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The Conceptual Question among Sovereignty, Biopolitics and Law: a Sensible Point between Foucault and Agamben

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The conceptual question among sovereignty, biopolitics and law: a sensible point between Foucault and Agamben

Abstract: The concept of biopolitics has its origin on the Michel Foucault works developped since 1975 to 1979. In this period, the author introduced the foundations for a new approach about the modern government, based in both crescent enpowerment on individuals and the control of populations. The theme has attracted the attentions of some critical political studies, with many practical uses. However, I believe there is not enough consolidation about biopolitics as a concept and a comprehensive theory of the new political mechanisms. This uncertainness is more evident when the very role of Law is questioned in a biopolitical model, due to the archaic nature that Foucault gives to it. So the aim of the paper is to identify the theorical comprehension of biopolitics in a contemporary author as Giorgio Agamben to demonstrate his oppositions and proximities from the original idea of Michel Foucault. I propose that Agamben has the same difficulties of Foucault to deal with legal theory and Law inside biopolitics. Nevertheless, after a critical review on the works of this two authors, my conclusion is that a settlement of the concepts of Law and biopolitics depends of the surpassing of the Foucaldian version of Law as sovereignity, a clear delimitation of a common core between the authors and their differences and the research and affirmation of the concept of Law in Agamben, more well-refined than Foucault's one.
Keywords: Michel Foucault, Giorgio Agamben, biopolitics, Law.

I. Introduction

Throughout the last decade, it was noticeable the development of literature about the biopolitics problem, in many knowledge fields. Particularly after September 11th 2001 events, from which the fight against terrorism has opened up a new dimension of international politics – a possible "world civil war" – and the materialization of human rights, there has been a perception that the classic categories of political theory would not be more effective to explain the new reality that was about to come.

When Michel Foucault suggested the birth of a biopolitics as a kind of bigger concept to comprise the production of new control dispositives and investment in individuals, he had in mind his research about the birth of a disciplinary society in the XVIII century, the modern ways of government or of governmentality as a "reason of state" (*raison d'État*) and, in his

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last courses in the *Collège de France* in the 70's, the neoliberalism as a political model of management of life. To sum up, the gradual enhancement of countersovereign logic of "to let die and make it live", announced in *The Will to Know*.

Among many uses of biopolitics as an unfinished theoretical construction of Foucault, we highlight Roberto Esposito, Antonio Negri, Mauricio Lazzarato and other authors[2]. None of them, though, is so close of the Foucaldian way of thinking like the Italian Giorgio Agamben, especially if we consider his production cycle so called *Homo Sacer*, from 1995 to 2008. Agamben mentions, in a specific way, pieces of Foucault's works and takes advantage of gaps left by the latter to build innovative reflections about politics, the ways of resistance and, also, about the law.

Making reference to the theoretical development that Agamben makes of the ideas left behind by Foucault about the biopolitics paradigm, it is important to highlight this last topic: the law. If, in previous works, I've tried to demonstrate that Foucault sees law in the modern times as a mask or a residue, that will simply be put on by better refined ways of control that came from the biopolitics mechanisms as opposed to sovereignty, in Agamben this conclusion would not be possible.

Now we have an author that has been presumably inserted, since the mid 90's, in a large range debate about assumptions and effects of biopolitics, but that emphasizes the law as a field of study, and he also makes remarkable mentions about noble legal problems in *Homo Sacer: the sovereign power and the nude life* and *State of Exception*. I refer myself to the constituent power in opposition to constituted power, to the application of the legal norms, to the idea of "force without significance" of the law and, furthermore, to the Schmittian return about the nature of the exception in face of the law.

The question I try to answer in this paper, even in an initial version, is: How does Agamben sees the law in the biopolitics perspective in comparison to Foucault? If, in one way, I presume that there is a connection between the authors in relation to the theme, being Agamben almost as a developer of themes left open because of Foucault's premature death in 1984 (and, in a certain way, for his well-known route changes among problems), on the other side there is a radically different appreciation about the law, that is being treated as a real field of debate.

To reach this aim, I split the analysis of the theme in two parts.

[2] For a more efficient summary of the biopolitics concept, Ottavio Marzocca, Biopolitique, In: Renata Brandimarte *et al, Lexique de biopolitique: les pouvoirs sur la vie.* Toulouse: Érès, 43-50, 2009.

