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Introduction

Human rights are the fate of postmodernity, the energy of our societies, the fulfillment of the Enlightenment promise of emancipation and self-realisation.

Costas Douzinas¹

My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads not to apathy but to hyper- and pessimistic activism.

Michel Foucault²

I. THE PROBLEM OF GOVERNMENT (THROUGH) RIGHTS

WHY DO WE write? A colleague recently started a postgraduate training workshop with that question. It was just meant as an icebreaker but it has stayed with me. Why do I write? For the most part it is an arduous, even painful, process that involves doubt, anxiety and a constant questioning of whether what is being said is significant or original or worth saying at all. I have concluded that I write out of dissatisfaction and a position of refusal. That it is a way to challenge the conventional methods in which we are taught to think problems and events, and a way to say ‘I do not want to be told to think like that’. The problem I tackle here in this book is ‘the problem of government’ (through) rights.

This book is about a dissatisfaction with and a refusal of rights discourse. It is not interested in whether rights are ‘good’ or ‘bad’—that, I think, is not worth saying given they are the ‘fate of postmodernity’—but in how the discourse of rights and what it produces in terms of good governance tactics and subject identities, might be dangerous. It was fashionable to study human rights when I began my postgraduate studies and I did so thinking I wanted to work for an international human rights organisation, or be a human

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I argue that rights are technologies of governmentality. When Foucault coined this ‘ugly’ term, he meant ‘governmentality’ to refer to the ‘problem of government’, that is, ‘how to govern oneself, how to be governed, by whom should we accept to be governed, how to be the best possible governor?’ He was thus interested in the how of government—both how governing happens and how it is thought. Governing happens through rights, I argue in this book; and so I am interested in interrogating how the relationship between rights and governance works. Rights are increasingly spoken about in a language of governance; this is true at the local level where rights and their being conditional on responsibility is echoed


5 Ibid.


7 Ibid 88.
through the UK government’s Big Society ethos. It is true at the regional level, where, in the EU, new governance agencies are set up with the specific objective of providing assistance and expertise on rights. And it is true also at the international level where human rights non-governmental organisations (NGOs) must fulfil certain good governance criteria to be considered good participants in the rights project. How is this language of governance, which is used to speak about rights, actually a language of government, or more accurately still, of governmentality? I uncover the how by looking at the processes of governing (through rights) with reference to particular initiatives or agencies, namely, the Fundamental Rights Agency of the EU (FRA, Chapter 2), the international NGO Human Rights Watch (Chapter 3) and the Big Society agenda in the United Kingdom (Chapter 4). Within these national, regional and international sites at which rights and governance intersect, rights operate as mechanisms of regulation and control that manage the production of certain political identities (such as the EU as a virtuous human rights actor). Rights also produce a governmentable subject of rights, the individual that can be permanently observed and is politically useful (eg the ‘irregular migrant’). Moreover, rights language is itself regulated to the extent that experts and how they measure rights tells us what the ‘truth’ about rights is (and should be) within a particular region or area, and how to properly ‘do’ rights using the right kind of (rights-based) approach. We are thus experiencing government through rights and government of rights—hence ‘governing (through) rights’. Should we accept this form of being governed? Can we do otherwise? The other side of the problem of government is how to counter it. And so the second part of this book is concerned with how government (through) rights is countered. The ethos of the Big Society is one situated in an ethic of responsibility that poses a direct threat to rights since it replaces individual rights with a right to community. What are the dangers of this counter-narrative of responsibility? And what possibilities are there for recognizing unruly counter-conduct on the part of the rights-bearing citizen? Do rights experts have a duty to counter government through rights? The governmentality framework can, I suggest here, be stretched to examine resistance to a governmentality (through) rights.

As such, the book has two central aims: first, to interrogate and ‘encounter’ the relationship between rights and governance at the three sites I have mentioned (national, regional and international) and, second, to explore the possibilities and dangers of resistance to governing (through) rights. In this way, the book hopes to contribute, on the one hand, to a better understanding of human rights by examining the how of rights—the actors, tactics and processes involved in their realization. On the other

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hand, it hopes to intervene in Foucauldian studies and make the tool of
governmentality ‘protest and groan’ nine through applying it to a study of
rights—an endeavour that Foucault left somewhat neglected despite his
‘curious’ turn towards rights in the late 1970s.

