This module provides a detailed understanding of how the work of a broad range of social theorists contributes to a specifically sociological understanding of legal ideas, institutions and practices. Beginning with the more recent social theoretical perspectives on legal discourse, structures, processes, relations and institutions - the work of Foucault, Habermas, Luhmann, Bourdieu, ethnomethodology and symbolic interactionism - we will then broaden our grasp of their approaches to law and how they interrelate with each other by taking a closer look at their connections with the earlier work of Elias, the Frankfurt School, Marx, Weber, and Durkheim. Throughout the module there will be a concern develop our understanding of (1) each theorist or theoretical perspective, (2) the relevant secondary literature, and also (3) of the ways in which that theoretical orientation has been ‘put to work’, utilised or applied in research into particular legal fields, case studies, or issues. The module reinforces the knowledge and skills acquired in your undergraduate training by providing you with a thorough grounding in a wide range of perspectives and approaches in social theory underpinning the analysis of law’s relationships to its changing social context, other social institutions, fields of knowledge and practice, its continuing historical evolution, and its role in key contemporary social and political transformations.

READING MATERIALS

The reading materials for the course will consist of:

1. Reza Banakar and Max Travers (eds) An Introduction to Law and Social Theory (Oxford: Hart, 2002) [B&T]
2. Reading provide via the Blackboard site.

The readings marked with an asterix* have also been placed in UCD Library Short Loans.

By way of background and supplementary reading, there is an enormous literature covering the range of classical and contemporary social theory which you may find useful to draw on. Apart from the sociology journals, just some of the examples include:


KEY DATES

| Classes begin: | 15 September |
| Workbook Pt 1 due: | 2 October |
| Reading Week: | 26-30 October |
| Workbook Pt 2 due: | 30 October |
| Essay due: | 8 December |
CONSULTATION
I will be available for consultation at times to be arranged either in class, by phone or by email.

LEARNING OBJECTIVES AND OUTCOMES
This module aims to provide students with:

- a detailed understanding of the perspectives of a broad range of social theorists on the place of legal ideas, institutions and practices in society, as well as how they have developed over time;
- an understanding of how the way in which social theorists approach law differs from other disciplines, such as philosophy, economics and the legal profession itself;
- improved oral and written communication skills;
- strengthened analytical and research skills, including the ability to identify and evaluate different interpretations of an issue, present evidence and argument in support of their own particular position.

By the end of module, students will be able to:

- understand, explain and use the work of a broad range of social theorists in relation to legal ideas, institutions and practices;
- understand how legal ideas, institutions and practices have developed over time, and are developing into the future, from a specifically sociological perspective;
- effectively communicate that understanding of a variety of social theoretical perspectives on law, both orally and in writing, and under time pressure (in a take-home exam);
- identify and explain how a sociological approach to law differs from other disciplines;
- research a particular topic in the application of social theory to a particular legal issue or case, identify and develop a focused argument concerning that research, and write it up as an effective and persuasive essay.

The aims and objectives of the module are consistent with the generic attributes of graduates identified by the College of Human Sciences and offer students the opportunity to work towards improving their skills in all five areas of: research and inquiry, information literacy, personal and intellectual autonomy, ethical, social and professional understanding, and communication.

LEARNING SITUATIONS
These learning objectives will be pursued in the context of a weekly 3-hour seminar/workshop, which will combine a lecture by myself with class discussion, preceded by completion of the required reading and accompanied by independent reading.

ASSESSMENT
Students are required to:

- attend the designated seminars;
- participate in class discussion;
- complete satisfactorily such written work, presentations and examinations as may be prescribed; and
- meet the standards required by the University for academic honesty.

Students are required to complete all components of the following work:

- Participation in seminars, 10%
- One 1500 word workbook, 40%, covering 4 of the 12 topics in the module. It is due in two parts: Part 1 on Friday 8 October, and Part 2 on Friday 5 November.
- one 3000 word research essay, 50%; due: Friday 10 December, 4 pm.
  o A list of essay topics will be provided, and students are also encouraged to
develop their own essay topic, subject to approval by Robert van Krieken.

