

ARTICLES : SPECIAL ISSUE  
A DEDICATION TO JACQUES DERRIDA - THEORY

## Derrida and Foucault On Sovereignty<sup>+</sup>

By Friedrich Balke\*

### A. A "Certain Sovereignty"

In his final publication Derrida argues for a rather wide notion of the concept of sovereignty. Sovereigns are not only public officers and dignitaries, or those who invest them with sovereign power – we all are sovereigns, without exception, insofar the sovereign function is nothing but the rationale of all metaphysics, anchored in a certain capability, in the ability to do something, in a power or potency that transfers and realizes itself, that shows itself in possession, property, the power or authority of the master, be it the master of the house or in the city or state, *despot*, be it the master over himself, and thus master over his passions which have to be mastered just like the many-headed mass in the political arena. Derrida thinks the sovereign with Aristotle: the *prima causa*, the unmoved mover. It has been often remarked that philosophy here openly reveals itself as political theology. Derrida thus refers to the famous lines of the *Iliad*<sup>1</sup>, where Ulysses warns of the sovereignty of the many: "it is not well that there should be many masters; one man must be supreme – one king to whom the son of scheming Saturn has given the scepter of sovereignty over you all."<sup>2</sup>

This means that all metaphysics is grounded on a political imperative that prohibits the sovereignty of the many in favor of the one cause, the one being, the *arche* (both cause and sovereignty), the one principle and *princeps*, of the *One* in the first place. The cause and the principle are representations of the function of the King in the

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\* Translated by Bernd Herzogenrath.

\* Teacher of Philosophy and German Literature at the University of Cologne and Bochum; Executive Director of the Research Center "Media and Cultural Communication" at the University of Cologne. He has published on political philosophy, social and cultural theory and contemporary French philosophy. He is the author of: DER STAAT NACH SEINEM ENDE. DIE VERSUCHUNG CARL SCHMITTS (1996); and GILLES DELEUZE (1998).

<sup>1</sup> Quoted by Aristotle at the end of book 12 of his METAPHYSICS (1076a).

<sup>2</sup> JACQUES DERRIDA. SCHURKEN [Rogues] 34-35 (2003) [not yet translated into English].

discourse of metaphysics. Derrida, however, does not only describe the metaphysical overstepping of the boundaries of a political category; as a metaphysical category, sovereignty encroaches on 'life,' insofar it nominates a power, potency or capability that is found "in every 'I can' – the *pse* of the *ipse* (*ipsissimus*)"<sup>3</sup>. This power does not only refer to individuals, insofar they are politically active, i.e. as public active agencies or as sovereign *pouvoir constituant*, but also refers to all which individuals can actually do, without being forced 'from the outside.' As soon as they are not only subjected to a causality, but on their part turn into a spontaneous cause of subsequent actions, they exhibit a 'certain sovereignty.' Thus understood, sovereignty is mere liberty, that is, "the authority or power, to do as one pleases: to decide, to choose, to determine *oneself*, to decide on oneself, to be master, and in particular master of oneself (*autos, ipse*). [...] No liberty without selfhood, and no selfhood without liberty, *vice versa*. And thus a certain sovereignty."<sup>4</sup>

Nothing and nobody can escape a sovereignty thus understood, not even deconstruction, the unending challenge of which, as Derrida once again makes unmistakably clear, was to disassociate itself time and again from a sovereignty with which in the last resort it was to inevitably coincide. Even there, where it seems to be impossible, deconstruction has to distinguish between "on the one hand, the compulsion or self-implementation of sovereignty (which is also and no less the one of selfhood itself, of the same, the self that one is [...]), the selfhood, which comprises – as etymology would affirm – the androcentric power position of the landlord, the sovereign power of master, father, or husband [...]) and *on the other hand* the posit of unconditionality, which one can find in the critical and (please permit me the word) deconstructive claim for reason alike." Insofar deconstruction claims to be "an unconditional rationalism," it is thus being haunted by what Derrida has called the "sovereignty drive."<sup>5</sup>

## B. Sovereignty and Democracy

I would like to pose an objection here. The rather limited political value of Derrida's theory of sovereignty for me seems to lie in its hasty generalization. There is in Derrida no real history of sovereignty, but merely an initial 'onto-theological' determination which cannot be modified or thwarted by a historical event, since historical differences can play themselves out only in the framework opened up by

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<sup>3</sup> *Id.* at 28.