In the first moment, it seems to be important to resume a well-known relationship between the concepts of sovereignty and biopolitics in the works of both authors, being this an essential support point so that it is understood how both deal with the concept of law.

In this second moment, in which the law is the main problem, I choose to associate Foucault to the image of negation, and Agamben to the emphasis about this concept. The difference in their approaches seem to be evident to me, but a topic still deserves to be highlighted: Agamben would be the kind of jurist that enhances Foucault's legacy in this field or, on the other side, his excessive connection with legal problems from a Schmittian point of view would damage the comprehension of contemporary biopolitics? Still in the topic, I intend to read both Foucault's and Agamben's works and highlight two topics with a possible asymmetry, both which would reinforce the question asked beforehand.

II. Sovereignty, biopolitics and law in Foucault and Agamben

1. From the opposition to the relationship of the dispositives in Foucault

According to what has been said in the introduction of this paper, and within its previously explained limits, I intend to remember the traditional rivalry between the concepts of sovereignty and biopolitics in Foucault's works. By the way, this topic has not escaped from the observation of the literature connected to the theme, and its comprehension seems to be essential to understand the idea I defend in relation to the absence of consideration of the law as a relevant object in the Foucaldian thought.

In the course named *Society Must Be Defended*, given in 1976, Foucault presents an initial version and, we can say, a less refined one, about the space of sovereignty in the contemporary model of power/knowledge. The most important characteristic of this comprehension of sovereignty as a dispositive is its strong association to the medieval way of thinking and to a certain return of Roman Law, reiteration of what has been affirmed in the lectures of *Truth and juridical forms*[3]. After all, Foucault opposes what he calls a "legal-political theory of sovereignty", associated to the birth of the great administrative monarchies, to the discourse of discipline, always different and distant from the model of law as a sovereign will and attached to the calculus of power investments in relation to the industrial capitalism[4]. Although he states that both sovereignty and discipline are constitutive pieces of the current power dispositives, Foucault attaches himself to a primary distinction that made him adopt an opposition between them, generating questions of difficult – or even impossible,

[3] Michel Foucault, *A verdade e as formas jurídicas*. Rio de Janeiro: NAU, 2002, 58.
[4] Michel Foucault, *"Il faut défendre la societé"*. Paris: Seuil Gallimard, 1997, 32-35.

aphoretic – solution as the "new form of right", as announced in the 14th January 1976 lecture[5].

If we take both concepts as dispositives, in the Foucaldian-Deleuzian meaning of strategic arrangements of power levels and knowledge relationships, we can say that sovereignty, as well as its classic way of expression, which is the law, would be gradually replaced by another device of bigger adaptation and intensity, which is the discipline. While the first would imply in the growth of the importance of the law, according to Johanna Oksala, the second one, the disciplinary power in *Society must be defended*, would generate a regression of the law, being this a characteristic topic, and a very precarious one, in the works of Foucault up to that moment[6].

However, in a two-year period Foucault was able to refine his first hypothesis of relationship between sovereignty and discipline. Not by chance, this movement begun when he stopped to emphasize only the two concepts, but started to investigate with more attention the appearance of biopower and, as a consequence, of biopolitics, being the first understood as the growing investment of the devices in the domain of life and the second as a formation of a new governmentality, or the art of government of the others, from this base[7]. The main point of this new idea of the relationships between the devices is *Security, Territory, Population*, lecture given in 1978.

In the first class of this course, Foucault radically reverses his impression about the law. From something ancient, that intended to see almost expelled from Modernity like a medieval residue in the words of Hart and Wickham[8], the philosopher begins to integrate it to a set not only of two, but now three devices: sovereignty, discipline and security. About the last one, he states that the growth of the security mechanisms, which don't have anything new, and don't imply in the cancellation of the legal structures. On the contrary, it feeds itself from them, through a "true legal inflation"[9].

When he ruptures with the successive model and admit a set of devices that match themselves and are balanced in a biopower era ("there is not the legal age, the disciplinary age, the security age"[10]) Foucault admits a scenario of mutual reactivations, predominances inside the co-existence of the three devices mentioned. This shows not only a softening, but a

[5] Michel Foucault, *"Il faut défendre la societé"*. Paris: Seuil Gallimard, 1997, 35-36.
[6] Johanna Oksala, Violence and the Biopolitics of Modernity. *Foucault Studies* 10 (2010), 38.
[7] Maurizio Lazzarato, From biopower to biopolitics. *Pli – The Warwick Journal of Philosophy* 13 (2002), 112-114.
[8] Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law in Governance*. Chicago: Pluto Press, 1994, 56.
[9] Michel Foucault, *Sécurité, territoire, population*. Paris: Seuil, Gallimard, 2004, 9.
[10] Michel Foucault, *Sécurité, territoire, population*. Paris: Seuil, Gallimard, 2004, 10.

true suppression of the dual way of thinking of *Society Must Be Defended* and other works from the same period.

