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## Comment on Paul du Gay and Alan Scott/3

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## Introduction

There seems no shortage of terms available to describe new state formations thought to typify the late Twenty and early Twenty-first centuries. These have proliferated: competition state, financialized state, networked state, failed state, post-modern state, information state, workfare state, and surveillance state being just some of the most well known that come immediately to mind. One or other of these is often argued to have replaced – or being in the advanced stages of replacing – the welfare state, or Keynesian-welfare state, or Fordist state. In addition, there is the position of the nation-state – a slightly different formulation but one, nevertheless, itself thought to be under threat from – or already having been completely eclipsed by – the transnational forces of internationalization or globalization.

It is salutary, therefore, to have some new sober reflections on the conceptualization of the state from Paul du Gay and Alan Scott. They want to challenge this proliferation of terms and to de-emphasize over-exaggerated claims about epochal social transformations. This they do from an overtly politico-sociological perspective and with a determined attempt to situate state formation in a non-teleological historical narrative. I welcome this intervention and agree with much of what they have to say about these matters. In particular, to draw attention to the differences between “state form” and “governmental regime” is a very useful clarificatory move, one that serves their purpose well in confronting the perils of terminological inexactitude.

Thus my comments should be seen not so much as criticism of their positions but as further clarificatory moves designed to enhance the analytical drive embodied in the paper, to enquire into certain of its formulations, and to raise further issues in the style and light of their approach. Two matters dominate my comments: first the analysis of – and importance they attribute to – the “constitutional state” in their historical narrative, and second issues associated with the role of the state in possible current conjunctural ruptures associated with tensions brought about by what is broadly termed “globalization.” Here I use the terminology of “conjunctural ruptures” advisedly in an attempt to avoid unwise epochal tendencies in analytical thinking. A conjuncture refers to multiple overlapping times, arrangements and unstable combinations of circumstances within which events and episodes happen to produce more quasi-resolution than permanent crisis or change. Epochal change, on the other hand, is attractive from the point of view of academics because it seems to address more fundamental “structural” issues and allows them to indulge and demonstrate their skills as critical analysts of rapidly changing circumstances. Small events are often, as a result, afforded a dramatic significance way beyond their immediate reach: the inconsequential, the mundane and the superficial are thereby rendered profound. To some extent the distinction between conjunctural ruptures and epochal change hinges on whether conjunctural events and tensions turn into repeatable characteristics with reliability, predictability and durability. Conjunctural ruptures speak to distinct and limited combinations of conditions. This terminology is designed to reduce expectations about fundamental change. But, of course this exactly raises the issue of how to know or appreciate fundamental change of an epochal nature, and distinguish it from conjunctural ruptures? To confront and answer this question would require much more space than available here, but it is one that deserves further attention in the light of du Gay and Scott’s reasonable attempt, in my view at least, not to prematurely rush to judgement but to dampen immediate expectations in this respect.

### **The “Constitutional State”**

Du Gay and Scott place a great deal of emphasis on both the formation and durability of what they term (following Poggi) the “constitutional state.” Indeed, this amounts to probably the only form of state they feel really comfortable working with. In the analysis this is firmly linked to the role of the law and, in particular, the Rule of Law, as a basic condition of its existence. I raise two points in connection to this. One is the neglected importance of discourses (and practices) of Liberalism in

this historical account, and second, the importance of differences between the Rule of Law (RoL) and the rule by laws (RbLs) to the form and possible durability of the constitutional state.

Putting aside the differences between Liberalism as a philosophical discourse and the emergence of definite practices of calculative liberal politics (between Liberalism and liberalism perhaps, which I collapse from now on into the capital “L” version), one of the most alluring paradoxes of the emergence of Liberalism in the aftermath of the religious wars in Seventeenth Century Europe – about which du Gay and Scott have much to say with which I agree – was that it ruthlessly criticised its own condition of existence. And this was a Liberalism, I would suggest, that was a key constitutive element – if not *the* key constitutive element – in the construction of the ‘constitutional state’ about which they speak so forcefully.