<sup>4</sup> *Id.* at 42.

<sup>5</sup> *Id.* at 190-191.

the initial metaphysical determination. Derrida defines sovereignty as metaphysical and is thus able to carry out its critique as another variant of the deconstruction of the metaphysical heritage. All the historical analyses which Derrida also commences, can thus only confirm what was certain from the very beginning. However, thus they turn out to be mere illustrations of a particular definition, which on its part is not accessible to a historical relativization. All that can happen to sovereignty in the narrower political sense is, according to such a metaphysical analysis, to be *transferred* and, in the case of democracy, to possibly return to its origin after the expiration of a time limit, only to be transferred anew. Thus, Derrida can claim that "sovereignty is circular, round, it is a rounding," insofar as it rotates according to the conditions of Greek democracy, as it can take "the alternating form of succession, of the one-after-the-other:" today's rulers will be tomorrow's ruled. Such a model of "spheric rotation,"<sup>6</sup> however, does not necessarily have to take the form of an effective return of sovereign power to its point of origin. Instead of a sovereignty that is transferred to and fro between governors and governed, one can think of a speculative variant, according to which the sovereign is envisioned as being endowed with power once and for all by an act of originary authorization. Instead of an alternating rotation of rulers and ruled, we would have the case of a transfer of sovereignty without the possibility of revocation.

Yet, Derrida emphasizes the fact that the interrelation of democracy and sovereignty remains problematic, since philosophic discourses never succeed in abolishing "the semantic indeterminacy at the center of *demokratia*."<sup>7</sup> There seems to be a limit to sovereignty's capability of effectively coding society in its entirety. Repudiations of democracy in Classic Greek Philosophy, accusing it of a lack of identity and determination with regard to constitutional law, testify to that. Too much "free-wheeling" in democracy, regarded as the most beautiful political order only by those who are, according to Plato, "womanish and childish."<sup>8</sup> Either democracy spins around, following the circle defined by sovereignty, or it loses track, develops without plan and aim, erratically, an "essence without essence,"<sup>9</sup> which can "comprise all kinds of constitutions, constitutional schemes, and thus interpretations."<sup>10</sup> But, it should be asked, is such a democracy a viable alternative

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<sup>6</sup> *Id.* at 30.

<sup>7</sup> *Id.* at 64.

<sup>8</sup> *Id.* at 47.

<sup>9</sup> *Id.* at 53.

<sup>10</sup> *Id.* at 60.

to sovereignty, does the 'force' of a *différance* manifest itself in it, which differentiates it time and again from all that seeks to identify itself with it? Or is it merely a piece of a philosophical fantasy the function of which is to intervene in a particular war (with democracy, with the assemblies, with rhetoric, with the Sophists), one that is about to invade the *polis* and to confirm once again (in the name of the kingship of philosophers, or of true monarchy) a model of sovereignty in crisis? Plato's image of democracy parallels his image of art: the insubstantiality and mere mimetic character of both serves their political disqualification. Democracy for Plato is the negative utopia of the *politeia*, of the *politeia* in the state of dissolution, guidelessness, and a-nomy.

### C. Tyrants

Up to this point one cannot clearly see the connection between sovereignty and the subject of "rogues" (*voyou, rogue*), which has given its title to Derrida's last publication. Neither its metaphysical determination, nor its political articulation within the frame of a philosophical theory of democracy open up a dimension of "roguishness" within sovereignty. On the contrary, philosophical discourses treat the absence of sovereignty as an almost unbearable state of unseemly mixtures and deviations from the ideal standard of the *politeia*, which could be connected to the subject of a-nomy and an-archy – that is: roguishness. A democracy without a sovereign head (Plato) or sovereign cycle (Aristotle), proves to pave the way for tyranny, differing from rightful 'monarchy' insofar as it is a liminal case of a dissociation of sovereignty and rights, or law. Greek political theory as well as political praxis knows the problem of tyranny as a liminal case of sovereign dominance, transforming the sovereign into an *outlaw*, with no contractual connection to the citizens, so that they can deal with him like a tyrant.<sup>11</sup> On the other hand, Hieron shows, that philosophers should also be prepared to communicate with tyrants, in order to conjointly search for possibilities of a more 'just' or measured exertion of his authority. A tyrant does not necessarily have to be killed, he can also be educated. Yet, despite this intensive concern for the phenomenon of tyrannical hubris, a suspicion that sovereignty might be of a fundamental roguish nature is nowhere voiced. Derrida allows for this fact in that he does not touch the subject of tyranny in his study of "rogues."