There is this effort in many moments. Foucault mentions the displaced role of the sovereign, which begins to exercise the power not only over the bodies and the territory, but over a notion of "means", that came from the security dispositive[11]. He divides, in a didactic manner, the basic characteristics of sovereignty as prohibition of disorder, of discipline as a ban of the non-permitted and of security as a fine regulation of the movements of the reality[12]. There is, still, an important mention to the increase and the transmutation of sovereignty. Here it follows a quotation:

I don't want to say that sovereignty have stopped to play its role from the moment when the art of government have started to become a political science. I would rather say that never the problem of the sovereignty was taken with such perception as in that moment when we dealt no more, as in the XVI or XVII centuries, to deduce some art of government from the sovereignty theories, but clearly presuming that there has been already some art of government and it was being developed, to see which legal and institutional form or which reason of law we could give to this sovereignty that characterizes a modern state[13]

Therefore, it seems evident to me that Foucault goes from an opposition between sovereignty and biopolitics, being this taken as a current and increasing way of government or the own governmentality announced in the 70's, to a much more refined and better elaborated point of view about the concepts involved. Biopolitics, currently, would be taken, in my point of view, as a dynamic interaction among sovereignty, discipline and security, although I still believe that the law is solemnly ignored as it is a creative field of thinking.

2. The Agambenian connection as an extension of biopolitics

Giorgio Agamben, in his turn, advances a lot in the relationship between sovereignty and biopolitics, even if we consider the review undertaken by Foucault in *Security, Territory, Population* as something already very relevant.

It's obvious to talk about the influence of Foucault over Agamben's thought, although it's worth to highlight the memory of Snoek and others from which the latter appears with

[11] Michel Foucault, *Sécurité, territoire, population*. Paris: Seuil, Gallimard, 2004, 24-25.
[12] Michel Foucault, *Sécurité, territoire, population*. Paris: Seuil, Gallimard, 2004, 47-48.
[13] Michel Foucault, *Sécurité, territoire, population*. Paris: Seuil, Gallimard, 2004, 109-110.

relevance in the cycle *Homo Sacer* from the first author[14], and that the degree and even the possibility of this dialogue aren't unanimous in the posterior literature[15].

In spite of mentioning this divergence, I believe that prevails the idea of a proximity or even filiation from Agamben to Foucault, and we can affirm that, as Leland de la Durantaye does, that the "*Homo Sacer*'s strength is inseparable from its weakness: the radicalization of Foucault's paradigmatic method"[16]. Another suggested possibility is to take Foucault as Agamben's methodological source, while Benjamin's readings and, mainly, Heidegger would give it a foundation of his way of thinking[17].

To Fuggle[18] e Bussolini[19] there is an evident connection between the Foucaldian and Agambenian concepts, although some problems of dissymmetry as well as doubts about the results of the combined reading of both authors as a sequence or even combination. However, the best possible demonstration to this connection is the text *What is an apparatus?*, in which Agamben argues with a big interest Foucault's methodological itinerary until he adopts the dispositives or apparatus explanation scheme[20] as his own. Anyway, the recognition of the Italian philosopher as an assumed Foucaldian, at least from the 90's on, is very clear.

Besides the method and the appropriation of the concepts, the Foucaldian reading made by Agamben reveals itself by the maintenance of the problem of the sovereignty facing biopolitics. Yet, Agamben's exit presumes something very different in relation to what he calls "hidden point of intersection between the legal institutional model and the power's biopolitical model"[21], what I interpret as a "blind point", left open by Foucault.