What was that central condition of Liberalism’s emergence? Paradoxically, it was the relative social peace secured by its main enemy Absolutism. I would argue all liberal programmes of government broadly conceived – and all constitutional states no less – rely upon relative social peace as a condition of their existence. Without it they collapse. And this in turn relies upon some minimal operation of sovereignty, for the most part initially secured by Absolutism. But this point also needs to be considered alongside the development of Neostoicism [Oestreich 1982]. This provided a practical guide to the art of living not inspired by theological disputation: a secular “philosophy of life” that stressed the ethical virtues of frugality, dutifulness, obedience, self-inspection and discipline, toleration and moderation, as at the same time it recognized the need for a powerful and efficient state and the acceptance of the central role of force and the army in centralizing control. In the first instance this neatly chimed with Absolutism’s claims for exclusive sovereignty and *raison d’état* (that nothing should harm the state, while conscience and morality should be subject to the dictates of politics), and secondly, it then provided a bridge to Liberalism as the latter consolidated its hold over the discursive agenda with its the ruthless critique of Absolutism itself, and finally Neostocism dissolved in the face of Liberalisms’ role in stressing the constitutionalization of state formations [Thompson 2007]. Thus the constitutional state needed both Absolutism and Neostoicism – and Liberalism – as its conditions of existence despite the fact that it embodied an abiding opposition to both the first two of these doctrines, and was so thoroughly embraced and absorbed by the third. A discussion of Liberalism is then, I think, a necessary ingredient in any analysis of the “constitutional state,” even if it involves a critical one.

## **Role of Rule of Law**

The second point I would like to stress in respect to the mobilization of the constitutional state concerns the relationship between the RoL and RbLs. I would like to illustrate this with an anecdote in the first instance. Several years ago I was involved in a discussion with Chinese academic members of the Communist Party about democracy in China. On that occasion my hosts' knowledge of all the main western writers associated with the popular notion of participative and deliberative democracy genuinely surprised me. They argued with great cogency that democracy was alive and well in China, and pointed to the thick layers of deliberation and participation that could be found in Chinese political life [Gastil and Levine 2005; Leib and Baogang 2006; Centre for Deliberative Democracy 2008]. In addition they stressed to me that China had a highly developed and elaborate legal code, and a "constitution" that protected citizens' rights.

During our conversations it became clear to me that for Chinese officialdom, the *procedural dimensions* to democracy were of central importance. Its *substantive dimensions* – such as an independent judiciary and the genuine RoL, a separation of powers, contestation and compromise over political outcomes, a free media – were beyond consideration. As long as certain deliberative norms were in place (such as transparency, due process, the representativeness of participants) the deliberations of such forums could, in the Chinese view, deliver democracy.

I think this is a telling anecdote because it illustrates the differences between the RoL and the RbLs. The RoL is something more than the RbLs. If China has a constitution and an elaborate legal code, does it also have a constitutional state in du Gay and Scott's terms? I suspect not. Du Gay and Scott are rightly suspicious of "popular democracy" in its radical deliberative and participatory forms, particularly when it plays down the central importance of formal democracy and the rule by public law (or constitutional law) to the operation of that democracy. Their cautions against this are well taken. Popular decision making forums (often sanctioned and legitimized by RbLs) are all very well and clearly have their place, but they need to be considered very much as operating in the shadow of the formal RoL, and other substantive democratic instruments. Thus a "constitutional state" is not necessarily the same as a state with a constitution. Whilst these distinctions – between the RoL and RbLs on the one hand and the 'constitutional state' and states with constitutions on the other – might seem purely terminological, I would suggest they are conceptual and promise a clarity with which to analyze different types of state order and rule. We do need a set of terms to adequately describe other forms of state than just the "constitutional state" – forms of state that exist elsewhere than within the European liberal tradition.

Whilst the attribution of “authoritarian state” to cases like China might seem just to add another loose category to the already long list of state forms indicated in the opening sentences to this comment, something more elaborated might suffice.

