

## REIMAGINING HUMAN RIGHTS

### The Concept of *Droit des Gouvernés* in Foucault's Political Philosophy

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#### ABSTRACT

This study explores Michel Foucault's critique of human rights and his concept of *droit des gouvernés*, particularly with regard to refugees and migrants. It analyzes how Foucault's ideas can revitalize democratic elements within the context of neoliberal governance and reframe our understanding of human rights. His approach encourages rethinking the foundations of democracy and challenging the monopoly of political decision-making.

**KEYWORDS:** *Michel Foucault; droit des gouvernés; human rights; neoliberal governance; refugees*

#### Reimaginando os direitos humanos: o conceito de *droit des gouvernés* na filosofia política de Foucault

#### RESUMO

Este estudo explora o conceito de *droit des gouvernés* e a crítica de Michel Foucault aos direitos humanos, particularmente no que se refere a refugiados e migrantes. Analisa a forma como as ideias de Foucault podem revitalizar elementos democráticos no contexto do neoliberalismo e reformular nossa compreensão dos direitos humanos. Sua abordagem encoraja a repensar os fundamentos da democracia e a desafiar o monopólio da tomada de decisões políticas.

**PALAVRAS-CHAVE:** *Michel Foucault; droit des gouvernés; direitos humanos; governança neoliberal; refugiados*

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#### INTRODUCTION

Contemporary critical thought has highlighted the crisis of the legal apparatus of human rights. Immediately following the approval of the Universal Declaration of Human Rights, in 1948, Hannah Arendt pointed out its tragic impotence. The large masses of stateless refugees produced by the world wars indeed remained without any protection. Precisely when the rights of all human beings were solemnly declared, refugees remained without citizenship and were considered superfluous beings because they did not belong to any existing community. Millions of human beings had lost the

“right to have rights” (Arendt, 1973, p. 410). Defined as “the abstract nudity of being-nothing-but-human”, human rights were destined to remain “paper rights”. Starting from this Arendtian intuition — and relying on the studies of Giorgio Agamben (1998, p. 148) —, Slavoj Žižek (2005, p. 11) returned to the figure of the refugee understood as a human being reduced to bare life. Despite being the ideal bearer of universal human rights, presented as the sublime essence of humanity, for Žižek the refugee ends up coinciding with the “inhuman: something similar to Kafka’s Odradek” (2005, p. 18, my translation). The subject of human rights then becomes a victim to be defended, and not an authentic political subject. The legal apparatus of human rights therefore proves to be depoliticizing and can, when necessary, become an ideology of military intervention (Žižek, 2005, p. 8).

Jacques Rancière (2004) also pointed out the depoliticizing nature of human rights. For him, however, it is always possible to conceive the subject of human rights as a political subject capable of creating a construction of a disagreement. Acting politically as a part of the partless, the subject of human rights can radically question the “policing” account of the roles assigned to the living beings of a particular community, thus proving to have the rights that the constitution denies them (Rancière, 2004, p. 304). As a dynamic universal, the part of the partless can speak out and take on the burden of all the oppressed who demand recognition (Rancière, 2004). Alongside Marx, Étienne Balibar has also insisted on the necessary politicization of human rights, focusing on their fundamental ambivalence. If, on the one hand, private property is, under capitalism, the glue of the human rights listed in the Constitution, and the generalized competition among property owners is the true *nomos* of a society within which the collective dispossession of workers takes shape, on the other hand — in modernity — the resistances and emancipation projects of the subalterns can only be formulated “in the language of freedom and equality” (Balibar, 2017, p. 46, my translation). In the name of *égalité*, for Balibar it is still possible to conceive a politics of human rights capable of requalifying equality in a time like ours, in which “absolute capitalism” stubbornly tends to empty it of meaning.

This important debate has not valorized the concept of *droit des gouvernés*: a concept with which, in the 1970s, Michel Foucault had criticized the traditional notion of human rights proposing their peculiar form of politicization. The primary objective of this paper, therefore, is to illuminate Foucault’s overlooked concept of the *droit des gouvernés* and to explore its potential implications for contemporary discussions on human rights. This paper aims to address this gap by providing a nuanced examination of Foucault’s concept and

its implications for current debates on human rights, with a focus on refugees and migrants. In this endeavor, we engage critically with Foucault's philosophical framework, highlighting its potential for understanding complex power dynamics and fostering a more inclusive democratic process.