### D. Silently and Secretly

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<sup>11</sup> Nino Luraghi, *Sterben wie ein Tyrann* [Die like a Tyrant], in TYRANNIS UND VERFÜHRUNG [TYRANNIS AND SEDUCTION] 91-114 (Wolfgang Pircher and Martin Tremml. eds. 2000).

Derrida's engagement with the "rogues" is motivated by the use of that term in the official statements of the US diplomacy and geopolitics after the end of the Cold War. His text centers on the question of the existence of so-called "rogue states." Derrida asks for the conditions of possibility for such a diagnosis. Who has the right and the possibility to identify certain states as rogue states, and to threaten them with measures that include military force – and this even, as is explicitly stated, in the case that these states have not yet been guilty of a prior violation of International Law, but the willingness for such a violation in the (near) future is only assumed? The identification of states outside the law leads to the paradoxical consequence that those states that feel called to combat, or that let themselves be formally empowered (e.g. by the UN Security Council) to combat, on their part claim the 'sovereign' right to take measures, even if these measures violate established law. In the 'exceptional case,' one has to be prepared to violate law in order to restore it. The state strong enough to define and combat rogue states has to be a rogue state itself, insofar he claims the 'sovereign' right to deviate from the law under particular circumstances (that is, for a certain period of time that seems to be favorable to the cause), to suspend the law, to annul it. The rhetorics of rogue states suggest that it is always only a handful of 'rotten apples' that violate law and order; fact is: "There are only rogue states, *in potentia*, or *in actu*. The state itself is roguish. There are always more rogue states than one thinks." <sup>12</sup> The moment a strategy of foreign policy commits itself to the combat of rogue states, one finds that the term has already "come up against its limits," that its time is already used up, since it promises to *localize* a threat coming from uncontrollable and widespread weapons of mass destruction, whereas the dynamics of dissemination, and thus: the failure of all those efforts to reserve the atomic privilege to the 'club' of hegemonic industrial states, has long become visible. The preliminary result of the Iraq War shows, that such weapons are never located on the territory of the state against one is at war with.

In connection with his diagnosis of current politics Derrida sets out anew to a fundamental determination of political sovereignty, which I would like to quote, since it, I think, all too hastily presents itself as a theory of the 'nature' of the sovereignty, whereas it in fact accommodates a historically datable shift in the relation of sovereignty to other powers and forces. "Silently and secretly, like sovereignty itself," Derrida states the bottom line of his theory of political sovereignty, even though the 'holder' of sovereignty originally was the one who could achieve his power – a collective "binding" – only by *speaking in public*, instead of trusting in the silent right of the strongest. The sovereign wards off everything that is reminiscent of death, his office is not to unleash the violence of war, but to

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<sup>12</sup> *Id.* at 144.

found peace by way of a mutual agreement, thus, a *contract*. The matter-of-factness of Derrida's equalization of sovereignty and violence has to be opposed by the dissimilarity of sovereign and bellicose power-effects and power-operations as established in the context of the Indo-European "three orders" or "three functions." Before I enter this context, of which I want to show that it is the frame for Foucault's genealogy of sovereignty, I want to quote the passage in which Derrida conjures the roguish substance of all sovereignty. The sovereign is a rogue, because he always is at work 'silently and secretly,' like a criminal – everything he publicly declares is subordinated to his intention, to break the law 'in good intention,' without getting caught. Thus he makes every possible effort to 'abruptly' take action at the right moment and to create a *fait accompli* which even a retroactive jurisdiction cannot undo:

"Silence, disavowal, that is exactly the never appearing nature of sovereignty. [We will see that the opposite is the case for the original nature of sovereignty: to appear, and to act through the light of appearance, F.B.]. That, about which the community has to maintain silence, is last but not least a sovereignty which can only place and assert itself silently, in the unsaid. Even if it rehashes every juridical discourse and all political rhetoric, sovereignty itself (if there is such a thing, in its purity) is always silent in the self-hood of its own moment, which can only be the time of an indivisible instant.

