QUESTIONING THE ONENESS OF PHILOSOPHY

I. PHILOSOPHY AND THE ARTS
II. PHILOSOPHY, GENDER AND SEXUAL DIFFERENCE

4th Workshop of the Project
Experimentation and Dissidence

Editors
José Miranda Justo
Paulo Alexandre Lima
Fernando M. F. Silva

VNIVERSITAS
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BIOCRIMINALITY
AND THE BORDERS OF PUBLIC ORDER[1]

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Abstract

In this presentation, I aim at exploring the notion of *public order* from a biopolitical point of view. It draws on the analysis of the *state of exception* by Giorgio Agamben, through which he studied the tendency of Western democracies to re-produce forms of sovereign power that bypass parliamentary democratic control. Departing from his analysis, I will argue that *public order* is one of the main forms through which these forms of sovereign power disseminate in a microphysical form, in almost every instance of the judicial system. Moreover, in a similar vein that the state of exception represents, for Agamben, a crucial dimension of the relation between the order of life and the order of the law, public order represents, in my view, a fundamental dispositive through which biopower regulates the social life of gender, sexuality, reproduction and kinship.

Keywords
Public Order, Homonationalism, Biopolitics, Monogamy, Friendship.

Introduction

Since its irruption in European civil codes during the XIX century, the notion of public became an essential part of state biopolitics of reproduction, gender and kinship. Its common uses in the hands of governments, but also jurors and other public officers entail the exercise of specific forms of

sovereign power, often surpassing the limits of any meaningful separation of powers in Western liberal democracies. In this sense, while partly overlapping with the logics of exceptionality explored by Giorgio Agamben (2005), public order became the legal *dispositif* (Foucault, 1975, 133) through which sovereign power and the logics of exceptionality disseminate in a microphysical form, in almost every instance of the administrative and judicial structure of the nation state.

However, where refugee and other camps stand as paradigmatic heterotopias for the state of exception, the genealogy of public order bounds this *dispositif* to the liberal institution of civil marriage. The order of public order is thus, in the first place, that of the monogamous, heterosexual, reproductive couple. This does not isolate, nonetheless, public order from the biopolitical definition of borders, margins, and constitutive outsides of the community or of the nation. On the contrary, the irruption of public order in modern law as a tool for the normalization of marriage served, from its inception, to put the performative power of the state at the service of defending the community from alien, decaying, immoral relational practices. The biopolitics of public order are, therefore, closely bound to the history of Western racism and to the anti-migratory policies of the fortress Europe, to which they belong as one of its most vague and inapprehensible, but still ubiquitous and naturalized, constitutive elements.

Through the biopolitics of public order, queer reproductive projects, non-monogamous migrants, transgender bodies, and other "biocriminals" are subjected to moral and legal scrutiny. However, in the same way migratory fluxes may be subjected to state and also transnational forms of neglect and violence, but not stopped, so are dissident genders and relational practices exposed to a differential distribution of vulnerability (Butler & Athanasiou, 2013, 2) through institutional hostility and plain criminalization, but not erased form in the cultural and political landscape. Usually, we are more or less familiarized with the geopolitical causes leading to the succession of the misleadingly called migratory "crisis." In a similar way, we may ask, what is this impulse rendering it impossible, at the end, for state institutions to contain the flux of emerging forms of relationality? What is the topographical structure of that encounter or, rather, what kind of cartographies emerge from it? Moreover, how are we to conceive this failure of the

state in containing queer, racialized, biocriminal bodies in the strict margins of recognition the state offers? Should we "open the borders" of liberal state institutions regarding state control over kinship, gender and reproduction, or should we, on the contrary, refuse altogether the terms of recognition offered by the state? How can we best resist the order of public order?