To substantiate the paper's scientific relevance in international literature, we integrate recent scholarship on Foucault's philosophy of rights, notably Ben Golder's work (2013, 2015). Golder emphasizes Foucault's dynamic and evolving perspective on rights as rooted in a broader understanding of power and resistance. These insights are particularly relevant when considering the ever-changing status of refugees and migrants in today's geopolitical landscape. Particularly relevant to this study is Golder's exploration of how Foucault's later works offer a nuanced view of rights as performative, constitutive, and contestatory rather than purely declarative or prescriptive. These ideas enrich our discussion, especially as we consider the complex status of refugees and migrants in contemporary society. Furthermore, we will delve into the criticisms that Foucault's notions have faced over the years, particularly those related to his views on power, legality, and truth. By examining these critiques, we hope to further refine our understanding of Foucault's philosophical constructs and their relevance to contemporary sociopolitical scenarios. Lastly, we aim to assess the ongoing validity of Foucault's *droit des gouvernés* in our neoliberal world order and to explore its potential in catalyzing a more equitable, inclusive, and democratic society. By focusing on Foucault's concept as a theoretical lens to scrutinize the complexities and ethical dimensions surrounding governance and individual liberties, this paper addresses a significant gap in the field. Its insights are geared towards fostering a more nuanced international dialogue on human rights, beyond the limitations of existing paradigms.

### **I. THE CROISSANT AFFAIR AND THE *DROITS DE GOUVERNÉS***

The concept of the right of the governed emerges in Foucault's work with the decision to update the analytics of power — established after the decisive break of 1968 and elaborated in terms of biopower from the mid-1970s —, through the use of the notion of governmentality. It is in the courses held at the Collège de France between 1977 and 1979 that the philosopher famously relativizes the Nietzschean hypothesis of politics as war — maintained in the course of 1975-76 — and focuses on that of power as government, or rather as the set of procedures intended to “conduct conducts” and to “structure the possible field of action of others” (Foucault, 2001, pp. 1056-8, my translation). In his courses, Foucault claims his goal of tracing a true

“history of governmentality”, from the Reason of State of the early modern age to the neoliberalism of the second half of the 20th century (Foucault, 2009b, p. 88). The concept of government will also be used in texts that are only apparently minor, in which Foucault will examine certain political events that will allow him to confront some interesting figures of the governed of his time. The right of the governed is indeed theorized for the first time in November 1977, while the Croissant Affair erupts in France.

On the occasion of the extradition of Klaus Croissant, defense lawyer of the Red Army Faction (RAF) — who took refuge in France after being arrested twice in Germany —, Foucault publicly takes a stand for the recognition of the right to asylum (Foucault, 2000). Without supporting the positions of Deleuze and Guattari<sup>1</sup> and other left-wing intellectuals, who saw in the Federal Republic of Germany the potential laboratory of a new model of European authoritarianism, the philosopher protests with them in front of La Santé in an attempt to prevent his expulsion.

What the Croissant Affair seems to reveal to him is the crisis of a certain arrangement of the right to asylum, whose history he succinctly reconstructs in a short text. “For more than a century”, writes Foucault, “all laws, all conventions are in agreement: extradition for common crimes but not for political ones” (Foucault, 2000, p. 362). If in the 19th century, with the rise of anarchism, the right to asylum had undergone heavy restrictions, subsequently — with the new jurisprudence of individual countries and the European Convention of 1957 — extradition is granted with increasing difficulty. Thus, a conception of human rights and the right to asylum is born, rooted in the existence of totalitarian regimes and focusing on a character who is no longer the potential future ruler — the Blanqui-like conspirator —, but the perpetual dissident: he who is persecuted not so much because he wants to conquer power, but because he is “in global disagreement with the system in which he lives” and “expresses such disagreement with the means at his disposal” (Foucault, 2009a, pp. 53-4, my translation). Perpetual dissidents have the right to “legitimate defense against governments”: for this reason, they are recognized the “right to live, to be free, to leave, not to be persecuted” (Foucault, 2009a, p. 57, my translation). It is this arrangement of the right to asylum that is questioned in the case of Croissant. Foucault fears that between the judgment of the French judges, the exceptional German laws, and the project of an international anti-terrorism convention, the legal device returns to assume features that resemble the fight against the anarchist (Foucault, 2009a, p. 57).