To Oksala, to whom I agree with, both Foucault and Agamben admit the inevitability of the biopower, not treating it as a consistent aberration of the mix of incompatible elements as life and politics (characteristic hypothesis of, *v.g*, Hannah Arendt). The question is to have Foucault focused on the origin of biopower and the enhancement of governamentability and of biopolitics from some moment of Modern times, between the XVI and XVIII centuries, while Agamben in *Homo Sacer* points out biopower as a kind of side effect of occidental

[14] Anke Snoek, Agamben's Foucault: An overview, *Foucault Studies* 10 (2010), 44.
[15] Anke Snoek, Agamben's Foucault: An overview, *Foucault Studies* 10 (2010) 47.
[16] Leland de la Durantaye, *Giorgio Agamben: a critical introduction*. Stanford: Stanford University Press, 2009, 226.
[17] Alex Murray, *Giorgio Agamben*. London: Routledge, 2010, 57.
[18] Sophie Fuggle, Excavating Government: Giorgio Agamben's Archaeological Dig, *Foucault Studies* 7 (2009), 97-98.
[19] Jeffrey Bussolini, What is a Dispositive?, *Foucault Studies* 10 (2010), 92-93.
[20] Giorgio Agamben, O que é um dispositivo?, In: *O que é o contemporâneo? e outros ensaios*. Chapecó: Argos, 2009, 27-35.
[21] Giorgio Agamben, *Homo Sacer: o poder soberano e a vida nua*. Belo Horizonte: UFMG, 2004, 14.

metaphysics. To him, therefore, the naked life mentioned in *Homo Sacer* would remain as a "hidden foundation of politics"[22], also identified as his genealogy or counter-history[23].

If biopower is an intrinsic reality to politics from the pressure between *bíos* and *zoé*, bringing nowadays the need of a permanent redefinition of space of life and the rule then obtained as an origin and foundation of the concept of sovereignty[24], the Angambenian problem ceases to be the one to establish any historical limit and delimit the eruption of one disciplinary or security investment; after all, the political conformation of the present moment would be seen as a consequence of the irreconcilable tension between sovereignty and biopolitics as aspects of biopower, as Ojakangas[25] suggests. By the way, the same author points out that Agamben studies the "demoniac combination" of modern state, which exercises "sovereign means to biopolitical endings"[26]. Anyway, the opposition between the two concepts is less believable, due to the idea that started in *Homo Sacer*: "the production of a biopolitical body is the original contribution of a sovereign power"[27].

So, I understand that resuming the couple sovereignty *versus* law in Agamben will not bring good results, because (and even here, supposing) the progressiveness between the authors, Foucault had abandoned this problem in "*Security, Territory, Population"*. It's better to take Agamben's attachment to the notion of sovereignty as data of his legal theory-based education in Schmittian models, as an emphasis to this aspect or some critics to an eventual legalism[28].

To conclude this topic, we should ask ourselves about the role of law in both authors, outside of the presumably outdated problem of the dispute between sovereignty and biopolitics.

3. Is Law a hybrid element between sovereignty and biopolitics?

Since the beginning of this paper, when I talk about the conceptual dispute between sovereignty and biopolitics inside the political frame drawn by not only Foucault but also Agamben, I kept the question that, besides cheering up this specific reflection, serves as a reason to the research I try to embrace about the two authors: where does the concept of law,

[22] Johanna Oksala, Violence and the Biopolitics of Modernity. *Foucault Studies* 10 (2010), 29.
[23] Alex Murray, *Giorgio Agamben*. London: Routledge, 2010, 60.
[24] Giorgio Agamben, *Homo Sacer: o poder soberano e a vida nua*. Belo Horizonte: UFMG, 2004,136.
[25] Mika Ojakangas, Impossible Dialogue on Bio-power: Agamben and Foucault, *Foucault Studies* 2 (2005), 26.
[26] Mika Ojakangas, Impossible Dialogue on Bio-power: Agamben and Foucault, *Foucault Studies* 2 (2005), 22.
[27] Giorgio Agamben, *Homo Sacer: o poder soberano e a vida nua*. Belo Horizonte: UFMG, 2004, 14.
[28] Carlo Salzani, 'The sentence is the goal': Agamben's Notion of Law. In: Stephen King *et al*, *Law, Morality and Power: Global Perspectives on Violence and the State*. Oxford: Inter-Disciplinary Press, 2010, 3; Thomas Lemke, A Zone of Indistinction – A Critique of Giorgio Agamben's Concept of Biopolitics, *Outlines* 1 (2005), 4.

as well as the legal techniques, would fit inside their works and in relation to the two already mentioned concepts?