- Please submit your essay via the module’s Blackboard site, and also submit a printed copy me directly (not to the School office).

The *workbook* is designed to encourage participation, to develop your capacity to read the course materials and references critically, and to identify the key issues emerging from such a critical analysis.

The *research essay* is a vehicle for you to undertake independent research, and to apply the understanding of various theoretical perspectives to a particular issue or case study. The essay also assesses the skills of critical analysis, the development of an argument, and written communication.

**RESOURCES**

**Web Resources**
A listing of web resources in law can be found at:

- Social Science Information Gateway, Sociology of Law and Crime: [www.sosig.ac.uk/roads/subject-listing/World-cat/sociolaw.html](http://www.sosig.ac.uk/roads/subject-listing/World-cat/sociolaw.html)
- Sociosite’s Sociology of Right: [www.sociosite.net/topics/right.php](http://www.sociosite.net/topics/right.php)
- WWW Virtual Library, Law: [www.vlib.org/Law.html](http://www.vlib.org/Law.html)
Week 1 - Introduction: Why law and social theory?
In the first week we will begin by discussing the module as a whole, examining what is distinctive about social theory as opposed to political theory, philosophy, and jurisprudence, identifying what social theory might be able to offer legal scholars and practitioners. In the second seminar, we’ll work with the example of globalization and law as a case study, to clarify how a major concern for legal practitioners as well as theorists requires an understanding of broader social processes and developments which can only come from outside the legal arena itself, from social theory.

Reading
Alan Hunt, ‘The problematisation of law in classical social theory’, B&T Chapter 1.
John Flood, ‘Globalisation and law’, B&T Chapter 16.

Discussion questions
- Pick one of the classical social theorists and explain how their work contributes to our understanding of legal institutions and practices.
- What makes social theory, ‘social’?
- What does the term ‘globalisation’ refer to, and what does it mean for legal practitioners?
- What are the implications of Hardt & Negri’s approach to the concept of ‘Empire’ for legal approaches to sovereignty, constitutional law and international law?
- In what ways can processes of globalization be seen as undermining or weakening the rule of law?
Additional Reading

Week 2 - Power, discipline and government: Michel Foucault
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.

Reading
Gary Wickham, ‘Foucault and law’, B&T Chapter 13.

Discussion questions
➤ How does Foucault approach the relationship between power and knowledge?
➤ 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?
➤ Can you think of examples of social governance from the perspective of Foucault’s work?

Additional Reading


**Week 3 - Between facts and norms: Jürgen Habermas**

Jürgen Habermas provides a completely different conceptual apparatus for a social theoretical analysis to law, and this week we will examine some of its core elements. He understood modern society, for example, as characterised by a distinction between two spheres or realms: the social
‘system’ and the ‘lifeworld’. The concept of the ‘system’ refers to mechanisms of abstraction and formalization, the demands arising from the need to coordinate human action. The lifeworld refers to something more familiar, the world of cultural production, communication, social solidarity, community and identity. The general line of development which Habermas sees as characterizing the modern world is the increasing ‘colonization’ of the lifeworld by monetarisation and bureaucratisation. Part of this process is a growing ‘juridification’ of social institutions and social interaction, in which legal norms and ideas come to dominate other sources of ethical and conceptual orientation. We will also examine his analysis of the public sphere, the importance of rational public discourse, and the role which law can play in mediating the relationship between system and lifeworld, rather than merely facilitating the colonization of the lifeworld through juridification.

Reading
Bo Carlsson, ‘Jurgen Habermas and the sociology of law’ B&T Chapter 4.

Discussion questions
➢ Explain Habermas’s distinction between the ‘system’ and the ‘lifeworld’. Give examples.
➢ Do you think Habermas sees legal institutions as the basis of the increasing juridification of social life, or as the basis of a form of deliberative democracy which sustains the lifeworld? Or both?
➢ Outline the main elements of a Habermasian approach to pornography.
➢ Is Habermas’s approach to law essentially an argument for formal justice, in preference to the pursuit of substantive justice?