The ongoing security reshaping of the state form seems to him to foreshadow a progressive tightening on what he defines as the in-

[1] For more on the stance of Deleuze and Guattari, see Deleuze (2003).

dispensable political emigration: an emigration up to that moment welcomed, fuelled by women and men who — like the dissidents from the West or the East — demonstrate the ability to practically escape the power apparatuses that govern their lives. In this sense, Croissant is an emblematic figure as are the dissidents of the Soviet bloc, on whose behalf Foucault had openly positioned himself a few months earlier. Croissant is not just the defender of the public enemy to be defended in turn, because he is persecuted by an evidently hostile justice system that acts in violation of human rights. Like the members of the RAF — and like the dissidents of the East —, Croissant has rather the right to be defended by a lawyer who allows him to make his voice heard, as well as the strength of his refusal: the refusal to be governed in a certain place, in a certain way, and by certain people. For this reason, according to Foucault, in the Croissant Affair, the possibility of affirming the principle of a new right of the governed is at stake: a very peculiar right, “more precise, more historically determined compared to the rights of man: broader than that of the administered and of the citizens” (Foucault, 2000, p. 365, my translation). A right whose theory has never been formulated, but which has been established by judicial practice and by the recent jurisprudence of extradition (Foucault, 2000, p. 365). The fragile presence of the right of the governed is at risk, for Foucault, of being overwhelmed by the emergence of a new form of state: a security state that — albeit very different from the old forms of authoritarianism — provides for the reactivation of emergency measures presented as attentive care towards the people (Foucault, 2009a, p. 63). For this reason, the right of the governed cannot be constructed as a legal abstraction to be opposed to a supposed upcoming neo-fascism. It cannot and must not appeal to the transcendence of human rights or to their presumed nature. Rather, for Foucault, the right of the governed is something that is part of our historical reality (Foucault, 2000, p. 365).

While human rights claim an abstract humanity to counter a generic authoritarianism, the right of the governed that Foucault envisages does not chase utopian ideals, but asserts, as Marcelo Raffin (2018, p. 204) has highlighted, here and now the independence of the governed from governmentality. The right of the governed thus takes shape only in immanence and necessarily lives as the legal-political consecration of struggles: the struggles that the governed engage against a concrete and well-determined modality of government (Raffin, 2018, p. 203). In short, the right of the governed concerns the way in which freedoms are prescribed in a particular society (Sauvêtre, 2015, p. 3). Maintaining the level of freedom reached requires continuous processes of subjectivation against any regressive

remodelling of the government. The possible restriction of the right of asylum, to which — for Foucault — the Croissant affair alludes, is a concrete example. In this affair, therefore, as on every occasion in which the right of the governed is claimed, it is not so much a matter of pushing the government to promise respect for general principles, but of politically acting on the way power is materially exercised. It is, in other words, a matter of “pressuring the authorities to force them not to erase this or that right from historical reality” (Sauvêtre, 2015, p. 3, my translation). As Sauvêtre (2015, p. 3) appropriately observed, the stake of the right of the governed is always political. It consists, in fact, in being able to impose on the government the way in which the governed themselves want to be able to exercise their freedoms (Sauvêtre, 2015). For Foucault, in an era when security seems to be above the law, the safeguarding of freedoms depends mainly on the vigilance and inventive capacity of resistance of the governed. Drawing from this source, the *droit des gouvernés* must record the “positive and precise affirmation of the way in which individuals want to be governed” (Sauvêtre, 2015, p. 4, my translation).

## **2. DROIT DES GOUVERNÉS AND HUMAN RIGHTS**

Foucault had already spoken, in the lecture of January 14, 1976, at the Collège de France, of a new legal apparatus whose production traces back to resistance to the mechanisms of power scattered in contemporary societies (Foucault, 2003, p. 41). This new legal apparatus is situated in opposition to both the legal devices of sovereignty, as well as the related grammar of legality, and to the normalizing logics of disciplinary society. Moreover, for the philosopher, “sovereignty and discipline, legislation, right of sovereignty and disciplinary mechanisms are two absolutely constitutive parts of the general mechanisms of power in our society” (Foucault, 2003, p. 41). According to Foucault, to open the way to a non-disciplinary power one should not therefore turn to the “old right of sovereignty, but to a new right which — while being anti-disciplinary — should at the same time be liberated from the principle of sovereignty” (Foucault, 2003, p. 41). In other words, this new right is configured as a counter-use of the formal and bourgeois law: a counter-use that must be understood as a strategy of counter-power (Raffin, 2018, p. 207). As it has been observed, this new non-sovereign right has remained, in Foucault’s discourse, rather mysterious. Foucault will never adequately explain its meaning and content. However, he will develop its liberatory potential precisely by conceptualizing the rights of the governed that, while not radically opposing human rights, diverge significantly from their grammar.