In order to approach some of the questions raised by the encounter between biopower and resistance, or even the clash between assimilationist and radical sexual politics, it may turn useful to explore the genealogical relations between the biopolitics of public order and the racist, exclusionary construction of Western nation states. In a similar manner to the way Jasbir Puar did in Terrorist Assemblages (Puar, 2007), I will also depart from Agamben's criticism of the logics of exceptionalism, with the aim of exposing some of its parallelisms, and differences, with the biopolitics of public order as such. Then, I will also address the relation of contiguity or, rather, of historical overlapping, between the biopolitics of public order and the homonationalist frame. Finally, and in order to avoid the depiction of the resulting biopolitical scenario as equivalent to that of the penal colony (Foucault, 1975) or the totalitarian camp (Agamben, 2005) I will also explore the counter-biopolitical role played by the force of disestablishment (Duggan, 1994) and the works of that form of biocriminality that Michel Foucault referred to as friendship.

Abyssal cartographies

At the end of one of the most influent discussions of biopower Foucault offered in his lectures at the College de France, he introduced a compelling analysis of the relation between biopolitics and racism. If biopower is a governmental rationality substituting the sovereign right to kill by state management of life, of populations considered primarily as an assemble of living beings, then how do modern nation states justify, Foucault asks, their "need to kill people, to kill populations, and to kill civilizations?" (Foucault, 2003, 257) For Foucault, this *necropolitical* side of biopower, as Mbembe would call it, would not reside in a different or a complementary governmental rationality. In his view, the category that makes it possible for the economy of biopower to exercise the right to kill in its own terms is no other than *race*. Racism, Foucault argues, is the strategy through which the other is depicted

as a threat to the wellbeing of the group, the health of the population, or even the survival of the species. Thanks to racism, therefore, the state performs the killing function in the name of life itself. Moreover, according to Foucault, the logics of racism extend its rule, not only over racialized others, but also over those who are depicted as *biocriminals* of different kinds, on the basis of posing a similar threat to the moral strength of the community.

There is a topological problem at play in this biopolitical account of the right to kill. The biocriminal outcast, whatever form it adopts, does not represent an absolute, exterior form of otherness. Because of the eugenic logics at play, the target of racism has an ambivalent relation of belonging to the population whose wellbeing justifies its killing or its political *vanishing*. Certainly, the racialized other or the biocriminal Foucault was thinking about is not a full member or a legitimate citizen of any given population. Its biocriminality serves to define, rather, the margins of the population. When biopower, in this sense, takes hold of that mark of sovereign power that is the right to kill, literal or otherwise, it reveals itself as the power to decide who is to become, as it were, the mark of the margin, the living or, rather, the dying border of the population itself. Foucault's biocriminal, because of this topological operation of power, threatens a population by virtue of belonging and not belonging to it at the same time. In this sense, the biocriminal signals a similarly ambivalent topology to the one Agamben addressed in his influent treatment of the figure of the refugee as a "limit concept" (Agamben, 1998, 134), confusing the boundaries between exclusion and inclusion in that state of exception which is the refugee camp.

In genealogical terms, the biopolitics of public order emerges in close relation with this topological dimension, in relation to the definition of the inside, the outside and the margins of the nation. This is the case, at the very least, since public order was introduced in modern law as a way to discipline the institution of civil marriage, as it had been conceived during the French Revolution. The intimate relationship between monogamy and public order dates, also, from this time, but it has long roots in the rejection of polygamy by French political philosophers and jurists during the 18th century. Montesquieu, for example, depicted both Christian monogamy, for not allowing divorce, and Islamic polygamy, as a major biopolitical problem:

> Things are much altered since the Christians and Mohammedan religions divided the Roman world; these two religions have not been nearly so favorable to *the propagation of the species* as that of those masters of the world. (Montesquieu, 2014, 168, my emphasis).

It was under the influence of this tradition that the jurist Jean-Étienne-Marie Portalis wrote his Preliminary Address on the first draft of the Civil Code where the idea of "public order" was introduced for the first time, when he stated that "the legislator can, in the interests of public order establish such impediments [to marriage] as they deem appropriate" (Portalis, 2016, 17). Of course, illicit unions included polygamous ones, and Portalis himself considered polygamy to be "revolting."[2] The enforcement of the same *biopolitical* tradition Montesquieu belonged to is made evident when he remarks that "the publicity, the solemnity, of marriages may alone prevent those vague and illicit unions that are so unfavorable *to the propagation of the species*" (Portalis, 2016, 16).