Additional Reading
—, ‘The boundaries of abortion law: Systems theory from Parsons to Luhmann and Habermas’ (1998) 76 (3) Social Forces 775.
Jürgen Habermas, ‘Law and Morality’ in S. M. McMurrin (ed.) The Tanner Lectures on Human Values (Vol.8) (Salt Lake City: University of Utah Press, 1988)
Week 4 - Closure and openness in the legal system: Niklas Luhmann

Niklas Luhmann’s work has also become a central reference point for many social scientific analyses of the legal system. This week we will begin by examining his approach to the question of law’s closure in relation to the rest of society. He addresses the idea that law might possess greater or lesser degrees of autonomy or closure in relation to the extra-legal world by focusing on the character of law as a system of communication. He sees law as an “autopoietic” or self-reproducing system of meaning and communication rather than as a set of institutional forms, structures or practices, so we will explore exactly how this works and attempt to apply the analysis to particular case studies.

Reading

Alex Ziegert, ‘The thick description of law: an introduction to Niklas Luhmann’s theory’, B&T Chapter 3.


Discussion questions

- What does Luhmann mean by approaching law as an ‘autopoietic system’?
- Explain the way in which Luhmann sees the legal system as both ‘operationally closed’ and ‘cognitively open’. Can you think of counter-examples, such as when the legal system is not operationally closed at all?
- In his systems-theoretical approach to society as a whole, do you think that Luhmann accords a special place to law, and how would you explain what is distinctive about it?
- How does ‘structural coupling’ work, what is the relationship between law and politics, law and the economy, law and civil society?
- Do you think Luhmann’s approach is too abstract? What place does it give to human action?

Additional Reading

Neil Andrews, ‘The inherited ‘peculiarities of the English’: exploring the culture of the common law statements of directors’ duties with Luhmann and Bourdieu’ in M. Andenas and D.


—, ‘Company interest: the public interest of the enterprise "in itself"’ in R. Rogowski and T.
Week 5 - The force of the legal field: Pierre Bourdieu

The French sociologist Pierre Bourdieu works with a completely different vocabulary and conceptual apparatus which produces a distinctive perspective on legal institutions and practice. Rather than dividing society into relatively autonomous ‘systems’ and ‘sub-systems’, he sees social life as made up of interdependent and competing **fields** comprising of a variety of ‘players’ or ‘actors’ pursuing their own particular strategies, drawing on differing degrees and types of ‘capital’, all of which interact with each other in relatively volatile ways. This week we will examine the way in which Bourdieu places more emphasis on the **practices** of legal actors and their material and institutional constitution, which draws our attention to different aspects of law, and we will discuss some examples of how current developments in international law can be analysed from this perspective.

**Reading**


**Discussion questions**

- What is Bourdieu referring to when he speaks of ‘fields’?
- How would you explain what the ‘field of law’ is, and how does it relate to other social fields?
- What does the concept of ‘legal habitus’ refer to?
- Take one recent major legal development and explain how it would be understood differently if approached in terms of Bourdieu’s strategic analysis.

**Additional Reading**


Bourdieu’s work draws our attention to law as a realm of symbolic contestation and the importance of language in constituting its power relations, and it is useful to elaborate on this theme by examining an older set of traditions in social theory, symbolic interactionism and ethnomethodology, to see how they have been applying to legal practices and institutions. This week we will discuss both these strands of social theory, the kinds of research into legal practice they have generated, as well as focusing on the application of these perspectives in two case studies: a prominent rape trial and the work of judges.

**Week 6 - The power of language: ethnomethodology & symbolic interactionism**

**Reading**

Max Travers, ‘Symbolic interactionism and law’, B&T Chapter 11.


**Discussion questions**

- What do the approaches adopted in ethnomethodology and symbolic interactionism tell you about the operation of power in legal settings?
- Which aspects of legal institutions and practices can be explained more effectively than other theoretical perspectives if we focus more directly on their language and symbolic dimensions?
- How would it be possible to reconcile a sensitivity to the linguistic and symbolic aspects of law with a more formalistic a ‘black letter’ approach?