### **Globalization and the State: The Importance of “Constitutive Power” and “Constituted Power”**

In this section I turn to my other main line of commentary, the “fate-of-the-state” (as one might put it) in the face of the forces of globalization and transnationalism. But to do this I first go back to Liberalism and the defining moment of constitutionalization itself – if you like, to return to the “primary *scene*” of liberal politics; its birth. And rather like the “primary *scream*” which it echoes, this issue returns to haunt us. It is re-enacted again and again both historically and rhetorically as one moves from the domestic to the international arena. To put it in a nutshell it presents the problem of how “the multitude” are rendered into “the people”; how the subjects of the constitution are constituted, and out of what? Three preliminary points are worth making.

First, it is important to note in the context of du Gay and Scott’s historical journey that constitutions are relatively modern instruments of rule [Blaustein and Flanz 1991; Dodd 1909]. Whilst, as they stress, these were originally closely associated with the formation of national states from the Eighteenth century onwards, most “constitutional states” were not constituted or consolidated until well after the Second World War, as decolonization gathered pace and written constitutional documents drawn up. Traditionally constitutions do two basic things: they allocate powers and they determine rights and responsibilities. One of the issues associated with the writing of constitutions is where exactly to place these two aspects. The first aspect has to do with “order” broadly speaking: it constitutes the institutions of the state and governance and their respective powers and relationships, distributing powers between these and – very importantly – limiting them in various ways. The second aspect has to do with the establishment of the civil rights, duties, obligations and responsibilities of the parties to the constitution, not just of citizens but also of the other institutions of state. Broadly speaking the evolution of constitution making has seen the move of the issues associated with “order/powers” from the front of these documents, with the question of “rights/duties” being tucked away at the back (in a special appendix, or as a supplementary Bill of Rights), to the reverse; rights and responsibilities now occupy the bulk of the documents at the front while questions of institutions and powers appear at the back (a classic example can be seen in the

case of the moves between the 1871, 1919 and 1949 German constitutional documents). Most modern, post Second World War, constitutions now follow this latter pattern.

Secondly, the relationships between *constitutive* power and *constituent* and *constituted* power are fraught ones. And although controversial and difficult, one is tempted to opt for a form or reflexivity to express these relationships [Lindhal 2007]. The problem is that we begin from a situation in which there is no competent authority yet constituted that can claim the capacity to restrain power. What is needed therefore is some method of first constituting that power, not constraining it. This is a theoretically reflexive moment I would suggest, embodying in one way or another a form of “social contracting.” And although I do not particularly like this terminology (as should become obvious later), at the moment I see no clear alternative to its use (though a “social convention” might prove a better terminology).

The third related point is that the concept of the multitude is itself highly controversial – and highly fashionable. The multitude is seen as both a pre-constitutionalized category – that which exists *before* the advent of liberal politics, with its emphasis on the people of a definite polity, ones largely confined to a territorially and jurisdictionally distinct nation-state, – and a currently disembedded potential social force, wrought from the constraints of the nation-state by the forces of globalization and new communication technologies. In the radical literature this “emergent category” is there to be mobilized for a new global liberatory project, acting as a substitute for the working class and its organizations, which are now fatally discredited and which, anyway, remain nostalgically tethered to the nation-state [Virno 2004; Virno 2008]. So, the working class can no longer rise-up to fulfil its historic destiny – that task is now handed to the global multitude.

For those not committed to another global liberatory struggle, this time announced by the advent of the new multitude, the question of constituting the people out of the multitude still involves in one way or another a form of theoretical social contracting. The question is how is it to be done? In the context of Liberalism John Rawls [1999] offers an influential response to this question. And the context for these remarks is the way he has managed to recast the academic conceptualization of Liberalism over the last thirty years. As du Gay and Scott so tellingly remind us, the original issue for what I have emphasised as Liberalism in the wake of the Seventeenth century European religious wars was one of establishing a certain “liberal order” (both domestically and internationally), from which it was expected rights, justices and fairness would follow. Modern – particularly post Rawlsian – Liberalism reverses this direction of expectations: justices, fairnesses and rights come first, which will in turn secure the order necessary for social cohesion. And this pattern of expectations

is mirrored in a whole host of other institutional contexts that deal with societal governance: witness the UN system as a conspicuous example – human rights are paramount. What is striking is the way this recasting of the Liberal project by Rawls chimes so closely with the way actual constitutional documents are written as outlined above.

