On the nature of the right to resist: a rights-based theory of the ius resistendi in liberal democracies

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"Italian resistance was an action of the people, uniting different generations in the fight to conquer freedom. That led to the development of civil and ideal unity. Resistance became European, and in her name, Europe found the strength to unite to become a space of peace, of solidarity and of cooperation. This is why we should never forget the men and the women that chose to fight, to rebel against war, simply to disobey the dictatorship. Europe was born after the horrors of Nazism and fascism. Europe´s construction represents not only the political response but also a fundamental driving force of the process of integration of our democratic societies (…). Let´s never forget that Nazism and fascism are not opinions, they are crimes. And even today we must fight with conviction so that fascism does not ever come back, under any form. To all those that fight for ideas and for democracy and social equality. To those that disobey intolerance and prevarication every day. Good liberation to all!".

David Sassoli, former President of the European Parliament, statement through twitter (@EP_President) on the occasion of the Liberation Day of Italy, 25 April 2021 (own translation).

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INTRODUCTION

Anyone living in a liberal democracy has been witness to a significant number of acts of resistance, of civil disobedience, of non-cooperation, expressions of grievance, of discontent and of dissent. The last decade, and especially the year 2019, saw what may have been the largest wave of mass, nonviolent anti-government movements in recorded history (Chenoweth 2020)P69): the protests against the restrictions imposed during the covid-19 pandemic, the Black Lives Matter movement, the gilets jaunes in Paris, the Occupy Wall Street in New York, the indignados in Spain, the student protests in London, the anti-austerity movement in Greece. Costas Douzinas calls it the "age of resistance" (Douzinas 2013)P6) and Alain Badiou the "rebirth of history" (M. S. Richards 2014). The motivations behind these protests were diverse, and so were the forms in which people expressed them. Some engagements aimed at righting a wrong, others demanded the fulfilment of a broken promise, others appealed for recognition of a particular normative situation, and still others attempted to break away from the constraints that prevent progress. And yet, beyond their external political appearance or the motivations behind them, they all shared a common feature, they were all external expressions of the same right, the *ius resistendi*, the right to resist.

Albeit under different names, the *ius resistendi* is a notion extant in all political traditions, civilizations, and historical moments. As soon as the first relation of power between men materialized, there was probably a reaction to the exercise of that power and a subsequent need to vindicate it in rational, rather than in instinct-based terms. In the western tradition, the idea of the *ius resistendi*, also called the right to dissent, to revolt, to rebel, or to resist against oppression, against the tyrant, or against gross violations of human rights, is contemporary to every political system since the formation of the polis. It has been part of the intellectual enquiry of all major philosophical and political figures, for it poses a fundamental question of concern to all forms of power; am I legitimate?[1].

The *ius resistendi* continues to be the focus of political theorists seeking to resolve the question whether one is morally entitled to confront the authority to protect one´s freedom against the power of the sovereign, and of legal theorists, preoccupied with the question whether disobedience to the law can be legally justified. Sociologists have wondered about the role of resistance in shaping power relations and the structures of society, and moral philosophers seek to reason about the legitimacy of power and whether violence can be justified in any form of dissent. Those searching the questions above have focused

[1] Jean-Jacques Rousseau opens his theory of the social contract with the very question of legitimacy. "I mean to inquire if, in the civil order, there can be any sure and legitimate rule of administration, men being taken as they are and laws as they might be" (Rousseau 1762)Book1).

predominantly on the motivations behind the action and in the external expressions of defiance, in the actual physical or political engagement. Empirically, some of those actions have certainly had the most significant impact in the formation of our societies.

All manifestations of dissent, opposition or resistance take place within a specific normative framework and in relation to actual power dynamics that condition their expression. But an external political engagement that is determined by the circumstances of the normative framework in which it occurs cannot serve as the basis to build a universal theory of any phenomenon. A theory of resistance cannot be reduced to the classical moral justification of acting against an unjust or immoral law enacted by the sovereign-turned-tyrant, nor to a simple description of the different manifestations of dissent as outbursts of dissatisfaction of the community.

Scholars have generally neglected to examine the legal nature of the *ius resistendi* and have evaded the task of finding its rightful place in the legal order. For most legal and political theorists in the liberal and the critical tradition, from Rawls to Habermas, the right to resist is "only" a moral right that does not possess the necessary characteristics to be considered a legal right, while others, from Kant to Raz, affirm that acknowledging the right to resist in a democracy is an absurdity, for no logical system would legalize a right to be challenged from within. To date, there is still no universally accepted theory of the *ius resistendi*, let alone of its role in contemporary democracies. It remains a contested notion because it remains an evolving right, but it also remains a misconstrued concept because it has generally been considered a political affair. And it is precisely the fixation on defining the right to resist as a political expression, ignoring for the most part its legal character and disregarding, in this way, the legal framework that supports and realizes the political, that constitutes, I contend, the main fallacy of many theories of the right to resist. Any theory that seeks to provide a compelling account of the *ius resistendi* must transcend the time-bound expression-specific account of a particular engagement and focus on the element that instils that expression of resistance with its universal character: its value as a right.

The objective of the thesis is to develop a theory of the right to resist *qua* right, within a specific ideological tradition, that of liberal democracies[2]. My hypothesis is that it is possible to formulate a universal rights-based theory of the right to resist through legal probe. Because *the ius resistendi* embodies the resistances inherent to the political order that shape the very notion of law, we can derive its normative value from the power dynamics that recreate the order in positive form, or that constrain it through legal narratives.

[2] I understand the notion of liberal democracy as a *régime* in which the legitimacy of laws and policies flow from its having a liberal constitution and a democratic form of government (Finlayson 2016)P6).

Central to this thesis is the assertion that the right to resist remains unchanged despite the different political forms that its external manifestations may take. The external political manifestations of the right to resist shift over time, adapting their performative features, as the state, and the legal system, adjust the use of coercive mechanisms to respond to particular circumstances, challenges and needs (Miotto 2020)P16)[3]. The normative value of the *ius resistendi* may vary depending on the circumstances and the consequences of its assertion, but the nature of the right to resist remains unaffected by those conditions.

The thesis is divided in two parts. Part One (chapters I, II and III) provides the historical, political, and moral context necessary to grasp the current understanding of the right to resist in liberal democracies. Part One explores the political and moral accounts about the fundamental role that the right to resist has played in shaping our existing idea of society, and of law. It frames the *ius resistendi* within the notion of the obligation to obey the law as the principal duty of citizens in liberal democracies, yet it frames the analysis of the right to resist not as a challenge to the norm (or to the obligation), but as a right within the norm (and as an obligation). The *ius resistendi*, I submit, underpins democracy.

In Part One, Chapter I provides a brief account of the evolution of the notion of the right to resist in the western philosophical tradition. The purpose of the chapter is not to undertake a thorough account of that historical evolution, but to focus on key moments, philosophical traditions, and the most relevant scholars that have, collectively, shaped the current understanding of the *ius resistendi*. The chapter also reflects on contemporary debates about resistance and brings into question the narrow liberal definition of civil disobedience. Finally, to challenge classical interpretations about resistance, both as a political engagement and as I right, I contend that the most important function of the *ius resistendi* is not the classical role of opposing injustice, but rather that of capturing normative spaces through a rational purposeful engagement that transcends extant practices to open new normative possibilities.

Chapter II outlines the theoretical framework of the thesis, framing the conversation into recognizable legal and political terms. It examines the relation between law, politics, and the right to resist under the premise that "the ideology" – the basic system of values and ideas – is the origin and the source of all legitimacy. The chapter analyses the *ius resistendi* through a critical-realist approach and explores the relationship between the right to resist and the concepts of power, violence, dignity, justice as well as what I call "the principles of

[3] The Greeks did not go on protest marches, and Socrates never engaged in a sit-in (Richard Kraut, Socrates and the State, as cited in (Bedau 1991)P6). Nowadays those actions are an essential part of the toolbox of resistance which has widened to incorporate strategic engagements unthinkable a few decades ago, like cyber-resistance and DDoS attacks.

democratic practice". The chapter provides the principled underpinning that informs the rest of the thesis and lays the foundation for the rights-based theory of the *ius resistendi*.

Chapter III explores the reasons why in liberal democracies scholars frame theoretical interrogations about the *ius resistendi* in terms of the obligation to obey the law. It challenges two fundamental elements in which modern democracies rely on: the pairing of the concepts of legitimacy and legality, and the merging of the notions of the obligation to obey the law with that of being a good citizen. The chapter also analyses whether there is any normative relationship between the right to resist and the right to do wrong.

Part Two (chapters IV and V) argues that the right to resist is a right and that the liberal legal orthodoxy has no reason, other than political convenience, to deny it the status of a legal right. This part develops a rights-based theory of the *ius resistendi* within a broader conception that recognizes the sovereignty of individual and collective right bearers without undermining the notion of duty holders, a theory that advances de idea of democracy through the legitimization of its practice.

In Part Two, Chapter IV examines the right to resist in its current legal dimensions. The chapter aims at settling the debate about the legality of the *ius resistendi* by providing evidence of its positive, and even of its constitutional character. It also analyses how liberal regimes have come to criminalize the assertion of the right to resist. I contend that the degree of criminalization of the *ius resistendi* reveals the inherent contradictions of a system (the liberal democracy) that it is still unable to truly justify itself. The chapter also advances arguments to vindicate the legal nature of the *ius resistendi* by exploring the moral and legal protections that its assertion offers. The objective of the chapter is to prove, through classical legal analysis, that there are no reasons why the *ius resistendi* could not be considered a legal right.

Chapter V develops a rights-based theory of the right to resist. It breaks with the traditional understanding of rights in liberal accounts and proposes a broader conception of rights where the *ius resistendi* is recognized in its intrinsic place in the legal order. The rest of the chapter explores some of the key features that define the essence of the right to resist as a right, including its normative value and its relationship to other rights in the normative system. I argue that the *ius resistendi* is not a human right, and to resolve the conundrum between the primacy of individual rights in the liberal order and the recognition of collective rights, I suggest that the right to resist is an individual right of collective expression. I also introduce the idea that the *ius resistendi* epitomizes the right to be sovereign, and to decide on the exception, or on the exception over the exception. The chapter contends that the right to resist is not the right of last resort, but the *ultima ratio*, the narrative that engages the will of the people to realize their right to have rights.

To conclude, I offer some reflections and pose some further questions about the nature of the *ius resistendi* and its role in liberal democracies. I hold that any legal theory would be incomplete and erroneous without due consideration of the right to resist, because every right, every law, norm, or standard that ever was, was born out of pressures for them not to become. I conclude that the *ius resistendi* is the agent that connects the forces that collide when power is exercised, for it attempts to close the gap between the expectations of the ruled and the actuality of the rule. But as in any refection about power, whether the right to resist can close that gap depends on forces other than its normative strength, or even the truthfulness of its assertion.

THEORETICAL FRAMEWORK

The theorization of legal scholars about the *ius resistendi* tends to be more conservative than those of political scientists because law tends to have a more stabilizing effect on society than politics. Whereas radical theorists argue about the need to appeal to new forms of re-politicizing the public space, few legal theorists have embarked in similar inquiries. To the extent that I defend that the *ius resistendi* is a right and that it has a place in the legal order, I must undertake to examine its nature from a broader, fairly disruptive theory of rights[4].

In my research, I explore the descriptions and accounts of three major schools of western legal philosophy only to find that there is a remarkable lack of insight in the postulates of *ius naturalists*, positivists, and critical scholars about the nature of the right to resist. Most of these legal doctrines generally agree to limit the validity of the external expressions of the *ius resistendi* in relation to their legality (Bedau 1961)P654), yet this approach seriously constrains the recognition of the *ius resistendi*, especially for positivists that consider that an action is either legal or illegal. *Ius naturalists* have traditionally provided the strongest arguments to acknowledge the existence of the right to resist, but they have done so by linking it to subjective postulates that constrain, if not repudiate, some of its key functions. These are unsuitable approaches.

I find in a combination of critical-realism[5] and communitarianism a more welcoming theoretical framework for my hypothesis. I embrace a critical legal approach because, in

[4] I agree with Jovanović in that legal theory has to get actively involved when there is enough legal material (statutory norms, judicial decisions, expert opinions, etc.) to work with, and yet there are serious doubts as to whether this leads to the emergence of some new general legal concept (Jovanović 2012)P3). That is also, in a way, the objective of the thesis, to generate a legal concept about the right to resist.

[5] There is an important difference between the traditional understanding of "legal realist" and "realist". I use the term "realist" insofar for realists the true nature of public law and the theory of constitutionalism does not lie within law alone, but must include aspects of the non-legal (Mauthe and Webb 2013)P23). American Legal Realists focused primarily on how (subjective) court decisions were taken, suggesting that judges interpreted

essence, it provides a link between the legal and the political system, which includes a critique of the injustice and oppressiveness of current arrangements and for realization of freedom through reason (D. Kennedy 2013)P178). A key element in critical legal studies is the development of the indeterminacy argument which underlines the general perception that there is no interesting difference between legal discourse and ordinary moral and political discourse (Tushnet 1991)P1524). For critical legal theorists, law is indeterminate, intrinsically unreliable (Fitzpatrick 1992)P34), and even incoherent, because the premises that build the legal arguments of the liberal system are inconsistent with each other (Sandoval 2017)P219). Law is a product of power and, at the same time, its sustenance. The advantage of adopting as a combination of communitarianism and critical-realism as a methodological approach, is that it provides a normative perspective from which to critique the exercise of power in any political context, for it is "willing to examine the external and even the peripheral" (Mauthe and Webb 2013)P24), in other words, it is not constrained by the positivist or the *ius naturalist* narrow view of rights, or of democracy. This is precisely the theoretical foundation that underpins my analysis of the right to resist: to consider the *ius resistendi* as an indeterminate (and disruptive) right, but nevertheless, a right that the political, the moral and the legal discourse can embrace, adopt and validate.

Communitarianism provides a suitable environment for the acknowledgement of an indeterminate right for it pursuits, almost as a post-liberal endeavour, the balance between the individual and the common good, and of individual rights and collective engagements (Etzioni 2014). For communitarians, the self is made up of communal ends and values that are predetermined by the culture of the community of which it forms part. Rights are narratives that express the self within a community, a community that also determines the value that we give to the rights that we assert. We ascertain basic rights (the concrete implications of our commitment to the abstract ideals that they represent) within the specific context of our own tradition (Allan 2017)P5), and it is that (legal, political and social) framework that provides the value of a right.

The thesis draws from critical legal and political scholarship (Herbert Marcuse, Costas Douzinas, Robin Celikates, Candice Delmas) and realist interpretations of law (Brian Tamanaha), as well as from structuralist perspectives (Michel Foucault). It focuses on exploring the actualization of the *ius resistendi* in the public sphere through Martin Laughlin´s notion of the *ius politicum*, Hannan Arendt´s concept of the political and, with caveats, Carl Schmitt´s view about the constituent power. The reason why the concept of

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the law subjectively, rather than applying legal rules in a mechanical (positive) manner. The "realist" in the thesis refers to this approach, particularly when considering the practice of judges (as political agents) when deciding on cases related to the right to resist.

ius politicum[6] is so central to the very idea of the right to resist, and therefore a fundamental element in the theoretical foundation of the thesis, is because "the public" is the space where all rights are contested, negotiated, and asserted[7]. There are no rights outside of the polis. The *ius politicum* embodies the immanent laws of the polis, laws that ground and legitimatize the political order, the ideology, and that far from expressing an ideal arrangement of liberal-democratic norms, derive from lived experience (Loughlin 2016)[8]. The *ius resistendi* pertains to the domain of the political.

What Martin Loughlin refers to as "political jurisprudence", that is, the way in which governmental authority is constituted (Loughlin 2016)P15), is criticized for being too empiricist and limited (Becker 1967)P646), and mostly an issue pertaining to common law countries and still a relatively alien matter in Europe (Rehder 2007)P11). I believe, nonetheless, that it is essential to inquire into the historical, political and philosophical foundations of the *ius politicum* to understand power and the manner in which public authority is established and maintained (Loughlin & Tschorne, 2017)P4), because there is no understanding of the *ius resistendi* without an understanding of power dynamics. It is in that order, in those specific dynamics of power, that we can question and ascertain the conditions for the actualization of the *ius resistendi*[9].

Foucault becomes central in my understanding of power. He examines resistance in relation to power, although he did not develop any notion of the right to resist or even a concept of law. For him, as soon as there is a power relation, there is a possibility of resistance

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[6] Carl Schmitt spoke of the *Jus Publicum Europaeum* (Werner 2009)P130) as the public law governing the relations between European states according to which all independent states were recognized to possess the right to go to war on the basis of their own judgment of justice and necessity (the European nomos as even war respected the Christian order). But he never considered outlining the conditions for a stable, long-lasting and peaceful society (Sandoval 2017)P28). The concept, as Schmitt envisaged it, did not prosper (in part because it had no refence to legal rules), but today some institutions like the Max Planck Institute for Comparative Public Law and International Law continue to use the concept of *Ius Publicum Europaeum* to describe the public law of the European legal area that is composed of European Union law and the laws of its Member States, as well as other legal sources.

[7] The notion of *ius politicum* does not perfectly correspond to that of "public law" because the latter is often identified in reference to the institutional and doctrinal matters that make up constitutional and administrative law, institutions that create a condition in which private persons may interact on the basis of publicly established norms and modes of adjudication and enforcement (Weinrib 2014)P712). The notion of *ius politicum*, in addition, contains moral, political and ethical dimensions.

[8] Rousseau, referring to the right of people to regain their liberty, already noted that "this right does not come from nature, and must therefore be founded on conventions" (Rousseau 1762)Book1). Even Carl Schmitt, albeit in a whole different context, noted that "concepts of public law change under the impact of political events" (Emden 2006)P5).

[9] "One cannot rely on the paradigms of government or of sovereignty as the basic point of departure for the study of politics and power relations as such" (D. C. Barnett 2016)P240). One must rely on the very concept of power.

(Demirović 2017)P35)[10]. Foucault argues that "in the relations of power, there is necessarily the possibility of resistance, for if there were no possibility of resistance - of violent resistance, of escape, of ruse, of strategies that reverse the situation - there would be no relations of power" (Fornet-Betancourt 1987)P123). For Foucault, resistance is a form of power (D. C. Barnett 2016)P401)[11]. Power and resistance are usually constrained in the framework of an ideology that determines those situations of power and the elements to overcome them (the Foucauldian power-knowledge pair). That evolution is then reflected in the normative framework that sustains the idea of the ideology and the forms of rule that preserve it and that constrain the resistances inherent to that order. There is a conceptual and performative correlation between rule (understood as forms of authority and law) and the form that the external expression of the right to resist adopts.

Some scholars, in fact, wonder about the conditions of exteriority that enable law to negotiate the slippery relations between power, injustice, and resistance (Madsen 2010)P2). Still others speculate whether the power-resistance relation is dependent on each other, and whether one can examine resistance independently from power (Baaz et al. 2016). Within that framework of inquire, and departing from a critical-realist approach, I attempt to challenge some of the key arguments on which the liberal order has attempted to justify its narrow view of resistance and dissent, specifically, that democracies are nearly just societies, that their laws deserve obedience, and that disobedience must be confined within the limits of the law.

Some consider resistance to be a dramatization of the tension between the poles of positive law and existing democratic processes and institutions on the one hand, and the idea of democracy as self-government on the other, a tension that is not exhausted by established law and the institutional *status quo*. In other words, resistance is the result of the tension between constituent power and constitutional form (Celikates 2014b)P223). The thesis follows this formulation to a great extent, except that I provide the cover of the ideology to both constituent power and constitutional form. An external manifestation of the right to resist reflects the tension between the ideology on the one hand, and the principles of sovereign rule on the other, which includes both constituent power and constitutional form.

[10] For Foucault there are three forms of power that emerged in different historical phases of modernity but did not replace each other; sovereign power with the rise of the modern European state (power that stops and limits certain behaviors); disciplinary power in early capitalism (power that trains and controls individuals through institutions and scientific discourses while simultaneously punishing in proportion to the violations); and biopower during modern liberalism (the governance of life/society through governmentality) (Lilja and Vinthagen 2014).

[11] Foucault presented resistance against the state in bold terms, "rebellion is a response to a war that the government never stops waging. Government means their war against us, rebellion is our war against them" (D. C. Barnett 2016)P338).

Because there is no one single theoretical legal framework that provides irrefutable certainty to understand the value and functions of rights in relation to power and the normative setting, I believe that legal (but also political, social or moral) pluralism is the most appropriate framework in which to examine resistance and its expressions (López Cuéllar 2011)P154). It is from that perspective that I develop my broader conception of rights, a conception that incorporates the *ius resistendi* as indissoluble part of the legal and political order but also a conception that transforms (but does not disregard) the traditional notion of the right-duty correlation or the validity of the extant order.

Within a critical-realist approach, the thesis is based on the fundamental premise that men create their own terms of engagement, and that men create the narratives that create the laws that accommodate or respond to expressions of power[12]. As Horkheimer argued, men are the "producers of their own historical way of life in its totality" (Olssen 2008)P2), and that totality includes the creation of the legal system and the structures of political organization that support it. All theories are man-created, and all theories, while pursuing universal philosophical theorization, must fit within understandable (if not suitable) political and legal parameters created by men. As man-created concepts, rights theories should aim at universality, they cannot remain purely discursive or within the domains of relativism. To be epistemologically sound, a theory of "a" right must capture the generally accepted understanding of that right in a particular moment, assess what the right means for right-holders, and evaluate its functions in relation to the ideological framework that provides that right, as well all other normative and political commands, with its legitimacy. In other words, as critical legal theorists argue, once we have derived a right from universal needs or values, it is understood to be possible to have a relatively objective, rational, determinate discussion of how it ought to be instantiated in social or legal rules (D. Kennedy 2013)P185). It is only after one has conclusively examined the right within the empirical framework, that one can pretend to arrive at a universally applicable understanding of that right or propose an alternative, broader conception of rights.

To develop the notion of the right to resist, the thesis therefore assumes (and accepts) the principle that there are external standards, anchored by the social, economic, political and historical moment (in other words, by the ideology), against which to judge the nature and the fairness of rules. It is in that sense that the *ius resistendi* could be somehow comparable to (or could be integrated within) the notion of a cultural right, because it serves as a baseline against which to identify its own position and value in relation to the order. The notion of cultural right (Cliteur and Ellian 2019) allows for a sociological jurisprudence

[12] "Since no man has a natural authority over his fellow, and force creates no right, we must conclude that conventions form the basis of all legitimate authority among men" (Rousseau 1762)Book1).

approach to interpreting when the right to resist is legitimate, because it helps determine whether its external manifestations are a reflection of moral, social and cultural principles of that time.

Another key aspect in the methodology used in the thesis is the differentiation between the term revolution and resistance, or between the right to revolution, if one will, and the right to resist, a differentiation that it is absolutely critical to understanding the concept of the *ius resistendi*, and most crucially, one that substantiates the entire proposition behind this thesis. I follow Hannah Arendt´s view (Arendt 1990). Revolution is everything that breaks the logic of the historic-legal moment by abruptly changing the system, often through violent methods. Revolution seeks to transform the whole order, and with it, the ideology that sustains it and gives it coherence[13]. Resistance, on the other hand, is a re-adjustment of that logic within the prevalent historical-legal context to strengthen progress by disruptive methods, which may or may not be violent. Resistance can indeed challenge the system, in parts or in its whole, but it does not necessarily become revolution (though in many instances specific acts of resistance have been at the origin of revolutions). External expressions of the right to resist, whether boycotts, strikes or civil disobedience are acts of stoppage and withdrawal, public expressions of discontent, but if they do not point to transformation and utopia, to changing not only the system, but its values, then they are not revolution (Walzer 1960).

Throughout the thesis I use the term "right to resist" or "*ius resistendi*" (indistinctively) rather than right to resistance, or right to civilly disobey, or right to dissent, because I contend that there is only one right, regardless of the external form that its political manifestation takes[14]. I use "external manifestation" or "external expression of the right to resist" rather than resistance[15], non-cooperation, or civil disobedience because those are political and strategic categories that refer to a particular action in a particular context, actions that depend, on their form, "on which kind of evil is resisted" (Brumlik 2017)P24).

[13] Gandhi did not practice civil disobedience. His aim was not to change parts of the system to accommodate his view of justice and fairness within the extant environment. He aimed at changing the ideology, from a British-dominated legal and political framework to an independent Indian state with its own institutional and social structure. He was a revolutionary. The external expression of his political strategy has been labelled as civil disobedience because of the methods (nonviolent, appealing to a higher law, public…). He confronted an empire, not to reform it, but to replace it.

[14] The 2022 World Protests study has identified 250 methods of non-violent protest (Ortiz et al. 2022)P114).

[15] Andrew Barry notes that the notion of resistance provides only an impoverished idea of the dynamics of contestation and opposition. For him, there has been a lack of interest in the analysis of study of political conflict, and a tendency to resort, in the absence of any developed account, to the notion of 'resistance' to understand such conflicts. (Thomas Lemke in (Wallenstein 2013)P43).

PART ONE

CHAPTER I: ABOUT RESISTANCE

Scholars generally consider Sophocles' Antigone as the original reference to the right to resist as she defends the laws of the Gods against the temporal laws of Creon. Antigone unveils the perpetual dichotomy that has defined our societies as political entities and ourselves as moral beings: a constant antagonism between right and wrong, between justice and injustice, between reason and the moral. Antigone commences a debate about the origins of power and the right of the ruler, an argument that would find its most powerful expression in the Christian doctrine, in the dispute between the power of the divine (God) and the power of the temporal (men). That debate is ongoing. It has continued in more secular terms, in the context of natural rights, in the ideas of the enlightenment, in the social contract, in debates about human rights or in various theories of political participation. Yet throughout western history, there has been an element that has provided coherence and logic to all those debates, a common element that has grounded the discussions in political, legal and moral terms and that has allowed societies to envision their aspirations for justice: the concept of the right to resist.

1.1. The evolving interpretations of the *ius resistendi* in western thought.

Despite its literary Greek origins and a solid tradition in both Greek and Roman philosophy and law that exonerated the killers of would-be tyrants, current interpretations of the *ius resistendi* cannot be dissociated from the Christian doctrine and from the fundamental dispute between the power of the divine and that of the temporal, between the rightness of the laws of God and those of man. Many regard the gospel, in particular the words spoken by Jesus in his Sermon on the Mount; "love your enemies and resist no evil", as the source of the passive non-resistance doctrine that would later develop in the Christian world (D'Amato 2015). According to the gospel, Jesus also commanded to "render unto Caesar the things that are Caesar's, and unto God the things that are God's". The determination of what belongs to whom has marked the evolution of western political and moral thought, and it is still a matter of personal (faith/moral) and collective (political/legal) concern. I contend that these two commands constitute, in essence, the foundations on which the right to resist would be later theorized in the western world, for they embody the *ius resistendi´s* two most important elements: the determination of the legitimacy of the source of power and its authority (the Caesar or God´s), and the moral base of the resistance and its external expression (resist evil or not, and how).

As Christianity progressively became the official religion of the "state" (a term then loosely defined), the political concept of resistance served to demarcate the spaces of power[16]. The *ius resistendi* found its normative standing during the resistance of the princes to the power of the Church expressed in the quarrels between the Emperor and Pope for dominance, not of souls, but of authority. This resistance led to the need for the normative space of the political to expand to offer the Church and the Sovereign a system to solve the problems arising from the need to harmonize the Augustinian City of God with that of Man. In other words, a doctrine for princes and people to serve the Caesar without abandoning its pledges to God (Fixdal and Smith 1998)P283). In the historical context of these quarrels, Augustine of Hippo, William of Ockham or Thomas Aquinas inferred about the nature and the legitimacy of power and the role of the divine will in constraining the malicious actions of princes. If princes could act against the divine law and exceed their power on earthly matters, then perhaps there had to be a moral argument inspired in the divine to protect people from those excesses. Thomas Aquinas argued that "*lex injusta non est lex*" even if it had been lawfully enacted by the prince, and *non lex*, which was a form of violence in itself, needed not to be obeyed[17].

To be able to facilitate the operations of power while serving as the beacon of justice, law assumed two parallel forms, an ordinary form, promulgated by the rulers, and a higher form, the law of God, binding the ruler as well as its subjects (Rubin 2008)P67). In this endeavour of power balance, the divine prevailed. Because divine law, by its very nature, could only be good and fair, its adherence became the fundamental external benchmark against which to assess the actions of the prince. Those that disrespected the will of God, for instance the prince-turned-tyrant, could not only be excommunicated, but also killed[18], thus liberating subjects from the moral obligation to follow their orders[19]. Today, in spite of the secular shift in the terms of the narrative around the *ius resistendi*, some still argue that the divine remains above the earthly, and that the right to resist is an absolute right in case

[16] Etymologically formed from the Latin prefix *re* (backward movement expressing, among other things, the return to a previous state) and the radical *sistere* (standing facing, opposing resistance to someone or something), the term "resist" was originally understood as the will to stand up to an enemy by means of war. The etymological root of rebellion, "*bellum*", also refers to the right to make war on one's society (Honoré 1988)P53). Both terms, resistance and rebellion, implied an active, violent confrontation with the enemy, whether within or outside one´s society. Today, although rebellion preserves its martial implications, the term resistance has undergone a shift from its military meaning towards a more moral and political sense, though it still maintains its confrontational connotation (Fragkou 2013)P832).

[17] Mark C. Murphy reformulates Aquinas's quote as "*lex sine rationem non est lex*" arguing that Aquinas saw unjust action as rationally defective action (Natural Law Theory in (M. P. Golding and Edmundson 2005)P19).

[18] Not only did tyrannicide find support among the scholastics as the measure of last resort, but it was, in medieval Europe, usually understood as an act seeking to reinstall a lawful and morally legitimate royal order, not as a subversive revolutionary act.

[19] Later exemplified by Pope Pius V Bull of 25 February 1570 "*Regnans in Excelsis*", excommunicating Queen Elizabeth I of England and releasing her subjects from allegiance to the Queen.

of violations of the divine right, but it is a relative right in case of violations of temporal laws (Falcon Tella 2008)P71), a sign of a worrisome reoccurrence of theocratic positions in the political discourse.

Following the divine rule also implied the subjection of the prince to an additional benchmark to evaluating his legitimacy. Aquinas argued that "a tyrannical government is not just, because it is directed, not to the common good, but to the private good of the ruler. Consequently, there is no sedition in disturbing a government of this kind" (Cliteur and Ellian 2019)P12). In medieval Europe, the terms of political engagement were simple: in a lawful regime (*regnum legitimum*), the sovereign would commit to rule in accordance with the people's interests, and the people would commit not to rebel against the ruler (Maliks 2018)P452). Similarly, it was accepted that the sovereign could suspend the common law, and even natural law, in the interest of the common good without that suspension being considered an arbitrary use of power (Gómez Orfanel 2021)P196). The degree to which an authority pursues the common good became, and continues to be, a key factor in determining the legitimacy of that authority. Liberal definitions of resistance still emphasize the collective character of resistance and deny that status to engagements that seek to protect private interests rather than the public good, particularly in modern liberal democracies that have attempted to build societies relying heavily on material justice.

In medieval Europe, the non-fulfilment of the benchmarks of the common good and the adherence to the commands of divine law was not only a theoretical principle, but it could also be legally enforced. The 1215 the English Magna Carta and the 1222 Hungarian Golden Bull attempted to limit the powers of the sovereign by giving "the people" (as in the nobility), the right to overrule or disobey the King when he acted contrary to (the divine) law, and in case of the Golden Bull, the right to resist without being subject to punishment for treason. The *ius resistendi* was a fundamental part of the feudal contract between the sovereign and society (Foronda 2016)P308). The *ius resistendi* was a right of classes, not of persons. It was framed within some sort of contractual agreement, a premise that would forever define the right; upon "violation of the feudal contract by the *senior*" the right of resistance legitimated the *vassus* "to break the bond of vassalage and take over the feud" (Bifulco 2016)P9). In 1442 the *ius resistendi* was legalized in the Cortes of Toro-Valladolid ("*Leyes de Toro*"[20]) and recognized by the King of Castille, without contemplating a punishment for those that asserted it, even if through arms. Lawful resistance, not as a right *per se*, but an act of resisting through the law (the *ius comune*), was not to be punished as long as the resistance was performed in the community, that is, in the public body (de

[20] The Laws of Toro coordinated the municipal jurisdictions and the noble and ecclesiastical privileges, clarifying the existing contradictions between all of them. They are made up of 83 precepts or laws, including royal obligations and rights (Arribas Gonzalez 1995).

Benedictis 2021). Cities and other political actors capable of independent, cooperative, and disciplined action proclaimed their identity vis-à-vis the sovereign (Foronda 2016)P297). The *ius resistendi* became instrumental in that struggle for (political, legal, social or economic) recognition, a struggle that remains the key feature that defines the very essence of any political system, including of democracies.

During the 16th century, the unthinkable happened; religion was challenged[21]. Growing political and religious turmoil subjugated Europe in numerous wars. The nation-state took shape with the concentration of power in the hands of the sovereign, while maintaining the rightness of God´s commands on one´s side, a remainder of the unsettled business of the division of things between God and the Caesar[22]. The century marked a shift in the subjectivity of the foundations of natural law; it configured a broad theory of natural rights to defend people from the abuses of arbitrary power[23] while preserving the will of God expressed through the sovereign[24]. The 1688 Glorious Revolution triggered a reconceptualization of power and with it, its progressive secularization. Asserting the right to resist conveyed the message that even the mighty were subject to a degree of accountability against some sort of external moral or principled standard, not necessarily the laws of God, that they could not simply control or annul, at least not without the use of force. Because Kings could be replaced, no power was absolute. Absolutism gave way to the establishment of parliamentary rule and a declaration of rights. The shift from the rule of the sovereign to the rule of the people meant that the structure and the sustainability of the political body was preserved not in the actual institutions, but by the free (and shifting) will of the people (Fragkou 2013)P836).

During the enlightened journey of redefining man in relation to power, and in relation to himself, rational men concluded that there was a critical difference between declaring that men had the right and the duty to enforce the law of nature, and stating that men had, as

[21] The reformation also led to a partial secularization of the *jus ad bellum* principles, splitting apart the secular from the religious, and the catholic, represented by Jesuit Francisco Suárez, from the protestant, especially Hugo Grotius, who acknowledged the *ius resistendi* when the King was either invading the power of the people, gave up his duties, or acted against the laws and the republic (Enríquez Sánchez 2015)P59).

[22] Although Martin Luther´s 95 thesis of 1517 aimed at theological reformation, he started the movement that would lead to both religious and political reformations (Rosado-Villaverde 2021).