**Additional Reading**


Week 7 - Processes of civilization and decivilization: Norbert Elias

Another body of social theory which would usefully inform a theoretical analysis of the current state of law is the work of the German sociologist Norbert Elias on state formation and its relationship to the structuring of subjectivity, and on what he referred to as processes of civilization and decivilization. Many of the political, social and economic concerns seen as amenable to a particularly legal ‘solution’ relate to the dominant concepts of how human beings ought to behave, what the principles governing interactions between human individuals and institutions are, and these are in turn related to our understanding and experience of what it means to be ‘civilized’, with the concept of ‘civilization’ being a reference point for much legal discourse. This week we will look at what Elias had to say about civilization and decivilization, how his analysis can inform our understanding of law, as well as some examples of the application of his analysis to the study of crime and crime control.

**Reading**


Robert van Krieken, ‘Governance, law and civilisation’ in S. Kenny, R. van Krieken, J. Loza and M. Muetzelfeldt (eds), *Civilising the State: Civil Society, Policy and State Transformation* (Geelong: Centre for Citizenship & Human Rights, Deakin University, 2000) 239.

**Discussion questions**

- How does Elias’s approach to the concept ‘civilization’ differ from the everyday understanding of that word?
- In what senses can we be said to have undergone a process of civilization over the centuries? What are the counterarguments to this idea?
- In the Australian *Mabo* judgement on native title, it was said that it would be contrary to the principles of any civilized society to refuse to recognize some form of native title. Do you agree, and why? Can you explain why this was said in 1991 and not in 1941?
- Are civilization and barbarism necessarily incompatible with each other, and what role does law play in the interplay between the two?

**Additional Reading**


Linklater, Andrew, ‘Norbert Elias, the ‘Civilizing Process’ and the sociology of international relations’ (2004) 41 International Politics 3.

Week 8 – Reading week

Week 9 - Capitalism, democracy & the rule of law: the Frankfurt School

Habermas’s work was preceded by two earlier Frankfurt School theorists, Franz L. Neumann and Otto Kirchheimer, whose analysis of the Weimar Republic and the emergence of Nazism in Germany have important implications for the critical analysis of liberalism and capitalism. This week we will look at another approach to social which draws on Marxism, but focuses more
directly on the events of the 20th century which have so decisively shaped the world we live in today, engaging with questions more familiar to legal theorists, including the concepts of the rule of law and democracy. We will discuss Neumann and Kirchheimer’s more positive assessment of institutions of liberal democracy, such as the rule of law, despite the problems characterizing their operation under capitalism, and the connections between their analysis of Germany in the 1930s and our understanding of the current dynamics of globalization.

Reading

Discussion questions
➢ Do you see a ‘strong state’ and an effective ‘rule of law’ as antithetical to democracy and individual liberty, or as essential to them?
➢ From the perspective of Neumann & Kirchheimer, what is the significance of the observation that the operation of the legal system is generally indeterminate?
➢ Is competitive monopoly capitalism rendered compatible with democracy through legal institutions and mechanisms, such as a constitution, separation of powers, corporate regulation, etc.?
➢ What do Kirchheimer and Neumann tell us about the social foundations of the rule of law?
➢ What went wrong with the Weimar Republic?

Additional Reading

Week 10 – Capitalism: Karl Marx
The work of theorists like Habermas, Neumann and Kirchheimer, and many others, is rooted in that of Karl Marx and his critique of the underlying mechanisms of capitalist political economies. This week we will examine Marx's analysis of the connections between the commodity form, money and the accumulation of capital on the one hand, and the emergence of modern conceptions of rights, law and the state on the other. We'll address questions such as the (im)possibility of ‘freedom of contract’ within fundamentally unequal economic relations, the relationship between the state and capital accumulation, and the possibility of developing a more differentiated Marxist approach to law which makes distinctions between its various component parts: corporations, constitutional, family, labour, property, etc. We will also discuss a critical debate dealing with how the Marxist approach to law was operationalised under communism, and what that example means for our understanding of the rule of law.

