If power were never anything but repressive, if it never did anything but say no, do you really think one would be brought to obey it? What makes power hold good ... is simply the fact that it does not weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms of knowledge, produces discourse. It needs to be considered as a productive network which runs through the entire social body, much more as a negative instance whose function is repression.⁶

The emergence of such a productive network of disciplinary powers took place, on Foucault's account, under the impact of improvements in the material conditions of human life brought about by the industrial revolution, notably in the area of agricultural productivity, with the result that starvation, plague, and other causes of early demise "ceased to torment life so directly."⁷ This relative surcease from struggle with the *memento mori* and the concomitant overcoming in political thinking of a preoccupation with the transcendent principles of an order of things guaranteed by God, meant that, for the first time in western history, societies were in a position to contemplate the conditions of human existence as forces that could be brought into the realm of explicit calculations in order to be modified. In addition to being freed from concerns about its implication in a larger ethical order, the State was freed from classic Machiavellian concerns over the need to legitimize and exercise power as a defense of the essentially fragile position of the prince in relation to his territory, and of his right of rejoinder to legal subjects who either submitted to his rule or transgressed it.⁸ A variety of doctrines began to build around the State as an end in itself that operated according to principles, termed the *raison d'état*, internal to the State and possessed of their own autonomy. All in all, the events that clustered at the beginning of the industrial revolution meant that

power would no longer be dealing simply with legal subjects over whom the ultimate dominion was death, but with living beings, and the mastery it would be able to exercise over them would be applied at the level of life

4. *Id.* at 84-85.

5. *Id.* at 83.

6. Michel Foucault, *Truth and Power, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* 119 (Gordon ed., 1980).

7. FOUCAULT, *HISTORY OF SEXUALITY*, *supra* note 2, at 142.

8. Michel Foucault, *Governmentality, in POWER, VOLUME THREE OF ESSENTIAL WORKS OF FOUCAULT, 1954-1984* 204 (Paul Rabinow, series ed., James Faubion, ed., Robert Hurley et al, trans., 1994).

itself; it was the taking charge of life, more than the threat of death, that gave power its access even to the body.⁹

In other words, as the State became the goal and justification for State action, a new set of problems for governments arose, relating primarily to their populations' health, morals, fecundity, wealth, happiness, and longevity. To facilitate its response to these problems, the State deployed a whole new series of strategies, notably one which it borrowed from the Christian Church, called the "government of souls," which, in the State's use, involved taking men by the hand in order to lead them, not to salvation in the next life, but to a this-worldly salvation, through an operation, a technique of precise piloting, which implied a full range of knowledge concerning the individuals being guided, the truth towards which one was guiding them.¹⁰ What was distinctive about the "government of souls" or "pastoral power" was that at the same time that it individualized, attributing "as much value to a single lamb as to the entire flock," it concerned itself with individuals only insofar as "what they did, their life, their death, their activity, their individual behavior, their work, and so on" was "somehow relevant for the reinforcement of the State's strength." In other words, in its secular form in the modern State, "pastoral power" organized the knowledge of its subjects around two poles: "the one, globalizing and quantitative, concerning the population; the other analytical, concerning the individual."¹¹

At the pole of population, the State generated a heterogeneity of variables relating to its population, its nature and composition, its internal instabilities, health, hygiene, economic stability, crime rates, welfare, education, fertility, diet, death rates, and dozens of other variables, in the effort to develop the master concept of population, and with a view to determining the most efficient ways of manipulating the relevant variables. Technical social science began to take shape in this context – not a general, context-independent, universal and "tending towards formalization" science such as one came to expect of the physical sciences – but a science that aimed at particulars. With knowledge organized in this manner, the State administrative apparatus could operate a "life-" or "bio-politics," one that adopted policies and took specific courses of action aimed at the production of wealth, the control of disease, that enabled it to influence where and how people worked and lived, monitor the quality of their environment, and

make inroads into the previously "private" domains of marriage, sexuality, and methods of contraception. With bio-politics in place, the life of the population, together with the prospect of its destruction, became political choices. Between the idea that the State has its own nature and its own finality, to the idea that insofar as he produces a surplus strength, insofar as he is a living, working, speaking being, insofar as he belongs to a population, the individual is the true object of the State's power, we find, increasingly, interventions on the part of the State in the life of the individual. Unmoored from the limitations of nature and theology, such power entered into a mode that was capable of unbounded expansion; there was no inherent limit to the possible strength a State might achieve. Insofar as State cared for its population "for its own sake," it was "entitled to relocate [its citizens] or slaughter them if it served the state's interest to do so." Expansion – or destruction – takes place on the stage of history.¹²