II. GOVERNMENTALITY AS A METHODOLOGY

A. Methodology: A (Critical) Attitude

The refusal of the governmentality of rights that this book attempts is an
outlook that can perhaps best be described as a ‘critical attitude’; eleven that is,
‘a certain way of thinking, speaking and acting, a certain relationship to
what exists, to what one knows, to what one does, a relationship to society,
to culture and also a relationship to others’. Twelve This attitude has, I suggest,
three important features. It is, first, encouraged by a curiosity, a character-
nistic that:

- evokes ‘care’; it evokes the care one takes of what exists and what might exist;
- a sharpened sense of reality, but one that is never immobilised before it; a readi-
tness to find what surrounds us strange and odd;
- a certain determination to throw off familiar ways of thought and to look at the same things in a different way;
- a passion for seizing what is happening now and what is disappearing; a lack of
respect for the traditional hierarchies of what is important and fundamental.

This lack of respect for what appears fundamental and important is the
second feature: the critical attitude is ‘a way of thinking … which I would
very simply call the art of not being governed or better, the art of not being
governed like that and at that cost … the art of not being governed quite
so much’. Fourteen And third, the critical attitude provides an alternative way of

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9 I take inspiration here from Foucault, who responded to a question about his use of
Nietzsche with the following: ‘The only valid tribute to thought such as Nietzsche’s is precisely
to use it, to deform it, to make it groan and protest. And if commentators then say that I am
being faithful or unfaithful to Nietzsche, that is of absolutely no interest’: M Foucault, ‘Prison
Talk’ in Power/Knowledge: Selected Interviews and Other Writings 1972–1977 (C Gordon

10 See B Golder, Foucault and the Politics of Rights (Stanford, CA, Stanford University

11 M Foucault, ‘What is Critique?’, in M Foucault, The Politics of Truth (S Lotringer and
L Hochroth (eds), Los Angeles, CA, Semiotext(e), 1997) 24. See also P Minkkinen, ‘Critical
Legal “Method” as Attitude’ in D Watkins and M Burton (eds), Research Methods in Law

12 Foucault, ‘What is Critique?’, ibid.

13 M Foucault, ‘The Masked Philosopher’ in M Foucault, Ethics, vol 1, Subjectivity and

14 Foucault, ‘What is Critique?’, above n 11, 29.
thinking familiar things; it provides alternative truths. The critical attitude of this book allows us to think the language of rights differently; to be curious about the claims that rights make to being the ‘enlightenment promise of emancipation’ and ask what else do rights do?

The critical attitude, furthermore, refers to a type of critique, rather than criticism. It is thus not negative in its outlook (as the words ‘refusal’ or ‘critical’ might connote). Criticism suggests disapproval that is based on a perceived fault—it may imply a dismissal of the thing being criticized. Criticism may also be constructive; it may be intended to improve the thing being criticized. It is usually a stance or a position that one takes. For instance, a criticism of human rights might be that they do not achieve in practice what they set out in theory. This book does not disapprove of, dismiss or seek to improve rights discourse. It presents a way of thinking rights that exposes features about this discourse (namely, the tactics and technologies of governmentality) that might not otherwise be apparent. It asks questions of rights discourse that are based in how they operate. This way of thinking is critique. Critique re-reads and re-considers the claims of a discourse, searching for what is authentic in it. Before uncovering the power relations within the discourses that regulate and govern us, critique re-asserts the importance of the said discourses. Critique is, therefore, far from negating. It does not dismiss, reject or refute its object. It cannot, since by re-reading it must affirm the object. Critique is thus an act of reclamation, which takes over the object, or the discourse, for a purpose other than that for which it is currently employed. The claim has often been made that critique is ‘disinterested, distanced, negating or academic’ and that it does not provide insights into progressive change. However, critique is neither disinterested nor distant; rather, it engages the discourse which it contests. Nor is critique ‘just theorizing’ that bears no relation to ‘practice’. The case studies in this book—on the European Union’s rights agency, on human rights international NGOs, on the Big Society and its (dis/ab)use of rights rhetoric and on riots as counter-conduct—illustrate the ‘practical’ application of critique. Critique is an attitude; it provides a way of thinking, perhaps even a better way of understanding because it focuses on what is ordinarily hidden; in terms of a governmentality critique this would be the...
intricate, minor and heterarchical forms in which power operates, and the resultant identities and *ethos* that is produced.