The question is not sterile and also not without a reason. As both authors have dialogues with problems related to philosophy of law (state, sovereignty, power), but don't dare to follow the tradition of the legal literature with so much loyalty, that there is the risk of forgetting as well as having a bad comprehension of it.

In relation to Foucault, I believe that in any other moment a promotion of his image of law and the sovereignty dispositive has been left aside, being both images almost symmetrical.

To reach this conclusion, it's enough to notice that in the course *Society Must Be Defended*, from 1976, the law is rejected as a part of sovereignty, or as an almost outdated knowledge, while since before *Madness and Civilization* or *Discipline and Punish* the legal knowledge could be seen as a vector of the procedures of disciplinary normalization[29].

When he adopts the idea of governamentality, going from the superposition among the dispositives (sovereignty, discipline and security) in the formation of the current arrangements of power/knowledge, the author equally rejects the law as an own property. It would be one, from various other possible techniques to implement from one government to the others in the biopolitical paradigma. On the other hand, the modernity of law, even when technical, it's only recognized when it admits the maintenance in force of the sovereign power, from which we can conclude that law didn't let go away from sovereignty in the original Foucaldian way of thinking.

Agamben, talking about this aspect, partially escapes from the association of law to sovereignty. Like Catherine Mills affirms, "while Foucault's genealogy rejects the search for origins and instead traces the emergence of particular configurations of relations of force, Agamben seeks to illuminate the 'originary' relationship of law and life"[30]. It's not for other reason that the author, in *Homo Sacer*, resumes the question of the legal nihilism that would have been born with the Kantian thought, provoking the "force without significance"[31]. On the other hand, there is no question about if he would be compared to modern biopolitics, because this problem had been overcome by the author when he denies this binomial that seemed so important to Foucault in the beginning of his researches.

[29] Márcio Alves da Fonseca, *Michel Foucault e o direito*. São Paulo: Max Limonad, 2002, 143-146.
[30] Catherine Mills, *The philosophy of Agamben*. Montreal: McGill-Queen's University Press, 2008, 60.
[31] Giorgio Agamben, *Homo Sacer: o poder soberano e a vida nua*. Belo Horizonte: UFMG, 2004, 60; Daniel McLoughlin, In Force Without Significance: Kantian Nihilism and Agamben's Critique of Law, *Law Critique* 20, (2009), 255-256.

Better than defining the space of the law near sovereignty or biopolitics inside each one of the authors, it's more convenient to admit that this concept, and all the legal theory that is adjacent to it, makes up a *sensitive point*, that reveals the attachment or not of each of them to our so well-liked object of study. This is what I intend to develop in the next section.

III. Law as a sensible point: beyond the negation or the emphasis

1. How to approach the differences between Foucault and Agamben about law?

As I've pointed out in the last section, there is an evident penetration between Foucault and Agamben's works, not only in its methodological aspects but also in the themes from which the conceptions of both authors are revealed. It seems to be undoubtful that a formation of a contemporary concept of biopolitics, even if we recognize the relevance of further contributions of literature, it still depends on a very substantial way of the Foucaldian reference, and it is in this point that Agamben, because of his great tribute to Foucault, can go ahead in the composition of his own points of view and concepts, as in the paradigmatic case of the *homo sacer*.

However, when we observe just the treatment given to law in their texts, we can surely have an initial impression of disagreement, based in the opposition between a Foucaldian image of an almost inexistent law as a proper object of studies and simple projection of the dispositive of sovereignty, in comparison to an Agambenian notion of law as a theoretical space for the construction of some reference points to biopolitics, as would be the case of Carl Schmitt. So, it would be at least one point of radical divergence between them.

I prefer to overlap this conclusion, because I consider it, in a certain way, unnecessary for our aim, which seems more relevant, of introducing the problem of biopolitics inside legal theory and its discussions. An emphasis in some eventual disagreement between Foucault and Agamben can be, on one hand, positive to the debate if it is taken in a superficial way, but, on the other, can also prison the legal problem to an aspect of sympathy *versus* antipathy and cause its carelessness.

Because of this, I suggest, as a hypothesis, that the differences between the two authors must not necessarily be seen as a conflict of negation and recognition of law. So that there is a fruitful comparison, stimulating the problem and not only restricting it to be such a "stylistic question" when dealing with the already mentioned and outdated dilemma of biopolitics against sovereignty, I propose the replacement of this debate about the level of importance of law as an object by another; it would be the level of bondness of the images of Foucault and Agamben about law with the legal thinking. From that point, I ask: Is Agamben just a

follower of "juridical" themes of Foucault or a turning point, like a developer of an autonomous line of insertion of legal theory inside biopolitics?