Pure sovereignty is indivisible, or it is not. This all theoreticians of sovereignty have rightly recognized, and that is what gives sovereignty the character of an exception out of pure decisionism, commented on by Carl Schmitt. This indivisibility as a matter of principle withdraws it from collective participation as well as from time and language. From time, from temporalization, to which it is ceaselessly exposed, and thus, paradoxically, from history. Thus, sovereignty is in a certain manner un-historical, it is a contract made with a history contracting itself into the punctiform event of an exceptional decision without temporal and historical expansion. Thus sovereignty also withdraws itself from language, which introduces universalizing collective participation. [...] There is no sovereignty without violence, without the force of the stronger, the justification [raison] of which – as the right [raison] of the strongest – consists in its power over everything [avoir raison de tout]."<sup>13</sup>

So much for Derrida's theory of sovereignty, the historical signature of which becomes clearer the more he insists on denying its connection to history. One might venture to say that the sovereign for Derrida is inseparable from a certain excess or mania of the top, or the head. From an epistemological perspective one could speak

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<sup>13</sup> *Id.* at 141-142.

of a political solipsism, since the sovereign, even when he speaks, does not talk to anybody, but refuses any communicative participation. Not by chance Derrida mentions Carl Schmitt, which I take as another hint that it is in fact a very specific structure of sovereignty that Derrida is describing, a structure that locates the sovereign act in its decision, without posing the question of the quality of who makes that decision: "Sovereign is he who decides on the exception,"<sup>14</sup> means that *whoever* makes such a decision takes the place of sovereignty, regardless of his qualification. In Schmitt's and Derrida's concept of the sovereign decision figures a 'baroque' experience of a crisis of the sovereign body, who in the act of decision *at the same time* decides on his existence.

### E. Wolves, Lambs, Lycology

Derrida evokes an etymological speculation that derives "voyou" (rogue) from the French term for *werewolf*, "loup-garou." This speculation is "interesting," even if it has not "met with much response." Derrida thus joins with some considerations of Giorgio Agamben, who himself has also proposed a theory of sovereignty that defines the sovereign act as the act of a systematic creation of a state *hors-la-loi*, of an un-making of peace.<sup>15</sup> The werewolf is the one banned from the community by sovereign decree, existing on the border between man and beast. He is not 'released' into banishment, in contrast, the act of his (symbolic) banishment is meant to increase the image of his presumptive dangerousness. As a wolf, he would have been expelled from the human community once and for all, as a werewolf, however, he still poses a virulent threat to the very community that had banished him. In *Rogues*, Derrida announces a debate with Agamben's theory of sovereignty and its figuralization in the *homo sacer*<sup>16</sup> "for some other time."<sup>17</sup> There was no time for this, however, before his death. Via the semantics of *outlaw nations* and the rhetorics of the bestialization of enemies, as was the case in the mass media representations of the "Baghdad Tyrant," Derrida establishes an up-to-date historical connection between "the wild beast and the sovereign" – at the same time this was the title of a seminar in which Derrida tried to come up with a

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<sup>14</sup> CARL SCHMITT, *POLITICAL THEOLOGY - FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., 1988).

<sup>15</sup> For his notion of sovereignty and the state of exception, see recently GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2004); see also *Interview with Giorgio Agamben - Life, A Work of Art Without an Author: The State of Exception, the Administration of Disorder and Private Life*, 5 *GERMAN LAW JOURNAL* 609 (2004), at <http://www.germanlawjournal.com/article.php?id=437>.

<sup>16</sup> See GIORGIO AGAMBEN, *HOMO SACER - SOVEREIGN POWER AND THE BARE LIFE* (Daniel Heller-Roazan trans., 1998) (German translation: *HOMO SACER. SOUVERÄNE MACHT UND BLOßES LEBEN* (2002)).

<sup>17</sup> *Id.* at 44.



“genealogical theory of the wolf (*lykos*), the figure of the wolf and all werewolves in the problematic of sovereignty.”<sup>18</sup>

This seminar focused on La Fontaine’s famous fable of *The Wolf and the Lamb*, the introductory sentence of which Derrida uses as a motto for *Rogues*:

La raison du plus fort est toujours la meilleure  
Nous l’allons montrer tout à l’heure.