Foucault, indeed, sharply distinguishes human rights (*droits de l'homme*) from the rights of the governed (*droit des gouvernés*). The former do not achieve its goal. They indeed lack precision and historical determination, as they — targeting the attacks of power on an undefined freedom and on the substance of man as such — fail to respond to the functioning of modern governmentality, which in fact directs the behavior of the living without violating freedom and “humanity”. Moreover, in an only seemingly paradoxical way, human rights often end up becoming one of the main tools legitimizing biopower. In the articulation of sovereignty, discipline and biopolitics, the practices of liberal and neoliberal governmentality promise to respect men’s freedom — along with other fundamental rights — precisely while they produce and direct it towards objectives functional to societal order.<sup>2</sup> Thus, human rights end up being powerless in the face of a power of control over populations exercised by government techniques that cannot in any way be countered by the legal logics of the contract theory (Sauvêtre, 2015, p. 6). Precisely for this reason, Foucault redefines human rights in terms of the rights of the governed. Unlike the former, the *droit des gouvernés* aims to limit the pretentious ambitions of governmental biopower. It specifically targets the fact of being governed in this or that way and materially claims the practice of a determined freedom (Sauvêtre, 2015, p. 2). For Foucault, freedom is not an essence. In his lecture of *Naissance de la biopolitique*, he states that, contrary to what is thought from the abstract perspective of human rights, “we should not think of freedom as universal” (Foucault, 2010a, p. 65). It should always and only be understood as “a current relationship between rulers and ruled: a relationship in which the measure of the too little freedom that exists is given by the even more freedom that is demanded” (Foucault, 2010a, p. 65). Freedom always depends “on the relations of force and on a tactical game between rulers and ruled” (Foucault, 2010a, p. 65). And it is from those relationships and that game that the right of the governed must claim it, in a manner as detailed and precise as it is deeply political.

The *droit des gouvernés*, therefore, does not invoke “universal and essential rights, to which any government [...] must submit” (Foucault, 1997, p. 37, my translation). Rather, it precisely captures a well-defined will “not to be governed in this way and at this cost” (Foucault, 1997, p. 38, my translation). The way in which Foucault thinks about the rights of the governed is closely linked to the concept of critique he was working on in the same years. In a famous lecture, entitled *Qu'est-ce que la critique?*, Foucault maintains that critique is born as a response to the progressive governmentalization that has occurred in Western societies from the 16th century onwards. In this sense, critique is the art of voluntary disobedience, of reasoned intractability:

[2] It is worthy highlighting that, in a debate with Noam Chomsky in November 1971, Foucault talks about a class order, denying that the struggles of the proletariat can be conducted using the language of human rights. That language indeed — like the entire system of law — is for him an integral part of the bourgeois order in which a “regime of class dictatorship” takes shape: a regime in which justice is falsely proposed as a neutral third instance. For the working classes — Foucault argues then —, it is impossible to overturn the bourgeois order by formulating their own claims with concepts and tools that derive precisely from that order, and that contribute to firmly maintaining that order. For more, see Chomsky and Foucault (2006).

the art of not being governed in this way and at this cost, expressed, from time to time, by the political capacity of the governed (Foucault, 2015). The main source of the rights of the governed is therefore critique, that is the ability to act politically, which the governed reclaim by practicing a desubjugation (*désassujettissement*) capable of questioning the governmental apparatus and the logic of representation within which their lives were objectified (Foucault, 1997, p. 40). That capacity for subtraction — exercised in the immanence of politics — is what the *droit des gouvernés* aims to imprint in the immanence of codes, thus guaranteeing those political freedoms that the normative and transcendental apparatus of human rights individualizes and depoliticizes.