Reading

Discussion questions
- What is Marx’s view of the relationship between capitalist capital accumulation and the rule of law under liberal democracy?
- Can one have freedom of contract between rich entrepreneurs and workers with nothing to sell but their labour power?
- How would Marx approach more recent developments in contract law?
- What would a form of the ‘rule of law’ which was consistent with Marx’s analysis of capitalism look like?

Additional Reading
—, ‘Law, State and Class Struggle’ Explorations in Law and Society: Toward a Constitutive Theory of
Max Weber devoted much detailed attention to a sociological analysis of law, not least because he saw the expansion of law as a distinct social and political realm as a core element of a specifically ‘modern’ society. This week we will examine Weber’s analysis of the emergence of formal, ‘legal’ rationality and bureaucracy as an underlying principle of social and political organisation, the effects this has on the fabric of social relations, his account of differing forms of ‘authority’, and the implications of his analysis for more contemporary concerns with the relationship between individual freedom and increasingly globalized forms of interdependency and governance. The case study we will look at concerns the formalization of human rights in the Canadian Charter of Rights and Freedoms, and the contradictions in inherent in attempting to find legally rational solutions to problems inherently bound up with non-legal, political questions concerning values, norms and power.

**Reading**


**Discussion questions**

- Explain Weber’s distinctions between traditional, charismatic and rational-legal authority; does it make sense of how contemporary Australian political life operates?
- Can one use Weber’s analysis of the ‘iron cage of modernity’, the fundamental contradiction between the efficiency and power of formal rationality and its evacuation
of content and meaning, to improve our understanding of contemporary socio-legal questions? (E.g., the tension between formal and substantive justice)

- What is the relationship between Weber’s and Habermas’s approaches to law?
- Weber argued that legal rules, institutions and practices operate to legitimate the exercise of political power (authority and domination); to what extent do you think this explains the operation of legal systems today, and what distinctions should we make between the application of the argument to different jurisdictions (e.g., Australia and China)?

### Additional Reading


Week 12 - Moral community: Emile Durkheim

It is arguable that all of the themes found in social theoretical analyses of law relate in one way or another to the core question posed by Durkheim: how do modern societies retain social and moral coherence within the ever-growing multiplicity of cultural and normative positions generated by ever-increasing social, economic and political differentiation, and what is the specific role of law in addressing this problem? This week we will examine Durkheim’s own approach to this question, his account of the increasing division of labour, the transition from mechanical to organic solidarity together with developments in the associated forms of sanction and punishment, the relationship between internalised self-discipline and externally imposed social regulation, as well as the symbolic dimensions of legal processes and their role in social order.

Reading


Discussion questions

➢ How does Durkheim think social order is maintained in the face of divergent cultural and ethical orientations?
➢ What symbolic functions does the punishment of crime have? Would you agree that crime (and its punishment) can be seen as part of the normal functioning of society, rather than as in indication of its breakdown?
➢ Outline Durkheim’s understanding of the main developmental trajectory of modern law and society, and explain the extent to which this perception of the history of legal institutions might be applicable to some contemporary socio-legal developments.
➢ Do you agree that the forms taken by legal institutions and ideas are a kind of ‘index’ to the character of the society within which they are located? Can you think of current examples which would usefully illustrate this argument?

Additional Reading

of the Sociology of Law 407.

B. Carlsson and Hoff, D., ‘Dealing with insolvency and indebted individuals in respect to law and morality’ (2000) 9 (2) Social & Legal Studies 293.


Roger Cotterrell, ‘Durkheim on legal development and social solidarity’ (1977) 4 British Journal of Law & Society 266.


*Steven Lukes and Scull, Andrew, Durkheim and the Law.


Short Loan


Reza Banakar and Max Travers (eds) An Introduction to Law and Social Theory (Oxford: Hart, 2002).


Steven Lukes and Scull, Andrew, Durkheim and the Law.