That “the right of the stronger has always been the best right,” as the moral of the story, which in fact *precedes* it, claims, is the open, even cynical confession of sovereign power to speak in the name of the law, and to simultaneously violate it. Derrida finds in this formula to a certain extent sovereign plaintext which unambiguously states the paradox that the right of sovereignty is its power to break the law: sovereign *or* criminal, sovereign *or* rogue. Yet, Derrida writes: “The logic of La Fontaine’s fable has no room for the rogue” – neither from the perspective of the fabulist, nor from the perspective of the wolf (not to speak from that of the lamb, who takes up a position of pure innocence): “The wolf is in principle no rogue, since he represents sovereign power that poses the law and entitles itself.”<sup>19</sup> Derrida’s conclusion is quite enigmatic, since the fable’s whole strategy seems to set out to present the wolf as a rogue, since the wolf speaks from the position of the law, but would never allow it to be turned against himself. The law is a weapon in the wolf’s claws, who conducts a mock trial against the lamb, being prosecutor, judge, and executor at the same time. A crucial aspect of the fable is the surprising fact that the wolf does not devour the lamb immediately – which he would certainly do if he was nothing but a wolf – but that between their meeting and the final devouring of the lamb, a *quasi-judicial intermezzo* unfolds, a “trial,” which is opened, as a matter of course, by the wolf in his role as prosecutor. La Fontaine thus stresses that there is a lawful and contractual connection between wolf and lamb, even if it becomes clear that the wolf systematically violates the law. *The sovereign speaks, before he devours*. The lamb, on the other hand, that inevitably will become his victim, does not recognize in the wolf its ‘natural enemy’ (in that case it would take to its heels and run), but an authority, and it apologetically stammers: “Oh, your majesty!” The recognition of the wolf as master is the lamb’s crucial mistake, and here lies the fable’s irony. The wolf’s “cruelty,” then, does not consist in his drive to give the lamb short shrift and eat it, but in the unflinching way with which he dismisses the not only legitimate, but irrefutable objections put forth by

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<sup>18</sup> DERRIDA, *supra* note 2, at 101.

<sup>19</sup> *Id.* at 102.



the lamb. The wolf's accusations do not only contradict the facts, they prove impossible.

Michel Foucault has presented a comprehensive genealogy of pastoral power. Its punch line lies in the fact that he can show that the model of the shepherd and the flock is transferred from the religious-spiritual contexts, where it was first used, to the sphere of political relations. The shepherd has to protect the flock by all means, be it even at the cost of his own life; he has to keep track of every sheep that gets astray, and bring it back to the flock safe and sound.<sup>20</sup> The fable's scenario at first sight seems to present such a critical situation, in which a lamb has gotten lost and meets its most dangerous enemy, the wolf, who eats it. Yet, the situation of the fable is slightly off-balance with regard to the ideal situation of the pastorate, insofar we are dealing here with a dual relation, the "cruelty" of which lies in the fact that *the shepherd himself has become the wolf*. The shepherd, who is absent in the fable, 'hides' in the wolf, who therefore has to conduct a trial against the lamb before he can eat it. Even where the sovereign resorts to violence, he cannot but do it in the guise of the law. La Fontaine's fable is thus indeed an essay about the relation of sovereignty and law. It shows the sovereign as wolf, but does it also express an insight in the 'nature' of sovereignty? Could it not be the case that this exposure, this disclosure of the wolfish nature of the sovereign, is in fact a *superimposition of two functions* that have to be differentiated, even if they coincide in one and the same figure?

I will close this section with a reference to the role of a completely different presence of the wolfish in the context of Rome's myth of origin. Instead of a wolf that devours, we are presented with the image of a nurturing she-wolf. The "shepherd of the royal flock," writes Livius, observes how a "thirsty she-wolf" - in La Fontaine's fable it is the lamb that quenches its thirst - "compassionately offers her teats to the infants [the abandoned twins Romulus and Remus, F.B.]" and later "licks the infants with her tongue;" another version of the legend affirms this surprising generosity of the wolfish: the shepherd takes the twins to his wife to raise them. "Some people believe," thus Livy, "that Larentia was called 'she-wolf' by the shepherds, because she gave her body indiscriminately, and that this is the origin of the legend." The wolfish strength that the twins, one way or another, acquire, does not only help them to resist "wild beasts," as Livius says - they also use it in a manner that benefits the shepherds, with whom they live: they attack "booty-laden robbers" and "distribute the haul amongst the shepherds."<sup>21</sup> The

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<sup>20</sup> Compare MICHEL FOUCAULT, *GESCHICHTE DER GOVERNEMENTALITÄT I* [*History of Governmentality*] (2004).