This political aspect of the rights of the governed appears again in a text from 1981. Foucault reads it in Geneva during a press conference where, in the presence of representatives of a group of NGOs, he asserts the need to send ships to ensure adequate protection for refugees (Foucault, 2009a, pp. 235-7). The occasion for the meeting is indeed the precipitous migration of thousands of Indochinese refugees, mainly Vietnamese, fleeing oppressive regimes on makeshift boats. This is a topic that Foucault had already paid attention to two years earlier — in August 1979 —, in an interview given in Japan, in which he pointed out how what was happening in Vietnam was not a remnant of the past but a harbinger of the future: the causes of these migrations, necessarily painful and tragic — Foucault argued —, would have intensified due to a probable increase in dictatorial regimes, ethnic antagonisms in the former colonies, and the dialectic between differential inclusion and expulsion carried out by the major economic powers towards refugees and migrants (Foucault, 2009a, p. 123). The 21st century could therefore have been the century of migrations. At that time, in France, the wave of refugees from South-east Asia had created conditions for the birth of a humanitarian sensibility different from the traditional one of charitable and religious inspiration. The new humanitarian mobilizations and the action of the first NGOs were rather taking the form of a solidarity movement inspired by political reasons and the defence of human rights. Contrary to what was announced by the title of the text, however — a title that, according to a hypothesis by Daniel Defert, was probably decided by the publisher of *Liberation* —, “*Face aux gouvernements, les droits de l’homme*”, never mentions the term “human rights” (Raffin, 2018, p. 205). Nor does it claim that the defence or promotion of those rights is the task of States, governments, or supra-national institutions. Foucault’s idea seems to be precisely that of criticizing the Declarations of Human Rights and tracing the prolegomena for a new Declaration of the Rights of the Governed.

This Declaration does not have Man as its subject, understood as a universal subject, nor the citizen enjoying abstract rights that would be guaranteed by the constituted authority. Instead, Foucault thinks of ordinary subjects without particular strength: the governed understood as any singularities. Subjects without qualities, “individuals who speak and do so together only on the basis of a certain common difficulty in bearing what is happening” (Foucault, 2009a, pp. 235-6, my translation). Addressing those present and posing the question “on whose behalf, then, are we here?”, Foucault answers in an apparently enigmatic way: “on behalf of no one. And that’s exactly what gives us the right” (Foucault, 2009a, p. 235, my translation). The governed — Foucault seems to argue — do not act as representatives and do not aim to represent anyone, because they recognize the fundamental “indignity of speaking for others” (Foucault, 1977, p. 111). Their discourse and action do not aim to oppose a good representation, from below, to the bad one of power — in an ultimately reformist perspective: they are instead based on the simple fact of wanting to resist together the intolerable. Resisting together, within and against a very precise governmental order, means attempting to disarticulate it by questioning the representation that legitimizes it, based precisely on the principle of representation. In *La volonté de savoir*, Foucault had already written: “where there is power, there is resistance, and yet, or precisely for this reason, it is never in a position of externality with respect to power” (Foucault, 1997, pp. 39-40, my translation). Power is not a sovereign essence shaped on the legal model, nor a repressive monopoly that prevents the possibility of resistance. Power produces subjectivities, crosses them, conducts their behaviours. In short, it is given as a relationship whose dynamics are always open and exposed to the resistance of the governed, who — from within — can transform it with their own autonomous subjectivation.

### 3. FROM *DROITS DE GOUVERNÉS* TO THE POLITICS OF THE GOVERNED

In the initial part of “*Face aux gouvernements, les droit de l’homme*”, Foucault states that he is fully aware that it is impossible to “do much against the reasons that lead certain men and women to prefer to leave their country rather than live there” (Foucault, 2009a, p. 235, my translation). However, with the humanitarian initiatives of the 1970s in the background of his speech, where NGOs promoted the freedom of movement for refugees and the right of free access to all war victims, Foucault supports the actions of those opposing a state of affairs in which refugees lose their lives at sea, while migration policies tend to restrict migrants the right to escape and then include them in a differential way once they reach the landing countries. Aligning with

Île-de-Lumière, Cap Anamour, Avion pour le Salvador, Terre des Hommes, and Amnesty International — the NGOs mentioned in the text —, Foucault asserts that it is always possible to take a stand, resist, and rise up in the name of the fact that we are all governed and, as such, we are in solidarity (Foucault, 2009a, p. 236).

Governed people, Foucault argues, make a mistake in passively waiting for the governors — understood as the only subjects authorized to act politically as representatives of the people — to translate human rights, which are etched in the rigid marble of constitutions or listed in the long catalogs of declarations, into facts. Consequently, rights are never effectively guaranteed simply because there are sovereign institutions appointed to do so. Against such state pedagogy, the philosopher opposes another logic of rights. Within and against the devices of international governmentality that produce forced migrations and desperate escapes — and beyond the natural or universal dimension in which rights are confined by the Declarations —, it is necessary to promote non-governmental actions, of a political type, aimed at conquering new rights for all the governed: specific rights that the resistance and struggles of the governed inscribe in the materiality of history. In other words, here too Foucault opposes the transcendence of human rights with the idea that the rights of the governed are produced starting from resistance, from revolt, from the very immanence of political struggle (Raffin, 2018, p. 207). A struggle that Foucault bases on three clear guiding principles: international citizenship, the right to revolt, and the rejection of the division between rulers and the ruled.