As if to emulate the propagation of the species, the uses of public order propagated, in a chain of performative repetitions, from one civil code to another, way beyond the limits of Europe, from Latin America to Japan (Noriega, 2007; Novoa Monreal, 1976). Meanwhile, however, state regulation of monogamy continued delimiting a diffuse, imaginary boundary between Western countries and Arab world, even though polygamy is in fact a minority practice restricted to certain Islamic countries.

The impact over non-monogamous relational structures is obvious. The fact that, as some would say, "public order is monogamous in the Western world" (Noriega, 2007, 2) exposes polygamous and polyamorous people, but also multiparental families that may be neither,[3] to specific forms of vulnerability and state violence, from the denial of widow's pensions to plain deportation. As a result, the biopolitics of public order define a whole cartography by imposing a monogamous *relational performativity* (A. C. Santos, 2019) *within* the community while limiting its permeability to alien, abject and, ultimately, unintelligible relational practices coming from its outside.

[2] Indeed, his account of the benefits of raising children between "the two spouses" have little to envy to San Agustin's elegies to monogamous marriage.

[3] Brazil, for example, has recently recognized non-monogamous forms of kinship with no direct relation with polygamy nor polyamory.

In this sense, the biopolitics of public order delimit, as Catarina Martins has shown (2015), what Boaventura de Sousa Santos would call an abyssal line, that is, a division such that:

> "The other side of the line" vanishes as reality, becomes inexistent, and is indeed produced as nonexistent. Nonexistent means not existing in any relevant or comprehensible way of being. Whatever is produced as nonexistent is radically excluded because it lies beyond the realms of what the accepted conception of inclusion considers to be its other. (Sousa Santos, 2007, 45)

Sousa Santos signals precisely modern law as one of the most accomplished Western forms of abyssal thinking. According to him, distinctions between what is legal and what is not would be abyssal not only because of their dichotomic structure, but also due to the process of geographical territorialization of the law, which would have evolved in close relation to the history of colonialism. Therefore, even when these abyssal lines lack any fixed location, their relation with modern law would nonetheless delineate a whole postcolonial cartography.

Homonationalism and the biopolitics of friendship

Gradually, the protection of a restricted spectrum of gay and lesbian rights has become a part of the biopolitics of public order in many countries. Nowadays, some European countries, as Slovenia has recently done (Čeferin & Meznar, 2014), present the protection against certain forms of homophobia as an issue of public order in explicit terms, in what can be read as an intrinsic part of the emerging biopolitics that Jasbir Puar refers to as *homonationalism*. For her, the historical shift in the relations between the state and at least certain relational rights, including gay and lesbian (monogamous) marriages, would be still entrenched in the exclusionary, Western-centric, and ultimately, racist constitution of the nation state. That is why the homonationalist frame, for Puar, would demand for,

> A deep critique of lesbian and gay liberal rights discourses and how those rights discourses produce narratives of progress and modernity that continue to accord some populations access to citizenship – cultural

and legal – at the expense of the delimitation and expulsion of other populations. (Puar, 2013, 335)

According to Puar, Israel's strategies of pinkwashing, aimed at promoting an image of gay-friendliness in order to be perceived as progressive, modern and tolerant despite or even through the violation of the rights of the homophobic Palestinian people, would be a paradigmatic example. The works of nationalism would be equally present in Europe and the US, however, especially in the widespread discourses depicting Islamic refugees as a threat to the security of women or LGBT people. It could be assumed that homonationalism serves as a way of opening the borders to, at least, those who run away from homophobic or transphobic violence, institutional or otherwise. The treatment given in European countries to gay LGBT asylum seekers, however, prove that hypothesis wrong (European Union Agency for Fundamental Rights, 2017; Vine, 2014). Transgender migrants and asylum seekers, in particular, often find themselves trapped between biopolitical regimes clashing between them, leading to often unbearable situations in relation with legal gender and name recognition or access to hormonal treatments (Namer & Razum, 2018; Rojas & Aguirre, 2013; van der Pijl, Oude Breuil, Swetzer, Drymioti, & Goderie, 2018). The deportations of transgender migrants who happen to be, also, sex-workers (Vartabedian, 2014), make it evident that this emerging, homonationalist layer of the biopolitics of public order benefits only the mobility of very specific groups of queer people.