To illustrate these two possibilities of comprehension, I've selected two specific points of both authors for a comparative reading. In the first, I see Foucault far off, and Agamben very near the tradition of philosophy of law. In the second, both of them seem to reject the legal model.

2. Possible examples of distances and proximities between Foucault and Agamben in the understanding of their images about law

a) From negation of legal theory to its dependence

As a first example, I return to the point I've mentioned about the dilemma sovereignty *versus* discipline and biopolitics on the two authors.

In a moment of his production, when he starts his more specific approach about disciplinary mechanisms according to his genealogical perspective, Foucault rejects the problem of sovereignty as a fake contemporary impression about Modernity. In a very general view, sovereignty grows from power/knowledge arrangements that are no more real or effective, just working as masks to the exercise of disciplinary power – that one a real and original descendent of modern times.

In the course *Society must be defended*, that was better commented in the first section of this paper, the anachronism of the sovereignty model is stressed in various moments, where Foucault reinforces the urgency to abandon it or at least put it out of the central position. Just to remember, here follows a part of the third lesson of the course, given in March 21th 1976:

(…) the theory of sovereignty is the cycle from subject to subject, from power and the powers, the cycle from legitimacy and the law. We can say that, by one way or another, and according to its own theoretical schemes in which it is founded, the theory of sovereignty presupposes the subject. It wants to found the essential unity of power and always holds in the previous element of law. (…)

The general project, from the previous years and this one, is to try to separate this power analysis from the tripod of the subject, the unity and the law, to make it appear, more than the founding element of sovereignty, what I would call the domination relations or operators.[32]

[32] Michel Foucault *"Il faut défendre la societé"*. Paris: Seuil Gallimard, 1997, 38.

This theme is better explained in the chapter “Right of Death and Power over Life” from the book *The Will to Know*. After associating the right of life and death over the vassals as “one of the typical privileges of the sovereign power”, Foucault mentions that “to the old right of make die and let live overcome the new one, of let live and reject the death", typical of discipline and the biopower investments, well-known for its “administration of bodies and the calculated management of life”[33].

So, to Foucault the birth of biopower as a comprehensive sphere of new power/knowledge arrangements is independent from all theoretical considerations about Law, even if this one is taken as an object of studies of philosophy and not of legal theorists. Nevertheless, for Agamben, the perspective is quite different: Law is the field of elaboration of ideas, and no more an outcast problem.

We can take the first part of *Homo Sacer* as an obvious and easy example. In its first section, under the title “The paradox of sovereignty", Agamben presents the dilemmas of the sovereign as a Janus-faced figure, that is inside and outside legal order at the same time, and takes its exceptionality or “exceptional relationship” as an “extreme way of relationship that includes something just by excluding it”[34] The same point has originated some years later the book *State of Exception*, in which the same author draws a historical line of the concept of state of exception in modern political theory, recasts the Schmittian problem of sovereign decision and finally dedicates this field – the field of sovereignty – as the one in which the possibility of legal order suspension takes place without its abrogation and, as a consequence, anomy[35].

Back to the first part of *Homo Sacer*, Agamben tries to face the already mentioned paradox of sovereignty in the third section, so called “Potentiality and Law”, with an immediate use of the concepts of constituant and constitued power. He holds up that “the basic problem is not that of – not easy but theoretically solvable – conceiving a constituant power that never turns the course to a constitued power, but rather that harder one of distinguishing clearly the latter from the sovereign power”[36].

What is interesting in the comparison of these two authors? While Foucault sees the problem of Law from an external legal theory point of view that considers it just a secondary but inseparable aspect of the sovereign dispositive, potentially dominated by biopower mechanisms, Agamben begins with legal theory, and uses it as a start point or a jumping

[33] Michel Foucault, *La volonté de savoir*. Paris: Gallimard, 1976, 178-184.
[34] Giorgio Agamben, *Homo Sacer: o poder soberano e a vida nua*. Belo Horizonte: UFMG, 2004, 26.
[35] Giorgio Agamben, *Estado de exceção*. São Paulo: Boitempo, 2004, 39.
[36] Giorgio Agamben, *Homo Sacer: o poder soberano e a vida nua*. Belo Horizonte: UFMG, 2004, 49.

board to discuss, as in "Potentiality and Law", themes such as virtualities or creative potentialities.