<sup>21</sup> TITUS LIVIUS, *AB URBE CONDITA*. Liber I:4

lycology of Livy is thus entirely different from La Fontaine's. The values of lawlessness and anomy, evoked by the semantic field of the wolfish, are not used for a sovereign exclusion, the excluding sovereignty does by no means amalgamate, as in the modern lycology, with the excluded beyond distinguishability. Romulus' wolfish nature manifests itself in the course of the foundation of the city in an exemplary act of 'unlimited' inclusion, by attracting "multitudes of riffraff and inferior mobs," that is: *rogues* which, as Livy notes, has been "the original nucleus of the increasing size of Rome."<sup>22</sup>

#### F. The Great Trap

From beginning to end, Foucault's political theory, his insistent elaboration of an analytic of power, is concerned with the topic and problem of sovereignty. In contrast to Derrida, however, he does not make sovereignty the horizon of his political thought. For Derrida, there is no escape from the structure of sovereignty, just as little as from that of metaphysics; what he apostrophizes as the coming democracy can never substitute sovereignty, but can only – if at all – differ from it in an inconspicuous, minimal manner. Politics for Derrida means: to mark a difference in the relation to sovereignty, to make the sovereign, who by nature holds his tongue, speak, to induce him to share his essence with the citizens, to communicate himself to the citizens. To remind the sovereign that he, according to his nature, himself is what he accuses others of: a rogue. For Foucault, the problem of sovereignty is not founded in a metaphysical basic position, but in the – not at all arbitrary – impact of a model or a discourse that prevents us from thinking a power that has long ceased to function according to the model of sovereignty. Power effects do not necessarily presuppose the existence of a sovereign from which they emanate. The "massive historical fact," according to Foucault, one has "to get away from if we want to analyze power," is the "juridico-political theory of sovereignty" that "dates from the Middle Ages" and is a result of "the reactivation of Roman law." For Foucault, the theory of sovereignty is "the great trap we are in danger of falling into when we try to analyze power."<sup>23</sup> Foucault thus scans European history for what in its politics eludes the model of sovereignty. Whereas for Derrida the history of the political can never escape the spell of the sovereign, Foucault tries to excavate that moment in political history where the sovereign may not cease to exist, but forever loses his exemplary position. What will become apparent is the fact that the moment of the most extreme and intensive challenge of the sovereign's position coincides with the attempt of a re-erection, inseparably connected with the name of Thomas Hobbes and the image of the Leviathan.

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<sup>22</sup> *Id.* at I:8.

<sup>23</sup> MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED." LECTURES AT THE COLLÈGE DE FRANCE 1975 – 1976 34 (David Macey trans., 2003) (2003).

In his attempt of the sovereign's disempowerment, Foucault strangely enough does not mention the periodic rites attested by anthropologists, which in the course of an extensive carnivalization of the socio-political order also dethrone the king: "In a scenario of a general licentiousness, clamorous festiveness and inverted social roles, this inversion conjoins with subversion, and even perversion. Master and servant are on the same level, maybe even take the other's position. The king is put to flight (*refugium*) or ritually killed. In the case of the *incwala* ceremony of the Swazi – famous with anthropologists – the king's capital is raided, and he himself is branded with holy dispraises as public enemy."<sup>24</sup> With Derrida, one could recognize here another evidence for the existence of a democratic *cycle*, different from the contractual alternation of rulers and ruled only by force of its symbolic violence: in both cases, history corresponds to the concept of a "spheric rotation." Thus, where for Derrida power revolves around the sovereign, Foucault searches for that power which inflicts a symbolic death blow on the sovereign once and for all. All those deaths the sovereign has to die – eg. in the archaic kingdoms – do not prevent his ultimate return to the throne. After all, as ethnological studies attest, the sovereign was never shown much respect. Instead, he was revered only on condition of the right to his profanation. Appointment, deposition, and re-appointment are regular moves in the *fort/da*-game that people play with the sovereign. The king is and remains an "alien," he always comes from the exterior, as an usurper, he spreads fear and terror, but is "gradually integrated and domesticated"<sup>25</sup> by the natives. In contrast to Derrida's claim, sovereignty does not withdraw from "collective participation in principle" by means of its indivisibility, it is thus also wrong to think it as an "exceptional decision without temporal and historical expansion." The periodic rites in which the people get rid of the sovereign attest to exactly this: the attempt to communize the absolutely a-social as which the sovereign *appears*.