Despite its inner fragmentations[4] and its emerging forms, such as the homonationalist frame, the biopolitics of public order is a force of the *status quo*. While it is true that jurors and public officers invoke the powers of public order in often arbitrary ways, re-signifying and producing new meanings for this empty signifier, they do so only to allow for an effective microphysical distribution of sovereign power. The biopolitics of public order are, therefore, a micro-political, disseminating form of the established order, *acting upon a disseminating impulse of an opposite direction* by which individuals and, through them, populations, produce and inhabit new relational possibilities.

[4] Especially evident in relation with the regulation of the reproductive field.

Foucault provided, also, a very compelling account of this impulse for public disorder. For gay culture to become part of a radical or, at least, an interesting political project, he argued, it would need to turn into an impulse for creating new forms of relationships. In an interview for the gay magazine *Christopher Street*, he provided a quite specific example:

> Why shouldn't I adopt a friend who's ten years younger than I am? And even if he's ten years older? Rather than arguing that rights are fundamental and natural to the individual, we should try to imagine and create a new relational right that permits all possible types of relations to exist and not be prevented, blocked, or annulled by impoverished relational institutions. (Foucault, 1994, 158)

By suggesting to use adoption in a totally unprecedented way, one to which the institution was certainly not intended for, Foucault was not just defending the need for inventing new forms of relationality *apart* from the forms of institutional recognition provided by the state. In a way, he certainly was, but he was *also* thinking on how to turn these creative, relational alternatives into a force of institutional transformation. The cultural force that he had in mind was not a new layer, but, on the contrary, a counter-force for the biopolitics of public order, that is, for the way state biopolitics oppose all those "vague and illicit unions" referred by Portalis in his passionate defense of the *marriage* between marriage and public order. The name of the force Foucault was thinking about for opposing the rigidity of the institutions normalizing sexuality and, concomitantly, the racist, Eurocentric frame was no other than *friendship*.

Foucault's discussion of friendship in the above-mentioned interview, but also in others like Sex, Power, and the Politics of Identity (1994b) and, of course, Friendship as a Way of Life (1994), points to something similar and, at the same time, completely different from an anarchist project of producing new forms relationality beyond the normalizing powers of the state. Friendship would be, rather, a way of subverting its normalizing powers, exciting our political imagination toward a radical transformation of liberal state institutions. Demands for the recognition of non-monogamous kinship relationships, queer and third-party assisted reproductive projects or the demands for gender self-determination, would belong, in my view, to

this sphere of relational creativity. In this sense, Foucault's "friendship" is just another name for *queerness*, very close to the way Lisa Duggan uses this word in "Queering the state":

> This is not the historical moment when we want to set up a negative relation to state power or slip into limiting forms of libertarianism. The arguments would need to be carefully framed to emphasize that state institutions must be even-handed in the arena of sexuality, not that sexuality should be removed from state action completely. Activists might also make the crucial distinction between state institutions (which must, in some sense, be neutral) and "the public" arena, where explicit advocacy is not only allowable but desirable. (Duggan, 1994, 11)

We would possibly still need to slip, perhaps, into at least some non-limiting forms of libertarianism. The demand of the intersex and transgender movements for the end of the legal life of gender or, at the very least, for the disappearance of legal gender marks from identity documents, would fit quite nicely in that category. In any case, both these claims and what Duggan calls "disestablishment" uses of liberal rhetoric would be ways of resisting the homonationalist layer of the biopolitics of public order. At least if we read the works of friendship as a counter-biopolitical force or, that is, if we understand friendship as an impulse for *public disorder*.

To include friendship, in the latter sense, in radical sexual politics would entail both resisting and taking distance from the logics of exceptionalism and the set of liberal institutions of the state, along with the impoverishing frames of cultural intelligibility they help to consolidate. However, such a counter-biopolitics would also need to consider, in order to be able to shake the moral, legal, political, economic and even religious principles of the nation that courts and jurists often refer to as "public order," to consider all of the above as targets of political transformation.

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