Whatever one makes of these seemingly parallel moves however, the constitutive moment of the primal scene as conjured up by Rawls, particularly as addressed in his 1999 book *The Laws of Peoples*, embodies a particular take on international constitutional matters. Here the primary scene is the Rawlsian original position, and within the context of the international level a kind of double original position deliberation is required, once domestically and the second internationally. Under a situation of the veil of ignorance original position deliberation enables a working out of the most just social solution along classical Rawlsian lines. But the “reasonable liberal peoples” so constructed at the domestic level can then deliberate to contract with other “decent peoples” at the international level. This secures a kind of global constitution. And it is most important for Rawls – as a very traditional liberal – that this is a contracting between peoples and not between nations. But these global institutions would fall well short of a world-state. Indeed, the laws so enacted by these bodies and forums – or brought into being through their actions – are not instruments of state law. These are deliberately laws of peoples not laws of states – or international law. In classic liberal fashion, Rawls consigned the state to a very secondary position and status. The driving force behind Rawlsian analysis is “public reason.” This is, of course, a “reasonable” and “tolerant” reason. For Rawls the only role for states is to provide a mechanism for reasonable deliberation by peoples on the form of their governance, to help protect their territories and populations, preserve their freedoms and civil society, and act as the representative medium through which they negotiate the Laws of Peoples with other international parties so as to create the global Society of Reasonable Peoples. “Citizens” deliberate in the context of the state, “Peoples” in the context of the international Society of Reasonable Peoples. States are too tied up with considerations of their own “sovereignty” – expressing state interests above those of their peoples – to be left to negotiate between themselves over matters of global order.

In the face of this kind of analysis I would completely agree with the tone and substance of du Gay and Scott’s defense of nationally based political constitutions. These are dangerous intellectual moves, ones that would completely disarm any politics that took them seriously. I too would like to offer a defence of sovereign power and the constitutional state under modern circumstances and in the face of exaggerated claims about the end of the national state. In my terms this would try to re-emphasise the efficacy of sovereignty for the continued operation of Liberalism, viewed as a calculative governmental programme. What does sovereignty offer in respect to



relative social peace? As stressed by du Gay and Scott it does two things. First, internally and domestically it protects citizens from each other (and they need protecting from each other). And secondly, externally and internationally it protects the citizens of one polity from those of another (and here again, they need such protection). Thus it addresses the clear necessity of at least trying to ensure relative social peace in both arenas (of course it does not guarantee this, but relative to the alternatives, it has proved the least worst option).

So there are some very positive things to be said for sovereign power and sovereignty in the modern world, and people will not easily give up the relative securities it affords them. Thus, it should not be forgotten, that Liberalism itself is – I would suggest —founded on sovereign power despite the fact that – or perhaps precisely because of the fact that – it ruthlessly and continuously criticizes that sovereign power – its own condition of existence. I find this one of the most alluring paradoxes of Liberalism, but one that has profound analytical and political implications for an understanding of the modern world. Du Gay and Scott’s analysis of the continued pertinence of the “constitutional state” in a supposed time of “globalization” adds decisively to this understanding.

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## Comment on Paul du Gay and Alan Scott/3

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Abstract: In their contribution Paul du Gay and Alan Scott challenge the proliferation of terms used to describe current state formations and de-emphasize over-exaggerated claims about contemporary epochal social change. I welcome this intervention and agree with much of what they have to say. In particular, to draw attention to the differences between “state form” and “governmental regime” is a very useful clarificatory move, one that serves their purpose well in confronting the perils of terminological inexactitude. My comments fall under two main headings: first the analysis of – and importance they attribute to – the “constitutional state” in their historical narrative, and second issues associated with the role of the state in possible current conjunctural ruptures associated with tensions brought about by what is broadly termed “globalization.”

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*Keywords: Constitutional state, Rule of Law, Liberalism, multitude, globalization, deterritorialization, deliberative democracy.*

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