[23] Jean Cauvin introduced the key arguments of modern philosophy; the doctrine of the magistrates as representatives of the community (political questions should be debated and decided between men), rigid public morals designed to protect the social and political order established by contract, and the acceptance of the *ius resistendi* (Enríquez Sánchez 2015)P49), although he is often characterized as an advocate of what today we call civil disobedience rather than active resistance (Pottage 2013)P269).

[24] The 1579 *Vindicae contra Tyrannos*, exposes the central arguments of the Monarchomachs that turned an essentially theological discussion into a political-theoretical reflection on the bases of governmental power: when the unjust ruler degenerates into a tyrant resistance to despotism is legal, including, in extreme cases, tyrannicide (Valencia Cárdenas 2015).

governed by the law of nature, certain reciprocal rights and obligations (Wand 1970)P158). The theory of the social contract would progressively become the tenet around which the notions of power, sovereignty and law, and indeed the very principle of society, would be articulated[25]. Modernity started, and it meant that both sovereign and people had rights and duties and that each had obligations towards the other. The *ius resistendi* would find in the social contract its strongest validation, for it provided people with a conclusive justification to appeal to their right of redress if the terms of the contract were violated. If consent was given, consent could be withdrawn.

Thomas Hobbes would only consider legitimate the exercise of passive obedience to avoid a war of every man against every man. For him, the right to resist was the natural freedom that everyone possessed to do everything possible to keep themselves alive when they considered themselves threatened, including by the legitimate state (Desmons 2015)P35)[26]. If one could not make the distinction between legitimate and illegitimate, however, there was nothing with which a right of resistance could engage, because nothing outside the action of the state could be legitimate[27]. Yet if someone was to successfully take power, then that new order would become the law, such as to avoid more war of all against all and the return to a brutish, short and nasty state of nature. When triumphant, the *ius resistendi* had been a historical necessity[28], the new order became the law[29]. If unsuccessful, those that had resisted would turn out to be plain criminals or worst, traitors. What was essential was to have a strong Leviathan, however it rose to power.

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[25] The concept of the social contract (not necessarily the theory in its classical terms), remains current. In his 2021 Report "Our Common Agenda", the United Nations Secretary-General recommended the establishment of a new social contract, anchored in human rights, to rebuild trust between people and their governments (Our Common Agenda 2021).

[26] "The obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them. For the right men have by nature to protect themselves, when none else can protect them, can by no covenant be relinquished". (Hobbes 2007) Leviathan, chapter 21 "On the liberty of subjects".

[2727] Hobbes refuses the illegality of the right to resist because of the illegitimacy of confronting the one power (the leviathan) with *plenitude potestatis* (Pottage 2013)P271) (Pereira Sáez 2015)P259).

[28] Burke, Kant, Hegel and Marx subscribed to the concept of historical necessity, albeit in different terms. Kant, for instance, affirmed the authority of the revolution once it was consolidated itself into a legal order, an authority that was beyond appeal to the same extent as was its predecessor (Fehér 1990)P206). The notion of historical necessity becomes the central justification for those that oppose natural law as a guide to events yet still need to explain why revolutions happen.

[29] In modern times, this principle was actually endorsed by the Tinoco arbitration case between Great Britain and Costa Rica in which the court established that; "to hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a de facto government unless it conforms to a previous constitution, would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true" (Marsavelski 2013)P276).

John Locke´s description of popular action as an enforcement mechanism for the social contract helped crystallize the intellectual underpinnings of the modern understanding of the right to resist (Ginsburg, Lansberg-Rodriguez, and Versteeg 2013)P1202). For Locke, the legitimacy of a government rested basically in its capacity to protect natural rights: life, liberty and property. His appeal to heaven[30], that is, his call for revolution, became legitimate when the legislative planned on violating those rights (Locke 2017)para220-221). Locke introduced two crucial external benchmarks to assessing the performance of the ruler, the degree to which the state protected basic rights, and which ones, and the notion of rights-bearing citizen, that is, a determination of which actors were entitled to demand accountability from the actions of the state. These external benchmarks would shape, to a great extent, the views of liberal societies about the legitimate reasons to assert the right to resist, which, in turn, would become a key factor in the evaluation of the legitimacy of liberal democracies, especially regarding the extent to which these regimes either recognize or dismiss claims from non-bearing agents.

In Jean-Jacques Rousseau´s republic there would be no need to impose a higher, God-given law because the republic would embody the "general will", and laws would be enacted by people. Rousseau, however, recognized that the Will was unstable, and the instability of the Will inevitability led to the conclusion that the foundations of the system could also be unstable (Rousseau 1762)Book2).

Without the fear of eternal damnation and the expansion of the concept of "the people", which progressively included the recognition of more subjects, the *ius resistendi* strengthened its normative value by referring to a growing number of rights[31]. The right to resist was conceived as a right against the subjugation of people by the authority, in whatever form or origin, and a claim-right to fight against the denial of fundamental natural rights and the lack of accountability. In 1760´s England, for instance, the law recognized what William Blackstone called "the law of redress against public oppression" (Blackstone 1753)P164), which vindicated the people resisting the sovereign for his failure to fulfil his part of the contract[32]. Americans under British colonial rule would find in the lack of redress

[30] "The old question will be asked in this matter of prerogative, "But who shall be judge when this power is made a right use of? (…) there can be no judge on earth (…) People have no other remedy in this, as in all other cases where they have no judge on earth, but to appeal to Heaven" (Locke 2017)P178-179). John Finnis classifies Locke as belonging to the modern natural law theory tradition because for him, there is no law without a legislator and no obligation without subjection to the will of a superior power (Finnis 2002)P6).

[31] The consolidation of the notion of the *ius resistendi* and its connection with the principle of ideological freedom will be part of the liberal postulates (Rosado-Villaverde 2021)P216).

[32] Blackstone posed an ingenious logical argument to justify rebellion against the Monarch. He asserts that "it is at the same time a maxim in those laws, that the king himself can do no wrong: since it would be a great weakness and absurdity in any system of positive law to define any possible wrong without any possible

a most powerful reason to declare independence from the Crown[33]. It is at this point, I believe, that the *ius resistendi* truly becomes "the right to resist" in its modern conception: an appeal to an expanding conception of rights, a vindication of the principles of personal autonomy, of political identity, of reason, and of social conscience, appeals that were translated into a political form of engagement expressed through a growing number of strategic and impactful external manifestations.

During the 18th century, the right to revolution became in itself an expression of a legitimate right connected with the ideals of freedom, progress, and of a free autonomous subject with his individual rights (Douzinas 2014b)P151). Liberty, man, resistance, rights, and revolution became, for a while, a single notion. The political, enabled by the existence of a public space and the separation of powers, replaced the "one prince, one faith, one law" principle with that of freedom of religious worship in a private sphere and the authority of a secular sovereign in the public[34]; autonomy from the previous notions of legitimization of power based on force; and liberation from the idea that property equalled sovereignty and that political power was reducible to economic power (Loughlin 2016).

The 1776 American Declaration of Independence and the 1789 French Declarations of the Right of Man and of the Citizen, the manifestos of modernity, brought together, albeit in a very tumultuous way, the double source of rights: equality and resistance (Douzinas 2019)P156)[35]. With the words "Men are born and remain free and equal in rights", the 1789 French Declaration was the first document to incorporate an abstract understanding of the human being (Faghfouri Azar 2019). With its second article, that "these rights are liberty, property, security and resistance to oppression", the declaration acknowledged that the legitimate right to resist was triggered when the ruler tyrannically violated the conditions

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redress. For, as to such public oppressions as tend to dissolve the constitution and subvert the fundamentals of government, they are cases which the law will not, out of decency, suppose; being incapable of distrusting those whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable" (Blackstone 1753). The law could not make any provision for punishment for the right to resist oppression not because Blackstone denied it was a right, but because it could not be conceived (sarcasm added) that the sovereign would oppress his own people or dissolve the constitution, since those actions would eliminate his very legitimacy to exercise power.

[33] Blunt argues, to make the point about the political and at-that-time elitist conception of resistance, that "the authors of the Declaration of Independence found the arbitrary power of the king to be intolerable, but many had no compunction about owning slaves or wielding patriarchal power over women" (Blunt 2019)P42). Only property-owning white men had the capacity to resist because only they were political agents.

[34] As Carl Schmitt puts it, all the important concepts of modern state theory are secularized theological concepts (Douzinas 2021).

[35] In his Dissertation on the First Principles of Government, Thomas Paine defined equality and resistance, and asserted their essentiality in the new order; "the true and only true basis of representative government is equality of rights (…) it is possible to exclude men from the right of voting, but it is impossible to exclude them from the right of rebelling against that exclusion; and when all other rights are taken away, the right of rebellion is made perfect" (Paine 1986).

enabling individuals to pursue their perfection (Maliks 2018)P453). The American Declaration of Independence incarnates the culmination of the enlightened theory of right to resist based on natural rights. The protection of life, liberty, and the pursuit of happiness were fundamental duties of the state, and these duties, as John Locke had foretold, would indeed become the external benchmarks to assess the fitness of the new order.

For some, the right to revolution is perhaps the most important political value that was ever made in America and exported throughout the world (Marsavelski 2013)P271). With the words "We, the people", the American constitution inaugurated the practice of asserting popular will as the source of political authority and with it, a long tradition of what will later be called civil disobedience (Loesch 2014)P1072)[36]. The *ius resistendi* found a formal place in the revolutionary new order with actual provisions allowing individuals to disregard, or even attack the governing laws and structures if and when basic rights were violated. The acknowledgement of the right to resist was, however, a temporary safety clause to prevent attempts to revert to the old regime by empowering citizens to fight against the many counterrevolutionary forces that threatened the new order and the promise of rights and freedom, a sort of insurance policy against tyranny. Today, constitutions that incorporate the right to resist do so as a sort of insurance policy against attacks, internal or external, to the constitutional order.

While Maximilien Robespierre challenged a King, Immanuel Kant challenged God (Fehér 1990)P201), "officially rejecting any reduction of ought to the is of will, Kant holds that reason alone holds sway in conscientious deliberation and action" (Finnis 2002)P7). His main challenge to the divine was human freedom. Kant offered a compromise between accepting the historical necessity of the French and American revolution as well as the Irish resistance against the British, while dismissing disobedience and the idea of a right to revolution. He argued that it would make no sense to have a positive norm that empowers the subject of an order not to obey that very order. If one was to incorporate a right of resistance into a written constitution, he said, "the highest legislation would have to contain a provision that is not the highest" (Pottage 2013)P272). It would lack consistency. For Kant, the right to resist would not withstand the test of universalization, because either in its

[36] Resistance to authority appears as "one of the four ideas that distinguished constitutionalism in its origins, together with the concept of the unalienable character of certain basic rights; the idea that authority is legitimate as long as it rested on the consensus of the governed, and the idea that the first duty of any government was to protect the inalienable rights of the people" (Bifulco 2016)P10). In fact, this question had such a profound importance to the American founding fathers that it today stands at the very basis of modern constitutionalism as we know it (Ginsburg, Lansberg-Rodriguez, and Versteeg 2013)P1188).

normative or in its performative forms, it would incite anarchy[37]. If one was to accept the right for some, one would have to do it for all, and if all resisted or disobeyed, then there would be no order. Whether as a Kantian notion, or as its modern interpretation as the principle of the obligation to obey the law, this argument remains the cornerstone for those that dismiss the existence of the right to resist in liberal democracies.

From the 18th century on, when actual episodes of opposition between principal economic actors and working classes became more frequent, the right of resist took on a particularly negative connotation, especially when it was associated with the occurrence of strikes[38]. Capitalism created new forces of production (and with them, new legal and political frameworks) that no longer fit into the old property relations (Marx and Engels 1969)P48). Resistance took a materialist connotation and one of social justice, of politics and of ideology, not only of (natural, divine, or positive) rights[39]. The increasing expressions of resistance by workers and other sectors of society represented a menace to the new property relations that capitalism had established[40]. For the elites, resistance represented the wicked worker´s, anti-capitalist, disorderly and disruptive action against progress and the reason of the state that had to be controlled, criminalized, and severely punished. And while Karl Marx worked on the philosophical justification to the worker´s revolution, Henry David Thoreau was laying the foundations of what would become the commonly acknowledged interpretation of resistance in modern times; a re-accommodation of parts of a generally accepted system based on individual or collective moral principled decisions to disobey the law, in other words, civil disobedience[41]. Different systems, different objectives, and

[37] "A legally permitted resistance would require established channels of enforcement against the ruler, but that would lead to a situation with two entities claiming enforcement and no way to peacefully adjudicate between them, which technically would be anarchy (Maliks 2018)P454). For some, the Kantian moral imperative is applicable not only to men but to the very system they create for "wherever an established legal system tries to become an end in itself and uses man as no more than a means for the achievement of political ends, there is a call for man to resist (Marcic 1973)P104).

[38] Because the liberal democratic ideology is based on individual rights and individuals as part of the market, I believe that it would not be farfetched to compare the state with a business and consider the relations between the state and the citizen with that of the business and the workers. In that context, the right to strike can be credibly understood as a form of the right to resist oppression for the sake of the interest in freedom (Raekstad and Rossi 2020)P12) that at least partly grounds the liberal basic liberties. Some claim that the right to strike and the basic liberties share a foundation in the interest in freedom (Gourevitch 2018), which in turn grounds a right to resist oppression.

[39] Although economic power is thought to be mostly conservative, one always has to examine the specific constitution of economic power to determine whether it is hospitable to a specific political doctrine.

[40] Referring to Marcuse, Winter notes how in capitalism each form of resistance or opposition is apparently neutralized or integrated by a coherent and overall structure of domination (Winter 2017).

[41] Scholars disagree about the authorship of the title of Henry David Thoreau's 1849 essay "On the Duty of Civil Disobedience", the original being "The Rights and Duties of the Individual in relation to Government". Apparently the term was coined by Thoreau´s editor since there is no mention of "civil disobedience" in the original essay (Enríquez Sánchez 2015)P140). Contrary to the interpretation given by most authors, Thoreau´s

different realities required different engagements and different philosophical explanations. Resistance and revolution took separate paths.

Yet it is not until after the Second World War, that the tenet that had given the oppressed the legitimacy to resist the powerful needed to be seriously re-evaluated. The victory of the allies had become a reality through resistance, with the French "*résistance*" being the most paradigmatic during the war. Yet wining democracies faced a serious predicament with that victory. How could one justify the traditional notion of the right to resist a tyrannical regime (for instance, that of the Czars) when resistance had been successful, yet the outcome (the USSR) was in itself a threat to the very principles (of the enlightenment) that the right to resist was meant to protect? Imperial Russia satisfied all necessary external factors to be negatively assessed in its performance (poverty, oppression, tyrannical rule, hunger), and so one had to accept that people had a legitimate right to assert their *ius resistendi*. Politically speaking, the west could not ignore the historical significance of the right to resist, yet precisely because of its proven effectiveness, it was important to prevent it from being a moral source for destabilizing forces, especially if these were communists. Recognizing a positive, or even a moral right to resist, would somehow grant legitimacy to both internal and external dissidents. The Russian, the Chinese and the Cuban revolutions, the opposition to dynastic power and the power of the elites, were pungent examples of what the new liberal order could not tolerate.

It would be morally and politically absurd to attempt to lawfully proscribe the *ius resistendi*. A provision declaring that the "the right to resist is prohibited" would not only pointlessly attack the very nature and autonomy of the human being, but it would de facto indicate that the regime in question was totalitarian, not democratic. For Rousseau there was no arguing about resistance, as he already sought "to make oppression impossible rather than to legitimize the insurrection" (Fragkou 2013)P836). Since legally speaking the *ius resistendi* could not be proscribed, it was necessary to isolate it by means of other legal and political measures that would render it virtually impossible to assert, or to defend in a court of justice, or to gain support from the public. With the enactment of modern constitutions and the adoption of fundamental rights, it was expected that the right to resist would become

interpretation of "civil" refers to the type of domestic government he resisted, the state's constituted political authority, and not to the methods used in the action of resistance (Raymon 2019). Civil does not refer either to nonviolent or ordered resistance. Thoreau, in fact, stated that John Brown's violent lack of civility was the best that had ever happened with the abolitionist movement (Shklar 2019)P178).

redundant[42]. What had been a natural right of resistance, was transformed into a political right to opposition in a controlled environment (Ugartemendía 1999)P228).

To realize human rights at home and prevent internal resistance, the liberal democratic state recognized the need to protect individual rights, particularly those of the most disadvantaged and vulnerable, through positive social rights, while creating a society that needed to be morally antagonistic to that of communism. *Fraternité* was added to the basic concepts of the enlightenment, equality (*egalité*) and freedom (*liberté*), as a sign that society should aspire to be more caring, but also as a sign that the system was able to marginalize and contain its own resistances (Fitzpatrick 1995). Modern liberal democracies were, all in all, created to resist resistance.

The concept of the *ius resistendi*, this time under the appearance of civil disobedience[43], found a novel audience in the wave of new social movements of the 60´s and 70´s with groups that did not mobilize on the basis of class or material interests, but on the basis of identity and post-materialist values (Toplišek 2016)[44]. The experience of the 60s, the anti-Vietnam protest, Martin Luther King and the civil rights movement, shacked the philosophical foundations of liberal democracies because they exposed essential contradictions of a system that was (and still is) unable to truly justify itself. That generation of activists realized that the illusion of universalized fundamental values was oftentimes not about human rights, but about the right humans[45]. Those groups appealed, morally, to the public conscience embedded in the idea of human rights and, politically, to deepening

[42] Liberal systems that prioritized the protection of individual rights were designed to resist resistance through the moral justification (though always backed by sanctioning law), that the regime already provided for man´s freedom and realization. In the age of reason and increasingly sophisticated legal reasoning in constitutions and positive law, the principle that "the subjection of the lord to the law is to be guaranteed by sanctions internal to the public right and not only left to the exercise of the right of revolt" (Bifulco 2016)P10) was the consolidation of the constitutionalization of the right to resist.

[43] Although comparable definitions had been proposed, for instance by Hugo A. Bedau in 1961 "Anyone commits an act of civil disobedience if and only if he acts illegally, publicly, nonviolently, and conscientiously with the intent to frustrate (one of) the laws, policies, or decisions of his government" (Bedau 1961)P661) or by Judge Johnson in 1969 "An open, intentional violation of a law concededly valid, under a banner of morality or justice by one willing to accept punishment for the violation" (Johnson 1970)P6), in his 1971 A Theory of Justice, John Rawls articulated what was, and probably still is, the most widely cited definition of civil disobedience; "a public, non-violent and conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government" and with which one appeals to the "public acceptance of the same principles of justice" (Rawls 1999)P340), all within the limits of fidelity to law, which is expressed, among other things, by accepting the possibility of a penalty (Rawls 1971)P364)(Rawls 1999)P320).

[44] For Tilly, a social movement is a sustained campaign of claims on power holders using a distinct repertoire designed to display collective worthiness, unity, numbers and commitment (Kriesi 2009)P345).

[45] Hannah Arendt barred from the category of civil disobedience (e.g. sovereign autonomous politically mature agents) racialized political actors (the negro community) whose lawbreaking action challenged the foundational tales of American exceptionalism (Çubukçu 2020)P3)(Berkowitz 2019).

and expanding democratic responsibility by broadening the number of issues that configured the political, in the Arendtian sense. As Hugo Bedau noted, the "dissenter proposes to justify his disobedience by an appeal to the incompatibility between his political circumstances and his moral convictions" (Bedau 1961)P659). It is in this context that the *ius resistendi* realizes one of its major functions, that of making asymmetrical power relations visible and unveiling the mechanisms of generating obedience (Daase and Deitelhoff 2019)P18)[46]. A radical democratic view would assert that it is through the exercise of resistance, by opposing the status quo, that one can unmask existing laws as both non-neutral, in a normative legal positivist approach, but also as stabilizing of a specific order of domination (Wolin 2003). It is only from a non-ideal approach that the manifestations of non-compliance, opposition and resistance to the law can be examined.

Although it did not materialize much in terms of social transformation[47], the May 1968 "revolution", where people seemed to hatch into a range of new subjectivities, constitutes what could be called the socialization of the revolution (Quintana 2009)P67). The events of May, in Paris, were important because the people had lost the post WWII fear of revolution as a radical demand to the state, a demand that went beyond the individual rights discourse to include the ideal of a new society. The right to resist, usually asserted as an engagement to protest injustice or an immoral rule, revealed its most important feature; its function as a claim-right not only to demand the fulfilment of the promise of democracy, but to resist non-evolution, lack of progress, indifference, or the counter-resistance of the system vis-à-vis the normative space that lied ahead[48].

By mid-20th century, it is possible to differentiate two major positions in relation to the *ius resistendi*; political theorists like Arendt, Habermas and the Frankfurt school that see the right to resist in its basic political and social dimension, and others, mostly legal scholars, that constrain the notion of the *ius resistendi* by connecting it with the idea of legality. Liberals, like Rawls, look at civil disobedience in an extremely narrow way. Rawls and Habermas coincide in understanding civil disobedience as per the classical notion of a (moral) right[49], with a vigilant function that points to potential trouble and allows political

[46] Foucault argued that we might use resistance as a chemical catalyst so as to bring to light power relations, locate their position, and find out their point of application and the methods used (Lilja and Vinthagen 2014)P1).

[47] It was a revolutionary situation which did not develop into a revolution because there was nobody, least of all the students, who was prepared to seize power and the responsibility that goes with it (Arendt 1969)P10).

[48] Slavoj Zizek speaks of civil disobedience as "the short circuit between the present and the future" where we are for a moment of our lives "allowed to act as if the utopian future were already at hand, just there to be grab" (Zizek quoted in (Fiedler 2009)P48).

[49] The main difference between Rawls and Habermas is the way in which they consider morality relates to political legitimacy. While Habermas claims a comprehensive approach to democratic legitimacy, Rawls´ is confined to the political (Finlayson 2016)P1).

leaders to react. Liberal thinkers coincide in justifying the principle of civil disobedience although, in practice, they hinder its assertion because of its political destabilizing effect. For Rawls, mild-mannered disobedience is justified only if policies and laws violate the principles of equal liberty and equality of opportunities, while for Dworkin, disobedience may be justified when fundamental rights are violated, as long as one accepts the morality and integrity of the constitution and the law[50]. The right to resist has, for Dworkin, a more reflective and transformative meaning, to the point that he asserted that "society and the law may gain from their so doing (referring to civil disobedience), because their actions form part of the collaborative effort, alongside the courts and government, to get the law right by encouraging them to try their best to do so" (Bellamy 2015)P7). Positivists, like Raz, refute the existence of the right to resist based on its lack of positive character and enforcement. For Raz there is no moral right to civil disobedience in liberal states because they have properly legal forms of political participation[51]. For him, political participation is a right, but it is does have an absolute value, it has limits, and therefore, civil disobedience is better conceived of as an action in terms of rightness or wrongness rather than as an action that one is entitled to perform by a moral right[52].

Liberal political theorists have traditionally taken the legitimacy of the constitutional order as a given, assuming as inherent priority of the system its integrity and stability, and placing "the citizen" (white, male, religiously appropriate – catholic or protestant depending on the country – property owning, heterosexual and family oriented), as the normative ideal of society. Injustice is seen through the eyes of the ideal, and it is mostly considered a matter of sporadic events, and always limited[53]. In this ideological cosmology, the liberal concept

[50] For some authors (Ugartemendía 1999)P214) the rights that resistance protects through its action are those referred to as "primary rights", those that seek to protect a situation of imminent risk to life, freedoms and security, property, etc. For that reason, "minor" forms of resistance that can be managed through ordinary legal channels, that have a pre-established normative legal basis, or that involve violations of rights between individuals in relationships of non-subordination are categorically excluded from the *ius resistendi*.

[51] "Every claim that one's right to political participation entitles one to take a certain action in support of one's political aims (be they what they may), even though it is against the law, is ipso facto a criticism of the law for outlawing this action. For if one has a right to perform it its performance should not be civil disobedience but a lawful political act. Since by hypothesis no such criticism can be directed against the liberal state there can be no right to civil disobedience in it" (Raz 2009)P273).

[52] In the Ex parte Mulligan case, the U.S. Supreme Court argued that there is no reason that the state should suspend constitutional provisions, that is, the use of states of exception or other unconstitutional measures, because within the Constitution, the government is granted all the necessary powers to preserve its existence (U.S. Supreme Court, 71 U.S. 2 (1866)). If, as Raz contends, citizens in liberal democracies have no reason to appeal to the right to resist because the constitution provides all necessary channels for political participation, it then follows that the state too should strictly abide by the terms of the constitution that provides it with all necessary powers to protect itself.

[53] Conservative thinking is concerned with order, to the detriment of justice. Their thinking on the right to resist is epitomized in Goethe´s "Better to commit an injustice than to countenance disorder", which has the implicit assumption is that disorder would allow greater injustice to occur (Marzal 2021)P6-11).

of civil disobedience was crafted to provide a balance between democratic principles (among which, freedom and the idea of individual rights) and political stability. It excluded the possibly of legitimizing potential revolutionary acts, separating political engagements from plain criminal activity, and creating a narrative narrow enough to discourage any attempts to radicalize the public space while bestowing the system with a veneer of freedom and legitimacy. Everything outside a narrow conception that only tolerated expressions of dissent within the limits of fidelity to law, and within the confinements of the politically acceptable, could be easily considered illegal or immoral, and thus, criminalized. At the core of this classical thinking on civil disobedience, there is a defence of the rule of law, and of order[54], both as a legal and as a moral ideal, and a profound fear of change.

In spite of their different legal approaches, these views share a common concern, which is not the definition of civil disobedience or the moral entitlement of people to assert it, but the determination of when a state becomes an "illiberal democracy", a (Dworkinian) state that does not take the rights of its citizens seriously, a (Rawlsian) state where there is no equality, or (following Raz), a state that lacks mechanisms for effective political participation. To date, for most legal scholars the only conceivable function of the *ius resistendi* continues to be the preservation and defence of the constitution and the constitutional state[55] (Bifulco 2016) (Santos 2014) (Magoja 2016) (Pressacco 2010), with resistance not being considered a mode of transformation, but rather a process of reaffirmation of that system (Pottage 2013)P263).

The narrow liberal definition of civil disobedience that contributed to generating a mostly disapproving collective concept about resistance is still identified with public disorder and anti-systemic conflict. Critical theory scholars, like Habermas and his heirs, have attempted to expand this narrow conception in an effort to articulate a narrative about the right to resist that would contribute to the positive politization of the public space through alternative participatory mechanisms. I examine these efforts in the next section.

[54] The "civil" in Rawls is about the method, about civility and about adherence to constraints that manifested respect for the legal and democratic order (Çıdam et al. 2020)P13).

[55] In 2017, Harvard Law professor Laurence H. Tribe noted that "if enough judges, legislators, public officials, and ordinary citizens come to the conclusion that Trump is not taking care that the laws be faithfully executed and cannot be trusted to do so in a future crisis, they can-and should-reflect creatively on ways to more robustly check and balance Trump while protecting the constitutional system" (Blackman 2017)P54). On 3 June 2020, in his article "In Union There Is Strength" in The Atlantic (Goldberg 2020), James Mattis, former Defence Secretary under Trump, denounced him as a "threat to the constitution" by ordering the U.S. military to violate the constitutional rights of American citizens and turn Americans against one another. In the article, Mattis wrote that protesters were rightly demanding "Equal Justice Under Law", words that are carved in the pediment of the United States Supreme Court.

1.2. Contemporary debates about resistance.

Contemporary debates around resistance assume that the liberal conception of the right to resist that tolerated limited, non-violent dissent, is no longer reflecting our reality[56]. Radical theorists refer to the complexity and multi-dimensional character of our societies to argue about the need to appeal to new forms of re-politicizing the public space. Scholars engaged in this debate assert that, in modern times, theories of deliberative democracy have probably replaced social contract theory as the prevailing account of political legitimacy in democracies (Rubin 2008)P156) (Celikates 2014a)P435). As a response, the radical democratic perspective views civil disobedience as the expression of democratic citizenship and as a dynamizing counterweight to the rigidifying tendencies of state institutions (Celikates 2017)P3) (Milligan 2013). For radical thinkers, disobedience is the only way to fight what some consider a new form of political and economic imperialism that doesn't bother with the rule of law (Bentouhami 2007)P8). For them, civil disobedience contributes to politicizing ignored problems, bringing marginalized arguments, and inexistent people, into the public sphere. Civil disobedience is considered a way to enhance the breadth and quality of democratic deliberation rather than a struggle to defend rights, or a response to the defects of formal constitutional procedures.

In fact, recent contributions to the debate about resistance tend to place much less weight on legality and the presumptive obligation to obey the law, and rather put the emphasis on acts of coercion and violence that involve militant confrontation with the authorities (Aitchison 2018a)P7)[57]. Scholars like Robin Celikates (Celikates 2015), Erin Pineda (Pineda 2019) or Candice Delmas (Delmas 2018), learn from the streets, from the strategies of social movements. They are moved by experience, seeking to find a philosophical explanation to current social practices (rather than first constructing a philosophical model to guide that practice), and to develop new formulas to explain social realities. For them, civil disobedience is used by minorities devoid of the power and means to influence politics, to compensate disadvantageous power relations while maintaining its principles, and above all, to deeply transform the political and the social organization[58].

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[56] On 26 may 2020, former German Chancellor Angela Merkel suggested that the post-covid era accelerated a new reality, that the idea of the nation state as we knew it was over as "The nation state has no future standing alone", and that we were moving toward a system in which territorial realities had to be managed within a larger context of a (possibly) a continental state, with the plan for the European commission to borrow money on behalf of the entire EU and issue grants to the most stricken industries and regions (Rankin and Oltermann 2020).

[57] In fact, as some argue, "the emphasis on result-oriented civil disobedience has obscured the test of conscientiousness to a great extent" (D. D. Smith 1968)P721).

[58] The DiEM25 movement, initiated in 2015 by former Syriza figure Yanis Varoufakis, proposes in one of its programmatic statements a pan-European movement of civil and governmental disobedience with which to

Many in the radical school continue to obsessively endeavour to define and label external expressions of dissent, seeking to survey various definitions and understandings of resistance to capture what they call "the distinctive features of this social phenomenon" (Baaz et al. 2016)P138)[59]. While some acknowledge that civil disobedience is too broad a notion to specify the strategies of current democratically minded protest movements (Niesen 2019a)P4), and that "civil disobedience stands in need of moral justification in a democratic society" (Celikates 2014a)P434), they also maintain that legal and political philosophy should challenge the essentially contested concept of civil disobedience (Çıdam et al. 2020)P10) in favour of more radical notions (Scheuerman 2019). What radical thinkers do not consider is that, paradoxically, to treat an expression of the right to resist purely as a political or communicative engagement is certainly in line with the liberal-democratic consensus about it (Pineda 2019)P6).

Clearly, the politics of resistance, like all politics, operates through the giving of names (Douzinas 2013)P153). Some scholars attempt to explain current forms of resistance arguing that it is necessary to move beyond the existing typology and introduce new concepts. Instead of civil disobedience, some speak of "disruptive disobedience" (Edyvane and Kulenovic 2017)P2), others of "political disobedience" (Markovits 2005)P1898), others prefer the term "civil resistance"[60], and yet a few, forcing the conceptualization of the concept, talk about "uncivil obedience" (Bulman-Pozen and Pozen 2015) in which instead of explicit law-breaking (disobedience), it involves subversive law-following (obedience) and it carries no clear legal consequences. Some scholars now drop the qualification "civil" altogether, to speak only of disobedience, which, I believe, is not a useful or a sensible proposal. They argue that the term civil disobedience is built on an oxymoron that reflects the positive and the negative aspects of the concept, and that it is semantically inaccurate, because disobedience cannot be civil, that is, acceptable in a civilized society (Tiefenbrun 2003)P6). I disagree. The term "civil" does not refer to the "civility" of the engagement, but to the form of government that one opposes, along with all that it entails; an organizational and political structure based on an ideological identity, that is translated into rights, and a legal order that obliges the state to certain standards of conduct. There is no possible engagement outside of the "civil", outside of the civitas, outside of the political, because

bring on a surge of democratic opposition to the way European elites do business at the local, national and EU levels (White 2017)P9).

[59] Some scholars argue that the "philosophy of resistance has itself to resist the pressure of concept formation" (Caygill 2013)P6).

[60] Some consider civil resistance as actions attempting to prevent the ongoing commission of international crimes under well-recognized principles of international law (Boyle 2007)P24) that is, civil disobedience targeting international policies of countries (especially the U.S.) that are supposed to uphold human rights internationally.

separated from it, as Hannah Arendt would say, man loses his humanity[61]. The word "disobedience", alone, does not reflect either the necessary active or direct transformative engagement that radical theories defend. Disobedience does not need to be active, it can just adopt the form of non-compliance, and non-cooperation is just another technique. Passive resistance seems to be a contradiction in terms, since to resist something, entails an opposition to offset an action.

To circumvent the constrains of the classical definition, Jennet Kirkpatrick or Candice Delmas use the term "uncivil disobedience" (Delmas 2018, 2019a) (Lai 2019)P93) which includes acts "that are covert, evasive, anonymous, violent, or deliberately offensive" (Livingston 2019)P3). I believe that adding the appellative "uncivil" does a disservice to those that attempt to vindicate the role of resistance as a valid and constructive expression of dissent in a democratic society. If for radical scholars "civil" refers to the form of expression of the disobedience rather than the type of government, then "uncivil" must denote "not civilized", barbaric. If we consider the term "civil" as referring to the form of government, then disobeying an "uncivil" government would not constitute an uncivil act, but a legitimate engagement, regardless of its form, since that government would be barbaric and tyrannical, not civil. If we consider the term "civil" as indicating the "civility" of the action, then uncivil denotes an action against the "civitas", against the political. Uncivil would be an "un-political" action, the illegitimacy of which derives not from the form of action itself, but from the subject that it opposes, regardless of the behaviour of those that disobey. There can be no disagreement outside of the realm of the political and therefore there cannot be uncivil (un-political) disobedience without civility, without being framed in a certain political context. To civilly disobey is to participate in the political.

In any event, contemporary debates about the right to resist continue to focus on the term "civil disobedience", which, in a way, seems to be a contradiction for an intellectual engagement that insists on moving beyond the cramped terms of "civil" as a critique of the classical liberal discourse of civil disobedience developed in the wake of the Civil Rights era (Livingston 2019)P1). Some, like Celikates, maintain the notion of civil disobedience because they consider that it has certain normative aura that speaks to people and because "a lot of work has been invested into the category of civil disobedience" (Guerrero-Jaramillo and Whitehouse 2021)P159). Others view the anti-liberalism theorization of civil disobedience as provisional and pragmatic because it fundamentally aims at strengthening

[61] For Hannah Arendt, the human has an inherent right to political participation. The right to resist is the essence of man, and to be human, is to be part of the political. Only the loss of a polity itself expels man from humanity (Arendt 1973)P297). If man gives up his right to resist expulsion from the polis, from engaging in the political, it ceases to be a man entitled to rights or to his very humanity, it is abandoned to a state of "mere existence"(Arendt 1973)P301).

liberalism by reducing the current gap between the norm and the reality of liberal regimes (Marzal 2021)P2). I wonder whether these attempts to rename or reinterpret the notion of civil disobedience could mask the fact that radical theories somehow remain hostage to the liberal mindset. Rather than looking at the right to resist from a fresh perspective, including through a reconceptualization and an expansion of the conception of rights, these models depart from the liberal notion and subsequently attempt to adapt it to fit new realities. Why revolve around a notion that is considered outdated?