Firstly, the citizenship of the nation-state is not enough to recognize the rights of the governed; in fact, it hinders them by favoring *jus sanguinis* and *jus soli*. The solidarity of the governed — since “we are all governed” — appeals instead to an “international citizenship that has its rights, its duties, and which obliges to rise against any abuse of power, whoever is the author and whoever are the victims” (Foucault, 2009a, p. 236, my translation). It is in the name of this upcoming citizenship that, without delegating anyone and recognizing themselves as potential victims of the harm now suffered by others who are distant and unknown, the governed mobilize in a disinterested way alluding to a virtual community: a community of the governed that includes both the citizens of the countries that systematically violate human rights, and those of the “democratic” countries that instead use them as a tool of self-legitimization and as a means of government, except then to violate them every time the defense of a hierarchized social order punctually comes to require it.

We could argue, nevertheless, that it is not coincidental that the text focuses on the issue of refugees and migrants: by definition,

refugees and migrants represent a fraction of governed, hierarchized, and racialized humanity which suffers varying forms of denial of rights due to their origin, race, language, religion and so on. From here, in fact, follows the second principle of the political practice that founds the rights of the governed: the absolute right to revolt against whoever holds power (Foucault, 2009a, p. 236). Using language reminiscent of Albert Camus, Foucault bases the rights of the governed on the fact that the suffering of men must never be a silent residue of politics (Foucault, 2009a, p. 236). On the contrary, suffering can be foundational to a policy that, always in the name of international citizenship, knows how to counteract “governments that claim to take care of the happiness of societies, [and] which arrogate the right to consider human suffering caused by their decisions or allowed by their neglect in terms of profits and losses” (Foucault, 2009a, p. 236, my translation). As the case of migration exemplifies, it is false that our governments are not responsible for human suffering: not only do refugees almost always flee from a former colony — and it is not by chance that Vietnam is a former French colony — but it is the postcolonial governmentality of states and supranational institutions that hinders the freedom of movement of migrants, or channels it, to make it functional to capitalist needs in the destination countries. Against the intolerable — emblematically embodied both by the authoritarianism of the governments and by the devices that govern migratory mobility in the West — the governed rise up and take a stand. From Foucault’s perspective, they do this not to speak on behalf of the “victims”, but to live up to those who suffer the violence of power: to “become worthy of what happens to us”, as Gilles Deleuze (1990, p. 133) had written a few years earlier.

The governed rise up, also, to confront all the rulers — those of the countries from which migrants come and those of the countries where migrants arrive — with their serious responsibilities. And they do it, finally, to highlight the existing conflict between the states that consider themselves the legitimate guardians of human rights and their actual governmental practices. From this also stems the third principle announced by Foucault: the rejection of the division between rulers and ruled. The governed must not accept the theatrical role of pure and simple indignation that is assigned to them (Foucault, 2009a, p. 237).

For Foucault, lyrically protesting against this or that outrage to human rights is part of a script prescribed by the order of government. The governed must instead contest the monopoly that governments and rulers have arrogated to themselves on the definition of international politics and on the implementation of the universal principles to which this constantly refers. The monopoly of political decision-

making that characterizes representative democracies is therefore under discussion: a monopoly that for Foucault must be uprooted little by little, day by day (Foucault, 2009a, p. 237). It is therefore necessary to radically question the division of tasks according to which individuals have “to be outraged and to speak; governments to reflect and to act” (Foucault, 2009a, p. 237, my translation): a consolidated representation for which “good” governments must also publicly show that they know how to love “the sacred indignation of the governed, as long as it remains lyrical” (Foucault, 2009a, p. 237, my translation).

In the birth of NGOs — long before many of these fell into the snares of a soft humanitarianism —, Foucault sees the possibility of practicing a new form of politics capable of giving substance to the right of the governed. “Amnesty International, Terre des Hommes, Médecins du Monde”, he writes, “are initiatives that have created this new right: that of individuals to effectively intervene in the arrangement of international policies and strategies” (Foucault, 2009a, p. 237, my translation). Foucault, thus, thinks of a right to intervene actively, short-circuiting the institutions and customs of institutional politics, in situations where the scandal of the present becomes glaring: a right that the governed impose on rulers with their uprising.