At the other pole, that of the individual, concern developed around individuals whose aggregate health and productivity were, after all, consequential for the constitution and maintenance of the State's strength. The State, as such, contrived to establish "a visibility" over them by means of which it could "differentiate ... and judge them."¹³ This it accomplished through the "examination," an assessing, objectifying gaze which determined who an individual was in an established hierarchy, and where he or she belonged. What was crucially important about the examination was that it "linked to a certain type of the formation of knowledge a certain form of the exercise of power."¹⁴ All of those things – "small techniques of notation, of registration, of constituting files, of arranging facts in columns and table" – that facilitated the build-up of data relating to an individual's health, knowledge, attitude, or skills, through their "reinvest[ment] back into disciplinary practices that were brought to bear on the individual," functioned as well as "a means of control and a method of domination." Indeed, "the examination was at the center of the procedures that constituted the individual as effect and object of power, as effect and object of knowledge."¹⁵

The development and expansion of the aforementioned knowledges became the subject matter of *Polizeiwissenschaft* – a statistics-driven "police science" which, in a multiplicity of offices, branches, divisions, bureaus,

9. FOUCAULT, HISTORY OF SEXUALITY, *supra* note 2, at 142-143.

10. Cf. Michel Foucault, *What Is Critique*, in "WHAT IS ENLIGHTENMENT?": EIGHTEENTH-CENTURY ANSWERS AND TWENTIETH-CENTURY QUESTIONS 383 (James Schmidt, ed., Kevin Paul Geiman, trans., 1996).

11. Michel Foucault, *The Political Technology of Individuals*, in TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT 152 (Luther H. Martin et al., eds., 1988) [hereinafter Foucault, POLITICAL TECHNOLOGY].

12. Foucault wants to underscore the fact that the most important and creative inventions concerning the uses of power have taken place in the development of local, site-specific mechanisms for handling (and producing) individuals and groups.

13. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 184 (Alan Sheridan, trans., 1977). [hereinafter FOUCAULT, DISCIPLINE].

14. *Id.* at 187.

15. *Id.* at 192.

agencies, and other institutions of government, accumulated records of birth, mortality, suicide, longevity, health, and disease, and kept "permanent accounts of individuals' behavior," in order to facilitate the extension of governmental authority to the level of such everyday activities as work, health, the exchange of goods and services. So while the police did on occasion deport themselves like police in the direct, coercive sense of that term (through fines, levies, seizures, audits, the withholding of services or benefits, the repetition of training assignments), what needs to be imagined here is a wide array of practices that took as their target the welfare of the population as a whole. Foucault writes "as a form of rational intervention wielding political power over men, the role of the police is to supply them with a little extra life, and by so doing, supply the state with a little extra strength."¹⁶

Given the absorption and indoctrination of political subjects to such a mosaic of subtle coercions and procedural manipulations, the challenge emerged of how to describe their relation to government. John Locke had held, and traditional political science with him, that individuals have certain basic rights and freedoms in the state of nature that they do not relinquish even upon the creation of civil government, and that should anything or anyone — a simple thief, or civil government itself — threaten to take away these rights, they would be justified in resisting it. According to this thinking, the power and authority of government, far from being absolute, was vested in the freely given consent of the governed, whose rights, freedoms, and mutual obligations, after all, was the task of government to delimit, define, preserve, and enlarge. If it failed in that task, political subjects were liable to withdraw from it both their consent and the governmental powers that had gone along with that consent. The political science perspectives relating to government had to do, therefore, with issues of legitimacy, the regulation by political subjects of the power of government, and the remedies to governmental abuse of the rights of the people.