Many still regard the relation between civil disobedience, and the law, as being confined within the classical idea that civil disobedience is "the deliberate violation of law for a vital social purpose" (Wilt 2017)P44), and that law breaking plays as a response to the defects of formal constitutional procedures (Aitchison 2018a)P7-8). New forms of resistance may seek "to expand the boundaries of normatively legitimate lawbreaking" (Çıdam et al. 2020)P8), but to argue that new forms of the expression of the *ius resistendi* attempt to provide a response to defects of formal constitutional procedure, is to reduce the right to resist to a formalistic event.

The *ius resistendi* is not a right to break the law. Contemporary theories fail to acknowledge the fact that any "resistance", as a political engagement, is an external expression of one right. There are no separate rights to resistance, to civil disobedience or to dissent, there is only the *ius resistendi*. There is no civil disobedience in a legal vacuum because there is no resistance outside the normative. Conversely, resistance or civil disobedience cannot be explained as an autonomous political engagement because it cannot be materialized outside of a legal framework. There can be no notion of civil disobedience, or of resistance, or of opposition without a notion of rights. After 50 years of liberal theorizing about civil disobedience, most agree that no single, authoritative model can make sense of the array of different types of political engagement that take place beyond the realm of ordinary politics (Aitchison 2018a)P9). There is no model because theoretical efforts have primarily focused on external manifestations that are as diverse as political positions. Historians and scholars have forgot to build a model based not on politics, but on rights[62].

1.3. The functions of the right to resist.

Although the right to resist cannot be grounded politically, socially, historically, or in the name of a tradition (Zarka 2014)P37), it is only through historical accounts that one can

[62] In 1984, a number of UNESCO experts met to analyze the basis and forms of individual and collective action by which violations of human rights could be combated (UNESCO 1984). The report emphasized that while the right to resist government oppression had historically been based on natural or divine law, it was now based upon the protection of universally recognized human rights (p 221), that the means of resistance had to be proportionate to the gravity of the human rights violated (p 223) and that violent resistance may only be relied upon as a last resort (p 226).

identify the major functions that most scholars in the western tradition assign to the *ius resistendi*[63]: keeping a watchful eye on power, protecting the constitutional order and its fundamental rights, exposing the real character and truthfulness of the system, and advancing society through the capture of new normative spaces. The first three functions respond to traditional conceptions of the right to resist, for they mostly imply the deliberate violation of a law for a social purpose (Zinn 2012)P900). As Habermas argued, even today the democratic constitutional state must rely on the *ius resistendi* as "the guardian of legitimacy" (Habermas 1985)P105).

Along with its function of defence of the tenets of the ideology, the mere potentiality of the *ius resistendi* serves as a reminder to power that the social body has its own interpretation of the functions and the value of rights, and that that understanding must be recognized at the risk of open contestation[64]. As Thomas Jefferson wondered, "what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance?"(Jefferson 1787).

Whereas radical democratic postulates see resistance as a means to re-politicizing the public space, I submit that what constitutes the primary function of the *ius resistendi* is not to re-politicize the public space, but to capture normative spaces, without which there is no social progress. Resistance is not only a contesting endeavour, but rather, a productive activity (Vinthagen 2010)P292).

All functions of the right to resist push normative frameworks to re-accommodate or even transcend extant legal, political or social practices and, with it, modify power relations. By doing so, they open the possibility of capturing alternative normative spaces by expanding the opportunities that pluralism offers (Douzinas 2021). What I call "capturing a normative space" is a transcending normative claim that is either inherent or latent in practices and believes of society, but that requires a purposeful societal engagement to become actual. In a similar sense, Axel Honneth coins the term "normative surplus"[65] and Lon Fuller that of

[63] For Hollander and Einwohner there are only two points of agreement among scholars on the nature of resistance. On the one hand, that resistance is an act that is always oppositional to power, and, on the other, that recognition and intent (of the act) are necessary to define an engagement as resistance (Hollander and Einwohner 2004)P538).

[64] In 1823, the Duke of Broglie described the right of resistance to oppression as a "delicate and terrible right which lies dormant at the foot of all human institutions" (Sopena 2010).

[65] For Axel Honneth, if one does not recognize the normative core of modernity, then, where will one find the "normative surplus" which guarantees the possibility (both conceptual and practical) of emancipation? (Dearnty 2011)P71). For him, and I agree, the normative progress accomplished with modernity is a fact, yet I do not agree with his characterization of the word surplus, as it suggests that the normative and social development has already occurred and that it is in excess of the political or social circumstance in which occurs. Normative surplus also suggests that the excess or potentiality is determined by the normative

"implicit rules"[66]. "Capturable" indicates that progress in excess of the extant political or social framework is possible, and that there are sufficient elements for people to advance, but also that it requires a conscious, purposeful action from society to occupy that space. Capturing the normative space consists in exercising an act whose legitimacy is determined by a right-claim that justifies a new extensive interpretation of a right (broadly understood) that is considered to be extant in social practice or as a shared moral principle[67].

In this function, the *ius resistendi* becomes a mechanism to create "an alternative legal order that is not yet reflected in positive legal codes, but that is being created intersubjectively through the collective work of human beings engaged in nonviolent civil resistance" (Wilson 2017)P4). The legitimacy of the assertion it is not determined by the conditions in which the claim is made, for the right to resist necessarily implies the existence of non-ideal conditions. Rather, is derived from balancing the progress that legal disobedience can stimulate (that is, the normative space that can be seized) against any harms done to others and their associations (Simmons 2010)P1830).

For communitarians, people recognize new, or capturable normative spaces through moral dialogues, deliberations in an open society based on reason, ideally evidence-driven, cool and logical (Etzioni 2014)P249). However, the fact that some cause appears to be socially powerful or as having a widespread consensus on its rightness, does not necessarily imply that the cause is right. The outcome of the moral dialogue is not necessarily agreement on a moral judgement, but consensus among those that participate on the need to advance in the dialogue by means of expanding its communicative aspect and involving a broader set of society, including the state.

That which is *prima facie* disobedience, Habermas noted, it may soon prove to be the pace-setter for long overdue corrections and innovations, because law and policy depending on principles, are in a constant process of adaptation and revision (Habermas 1985)P104). In the process of translating the captured normative spaces into factual legal realities, resistances established in law remain contingent on change, or abolition, through a rule of law which does not grant them any existence outside of its own domain (Fitzpatrick 1992)P35). Change (a new piece of legislation or a normative or social agreement) is

framework in which it happens, in a sort of normative continuity that would exclude other options, namely total disruption or revolution. Capturing a normative space opens up possibilities by indicating that there are indeed areas of potential, but it does not indicate how large or excessive they are.

[66] For Lon Fuller, implicit rules arise from "reasonable" conduct, not form conception. Although implicit rules arise from the conduct of determinate agents, typically they have no precise date of birth and no determinate authors. They presuppose no relations of authority and subordination; thus, their practical force depends neither on authority nor on enactment, but on the fact that they find direct expression in the conduct of people toward one another (Postema 1994)P363).

[67] Or what John Finnis calls "full practical reasonableness" (Finnis 2002)P11).

necessary for these resistances to materialize in the normative framework[68]. That very change (e.g., the new law) can then secure the realization of the resistances against other resistances, even the resistance of law.

[68] Badiou speaks of "events" as foundational breaks with the repetition and order of the world as they affirm profound political change and the unfolding of anew potential course of action (M. S. Richards 2014)P104).

CHAPTER II: IDEOLOGY, LAW, AND THE RIGHT TO RESIST

The right to resist has been traditionally considered as an engagement that speaks directly to the "higher law", to the source of all that is legitimate, whether the law of God, the law of nature, or the law of reason. Man has long ached to identify the external origin of all that is good and rightful, the source of the legitimate power, so that he can avoid having to decide himself and compromise his own, human, dubious nature. In that quest for the source of all legitimacy, modern man has crafted the notion of the ideology as the space where power, believe and reason converge.

In the space of the ideology, power and resistance are not opposed but rather interconnected[69]. They shape and reinforce each other. It is through the exercise of authority that power, embodied in the law, becomes an expression of the ideology. It is through the appeal to that the ideology that one opposes deviant power, particularly in the form of challenging the legitimacy of the law that represents the manifestation of that power. And it is through the examination of the role of ideology as the *grundnorm,* that one arrives at the conclusion of the inseparability of law and politics as expressions of power. I analyse law and the right to resist in relation to the structure and the value of what I term "the ideology", not as a notion purely of the political or referring to competing "isms" (Czolacz 2022), but in the meaning coined during the aftermath of the French Revolution to describe a science consisting of the study of the origin and nature of ideas, a term that refers to the worldview acquired through experience, reason and believe.

[69] Forms of rule and the changes they undergo can, in fact, be reconstructed in terms of the resistance they provoke (Daase and Deitelhoff 2019)P12).

2.1. The ideology.

For any practical proposition, what I call the ideology[70] can also be referred to as the *grundnorm*[71], the constituent power[72], the *volksgeist*, the metaconstitution[73] or the consciousness, depending on the field of knowledge. The ideology is the basic system of values and ideas from which all laws, rules, and norms, including constitutions, acquire their formal and political legitimacy, the "self-evident" truths that the American Founding Fathers spoke of[74]. The ideology is the higher law, not one law, one rule, or one norm, but rather, the normative tenet (normative in the sense of "ought") that embodies the ideals and aspirations of rightness and justice. The ideology is the result of the clash and the evolution of narratives, the result of wars and the becoming of ideas, is what provides cultures with its symbology and what defines power relations, and with it, the idea of society. The ideology is the whole that determines the truth (Marcuse 1965)P83). The ideology is the system of moral values that forms the basis of political theory (Erman and Möller 2013), of our understanding of how a society should be organized, of what forces come to play in that organization, and how we actually realize that vision. When we doubt the ideology, we also doubt the legitimacy of the laws, the norms, and the rules that derive from its values.

The ideology conditions every relation in society, it defines the channels for political exchange, and draws the space where rights are formed and contested. There is no escaping the influence of the ideology because there is no living outside of the ideas that makes us rational political beings, there is no living outside of the *demos*, although we can challenge and resist it. When we take the ideology for granted, when it is assumed in a way we do

[70] I use the term ideology in the meaning that Antoine Destutt de Tracy coined it in 1796 as the "science of ideas", a system developed from the ideas that people form in their minds due to the sensations they experience as the interact with the material world (E. Kennedy 1979)P355). This is a crucial as ideology is not beyond the epistemic, it is a view formed by experience and not by blind dogmatic believe. Experience (or practice) modifies the ideology as it challenges the coherence of the system of ideas that it attempts to provide.

[71] Although for Kelsen the *grundnorm* can only be presupposed (Loughlin 2017)P12), I use the term in its meaning as the tangible (not presupposed), founding norm. The ideological *grundnorm* informs the whole order with meaning and direction because of its intrinsic moral-performative value. Clearly a non-positivist position. It is the reason we think and act the way we do.

[72] Carl Schmitt defined the *pouvoir constituant* as playing the theological role of the objectively unclear God, acting as the extra-legal power which justifies the legal power of the sovereign (Liew 2012)P2). Schmitt uses an alternative, secular way of defining ideology which, in his case, was also used to justify the "unity" of the nation and the ultimate power of the "sovereign", with horrible and reprehensible outcomes. Such is the power of ideology and of the terms we use to refer to it.

[73] Larry Alexandre differentiates between constitution, which is the set of agreed-upon symbols, and the metaconstitution, which is the agreed-upon mode of identifying and interpreting those symbols (M. P. Golding and Edmundson 2005)P9).

[74] Costas Douzinas argues that when the American revolutionaries declared at the beginning of the Declaration of Independence 'We, the People', they made a double claim: 'who' we are (the constituent part) and 'what' we will become (the constituted) (Douzinas 2021).

not even realize, is when the ideology exists at its purest (Canaan, Hill, and Maisuria 2013)P182). It is at that moment, when we internalize it, that some consider that ideologies become forms of consciousness that make people, contrary to their own interests[75], contribute to the reproduction of oppressive power relationships (Prinz 2018), or that adopt forms that conceal structural injustices making its harms look necessary or justified (Delmas 2018)P14).

Ideologies are man-made, they are thought experiments[76], rational choices from those that have the power to shape and change the will of others through power, believe or reason. Historically, only a few have had that power, which means that the *demos* has always been under the continuous threat of monopolizing tendencies of those with the skills, resources and time to impose their will on society (Elbasani 2009)P414). Some argue that the persuasive power of legitimating ideologies is often circumscribed to limited circles of ruling and elite strata, and ineffectual among the masse (Abercrombie and Turner 1978). Nothing further to the truth. The elites, the ruling class, the aristocracy, the oligarchy or the capitalists, depending on the time, have had the means to generate (or rather impose) acceptance of their ideas on the rest of society, and they continue to do so. Karl Marx argued that the ruling ideas in society are, indeed, the ideas of the ruling class (Clement 2016)P137), and in one way or another, I believe, we generally accept an informal Marxist account of law and society, one in which one can explain legal (and political) outcomes most of the time by referring to the interests of the ruling class (Tushnet 1991)P1528)[77].

Although one can never escape the ideology, there are, certainly, ways in which it can be transformed. Ideologies, like morals, principles and ideas, are not static, for no social system is safe from change (Winter 2017)P75). Ideologies can undergo subtle alterations in the course of normal social dynamics, or more poignant ones through external acts of resistance that accelerate change. These changes can alter the normative framework of the ideology and even its principles, but not its fundamental values, for new values entail a new ideology[78]. What differentiates resistance from revolution, the right to resist from the right

[75] In the sense of the Marxist understanding of ideology as the "false-consciousness" which prevents the proletariat from realizing the material reality of their exploitation by the bourgeoisie (Czolacz 2022).
[76] For Hegel, man "produces" himself through thought. One may argue, Hannah Arendt noted, that all notions of man-creating-himself have in common a rebellion against the human condition itself (Arendt 1969)P4).
[77] On 6 September 2022, Liz Truss became Prime Minster of the UK after winning 81,326 votes of conservative-party members. "Tories tend to be older, more middle class and more white than the rest of the population" https://www.bbc.com/news/uk-politics-62138041
[78] The Treaty of Lisbon established that the EU is a community of values, and the legal order that is established in the acquis, is a representation of that common understanding of the critical importance of respecting and protecting the fundamental values in which the Union is formed. The concept of the essence of a fundamental right—set out in Article 52(1) of the Charter of Fundamental Rights of the European Union—

to revolution, is precisely their truthfulness to the principles of the ideology. The strength of an ideology rests therefore not in whether it is just or unjust (a concept in itself defined by the ideology), but in whether it can endure and adapt its normative framework to respond to poignant social challenges.

For some, the structure of ideologies can be explained through three elements; a) their epistemic nature, which is directly responsible for the forms of consciousness or ideas created; b) their genetic reasons, which are related to the way people come to these forms of consciousness, and c) their functional roles that contribute to the reproduction of social forms of rule (Prinz 2018). This interpretation of the concept of ideology bears similarity with that of Foucault's regime of truth as they both become intertwined with the practice of power and the political notion of the regime. For Foucault, each society has its regime of truth[79], like each society is determined by its ideology. By regimes of truth Foucault means: 1) "the types of discourse that society harbours and causes to function as true", that is, the epistemic nature of the regimes of truth, 2) "the mechanisms and instances which enable one to distinguish true from false statements", the genetic reasons that people come to see those truths, and 3), "the way in which each is sanctioned", in other words, the functional roles that contribute to reproducing those truths (Lorenzini 2015)P2). I have chosen the concept of "ideology" over "regime of truth" because, unlike Foucault, I do not assume the meaning or the relevance of truth in the regime. Rather, my concept of ideology presupposes that there is a bias inherent to that human creation – because ideology is the convergence of power, reason, and believe – and that all normative conditions in the ideology are moulded to transform that bias into truth.

The same structure can be applied to understanding the nature of law as part of the system of the ideology. Law derives from, and simultaneously supports the ideology and its values. It forms a system, a "rule of law"[80] that is legitimized by the very order that is held together by the law. I examine the concept of law through the lens of the structure of ideologies, that is, by analysing a) law´s epistemic nature, which refers to the origin and sources of law, b)

operates as a constant reminder that the core values as Europeans are absolute and, as such, are not up for balancing" (Lenaerts 2019)P782). The EU is a community of values, and its strength resides on a common legal framework that actualizes those values across borders. In response to the ruling of the Polish Constitutional Court declaring the primacy of Polish Law over EU Law, on 19 October 2021, during a debate with the Prime Minister of Poland Mateusz Morawiecki in the European Parliament, Ursula von der Leyen, President of the Commission was emphatic in noting that "we cannot, and we will not allow our common values to be put at risk, the Commission will act, and the options are all known" (El Pais, 19 October 2021).

[79] Foucault makes it clear that these rules are not themselves autonomous: on the contrary, they are always the result of a historical, social, cultural and ultimately a political' production (Lorenzini 2015)P5).

[80] For the purpose of the thesis, I adopt Brian Tamahana´s notion that "the rule of law is not in itself a legal rule or a rule system, but a political and cultural ideal that emerges over time and provides essential support for the proper functioning of law" (Tamanaha 2017)P31).

the genetic reasons that make people determine the validity of the form in which law is enacted and implemented, and c) the functional nature that determines the degree to which law assists in reproducing social forms of rule, including whether people are obliged to obey it. Without understanding the role of law in the ideology, it is impossible to comprehend the nature and the role of *ius resistendi* within a specific context.

The endurance of an ideology can therefore be measured by testing whether the transformations of the principles of the ideology and those of the legal system reflect or support each other, and whether the order has effective systems in place to resolve the potential conflict between its epistemic, its functional and its genetic roles (that is, between the foundational values, their legitimacy, and their compliance). The grater arrogance of power, Douzinas writes, is to believe it can change society radically by legislating a few policies, while destroying the values that enable their acceptance and application (Douzinas 2013)P55). The legitimacy in the assertion of the right to resist is acquired in the same manner that laws and policies obtain (or lose) theirs, through a test of compatibility with the principles of the ideology.

2.2. The epistemic nature; law and power.

The ideology is materialized through power. The actualization of power, and the resistances to offset it, lie at the origins of conflict, and therefore, of politics. The shape that the political takes is contingent on the conditions created to justify and maintain the imposition of one conflicting notion of power over the others, justifications that are largely based on religious[81], aristocratic, property ownership[82], and social traditions (Tamanaha 2017)P6). In the pursuit of its own substantiation and legitimization, each ideology has tried to balance divergent and opposing views about the conditions to maintain power in one way or another, establishing a range of mechanisms to confront, manage or contain that conflict[83]. Western societies have increasingly relied on the institution of law[84].

[81] For Axel Honneth, traditional societies are said to have been "integrated" around rigid norms and values corresponding to social aims anchored in and justified by religious and metaphysical belief systems (Dearnty 2011)P61).

[82] For some, the whole idea of law derives from the articulation of the right to property (Tamanaha 2017) (Douzinas 2013).

[83] Communitarianism holds that there is no one set balance point that can be found in all societies. Rather, the particular balance between rights and responsibilities or rights and the common good will vary with the cultural and historical context, across societies and over time (Etzioni 2014)P246).

[84] For Habermas, the principle of democracy is supposed to rationally reconstruct the democratic procedure for the production of law, which is the sole source of legitimacy in modern Western societies (Finlayson 2016)P6).

History shows that law is in a special way linked to the history of political ideas (Schmoeckel 2002)P7), for law is a product of power and, at the same time, its sustenance[85]. Natural law theories leaned on divine law to explain the world, the divine also being a human-made construct with a clear purpose of social control[86]. Positivists rely on the sources of law to determine their legality. The sources of law also being a man-made social construct. For others, law is continuous with, and fundamentally dependent upon, informal social practices (Postema 1994)P362). Critical legal scholars see law as a form of human activity in which political conflicts are worked out in ways that contribute to the stability of the social order, in part by constituting personality and social institutions in ways that come to seem natural (Tushnet 1991)P1526). For realists, what people consider law will be law as far as people, as lawmakers, "conventionally attach the label law to" (Tamanaha 2017)P194). Communitarians consider that law must be understood not as an independent organism, but as an integral part of the social system (Shapiro 1964)P295), and Foucault argued that there are different kinds of law on the basis of the objectives that law serves and the regime of truth that it embodies (Brännström 2014)P175). There are as many interpretations of law as there are human conceptions of power.

Dworkin argued that law is an argumentative social practice whose function, complexity, and consequence, depend on participants making and debating claims about what the law requires (Loughlin and Tschorne 2017)P9). He contended that officials and citizens have a duty to integrate the legal principles found in the law into a coherent whole that presents the entire system of laws in the best possible moral light. This integrative process is a matter of construction of an evolving notion, the law, that depends on the social debate and the fundamental principles of that society (Bellamy 2015)P6), and therefore it cannot be determined without taking a position on the values and principles it exists to serve (Loughlin and Tschorne 2017)P10). We would not argue, Dworkin noted, for the validity of a legal principle in the same way as we would for a legal rule, rather we would point to a principle's "sense of appropriateness" and the extent to which it was supported by the moral concerns and traditions of the community (Ramsay 1978)P551). In the matter of principles, questioning and defiance constitute important means of testing the validity of laws (Alton 1992)P66). Rather than expanding the notion of rights to the moral, the Dworkinian principle of appropriateness, I contend, reinforces the conception that law is a tool operated those that dominate the means of enacting and implementing it, in other words, by those with the capacity to impose their ideas in the argumentative social practice, by those that win the arguments. One could even wonder if perhaps the difference between resistance

[85] Some claim that "law is so readily identified with the exercise of power that it is easy to overlook the sense in which law functions as a technique for generating and culturing social resistance" (Pottage 2013)P262).
[86] Natural law is not per se "good law". Walter Benjamin argued that a dictatorship´s goal is to replace the unpredictability of historical accident with the iron constitution of the laws of nature (Mcquillan 2010)P100).

and revolution is not so much whether one or the other change the values of the ideology but, rather, about the morality of the power used to win the moral arguments about the moral validity of the principles that sustain the order. In other words, what kind of force, coercion, debate, accommodation, or violence is used by power to "win" the moral argument about the appropriateness of the law.

Regardless of the conception of law that one ascribes to, because the modern form that law takes is as an expression of political power[87], there is no avoiding the functional relationship, or the interaction between the two (Priel 2013)P324) (Loughlin 2014)P971) (Weinrib 2014). Law cannot rationalize itself only on being law. Law is politics by other means[88], even though it comes with specific requirements and in a specific form (Michaels 2018). And it is oftentimes the restrictive and limiting nature of these requirements and forms that is challenged by the right to resist, a challenge that can transform the relations of power and present itself as having a "right to law" (Douzinas 2014b)P165), that is, a right to legislating one´s own circumstances[89]. In other words, the right to power is the right to law.

Law then inevitably becomes self-protective of those that control legal institutions and of powerful groups within society that are able to produce laws that serve their interests (Tamanaha 2017)P5) (Tushnet 1991)P1517) (Wolin 2008)P159). This protection, by its very nature, implies that others are excluded. For Foucault, law engages responsively with exteriority made up of resistances and transgressions, and therefore is constantly responsive to new forms and content (Piška 2011)P254). Specific expressions of resistance emerge as a consequence of acts of force between those that want to preserve their space of privilege, and those that challenge it, in a never-ending circle of dichotomies and opposing conceptions of power that maintains life in the *polis*. The affirmation of power through force, understanding force as the capacity to impose or to impede a change of the normative situation of another person or of a group of persons, responds to the competition over the nature of those requirements and forms. Yet while politics and law play a distinctive and complementary role in the ideological order, and in its preservation, one must always remember that it is power that defines the order. As Hannah Arendt noted, "in a conflict between law and power, it is seldom the law which will emerge as victor" (Arendt 1990)P151). Power is "an end in itself" (Arendt 1969)P11), law is only one of the means to

[87] I understand political power as the capacity to engage in certain acts, and in certain spheres, that are not allowed or available to private citizens, in other words, the degree of maneuver of influence in the ius politicum.

[88] For Carl Schmitt "authority proves that to produce law, it need not be based on law" (Emden 2006)P1). This postulate, however, justified one of the darkest moments of human history.

[89] Kant argued that the moral law is a matter of one's legislation for oneself (Finnis 2002)P7), but he did not provide reasons for action.

achieve that end. Power is materialized in authority which is expressed through law. Not all power is expressed through law, but all law is an expression of power. Law is a social construct that those that are recognized "the right to law" intentionally create through a social process according to their purpose. Law protects the space of those that create it, but also embeds the language of rights in the conception and the application of power.

Rights are sociocultural artefacts of a particular historical phase of development of human societies (Jovanović 2012)P68)[90], the result of certain expressions of power and of the narratives that explain that relationship in a particular time, and under specific circumstances. They are part of the general project of social rationality (D. Kennedy 2013)185), a "key element in the universalization projects of ideological intelligentsias of all stripes" (D. Kennedy 2013)P188). Because social and cultural objects are the product of human intentions (Thomasson 2007)P52), rights, as cultural products, are the product of intentionally created narratives which are embodied, most times, in legal rules that are themselves "often ratificatory and regulative rather than truly constitutive" (Finnis 2002)P26). Law is the codification of rights that have passed the narrative test of those that have the right to law.

Grasping the concepts of power and rights requires understanding the process by which the narratives about those concepts are constructed, that is, how societies form a social, moral, ethical and political image of what it is implied by the notions of power and rights. Foucault believed that power is linked to the formation of discourse within specific historical periods[91]. Power, therefore, needs to maintain a specific type of narrative (Sokhi-Bulley 2016). No legal institution or normative order can exist separate from the narratives that provides it with meaning and that sanctions its very existence. In fact, for those subscribing to Habermas´ theory of communicative action, the normative value of norms is necessarily implied in the discourse, not necessarily in the self-understanding that agents may have of that norm, nor in the legal form alone, but in the discourse theoretical process of giving concrete shape to the initially unsaturated concepts or basic rights (Forst 2017)P19)[92].

[90] Foucault too treats law as a historical formation and does not decide its distinctive features, function, or field of influence in advance He brings to the fore the implicit patterns in the discourses and the discursive practices that produce a historical formation (Brännström 2014)P176).

[91] Charles Tilly argues, and I agree, that in the study of contentious politics one needs to move away from simple event count toward procedures that trace interactions among participants in multiple episode (Kriesi 2009)P344) that is, one needs to examine the multi-factor, no-time-specific, socially grounded narratives around the engagements, not the engagements per se.

[92] For Habermas, what civil disobedience implies, and defends, is the feedback connection of the formation of political will with the informal processes of communication in the public space (Quintana 2009)P63), that is, the debate among the forces of society in the space where rights are created and contested, the *ius politicum*.

The possibilities of the narrative are vast, if not endless. Narratives can shape the most fundamental ideas about ourselves, about our values and about what we believe we are entitled to. Language imposes meaning and manipulates our perception (Nieminen 2017)P7). We believe, for instance, that the language of rights has a higher value than the common language because it embodies the aspirations and the values of the *grundnorm*, the latter being in itself a narrative, albeit the one with the highest significance. It then follows that the interpretation that we give to the notion of rights is contingent on our adherence to a specific narrative, because what rights can mean in a substantive, and not only in a formal sense, always depends on the principles or values to which a person or a group of persons feels committed (Brumlik 2017)P25). Rights, therefore, are not just morally grounded, they are justified by an internal interpretation of the discourse around them, and by the legal form that they take. The concept of rights, as a specific artifactual kind created by human intention, is determined (often gradually and collectively) by power, by the makers' concepts about what features are relevant to kind membership (Thomasson 2007)P80). Just as Foucault argued that political struggles over what human rights included, and what they excluded, defined the content of "the human" in whose name these rights are claimed (Golder 2015)[93], political struggles over what rights mean, what they include and what they exclude, define the very content of those rights.

The language of rights, or more concretely, the language that appeals to rights, is, consequently, what creates rights. Robert Cover uses the term *jurisgenesis* to refer to the creation of legal meaning by the *nomos* (Wilson 2017)P139), the normative universe of different social groups within a society, a process of meaning-creation that takes place in the public sphere, in the political. The language of rights, and rights themselves, are fundamentally political in the sense of being open, provisional and subject to on-going contestation (Aitchison 2017)P8). They have become a common feature in the political discourse and central to the causes of those that take the streets, but rights, and their meaning, remain essentially an instrument in the hands of those that can impose their narrative over the appeals, or the legislating power, of others.

Law´s epistemic nature is politics, understood as a public exercise through which power is actualized in connection with the values of the ideology. Those values, and the societies built around them, are threatened when law´s epistemic nature ceases to be politics and instead becomes just power. When power is asserted in a commanding and excluding manner, even within liberal democracies, law is pulled in conflicting directions seeking to

[93] In fact, Foucault´s obsessive examination of power focuses on the human. For him, the disciplines of the body (the anatamo-politics of the human body) and the regulation of the population (biopolitics) constituted the two poles around which the organization of power over life was deployed (Muller 2011)P7).

fit the purpose of the power while remaining truthful to the narrative that create it[94]. Law then becomes a paradox in itself, "a vehicle simultaneously of governmentality and of its subversion, of subjection and emancipation, of dispossession and reappropriation" (Maurer 2004)P844). When politics is law´s epistemic source, that is, when power is asserted in the public space in a manner consistent with the principles of the ideology, law acquires its full normative, performative, and moral value[95].

Today, law is expanding as it assumes the characteristics of contemporary society. As power is exerted in a multitude of forms, law is increasingly becoming dispersed and fragmented, responding to a multitude of private, corporate, political and transnational interest from which the individual is, most times, left aside. The financial markets have replaced the sovereign people (Douzinas 2021). Law and sovereign power are increasing displaced by discipline and bio-power which function through the norm (Piška 2011)P252). Some point out that what we are seeing is class war from above, in which the rich are bailed out by all others (Canaan, Hill, and Maisuria 2013)P179), a practice that one can deem immoral, but that the elites ensure is not illegal. Law has transformed itself into a network of norms continually under negotiation among a plurality of private and public actors (M. P. Golding and Edmundson 2005)P11), reflecting the contrasting (yet not necessarily opposing) views about the actualization of power. This is a law with force, but without normative weight beyond the ideological preferences of ruling elites masquerading as scientific policies (Douzinas 2014a)P88).

2.2.1. *Violence.*

Violence, too, is an expression of power. Foul power perhaps, but power. From Aquinas to Rawls, scholars have historically sought to settle the debate whether violence in a political engagement nullifies the act or delegitimizes the engagement. As Hannah Arendt noted, no one concerned with history and politics can remain unaware of the enormous role violence has always played in human affairs (Arendt 1969)P2). In that same debate, scholars have also questioned the use of violence by the state and wondered about the moral limits of exerting power by force[96].

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[94] As Weber said, "the facts of life are juridically construed in order to make them fit the abstract propositions of law" (Tamanaha 2017)P113).

[95] Moral value in the sense of Lon Fuller´s "inner morality of law", which I will later discuss. Legal scholars have traditionally believed that much of what legitimates law and distinguish it from other forms of normativity are the procedures by which it is created and applied: adherence to legal process, the ability of actors to participate and feel their influence, and the use of legal forms of reasoning.

[96] "If force creates right, the effect changes with the cause: every force that is greater than the first succeeds to its right (…) But what kind of right is that which perishes when force fails? (Rousseau 1762)Book1).

Through action, response and adaptation, the state and those that assert their right to resist engage in a competition to outpower one another[97]. Because resistance is a reaction to an expression of power, then the tactics pursued by that power affect the type of external expression of resistance that ensue. This includes the possibility that the external manifestations of the right to resist, themselves expressions of power, include force or some forms of violence, or that the state, in its attempt counter expressions of resistance (whether factual or not) or to coerce people into obeying, makes use of violence. A different question is whether the state (*qua* state), has the right to resist (*qua* right)[98].

I depart from a basic premise, that resisting oppression by exercising the liberties it attempts to curb is a right, and that right is unaffected by the occurrence of violence (Finlay 2008)P97). It would defeat the ambition of universality of my theory of the *ius resistendi* to disregard the fact that violence might be present in its external manifestations[99], and it would also defeat that ambition if I was to condition the existence of the *ius resistendi* to the forms that its external expressions take. There is a fundamental difference between violence as the consequence of an action (e.g., the actual assertion of a right), and violence as a defining part of that right. Violence is a political term, one which is used to define a wide range of behaviours and actions, from acts of terror to murder to certain forms of speech. Since there is no universally agreed meaning, significance, or definition of what constitutes violence, the claim that the presence of violence can be a defining part of what constitutes a right is in itself a contradiction. I agree, following Judith Butler´s reasoning, that the presence of violence or not cannot be, in itself, a principle that defines a right if by a "principle we mean a strong rule that can be applied with the same confidence and in the same way to any and all situations" (J. Butler 2009)P165). And yet, violence is frequently

[97] Erica Chenoweth notes that one of the reasons why nonviolent resistance has decreased in efficiency during the last decade is the adaptation of the State to nonviolent challenges and developed a repertoire of politically savvy approaches to repression, for instance infiltrating movements and provoking violence from within them (Chenoweth 2020)P76). I believe that what weakens the political and strategic sustainability of an external expression of the right to resist is to dissociate that political strategy from the normative framework in which it takes place. The language of rights endures in society much longer than the language of politics and provides a much stronger foundation for a long-term strategy that seeks to fit within the ideological framework, and, at the same time, surpass it.

[98] I, however, agree with Weinrib that unlike a private person, a state lacks the right to determine its own end (Weinrib 2014)P720).

[99] The ECHR considers the possibility that violence may occur in a demonstration. According to the Court, it is the intention to hold a peaceful form of assembly that is decisive in evaluating whether Article 11 of the European Convention on Human Rights (ECHR) is applicable (Council of Europe 2013)P8). A participant in a demonstration does not cease to enjoy his rights under the ECHR because of the violence or other punishable acts committed by others during the demonstration, if the individual in question remains peaceful in his or her own intentions or behavior.

used by the state as the measure to judge the validity of the *ius resistendi qua* right[100], as well as the justification to use of violence against those that resist.