In this sense, the right of the governed is not simply an alternative to human rights but reconfigures them by imbuing them with political substance and effectiveness. That is, it removes them from a merely legal, ethical, and humanitarian horizon. If Foucault accepts the reference to human rights in the title, it is only because — in the text — he strongly proposes to re-politicize them. There is indeed no *droit des gouvernés* without a politics of the governed capable of making law a technique that minimizes the potential for domination and subjugation present in power devices.

The politics of the governed that Foucault has in mind always takes place within power relations, and obstinately operates against the strategic games with which the government seeks to guide the conduct of the living (Foucault, 2001, p. 1.547). The governed respond to these games by trying to “not let their conduct be determined or trying to determine the conduct of others in turn” (Foucault, 2001, p. 1.547, my translation). Only the counterconducts of the governed — their non-governmental actions — can establish a new *droit des gouvernés*.<sup>3</sup> By subtracting spaces of action from governmental devices (whether local, national, or global), the governed can push rulers to confrontation, forcing them to respect the way the insurgents want to be governed or no longer want to be. The politics of the governed thus seeks to “impose political agendas and priorities from the side of the governed, expressing in these terms the constituent power of freedom, up to the ultimate limit of self-government” (Sauvêtre, 2015, pp. 6-7, my translation).

[3] For a discussion of the notion of counter-conduct, see Foucault (2009b, pp. 259-62).

#### 4. CRITIQUES TO FOUCAULT'S CONCEPTUALIZATION

There are, however, several critiques of Foucault's theories worth considering. Habermas (2004) articulates a critique based on Foucault's relativist leanings, arguing that without some recourse to universal standards or norms, we are left unable to adequately critique power structures. Fraser (1993) echoes this concern, suggesting that a focus on micro-level power dynamics might obscure structural injustices, effectively causing us to miss the forest for the trees. Dean (2010) highlights possible limitations in achieving substantial systemic change through the *droit des gouvernés*, cautioning that a sole focus on micro-level resistance might overlook systemic inequalities.

Charles Taylor (1984) postulates a critique around Foucault's portrayal of power, suggesting that it could lead to cynicism or fatalism, discouraging active engagement in social and political life. Similarly, Hunt and Wickham (1994) raise concerns about Foucault's perspective on legality and the rule of law, highlighting its potential to overlook the emancipatory aspects of law, particularly relevant to human rights. Moreover, Dreyfus and Rabinow (1983) question the practical applicability of Foucault's complex theoretical framework, while Harding (1991) criticizes his dismissal of the concept of "truth", emphasizing its importance in social justice projects.

Critiques of Foucault's concept of the *droit des gouvernés* should not be viewed as wholesale dismissals of his theoretical contributions. Rather, they serve as instruments for deepening our comprehension and augmenting the interpretative potency of his propositions. Foucault's notion of the *droit des gouvernés* offers an invaluable lens to scrutinize and dissect the complex power dynamics inherent in our contemporary sociopolitical frameworks. Habermas's concern about the absence of universal standards in Foucault's approach invites us to consider how the *droit des gouvernés* might incorporate a shared moral framework, essential in uniting diverse social groups and mobilizing them towards a common cause. Fraser's critique, on the other hand, alerts us to the risk of neglecting the larger systemic structures of oppression while focusing on localized power struggles. This invites the Foucauldian thinkers to engage in a more extensive critique of structural injustices and incorporate the analysis of larger systemic forces into the application of *droit des gouvernés*.

Taylor's critique provides an opportunity to reflect on the positive aspects of power, such as empowerment and collective action. A revised understanding of Foucault's *droit des gouvernés*, which acknowledges these dimensions of power, could foster more optimistic and proactive engagements with sociopolitical issues. Hunt and Wickham's critique of Foucault's view on law and legality reminds us

to consider the emancipatory possibilities that legal systems offer, especially in advancing human rights. This critique paves the way for a more productive dialogue between Foucauldian philosophy and the realm of legal studies.

Moreover, responding to Dreyfus and Rabinow's critique can promote the development of practical strategies for implementing Foucault's concepts in real-world contexts. Foucault's *droit des gouvernés*, when applied judiciously, could guide practical interventions and policies, leading to more democratic and inclusive social structures. Lastly, Harding's critique emphasizes the importance of retaining a notion of "truth". This critique invites a nuanced understanding of Foucault's "regime of truth", recognizing the simultaneous danger and necessity of truth claims in pursuing social justice. Despite the multiple critiques, the concept of the *droit des gouvernés* retains its transformative potential. It continues to provide a potent tool for examining the operations of power in our neoliberal societies and for challenging the legitimacy of existing power structures. At its core, the *droit des gouvernés* promotes a vision of a more inclusive and participatory democracy, in which decisions are not monopolized by the few but instead are a collective undertaking of all those who are governed.