Therefore, it is announced, at least in this point, a remarkable origin difference between Foucauldian and Agambenian thoughts, and it makes harder any possibilities of comparison. We cannot admit with such stillness a *continuum* if Agamben takes some basis and theoretical references that Foucault has never imagined to use. More than that, Agamben actually depends of legal theory to explain the problem of *homo sacer* and sovereignty, and in any moment it is apart from it. To sum up, there would not be Agamben without a strong Schmittianism as a background; this dependence, in my opinion, is enough to suggest a difference between the two authors beyond the problem of negation or emphasis about the concept of law in a biopolitical approach.

b) From the paradox of the expected resistance to the profanation of the dispositives

Talking on Foucault and before any consideration about problems like sovereignty or biopolitics, we must take his concept of power as a relational, non economical dimension of forces exercised in very plural ways as part of many dispositives. The author defines it as immanent to relationships because of its separation from any metaphysical or super structural reason; intentional to reveal itself in operations, but anonymous because it independs of individual subjects decisions, of governors, state nor rationality; and, as an end, inapprehensible for its absence of any stable point. So, power is a relationship rather than an object[37]. On the other hand, Foucault rejects the idea of any totality of power that is not "everywhere" as we may say based in initial readings. In his words, "power does not cover everything, it *comes from* everything"[38].

However, our announced theoretical problem is bigger than the concept of power, cause it's concerned with finding ways by which inside this Foucaldian power landscape it would be possible the exercise of equally relational way of resistance, of opposition to power/knowledge dominant strategies in a certain moment of time. After all, to Foucault there is power where there is resistance, but this is never in an external position in relation to the first one. So we can say that resistance could not be seen apart from power, because it comes in the exact moment when a point of the diagram of relations gets updated or make active a web of codified subjectivities in a same level of knowledge, and permits by this way the exercise of power.

[37] Michel Foucault, *La volonté de savoir*. Paris: Gallimard, 1976, 123-125.
[38] Michel Foucault, *La volonté de savoir*. Paris: Gallimard, 1976, p. 122.

In a very short explanation, I take the image of an almost instantaneous resistance to power. When a new power relation gets actual inside the arrangements of any of the dispositives, it has already predicted and carried within a new way of resistance, that is programmed and very well absorbed by the same arrangement from which it intended to rise against. It would be to me a paradox of the expected resistance that would eliminate or even quench the uprise of dispositive's alternatives.

The problem was understood by Jürgen Habermas and Gilles Deleuze in texts from the 80's. The first, in a more critical and less optimistic approach about the Foucaldian thought, sees in this paradox an aporia, because the subjects would necessarily resist against the power investments but if all resistances are part of a predetermined scheme of forces, there would not be more forms for a real and creative resistance[39].

Deleuze adopts a more optimistic version in comparison to Habermas. He considers the Foucaldian thought increases the great temptation of trying to extract hidden resistances from the already existent power relations. The lack of alternatives to the diagrams or dispositives seen from inside gets Foucault to a search of ideal resistances from the Outside, by the study of infamous lives, subjectivization experiences and transgression images that, if were well codified, would compose a field of opposition to the present ones[40]. However, to recognize this appeal to a constituant potentiality dimension out of the dispositives just shows the limits of the Foucaldian model of dealing with the rise of non-predictable resistances inside the established power networks.

Hence it follows that is not an idea of resistance to Foucault that remembers the images of insurrection or even a juridical-based revolution against an aim. Agamben, in a contrary sense, seems to take this second path, that in any moment appeals to a classical legal model of resistance by an attack to a legal order.

In his *What is a Dispositive?* Agamben keeps devoted to the concept theme of the essay and takes it as a necessary contribution of Foucault to the understanding of contemporary biopolitics. In his words a dispositive is "anything that has by any means the capacity of capturing, guiding, determining, intercepting, modeling, controlling and assuring gestures, conducts, opinions and speeches of the living beings"[41]. The author asseverates that a

[39] Jürgen Habermas, Aporias de uma teoria do poder, In: *O discurso filosófico da modernidade: doze lições*. São Paulo: Martins Fontes, 2000, 397.
[40] Gilles Deleuze, *Foucault*. Paris: Minuit, 1986, 126-130.
[41] Giorgio Agamben, O que é um dispositivo?, In: *O que é o contemporâneo? e outros ensaios*. Chapecó: Argos, 2009, 40.

subjectivity appears in the middle point of appropriation between these free lives and the dispositives, by multiple and growing processes of subjectivization[42].