As the instrument that can, and does, effectively limit the space where freedoms are exercised, law itself is instituted on the notion of violence, both structural and systemic. Legal systems are, in most cases, the outcome of force, the progeny of war, revolution, rebellion or occupation (Antiphon 2009)[101]. Law is invariably violent as regards the limiting force it can exert (Van der Walt 2010)P213). There is, in Foucauldian terms, an intrinsic, transhistorical tie between law and a certain negative, repressive, modality of exercising power (Brännström 2014)P177). Law can be the source of justice and injustice at the same time, and bearing in mind the massive intrusion of criminal violence into politics (Arendt 1969)P4), if we consider the extant violence-based legal order as legitimate, then there is no reason why we should not consider legitimate the exercise of certain rights and freedoms within that order, even if the expression of those right is not free from violence.

In the public space, violence generally presents itself as the alternative to the lack of dialogue and the result of the breaking of politics[102]. But not all violence is the same. When part of an external expression of the right to resist, one must clearly distinguish between object-violence and body-violence, a distinction that is not only semantic, but that relates to the very essence of what is ethically, legally, and politically permissible in the ideology and determines whether one (as moral being and as political agent) can ethically justify its use.

There is no possible moral or political defence of body-violence. Body-violence is an action exerted against a person or against people, against their physical integrity or their moral standing, is a force applied with the aim of hurting, of restricting people´s freedoms or exerting psychological pressure (Celikates 2017)P2). Body-violence attacks the very essence of humanity and the measure of all things, the human, and with it, the source of reason. Body-violence removes the epistemic nature of any of its possible outcomes, it dehumanizes

[100] The ECHR has held on several occasions that "if every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion" Case of Alekseyev V. Russia (Applications nos. 4916/07, 25924/08 and 14599/09) of 21 October 2010, para 77.

[101] "European civility was in fact the contingent product of a complex historical process, traceable to the fifteenth century, of the gradual pacification of society through the repression of individual tendencies to violence (…) in part by reinforcing existing socio-political hierarchies. And it achieves this by marking disruptive practices, including practices of dissent, as un-civil, unrefined, not to be taken seriously" (Edyvane 2020)P98). Walter Benjamin argued about the forms of "law-preserving violence" that the constituted power would take as inseparable from state power, whereas revolution (divine violence), would be an example of a form of constituting power, or "law-making power" (D. C. Barnett 2016)P433).

[102] As Herbert Marcuse argued, "the ways should not be blocked on which a subversive majority could develop, and if they are blocked by organized repression and indoctrination, their reopening may require apparently undemocratic means" (Marcuse 1965)P100).

the political, and without reason at its centre, the political proscribes itself. The irrational then takes over, and we revert back to a Hobbesian brutish, short and nasty state of nature.

Against things, one applies object-violence. I define object-violence as the use of force against unanimated objects in pursuit of a political or a communicative aim, without causing harm to people or to the most essential values of the ideology: dignity and freedom. The use of force against objects and interests, usually an expression of the clash arising from the actualization of power, must be always morally and rationally defensible (which does not necessarily mean allowable). A riot does not follow from motives that are considered a moral obligation. The difference between a riot and an external expression of the right to resist lies not in the methods used (both can resort to object-violence) but on whether these expressions are politically motivated, public, rational and morally grounded, as well as by the legal consequences that they create both for the resisters and for the state[103]. A riot is an irrational, anger-driven social expression caused by the lack of capacity of rational group deliberation (which would include a choice of political means and a rationalization of the grievance in the language of rights), caused by the oppression of the state or by non-public interests upon specific groups of population[104]. The intent of rioting is destructive, and while one can sometimes understand the reasons behind frustration and emotional outbursts, the engagement does not qualify as an external expression of the right to resist.

The Greek, Roman and medieval conceptions of the *ius resistendi* embraced as lawful and legitimate expressions that could contain violence, for instance, tyrannicide or resistance against the King by arms. The liberal concept of civil disobedience rejects violence. Liberals defend that while the use of coercive tactics may be required in authoritarian regimes, it is not appropriate in democratic states with a broadly egalitarian ethos (Aitchison 2018b). John Rawls discarded the use of violence "because any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act" (Rawls 1991)P106). Liberal literature, I maintain, converged mostly on non-violent expressions of the *ius resistendi* because non-violence removes, to a great extent, the burden of justifying otherwise morally ambiguous expressions of discontent, especially when those are caused

[103] Paradoxically, the European Commission of Democracy through Law (the Venice Commission) considers that "non-peaceful gatherings, involving coordinated and persistent assaults on State institutions and other similar violent incidents" can be described as riots (R. Barrett et al. 2021)para 50). I, however, consider that a riot is, primarily, a social outburst without a clear political purpose or coordination, and that is not sustained over time. Recent publications also consider that the rise in world protests "were not random, unorganized riots; the majority of world protests were planned, and their demands were articulated", the main grievances and causes of outrage being the failure of political representation and political systems, economic justice and anti-austerity, civil rights, and global justice (Ortiz et al. 2022)P113).

[104] Oppression understood as a social circumstance (political, legal, cultural, or otherwise) that systematically and wrongfully burdens a victim's autonomy or overall life prospects. Oppression is often the cumulative effect of diffuse norms, actions, practices, and institutions (Silvermint 2013)P405).

by the failure of the state to uphold its obligations, not because violent expressions of discontent are morally unjustifiable.

Object violence needs justification, and, in some cases, it can be justified. Under certain circumstances, "violence is the only possibility of setting the scales of justice right again" (Arendt 1969)P13). For Michael Ignatieff, European liberalism has typically endorsed some limited rights to deploy violence for political purposes, since rights would not be ultimate claims were they not worth defending (Finlay 2008)P86-87), even if this defence includes the use of violence and force (Ugartemendía 1999)P214). For Tony Honoré, too, by calling "rights the values that we define as human rights in western culture, we want to distinguish them from mere aspirations by acknowledging the right to seek a remedy, even a violent one, where this is the only possible means of achieving or protecting them (Honoré 1988)P34). Hugo Bedau concluded that civil disobedience ought not to be defined by reference to nonviolence (Bedau 1972)P183), since the decision whether to act violently emerges as a tactical, not as a principled, matter (Bedau 1991)P8). Jean Paul Sartre went further in his justification of violence, arguing that any violent resistance must be ethically grounded in the whole community that is being oppressed, but also that there is no logical reason why this argument should not be equally deployed for a minority community, particularly in the face of sectarian tyranny enforced by the majority (Young 2011)P47). And even the first president of the Federal Court of Justice of the Federal Republic of Germany, Hermann Weinkauff, advocated positive resistance, even violent resistance, against the despotic state authority (Schwarz 1964)P128).

For some critical scholars, especially for those that advance the notion of "uncivil disobedience", a certain degree of violence is now considered, perhaps, even necessary. Prompted in part by controversies surrounding militarized and racialized policing, critical scholars justify violence when it is either a tactic of self-defence, or a means of rescuing others from the immediate threat of harm (Delmas 2019a)P244). They contend that "the claim that disobedience has to be nonviolent in order to count as civil can be contested with good reasons, not least because the vagueness of the notion of violence lends itself to political instrumentalization" (Celikates 2014a)P434). Still, others think that civil disobedience need only be largely non-violent, or aspirationally nonviolent, and even then, primarily with regard to persons and not necessarily with regard to property, or even as self-defence in the face of assault by others, such as the police and security personnel (Milligan 2013)P14). Others argue that the right to resist oppression justifies coercive tactics in all cases where, in general, such tactics have a realistic chance of providing less oppressive social relations (Raekstad and Rossi 2020)P12). In any event, what seems clear is that disruption is not incidental to the success of protest movements, it is essential (Engler and Engler 2016), and that disruption often involves some sort of force.

The perception that violence might be somehow justified in some circumstances is not only raising in academia, but most significantly with the common people. Current resistance networks conceive their political engagements as forms of community self-defence, and believe that any force they might use is fundamentally different than the coercive violence of their opponents: murderous cops, polluting energy companies, statists, capitalists, and fascists (Loadenthal 2020)P15)[105]. While the growing acceptance of violence from those that resist may be regarded as a worrisome indication that people increasingly find impossible to obtain solutions within established democratic channels, it also demonstrates that more people are willing to risk their integrity to defend principles and values they consider fundamental[106]. Current trends are not necessarily bad news for democracy, although these trends are usually portrayed as bad news by the mainstream media, and any expression of violent behaviour, even by a small minority within a movement, "is food for the adversary" (Etzioni 2020)[107].

Like rights, violence is formed around its narrative. Violence is political, and it is the negation of politics at the same time. It is contingent on its source and on its purpose, on the story around it and on the consequences for those with the power to sanction it. Violence

[105] For instance, the "Principles and values of the environmental movement "Extinction Rebellion UK" says that "we also recognize that many people and movements in the world face death, displacement and abuse in defending what is theirs. We will not condemn those who justly defend their families and communities through the use of force, especially as we must also recognize that it is often our privilege which keeps us safe. We stand in solidarity with those who have no such privilege to protect them and therefore must protect themselves through violent means; this does not mean we condone all violence, just that we understand in some cases it may be justified. Also, we do not condemn other social and environmental movements that choose to damage property in order to protect themselves and nature, for example disabling a fracking rig or putting a detention center out of action. Our network, however, will not undertake significant property damage because of risks to other participants by association". https://extinctionrebellion.uk/the-truth/about-us/. Many of the protestors do not consider themselves activists and yet they protest because they are disillusioned with official processes, political parties and the other usual political actors associated with them (Ortiz et al. 2022)P113).

[106] The death in police custody of George Floyd, a 44-year-old African American man, on 25 May 2020 in Minneapolis (USA), sparked a wave of anti-racism protests in the U.S. and around the world. A CNN Poll conducted by SSRS from 2 to 5 June 2020, after the U.S. nation-wide "Black Lives Matter" demonstrations that first surfaced in 2013, found that a majority of Americans (84%) justified the peaceful protests across the country after police violence against African Americans, and roughly a quarter (27%), said that violent protests in response to police harming or killing African Americans were justified (Agieska 2020).

[107] The West has greatly expanded its interpretation of what constitutes violence, mainly as a mechanism for societal discipline and control, and has become less permissible of any form of direct confrontation. Habermas, for instance, referring to the position of some German politicians that declared that nonviolent resistance is violence, noted that "the advocates of a tightening-up of the law regarding demonstrations have pursued a course in which they attempt to extend the juridical concept of violence beyond actual violent acts to include unconventional means of influencing the formation of political will" (Habermas 1985)P96-97). One must, as some insist, understand the communicative aspect of the external expressions of the right to resist beyond the ritual denunciation of acts of violence as "outrages" or even "terror" that are always voiced by politicians and commentators (Young 2011)P56).

is to power what punishment is to law. Violence appears where power is in jeopardy, but left to its own course, its end is the disappearance of power (Arendt 1969)P13), at least of legitimate, democratic power. Violence can be used as a tool of coercion or of liberation. State violence strengthens the coercive role of the state while undermining the role of resistance. Object violence may reinforce the power of the people, but it undermines the legality of rules. All forms of violence are, from whatever perspective, flawed, but some are perceived as being more flawed than others, and it is oftentimes only the violence exerted against structural (state) violence that is visible, and it is that visibility that provides the standard for censuring violence rather than the violence exerted by law, power or authority.

The state does not merely use force, its reaction to legitimate assertions of the right to resist (emphasis added) is always violent, not necessarily because of the physical harm that police or security forces may inflict[108], but because of the imbalance of power between the state and those that resist, and because of the state´s capacity to severely affect the normative status, and even the lives, of those that legitimately assert their right[109]. While resisters may be organized in their use of (object)violence, that violence is usually limited to a specific political strategy to challenge a particular law or a policy[110] and generally uses a language that appeals to rights. The "harm" that resisters inflict on the state is political and usually depersonalized. Inversely, the response of power primarily targets the individual (the organizers of a campaign, the participants in a demonstration, the members of a civil society[111] or political group) and uses the language of criminal law with the aim to punish.

In domestic affairs, violence functions as the last resort of power against criminals or rebels, that is, against individuals who refuse to be overpowered by the consensus of the majority (Arendt 1969)P11). By labelling someone, or some action, as violent, those that control the narrative that create rights, nullify the engagement and deprive it of any pretence of legality or legitimacy. Appealing to irrational, primeval concepts, post-democratic regimes[112] have

[108] Contrary to public perceptions, riots and protests involving violence and vandalism/looting represent only 20% of the total of 2809 protests that occurred between 2006 and 2020 worldwide. Repression is documented in more than 60% of the protest episodes analyzed in the study, taking the form of arrests, injuries and deaths due to state-organized violence (Ortiz et al. 2022)P114-116).

[109] "All attempts to understand legal judgments and judicial decision-making as exclusively hermeneutical are incomplete. Whatever else judges do, they deal in fear, pain, and death. Legal decisions lead to people losing their homes or children, being sent back to persecution and torture: legal interpretation leads to people losing their lives" (Antiphon 2009).

[110] As Kent Greenawalt notes, it is often difficult to determine the exact law or policy that the disobedient person seeks to protest; thus, the application of any rule permitting nonviolent disobedience which is directed only at the challenged law or policy might be elusive (Greenawalt 1970).

[111] Antonio Gramsci conceptualized civil society as an arena of contestation, which could both strengthen or resist the hegemony of the (bourgeois) powers (Buyse 2019)P17).

[112] By post-democratic I refer to a system formally democratic, but fundamentally distorted by practices that have transformed it into a regime that is not undemocratic, but that is not democratic.

been able to resist resistances both as political concepts and as normative possibilities, managing most external expression of the *ius resistendi* through violence, either through "lawfare", the politization of the judicial[113], or via the police[114]. This response is, however, counterproductive. When a government uses violence against its citizens, the government is as liable to resistance as any other oppressing power. Many scholars concur that the use of force by the state destroys, rather than protects, the democratic culture that it pretends to defend, and that the use of the criminal justice system to defend the egalitarian democratic culture in a society, that is, the combination of the terms force and democracy, are hard to reconcile (Ellian and Molier 2015)P256). If violence is not the way to demand justice, why would it be the way to restore order? Why do we consider violence from above (violence used by agents of the state), as morally superior to violence from below (violence from the oppressed resisting their oppression)? (Garland 2012)P9).

Modern expressions of dissent arise from the actualization of power in the framework of the contemporary ideological indeterminacy, an uncertainty that causes people to question whether the order and its institutions are legitimate. Questions about legitimacy are the result of the increasing disconnect between the ideological foundations of the system and the prevalent discourse of political legitimization. Western societies live under the constant assault of external threats and pressures, menaces that have overwhelmed the moral and ethical institutions of a system that has been unable to respond to the anxieties of fear and has, instead, responded with force, and without reason. In this estranged environment, as Stellan Vinthagen argues, the violence by the State (including linguistic and discursive attempts), should be understood not as proof of its might, but rather a demonstration of its absence, a failing of State power and a forced retreat to its barbarity (Loadenthal 2020)P18).

The discourse of order and security, for instance, has replaced the enlightened discourse of freedom and equality as the basis for the actualization of power, and with it, the form in which citizens relate to the state or rather, the form in which the state exerts power over the people. Consent is becoming irrelevant as we are told that there is no alternative to the

[113] For Britta Rehder the term "politization" suggests that politics invades the legal sphere, while the term "juridification" is one in which the judicial action invades or displaces politics. From Spain to Poland to Hungary, courts are being increasingly politicized. Court interferences in the political reflect the political power behind the Court as a branch of government. Jacques Rancière argues that juridification and rule by law is "not so much the submission of the legislative and the executive to the "government of the Bench"' as a declaration of "no case to answer" for any public manifestation of conflict (Rehder 2007).

[114] When talking about the use of pepper spray on protestors, Tony Milligan makes an interesting reflection: "if its use would be illegal on the battlefield, there is a question about why it should be considered legal on the streets" (Milligan 2013)P2). In his account of the 25 May 2011 events in Syntagma square, Costas Douzinas notes that "the police attack in and around Syntagma turned the center of Athens into a battleground (…) the Greek Medical Association and the Athens Bar stated that such extensive use of chemical weapons in times of war amounts to a war crime" (Douzinas 2013)P149).

security of the state (Wood and Fortier 2016)P9). The consolidation of this security-focused narrative has relied, to a great extent, on the ability of the state to mobilize the symbols of power, particularly the law and the force of the police, a force that is applied with little reference to justice, morality or democratic legitimacy (Douzinas 2013)P45). In the pursuance of the objective of countering resistances and consolidating order, democracies have tended to provide disproportionate discretion to the police to determine the balance between legitimate protest and those considered to be a disruption[115], and between the exercise of freedoms and the maintenance of public goods (including order and security). The delegation of the use of legal(ized) (body)violence against those that assert their right to resist has the effect of releasing elected officials from their responsibility to adjudicate moral reason, thus somewhat discharging the state from its obligation to protect basic rights[116], that is, from its obligation to upholding the basic tenants of the ideology that sustains the state itself.

Some view state violence against demonstrators or political opponents as an act of state terrorism, a pre-emptive policing (Garland 2012)P10) designed to strike fear into potential protesters, dissidents or even observers, seeking to provoke a chilling dissuasion effect. Such aggressive policing and state violence is intended to send a message to anyone willing to assert her right to resist that political demonstrations that challenge the status quo are not to be tolerated. When the state uses violence, it seeks its own justification and the pursuance of its own existence at the expense of the rights of those that form the collective[117], it de-humanizes people, and when the opponent is dehumanized, then the burden of respecting its rights is lessened, and the use of violence is justified as a necessity to protect the order from the morally inferior. Interventions with an agent's physical integrity, that is, the application of body violence, is equivalent to treating the agent as a morally inferior being compared to the intervening agent (Andersson 2015)P1643). Police

[115] The escalation of the number of police aggressions against protesters is a clear indication that the democratic state is willing to use strong measures to deter protest that threatens the status quo (Canaan, Hill, and Maisuria 2013)P11). Only in the decade of the 80´s there were nearly 37,000 individuals arrested for protest activities (Lippman 2012).

[116] In Case of Alekseyev V. Russia (Applications nos. 4916/07, 25924/08 and 14599/09) of 21 October 2010, the ECHR stressed that, para 73, "freedom of assembly as enshrined in Article 11 of the Convention protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents. It is thus the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully".

[117] Astonishingly, for instance, in its Ruling 91/2021 of 22 April 2021 (BOE no 119, of 19 May 2021), the Spanish Constitutional Court argued that a peaceful but massive demonstration may be seen as a way to prevent the police from using force which, at the end of the day, may disrupt the normal functioning of the state powers (Urias 2021).

brutality has become in itself a political feature, a usual state response to actions of dissidence under the cover of its Weberian legitimacy.

Indeed, the Weberian principle of the state´s monopoly of the legitimate use of physical force remains the defining feature of sovereignty. The defining feature of the democratic ideology is the principle that delegation is constrained. Democracy creates a situation where the state is never fully released from its duty (not the right) to govern, and from its obligation to protect people´s rights, that is, to realize a system of law that conforms to the terms of its own justification (Weinrib 2014)P720). A Lockean logic would then reason that the legitimacy of the monopoly of force should be contingent on the fulfilment of the state´s obligations to govern and uphold the rights of citizens. Consequently, if the state was to fail in fulfilling those obligations, and thus maintain an unjust condition, then it should not be entitled to having the monopoly of the use of force. Using state force to unjustly deter the legitimate claim of rights from citizens is wrong. Even John Rawls reasoned that, ultimately, the responsibility for social division rests not on those that resist, but on the authority that has maintained unjust institutions, "for to employ the coercive apparatus of the state in order to maintain manifestly unjust institutions is itself a form of illegitimate force that men in due course have a right to resist" (Rawls 1999)P342). But logic and politics are not always good companions. In democratic liberal orders, legal relationships have tended to provide nominal rights to people, and consequently nominal duties to the state, while bestowing real rights to the state, thus imposing real duties on people.

In this logic of contention, the claim of the monopoly of force, and of (body)violence, embodies the expression of the superior rights of the state in relation to the rights of citizens. It is the *raison d´état*, a notion that epitomizes the ultimate bulwark of the state to defend itself against any threats to power, especially when the menaces come from within, and for legitimate reasons[118]. The "reason of state" is always at the rearward of all political theory, and of all political action, emerging as the unquestionable reason for state intervention in ways that can limit the enjoyment of fundamental rights. The notion of the *raison d´état* implies, fundamentally, that there are no binding obligations, that there are no unbreakable principles, even those that provide the basis for the very existence of the state, and that certain values can be transgressed to promote others, even if those values defy the very nature of the democracy.

In his Sprit of the Law, Montesquieu already cautioned that "legislative enactments that clash with prevailing moral and social norms may well fail and may require tyrannical force to be effective" (Tamanaha 2017)P16). Because the appeal to the *raison d'état* is made without

[118] In Machiavellian terms, the reason of the state is a break with the ethical and legal order, in a permanent precept: the State knows no other law than the desire for its own conservation (Gómez Orfanel 2021)P197).

citizens, and even against citizens, the state does not need justification for "its" reason, which means that it does not need to rationalize the reactions against those that do not abide by the same rationality. The violence of the *raison d´état* expresses itself in an aggressive institutional way, purportedly or not, provoking a collision of constitutional rights, fundamental principles, security concerns, appeals to order, and the stigmatization of violence when used by others to maintain its margins of political dominance. The *raison d'état* transforms the state into the only moral measurement and the sole interpreter of the *ultima ratio*. The political is delegalized and turned into raw power. The *raison d'état* embodies the Schmidtian "exception", it expands the delegation, and like the *ius resistendi*, it exposes the real mechanisms that the state uses to generate obedience or allegiance. And yet, the *raison d'état* and the *ius resistendi* are, ironically, born out of the same need, that of vindicating power.

We are witnessing a worrying democratic drift, an erosion of basic principles of justice and rights, not tyranny per se, as the identifiable source of injustice, but tyranny of exercise (Pelloni 2000)P5)[119]. Tyranny of exercise defines those regimes that are legitimized in their legal and democratic origin, but that may be repressive, oppressive or unresponsive in their exercise, a situation where democracy is demoted from a formative principle to a largely rhetorical function within an increasingly corrupt political system (Wolin 2008)P131). This tyranny of exercise is currently enabled by the lack of counter-power to neoliberalism and to the biopolitics and governmentality approaches to managing population (Muller 2011)P4), practices that have instituted a semi-tyrannical mode where no one has really much to say. Tyranny of exercise epitomizes the delegation of the institutional obligation of the authority in regard to the rights of those that resist, and those that do not[120].

2.3. Genetic reasons; the morality of law.

Legal positivism posits that what the law is can be identified without moral or evaluative concepts as to what the law ought to be in particular circumstances. Positivist accounts simply examine the legal system *qua* system of rules, the description of normative hierarchies (Zipursky 2006)P1245). It proposes that state law is, or should systematically be

[119] In the words of the UN Secretary-General, "there is a growing disconnect between people and the institutions that serve them, with many feeling left behind and no longer confident that the system is working for them, an increase in social movements and protests and an ever deeper crisis of trust fomented by a loss of shared truth and understanding (Our Common Agenda 2021)P22).

[120] European institutions, for instance, have been "effective" in taking harsh measures to neutralize resistance. As White notes, "in the light of the Syriza experience in 2015, when the threat of disobedience towards the demands of the emerging Eurozone regime was evoked only to be soon discarded, the prospects for resistance of this kind in the EU may currently seem remote. Indeed, given the scale of the power resources that can apparently be applied to forestall it, consideration of the normative basis for such a counter-politics may seem wholly premature" (White 2017)P2).

studied as if it were, a set of standards originated exclusively by conventions, commands, or other such social facts (Finnis 2002)P9), norms that in order to fulfil their function should meet certain procedural requirements so that the individual is enabled to obey them (Sypnowich 2019).

At its fundamental core, some believe that positivism developed around one central question: can law be bad? (Tamanaha 2005)P6). Although positivism does not reject the possibility that the law may contain moral principles[121], it considers the rule of law as value-neutral, or content independent in the case of H.L.A. Hart (Valentini 2018)(Finnis 2002)P23), and proclaims that the very strength of the idea of the rule of law, understanding law in its formal and procedural meaning of having the status of a law, stems precisely from its moral neutrality (T. Smith 2011)P51)[122]. Value neutral theories sustain that a lawful act does not need to be morally right, as long as the law permitting the act had been lawfully enacted through legitimate law-making powers and procedures[123]. This could be determined, Hart argued, through the acceptance of the rule of recognition as a social rule, effectively setting the accepted common public standards of official behaviour by the system's officials (Boos 1996)(Zipursky 2006)P1233).

Positivism tends to favour the stabilizing nature of law and with it, the *status quo* of power. Hart´s rule of recognition is, in essence, a rule of recognition of power, and a rule by which power (in the form of law), is recognized, because change, adjudication, and recognition are opportunities to ascertain the power of those with the power to change, adjudicate and recognize. For positivists, including Raz, the reason why achieving a value neutral rule of law system can be an appropriate goal for regimes across the globe, is that it does not commit a society to any particular ideology. And this is, precisely, my fundamental disagreement with positivism, for the ideology is the *grundnorm* of any normative order.

[121] Hart always acknowledged that in legal systems such as the United States "the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values" (Bellamy 2015)P7).
[122] But "procedures can imbue even substantively mistaken laws with (the) authority these laws would otherwise lack" (Viehoff 2014)P342).
[123] I am aware of the simplicity of the argument I put forward, as both Hart and Raz have developed complex theories in which they elaborate the link between law and morally permissible acts. Hart and Raz have argued that legal positivism is committed only to the idea that because what is law is a factual question, law's legitimacy can be determined by moral criteria outside the law that might recommend disobedience, and that although law may meet moral criteria, what the law is and what it ought to be should be kept distinct (Sypnowich 2019). Inclusive positivists argue that legal positivism can allow moral tests of legality without requiring that they consider the manner in which it has been enacted. Even exclusive legal positivists like Joseph Raz, while affirming that all law is based upon and validated by social-fact sources, also accept that judges can have a legal and moral obligation to include in their judicial reasoning principles and norms which are applicable because, although not legally valid they are, or are taken by the judge in question to be, morally true (Finnis 2002)P9).

There is no order in an ideological vacuum. Whether one abides to a particular ideology or not is, however, a different matter.

I agree with those that assert that law is a valid ideal only because it is a moral good that serves a morally worthy purpose (T. Smith 2011)P51). Law cannot be purely procedural or content independent. What is morally worth can only be discerned within a value-based conception of society[124]. It is only when we ponder certain cultural and social objects through a "scale of worthiness" against other social and cultural objects that we can determine the value of the objects that we consider, including law, rights and principles. No value can be provided to any object unless is it measured against an ideological background, for good, or for worst.

Ronald Dworkin argued that the falsehood of legal positivism resides in the fact that it is incapable of accounting for the important role that legal principles play in the law (Ramsay 1978)P550). He suggested that a moral reading of the law is not only possible, but also unavoidable (Bellamy 2015)P4). Values, entrenched in legal principles, are the genetic reasons of the ideology, the scale that the ideology possesses to assess whether rules, norms and laws are morally (and politically) adequate. Dworkin asserts that "according to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice" (Altman 1986). In other words, law is valid as long as it reproduces accepted values.

Successful legal orders necessarily have morally acceptable purposes and aims (Lovett 2015)P2). After the second world war, the Radbruch formula, which contends that if positive law does not aspire to justice and if the equality which is the essence of justice is knowingly denied, the law is not merely false law, but lacks the very nature of law (Ellian and Rijkpema 2018)P101)(Tamanaha 2005)P11) was applied as the ultimate moral justification of "judicial resistance" against the validity of laws unbearably unjust or deemed to have trespassed all frontiers of decency. In its judgment of 24 October 1996, the Federal Constitutional Court of Germany[125] described the relationship between the criteria which together make up Radbruch's formula and the human rights protected under international law as being that the criteria of Radbruch's formula, which were difficult to apply because of their imprecision, had been supplemented by more specific assessment criteria, since the international human-rights covenants provided a basis for determining

[124] I speak of morality in reference to the justification of actions consistent with the essence of fundamental values and principles of the democratic ideology, rather than in its traditional acceptation which still remains heavily influenced by religious considerations.
[125] Cited in ECtHR Case of K.-H. W. v. Germany (Application no. 37201/97) of 22 March 2001.

when a State was infringing human rights according to the convictions of the world-wide legal community.

The moral righteousness of an ideology (not its validity, which is related to its resilience), depends on the justice or the injustice that it causes in relation to its own conception of justice, that is, on whether there is a disconnection between the actualization of power in the ideology and the ideal of justice that it represents. As a set of normative values that support the democratic ideology, law's moral righteousness is also directly related to whether it helps preserve or advance the ideological ideal of justice. Joseph Raz notes that "the morality of a government's laws measures, in part, its justice" (Raz 2012)P140). The other measure being the degree to which they are implemented in accordance with that sense of justice.

Since the public morality of any society is very definitely influenced by the law (Christie 1990)P1319), then one must accept that the opposite is true, that law is influenced by the public morality, a morality that is channelled through the political. The political idea that a society has of "the law", reflects how that society has come to morally justify the limits of power. Being ruled by the law means accepting (or at least acknowledging) that one is subjected to a positive moral idea of society, and that one is constrained by the moral justifications of maintaining that society (and its forms of power). The rule of law is the mechanism that establishes how legal narratives that reflect the values, and the political objectives of the ideology, are created. In other words, in a system of rule of law, legal coherency is due to a way of reasoning than to actual answers, and is due to, or biased by, the political objectives of the day (Schmoeckel 2002)P5)[126], not by a positive adjudication process. These political objectives are oftentimes not the result of the dispute between people and power, but among powers. The legislative, the executive and the judicial have always disputed the legitimacy to decide over "the limits" of democracy, of freedom and of rights, because they represent, in turn, different sources of power and of interests. The result of this aporia is that the rule of law, de facto, limits the capacity of representation of society at large in constructing societal narratives and in setting the limits of democracy, in spite of being inspired by those principles (Hidalgo Andrade 2018)P269).

Law has become the ultimate argument in debates about the ethics and the morality of politics[127], a debate that contains elements about the law´s own legitimacy as the gap

[126] Leslie Green argues that rights are as open to abuse as any other concept in political morality (L. Green 1991)P316) thus recognizing the political nature of rights and its possible utilization in common life arrangements for the benefit of those that can manipulate or control them.

[127] There is ample literature about the nature and role of ethics in the public sphere. I frame the notion of "ethics" following Hoover, in that we should think of ethics less in terms of rules, laws, and imperatives, and

between the actualization of power and the ideal of justice that it represents widens[128]. In principle, one would have reasons to assume that law equals good, or at least acceptable (Nieminen 2017)P31). But current debates about law and politics dispute this assumption. Some believe that we are facing a crisis of liquidation of the law, a crisis of "law for sale" (Pereira Sáez 2015)P271), as law tends to be reduced to a simple measure by and for the government, qualified to a specific and temporary situation which is oftentimes the result of political, non-transparent and non-inclusive processes which may even be technically defective. We are increasingly exposed to pretend value-based superficial narratives that enables power to justify, at the same time, a concrete thing, and its opposite. The question whether something is lawful or unlawful takes centre stage in political debates, while the substance of what kind of law or whose law, is left unaddressed (Gupta 2021), thus perpetuating the ethical and moral crisis that characterizes our current post-truth order[129]. The public debate has been filled with messages – not with ideas or values – which are often fake, of ethnic, social or gender superiority, messages that stir up the most ignoble feelings of human beings, messages that feed fear by appealing to fundamental moral values that are supposedly at risk (God, family, the nation, etc.) while avoiding any critical examination of those very values. Again, the cogency of the system is determined by the outcome of the narratives imposed by those who hold the means to do it.

Because in its current form law appears impersonal, and because it has the look of neutrality, its injustices are made legitimate (Zinn 2012)P904). Non-positivists find arguments that justify the *ius resistendi* precisely on whether there is an equilibrium between the changing nature of social morality reflected in the law, and the stagnation of the impersonal embedded in the legal, proclaiming that if moral obligations can, in some circumstances, trump otherwise legitimate legal obligations, disobedience may be justifiable (Loesch 2014)P1087-1088). Moral roles, and the responsibilities they generate, are understood in terms of moral reasons that come to apply to us as a result of the role we assume in society[130]. As Thoreau proclaimed, if our conscience tells us to act in a certain way in front of injustice, our moral role in engaging bears with it a certain responsibility (Oljar 2014)P294).

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instead understand ethical judgments in terms of the situational goods we value, which become the ends to which we provisionally commit ourselves (Hoover 2019)P26) in specific moments of uncertainty and disruption, when our claims or expectations are either blocked or denied.

[128] Tamanaha notes that "owing to formalistic aspects of law, legal results regularly diverge in content, operation and outcome from expectation and desires of the layperson" (Tamanaha 2017)P113).

[129] For Foucault, even truth itself is only a deceptive mask behind which we find rhetoric, or even coercion and simple violence (Wallenstein 2013)P10).

[130] Brownlee, for instance, argues that "excessive or inappropriate punishments (from the state) also would fail to respect the offender (the protestor) as a rational agent with whom the law may engage in moral dialogue" (Brownlee 2006)P4).

We are continuously negotiating that moral role with others in the way that we act, in the narratives we use and through our engagements. In each case, we are required to weight the objects that we can affect in the "scale of worthiness". This inevitably leads us to take a position regarding the relative merits of different moral values as reflected by the rights in question, "and some types of rights bearers' rights will be overridden whenever their rights conflict with rights of higher priority" (Andersson 2015)P1628). The most enduring challenge of law, and especially of the rule of law, is thus to regain its legitimacy by reconciling the need of legal stability with modern interdependent, expressive, complex societies that demand that they be recognized as rights bearers, and not only as duty holders. As Habermas argued, the political system has to be able to communicate through the medium of law with all the other legitimately ordered spheres of action (Finlayson 2016)P13).

2.3.1. *Dignity and justice*.

After the second world war, instead of the divine, liberal democracies adopted the notion of human dignity as the fundamental normative concept that shifted attention to the ideal dimension of law (Niemi 2018)P10). The second world war made the western world suspicious of its own nature. It made democracies reflect about the strength and the legitimacy of the genetic principles that had so far substantiated their existence. The immorality of some regimes that used the western notion of power and society, but that completely disregarded the human, compelled liberal democracies to embrace the notion of dignity and to re-dimension the nature of what it meant to be human, perhaps in an effort to condense into a single idea everything that was worth fighting for during, and after the war.

It is difficult to make sense of the concept of dignity since it is open and debatable in all its dimensions. I understand (the political concept of) dignity, as the element that humanizes a normative system that is built around an ideal of justice that puts the protection of the rights of the individual, and of the collective, at the centre of the political. A western, liberal, secular notion[131], intrinsically linked with the modern conception of human rights as the principled materialization of the ideal of the human, dignity is the element that connects the values of the ideology and the actualization of power as the measure to assess the rightness of the order. Judith Butler argues that when the human tries to order its instances, a certain incommensurability emerges between the norm and the life it seeks to organize (J. Butler 2009)P95). Liberal democracies have found in the concept of dignity a humane (not a divine or a rational) foundation for the legitimization of the actions committed by a de-

[131] As Rancière notes, secularism has been transformed into a moral obligation of the individuals themselves (Ranciere 2018)P48).

personalized power. Dignity is what restrains power to the human condition and has become the salient external factor to assess the performance of the state in relation to the principles and the rightness of power and its law.

