

## Exception? What exception? Foucault's state of convention

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### Abstract

The notion of the 'state of exception' (i.e. the sovereign decision to suspend some or all of the suite of rights, freedoms and obligations associated with the social contract) understands that such rights and obligations normally exist and function as protections. Giorgio Agamben's work figures the contract suite's institutionalised presence in terms of this conceptualisation, and then contemplates a permanent state of exception. However, in Foucault's work on 'governmentality', the contract suite functions as a conceptual veneer, in the service of the state's self-preservation rather than as protection for citizens. This perspective has implications for the usefulness of the notion of the exception as a way of understanding modern political obligation and authority. It is in this context that anti-foundationalist synergies between Foucault, Hume and others will be considered, particularly with regard to the role of convention in a governmentalist understanding of the relation between citizens and the state.

During the 1970s, Foucault's analysis of power was increasingly articulated in terms of what he called 'governmentality'. From this perspective, Foucault argues that, rather than people's allegiance to the state being explainable through reference to the founding philosophical principles of sovereignty and its suite of accompanying concepts (i.e. liberty, the social contract and rights), it is explainable through a study of the way in which populations are looked after, looked over, directed and shaped in the interests of the state's own self-legitimation, self-preservation and self-perpetuation. 'Governmentality', though, describes more than an alternative to the 'contract suite'. It is a critique of the incongruous persistence of the political theory of sovereignty.

The standard characterisation of modern political sovereignty begins with Hobbes. In *Leviathan* (1979), Hobbes expressed the idea of a covenant under which subjects agree with one another to obey the sovereign so that they can, in return, enjoy the sovereign's protection. Later, John Locke described his own version of the contract (1887, pp. 241–246), which was somewhat less authoritarian because it permitted the overthrow of a tyrant (pp. 297–298). Others elaborate more or less similar understandings of the social contract as the device that establishes the right and law of political society. From this idea of sovereignty and its foundations in contract theory flow the familiar accompanying concepts of liberty and rights.

On the other hand, according to the 'governmentalist' critique, modern political sovereignty and the contract suite operates not to guarantee the protections of liberty and rights, but to hide what is actually going on with power. For Foucault, power is not simply derived from and expressed by the sovereign; it flows in all directions and a whole population participates in wielding it to the extent that 'a human being turns him- or herself into a subject' (1982, p. 327). Foucault argues that modern political theory is stuck in the past – a past in which the theory was a fitting description of the ways in which power was exercised – when there were actual sovereigns who could wield the authority of a decision over life and death (1981, pp. 135–145). But things changed – from a sovereign monarch's exercise of power over land, labour, goods and wealth – to the dispersed and discontinuous forms of disciplinary power, the power 'over bodies and what they do' (Foucault 2004, pp. 35–36). Despite this change, the theory of sovereignty persists as an incongruous overlay. So Foucault argues that '[i]n thought and political analysis, we still have not cut off the head of the king' (1981, pp. 88–89).

In this paper, I will discuss Foucault's claim in relation to Giorgio Agamben's discussion of the state of exception (defined by Schmitt as the sovereign exercise of the power of a decision that is 'not codified in the existing legal order' (Schmitt 1985, p. 6), and his figuring of *Homo sacer*, or 'bare life'. Like Foucault, Agamben examines the modern theory of sovereignty (partly) by dredging through texts from the Middle Ages. Agamben's purpose though is to reveal the juridical roots of the modern horrors that, he argues, occur at the intersection of political theory and biological life. In *Homo sacer* (1998), Agamben directly addresses Foucault's work, recognising its insights into the realm of biopolitics. However, Agamben also thinks that Foucault's death cheated us of the further development of this study (1998, p. 4). In the absence of this development, Agamben identifies a gap between what he characterises as Foucault's *parallel* studies of political techniques, or governmentality, and the technologies of the self (p. 5). Agamben asks 'where, in the body of power, is the zone of indistinction (or at least, the point of intersection) at which techniques of individualization and totalizing procedures converge?' (p. 6).