Nothing to say about this continuity, that seems very reasonable to me. The problem that I see is situated in a later moment of the recognition of dispositives, which is the moment of resistance against them. Agamben does not offer to us, or have not offered until this moment, a legal answer inserted at the legal theory tradition that could face the magnetical characteristic of Foucaldian dispositives that gradually absorbs all the possible data and practices. There is not an opposite to dispositives, a new possible order that could replace them. So, the power relationships attached to the historical arrangements that are condensed in a given dispositive will be no more an object for an organized resistance from the subjects. After all, they are just parts of it, parts of the dispositives.

When Agamben had discussed the pornography as an art dispositive in *Profanations*, he says:

> Every dispositive of power has always been doubled: on one hand, it becomes from an individual behaviour of subjectivation, and on the other from its capture within a separated sphere. By itself the individual behaviour doesn't mean anything disapprovable and eventually, when not conditioned by circumstances, just the fact of being kept in a dispositive.[43]

The Agambenian resistance would happen in this point of view by the exercise of profanation. Without any more detailed explanations about the religious origins of this concept, it means "the counterdispositive that brings back to common use something already split and divided by the sacrifice"[44]. I believe that when Agamben adopts this capture model to dispositives and the idea of individual struggles for resistance as profanations, he suggests that even Law, as one of the various techniques of biopower, could be part of a profanation strategy. However, in the point I am interested about at this moment, this answer just sustains the same standards from the previous answers given by Foucault in the 70's as formless insurrections, too far from the notion of political resistance or "right to resist" that is dominant in modern legal theory. So in this second example of the topic, there is no legal influence to be observed in Agamben, but a strong and evident subordination to the same standard proposed by Foucault

[42] Giorgio Agamben, O que é um dispositivo?, In: *O que é o contemporâneo? e outros ensaios*. Chapecó: Argos, 2009, 41-42.
[43] Giorgio Agamben, *Profanações*. São Paulo: Boitempo, 2007, 79.
[44] Giorgio Agamben, O que é um dispositivo?, In: *O que é o contemporâneo? e outros ensaios*. Chapecó: Argos, 2009, 45.

of the expected resistances and the need of an opposition to dispositives by the escape from its capitation potentialities and some kind of sabotage of its mechanisms.

IV. Conclusion: Agamben as a Foucaldian legal theorist?

This paper does not run out the theme and did not want to achieve this goal. Nevertheless I strongly believe that even a very simple positioning of some close and conflict points allow us to reposition the relation of the works of Michel Foucault and Giorgio Agamben about Law. That is not an easy theme if we consider that neither of them has dedicated their efforts to this object. Beyond this, however, some methodological conclusions to future researches can be presented.

The first of them concerns the disentailness of a serious study of Law in their works from the old debate about sovereignty *versus* biopolitics. I risk saying that today it is meaningless to reinforce this opposition. Law is clearly taken and recognized by them as one technique of domination among others, and that has been captured with a notorious efficiency by the predominant dispositives of each historical period – and especially by the contemporary biopolitics.

On the other hand, I cannot take Agamben as a "Foucaldian jurist". His approach to Law gives to it the status of a specific theme and his various analysis have never stressed to us readers and scholars the Foucaldian opinion about this object, but rather his own theoretical referential that remembers Carl Schmitt and in some wide-range discussion about justice the enigmatic essays of Walter Benjamin. To sum up, Agamben can even be criticized to his strong and excessive ties and links to the legal theory tradition, but we don't seem to find in his works a "Foucaldian Law" version.

When examining compared examples from the works of these two authors, we can identify some variations between an attachment or not to legal theory concepts and problems. If Foucault decides to solemnly ignore this field of knowledge, Agamben sometimes comes near and, some other times, stands behind or dismisses it.

It is out of question that these random comparisons are by themselves susceptible of critics. However, with this paper I have tried to throw away the fake idea of a continuous line from Foucault to Agamben about Law inside biopolitics. In the future I hope it's easier to admit, in a more refined version, a concept of biopolitics inside legal theory.

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