A notion that in itself symbolizes the worth of being human, the term dignity has been embedded in constitutions, legal conventions and human rights instruments[132] and has been part of court decisions alongside a shared understanding of justice, to "provide a unifying creed unto which most nations can agree (at least in liberal democracies), even though the exact contours of that creed might not be specifically described" (Wilson 2017)P51). The European Court of Human Rights (ECHR), in the judgement of Féret Vs Belgium, emphasized that tolerance[133] and the equal dignity of all human beings constitute the foundation of a democratic and pluralist society (Ellian and Molier 2015)P130)[134]. In liberal democracies in particular, dignity has trespassed the realm of the ideal to become part of positive law and thus, some argue, it must be taken into account in a legal context since the sources say so (Niemi 2018)P3). As it has progressively become a positive concept, it has also been increasingly subjected to the polarizing interpretative forces that determine the value of the laws and the principles in the system. Yet in spite of becoming part of the legal reasoning of courts and legislators, dignity, like the *ius resistendi*, will continue to be an indeterminate term, for no power can legislate all dimensions of the human condition. As Hannah Arendt noted, man, it turns out, can lose all so-called rights of man without losing his essential quality as man, his human dignity (Arendt, 1973)P297).

As long as we feel that our dignity is being upheld, we will most likely conform to society´s terms. When that is not the case, dignity becomes the most formidable cause to appeal to the *ius resistendi*, for its disregard signals a situation of exceptionality where the application of power is considered to have violated something fundamentally ours, something that defines our own self, and our public self[135]. Both the concepts of dignity and justice appeal to some kind of ethical intuitionism, in the sense that we inherently assume that "a thing" called dignity, and "a thing" called justice exist and should be upheld, and that we are also

[132] Article 1 of the Universal Declaration of Human Rights declares that "All human beings are born free and equal in dignity and rights". Article 1 of the Charter of Fundamental Rights of the European Union reads "Human dignity is inviolable. It must be respected and protected".

[133] Marcuse argues, and I agree, that what is proclaimed and practiced as tolerance today, is in many of its most effective manifestations serving the cause of oppression, and that tolerance should indeed be a partisan goal, a subversive liberating notion and practice (Marcuse 1965)P81).

[134] For Marcuse, tolerance is an end in itself (Marcuse 1965)P82). As such, tolerance cannot protect false words and wrong deeds which demonstrate that they contradict and counteract the possibilities of liberation (P88).

[135] It is of course possible that a person violates the dignity of another person, but for the purpose of this work I refer to dignity, justice and other terms within the realm of the public.

inherently entitled to oppose any action that may deny or violate them[136]. But dignity and justice are not just felt, they do not just exist, they are ideological constructs themselves. At different times in history, dignity and justice had different meanings, and claims to dignity and justice had different responses from power. In our current context, as ideological constructs, the violation of the basic notions of dignity and justice amounts to a betrayal of the principles that validate the legitimate existence of the order and erodes its foundations. Ronald Dworkin, argued and that the legitimacy of the state rests on whether the state treats all those it governs with equal concern and respect their dignity person-by-person (Delmas 2016)[137]. Disregard for dignity and justice reverts democracies back to a stage where they need to re-consider their own ontological justification.

Justice is a concept as elusive as dignity. I agree with Amartya Sen in that it is easier to identify injustice than to say what justice consists (Delmas 2018)P15), and with Arthur Kaufmann, in the sense that "the essence of justice is resistance against injustice" (Kaufmann 1985)P571). Like dignity, the prevalent notion of justice is a construct of the ideology. Our personal account of justice is biased because it entails a political commitment to certain values and reflects a situated and contingent evaluation of what should be done (Hoover 2020)P10)[138]. Justice is a pre-legal concept that acquires different meanings depending on where it is located (Santos 2009)P252). Justice can represent an intangible ideal, a just system, a fair ruling, or a conception of society. We reflect about the meaning of justice because we acknowledge the existence of injustice. Injustice may materialize in a system that is essentially just, and justice may prevail in an unjust system. One must also differentiate between specific unjust acts and injustice itself, that is, the practices, institutions, political and economic structures, and cultural norms that enable unjust actions, while obscuring the true nature and extent of injustice in our world (Hoover 2020)P4). Injustice, as an act, can be redressed through a just system insofar there is no other systemic injustice that could impede those seeking justice to attain it. In an unjust system, there are also some occasions when one can be justified in acting unlawfully in the pursuit of justice (Caney 2015)P8), law and justice being separate concepts. For Derrida, for instance, justice is unattainable, while the law would be the attainable, manageable and

[136] For some, human dignity has three components: freedom, equality and solidarity (Torres Caro 1993)P396) as reflection to the "three generations" of human rights. Yet there are missing elements, namely the capacity or reason (to act with a purpose), and, as Yuval Noah Harari would argue, the capacity to work together. Without reason, the correlation between human rights and dignity propels the human being back to a stage of self-preservation.

[137] Dworkin considers that rights are an anti-utilitarian concept in being something that it would be wrong for the government to deny to someone, even though it would be in the general interest to do so (Bellamy 2015)P10).

[138] Political ideas must be tailored to meet the restrictions imposed by the political conception of justice and fit into the space it allows. Yet even John Rawls emphasized that the political conception of justice uses the political conception of good (Ivic 2010), in itself a moral concept.

deconstructible instrument through which justice is attempted. This, however, raises the impossibility of the complete realization of political ideals as well as the contradiction between the inadequacy and, at the same time, the need for law as a fallible and imperfect tool to try to attain those ideals (Sandoval 2017)P21), including that of justice.

Political injustice is the result of the imbalance between the values of the order and the ends that the state uses to achieve its objectives. Injustice exhorts people to reinterpret some of the fundamental conceptions that support the political order, including dominant interpretations of justice. We should not forget, Rainer Forst warns us, that there is a second image of justice, which concerns the equality of opportunity, freedom and power to co-determine the distribution of rights and goods (Wolthuis, Mak, and ten Haaf 2017). Alienation from the prevalent normative order, and thus from the distribution of rights and goods, engenders people´s resistance to moralized understandings of justice, of political obligation and of legitimacy, and when the values are questioned, the order is doubted. Ronald Dworkin, also argued that political obligation, a moral obligation, does not bind members of a group that is being excluded from the collective enterprise of governance, or those of political communities that violate their members' dignity (Delmas 2016). In these situations, the right to resist underscores the incompatibility between someone´s political circumstances, her alienation, and her moral convictions (D. D. Smith 1968)P715).

A system is just to the extent that it reconciles the authority of law with the independence of every person bound by it (Weinrib 2014)P719-722), not because the system adjudicates responsibilities in a manner consistent with positive laws. A system is just when its legal framework conforms with its own internal ideals, when it balances its morally acceptable purposes and aims with the power of the means that it employs to attain them. A system is just when dignity underpins the notion of justice. A just system affords people the opportunity to participate in the legislation of their own circumstances in a manner consistent with the principles of the ideology, and to arrive at a shared understanding of the conditions that support mutually beneficial social interaction. In a Rawlsian nearly just society[139], people recognize the reasonableness of treating each other in a just way, and to conduct themselves in a manner keeping with the guiding principles of democratic practice. In seeking a moral justification for acts of dissent, John Rawls argues that the disobedients appeal not to principles of personal morality or religion, let alone of self-interest, instead

[139] For some, Rawls' liberal theory of justice, like all liberal theories, is a universal theory because it supports moral individualism (Beck and Culp 2013)P41). Yet this is precisely where the conundrum with the Rawlsian theory lies, because injustice cannot be simply determined by the specific circumstances of the individual. Jacob Weinrib suggests that because the principle of justice is a regulative principle that calls for the ongoing approximation of a just legal system rather than a constitutive principle that calls for the realization of a perfectly just one, the duty to govern justly does not exceed the boundaries of possibility (Weinrib 2014)P723).

they invoke "the commonly shared conception of justice that underlies the political order" (Rawls 1999)P321)[140].

As the shared sense of justice is shattered, so is the understating of the notion (and the function) of the *ius resistendi* in society, because one is, in part, a reflection on the (lack) of the other. Nowhere is this more evident than in the manipulation of political actors of the idea of the right to resist, a right that individuals and groups have claimed for themselves when seeking to justify their own sense of justice, but not necessarily allow to others (Young 2011)P45). As a concept belonging to the order that it seeks to defy, the *ius resistendi* is pulled in conflicting directions forcing it, like the notions of law, dignity or justice, to adopt different interpretations of its own nature to justify its own ends.

Dignity, justice, and the right to resist, are similar in that they are all concepts that come into existence within the ideological. They form a three-sided relationship that demarcates the moral boundaries of the system. Affronts to the deepest sense of dignity and reactions to injustice, as long as they are rooted in reason, not just as a response "in desperation" from the pressing nature of the perceived wrong (Illan Rua Wall 2004)P5), find redress through the *ius resistendi.* All claims, to be recognized as rights, need to be translated in terms of dignity and justice, they need to be humanized. The legitimacy of an engagement of the right to resist, the test of its moral truth, is measured in terms of the capacity of the *ius resistendi* to translate claims into morally worth, universally recognized, or recognizable rights[141].

2.4. The functional roles: democracy.

Democracy is a system substantiated with the consent of most people that contribute, through their actions, to reproducing certain forms of social engagement and that accept the overall political system as valid and binding[142]. In a democratic regime, the public body

[140] In fact, for Rawls, a moral doctrine of justice general in scope is not distinguished from a strictly political conception of justice (Finlayson 2016)P4). Within the conception of their political value, for John Rawls, legitimate laws are those that can evince stability for the right reasons (Finlayson 2016)P7).

[141] The difference between a recognized and a recognizable right is important in terms of the functions of the right to resist. The *ius resistendi* can serve as an instrument-right to appeal to a recognized right in its function of defending the legal system, or to appeal to a recognizable right in its function of capturing a normative space, appealing to would-be rights that through social practice or believes are being recognized by the community but that have not yet acquired the status of a right.

[142] In 2004, the UN General Assembly adopted resolution A/RES/59/201. Paragraph 1 of the resolution states that, "the essential elements of democracy include respect for human rights and fundamental freedoms, *inter alia,* freedom of association and peaceful assembly and of expression and opinion, and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as a pluralistic system of political parties and organizations,

manages conflict through institutions that are considered legitimate by those that submit to them, institutions that mediate among those that engage in the political to maintain social peace and to realize the functions that the ideological principles entrust to the state (for instance, the defence of fundamental rights or the protection of citizens).

Although the idea of democracy is one of the most widely shared aspirations among those taking the streets (Ishkanian and Glasius 2013), there still remains considerable scope for debate about the meaning of democracy as a political concept[143]. For those that support the procedural democratic theory, the existence of effective normative and procedural mechanisms to manage conflict is what provides democratic regimes with their legitimacy. For them, the basic democratic operation is the institutionalization of conflict (Augsberg 2011)P257). Others, like Dworkin, consider that democracy is a procedurally incomplete scheme of government and, therefore, that democratic political communities may combine a variety of solutions, procedural and substantive, to the articulation of the institutional structures involved in interpreting these democratic conditions (Loughlin and Tschorne 2017)P12). In a democratic regime, the political should be both the space where values[144] are translated into rights and freedoms and where rights and freedoms are exercised[145]. The procedural element of a democracy embodies the accepted channel through which values are materialized into a democratic ideal.

The Arendtian concept of "the political", Habermas's public sphere, the Rawlsian space for mutual recognition, or what others call the civic space (Buyse 2018), is where citizens constantly articulate, support or confront different views about the necessary conditions to realize democracy. The political exercise in itself recognizes and enables the equal participation of actors that contribute to the construction of the democratic ideal, regardless of the position of those actors in the institutional order. The political is the space where agents "through the exercise of rights, link individual interest, class position and their conception of the public good" (Douzinas 2019)P66) so that a vision of society and of its necessary conditions can be formulated.

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respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media.

[143] In his Gettysburg address, Abraham Lincoln offered what is, perhaps, the most enduring notion of democracy, a government "of the people, by the people, for the people".

[144] As far as those values prevail over other values against which they compete in the public sphere.

[145] The 1949 Statute of the Council of Europe pledged the commitment of its Member States "to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy". Article 3 notes that "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms" (CoE 1949). The 1950 European Convention on Human Rights refers to "political democracy" as the system best suited to maintain "fundamental freedoms which are the foundation of justice and peace in the world" (ECHR 1950).

In democratic systems, the *ius politicum* is the normative system that normalizes and legitimizes the democratic order that ensues from the negotiations in the political, is the space where rights are acknowledged and freedoms are performed, a space where "the struggle made in the language of political right to irritate and challenge the norms of constituted power" takes place (Loughlin 2014)P970). The *ius politicum* does not concern itself merely with framing the relations between the state and the people, but with providing the conditions to enable positive, constructive relations between the state and the people. Good democratic relations are based on informed consent, a situation where the state has clear obligations toward people, including with respect to people that disobey the law, and people are bound to obey their own laws.

Democracy is the only mode of lawgiving in which citizens are both rulers and ruled[146], sovereign and subject (Weinrib 2014)P721), where people are able to legislate their own conditions and are, at the same time, bound by their own law-making[147]. Democracy is an order where individuals can remain autonomous actors while consenting to their own rule. Consent to democratic rule, therefore, requires the legal system to be closely related to the social conditions that it seeks to justify. To count as law, to be part of the *acquis*, normative principles must be operationalized within the actual democratic regime (Loughlin 2016)(Shapiro 1964), that is, within the extant order, which implies that certain values are articulated through the political. The *ius politicum* is therefore not simply a legal space, it is a space where elements of ethics are mixed with power politics (Schmoeckel 2002)P3)[148].

A robust public law remains the central dynamic in legitimizing democratic rule (Tierney 2013)P2), but it can also become its biggest threat. As political notions about democratic conditions change, perhaps, although not always, reflecting variations in the ideology (understood as ontological frameworks), should law change too? If law is part of the political, shouldn't law be subject to modifications in the framework of changing principles? Brian Tamanaha argues that the challenge for modern legal systems is that societies change more swiftly than law, constantly generating a gap between them, and that the greater or lesser happiness of a people depends on the degree of promptitude with

[146] It is commonly accepted that democracy and rights go hand in hand and that one is the outcome of the fight for the other, and that both, democracy and rights, are achieved through struggle and resistance. Article 54 of the 2006 Statue of Autotomy of Catalonia, for instance, reads "1. The Generalitat (government) and other public authorities must ensure the knowledge and maintenance of the historical memory of Catalonia as a collective heritage that testifies to the resistance and the struggle for democratic rights and freedoms".

[147] Those that embrace democracy as their ideology, and thus as their moral system of values, should then have the autonomy, and the moral justification, to insist on basic rights, which give them important forms of protection and control over their own lives (Erman and Möller 2013)P9).

[148] Habermas maintains that the process of discussing and enacting law requires ethical discourses articulated on the background of a cultural identity (Spector 1995)P76).

which the gulf is narrowed (Tamanaha 2017)P19)[149]. In fact, the variation in the actualization of the political ideal of democracy is usually not immediately reflected in positive form (which constitutes the ultimate stage of normative development), but rather in the perceptions of what society considers law to be through its social practice, as well as in the role of law, and of those that apply and interpret it, in reproducing social norms that buttress the changing principles (not the values) of the order.

Democracies are systems constantly under pressure to make political and legal choices about how and when to assert rights (Ellian and Molier 2015)P11), their legitimacy being contingent, to a large extent, on the choice of which rights protect, how, and under which circumstances. The actualization of power in democracies pulls the *ius politicum*, and law, in two opposite directions, change or stability, forcing it to adopt different moral interpretations of its own nature to maintain its legitimacy. The legitimacy of the order (and the happiness of people) seems then to depend, to a great extent, on the role and on the effectiveness of the *ius politicum* in narrowing or widening the gap between the law and the moral value attached to the law, as well as in its success in establishing a convincing narrative to preserve its own nature. In that shifting reality, the *ius politicum* seeks to provide legitimate reasons to justify the changing conditions that arise from the actualization of power and the exercise of rights, while appealing to the unwavering values that form the democratic ideology and the very foundation of the system in which it rests.

For many, both freedom and equality are the distinctive moral values that have become the mantras of the liberal democratic system against which the normative value of legal and political institutions is assessed (Viehoff 2014)(Jubb and Rossi 2015). During the enlightenment, and later in democracies, "*egalité*" became one of the leading ideals of society. The revolutionary concept of equality qualified the relationship between the common citizen and other agents within the body politic, particularly those that had monopolized power thus far. Coupled with the-then new idea of the rights of man and of the citizen, equality would be later translated into the more tangible principle of non-discrimination and would become the foundation for other material and moral ideas about democracy. But while for some democracy is uniquely based on equality[150], others regard the principle of equality, in its political conception, not as an objective in itself, but as the premise for action (Douzinas 2013)P87). I agree with this latter approach. All human beings

[149] Following this reasoning, one can make a strong case to argue that disobedience should be allowed in democracies, since existing procedures may not offer real practical possibilities of changing the law when the majority is set in its attitude (Norman 1975)P608).

[150] Democracy is, according to Rancière, uniquely based on equality, which in its turn is rooted in the common fact of language: all speech presupposes a mutual understanding and a belonging to a shared community, and political action means to further this possibility and include thereby those that "have no part" in the common (Wallenstein 2013)P33).

are indeed born free and equal in dignity and rights, but equality can only be obtained when people are free, because those under submission can never be equal to those that keep them subjugated.

For critical theorists, freedom, not justice or equality, is the only candidate for the central value of democratically conceived political theory and practice (Celikates 2014b)P208)[151], because only citizens who can regard themselves as free are able to decide how to organize their lives together (Ellian and Rijkpema 2018)P102)[152]. To be free and to act free are the same (Berkowitz 2019)P5). Freedom acquires its sense and its meaning only in the public realm, because the political creates the necessary conditions for freedom to appear (Ellian and Molier 2015)P12, P231-238). Freedom is a public matter, a political category[153]. When freedom is exerted, rights get tested. Liberty, Foucault argued, is in itself political (Fornet-Betancourt 1987)P117) and so, to be free, is to be able to freely participate in the political, for decisions originate in freedom[154]. Freedom, hence, is not simply a negative absence of oppressive power, freedom is the power to act together with others to build a public space where one´s dignity, and that of others, underpins all that is legitimate and just. For Hannah Arendt too, the *raison d´être* of politics is freedom, and its field of experience is action (Arendt 1990)P274). Freedom is the factual opportunity to realize one´s liberties and to have the unconstrained ability to engage in the political. Specific rights, like freedom of speech, derive their normative value from freedom, not from the act of speech. The right to resist derives its legitimacy and value from freedom, not from the act of resisting. But just being free, or carelessly asserting one´s freedom, does not create the conditions for real freedom. It just collides with the freedom of others.

To engage in the public sphere and build a common space, freedom must be bonded with reason[155], since freedom without a purpose can turn into an irrational force capable of

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[151] Even for Rousseau "to renounce liberty is to renounce being a man, to surrender the rights of humanity and even its duties" (Rousseau 1762)Book1).

[152] Dworkin had the opposite view. He insisted that rights derive from a core right to equality that reflects the underlying political morality of liberal democracies. The right to equality means that the weaker members of a political community are entitled to the same concern and respect of the government as the more powerful members. Dworkin contends there is no right to liberty as such but only to those liberties, like freedom of speech, necessary to protect the right to be treated with equal concern and respect (Bellamy 2015)P3,9, 11). Dworkin´s equality, however, does not entail that weaker members are free, and by not being free, they cannot guarantee that they will be treated with the deserved and respect. Dworkin´s equality principle is imbalanced from conception, as it makes equality depend on one actor, the powerful.

[153] The real possibilities of human freedom, as Marcuse notes, are relative to the attained stage of civilization (Marcuse 1965)P105) and thus one must balance individual freedom with collective ethos.

[154] Foucault noted that personal or collective acts of liberation are not (always) sufficient to establish the practices of liberty (freedom) that the people need, and that "liberation is sometimes the political or historical condition for a practice of liberty" (Fornet-Betancourt 1987)P114).

[155] Article 1 of the Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights, but also that they are endowed with reason and conscience.

destroying freedom itself. The flipside of the unhindered individual right to freedom is an equivalent liberty to expand (a right to *lebensraum*) on the part of the state or the collective (Parfitt 2021). Without reason, the forces of the individual and the state become reckless, purely physical, nasty, brutish, and short. Carol Hay argues that a way in which oppression can harm people's capacity to act rationally and take decisions, is by harming their capacities for rational deliberation (Hay 2011)P25). Without the capacity of rational deliberation, in itself the essence of democracy, oppression remains unchallenged, for one is barred from acquiring the tools to recognize and claim her own rights, including the right to redress. Reason is what bequeaths the right to resist with its political (yet not its normative) significance.

2.4.1. *The principles of democratic practice.*

The central value of democracy is freedom, but freedom alone cannot justify the order. Freedom needs to be perfected through two interrelated principles that support what I call "democratic practice", that is, the performative occurrence of democracy in a manner consistent with its fundamental values. Principles of democratic practice rationalize, but do not constrain, the exercise of freedom.

The first principle of democratic practice is accountability, a principle that, for some, has replaced that of consent as the conceptual core of legitimacy (Chambers 2003)P308). The principle of accountability requires all actors to be responsible of their own freedom. In textbook democracies, the sovereign's capacity to decide is restricted by the political and, consequently, by the legal order, forcing power to appeal to the inherent values of society and to the principle of the common interest to justify its own nature and gain legitimacy. Contractualists, for instance, hold that the signatories of the social contract are answerable to each other for fulfilling their respective obligations under the terms of the contract[156]. That means that because man has the capacity to reason about his choices and decisions, because, in principle, he enters the contract in freedom, he stands under a continuing obligation to take responsibility for those decisions (Wolff 1970)P8). In the polis, man cannot do as he pleases because he is bound by the terms of the contract. That also means that the state does not hold unlimited power to do what it wants to its own people. Because the state is also a part of the contact, the state too is compelled by the principle of rationality and accountability in its choices.

[156] I use the term contract, in social contract, as "the claim that contract embodies a liberal tradition wherein the law serves to facilitate the free will of individuals as that will is expressed in promises" (Roberts 2004)P225). Although this is considered an "old" conception of contract because its operation has become increasingly dominated by judicial and legislative intrusion, it highlights the importance of the interrelation between freedom (of man) and promise (of power).

If citizens do not oblige, if citizens do not take responsibility for their own freedom, the state has powerful (political, legal, or social) tools to guarantee that they are, nevertheless, accountable for their actions. When we defy the rules, especially if we are unsuccessful in our claims, the very action of perceived political misbehaviour affects our normative status. As Judith Butler notes, if we are already politically constituted beings within that community, defiance turns us into social outcasts, and brings us to the margins of the rule-compliant society. We lose social status, which means that we also lose some political and legal protections and rights, eventually even that of freedom, as well as the recognition of our prior standing in society. If we are not recognized political beings in that society, then we are not free to act within the polis using its rules, forcing us to appeal to universal normative principles that are easily unheeded. We would not lose a social status or the legal or political protection we did not have, but we would be sentenced to remaining not only outcasts, but undesirables, or even ungrievable (J. Butler 2009).

Arguably, however, the foremost predicament of current liberal democracies is not disobedience by the subject, but rather, the public (as in the authority's) defiance of the principle of accountability. Current systemic and democratic deficits arise out of the necessity to preserve the principle of accountability as the basis of the order against the inherent resistance of powerbrokers to answer to society[157]. If the state does not oblige, if the state does not take responsibility for its choices, then there must be some autonomous

[157] Accountability can be bypassed in many ways, some are clearly illegal, like corruption, while others take advantage of legal system itself. The most obvious manner is, through juridification, a concerted action between political elites and the courts to delegate governing power to courts as a means of escaping political accountability. Juridification creates legal narratives to categorize political collective movements and spaces and re-interpret law to redefine (and accommodate) certain ex post outcomes which are negative for the interests of the powerful. Some refer to "legislative deferrals" pretty much in the same sense, meaning that legislative (political) actors might be interested in delegating governing power to courts as a means of escaping accountability (Rehder 2007)P10). For Sheldon Wolin, the U.S. is experiencing an inverted totalitarianism that exploits democratic practices in ways that defeat their original purpose, without dismantling or overly attacking them. If the original purpose of the democratic state is defeated. Wolin's inverted totalitarianism suggests that a few (whether in the public or the corporate world) with the power to not internalize the norms (while appearing to do so), have been able to evade their responsibilities without accountability (Wolin 2008). For Hannah Arendt, the most formidable form of dominion is bureaucracy, or the rule by an intricate system of bureaux in which no men can be held responsible, and which could be properly called the rule by Nobody. Indeed, if we identify tyranny as the government that is not held to give account of itself, rule by Nobody is clearly the most tyrannical of all, since there is no one left who could even be asked to answer for what is being done. Bureaucracy is the form of government in which everybody is deprived of political freedom (Arendt 1969)P8-17).

way for citizens to demand accountability from the state[158], because devoid of alternative viable options to do so, even if heretical in nature[159], the notion of democracy is meaningless.

Some, consequently, accept that disobedience is a necessary means of challenging the structural deficits of the democratic state (Livingston 2019)P2). In this inference, disobedience emerges as an engagement that seeks to enforce accountability while preserving freedom within the political[160]. Herbert Marcuse argued that "the liberating force of democracy was the chance it gave to effective dissent, on the individual as well as on the social scale, its openness to qualitatively different forms of government, of culture, education, work-of the human existence in general" (Marcuse 1965)P95). Democracy acquires its full meaning when it becomes a system of possibilities within itself. The wonderful paradox of the democratic ideology, and what makes it politically viable, is indeed that we can agree that an action is wrong, for instance the use of object violence, while agreeing that tolerating it is right, for instance, the very principle of resistance to oppression (Tuckness 2002)P17). We can agree that even if a specific action or strategy is wrong, the *ius resistendi*, as the channel to demand accountably, is right for democracy[161], it is an integral part of the principles of democratic practice.

Many actually agree that tolerance for dissent is an element of a mature political culture (Habermas 1985)P99), and a crucial test case for any theory of the moral basis of democracy (Rawls 1991)P104). This overall agreement about the tolerability of dissent as means to hold power accountable, however, disappears as democracies confront direct forms of dissent and substitute politics by force. A political system, I contend, remains democratic not because it sanctions the decisions of the majority or compels a certain interpretation of the common good, but because it allows the continuous and concurrent demand for accountability form different actors, especially those that are not in the majority. What the

[158] I use the terms citizen aware that the "citizenship status conveys both the idea that someone is part of a specific political community, and the idea that someone is entitled to take part in the equal distribution of social goods occurring within this political community" (Raucea 2018). In other cases, I use the term "people" to describe anyone present in a territory or joining in an action, independent of their legal status.

[159] I use heresy in its original Greek meaning (*haíresis*) of choosing or not conforming to established rules.

[160] Although some argue that when there is no possibility for people to enforce the higher law against the ruler in the ordinary course of government, politics is lost (Rubin 2008)P154), I take the opposite view. The political is not created through the ordinary course of government (thought the institutionalized sequence of outcomes) but rather outside it, as the process through which people can find ways to enforce the higher law against the ruler, creating new, or challenging old, institutionalized sequences.

[161] The paradox of the democratic legal system is that it can create the conditions, especially through the action of the state, for the exception to not obey the law. There are cases in which we can obey the law and disobey it at the same time. In his Letter from Birmingham City Jail, Martin Luther King wrote: "There are some instances when a law is just on its face but unjust in its application" (King 1963). Whites often adopted laws that were de jure just but unjust in their application in order to maintain the legal fiction that blacks were treated equally (Tuckness 2002)P31). Civil rights activists, therefore, were not disobeying the law per se, but its unjust application and its unjust consequences.

right to resist questions are not the rules of the game, but the truthfulness of the rules that allow for the game to endure, for democracy can never be secure in itself (Howard 2007)P65).

The second principle of democratic practice is recognition, a principle that constricts the unbridled imposition of the will of the majority and prevents democracy from becoming the tyranny of the many[162]. In attempting to balance the principles of freedom and obligation, democracies have traditionally endeavoured to impose particular narratives aimed at homogenizing choices and avoiding deviance, while formally maintaining the dogma of the centrality of freedom as the pillar of the system. The principles of "majority rule" and "democratic consensus" are crafty. Some call them the politics of exclusion (Salazar Ugarte 2007)P261). They are philosophically based on the premise that those that have tacitly consented to their own rule have a moral right to have their principles reproduced, while avoiding addressing the question of what it means "to consent" or to which degree, and how, those principles are reproduced without becoming "imposed".

Democracies have certainly been compelled to acknowledge that the general will cannot be forced on the grounds of being legitimate because it represents the majority[163], for the very purpose of democracy would be defeated if a majority decision could violate minority rights (Pelloni 2000)P3)[164]. Even the drafters of the American constitution seemingly shared the view that democratic majorities can be the greatest danger to a free and functioning government (Elbasani 2009). Recognition as a principle of democratic practice refers to the mechanisms established to ensure that the majority principle is not blindly applied, but rather, that majority decisions are freely subsumed by the individual through a participatory process of mutual and beneficial acknowledgement as rational free agents.

Recognition *is* the political. The force engendered in the competition between recognition and dismissal, between being and not being, between belonging or being an outsider, shapes the political in a manner that reproduces the conditions to justify the imposition of one concept of power over the others. The power that prevails is the power socially

[162] Rosseau argued that "the general will acquires totalitarian tendencies because all those who refuse to obey the general will shall be forced to obey it by the entire body. The general will does not negotiate, debate, or reason. The general will forces" (Cliteur and Ellian 2019)P187).

[163] This principle has been established by the ECHR in its assertion that "democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position". Case Young, James and Webster v. the United Kingdom (Application number 7601/76 and 7806/77) of 13 August 1981, para. 63.

[164] Or even personal rights. In Viehoff´s opinion, "in denying authoritative status to democratic decisions, I do not deny reason-giving status to the judgments of others that I grant my own judgment. It is then not the case that I treat myself with special regard when I deny the authority of a democratic decision (and instead act directly on what I judge to be the relevant reasons apart from the alleged authoritative directive), but show no such special regard for myself when I accept its authority" (Viehoff 2014)P345).

warranted to recognize others and to set the conditions for others to be recognized. Recognition is the act through which social roles are assigned and the value of the self, and of the collective, is determined. Recognition is the act of placing an agent in the "scale of worthiness" through which we assess the value of social and cultural objects, but also of political and moral beings. The act of recognition befalls as a reappraisal of the value of life itself, including of those whose existence, as Judith Butler argues, are not as grievable as the lives of others[165].

Axel Honneth identifies a form of recognition that focuses on moral and legal relations (established within the institutional contexts provided by the law and the state), that make it possible for individuals to achieve recognition as persons with dignity, as free and equal subjects on a par with others, and as beings with a moral and legal status whose claims count, and cannot simply be ignored or dismissed (Dearnty 2011)P60). Many readings of the principle of recognition imply that there is a "recognizing actor" (the sovereign, the state, the church, or the market), with the power to acknowledge, accept or dismiss the claims and the very existence of others (the individual, or a community). This form of recognition is primarily threatened by disrespect and by misrecognition in the form of a denial of rights, and of exclusion from the legal community (Celikates 2021)P261). This is, however, not a form of recognition but of mere admission of the existence of another agency.

My concept of recognition refers not to the declaration of power of one agent over the other, but to a process of reciprocal recognition of agency as the basis of legitimate, participatory and normative-creating political spaces. My concept of recognition implies that the recognizing agent is subject to recognition by the recognized agent, and vice-versa. Recognition does not imply sameness or evenness in terms of rights and duties, in terms of power or in terms of moral standing. It rather refers to the mutual assent of extant agency within the political, and with it, the possibility of having and asserting power. Recognition is an exercise of sovereignty, a struggle for power within the political, a contest that defines and determines the value of each agent within the "scale of worthiness". An agent that has no value is not recognized, and conversely, an agent that is not recognized has no value. An agent that defies or disregards recognition may have value, but only inasmuch it values the recognizing agent.

In liberal democracies, the fundamental (and ideologically binding) principle of equal political participation and thus, the mere anticipation of "having to recognize" others as political actors, challenges the possibility of exclusivity in the interpretation of the order or

[165] Without grievability, there is no life, or, rather, there is something living that is other than life (J. Butler 2009)P15).

the unilateral decision over the existence of others[166]. The ineluctability of recognition emerges at the moment when an individual (or a collective), asserts her presence, her existence, or her persistence to exist. It is at that point that the collective, or the person, ceases to be valueless (ignored, or ungrievable) to acquire value as an agent whose existence disturbs (not necessarily changes) the causality of relations in the political. As Badiou notes, "as the inexistent comes to exist, the arrangement of power and possibility, at least temporarily, is altered" (M. S. Richards 2014)P108).

To resist is to assert agency, and agency is constantly actualized in the struggles for and over recognition, struggles that often get started when the oppressed can credibly threaten violent unrest (Celikates 2021)P277). Brownlee contends that when disobedients and authorities target each other, their confrontation allows for a direct comparison of the respective justifiability of their conduct (Brownlee 2006)P1)[167]. Engaging in the political, recognizing the other as a political agent, suggests that one assumes obligatory ties to the other (Rawls 1991)P113), but mutual recognition does not imply acquiescence. It does not infer that the state, for instance, is under an obligation to fully consent to the claims of the disobedient, or that it should give the inexistent an equal voice in all matters, or that resisters are entitled to an equal say (Edyvane 2020)P95). It does not imply, either, that the disobedient must recognize the state as a legitimate interlocutor, or that she cannot engage in apostasy, or reject the market by creating cooperative structures.

In liberal democracies, the state recognizes prioritized subjects as "rights bearers" (the citizens, the consumers, the proprietors), as a way to indicate the order of precedence of moral values, and of people, according to their contribution to supporting the status quo. In most cases, the degree to which one is recognized is foremostly a matter of prior existence, an acknowledgement that favours those that are already constituted as political agents (Walzer 2017)[168]. The value claimed through an external engagement of the right to

[166] For some, and I agree, to resist becomes an expression of societies' "despair over the impossibility of joining together (with the tyrant) to act at all" (Kohn 2001).

[167] Contrary to Brownlee, that argues that to be serious in her aim to bring about a lasting change in law or policy, she must recognize the importance of engaging policymakers in a moral dialogue (Brownlee 2006)P3), I argue that the engagement must go beyond the moral and that it should be framed within the legal (not necessarily the legality, as Brownlee tends to imply) and the political (in its different expressions). In other words, to talk to power, one must show power (in whatever moral, physical, legal, or other forms).