Agamben sees a gap. Foucault sees the theory of sovereignty and the contract suite as incongruous with the disciplinary power of modern politics. Agamben assumes (at least at the level of description) the legitimacy of political right (*droit* or law) and the contract suite and interprets incongruousness as the zone of indistinction, as the state of exception that ultimately defines *Homo sacer*.

These notions – *Homo sacer*, 'bare life' and the state of exception – are Agamben's 'gap filler'. Of this, though, a question needs to be asked: Is there actually a gap? There are at least a couple of aspects that need to be addressed in attempting to answer this question. One is quite complex and has to do with an individual's dual identity as citizen and 'people'; as free individual and obedient subject or slave. (This is discussed by Althusser (1972) in terms of the 'discrepancies' that emerge out of Rousseau's theorisation of the contract.) The other is to briefly describe the ideological appropriation of social conventions (or norms) in the name of the contract. This works to support Foucault's characterisation of 'governmentality', and shows how the exception is, rather, unexceptional, and not a gap at all. If this is so, Foucault's understanding of modern political power is more apt and the concepts of 'bare life' and the state of exception are more useful as a way of expanding our understanding of governmentality than as a way of problematising modern political sovereignty. Given the

constraints of space, this paper will address only the second aspect of this question of ‘the gap’.

So, the rest of this paper will focus on conventions – or, in Foucault’s language, norms – in relation to political allegiance and how the notion of conventions supports a ‘governmentalist’ perspective. This is not to reject the figure of homo sacer but I think that, given Agamben’s strong focus on a Schmittian sovereign decision in the state of exception, his work, among other things, exemplifies Foucault’s claim that we have not yet cut off the king’s head (Foucault 1981, p. 89).

In his 1975–76 lectures, *Society must be defended* (2004), Foucault claims that governmental, disciplinary power, cannot be described or justified in terms of the theory of sovereignty. It is radically heterogeneous and should logically have led to the disappearance of the great juridical edifice of the theory of sovereignty. In fact, the theory of sovereignty not only continued to exist as, if you like, an ideology of right; it also continued to organise the juridical codes that nineteenth-century Europe adopted after the Napoleonic codes. Why did sovereignty live on as an ideology and as the organising principle behind the great juridical codes (Foucault 2004, pp. 36–37)?

Foucault’s answers to this question relate to what could be described as the strategic necessities of the state (2004, p. 37). For this paper, though, the question is about *how* the theory of sovereignty and the contract suite has been theoretically transformed from a fitting explanation of allegiance to an ideology of it.

Early modern theorisations of the contract largely stick to the monarchical model. They are about securing the obedience of subjects to a sovereign. And during the seventeenth and eighteenth centuries the theory of the contract was fairly uncontroversial. What debate there was revolved around whether the contract was tacit or real. David Hume, though, had no time for this. He rejected the contract out of hand.

Hume described the contract, and consequently contractarian sovereignty, as simply ‘artificial contrivances for the convenience and advantage of society’ (1952, p. 227). People submit to a sovereign through the received conventions of the society in which they live (1952, pp. 235–

239; 1963, p. 306) and through force and coercion (Hume 1987). Conventions, for Hume, are simply the sets of social habits, customs, beliefs and mores (or norms) that emerge and develop within communities, simply because they happen – and have happened – to serve the long-term interests of that community. As a way of explaining political allegiance, conventions work just as well as that of the contract. However, conventions cannot be understood as constituting sovereign legitimacy or civil society. Such constitution can only be enacted by decree or force. Hume's plain speaking, however, did little to deter the theorists of political sovereignty.