The discourse that Foucault reconstructs as the condition of the possibility of his own analytic of power basically ceaselessly recalls the cultural fact that the king is an usurper and thus does not possess any legitimacy, that the legitimacy that he claims owes to an act of erasure of that disruption that his emergence presents. "It happens remarkably often," Marshall Sahlins writes, "that the big chieftains and kings of political society do not come from the people that they govern. According to local myths of origin, they are aliens, foreigners, just as the draconic measures by

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<sup>24</sup> Marshal Sahlins, *Der Fremde als König oder Dumézil unter den Fidschi-Insulanern* [The Stranger as King, or, Dumézil amongst the Fidschi], in MARSHAL SAHLINS, *INSELN DER GESCHICHTE* [ISLANDS OF HISTORY] 95 (1992).

<sup>25</sup> *Id.* at 79.

which they come into power are alien to the attitude of the 'true people' or the true 'sons of the country.'"<sup>26</sup> The discourse of the Count of Boulainvilliers, who takes center stage in the historico-political discourse reconstructed by Foucault, basically says the same. More precise: he draws the pathos of his political accusation from the identification of a betrayal of which the usurper-king has made himself guilty by conspiring with the indigenous population in order to make his position of power invulnerable and thus: *truly sovereign*. Boulainvilliers tells the tale of the genesis of sovereignty as a process of increasing estrangement between the king and his 'ancestral' people. The king becomes a sovereign the very moment he successfully rises above 'his' former people. The historico-political discourse is nothing but an attempt to retrieve the sovereign into the (fictitious) immanence of his ancestry and to restore his transcendence with regard to the conquered, who by now have become his allies.

What remains unclear in Derrida – i.e., in what sense a sovereign could be called a 'rogue' – Foucault reveals: the sovereign turns into a *rogue* when his foreignness is no longer accepted, when he is being denied the transition from a bellicose apparition to a legislative authority (like in the exemplary case of Romulus in Roman history), when every attempt of a political 'sublimation' is answered by a gesture of immediate 'martial' de-sublimation. The sovereign's foreignness is no longer understood as his original quality, but as the result of a political estrangement assigned to him, and which has to be annihilated. This annihilation is no longer provided for by the ritual, but by the regeneration through war, which the king has brought by his mere appearance, and which is now being declared on him by the people. The structural ambivalence of the sovereign position – *king and enemy* – is being resolved in favor of one side of the differentiation – leading to nothing less than a fundamentally new concept of political authority. Sahlins characterizes this notion as one that conceives of political authority as of something which "emerged from within society and resulted from the nature of social connections and relationships."<sup>27</sup> As examples, he names contractual, Marxist and biologicistic conceptions of the *social* to which one would have to add the analytic of forces and bellicose relations described by Foucault, since they also locate the play of power *within* society. *Power is immanent to society* – this is indeed the rationale of Foucault's analytic. Yes, the historico-political discourse reconstructed by Foucault turns even war which, as *ius belli*, i.e. as the most exclusive right of the sovereign, is taking place between states, into a society-immanent, descriptive category.

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<sup>26</sup> *Id.* at 83.

<sup>27</sup> *Id.* at 81.

### G. The Three Orders

Foucault stresses the fact that a binary conception of society (such as the martial discourse of the prosecutors of the king) is opposed to both organic and bodily models of society. In addition, it also cannot not be subsumed under the conception of a “tripartite organization” used to conceptualize the social structure as a relation of superordination and subordination. On the one hand, we have a discourse that pacifies society and founds order, on the other hand, we have a discourse that tears it into pieces. Foucault enriches the reflection on the forms and functions of sovereignty by discussing it within the framework of the *model of trifunctionality*, which historians of religion (e.g. Georges Dumézil) and linguists (e.g. Émile Benveniste) have revealed as the Indo-European system of representing power. Sovereignty finds its position within this system which has both a theological and a political and social dimension. Dumézil’s much admired by Foucault, was particularly interested in examining the Roman version of that system, in addition to an analysis of the classic Vedic version of the pattern of the three orders. This is certainly the reason why Foucault speaks of the historical type of discourse that stages sovereignty as a ‘Roman history.’ In Rome, it is – on the theological level – the famous sequence *Jupiter, Mars, Quirinus* presiding over the three functional areas. From a social perspective, the activities characteristic of the three areas are represented – here as well as in the other Indo-European cultures – by the priest, the warrior, and the farmer.