A ‘governmentality critique’ is therefore a way of thinking (rights), an *attitude* (towards rights)—it is in other words a methodology. A methodology is, as I understand it, about ‘how to think’ a project. This is different to how to think *about* a project (which is the method).²⁰ As a way of thinking, that is, as an attitude, methodology is therefore about an approach, a perspective, or a lens through which to see a project. The typical legal education does not give much consideration to questions of methodology; most of us are trained in law schools that follow the doctrinal tradition and experience the law in a largely or even purely positivist sense.²¹ So, for instance, human rights *law* courses are taught with a focus on concepts and institutions for the protection and promotion of rights; the philosophy of rights, critical approaches to rights and a general curiosity about the discourse is not encouraged.²² There is perhaps an aversion to methodology because it is associated with *theory*—and so it is left to singular courses such as legal theory or jurisprudence to tackle different ways of thinking law. Positivism is the dominant methodology within law schools; it is the “properly” legal perspective and presents law from the perspective that it is ‘created and laid down (‘posit-ed’) by a law-making authority, that the validity of a rule of law lies in its formal legal status (not its relation to morality or other external validating factors, ie law is self-referential); that there is a concern with social standards that are recognised as authoritative; judicial decisions, legislation, custom’.²³ There are, however, a variety of other approaches, of ‘alternative methodologies’²⁴ that may be used in the study of law and in legal research. These are ‘alternative’ to legal positivism and

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²⁰ A method has empirical and sociological connotations, so, is the method a qualitative or quantitative analysis? What methods of data collection are used: documentary analysis, case studies, observation, interviews, for example? It is essentially about *what you do* in a project, as opposed to *how you think it*. For more on ‘method’ versus methodology see R Cryer, T Hervey and B Sokhi-Bulley, *Research Methodologies in EU and International Law* (Oxford, Hart, 2011) 8.


²⁴ Ibid.
demand an engagement with other disciplines such as political theory, international relations, philosophy and sociology. What are these ‘alternative methodologies’ and how many are there?

Cryer et al have attempted to put together a list of legal research methodologies that begins with the ‘main jurisprudential approaches’ (which include legal positivism and natural law) and then goes on to examine ‘extensions and negations’ to these, which are split into ‘modern and critical approaches’ and the ‘law and’ approaches. The former includes, for example, Marxism, critical theory (which covers a range of poststructural approaches), feminist perspectives and postcolonial theory. The latter includes law and geography, law and international relations and leaves room open for other areas such as law and literature. These approaches are all different ways of looking at law. The first important point is that methodology reflects research questions and so influences what you say in a project. Different attitudes prompt different questions; so for instance, as the Feminist Judgments Project shows, a feminist consciousness or philosophy engages questions about the ways in which law constructs gender. Re-reading judgments through a feminist lens opens up possibilities for alternative truths, in the form of different judgment altogether or a different reasoning/rationale. So, ‘[i]t makes such a difference how the story is told’.26

This book attempts to provide an alternative truth about rights by telling a different story about them; employing a poststructural critique or attitude that uses Foucault’s concept of governmentality, it shows how rights operate as technologies of government. My critical attitude is one that is interested in how questions, in power and in the social structures that have the effect of governing us in the name of values that we are told we ought to aspire to, such as rights, or responsibility and opportunity. So, the book examines how rights act as techniques of government within specific sites (the EU, the international NGO and the United Kingdom’s Big Society) and shows how such an observation is made possible by using a governmentality lens. It thus uses governmentality as a tool by which to better understand rights as strategies of power.

B. Governmentality as a Critical Attitude

‘Governmentality’ as the ‘problem of government’ refers then to both the processes of governing and to a ‘way or system of thinking about the nature of the practice of government (who can govern; what governing is; what or

26 Baroness Hale, ‘Foreword’ to Hunter, McGlynn and Rackley, ibid.
who is governed). It is thus both the art (process) and rationality (way of thinking) of government. The art of government refers not to government in the ‘old’ sense of the term but to a regulatory or conducting power, that is:

This word [government] must be allowed the very broad meaning it had in the sixteenth century. ‘Government’ did not refer only to political structures or to the management of states; rather, it designated the way in which the conduct of individuals or of groups might be directed—the government of children, of souls, of communities, of the sick … To govern, in this sense, is to control the possible field of action of others.