## CONCLUSION

This paper retraced a part of the journey that led Foucault to articulate his critique of human rights and to sketch the concept of a *droit des gouvernés*. Although winding laterally, this path is an integral part of an analytics of power that — since the early 1970s — Foucault has constructed as part of a philosophical work characterized by radical enlightenment. For him, philosophy is not just used to shed light on what is happening in the present, investigated in its sagittal relationship with the past. It also serves to take a stance. As Deleuze and Guattari have shown, for Foucault the present represents "what we are and, thereby, what already we are ceasing to be" (Deleuze; Guattari, 1994, p. 112). Therefore, what matters most is to show what is "the actual" within the present: that is, "not what we are but, rather, what we become, what we are in the process of becoming [...], our becoming-other" (Deleuze; Guattari, 1994, p. 112). Understood as an "ontology of the actual", philosophy must then be able to "diagnose the actual possibilities and trace their strategic map with the (not too) secret hope of influencing the battles" (Veyne, 1986, p. 940, my translation): this is where the deep political nature of Foucauldian philosophy lies. When Foucault thinks of the *droit des gouvernés*, he practices this "politics of philosophy" and positions himself, with a partisan perspective, in the strategic field described by the ellipse

between the practices of freedom and the capturing devices that confront them (Foucault, 2010b, pp. 21-2).

Descending into the battlefield of the present, Foucault seeks to identify within it the “actual”: the “now of our becoming” that can introduce a political discontinuity into the present itself (Deleuze; Guattari, 1994, p. 112). For this reason, he places his hopes on that politics of the governed which, in perspective, seems to him to contain a force capable — at least potentially — of injecting democratic substance into the governmental devices of neoliberal democracy and the exhausted legal machine of human rights. In our time, refugees and migrants continue to be the governed on whom the new frontiers of subjugation and denial of everyone’s rights are tested. This alone would show the fertile current relevance of the Foucauldian approach to philosophy and politics: an approach still fully capable of challenging our political imagination to reinvent democracy. A good way to update Foucault’s politics of philosophy could then be to place our hope again on the end of the rulers’ monopoly on political decision. With the governed, in the uprising, for the *droit des gouvernés*.

Indeed, the durability of neoliberal governmentality, and the resilience it displays in the face of various political, social, and economic challenges, merits a deeper inquiry. As articulated by Brown (2015), the dogged persistence of neoliberal norms in contemporary societies has led to a sustained assault on social rights, effectively undermining the foundation of democratic societies. To comprehend the realities of this neoliberal order, a focus on those most affected by its policies, such as refugees and migrants, is required. As depicted by Sassen (2014), these groups frequently bear the harshest brunt of neoliberal strategies, serving as test cases for novel forms of control and subjugation. It is, once again, against this backdrop, that the theoretical construct of the *droit des gouvernés*, proposed by Foucault, offers a powerful counterbalance. This approach underlines the inherent right of all individuals to participate in decisions that affect their lives. A closer engagement with Foucault’s politics of philosophy could instigate a systemic change, thereby injecting democratic substance into neoliberal governmental structures. A reimagined political paradigm, informed by the *droit des gouvernés*, could extend to areas such as environmental policy, digital rights, and even global cooperation, serving as a counterweight to the neoliberal logic that shapes these areas.

While Deleuze and Guattari illuminate Foucault’s focus on the ontology of the actual, their perspective tends to emphasize the multiplicities of power and the potential for resistance within these multiplicities. Their interpretation aids in understanding Foucault’s *droit des gouvernés* as a concept that transcends binary understandings

of power, offering a more fluid and multifaceted view of governance. In contrast, Brown offers a critical examination of the persistence of neoliberal norms, thus situating Foucault's philosophy within the specific challenges of contemporary democracy. She provides us with a lens to explore how neoliberal rationality influences the conceptual limitations of human rights and governance. It is important to note that while both Deleuze and Brown engage with Foucauldian theory, they do so with different foci and conclusions. Our paper employs their insights to offer a more rounded understanding of Foucault's *droit des gouvernés*, adapting and extending its implications in distinct directions. By integrating these different perspectives, we aim to enrich the existing interpretations of *droit des gouvernés*, thereby making our work a composite of varied but relevant academic thoughts.

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