In light of his work on "governmentality," that is, on those technologies of power which act to socialize, discipline, and normalize the bodies of persons insofar as they are not merely citizens but members of a population, Foucault recognized the impossibility of conceiving the relations of subjects to civil government in the way that Locke did. Individuals at the founding of the social contract do not possess certain pre-existing "properties" that would provide the incentive for them to combine with others in the consensual process which is the essence of the social contract. For quite the reverse of protecting the pre-existing "properties" of the individual, governmentality *inserts* these properties into him. No one can give consent

16. Michel Foucault, *Power of Laws*, in PHILOSOPHY, POLITICS, AND CULTURE: INTERVIEWS AND OTHER WRITINGS, 1972-1977 79 (Lawrence Kritzman, ed., 1988).

to the erection of a disciplinary power before he becomes part of that discipline, and once a disciplinary power comes to be, the issue of consent becomes moot. In Foucault's view, the real inadequacy of the sovereign model of power lay in its focus on issues of consent and coercion, when in fact the most important issues had to do with the existence of "power at the extreme points of its exercise, where it is always less legal in character," insusceptible to capture by either the recognition of rights or their violation.¹⁷ Indeed, governmentality's concern for the lives of individuals is for individuals as part of populations, not for private autonomous individual with so-called individual rights. This is notably true of the legislature and the courts which by means of the police, prisons, punishments, and permanent records, operate justice that takes for its target a population as opposed to its subjects. The governmentalized state's radical indifference toward the rights of subjects, or the subject of right, is perhaps epitomized by its deployment of individuals as instruments of its own preservation in time of war. Indeed, writes Foucault, "[t]he coexistence in political structures of large destructive mechanisms and institutions oriented toward the care of individual life is ... one of the central antinomies of our political reason."¹⁸ Yet it is an antinomy that pervades our experience as political subjects. In this antinomy, we see how a discourse of right can be used by structures that fundamentally ignore rights, how promises of autonomy are bound to practices of domination.

The point concerning "power at the extreme points of its exercise, where it is always less legal in character," is perhaps best understood in terms of the rise of "regulation" as a distinctive technique of government. "Regulation" here sets up a contrast with "law." If law is the stipulation of general rules, then regulation is more task-oriented and less prohibitive; it does not so much "coerce" the individual into accepting detailed goals and targets for training and behavior modification, as to situate him in an environment that evaluates, corrects, and encourages responses from him that conform to "norms" or to normalizing judgments. Norms specify the goals that those who have been subjected to discipline must strive to attain. They underscore to us the fact that we are all alike and, if not altogether interchangeable, at least similar; never so different enough from one another as to imagine ourselves as entirely apart from the rest. If the establishment of norms implies classification, this is primarily because the norm creates classes of equivalency. But the norm also involves polarity, that is, it works to affirm differences, discrepancies, and disparities. The abnormal is not outside the realm of the normal but inside it, much the same way that mutation is an essential part of biological life. Foucault writes:

Disciplinary power ... refers individual actions to a whole that is at once a field of comparison, a space of differentiation, and the principle of a rule to

17. Foucault, *POWER/KNOWLEDGE*, *supra* note 1, at 97.

18. Foucault, *POLITICAL TECHNOLOGY*, *supra* note 11, at 147.

be followed. It differentiates individuals from one another, in terms of the following overall rule: that the rule be made to function as a minimal threshold, as an average to be respected or as an optimum towards which one must move. It measures in quantitative terms and hierarchizes in terms of value the abilities, the level, the 'nature' of individuals ... it introduces, through this 'value-giving' measure, the constraint of a conformity that must be achieved.¹⁹