The art of government(ality) thus refers to the ‘conduct of conducts’; or, in other words, the regulation (conduct) of behaviour (conduct). The rationality of government sees it as ‘govern/mentality’; a mental attitude, outlook or methodology for understanding the techniques of government.

In a lecture given at the Collège de France in 1978, posthumously given the title ‘Governmentality’, Foucault presents his most concise definition of the term. He explains that ‘governmentality’ means three things: first, ‘the ensemble formed by the institutions, procedures, analyses, reflections, calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population …’. Second, governmentality refers to ‘the tendency that, over a long period and throughout the West, has steadily led to the pre-eminence over all other forms (sovereignty, discipline and so on) of this type of power, which may be termed “government”’. Third, governmentality is the (result of the) process by which the state gradually ‘becomes governmentalised’. It is this idea of shifting the focus from an authority that needs to be legitimated or tamed to social practices of governing that touch all and each (omnes et singulatum) that forms the basis of a now well-established field of governmentality studies, which is typically appropriated by the social sciences and geographers. For instance, Garland and Rose use a governmentality perspective to understand technologies of crime control; Rose develops the concept of ‘ethopolitics’

29 Ibid 341.
to describe the government and politics of healthcare and a general ‘death of the social’ to allow for the birth and growth of ‘community’; 34 Bigo, Darling, Inda and Walters discuss the regulatory function of immigration and asylum laws, and question control at border sites, whilst Elden examines the notion of ‘territory’ as a political technology. 35

The shift in focus is a different understanding of power that is concerned with the how of power relations. The shift means looking at rights as a process rather than as an outcome, such that we examine the tactics and technologies that enable a wider strategy of government (through) rights. Hence, the actors involved in rights discourse and the mundane and minor processes by which they operate become significant. Expertise forms a significant tactic of government, as experts within non-state rights bodies (agencies, international NGOs), as policy-makers, bureaucrats, humanitarians, activists, the media engage in processes and procedures that narrate what rights are, and what the right way to do rights is. Within the mundane and minor instruments of policy documents, White Papers, reports and indicator criteria we find the technologies that govern through information. Data and indicators are thus hugely significant since they are the great numerical technologies that enable government (through) rights. Government by experts and through numerical and mundane tactics involves elements of direction, guidance and manipulation that reveal ‘technologies of pastoralism’. 36 Experts are concerned with narrating (the right kind of) stories, with compiling how to measure rights and how to indicate well-being, good governance and progress. Pastoral power as a technology of governmentality, as the manifestation of processes within the modern state and within the modern human rights architecture that regulate the behaviour of (non-) citizens, states and rights experts themselves, is thus another important methodological tool which we can use to uncover government (through) rights. Of course, governmentality, whilst it cannot be escaped (for power, as a ‘complex strategical situation’, ‘is everywhere’) 37 features a disruption in its rhythm, cracks in the governmental design and so leaves room for rupture or struggle. As well as observing the conduct of conducts,

we can then also observe *counter-conducts* in rights: how the rights-bearing actor (as a citizen with rights) finds ways to counter government and enact the impulse to no longer obey. The counter-conduct perspective allows us to ask what political and ethical possibilities can be imagined for the unruly, struggling subject (of rights): is she a courageous truth-teller, or parhresiast? And can her struggle be recognized within the discourse of rights, or do we need something else, a new technology, by which to understand and see it?

### III. THE CHAPTERS

The book then essentially uses the methodological tool of governmentality to show government of and through rights language, and related and contesting discourses (such as the ethic of responsibility and spontaneous unrest). So, the book attempts to challenge our understanding of new rights agencies that spring up in the name of good and better governance; to interrogate humanitarian and human rights actors and their role in governance; to highlight the challenge that the responsibilisation of individuals through Community and Society initiatives poses to rights; and whether the rights-bearing citizen can refuse to be governed and what space there is for counter-conduct in rights.