[168] Article 11 of the Treaty on the European Union establishes that 1) The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. In particular, article 4 notes that 4) Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. (Official Journal of the European Union C 326/13 of 26.10.2012). The EU treaty recognizes that social

resist by a full, property owning, tax paying citizen may be recognized afore those asserted by an illegal immigrant. When resistance is as an act of an already constituted political community, it forces the state to reassess, at least, the value of the asserted moral claim. It does not mean that the "full citizen" has immunity from potentially being punished because of her belonging to a constituted political community, rather, it reopens the competition that influences the form of the political, and it compels a revision of the justificatory reasons used by the state to impose one notion of power over the other.

Engaging with the state enables those that assert their right to resist to enjoy a certain standing in relation to the question of recognition, even though that standing is defined by circumstances other than the acknowledgement a particular claim or a right to a claim. Those that challenge the *status quo* are usually not recognized as bearing a right (to resist), but they are recognized as holding duties (for instance, not to interfere with traffic, to abide by the rules, or not to challenge the system). I argue that it is precisely in the recognition of duties that the resisting agent asserts her sovereignty and establishes her value, for it is in the obligations they create, not in the privileges that they bestow, that rights acquire their meaning. Law finds its efficacy in its compliance, not in the mere fact of being enacted. The *ius resistendi* is the right to recognition, or more precisely, it imposes a duty of recognition. The *ius resistendi* does not belong to the person by virtue of her nature as a human, but because of her ability to assert and exercise political agency, regardless of her prior status as a recognized political agent, and with that agency, create rights and obligations for herself and for third parties.

If we are inexistent, defying the rules of a system we do not belong to, turns us into political agents. We then have the ability of engage with that system and generate political power, which is the basis for recognition. Asserting the *ius resistendi* allows previously marginalized individuals or collectivities to be recognized as agents through their public engagements, and to create new forms of political subjectivity to contest and put into question claims to recognition that affect them (Celikates 2021)P277). The *ius resistendi* grants the disobedient, even the inexistent or the ungrievable, political and legal protection and recognition, because, paradoxically "only as an offender against the law can he gain protection from it" (Arendt 1973)P286).

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movements are legitimate to bring about change in the EU, yet only by providing initiatives for new legislation. It does not endorse an initiative to repel or resist extant directives or regulations. In many countries, the "popular" or "citizen´s initiative" is available, including, in some countries, the power to ask for direct referendums on key questions, though most countries prohibit direct initiatives on tax or budget issues, international treaties or key constitutional issues. Because of these restrictions and the needed percentage of registered voters required for the popular initiative to be brought to the respective parliament, popular legislative initiatives are rarely successful, especially those that deal with issues of fundamental importance for society.

Recognition is necessary to exist in the political. Hannah Arendt suggests that there should be a human right to belong to a political community for all human beings as a precondition for the protection of other human rights (Faghfouri Azar 2019). But recognition is also a necessity in physical terms, because lacking recognition as a rights-bearing agent, as a grievable-worthy subject, the person is prevented from fully realizing life itself. The process of recognition befalls through the very ideological framework that gives content to the *ius politicum*, the democratic ideology, and to the whole structure of the kind artifacts that we create to maintain it, the notion of rights. In a system where democracy is advanced through the principles of accountability and recognition, the effectiveness of the *ius resistendi* as a rights-claiming exercise is measured against the sturdiness of the *ius politicum* to assent, reject or adapt to those demands, and therefore, in its capacity of reproducing forms of oppression, or of instituting forms of freedom, or in determining the value of rights, and the value of the lives of others. The competing relationship between democracy and dissent, between those that are recognized as bearing rights and those that are not, opens spaces for the un-recognized, and the un-grievable, to compete for recognition[169], for political (and sometimes even physical) life.

In conclusion, there is no clarity on what a nearly just society should look like today. There is not even a consensus on whether the ideological basis of our societies remains the ideal of democracy[170]. All major aspects of legality have been weakened. Rule is replaced by regulation, normativity by normalization, legislation by executive action, principle by discretion and legal personality by administratively assigned roles and competencies (Douzinas 2013)P44). In this context, law continues to be a paradox because we continue to be uncertain whether its nature corresponds to the values of an ideology that we are unsure how to define. And indeed, the term we use to refer to the *grundnorm* has immense implications, for our inherent sense of obligation to obey the law, our faith in the values that define us as moral agents, and our believe in that we are being recognized as active members of that society depend wholly on it.

[169] I use the term un-recognized in a flexible manner. A citizen may have some specific right or freedom un-recognized while remaining a citizen, for instance, an unheard claim against discrimination based on gender. People can also be un-recognized in their whole (e.g., illegal immigrants), with all her rights unacknowledged.
[170] Many consider we currently live in a neoliberalist, rather than in a democratic ideology. As an ideology, neoliberalism sees the market as a supreme good in itself, just as most of its accompanying rhetoric concerning 'freedom' ultimately concerns the freedom to buy and sell and to acquire and maintain property (Garland 2012)P5). Others believe that recent transformations call into question, even unseat, assumptions of liberal democracy because legislation passed after 9/11 in many countries represent real threats to, and in some cases the removal of, fundamental pillars such as due process, presumption of innocence, right to disclosure of evidence, open hearings, timely processing, even habeas corpus (Jeff Shantz 2014)P17).

CHAPTER III: THE OBLIGATION TO OBEY THE LAW

No regime has ever survived without the obedience, wilful or otherwise, of its subjects. The very constitution of a regime as a system entails the development and the enforcement of norms and mechanisms to ensure compliance with the authority's commands as means of preserving power and the very existence of the system. The strategies used to ensure compliance have taken different forms, from the threat of eternal damnation, to violent coercion, from recognition of different participatory processes, to pleads to loyalty based on primary human emotions that portray the state as "the Motherland, or the Fatherland, or the Founding Fathers, or Uncle Sam" (Zinn 2012)P911). In general terms, appeals to moral values, and to the duties of the good, law-abiding citizen, have served well the preservation of legal and political systems. Whether the Jewish *khata*, the Muslim *dhanb* or the Christian sin, most ideologies and religions continue to identify obedience with virtue, and disobedience with immorality.

The modern liberal notion of the obligation to obey the law is no different from that of the medieval notion of the *regnum legitimum*. Both affirm that it is of the nature of law to claim authority over its citizens and, in turn, it is of the nature of authority to demand obedience, which requires compliance, and not merely conformity, from those subject to it (Sevel 2018)P2)[171]. In the liberal formulation of the *regnum legitimum*, the King has been replaced by the law, the expression of the power of the sovereign, and rebellion has been replaced by external expressions of the right to resist, the manifestation of people´s power. Today, the ability to exert obedience from subjects, while nominally acknowledging their sovereignty, remains the key feature of a modern state that continues to function on the premise that to claim authority is to claim the right to be obeyed (Wolff 1970)P4) (Baaz et al. 2016)P140).

The obligation to obey the law (broadly understood), is considered by some as the most significant obligation that citizens have. This is in part consequence of the tendency of scholars to conflate respect for the rule of law with acceptance of the prevailing legal order (Scheuerman 2019)P52), which has derived into an equalization of the concept of law and that of state, and the merging of the concepts of the obligation to obey the law (in positive terms), with that of being a good citizen (in moral terms). That is, however, a false deduction. If disobeying a law does not make us bad citizens, and obeying the law does not necessarily make us good citizens, why do we obey?

[171] The legitimacy of the system depends on its ability to generate outcomes which are actually endorsed by citizens, and this means that citizens are generally motivated to act in conformity with the requirements imposed upon them by the law (Ellian and Molier 2015)P275).

3.1. Why do we obey the law?

In the western tradition, the debate around the obligation to obey the law re-emerged with force after the affirmation of the primacy of the rights of the individual as a constitutive principle of the emerging political organization. The enlightenment attempted to secularize public life through an innovative and disrupting theory that endeavoured to respond to the challenges of legitimation of power in the age of reason: the theory of the social contract. The social contract sought to establish the legitimacy of a new order based on an implausible agreement between power and the subject[172]. The theory of the social contract was disruptive because it meant that the will of the sovereign was no more the reason to obey the law. And it was innovative because it provided a philosophical explanation that continued to allow for the domination of a few, but with the formal acquiescence of the many. The social contract gave subjects the illusion of freedom and power, for people could identify the nature of the basic rules imbedded in the contact and demand their fulfilment independently of the decision, or the will, of the sovereign.

The question of obeyance to the law was central to the whole construct of the theory of the social contact[173] because it is a postulate that aimed at materializing the consensual understanding about the limits of sovereignties and the circumstances of validity of legal rules. For early advocates of the theory, particularly for John Locke, citizens (male property owners) had the obligation to obey the law for "every man that hath any possession or enjoyment of any part of the dominions of any government doth hereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government" (Locke 2017)P157). Locke believed that to give the individual the right to "plead exception" to the social contract would render the contract voidable (M. S. Green 2002)P121)[174]. This tacit consent, however, did not imply that citizens were to completely surrender their rights to the body social. The individual retained certain natural rights against the community, not

[172] I agree with Finnis in that the social contract theory fails in its attempt to "ground political obligation in a contract of self-imposed political allegiance, and which often fail to integrate rights to freedom with obligations both of self-restraint and of service to others" (Finnis 2002)P8).

[173] When I talk about obeying the law, I do not refer to coordination laws, but to those that affect fundamental rights, principles, dignity and moral stands, in other words, those that can assist in "articulating constituent power" (Niesen 2019b)P32).

[174] A void contract is null from the very beginning and cannot be enforced. A voidable contract suffers from a smaller defect and can be avoided through the action of the injured party (if it has been obtained by fraud, or misrepresentation), and can be void if the injured party goes to the court and asks for it. If declared void, its reality is eliminated, like it never happened. The social contract is voidable. It has defects that must be corrected. However, if continuous and successive attempts of society (the injured party) to seek redress for those failures do not find remedy, then the injured party could claim that the contract is not voidable, but void.

as pleads for exceptions, but as rights that were inherently reserved owing to the individual´s human nature.

Locke´s view about the generality of the contract and the preservation of men´s freedom created a paradox when disagreements between individuals and the state about the violation of a reserved right arose[175]. If the individual resolved the dispute whether a violation had taken place or not, then there would be no political authority, for authority would be denied the power of judging and punishing that violation. If the state decided, then there would be no freedom, for the individual would be deprived of her liberty to decide which rights had, or had not, been surrendered to the state[176]. This conundrum is still not resolved.

Today, the liberal claim to compliance is largely based on the principle that legality and legitimacy are equivalent notions that, together, form the foundation of a seemingly fair system that entitles the order to demand obedience. In illiberal systems, officials need to ensure a high correlativity between disobedience and punishment, otherwise the incentives for citizens to comply with the law diminishes. Theoretically, in liberal democracies it should be the opposite. A high correlativity between disobedience and punishment increases the incentives for disobedience because people associate the normative value of the law (and thus, its obligatoriness) with its justice and its righteousness. Something that it is not perceived as just carries no moral weight, and if the imposition of punishments manifestly bears very little relation to the legal culpability or innocence of each person, then the inclination of the law's addressees to abide by its requirements will dwindle (Kramer 2005)P184)[177].

Most liberal accounts on the obligation to obey the law are based on the understanding that there is a direct correlativity between political obligation and compliance, and that although political obligation is not entailed by law´s nature, it is, nevertheless, constrained by it (L. Green 2004)P523). Nonetheless, while the pairing of legality and legitimacy constitutes democracies' most important conceptual foundation, it is also its biggest vulnerability, for any disruption of that connection essentially challenges the balance between political authority and legal obligation, and hence, the very core of an order based on the claim that

[175] In concrete when rulers "exercise a power the people never put into their hands" (Locke 2017)P179).
[176] "If the government lacks [the authority to forbid civil disobedience], its authority as a whole seems to evaporate. For individuals have the power to escape its authority, even when their reserved rights have not been violated, simply by believing that these rights have been violated. On the other hand, if the government has the authority to forbid civil disobedience, then all limits on its authority seem to evaporate. For the government may do whatever it pleases to individuals, even when its actions violate their reserved rights, as long as it believes that these rights have not been violated (M. S. Green 2002)P117).
[177] In fact, the more subtle the rule, the less likely it is that it will generate ample resistance (Daase and Deitelhoff 2019)P24).

laws must be obeyed because they are essentially just and emanate from a legitimate authority.

The consequence of emphasizing legal obligations severed from the political responsibilities, of both people and the state, is a sort of hyper-constitutionalization of the entire legal system, a situation that generates a constitutional and a political anomie. The uncompromising focus on the authority of the constitution delegitimizes the normative authorities and the effectiveness and applicability of the norms because it detaches the legal and the political obligation, exposing in most cases the rigidity of the system and the lack of adequacy between legal objectives and social ends. The paradox is that hyper-constitutionalization, as a political recourse to emphasize rule by law, rather than securing the rule of law, provokes social non-compliance, thus defeating its very objective of a strict implementation of the constitution and of the law.

To save the order from this inherent vulnerability, liberalism has attempted to somehow disconnect the idea of legal obligation from that of moral obligation[178]. If one always depended on the other there would be no society because disagreements would find no means to be resolved, except for violence. Liberalism, in fact, vindicates unnatural appeals to obedience as necessary moral conditions for political existence on the basis that it is one thing to be morally obliged to obey the law, as a matter of principle, and another thing to actually obey it, as a matter of social practice. We follow the law, for the most part, because we have internalized the fact that we are supposed to follow it, because it is a habit, a social convention in place (Sillari 2013)P3) (Bedau 1961)P659), a custom that it is socially formed through a combination of practical and moral factors as "the sense of being morally required, and the sense of being legally required, and the sense of being required by social mores and social expectations, tend to merge with one another" (Zipursky 2006)P1231). We tend to be more compliant with the laws that we perceive are backed by the most power[179], and obey those laws that we identify as carrying the most negative or harmful consequences for noncompliance. We would rather obey a state law that carries a jail sentence, than a municipal law that carries an administrative penalty. We would usually comply with rules that may cost us a large sum of money (e.g., not obtaining a permit for construction), rather than with laws that may have a higher moral value, but that are seldom enforced (e.g., animal protection laws).

Citizens in liberal democracies usually consider that the obligation to obey the law derives, for the most part, from the representative legitimacy of the parliament that enacts the law,

[178] In the Rawlsian tradition, some actually argue that by accepting the legitimacy of the law, the objector may be able to separate her personal objection to the law, from her political objection (Hutler 2018)P73).

[179] Compliance involves doing what the authority commands because the authority commands it, not because the subject necessarily recognizes the authority of the normative issuing institution (López Cuéllar 2011)P150).

for we have been told that in a regime of separation of powers, the legislative has the monopoly of law-making. That is clearly not the case. The executive power, administrative and multinational bodies, transnational corporations, or other local or international agencies all meddle in the business of law and rulemaking. The concept of institutionalized normative systems competing for citizens' loyalty goes hand-in-hand with the idea of simultaneous claims of authority (López Cuéllar 2011)P153). In modern societies, legal and political pluralism challenges the delicate balance between political authority and legal obligation, and questions traditional theories of compliance that portray consent as a direct correlation of the legitimacy and the representativeness of the lawmaker.

Those that consider that deliberative democracy has replaced the social contract theory as the prevailing account of political legitimacy, reject the notion that citizens have an overriding moral obligation to obey the law, because they do not believe that the citizen's relationship with the state is based on a contractual agreement. These scholars argue that although the citizen may accept some of the benefits of society, the acceptance in no way constitutes a promise, or an obligation, to perform in conformity with all of society's laws (Alton 1992)P51). In other words, since we have not (implicitly or otherwise), entered into a contract with most of the agents involved in law-making, or have in any way acceded to be bound by the rules enacted by non-representative (or not tacitly accepted) agents (e.g., regulatory bodies, international organizations, transitional corporations, or non-public interests), we cannot rely on traditional theories of consent that have sought to vindicate the basis of our submission to the legal order on a supposed agreement to explain why we normally obey the law. So why do we do it?

According to Susan Tiefenbrun, scholars have grounded the question of the obligation to obey the laws in six different legal theories; the duty to obey the law out of gratitude to an existing legal system (Socrates); the duty to obey the law because of the individual's contractual agreement or consent to obey (John Locke, Jean-Jacques Rousseau or Hannah Arendt); the duty to obey because of the negative consequences of disobedience (what most of us commonly call coercion); the duty to obey out of fairness (the fair play theory); the duty to obey in order to support just institutions (H.L.A. Hart and John Rawls), and the duty to obey in order to support one´s community (Ronald Dworkin) (Tiefenbrun 2003).

The fair-play theory of political obligation emphasizes that those who deny an obligation to obey the law in a just state take unfair advantage of others who submit to such an obligation (Dagger 2018)P78). I disagree[180]. Those that defend that the proper objective of

[180] One does not inherently consent to the system; one is born in it, and (mostly) consents to its rule because of the need of social interaction. Liberal democracies may be considered the closest, yet, to a "nearly just

law is to direct and coordinate human conduct, rather than to compel and constrain it (Marcic 1973)P104), also believe that laws must be obeyed, otherwise they would fail in their primary function, and inevitably, the lack of coordination would affect human conduct and order. For others, rule-following is understood as a regularity in the solution of coordination problems, an essential part of the mechanism to maintain the functions of the state (Sillari 2013)P7). Without the system, they argue, people would be subjected to the unilateral lawgiving, judgment, and enforcement of other private persons (Weinrib 2014)P717). This means that people could not just disregard the system or disobey its laws at the risk of inciting lawlessness and endangering their own freedom. Consequently, the obligation to obey the law derives from the presumption that government is necessary "to protect society from great evil" (M. B. E. Smith 1973)P265).

Because authority has a duty to protect society, positivists consider that the unqualified doctrine that an individual has the right to disobey any law he determines to be unjust "is simply a more sophisticated way of saying that a man is entitled to take the law into his own hands" (Johnson 1970)P7). Compliance, for this school, is merely part of the cost of making a constitutional democracy work. The duty to support just institutions, therefore, is what generates duties and obligations of citizenship (Loesch 2014)P1089). Hart used the notion of the internal point of view to preserve a philosophically tenable analysis of legal obligation that did not distort common sense (Zipursky 2006)P1229)[181]. He argued that along with its content-independent element, the duty to obey authority excludes deliberation, because a content-independent and deliberation-excluding duty to obey is the nucleus of the general notion of authority, and is the basis for legal authority (López Cuéllar 2011)P491-3). Hart and other positivists, however, maintained that there is always an element of basic justice and morality that must prevail since the "the certification of something as legally valid is not conclusive of the question of obedience (D. D. Smith 1968)P730) (Tamanaha 2005)P11) (Gandra Martins 2018)P328). Positivism, nevertheless, has oftentimes been unable to explain why anyone under an unjust, unfair, or unengaging system, even if formally labelled a democracy, would have an overriding political obligation to obey law[182].

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society". Yet gratitude is not necessarily the sentiment of many of the vulnerable, excluded, or working-poor citizens in democratic countries. Rather, I believe, it is a mixture of coercion, everyday needs, and their determination to be recognized that motivates people to obey. Not gratitude. It would indeed be excessive that, in systems deeply unequal and unjust, people would be asked to obey the law out of a sense of fair play.

[181] For John Finnis, Hart´s internal point of view is "the way of thinking of someone who treats a rule as a reason for action (and not simply as a prediction or a basis for prediction) (Finnis 2002)P27).

[182] Article 122-4 of the French Penal Code provides for an exemption from criminal liability for anyone who has performed an act authorized by law or regulation or ordered by the legitimate authority. However, there are two exceptions: criminal liability must be retained when the act of the legitimate authority was manifestly

Joseph Raz has taken an even more radical position, proclaiming that the right to rule entails a duty to obey (Raz 2012)P140), and that disobedience to the law is merely an action that undermines the government's ability to do good (Raz 2012)P148). For Raz, the moral obligatoriness of the law is directly related to the stability and to the order that it supports, although the extent of the obligation to obey varies from person to person (Raz 2012)P146). For him, the mere fact that an official declares that there is a legal duty implies that there is moral binding duty, even if the official that made the pronouncement does not believe in the moral bindingness of the duty (Kramer 2005)P182). Raz asserts that the "consent to obey is designed to bring greater conformity with the natural law and greater respect for the natural rights of men than is likely to be achieved in a state of nature" (Raz 2012)P153). For him, the essence of a legal order is not a norm-creating but a norm-applying institution (M. P. Golding and Edmundson 2005)P8) and, therefore, a non-coercive legal system is humanly impossible (Miotto 2020)P5), though logically plausible. Raz´s emphasis on the institutional as a necessity to set apart prosperous societies from the Hobbesian state of nature entails the acceptance of some sort of "consented coercion" from society.

In politics, coercion involves the manipulation of the tools of the system to impose, or to prevent the imposition of, one will over another will in the public domain[183]. If law is the representation of power, coercion is the actual expression of the discretional use of power when this power is unable (or unwilling) to set the conditions for consent. Coercion is the a-political constituent of the legal system. When coercion originates on the other side of the power spectrum, then it is simply labelled violence.

Coercion finds in Austin's hardcore command theory an appropriate conceptual justification[184]. The theory states that if one is politically obligated to obey the law, one ought to obey the law because of the law, not by virtue of the independent goodness of the law, or for the reason that the law requires, but because law itself commands it (Valentini 2018)(Sevel 2018)P5). When the law asks us to do, or to refrain from doing something, the reasons why we obey are irrelevant, "for authoritative orders do not even implicitly specify the reasons for which one must act" (Hershovitz 2011)P8). As Hans Kelsen argued, "legal

illegal or when, in accordance with article 213-4, the act authorized by law, regulation or legitimate authority leads to commit or to be complicit in a crime against humanity (Grosbon 2008).

[183] Certain expressions of resistance can also be a form of coercion (or of counter-coercion, if one will) intended to undermine the power of adversaries and pressure them to change course (Aitchison 2018a)P10), even if that course (e.g. the implementation of a law) is moral and legitimate. Coercion is nothing but a form of violence.

[184] Coercion and command are separate notions. Command, in its traditional view, "entails the subordination of the will of one person to that of another" because "law's distinctive normative force arises from, and is an expression of an unequal social relationship that is normatively charged" (Postema 2001)P485). There are hardly any instances in which people and the state (including the judiciary) are equal. Others define coercion as a "proposal" that people would not normally welcome, and which will make them significantly worse off if they do not behave that way (L. Green 2016)P19-20).

obligation is not, or not immediately, the behaviour that ought to be. Only the coercive act, functioning as a sanction, ought to be" (L. Green 2012)P3). The coercive command "do as you are told", is intended to instil a sense of infancy in society, where the "father state" commands us to obey, or else[185].

Although liberal democracies have also relied on a system of power backed by coercion to enforce legal obligations and to ensure stability (or rather, enforced stability[186]), theories of command are at odds with the principles of democratic practice, and with reason. In the democratic framework, normative ideals get their hierarchically superior status because their content is regarded as good, right, just or moral. The rightness of their nature is what gives norms the ability to impose duties on subjects[187]. In what is perhaps one of his most significant passages, Thoreau argued that if the injustice inherent in government "is of such a nature that requires you to be the agent of injustice to another, then I say, break the law" (Estrada Tanck 2019)P376)(Alton 1992)P43). With this, he instils the concept of disobedience with a profound sense of moral responsibility, self-respect, and intellectual autonomy.

The authority of power, on the other hand, does not necessarily derive from the norms that it applies, but on its ability to impose obligations on subjects, regardless of the rightness or the justice of a norm. Power does not derive from the content of the norms, but from extraneous circumstances that endow an actor to coerce others into complying. Oftentimes, therefore, the obligation to obey the law emanates from an external source rather than from the fairness of the norms, or even from the rational or moral acceptance by subjects of the bindingness of the rules. Democracy cannot reconcile the command theory with the principles of accountability and recognition.

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[185] Because coercive commands deny people´s autonomy and society´s sense of political maturity, the emphasis on the inflexible enforcement of law results in nothing more than an act of extraordinary dogmatism, pure injustice (Gargarella 2003), and injustice leads to resistance.

[186] In the last fifteen years, coinciding with the profound crisis of legitimacy of liberal economies, OECD countries have experienced a shift from a system based on consent to a return to more visible repression of increasingly broad sections of the population (Wood and Fortier 2016)P147).

[187] The conflict of conscience between obeying national law and upholding a higher ethical principle acknowledged by the international community has been articulated through judgements of the ECHR. In K.-H. W. v. Germany (Application no. 37201/97) of 22 March 2001, para 105 the European Court of Human Rights hold that "In the light of all of the above considerations, the Court considers that at the time when it was committed the applicant's act constituted an offence defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights". Decision as to the Admissibility of Application no. 2615/10 by Ludmila Polednová against the Czech Republic of 21 June 2011 "The Court also cannot accept the applicant's argument that she had simply been obeying the instructions of her more experienced superiors whom she had trusted completely. (…) Having already held that even a private soldier should not show total, blind obedience to orders which so flagrantly infringed the principles of national legislation but also internationally recognized human rights, in particular the right to life". In these particular cases, the Court criticized the applicants precisely for their inability to uphold a higher ethical standard contrary to the one affirmed by national law.

In fact, many scholars question Austin´s command theory because "the mere receipt of an order backed by force seems, if anything, to give rise to the duty of resisting, rather than obeying" (M. B. E. Smith 1973)P950)[188]. Defending Austin, Raz´s or other positivist' view of consented coercion would require empirical and conclusive evidence that security and stability result from absolute obedience, and this evidence is not readily available (D. D. Smith 1968)P710), nor likely to ever be[189]. Unlike consent, therefore, coercion carries a presumption of illegitimacy and a special justificatory burden (Miotto 2020).

Those that believe that it is a feature of our concept of law that law is coercive if necessary, though not necessarily coercive (L. Green 2016)P7), provide a more nuanced interpretation. In this approach, the authority's right to rule consists in having the power to change the subject's normative condition, if necessary, but this normative power, to obligate subjects to do as instructed at the risk of suffering reprisal, is only effective when it is legitimately asserted. We may disobey the law for different reasons, but we are nevertheless reliant on a system of rights that protects us from the indiscriminate and the excessive use of power. Legitimate power is constrained by the principles of democratic practice, despite our disobedience. This restrain must, however, be reciprocated, not only in the nature of our disobedience, but also in its form. Political liberalism holds that at least some kinds of disagreement give rise to the people´s, and not only the state´s, duty of restrain when they engage in political advocacy (Pallikkathayil 2021)P73).

Many of the above accounts about the obligation to obey the law are, nonetheless, limited (Caney 2015)P8). Legal scholars have frequently reflected the belief that the system is sustained though compliance, but have not, normally, addressed issues of moral and political allegiance to the order and people´s commitment to the values of the ideology. That has been left to political theory, as if legal theory was not part of political theory. And yet, our sense of obligatoriness to obey the law is determined, in large part, by the degree to which we internalize the ideological narratives about the obligation to obey the law. If we recognize that laws have a force of legal and moral obligation, then we accept, in principle, that the system that enacts them is politically or morally entitled to rule, to enact and to enforce laws. Our political allegiance, on the other hand, is contingent on our moral recognition of the order and its values, not only of its normative system, and cannot be

[188] Rawls argued that to employ the coercive apparatus of the state in order to maintain manifestly unjust institutions, is itself a form of illegitimate force that men in due course have a right to resist (Rawls 1991)P121).
[189] On the contrary, some actually argue that "if emergency rule relies on securitization, such that exceptional measures are advocated as necessary responses to urgent threats, then disobedience can be seen as a step towards de-securitization and re-politicization" (White 2017)P8).

presumed from our compliance with the law[190]. One thing is to accept that one is morally bound by the order, and another is to consider the morality of the laws within that order.

Some suggest that if we do not accept that we owe political allegiance to the system, then we must accept the right of people to freely adopt the condition of outlaw (Koubi 2008). And yet, this argument does nothing to vindicate the value of the *ius resistendi* in liberal democracies. Being an outlaw is not just being noncompliant, is to voluntarily disengage from the political, the space where rights are formed and contested, and to renounce the capacity of being an agent (with will and reason). Both the duty to obey and the duty to disobey are associative obligations insofar as they originate in membership (Delmas 2015)P1145). It is the quality of that membership and the ability to engage in the political that defines whether one is morally obliged to obey the law as a political agent, not whether one simply chooses to withdraw from its political obligations or retract from the legal system. Jurgen Habermas argued that legitimate laws must be able to elicit enough quasi-voluntary compliance to maintain social integration. "The modern constitutional state can only expect of its citizens obedience to the laws if and in so far as it rests on principles worthy of recognition, in light of which that which is legal can be justified as legitimate and, if necessary, can be rejected as illegitimate" (Habermas 1985)P102). I am convinced, too, that the moral obligation to obey a particular law, and the legal obligation to obey that law are not, and cannot be, of equal intensity (Christie 1990)P1333). Not all laws are equal, and not all of them deserve the same consideration. There are laws, and then there are important laws. And there are rights, and then there are those that matter the most because their violation would significantly diminish the enjoyment of other rights or freedoms or damage the foundations of the democratic ideology. Obligation is not only a legal or a political term, it is essentially a moral term. We would not speak of the *prima facie* obligation to obey the law if we did not believe that there is a moral determinacy in that conduct, otherwise we would simply sustain that all laws must be obeyed all the time. The same goes for the moral imperative of resisting a *prima facie* immoral law. Michael Walzer argues that the key issue is not to justify disobedience against the background presumption of a moral duty to obey the law, it is, instead, to justify obedience to the state, when one has a duty to disobey (Delmas 2015)P1146). Perhaps, as Candice Delmas argues, "given our less-than-ideal polities, obeying the law is neither the sole, nor necessarily the most important, of our political obligations" (Delmas 2019a)P106). There are other moral obligations that matter most.

[190] Some of the laws the state makes and enforces are not morally binding for their purported subjects (Viehoff 2014)P338).

In any event, if we have a moral claim that laws must be (*prima facie*) obeyed, is because we also have a moral certainty that those laws are (*prima facie*) just. We do not murder or torture not because the law says so, even if that law is *prima facie* just, but because of the moral prohibition that we recognize as binding (Hershovitz 2011)P18). The moral character of the law, therefore, goes hand in hand with the moral discretion of people to obey it, as anyone's obligation to obey any law is pretty clearly contingent on what the law happens to be (Bedau 1961)P662). Laws or commands that put a person in a direct conflict with her own freedom in a way that compliance with that law would annihilate her as a person (and as a citizen), are void of obligatory power, and must be resisted (Schwarz 1964)P129).

The legal acceptability of disobedience is thus closely associated with the acceptance of the moral imperative to not obey the law. Dworkin urged judges to engage in an open dialogue with civil disobedients (Delmas 2019b)P176) in an attempt, one thinks, to compel judges to understand the extra-legal (principled) perspective of a resistance engagement. If the law is doubtful, he argued, the citizen may follow his or her own judgment about obeying the law (in a prudent manner), even if a contrary decision had been reached by the highest court (Alton 1992)P66). Dworkin maintained that if considerations of justice are critical to the deliberations that integrity demands, they must outweigh any contrary arguments of political morality when the threatened injustice is grave, and contended that the unjust law may be invalid because it fails to reflect the best (moral) reading of the principles that ground the law (Bellamy 2015)P7). Considerations of justice must be taken, at least, in the case of each interpreter who wishes to preserve her allegiance to law without sacrificing her prior commitment to ideals of freedom and justice, a commitment that forms the very ground of that allegiance (Allan 2017)P12). So if the basic justification to obey the law is that the law is just, then it follows that the violation, or noncompliance, with a law that serves purposes contrary to those that justify its existence is comprehensible, and even worthy (Estrada Tanck 2019)P391)[191].

Considerations about the strained relationship between obedience and the principles of democratic practice, freedom and justice, as well as the changing roles of the state and the subjects in a democracy, have led some to conclude that although there is a moral obligation to obey the law, there is no *prima facie* moral obligation to obey the law, and that even though one has a moral obligation to obey the law, that does not mean that one must necessarily obey the law (Christie 1990)P1312)[192]. Some deny the existence of an obligation

[191] I agree that the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law (Quigley 2003)P11).

[192] For Raz, there is a voluntary *prima facie* obligation to obey the law. He consents, however, that if it this view is no longer true today is because the societies we live in are less homogeneous, more troubled about their own identity, and about the role of government and the law in the social fabric (Raz 2012) P155).

to obey the law on the ground that no state can be just, and that nothing could possibly justify a content independent obligation to do as the law requires, since this would violate our duty to be autonomous and always act on our judgement (Wolff 1970)P34). In other words, the lack of critical interrogation makes us lose our essence as rational beings, and therefore, as political agents. Even more, many contemporary legal and political philosophers have abandoned altogether the effort to demonstrate the existence of a blanket obligation to obey the law (Kramer 2005)P181) (L. Green 2004)P515). The current complexity and interdependency of political, social and legal systems, and of what some call "philosophical anarchism" (Dagger 2018), results in an ever-increasing exercise from scholars, but most significantly from citizens, to re-evaluate the moral and even the legal obligation to obey the law, and with it, question the political foundations of the order. This is a fundamental argument, because if we were to agree that there is no such blanket obligation, then we would be right in assuming that external expressions of the *ius resistendi* would not require any moral or legal justifications, simply because it could not be assumed that there is a moral obligation to obey the law (Milligan 2013)P144). To the continuing philosophical quest to determine the conditions for a democratic liberal state to produce legitimate laws and policies, we are now adding the quest to determine those conditions in a changing society.

Legal obligations are associated with the law. Moral obligations are not associated with the law, but with the principles that underly the law. I sustain that there is a *prima facie* obligation to obey the outcome of our own artificial construct, the law, because we, as a body politic, declare and accept so through social mores. A *non prima facie* obligation to obey the law would infer that we created something that we reject from its inception. It would be senseless to do so because it would be "self-contradictory not to keep a promise one has made" (Finnis 2002)P6). That does not mean, in the least, that the *prima facie* argument of obligation suppresses the freedom of the body politic (in its whole or in part), to resolve that there is no obligation to obey the law when the outcome of the artificial construct (the law), violates the fundamental terms of the original agreement by which we declared and accepted that the law must be obeyed (our moral recognition of the order and its values), or when the body politic (in its whole or in part), is denied the recognition as an agent able to amend the artificial construct that violates primary (non-construed) rights.