ASSESSMENT

General philosophies of assessment practice
1. The School favours 'deep learning' over 'shallow learning'. In other words, we are most interested in evidence that students have made conceptual developments in their ways of understanding and interpreting the world.
2. Students are encouraged to explore areas of particular interest to themselves, and will be rewarded for initiative and ingenuity in discovering relevant material.
3. An idea that cannot be expressed clearly probably has not been understood clearly. We therefore value evidence of logical, coherent thought, argument and expression in essays.
4. While recognising that the political and ethical values of students vary widely, the School does not reward or condone unreasoned polemic or racism or sexism.

Marking criteria
The following criteria will be used in assessing your written work
1. Content
   • extent of reading
   • accuracy of knowledge
   • breadth and depth of knowledge
   • relevance of information
   • sufficiency of evidence and documentation

2. Understanding
   • understanding of problem or project
   • judgement of significance of material
   • awareness/understanding of different arguments in reading
   • recognition of implications of evidence
   • ability to think critically
   • grasp of relevant theory
   • understanding of ethics and values relevant to reading and subject matter

3. Independence of thought
   • judgement and initiative in reading and research
   • originality in use and interpretation of evidence
   • development of argument
   • independence in use of concepts and language

4. Writing style
   • correctness of grammar and scholarly documentation
   • organisation and presentation of material
   • clarity of writing style
   • originality and creativity of writing style

Guide to interpretation of grades
This guide indicates broadly the qualitative judgements implied by the various grades which may be awarded.

<p>| A+, A, A- | Excellent. A deep and systematic engagement with the assessment task, with consistently impressive demonstration of a comprehensive mastery of the subject |</p>
<table>
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<th>Grade</th>
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| 4.2, 4, 3.8 | matter, reflecting;  
76.67, 73.33, 70 | - a deep and broad knowledge and critical insight as well as extensive reading;  
- a critical and comprehensive appreciation of the relevant literature or theoretical, technical or professional framework;  
- an exceptional ability to organise, analyse and present arguments fluently and lucidly with a high level of critical analysis, amply supported by evidence, citation or quotation;  
- a highly-developed capacity for original, creative and logical thinking. |
| B+, B, B- | Good. A substantial engagement with the assessment task, demonstrating  
3.6, 3.4, 3.2 | - a thorough familiarity with the relevant literature or theoretical, technical or professional framework;  
- well-developed capacity to analyse issues, organise material, present arguments clearly and cogently well supported by evidence, citation or quotation;  
- some original insights and capacity for creative and logical thinking. |
| C+, C, C- | Satisfactory. An acceptable level of intellectual engagement with the assessment task showing  
3, 2.8, 2.6 | - some familiarity with the relevant literature or theoretical, technical or professional framework;  
- mostly statements of ideas, with limited development of argument;  
- limited use of evidence, citation or quotation;  
- limited critical awareness displayed;  
- limited evidence of capacity for original and logical thinking. |
| D+, D | Acceptable. The minimum acceptable level of intellectual engagement with the assessment task, with  
2.4, 2.2 | - the minimum acceptable appreciation of the relevant literature or theoretical, technical or professional framework;  
- ideas largely expressed as statements, with little or no developed or structured argument;  
- minimum acceptable use of evidence, citation or quotation;  
- little or no analysis or critical awareness displayed or is only partially successful;  
- little or no demonstrated capacity for original and logical thinking. |
| E | Fail – Marginal, may be compensated. A factually sound answer with a partially successful, but not entirely acceptable, attempt to  
1.6 | - integrate factual knowledge into a broader literature or theoretical, technical or professional framework;  
- develop arguments;  
- support ideas or arguments with evidence, citation or quotation. |
| F | Fail – Unacceptable, cannot be compensated. An unacceptable level of intellectual engagement with the assessment task, with  
1.0 | - no appreciation of the relevant literature or theoretical, technical or professional framework;  
- no developed or structured argument; |
- no use of evidence, citation or quotation;
- no analysis or critical awareness displayed or is only partially successful;
- no demonstrated capacity for original and logical thinking.

| G 0.4 0.02 | Fail - Unacceptable, cannot be compensated. No intellectual engagement with the assessment task. |