In the next chapter, I explore the ‘problem of government’ (through) rights at the EUropean level to interrogate the case study of the EU and its FRA. I identify the features of the FRA that show it to be a vehicle of governmentality (and not simply governance) which both governs rights and governs through rights, as being experts, the rights-based approach and indicators. Thus, the chapter will argue that through the presence of vast networks of experts, through the adoption of a rights-based approach (to the example of migration policy) and through the measurement of progress in rights using newly developed indicators (eg on the rights of the child), rights are made technical and thus governmental. Rights become a complex, authentic and self-reinforcing discourse of conducting power that creates an empowered and right-eous identity for (rights) experts and the EU at the same time as it disempowers other subject identities (eg the ‘irregular’ migrant).

Chapter 3 looks at another level of non-state actor, the international non-governmental human rights organisation (INGO), in order to observe the potential of rights to govern and to be governed within this wider international human rights architecture. This architectural design is made up of a vast palette of actors and I observe the ‘rulership’ role of the experts of

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the archetypal human rights INGO that is Human Rights Watch (HRW).\textsuperscript{40} Relying on the tactic of expertise, HRW demonstrates how this kind of non-state, human rights actor comes to play a key role in the government of rights, which intersects with and utilises a humanitarian ethic. It thus demonstrates humanitarian government (through) rights. The activities of HRW are, furthermore, regulated by rights and by the requirement that it, like other human rights NGOs that are part of the same global architecture, be active, responsible and suitable participants in the discourse. So I examine HRW’s structure and functioning methods to question the extent to which the actors/experts involved govern (through) rights by virtue of their expertise, which allows for the ability to narrate rights stories and to scrutinise state behaviour (through) rights.

Chapter 4 moves to the local level and will consider the link between rights and a new improved version of responsibility in the context of the UK government’s Community and Society initiatives (formerly the Big Society). I focus on the nationwide National Citizen Service (NCS) and the construction of desirable and useful youth who will become desirable and useful active citizens in place of rights-bearing citizens. The active citizen is the ideal citizen and is a new type of governmentable subject created in the face of a reaction against rights language, in favour of responsibility and opportunity. The ethic of responsibility is thus a direct reaction against rights, a counter-narrative which exposes a failure in the governmentality of rights and poses a dangerous threat to rights discourse. For instance, the focus on individual responsibility over individual right stifles the kind of spontaneous struggle, or counter-conduct, that I discuss in Chapter 5 as being essential to the political and ethical agency of the rights-bearing citizen—that is, riotous behaviour. Chapter 5 therefore questions whether and how it is possible to counter rights language; how might the ‘revolting subject’,\textsuperscript{41} who refuses the regional and international human rights architecture, and the ethic of responsibility and its emphasis on community rights, enact a \textit{new ethical} right to struggle? I focus on the unsavoury figure of the rioting subject by examining recent unruly events that challenge our perception of the right way to resist within democratic, neoliberal society that have taken place in London and in Ferguson in the United States, and indeed challenge the limits of rights discourse in allowing for a ‘right to resistance’. I thus question the possibility of reading these events as counter-conduct, which necessitates that I describe what counter-conduct means and how it recognises political agency. I also ask whether counter-conduct can be an ethical position of \textit{parrhēsia}.

\textsuperscript{40} The specific nature of HRW as ‘archetypal’ and as only one of a range of INGO-types involved in the protection and promotion of rights, as well as the intersection of rights talk and the language of humanitarianism, are considered further in Chapter 3.

\textsuperscript{41} Taken from I Tyler, \textit{Revolting Subjects} (London, Zed Books, 2013).
And so, what is the point? The point is to permanently critique—and not to point out the ways in which rights are bad but the ways in which they are dangerous. That is, to contest the assumption that rights are ‘the fulfilment of the Enlightenment promise of emancipation’, to discover and highlight the minor tactics of measurement and the specificities of expert involvement and how they produce normalised identities and forms of behaviour—the governmentable subject of rights and the governing non-state actor. Perhaps then, there is ‘hope’ of an ‘other world’ in which there might be a right to contest rights, a scope for ‘transformation’ through critique; this is the challenge I leave open in Chapter 6. This continual struggle within rights and refusal of the different ways in which activities of government happen and have been made possible (through) rights will, I hope, always give us something to do.