This argument does not compromise the legal order. Not obeying *a* law is a concept that legally speaking is not incompatible with *the* law[193], as non-cooperation in certain matters is not inconsistent with continued cooperation in others (Honoré 1988)P53). But even if we

[193] There seems to be no inconsistency in saying that the requirement to obey the law can have exceptions built into it (Davis 1993)P45). In fact, for some political theorist civil disobedience constitutes "one of a short list of exceptions to an otherwise binding obligation to obey the law" (Pineda 2019)P2).

disobey *the* law (understood as the actualization of a power), it does not mean that we reject the legal order[194]. Although a measure of compliance with the law is a necessary condition for law, it does not follow that all legal duties and obligations are necessarily enforceable, since the conditions for the required measure of compliance may arise from sources other than legal enforcement (Herstein 2013)P10). In other words, while legally speaking the nature of *the* law (and of the legal system), requires compliance, the fact that some laws (or their corresponding duties) are not complied with, does not render the law (as a concept), or the legal system invalid, because other considerations (themselves forming part of the legal system, such a principles), create complementary conditions for obeyance, not only for compliance.

Some argue that if a man can only obey and not disobey, he is a slave; if he can only disobey and not obey, he is a rebel (Falcon Tella 2008)P67). If the nature of power is to rule, the nature of man is to resist being ruled. It is in man´s nature to question obligations that are external to his will, but it is also in his nature to examine whether complying with those external obligations can harm his, and his group's, political, social or physical survival[195]. Obedience and disobedience, following or breaking the rules, are political rational acts that cannot be simply justified on dogmatic arguments.

I hold that there is a middle ground between the tenacity of moral self and the submission of an automata. My position on the *prima facie* obligation to obey the law recognizes the rational agents´ obligation to comply with laws that are considered important for the functioning of basic coordination mechanisms of society (accepting obligations outside of man´s will as he acknowledges that their acceptance improve his chances of survival as a social agent), while recognizing his legitimate right to resist laws that directly and negatively affect his normative status and the basic values of the political order (dignity, justice, freedom, equality, recognition…), conditions that determine man´s chances of survival as a moral agent. If one cannot demand obedience for the mere fact that an obligation stems from the will of power, one cannot justify resistance just because that obligation stems from the will of power.

3.2. Blame it on the state.

Rousseau argued that "at the moment the government usurps sovereignty, the social pact is broken, and all the ordinary citizens, recovering by right their natural freedom, are

[194] Resistance is not about a Marcusean "great refusal", but rather, as Foucault argued, about a plurality of point of resistance (D. C. Barnett 2016)P269).

[195] "The nature of human beings is such that fulfilment is a matter of self-determination by free choices (and accompanying judgments of worth)" (Finnis 2002)P37).

compelled by force, but not morally obliged to obey" (Lippman 1990)P355)[196]. When the sovereign's commands violate the basic laws of the polity (established in the second contract), the obligation to obey the command disappears (Maliks 2018)P452). The traditional construction of the social contract establishes a direct correlation between non-compliance (of the state) and resistance (of the people), because it assumes that when the state breaks the basic principles that sustain the ideological order, then there is nothing left on which to ground the citizen's duty to observe the rules (Lovett 2015)P40). When the bonds are broken, it means that the system has failed in its enterprise of subjecting human conduct to the governance of rules (Lovett 2015)P2)P5), and by violating those principles and rules, the system itself legitimizes the existence and the exercise of the right to resist (Ugartemendía 1999)P215).

Scholars have traditionally considered that the social contract is broken if the state does not fulfil its obligations[197]. But then, except for revolution, people can never really break away from a neglecting state. If the (second) social contract is, theoretically, an agreement between two parties (between people and the state), should not we consider that the violation by any of the parties (whether people or the state) would (at least technically) void the contract[198]? Why are we still subjected to the contract, and to the duress of the authority of the state, even if we purposedly endeavour to free ourselves of the pact by expressively violating its terms (that is, by disobeying the law or challenging the authority)? The Lockean paradox was never a paradox. The consent-based nature the social contract served as a basis to vindicate, in rational terms acceptable to the people of the enlightenment, the inexorable submission of the individual to the decision of the authority about the degree to which reserved rights, and which ones, were (and are) actually reserved. With the social contract, people continued surrendering their sovereignty, albeit to a kinder form of Leviathan. Perhaps this softer appearance of the Leviathan could not forsake Rousseau's "ordinary citizens", since it was never meant to protect them. Perhaps the government could never usurp people´s sovereignty because people were never meant to retain it. And perhaps the

[196] In other words, when sovereignty has been usurped by forces that are not the intended original signatories of the social contract (non-public interests, unaccountable officials, multinationals, etc.) that do not have the interest of the common good as purpose, then the contract invalid.

[197] There are of course different levels of obligations of the state, and not all of them warrant the breaking of the contract.

[198] The purpose of the question is to expose the shortcomings of consent theories and the inherent inequality they perpetuate. Criminal law punishes behaviors forbidden by the law. But criminal law does not provide an answer to the overall question of responsibly of men in fulfilling their part of the social contract beyond individual responsibility for acts contrary to positive law. The *ius politicum* does not provide specific reasons, either, as to why if men (as the body politic) break the agreement, the agreement is not broken.

contract never intended to count those that were not in a position to directly consent to it through the exercise of power[199].

Because the social contract renders people powerless to free themselves of the agreement through predetermined means, the only alternative is oftentimes to resist. And because mainstream liberal scholarship has generally rejected the "right to", and instead has focused on demanding a "justification for", the burden of justification for the assertion of the *ius resistendi* has always cripplingly fallen on those that exercise their right. Many accept that responsibility for endangering the civil condition lies with those who revolt (Niesen 2019b)P34) and thus, the responsibility towards others is also theirs. In spite of the theoretical consensual basis of the social contract, and of the professed duty of the state in fulfilling its obligations, liberal states have traditionally been suspicious of any initiative which seeks to shift the emphasis to responsibilities (Clapham 2006). This has resulted in a system in which we are judged by the role that we play as duty-bearers (as good citizens), rather than on our capacity to assert our rights.

The doctrine of the liberal state has removed moral references to obedience to stress the need for (good citizen) compliance, and through a logic of market choices (and economic survival), has kept people excessively occupied and preoccupied with the immediate to insist on their rights. Those that have insisted, have always felt the pressure to justify their actions. Those that have asserted their *ius resistendi* to insist even further, have always been confronted with the argument that whoever wants to morally appeal to the right to resist has to bear the burden of justification and the burden of proof (Mirete Navarro 1999)P278). But why? Why must the individual engaging in disobedience as a result of an external condition for which she is not responsible bear the burden to justify an action which seeks to redress the injustice? Why shouldn't the initial justificatory burden be borne by those that oppose, arrest, try, convict, sentence, and punish the conscientious disobedient? (Bedau 1972)P185). Instead of resisters having to disobey the law and bear the legal and political burden for doing so, why not insist that the state do its part? Why not hold the state accountably for its own errors?

In a nearly just society with functioning institutions, fair and inclusive laws, independent powers, and genuine concern for the common good, there would hardly be any need for resistance[200]. Most people agree that a human artifact that is immoral and illegal creates no duties or obligations, and thus it can be safely dismissed. For Rawls, the principle of fairness does not generate any obligations in institutions that are not "reasonably just" (Rawls

[199] After all, the basic feature of a contract is that it is enforceable (Roberts 2004)P225), and only those with power are able to enforce it, or to preclude its enforcement.

[200] Clearly, the right of individuals and groups to resist is in abeyance so long as the rule of law functions without friction (Marcic 1973)P108).

1999)P96) and vice versa, when the basic structure of society is reasonably just, we are to recognize unjust laws as binding[201], provided that they do not exceed certain limits of injustice, or when the burden of the injustice falls on certain minorities, or when that law that infringes on certain basic liberties guaranteed to the people (Rawls 1999)P308-310-312). Many also share the view that there is no constant need to disobey the law or to challenge the political order as long as the oppression has some degree of Rawlsian acceptability, in the sense of being "bearable". A liberal nearly just society requires obedience, and only in situations where noncompliance would withhold benefits from someone or harm the enterprise (M. B. E. Smith 1973)P957), disobedience could be considered[202].

Liberalism holds that states have duties in respect of their citizens, and citizens have them in relation to the state. These duties must be fulfilled, according to Fuller´s principles of legality[203], as specific principles that must necessarily respond to the constraints of reciprocity and of good faith, that is, in full compliance with the principles of democratic practice, accountability and recognition. In other words, it requires that the state be responsive (J. Butler 2009)P50)[204]. Although individuals and states are encouraged not to exercise their legal rights in ways that violate moral norms (Wenar 2020), the increasingly blurry terms of the moral boundaries of liberal democracies create the grounds for disputation of the moral rightness of normative standards, and with it, the grounds of the system that sustains the legality of the norms. In democratic theory it would then seem pointless to examine the ethical obligation of the individual to obey the law without referring to the ethical obligations of authorities to do so, ethical obligations that "even beats their constitutional obligations" (Pelloni 2000)P4).

The state is not infallible, it cannot be[205]. And while being the maker of an artifact (the law) does not provide the legislator, the enforcer or the adjudicator "with a grant of immunity

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[201] And in case we are uncertain whether a society is reasonably just we apply the principle that "*lex in dubio praesumitur justa*", when it is doubtful, the law is also presumed to be just (MacGuigan 1965)P124).

[202] Everyone has the right, and especially the responsibility, to identify their own thresholds of bearability, and to make their own political, strategic, and ethical choices in that regard (Conway 2003))P511). The state does not have (or should not have) delegated authority to choose the threshold of acceptability of injustice for us, and while perceived injustice cannot serve as a *carte blanche* for anyone to disobey the law, as it would mean anarchy, most laws assigning thresholds of acceptably of an injustice, are unjust and violent in themselves.

[203] For Lon Fuller, compliance with the law requires that the legal subject must be able to anticipate that government will itself abide by its own declared rules when it comes to judge his actions (Postema 1994)P369).

[204] It seems, however, somehow illogical to believe that power would be subjected to its own assessment regarding its own behaviour and declare itself deviant. To suggest that the state is completely bound by the law, or the constitution in the same way that citizens are, something over which the state has the power to amend, it amounts to a paradox ((Majumdar 2009)P22) because power is, after all, the capacity to enforce rules on everyone, except on oneself.

[205] In its ruling 238/2012 of 13 December 2013 (BOE núm. 10, de 11 de enero de 2013), para 7, the Spanish Constitutional Court reaffirmed its view, expressed in several other rulings, that "The mere possibility of a

to error" (Thomasson 2007)P64), being the maker of the artifact does provide the legislator, the enforcer, or the adjudicator with a certain immunity from their own error, an immunity that it is often at odds with the principles of democratic practice. The lack of state responsibility and responsiveness endangers democracy because the political is then negated. And when the state fails to create the conditions that enable the enjoyment of rights and freedoms in a common space, or appallingly restricts that space, some suggest that that situation may loosen the proportionality requirement of inflicting defensive harm against the state and render it liable to revolutionary attack (Kapelner 2019)P445).

While not reaching the point of endorsing revolution, many scholars have vindicated the *ius resistendi* as a response of the failure of the state to live up to its responsibilities. For Tony Honoré, the special feature of the right to rebel as a counter-social right is that it is predicated on a breach of duty on the part of the state, so serious and sustained, that it can properly be treated by the subject, if he so chooses, as dissolving the bonds between them (Honoré 1988)P53). Dworkin argues that when the state passes a law or creates a situation that infringes a fundamental moral right which an individual has against the government, the individual has the right to disobey the law, because the government does wrong in infringing that right. Such a fundamental moral right exists when the right is necessary to protect the individual's dignity, or his standing as equally entitled to the concern and respect of the law (Davis 1993)P47). Habermas considered that when the representative system breaks down, "it puts its legality at the disposition of those who are in a position to care for its legitimacy. Whether this situation exists, cannot with any consistency be made dependent upon the determinations of a constitutional state organ" (Habermas 1985)P106). For others, "state sovereignty can be partially bypassed only as a state stops fulfilling the basic responsibilities and functions that go along with sovereignty" (Fixdal and Smith 1998)P303). John Simmons contends that when those injustices exceed reasonable limits, governments forfeit the rights with which they were entrusted, and "no longer have any moral standing beyond that of a powerful bully" (Simmons 2010)P1811)[206]. Others proclaim that "when the duty bearers fail in their responsibilities to right holders, the rights-holders are entitled (in certain yet-to-be-fully-specified conditions) to enforce their own rights" (Caney 2020)P7) and still, that claims of violations of rights are, in their very nature,

tortious use of the rules can never in itself be sufficient reason to declare them unconstitutional, because although the Rule of Law tends to replace the government by men with the government of laws, there is no legislature, however wise it may be, capable of producing laws that a ruler cannot misuse". A constitutional court thus recognizing the politization (and its lack of preventive action) of the law. See also Spanish Constitutional Court rulings STC 58/1982, de 27 de July, FJ 2, SSTC 132/1989, de 18 de July FJ 14; 204/1994, de 11 de July, FJ 6; 235/2000, de 5 de October, FJ 5; y 134/2006, de 27 de April, FJ 4).

[206] The receipt to restore the trust of people in the system is straightforward: enhance democratic governance and the rule of law by strengthening transparent and accountable governance and independent judicial institutions (Our Common Agenda 2021)P64).

grounds for dissent and, other things being equal, disobedience and forms of resistance, "the claimants of rights themselves bearing a primary responsibility in making and enforcing such rights" (D. A. J. Richards 1983)P420-423). In these accounts, the moral obligation to dissent or to resist arises out of the nature of the acts or practices of those who govern (Wand 1970)P161) as claims against specific violations of principles or rights. The virtually total inability of ordinary citizens to affect decision making leaves resistance as the only possible response to the misuse of governmental power and to decisions wrongly made (Walzer 1960). There is, to put it briefly, a solid theoretical basis to vindicate the right, even the duty to resist[207], when the state does wrong, when it acts without accountability, uses illegal means[208] or is unresponsible to appeals for recognition.

Whether one subscribes to a consensual or a deliberative idea of democracy, it seems reasonable to concede that, in liberal democracies, political authorities cannot claim that all laws must be obeyed all the time by all people, because democracies cannot comply with all their obligations either. Yet even if one accepted that the state is not strictly bound by the law in the same manner that citizens are, it still must be bound to something, to some kind of standard of conduct, otherwise, as Saint Augustine argued, the state would be nothing but a bunch of thieves (Desmons 2015)P29). The likely explanation is that the source of the bound condition must be found in the extra-legal, that is, not in the letter of the law, but in the values of the ideology grounded in a broader conception of rights, an innovative concept that advances a distinct perspective on obligation, and on resisting.

3.3. Blame it on non-public interests.

With the shift from sovereign ruler to sovereign state, sovereignty was depersonalized (Tamanaha 2017)P160)[209]. With depersonalization, it becomes harder to categorize the object of a grievance, to identify the source of the injustice, or to explain an engagement which is generally aimed at a collectivized, multi-agency, multi-level sovereign. According to Foucault, one of the reasons that makes the explanation of a grievance more complex is that power now looks kind, but it is not, whereas in the past, it clearly wasn't kind, and therefore

[207] Some scholars wonder whether to resist is a duty or a right (Delmas 2019a) (Silvermint 2013) as a contribution to a larger debate about the moral duty to oppose injustice and oppression regardless of whether this action derives from a specific right, or if it constitutes a "moral virtue".

[208] For Marx, the very concept of illegality cannot be explained or reformed without addressing the central question of political power, the state and its methods of social control (Clement 2016)P137). Legality and illegality are man-made concepts.

[209] Some argue that because liberal democracies believe that the sovereignty of the state is now in good hands (not in a monarch's but in the people's hands) the problem of adequately limiting sovereign power presents itself with less urgency" (Van Duffel 2003)P14). That is, in essence, how democracies have banished the right to resist to the periphery of the system.

could encourage open rebellion and protest. Because now one can no longer see what the state is doing, it has become harder to find objective reasons to resist (Sokhi-Bulley 2016).

As the primary rights-granting and rights-recognizing agent, the state has traditionally been the object of acts of resistance. But we now live in a world with multiple sources of rights, where we find actual instances of political obligation without legitimacy, and where power is asserted by numerous actors who are not subject to public accountability. Power is not only a matter of designed public authority. For Thomas Aquinas, a key benchmark to measure the legitimacy of the government of the prince was to assess whether he worked toward the common good, and not for his private interest. This is a distinction that has always been hard to ascertain, and increasingly so since the liberal order intertwined the concept of the legitimacy of the state with that of the material wellbeing of people. This interconnectedness of interests is reflected in biased regulatory frameworks, ambiguous legislative acts and political-economic alliances that makes it difficult to clearly separate the public from the private. The deliberated non-realization of legal clarity serves the system to maintain the discretion in the law´s application and implementation, although that, in turn, undermines the legitimacy of a legal order that is increasingly unable to substantiate moral and ethical reasons for people to abide by it beyond coercion and fear. For some, the common good has actually become an abstraction, while the private interests are the reality (Wolin 2008)P110)[210].

In the Foucauldian perspective, because biopolitical norms cannot be represented as a sovereign's declaration of will (Brännström 2014)P174), these are more difficult to oppose. In this context, then, who is to be resisted? For some, the response is clear; those who are morally responsible (and not simply the agents) for causing the injustice (Caney 2015)P15)[211]. Resistance should indeed be directed to those that have the capacity to change the normative status of people (or the individual) in a way that can significantly affect their basic rights and the enjoyment of their freedoms. Not necessarily those that cause the injustice, but those that occupy the space where effective power is asserted[212]. Disobeying,

[210] The Declaration of the Occupation of New York City notes that "a democratic government derives its just power from the people, but corporations do not seek consent to extract wealth from the people and the Earth; and that no true democracy is attainable when the process is determined by economic power" (Square 2011). Even the veterans of the WWII French Résistance, called on the political, economic and intellectual leaders and on the whole of society to "not resign, nor be impressed by the current international dictatorship of the financial markets which threatens peace and democracy" (Aubrac, Cordie, and Others 2004).

[211] Cohen asserts that "not only a society's positive laws, but any institutional practices (whether governmental or not, and including an institution's failure to have laws or rules of a certain sort) can be proper objects of protest through civil disobedience" (Bedau 1972)P181).

[212] In this context it is worth recalling the concept of "*eisangelia*", the right to prosecute any individual found to have damaged the common interests of the *polis* as a result of criminal, incorrupt conduct or the expression of incompetence, which was considered a vital component of the democratic regime itself in classical Athenian

dissenting, or claiming rights does not automatically end injustice, but serves as a mechanism to identify some of its causes and those that are behind the perpetuation of the conditions of injustice.

From a cosmopolitan viewpoint, resistance is legitimate against any authority (financial, political or individual) that endangers live in its different forms (Zarka 2014)[213]. Critical scholars and activists find in the non-achievement of the benchmark of the common good a direct causality to assert the *ius resistendi* against public and non-public interests, especially when the wellbeing of society (the public body), is put at risk because of the interests and the profit of a few[214]. The consequence of this causation is that critical theory emphatically denies any legitimacy to acts of resistance motivated by special or individual interests, but it does not necessarily deny the legitimacy of acts of resistance against non-public, special or individual interests.

I argue that if the change in the normative status of a person, or of people, or the limitation in the enjoyment of their rights and freedoms, is caused (directly or otherwise) by the action or by the domination of the interests of non-public actors[215], external expressions of the right to resist against them should be considered legitimate[216] when, 1) compliance with the law[217] by a non-public party is openly and bluntly immoral or dangerous for the majority of society, and makes that party co-responsible of the immorality of the law or the policies enacted by the state that could, by themselves, be the object of resistance, and, 2) when the non-public interest or party usurps the functions of the state (Locke 2017)Para 225) or

democracy (de Lucas and Añón 2013). Today, impeachment or motions of censure, have lost the spirit of the *eisangelia* to become tools of political bargaining.

[213] The grievances expressed in "The Declaration of the Occupation of New York City of 29 September 2011" are directed to corporations and their occupation of the public interest. The Declaration starts with "We write so that all people who feel wronged by the corporate forces of the world can know that we are your allies" (Square 2011).

[214] On January 6, 2011, Aaron Swartz was arrested for breaking and entering with the intent to commit a felony downloading millions of research articles from JSTOR. His motivation to do so was that he considered that the world's entire scientific and cultural heritage was being digitalized and locked up by a handful of private corporations and declared his opposition to the private theft of public culture (Edyvane and Kulenovic 2017)P1).

[215] Of the 2809 protests that occurred between 2006 and 2020 in 101 countries, people protested against distant and unaccountable systems or institutions such as the political and economic system (30%), corporations/employers (23%), the European Union/European Central Bank (16%), elites (14%) and others (Ortiz et al. 2022)P115).

[216] The UN has acknowledged that "serious and urgent ethical, social and regulatory questions confront us, including with respect to the lack of accountability in cyberspace; the emergence of large technology companies as geopolitical actors and arbiters of difficult social questions without the responsibilities commensurate with their outsized profits" (Our Common Agenda 2021)P62-63).

[217] Noncompliance with the law would not need an act of resistance but of law enforcement.

appropriates its powers, resources or purpose, undermining the common good[218] or affecting the rights of others without accountability (for instance by evading taxes[219], or when private interest regulate access to essential rights, like health). It is important to stress that while one may have some moral ground to assert the *ius resistendi* against non-public interests that misappropriate public resources to affect the will or the rights of the people without any accountability as part of a political strategy (Clement 2016), it is never justified to target the persons owning that property (Jeff Shantz 2014)P20)[220].

As long as non-public actors have the power to change not only our normative status but our fundamental rights (to free air, to labour conditions, to development, etc.…)[221], then there may be a justificatory basis to assert our right to resist in the same manner we would do against public authorities having the same power to affect our rights[222]. Asserting the *ius resistendi* against those non-public interest does not challenge the existence (or the recognition) of those interests, rather, it opposes the non-public decision-making process in public matters and appeals to the fundamental democratic principle of accountably.

3.4. Blame it on the people.

Aristotle used the term *akrasia* to refer to the weakness of the will, the lack of command, and the acting against one´s better judgment. In his Discourse on Voluntary Servitude, Étienne de la Boétie unmasked people´s enduring habit of voluntary servitude to the tyrant. Rousseau spoke of the blind multitude (Cusher 2016)P226), Martin Luther King feared the "white moderate" (King 1963), and Hannah Arendt referred to Eichmann as "the little man" (Douzinas 2019)P183) and the "common man" (Useche Aldana 2014)P149). Michel Foucault

[218] One account of the common good is that it is some benefit done for the sake of helping others, with no regard for who those people are in particular beyond their membership in some community, including future generations (Etzioni 2014)P246).

[219] In the UK, for instance, groups of people blocked the entry and sat inside shops owned by major transnational companies that reportedly evaded tax payment at a time of government austerity cuts, like Vodafone, Starbucks, Amazon or Google These actions have had some success, as indicated partly by Starbucks agreeing to pay corporate tax in 2013 and 2014 at least. (Canaan, Hill, and Maisuria 2013).

[220] "I am justified in resisting unlawful arrest, but I have no authority over the offending officer (L. Green 2004)P522). I may be justified in resisting a harmful malpractice of some non-public interest, but that gives me no authority over the owner (as a person) of that entity.

[221] As Brian Tamanaha notes, "courts depend on private forums to carry a major load of legal disputes. This is part of a broader trend in society of government organizations relying on private actors to complete public functions. Regulation of the environment, the internet and other domains involve the participation, expertise and monitoring by private actors. (…) Legal procedures, functions and modes of operation are thus diffusing outward from governmental legal organizations and being picked up by private actors" (Tamanaha 2017)P147). The lines between public and private are increasingly blurred, and their logics tend to merge.

[222] In its Judgment T-571/08 of 4 June 2008, the Constitutional Court of Colombia argued that although the right of resistance is directed primarily against the organs that hold the highest power of the State, it is also directed to other forms of social power in the hands of individuals and social groups.

explored the disciplinary power fostering "docile bodies", "pliable" entities able to be "manipulated, shaped, trained" (Loadenthal 2020)P5)(Muller 2011)P3), and Jacques Rancière claimed that "despite everything, there is a certain national consensus that people can live very well for a long time in a rotten system" (Ranciere 2018)P50). Others use the concept of "internalized oppression" to refer to the stage when people come to believe, and so actually endorse, the social norms and stereotypes that are responsible for their oppression, making oppression appear not to be oppression at all (Hay 2011)P22-26). In her Ethics of Ambiguity, Simone de Beauvoir argued that the oppressor would not be so strong if he did not have accomplices among the oppressed. Max Horkheimer´s conformity, encouraged by capitalism and the sameness fostered by a system that seeks consumer standardization, or Marcuse´s one dimensional man, are all representations of the same; the fading of the self through the domination of no one, a system without a face against which it is hard to resist.

In politics, as in life generally, men frequently forfeit their autonomy (Wolff 1970)P9), and too often, the fallibility of human judgment has led to submission to authority from a misguided sense of duty where this was a morally reprehensible attitude (Raz 2012)P151)[223]. Some believe that "contemporary, post-industrial societies, with their increase in population and technology, also increase the loss of autonomy and of critical sense. This makes of them a likely breeding ground for the exercise of authoritarian power" (Falcon Tella 2008)P66). The capitalist logic is so deeply embedded in the conscience of people, that they believe that competition and individualism is natural to man, not an ideological notion[224]. For others, the dictatorship of what's "politically correct" threatens, in general, all forms of legitimate dissidence (…), it makes it harder for the individual to intervene in political life" (Pereira Sáez 2015). Law also contributes to this generalized state of surrender by means of supporting a process of justification that requires the obfuscation of reality (Sypnowich 2019). For instance, positivism, as legal theory, is satisfied with an understanding of the "facticity of appearances" and so, it contributes to preserving

[223] Some justify acts or resistance for the mere fact that one is in a subordinate position in relation to the state (Baaz et al. 2016)P142), thus broadening the range of justification of resistance to a point where one could endorse anarchy, misinterpreting the concept of resistance to any engagement that a subordinate would perform, regardless of the aim.

[224] The right to resist is not an anti-capitalist right nor a right of the left. But it is not usually asserted by those that benefit from the system or that want to keep the status quo. On 7 July 2020, over 150 intellectuals published "A Letter on Justice and Open Debate" in Harper´s Magazine (Chomsky et al. 2020) in which the signatories, referring to the rise of protests for racial and social justice note with preoccupation that "this needed reckoning has also intensified a new set of moral attitudes and political commitments that tend to weaken our norms of open debate and toleration of differences in favor of ideological conformity. As we applaud the first development (the protest), we also raise our voices against the second (the intolerance)". The signatories criticize both the forces of illiberalism and Donald Trump as a real threat to democracy and warn that "resistance must not be allowed to harden into its own brand of dogma or coercion".

Marcuse´s one-dimensionality (Winter 2017)P73). And in other instances, law has come to represent the sole will of the ruler, distinctively serving the purpose of power with the acquiesce of the oppressed. From the Weimar republic to Hungary, some parliaments have reached the point of renouncing the power of the people assembled through collective abdication (Ellian and Rijkpema 2018)P9). A society in fear is a society paralyzed, a society that does not resist is a dead society.

No circumstances excuse a person from being responsible for her actions, and ultimately, for sustaining the *status quo* of her own domination. It is not that the individual cannot change her circumstances, it is generally that she is unaware of her own situation, uninterested in engaging, or unwilling to change the conditions of her own oppression. Many people have simply renounced their agency, even in the face of injustice, and take the side of the oppressor when conflict erupts. In fact, disruptive confrontation seems ill-equipped to move privileged onlookers who are wilfully blind to their complicity in structural injustice (Livingston 2019)P6). By renouncing to resist, people renounce their moral responsibility to prevent the aggressor´s use of their sovereignty as mere means to achieve a particular aim (Ohlin 2014)P21)[225]. They renounce their Kantian right of self-defence, and their duty of preservation (Hay 2011)P21).

The condition of victimhood imposes duties on the oppressed. Those that can, but fail to resist their oppression, particularly in liberal democracies, are subject to blame. People capable of resisting have a duty to resist their own oppression to ensure that their rights are upheld (Caney 2015)P9), and that their capacity to act rationally is not harmed (Hay 2011)P23). Not willing to oppose what can hurt us goes against all laws, not only of nature and of man, but also of reason, and without reason, there is no politics. Non-resistance is a wrongful conduct, because when a victim is compliant or complicit in the face of oppression, they fail to respect the moral law (Silvermint 2013)P415), and they fail to respect themselves as actors endowed with agency, and with dignity. They oust themselves from the space where rights are formed and contested. They do not become outlaws, but a-political. It is one thing to have one´s voice silenced, but to voluntarily curb one's own voice it to leave the silence to be filled by the voice of those that may not have our best interest in mind. Injustice is then justified.

[225] "Refraining from acting to protect one's rational capacities might actually be the best way to protect them in certain circumstances" (Hay 2011)P37) Refraining from action because of political or other considerations also engages the right to resist. There is a difference from willfully refraining from acting and surrendering. In the first scenario, the right to resist is asserted in its political and communicative form because some have made the calculation that resistance is not in their best interest. In the second, there is no resistance, and thus no right.

Insubordination, on the other hand, unravels sovereignty's hold on ordinary people (Douzinas 2013)P105). It reveals the true face of the system and its tangible control of the polis, and helps to penetrate the psychic numbing which facilitates the acceptance and involvement in evil (Lippman 2012)P970). For critical legal theorists, primarily interested in the forces that can negate and subversively circumvent the system and contribute to emancipation (Winter 2017)P71), the *ius resistendi* has an emancipatory and liberating role, one that is planned and sought, giving the right of voice to de disempowered[226]. It is only when we assert the right to resist to capture normative spaces that the *ius resistendi* can have an emancipatory character, not in the sense of seeking liberation from the rule, but in expanding the possibilities of recognition of new rights within a normative system capable of reflecting the changing ideological parameters. Marcuse´s emancipation, for instance, is about imagining another world, not just tweaking the existing one.

But that is only a partial interpretation of the *ius resistendi*. Many people, even in liberal democracies, do not regard the right to resist as being emancipatory, but rather, as a right to protection from uncertainty and change. The instinct of submission, an ardent desire to obey and be ruled by some strong man, is at least as prominent in human psychology as the will-to-power, and politically perhaps more relevant (Arendt 1969)P8). For some, in fact, rational agents will view life under a regulated system of punishment as preferable to the perils of a state of nature, and will not willingly gamble away the security that system provides (M. P. Golding and Edmundson 2005)P8). This is true even in non-liberal regimes. Fitzpatrick argues that during colonial times, "resistance involved, against great odds, sustained and effective demands on colonial law for it to honour its attenuated promise of liberal legality" (Fitzpatrick 1995)P112).

Especially since the 9/11 terrorist attacks, the steadiness between freedom and submission that liberal democracies attempted to balance since the enlightenment has clearly tilted toward the latter. The shift to biopolitics has increased the gap between emancipation and material security, exposing the true face of a system that has replaced its moral appeal in favor of measurable material protection and security. When asserted in its function of guardian of the constitutional order, the *ius resistendi* is an expression of the willingness of people to be bound by norms that provide them with security, fairness, and equal opportunities, as long as the obligations imposed in that pursual are (in theory) respectful of the principles and values of the democratic ideology. But any promise to protect people against the enemy, in whatever form the enemy may take, and however it may be defined

[226] For Costas Douzinas, humankind is free to die of freedom, but only collective political action can lead to emancipation (Douzinas 2014a)P91).

(ISIS, covid, or unemployment[227]), seems to significantly lower the value-based standards of acceptability of the bound-condition.

3.5. The right to do wrong.

To do a morally right thing, and to do a legally right thing are separate concepts. One is always morally entitled to do the right thing, but that does not mean that one is always legally entitled to do so. What is morally right cannot be morally wrong (at least when referring to the same object) but can be illegal. What is legally right can be morally right, but it can also be morally wrong without ceasing to be legally right. For some, like Jeremy Waldron, there is no paradox in the suggestion that someone may have a legal right to do an act that is morally wrong, just as individuals may have legal duties that require them to perform wrong acts. For him, an action may be morally wrong (for instance, abortion), but nevertheless it is an action that the agent in question has a moral right to do (for instance, abortion) (Waldron 1981)P22-23). For others, however, the fact that an action would be wrong constitutes sufficient reason not to do it, no matter what other considerations there might be in its favor (Scanlon 1998)P148).

Morality is relative, a product of human history and circumstances, and since law is a human product, law is also permeated by the relativeness of morality[228]. If there is no absolute universal certitude of what is morally right or morally wrong, but nevertheless we can agree that we have a moral right to do the right thing, then we should also conclude, for argument's sake, that there must be a moral right no to do the right thing. In some circumstances, and within certain limits, people may indeed have a moral right to be immoral (Van Duffel 2003)P3), that is, people may have the right not to do the right thing, for instance, they may have the right to not obey the law.

There are, of course, plenty of nuances in the reasons behind one´s moral behavior. When we describe someone as a responsible individual, we do not imply that she always does what is right, but only that she does not neglect the duty of attempting to ascertain what is right (Wolff 1970)P8), which does not necessarily mean legally right. One may concede that a law may be immoral, but nevertheless attempt to do the right thing by obeying that law (that is, be a responsible law-abiding citizen). The opposite is also true. A man may take responsibility for his actions and act wrongly, as the duty to obey the law may not always entail the moral impermissibility of illegal conduct (Lefkowitz 2007)P206). If one is morally

[227] For some, if modernity has lost the attributes of classical politics, is because one of the features of the state was the ability to define the enemy, and this is no longer the case (Sandoval 2017)P25).

[228] All reasons for action have subjective conditions, or as in Bernard Williams terms, "all external reason claims are false" (Scanlon 1998)P363).

inclined to do the right (moral) thing when there is a (legal) obligation to do wrong (for instance participate in an illegal war), shouldn't there be some sort of immunity right to allow the individual, and the collective, to oppose the wrongness of what may be legally right? In other words, should we not have a protection from the legal obligation to do legally wrong (as long as we do morally right)? If that was not the case and we were to be punished for doing the right thing, as T. M. Scanlon put it, "why be moral?" (Scanlon 1998)P148). If a person has a legal obligation to do wrong, and she insists on not complying with or resisting that obligation, is she simply disobeying? or is she asserting her right to do wrong, as immunity right not to comply with what may be legally right, but morally wrong?

For some, the right to do wrong offers protection (if not immunity) because a holder of a right to do wrong enjoys a right against certain interferences by others with the right-holder's wrongdoing (Herstein 2013)P2)[229]. The right to do wrong is a right pertaining to the sphere of personal freedom because obeying or resisting a legal obligation is ultimately a matter of rational moral choice, and freedom, as I have argued, is the premise for rational action. We all have a right of conduct understood as a certain sphere of liberty or autonomy, a defeasible normative protection, with which interference by others is restricted (Brownlee 2008)P713). Within the space of freedom, therefore, one should have the right to choose how to advance one´s claims, that is, how to determine how best to ensure one´s survival as a moral and social agent. If a person was forced to do the right thing, her freedom would be coerced and her right to choose violated[230], and with the violation of freedom, the enforcing agent would inevitably lose its moral position to enforce the right choice. That also means that one cannot purportedly do morally wrong under the pretext of asserting one´s right to do wrong, since the immorality of the intent would annul the only justification to assert the right to do wrong, which is to act in a way that vindicates the moral rightness of the wrongdoing[231].