Rousseau, for one, remained undeterred. This is despite his own recognition that the contract and the sovereign authority it constitutes could not hold without convention, 'morals, customs and ... belief' (Rousseau 2004, p. 62). In fact, in *The social contract* he describes conventions as the 'feature, unknown to our political theorists ... on which the success of all other laws depends' (p. 62). Rousseau's response is to introduce a civil religion through which the state can appropriate control over conventions so as to maintain the unity of the General Will. Althusser calls Rousseau's move the 'flight forward into ideology' (1972, pp. 155–157), under which social norms and customs become controlled, formed and directed by the state. Later, we see this ideologisation of convention taken to higher degrees of complexity by Hegel in the *Phenomenology of spirit* (1977) and the *Philosophy of right* (1952). In the ideal Hegelian state, the means of securing allegiance is through the ideological training of citizens (i.e. the sophisticated formation of custom and convention) via ethical institutions. Further light is shed on Hegel's state, its ethical institutions and their role in harnessing the allegiance of citizens by Althusser's theorisation of ideology as 'the imaginary relationship of individuals to their real conditions of existence' (Althusser 1969, p. 162).

And so we have come back to Foucault's claim that the theory of sovereignty continues to exist only as an 'ideology of right' (2004, p. 36) rather than as a fitting description of political allegiance. With regard to Agamben, Foucault does recognise the existence of the state of exception but sees it as unexceptional, as simply a norm within the policing grid of disciplinary power (Foucault 2004, pp. 27–28). As such, the state of exception becomes part of a body of evidence for the contention that 'governmentality' provides a more appropriate and useful understanding of political allegiance.

I think ‘governmentality’ is more useful because, as a critique, it opens a way for us to go further. Agamben’s work is about thinking about what figures – or forms of life – occupy the gaps and zones of indistinction within the modern system of states. Agamben’s problematisations though, still refer to the state. They *need* the state. The figures that emerge would not exist without theories of sovereignty (for example, the stateless denizen (Agamben 2000, pp. 23–24) is understood as an ‘other’ of the citizen and the state). On the other hand, ‘governmentality’ forces us to think beyond sovereignty and the contract suite, and beyond traditional citizenship and allegiance, to consider what else is possible of politics. And this to such an extent that, with both trepidation and excitement, we even have to consider the possibility of politics without the state, without rights, without liberty.

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## References

- Agamben, G 2000, *Means without end: notes on politics*, trans. V Binetti & C Casarino, University of Minnesota Press, Minneapolis.
- Agamben, G 1998, *Homo sacer: sovereign power and bare life*, trans. D Heller-Roazen, Stanford University Press, California.
- Althusser, L 1972, 'Rousseau: the social contract (the discrepancies)', in *Politics and history: Montesquieu, Rousseau, Hegel and Marx*, trans. B Brewster, NLB, London.
- Althusser, L 1969, 'Ideology and ideological state apparatuses (notes towards an investigation)', in *Lenin and philosophy and other essays*, trans. B Brewster, Monthly Review Press, New York.
- Foucault, M 2004, '*Society must be defended*': *lectures at the College de France, 1975–76*, trans. D Macey, Penguin Books, London.
- Foucault, M 1982, 'The subject and power', in *2001 power: the essential works of Foucault 1954–1984 volume III*, ed. JD Faubion, trans. R Hurley et al., Penguin Press, London.
- Foucault, M 1981, *The history of sexuality: volume I: an introduction*, trans. R Hurley, Penguin Books, Harmondsworth.
- Hegel, GWF 1977 [1807], *Phenomenology of spirit*, trans. AV Miller, Oxford University Press, London.
- Hegel, GWF 1952 [1821], *Philosophy of right*, trans. TM Knox, Oxford University Press, London.
- Hobbes, T 1979 [1651], *Leviathan*, Dent, London.
- Hume, D 1987 [1752], 'Of the original contract' in *Essays moral, political and literary*, Liberty Fund, Indianapolis.
- Hume, D 1963 [posthumous edition, 1777], *Enquiries concerning the human understanding and concerning the principles of morals*, Oxford University Press, London.
- Hume, D 1952 [1740], *A treatise on human nature: volume II*, Dent, London.
- Locke, J 1887 [1690], *Two treatises on civil government*, George Routledge & Sons, London.
- Rousseau, J-J 2004 [1762], *The social contract*, trans. M Cranston, Penguin, London.
- Schmitt, C 1985 [1922], *Political theology: four chapters on the concept of sovereignty*, trans. G Schwab, MIT Press, Cambridge, Massachusetts.