The norm does not represent an absolute, but a standard of measurement derived from those for whom it will serve as a standard. It makes no pretense, as such, to bind anyone for an indefinite period, as a law can. The norm is the group's observation of itself, no one has the power to declare it or establish it; it is created by the collectivity without being willed by anyone in particular. The inconstancy or relativity of the norm, the fact that its sphere of validity cannot extend beyond the bounds of the group that establishes it in the first place, has often been interpreted to its detriment. How, indeed, could it serve as a common reference if it is constantly changing and can offer no security to those who will have to make decisions based on it? Does not a rule have to be fixed, unchanging, and outside the influence of those who are going to use it? In fairness to the norm, it must be said that, while it is unstable, completely time-bound, it is at the same time enormously durable. Its durability stems from its flexibility. From the standpoint of the business community, for example, this capacity for adaptation and flexible response to changing conditions makes normalization superior to laws or regulations as a management technique.

So even if law, or the discourse on "rights," no longer operates as the organizing principle for the exercise and constitution of power in modern societies; even if the judicial system is utterly incongruous with the new methods of power whose operation is not ensured by right but by technique, not by law but by normalization, not by punishment but by control; even if methods that are employed on all levels and in forms that go beyond the state and its apparatus, it would be a mistake to assume that there has been a decline of law and legality in modern society. The formation of a normalizing society in no way diminishes the power of law or causes judicial institutions to disappear. Quite the contrary, normalization tends to be accompanied by an astonishing proliferation of legislation.

So what is this role that is retained for law?

Foucault points out that coeval with the emergence of "governmentality," of that "great preoccupation with the way to govern and the search for the ways to govern," was the appearance of the question "how not to be governed *like that*, by that, in the name of those principles, with such and such an objective in mind and by means of such procedures, not

19. FOUCAULT, DISCIPLINE, *supra* note 13, at 182-183.

like that, not for that, not by them."²⁰ In other words, power relations always carry with them the possibility of resistance. But since the efficacy of the disciplinary mechanisms of governmentality is directly proportional to their ability to produce docile bodies, that is to say, individuals who will not only not resist the techniques and practices that control them, but will actually take upon themselves the norms and expectations of discipline, and make them part of their own ethical relation to themselves, they must be able to channel such resistance, wherever it arises, toward objects that do not interfere with the ways in which individuals are managed, controlled, and defined, such as "the 'right' to life, to one's body or health, to happiness, to the satisfaction of needs, and beyond all the oppressions or 'alienations,' the right to rediscover what one is and all that one can be," rights which "did not derive, either, from the traditional rights of sovereignty."²¹ In other words, a more or less fictitious theory of sovereignty actually serves to disguise the real mechanisms of power that subject individuals. It provides a formulary or fictitious standard to which political subjects can appeal, in the name of rights and liberty, without upsetting the meticulous network of mechanisms and relations that really dominate and control them.

To understand how this works, consider what it is that we are really doing when we are asserting a right. When we assert a right we are usually concerned with addressing some issue or situation bearing directly or indirectly upon the quality of our lives. We may, for example, assert a right to work or to be treated fairly in the workplace. We may assert a right to education or the right to be treated humanely by the police and the courts. We may assert rights that bear on issues of health care, on the protection of the environment — which affects our health, on the equitable distribution of social resources. When we assert such rights, we think, we are exercising our autonomy as political subjects, as separate individuals. But in actuality, we are asserting the right to come under the governance of precisely those institutions and apparatus where discipline grabs our bodies and subjects them to its normalizing practices. When we assert the right to be treated fairly in the workplace, we are asserting the "right" to advance in rank through a hierarchy, the "liberty" to be trained to be a productive member of society. When we assert a right to education, we are asserting our "freedom of access" to an environment that evaluates, corrects, and encourages responses from us that conform to normalizing judgments. Even on liberal theory's own terms, the social opportunities, freedoms, and place of subjects are completely tied to the particular disciplinary practices to which they are subjected. The form of law remains in place, but the law comes to act more

20. Michel Foucault, *What is Critique? in THE POLITICS OF TRUTH* 28 (S. Lotringer ed., 1996).

21. ALAN SHERIDAN, MICHEL FOUCAULT: THE WILL TO TRUTH 144 (1980). See also Foucault, POWER/KNOWLEDGE, *supra* note 1, at 108.