It is interesting to observe that Foucault, when he speaks of the “Indo-European system of representing power,” *exclusively refers to the first function* which can indeed be characterized as the function of sovereignty. According to Foucault, historiography of the Roman type, leading via the Middle Ages directly to the court historiography of the emerging absolute monarchies, is nothing but a discourse that is juridical and magical at the same time. It justifies power and reinforces it by letting it appear in its full glory. Following Foucault, there are two operations with which the sovereign wins the hearts: *binding* (law) and *dazzling* (magic):

Now, these two functions correspond very closely to two aspects of power, as represented in religions, rituals, and Roman legends, and more generally in Indo-European legends. In the Indo-European system of representing power, power always has two aspects or two faces, and they are perpetually conjugated. On the one hand, the juridical aspect: power uses obligations, oaths, commitments, and the law to bind; on the other, power has a magical function, role, and efficacy; power dazzles, and power petrifies. Jupiter, that eminently divine representative of power,

the preeminent god of the first function and the first order in the Indo-European tripartite system, is both the god who binds and the god who hurls thunderbolts.<sup>28</sup>

The history of our society, thus Foucault, has long been a “Jupiterian’ history,” but with the form of discourse emerging at the threshold to the 17<sup>th</sup> century, a historiography comes into existence that is no longer ‘dazzled’ by the glory of gods and kings, a “counterhistory” no longer singing the “continuous chant” of sovereign power, but completely antithetical to history “as constituted up to that time.” Instead of recounting history as an uninterrupted sequence of victories, a “counterhistory of dark servitude and forfeiture”<sup>29</sup> rises to speak, a history the symbolic center of which is no longer Rome, but Jerusalem, a history as well that only evokes the past in order to completely break with it. “Unlike the historical discourse of Indo-European societies, this new discourse is no longer bound up with a ternary order, but with a binary perception and division of society and men; them and us, the unjust and the just, the masters and those who must obey them, the rich and the poor, the mighty and those who have to work in order to live.”<sup>30</sup>

One would beg to differ with Foucault here. All he has said about the new anti-Roman discursive type, all the statements he quotes, paraphrases, and reconstructs, do not imply the slightest doubt that this history, which declares war on sovereignty, does not at all break with the ternary order. To see this, we only have to ask ourselves from which position within this model a binary perception and distribution of society is possible. Such a perception, and its respective discursive construction is only possible from the perspective of the *second function*. It is not Jupiter, but *Mars* for whom war never ends and who keeps awake the memory that the origin of the state is not law but the “mud of battles.”<sup>31</sup> Foucault’s assessment obviously follows a reading of the model of the three orders that exclusively operates from the perspective of the first function. Even though he constantly refers to the *three orders*, the *three functions*, and the *three classes*, he never mentions the second or even third function, nor does he refer to the complex play of relations and interactions between them. He does not comment on them, although they are constitutive for the history that he narrates about the discourse of counterhistory. I would even venture to argue that Foucault’s *History of the Political*, the history of its dissociation from the model of sovereignty, follows a line that begins with Jupiter and runs via Mars to Quirinus. *Foucault’s history projects the structure of the three*

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<sup>28</sup> FOUCAULT, *supra* note 23, at 68.

<sup>29</sup> *Id.* at 73.

<sup>30</sup> *Id.* at 74.

<sup>31</sup> *Id.* at 47.

*orders from the paradigmatic onto the syntagmatic axis of his own discourse.* He transforms the series of the three orders into the principle of temporal organization of the history of the political – of the history that is his object, as well as the history he is recounting, and the development of which not by accident proceeds via the phase of the bellicose dissociation of the body politic, only to end under the sign of the governmentalization of power. The governmental technology of exerting political power produces an extensive politicization of the third function. The function of the police is nothing less than the observation, description, and administration of all life phenomena, insofar they are indispensable for the fortification of the state. A power that does not recount anymore, but counts, the element of which is the “big number” (Dumézil), and the regulative idea of which is the advancement of man’s “happiness.” Such a power occupies the third function, presided over, as Dumézil stresses, by a god: *Quirinus*, the “heterogeneity” of whom is incontestable.<sup>32</sup>

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<sup>32</sup> GEORGES DUMÉZIL, *QUIRINUS. LA VILLE ET L’EMPIRE*, 195.