In some instances, the relationship between the rightness and the wrongness of action in relation to an obligation is linear. If the wrongness of an action is in direct opposition to the

[229] The literature has consistently characterized the right to do wrong as a claim-right (Herstein 2013)P17).
[230] "Even though the person has no (privilege-) right to perform an action that is wrong, it would nevertheless violate an important (claim-) right of hers for others to compel her not to do that thing. To take the speech example, we respect the autonomy of speakers when we allow them to speak unmolested—even when they do wrong by expressing themselves in disrespectful ways" (Wenar 2020).
[231] A distinction must also be made between having a right to do something (even the right to do wrong) and the way that right is asserted. Liberal political philosophers have in fact distinguished the right to civil disobedience from its wise exercise, a distinction that implies that the relevant right covers cases of unwise exercises of the right (Haksar 2003)P414). I however disagree. I may have a right to do wrong, or a right to resist, but that does not mean I always resist wisely, or that I am entitled to do wrong things (for instance use body violence) even if I am entitled to the right to do wrong.

set normative value of a given right (e.g., the right to life), then there is little space for both a positive and a negative correlativity between the right to do (legally or morally) right, and the right to do (legally or morally) wrong at the same time. It is illegal to kill, and it is morally wrong to kill. In some very exceptional circumstances one may be legally or even morally exonerated for killing someone, but that does not make it morally right, and it continues to be legally wrong. Yet, if the normative value of a right is not pre-determined or variable in relation to its normative value (as most moral rights), then the correlativity between right and wrong becomes more complex. If, for instance, the *ius resistendi* is asserted as a "right to do wrong" (that is, as immunity right to the obligation to do legal wrong) in relation not to a specific obligation (to a single-issue linear correlativity), but to a set of incidents (for instance the obligation to denounce an immigrant to the police), one could find oneself in the situation of having a claim to doing legally wrong (e.g., protesting the obligation by cutting traffic in a major road), while also doing legally right (defending the constitutional right of assembly), while doing morally right (defending the right of immigrants to a dignified life), and morally wrong (denouncing the immigrant to the police). In situations where moral discrepancies occur, one would expect (at least in liberal democracies) that one would be legally entitled to do wrong (assert the right to resist), and that the state would have an obligation to not interfere with the legal wrong, because there may be higher-value legal and moral rights to protect, for instance, the lives and dignity of people or even the right of assembly.

The paradox of the multiplicity of right-wrong correlations is not only generated by those that assert their right to do wrong. If the state did attempt to remove people from blocking the street it would not be doing legally wrong (as long as there was a positive norm or other legally binding instrument forbidding the act). The action (the assertion of the right of the state to remove people to assure the security of the street and the safe passage of non-protestors) would be morally wrong in the eyes of the protestors, but possibly morally right in the eyes of a third party affected by the demonstration (the morally disengaged from the demonstration). The action could also be morally right if the cause of the protest was morally wrong (e.g., a racist gathering demanding the removal of all immigrants). It could also be legally wrong if the removal of people had violated other rights, or it had been done using illegal methods or excessive force. It is precisely the indeterminacy of the right to do wrong, and thus of the *ius resistendi*, that allows for legal and moral adjustments in each particular context.

But what is a wrong act? In ideal conditions, "an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced, general agreement" (Scanlon 1998)P153). When one exercises the right to do wrong (or the right to

resist), one is rationally and willingly "rejecting the principles that set regulation of behaviour". The "general agreement" about the regulation of behaviour (the social contract in terms of political behaviour) is thus undermined through rational and unforced intent. Logic then dictates that the performance of the (wrong) act should not be disallowed, because the generally accepted regulation of what constitutes a behaviour that is wrong would no longer exist (under those circumstances). In non-ideal conditions, because acceptance of the regulation of behaviour would no longer be informed, unforced, or generally agreed, the right to do wrong, or to resist a "forced agreement" would then have to be, if not right, at least not wrong. It is unclear whether Scanlon's definition of wrongness implies that there must be a large number of people (e.g., "society") that determines that the act is wrong, of whether "those who can reasonably reject" the engagement are (only) those expressly vested with the power to interpret the "general principles". In non-ideal conditions (in the real world) what constitutes a wrong is not determined by a general agreement but by those with the power to interpret, adjudicate or execute the set of principles that regulate society, that is, those that have "the weapon of law" (Ogien 2015)P582).

People are compelled to obey the law because they are subjected to an external (legal o political) decision about the extent to which their behaviour is deviant. As a concept, however, behaviour is not inherently deviant, it is only so by reference to a normative sense that notices transgression (Pottage 2013)P264). It is only deviant in relation to a set of norms[232]. Resistance, as an external expression of the right to resist, follows the same logic. Resistance does not form an own perspective, it is always only resistance, it is, rather, defined by that which it turns against (Demirović 2017)P33). The assessment of the degree to which behaviour is divergent, an expression of the right to resist, or an assertion of the right to so wrong, is ultimately a matter of political judgement and opportunity, not of legal orthodoxy[233].

Similarly, to acknowledge the notion that one is entitled to do wrong, one also needs to dismiss the generalized pre-set conception that wrong acts are, by nature, immoral. In the domain of the *ius politicum*, an action which is morally wrong is an action that directly conflicts with democratic values. The justification for non-interference in the conduct of an

[232] Sevel argues that "a person subject to the law must, to some extent and at some level of description, adopt the understanding which the law provides of a given action or range of actions, in order to act with, and be motivated by, the knowledge or awareness that one is or is not doing something which corresponds to that understanding" (Sevel 2018)P35).

[233] Brian Tamanaha argues that "beliefs, theories and concepts are given meaning by and evaluated in terms of the consequences that follow from actions based thereon" (Tamanaha 2017)P3). The *ius resistendi* is ignored not because of a legal impossibility, but because no power willingly chooses to take on the consequences of granting the right to oppose power itself.

agent disappears when the group acts immorally against the fundamental values of the ideology, not when the group acts in legally wrong ways. In the latter case, the group is not asserting a genuine right to resist (or to do wrong) and cannot claim immunity from the state's non-interference. A protest, a sit in, the burning of objects or of flags, the boycott to certain non-public interests, blocking streets, destroying a statue, or the non-compliance with specific norms may be illegal (and certainly merit state intervention if the rights or the security of others are at risk), and they may perhaps even be immoral in the sense of societal rules of behaviour, but they are not necessarily politically immoral.

PART TWO

CHAPTER IV: THE LEGAL CHARACTER OF THE RIGHT TO RESIST

Public manifestation of resistance, disobedience or dissent are common in liberal democracies. In most cases, external expressions of the right to resist are not evaluated through rationally appropriate arguments, they are rather the subject of incendiary political rhetoric, of social condemnation, of ill-informed legal debates and irrational media trials. Liberal democracies avoid having to publicly articulate their view about acts of resistance because that exposes their inability to find suitable, politically reasonable, and legally validating means to restrain and penalize the right of people to oppose specific manifestations of power while maintaining the value of freedom and the principles of democratic practice as the system´s legitimizers. The right to resist reveals the true face of the democratic system, forcing power to explain why the system choses to defend and uphold some interests against other values, rights, and freedoms.

Challenged by voices in the streets that claim their right to protest, challenge, oppose or disobey, the agents of power have often argued that there is no such thing as the right to resist, or that is not a right, or that it is just an ideal, or that it is illegal. Misplaced legal arguments have served to crush dissent with the argument of the primacy of the rule of law and the centrality of obeyance to the law as means to ensure peace and prosperity. This part examines the legal standing of the right to resist in liberal democracies by examining the features of the *ius resistendi* as a legal concept through legal probe, using some of the long-established and commonly accepted legal analysis theories. By unveiling some of the ways in which democratic regimes constrain the *ius resistendi* in legal terms, I intend to demonstrate that the right to resist is indeed right, and that besides political opportunity, there are no reasons why legal orthodoxy should not consider it as such.

4.1. A positive right.

In most liberal democracies, the order is embedded in a constitution, a covenant that materializes the order´s efforts to frame and constrain the notion of rights to politically manageable concepts and behaviours. Constitutions are a set of political ideas and assumptions about the nature and conditions of legality, which in turn define the character of legitimate government (Allan 2017)P1). Constitutions can enumerate rights, provide a snapshot of social interactions in each time, even make predictions of future behaviour, but

they are necessarily limited. They cannot enumerate every right or establish the conditions for every relation between the constituent and the constituted sovereignties. Even H.L.A. Hart was concerned by the possibility that law could not enclose all context-specific felt social experiences (Boos 1996). Constitutions, at most, channel the debate about rights into a reasonably coherent social discourse (Rubin 2008)P133) but by no means constrain all that there is.

Some consider that the constitution eternalizes a temporary balance of power (Douzinas 2014b)P152), and that it is an attempt, by those in the present, to fix and regulate the life of future generations (Demirović 2017)P33). Still others consider that the constitution operates to police the boundaries, and to specify the limits, of a singular worldview (Loughlin 2017)P3). To do so, constitutions provide the state with wide margins of appreciation about what constitutes deviant behaviour to a particular conception of society. Constitutions aim at setting and protecting a *status quo* through what one could call "requisite stability", for, at least in liberal democracies, the entire order depends, for its validity, on the fact that the people have not yet changed it (Niesen 2019b)P33).

We generally accept that if it is embedded in a constitution, a right is essentially legal, legitimate and occupies to the highest normative position in the order. The constitution, after all, is the normative source of legitimacy for the rest of the system. We also believe that a constitutional right is a fundamental right that must be protected. Since about twenty percent of all constitutions in the world contain references to the *ius resistendi*, one could then seemingly settle the debate about the "legality" (or rather, the legal character) of the right to resist. If in some countries the *ius resistendi* is a constitutional right, then there can be no doubt that the right to resist is a right.

The right to resist is embedded in the constitutions of Armenia, Azerbaijan, the Czech Republic, Estonia, Greece, Hungary, Lithuania, Portugal, Slovakia as well as in the constitutions of the two main foundational states of the European Union, France and Germany (Ginsburg, Lansberg-Rodriguez, and Versteeg 2013)P1218). All constitutional provisions concerning the *ius resistendi* in the European area refer to the right and the duty of citizens to resist an unlawful attack against the state or the constitution, in other words, to the classical function of the *ius resistendi*[234]. But that is not the case everywhere. In some

[234] The last article of the 1975 Greek constitution (Section IV: Final Provision, Article 120) explicitly consecrates "the right and the duty to resist by all possible means against anyone who attempts the violent abolition of the Constitution". The term "by all possible means" remains open to interpretation.

Latin American countries their constitutions recognize the individual and collective right to resist against the government, but also against other parties that violate people´s rights[235].

In some jurisdictions, the right to resist has a clear legal character. In France, for instance, although the right to resist oppression was not taken up by the current Constitution, it is indirectly enshrined in it by reference to the principles of the 1789 Declaration of the Rights of Man and of the Citizen. The Preamble of the 1958 French Constitution, and the 1789 Declaration, form an integral part of the constitutionality block, so the rights and principles they set out are endowed with legal value, thus achieving the status of positive law (Fragkou 2013)P839). In its decision of 16 January 1982, known as the "nationalization law", the French Constitutional Council affirmed that "the very principles set out in the Declaration of the Rights of Man have full constitutional value […] with regard to the fundamental character of right of property, the preservation of which constitutes one of the goals of political society and which is placed at the same level as freedom, security and resistance to oppression as regards the guarantees given to the holders of this right and the prerogatives of public power"[236].

In this scenario, it would then be technically conceivable to appeal to the *ius resistendi* in a court of law, contesting legal liability on grounds that criminal or civil charges for civil disobedience, for instance, would limit a constitutionally guaranteed right to resist. In addition, French law also technically sanctions the appeal to the right to resist when a public official is requested to follow illegal orders from her superior, or when those orders gravely compromise the public interest[237]. The Constitution of the Fifth Republic, established by Charles de Gaulle after the second world war, reflects a deep-felt concern to instil the

[235] Art. 98 of the 2008 Constitution of Ecuador declares that "Individuals and groups may exercise the right to resist actions or omissions of the public power or of non-state natural or legal persons that violate or may violate their constitutional rights and demand the recognition of new rights". In its Sentence T-571/08 of 4 June 2008, in its paragraph 14, the Constitutional Court of Colombia declared that dissent and protest regarding the content of a normative provision was allowed. In paragraph 15, the Court also ruled that citizens could be assisted by the right to resist compliance with a provision, if it was openly and clearly contrary to constitutional norms, or if said resistance advocated compliance with higher principles of justice, equity, dignity, among others, as a form of protest and manifestation of disagreement. The Constitutional Court of Colombia argued that the resistance has a logical explanation and legitimacy in a formally democratic system.

[236] *Décision n° 81-132 DC du 16 janvier 1982. Loi de nationalisation*.

[237] *Art. 28 de la loi n° 83-634 du 13 juillet 1983, Loi portant droits et obligations des fonctionnaires : « Tout fonctionnaire […] doit se conformer aux instructions de son supérieur hiérarchique, sauf dans le cas où l'ordre donné est manifestement illégal et de nature à compromettre gravement un intérêt public ».* In spite of this provision, the right to resist an illegal act of public authority has been rejected by the French Court of Cassation in the *Boissin* judgment, which establishes a presumption of legality of acts of public authorities and prohibits individuals from the right to constitute themselves judge of acts emanating from public authority (Ogien 2015)P584).

Republic with solid democratic moral values. And yet, the possibilities that the constitution and the laws of France offer are rarely, if ever, used.

The 1949 Basic Law for the Federal Republic of Germany, the *Grundgesetz*, incorporates the right to resist as an integral part of the constitutional principles. It was included to ensure that no threat against the new democratic state would ever be allowed, and that emergency provisions (art 48 of the Weimar Constitution), would never be misused again (Marsavelski 2013)P272)[238]. Article 20(4) of the 1949 constitution states that "All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available". Article 20(1) of the Bonn Basic Law provides that the Federal Republic of Germany is a democratic and social federal state. Art 20(2) declares that all state authority is derived from the people, and that it shall be exercised by the people through elections and other votes, and through specific legislative, executive, and judicial bodies. And article 20(3), that the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice[239]. If and when those principles; the principle of democracy[240], the principle of popular sovereignty, and the allegiance of public authorities to the constitutional order and to justice, were to be outrightly challenged or crumble, the only viable option to protect democracy would be to actively resist anyone who attempted to undermine it. Article 20(4) of the German constitution epitomizes the culmination of a logic of militant democracy[241].

Article 20(4) of the Basic Law returns the constituent power to the people, restoring their capacity to exert their sovereignty to defend, only, democracy, for no other value-system of political organization would be acceptable. On 20 July 2019, during the 75th commemoration

[238] Art 48 "(…) In case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to reestablish law and order, if necessary, using armed force. In the pursuit of this aim he may suspend the civil rights (…)". This article allowed the President to declare a state of emergency in Germany in times of national danger and to rule as a dictator for short periods of time. Hitler relied on the precedent of Article 48 to pass the Enabling Act which gave him truly unlimited dictatorial powers.
[239] Section 113(3) of the German Penal Code provides that resistance to an enforcement officer is not punishable if the official act is not lawful, or if the offender mistakenly assumes that the official act is lawful.
[240] In its 1956 decision banning the German Communist Party (KPD), the German Constitutional Court noted that the KPD represented the downfall of all human freedom, the very destruction of the individual in favor of an oligarchically run state collective (…) that revolution plotted against law and justice (…) and parties which, by reason of their aims or the behaviour of their members, seek to impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional .
[241] One could argue, in a very simplistic manner, that militant democracy is democratic resistance from the top, while democratic resistance is militant democracy from the bottom. Very much like the right to resist, "militant democracy is a topic at the intersection of political science, law and philosophy" (Ellian and Rijkpema 2018)P8). Herbert Marcuse argues (in what is a defense of militant democracy), that if democratic tolerance had been withdrawn when the future leaders started their campaign, mankind would have had a chance of avoiding Auschwitz and a World War (Marcuse 1965)P109). A militant conception of democracy is one in which the core democratic values ought to be defended by actively suppressing extremist ideas and groups in the public sphere (Ellian and Molier 2015)P281). I defend a militant conception of the right to resist.

of Operation Valkyrie, Hitler´s assassination plot, the then German Chancellor Angela Merkel stated that Germans have a duty to stand up to right-wing extremists, just as the resistance faced down Adolf Hitler. "We, too, have a duty today to stand up against all those tendencies that want to destroy democracy". Merkel added that the right to resistance in defence of the democratic order was contemplated in the German Constitution, written five years after the Capitulation of the Third Reich[242]. One cannot assume that the embedment of the right to resist in the German constitution is merely declaratory. It has political meaning and is meant to be used.

The *ius resistendi* is not only formally embedded in the German Basic Law, but it is also objectively protected through other constitutional provisions. Article 93(1)(4a), "*Jurisdiction of the Federal Constitutional Court*", proclaims that "The Federal Constitutional Court rules: […] on constitutional complaints which may be lodged by anyone who considers that he has been wronged by the public authority in one of his fundamental rights, or in one of his rights guaranteed by articles 20, al. 4, 33, 38, 101, 103 and 104"[243]. Article 20(4) can therefore be the subject of a constitutional complaint. The right to resist, in this sense, is clearly presented as a justiciable and subjective right (Grosbon 2008). In fact, German courts have had at least two instances in which they have been presented with the challenge of determining the extent to which the right to resist could be legitimately asserted and justified as part of a legal defence[244].

The wording of article 20(4) of the German constitution, "seeking to abolish this constitutional order", does not specify whether the threat to the order should be direct and simultaneous against all three basic principles of the system (democracy, popular sovereignty, and legitimate authority), that is, against the totality of the order, or whether partial, yet significant challenges to one or more of those pillars would also warrant invoking article 20(4). This is a very relevant point because what Germany and other liberal democracies currently face is not a complete failure, nor a generalized threat against the constitutional order, but rather, increasing doubts about the legitimacy of some of the tenets

[242] https://www.bbc.com/news/world-europe-49056973.

[243] https://www.btg-bestellservice.de/pdf/80201000.pdf

[244] One case was in Bremen, where an individual asked for reparations for those that resisted the Nazi regime and the other in 1956 when deciding on the banning of the German Communist Party (KPD). In this case the Court noted that the call for "national resistance" under the cover of the policy of reunification was not a constitutional means of exercising partisan democracy. In 2017, the German Constitutional Court decided not to ban the extreme right Nationaldemokratische Partei Deutschlands (NPD) because the party, in spite of being antidemocratic, was too insignificant to constitute a threat to Germany (Ellian & Rijkpema, 2018). Only in the first six months of 2020 Germany banned three extreme-right political movements. In January the ministry of interior banned the neo-nazi group Combat 18, in March the association "Geeinte deutsche Völker und Stämme" (German people and tribes united), and in June the Nordadler group, mostly active on the internet (La Vanguardia, 23 June 2020).

that support the pillars of that order (e.g., lack of independence of the judicial, non-representative electoral outcomes, or a system that deprives people of their social wellbeing). Specific threats against some of the tenants of the democratic system may undermine the system in its totality.

Because the U.S. Constitution makes no reference to the words of the Declaration of Independence ("that whenever any form of government becomes destructive of these ends - life, liberty, and the pursuit of happiness - it is the right of the people to alter or to abolish it"[245]), some consider that, in the U.S., the *ius resistendi* is extra-constitutional[246]. Those that defend the "original understanding" theory of constitutional interpretation, however, argue that the manner in which the U.S. Constitution was drafted in 1787, and later ratified, confirms the belief that it is constitutionally legal for the people to abolish their existing government and build a new one, that is, to assert their right to resist (Tiefenbrun 2003)P3). Still others believe that the *ius resistendi* has been circumvented by the real innovation of American constitutionalism, the establishment of judicial review (Stoner 2006)P9), a system that has effectively domesticated the right to resist by establishing an institution that (does) enforce the higher law against the ruler (Rubin 2008)P129).

As in later versions of the French Declaration of the Rights of Man, the non-inclusion of the *ius resistendi* in the U.S. constitution reveals the wilful intention of the founding fathers to constrain the emancipation of people to rebel against a newly formed, and still weak, order[247]. I contend, however, that several amendments of the U.S. constitution are crucial to understanding the enduring political dimension and influence of the *ius resistendi* in the ethos of the U.S. system[248]. The First Amendment of the Constitution[249] is a statement of tolerance and of the factual possibility of political dissent. It contains the elements that would later become some of the most recognizable human rights; freedom of speech, of the press, of peaceful assembly, or the right to redress. Notwithstanding heated debates about

[245] https://www.archives.gov/founding-docs/declaration-transcript

[246] The constitutions of 35 American states have, however, the same or similar provisions on the right of revolution as in the preamble of the American Declaration of Independence. The constitutions of New Hampshire, North Carolina, and Tennessee have the identical phrase "[t]he doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind (Marsavelski 2013)P270).

[247] I use "non-inclusion" rather than the word "exclusion" to avoid the implication of an explicit prohibition.

[248] Others speak of auxiliary constitutional rights to refer to the U.S. Constitution´s amendments, in particular the second (the right to bear arms) and the fifth (privilege against self-incrimination), as rights that protect civil disobedience. These rights, however, are paradoxical, as they protect the individual, but hamper the action of the state, and as a result, courts will never able to determine their scope in a coherent fashion (M. S. Green 2002)P117).

[249] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

the right to bear arms, the Second Amendment[250] embodies a concrete expression of the right to resist in a new society which still needed to defend its nascent freedom and autonomy against counter-revolutionary or tyrannical forces. The Ninth amendment of the U.S. constitution[251] imply that although the right to resist was not included in the Constitution, it does not mean that U.S. citizens gave it up. The U.S. Founding Fathers were determined to ensure that "the unenumerated (natural) rights that people possessed prior to the formation of government, and which they retain afterwards, (were) treated in the same manner as those (natural) rights that were enumerated in the Bill of Rights" (R. E. Barnett 2006)P1). Of all the unenumerated rights in the constitution, the *ius resistendi* was (and is) unquestionably a Lockean reserved right retained by people, for its existence prior to the formation of government is what gave birth to the very republic. The Fourteenth[252] and Fifteenth Amendments[253] were meant to translate into constitutional terms the changes that had come about as the result of the Civil War and affirmed the new rights of freed women and men (Berkowitz 2019)P3). The amendment stated that everyone born in the United States, including former slaves, were American citizens, and as such, were entitled, under the law, to make use of their prerogatives to express their disaccord with the government through voting, or other means.

A written constitution articulating shared norms in a popular idiom provides a reference-point by which to show up the failings of the *status quo* (White 2017)P11). It also provides a backdrop through which articulate specific objectives pointing to codified commitments that the existing order fails to honour. For some, "the inclusion of a right to resist in a constitutional text can facilitate its exercise, for example by stipulating predicate conditions and designating who has the right to invoke it as well as by facilitating coordination, because it would reminds citizens of their collective power" (Ginsburg, Lansberg-Rodriguez, and Versteeg 2013)P1194). The preoccupation of those that advocate for the constitutionalization of the right to resist in western liberal democracies is not so much with

[250] "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed".
[251] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".
[252] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States (…)".
[253] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude".

describing the right itself, but with defining more precisely the conditions under which it can be exercised[254].

The positive form of the right may enable its proclamation and provide the elements to substantiate its legal status, but that form does not determine its legitimacy nor its normative value. For Kant, the existence of a positive norm that legitimizes the *ius resistendi* would be equivalent to the dissolution of the state (Heck 2012)P191). I agree with Kant that the right to resist should not be positivized, but for different reasons. The right to resist is not tributary to the constitution, nor should it be constrained by it or by any other positive form, not only to guard the right to resist from the dangers of the paradox of institutionalization[255], but to protect it from losing its essence by being interpreted from a material conception. To positivize the right to resist is to control it, "to accept the right of resistance only within the framework of the Constitution is like denying it; not only because it confuses normativity and effectiveness (it presupposes that constitutional guarantees will work well), but also, because it reduces legitimacy to legality and, ultimately, the disobedient to a criminal" (Pereira Sáez 2015)P270).

Although some, like Waldron, argue that liberals should place a positive value on dissent, diversity, and "moral distress" (Christman 1995)P419), the very nature of the *ius resistendi* as an indeterminate right implies that it cannot be artificially constrained through potentially misplaced or politically constraining positivization[256]. If acknowledged as a legal right, the *ius resistendi* becomes part of the legal order, it then ceases to be the right to resist to become a positive "right to something determinate", and with the determinacy, it loses its essential nature and its claim to universality. From the moment an objection, or the substantive basis of an external expression of the right to resist is confirmed by law, there is no longer disobedience to the law.

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[254] Depending on the context, the right to resist can serve as a fundamentally democratic and forward-looking tool that constrains future government abuse and acts as an insurance policy against undemocratic backsliding, or it can serve as a backward-looking justification for coup-makers who seek retroactive legitimacy for whatever political crimes placed them in a position to make a new constitution in the first place (Ginsburg, Lansberg-Rodriguez, and Versteeg 2013)P1184).

[255] The paradox of institutionalization means that when rules become formal legal rules, the opposition has grounds for radicalization, as it is at this point that the inequalities become apparent but are also made permanent through codification (Daase and Deitelhoff 2019). The paradox is also one of legitimacy because "when rights are recognized by states and governments the regulatory framework can restrict and constrain collective action, but at the same time, can open a formal opportunity to legitimize and enhance collective action" (López 2017).

[256] Referring to freedom of assembly, in Case Navalnyy V. Russia (Applications nos. 29580/12 and 4 others of 15 November 2018), the ECHR declared that (para. 98) "to avert the risk of a restrictive interpretation, the Court has refrained from formulating the notion of an assembly, which it regards as an autonomous concept, or exhaustively listing the criteria which would define it". The same applies to the right to resist.

I cannot but agree with Carl Schmitt's formulation that the idea of institutionalizing resistance is a typically inadequate liberal evasion, because "insofar as one organizes it, one denaturalizes it; as soon as one rationalizes it, it remains rationed" (McDaniel 2018)P402). The liberal order has expanded the notion of rights, including that of political participation, as a strategy to resist the resistances inherent to its very order[257]. The approach has been partially successful because liberal democracies have been able to offer greater opportunities to participate in the system of rule, "and the more space that was accorded to resistance, the more the resistance of dissidence lost its radical character and turned into opposition that seeks to exercise influence within the applicable rules of the game" (Daase and Deitelhoff 2019)P19). The liberal state has focused on providing responses to particular claims exerted through the right to resist, but it has failed in understanding its universal, deeply political, non-material nature and, with it, the magnitude and scope of its multiple functions and expressions. Positivizing the *ius resistendi* is not a necessary condition to validate its legal character or to ensure its protection and applicability. A reasonable normative framework, the enabling rights, a responsive *ius politicum*, or the genuine implementation of the principles of democratic practice within a broader conception of rights, provide the *ius resistendi* both with its legal substance, so that it can perform as a right, as well as with its performative weight, so that it can maintain its indeterminacy and universality while fulfilling its functions.

4.2. A legal analysis of the right to resist.

In this section, I examine the legal character of the right to resist from the perspective of traditional legal approaches to underline some features that make the *ius resistendi* special among rights. The purpose of analysing the right to resist under mainstream legal methods, for instance, the will and the interest theories, the Hohfeldian incidents, or Fuller´s principles, is purely vindictive; it aims at providing further conclusive elements about the certainty of the right to resist as a right. Ultimately, the objective of examining the legal nature of the *ius resistendi* serves another purpose, to counterbalance the anti-legal turn that robs the right to resist and its advocates of an impressive line of defence (Scheuerman 2015)P427).

4.2.1. The Hohfeldian incidents.

A couple of clarifications are necessary before examining the right to resist under Wesley Newcomb Hohfeld´s account of rights. First, although Hohfeld thought that all legal

[257] Brownlee believes that if we only consider the right to resist in its aspect of political participation, it then means that we deny the right to those that are politically disadvantaged (for instance those that live in illiberal regimes), but that it also contradicts the very essence of the right to resist in a politically participatory society, especially when the right to political participation is purely ritualistic or inconsequential.

relations could be analysed as relations between two individuals (Van Duffel 2012b)P105), nothing prevents his work from being used outside the legal discourse and applied, for example, to moral rights (Toscano 2014)P225). And second, this approach is also suitable to examine the right to resist from the perspective of the *ius politicum* because that is a sphere formed by multiple relations, numerous rights-bearers and duty-holders and multi-layered incidents that distort the identification of the specific object of the right, and of its correlative duties, to enter the domain of the political, the moral and the social.

Some argue that all Hohfeldian incidents that serve certain functions should be classified as rights (Andersson 2015)P1636) and, therefore, that singular Hohfeldian positions (privilege, claim, power, and immunity) are never rights in or by themselves (Frydrych 2019)P461). In fact, the most valued rights, the rights we appreciate the most, like the right to life, freedom of speech, contractual rights, property rights and so on, are actually complex packages of Hohfeldian positions (Toscano 2014)P232). These Hohfeldian combinations necessarily extend to domains beyond the legal, a condition that does not question the legality or the validity of the rights in those correlations. The right to resist, too, is a complex package of incidents that extends beyond the legal.

If one was to consider Hohfeld´s incidents alone, one could classify the right to resist as an immunity-right because, in an ideal world, the *ius resistendi* should, theoretically, protect their holders from the authority of others and enable them to be free (or at least aim at being free) from conditions like oppression, tyranny or exploitation. In the real world, however, there is no immunity for those that assert their right to resist. Frequently, the repressive actions of the state in managing many external expressions of the right to resist suggests a lack of appreciation of immunity rights of those that exert their right. That does not mean, as I will argue later, that there are no moral protections (different from immunities) for those that disobey.

One could also argue that the *ius resistendi* is a liberty, a privilege-right, in the sense that when the state neglects its obligation to protect fundamental rights, the moral obligation to obey the law disappears and the duty of the state not to interfere with the assertion of the right to resist as a response of its own negligence, arises. But that liberty is not unrestricted. There is no duty, neither a right to resist, if the state fulfils its part of the contract in a manner consistent with the principles of democratic practice. There is only a legal duty when there is a privilege, and there is no privilege to assert a right when that right is not legitimate. If one was to use a privilege-right to resist without a connected moral duty, the *ius resistendi* would cease to exist because it would become a ludicrous and immoral privilege. Additionally, even if the state was not to fulfil its part of the contract, the *ius resistendi* could not be a Hohfeldian privilege because it imposes no actual duties on others to resist,

although everyone has the same right. Asserting the *ius resistendi* may perhaps suggest a moral duty to resist on others that may be in the same situation, but it cannot impose an actual duty on them to do so.

The right to resist is a claim-right, "a right in the strictest sense" (Toscano 2014)P227). Still, it is not just a regular claim-right. The *ius resistendi* is a right that makes claims to and from power, it is a power-right. The verb "to resist" implies power, it points to an engagement to counteract an action and provoke a reaction or to exert force to change a circumstance. Effective claims to fulfil duties (by the state, for instance), must be accompanied by a degree of power to be effective. The *ius resistendi* carries the power of the moral force of the claim, of the normative and performative authority of the rights enabling its manifestation, and the strength of the political, social or cultural significance of its external expression. Stephen Darwall argues that to have a claim-right, "includes a second-personal authority to resist, complain, remonstrate, and perhaps use coercive measures of other kinds, including, perhaps, to gain compensation if the right is violated" (Waldron 2009). The *ius resistendi* translates claims into the actuality of a right through power. It is through the right to resist that we re-claim other rights and claim the right to resist as a right to have rights.

If individuals have a claim against oppression, then individuals have the power, the ability within a set of rules, to alter the normative situation of oneself or another (Wenar 2005)P230). Individuals also have the power to transfer the claim to the state or to other social institutions (Blunt 2017)P25) (Caney 2015)P3), therefore generating duties on them. If we assert the right to resist, we self-generate an obligation regarding the agents that we oppose in terms of recognizing their power over our own claim (for instance, the state), or their immunity in relation to our claim (for instance those that do not want to participate in a demonstration). But then again, the state and those that do not partake also have an obligation to recognize us as agents capable of making a claim. Some declare that we do have reason to regard claim-rights as relational positions (Duarte d'Almeida 2016), especially those in the body politic. While the right to resist may be directed towards a concrete objective that represents the immediate grievance (a politician, a law, or a policy), what a claim does is to assert the need for recognition of the contention, not only of the object or the position that the agent occupies.

The assertion of the *ius resistendi* always constitutes a claim, and claim rights, as Feinberg notes "are somehow prior to, or more basic than the duties with which they are necessarily correlated (Feinberg 1970)P620). The right to resist is prior to, and more basic than any duty imposed by any normative system because it determines, to a great extent, the very existence of that system. Because claim-rights, and in particular the right to resist, generate new relationships of recognition through democratic contestation (Hoover 2019)P11), they

also re-adjust the relations of power. If the assertion of a right reveals the degree of protection of the claim by those responsible to fulfil the corresponding duty, the assertion of the right to resist reveals the degree to which power respects or prevents the expression of the principles of the democratic order by fulfilling or not its duty to respect the assertion of a claim. In Hohfeldian terms, the content of A's claim corresponds to the content of B's duty, so we can find out when A's claim has been respected or infringed, for instance, if the duty of B to respect A´s right has been complied with or not. The content of the claim always refers to the behaviour of the person (or the agent) bearing the correlative duty, concerning what B must do, or must not do (Toscano 2014)P228). The right to resist (usually, but not always) embodies a claim against the state to refrain from doing something, or to demand that it does something. In its most basic conception, the state has a duty to enable the necessary conditions for the realization of rights and freedoms consistent with the values of the ideology and therefore, the state should have no power-right over the claim-rights of those that resist when their claim is normatively filled with the values that shape the structure of the order. The state can forbid protestors from going into the streets (thus preventing the manifestation of A's claim), but it will usually have to use force or coercion[258], not just normative power (thus violating B´s duties).

Moral constraints are the only caveat to enjoying rights, and the causal factor to the validity of a claim right. As Simon Caney puts it, "if other agents are morally required to act in such a way that A enjoys a right X (honouring, of course, some moral constraints), then that gives us good reason to think that, other things being equal, A is morally permitted to act in such a way that A enjoys right X (again, subject to honouring certain moral constraints) (Caney 2020)P7). One would think that as long as X is within acceptable moral parameters, then A should have the right to enjoy X. If X was the (moral) right to resist, then B (the state), should ensure that A (the protesters) can enjoy X by acting in a way as to create the necessary conditions for X to be realized (e.g., the protection of the enabling rights). Now, because of the complexity of connected of incidents, if other agents (C: media, non-resisters, other groups…) are not politically or legally required to allow X (the right to resist) even if the *ius resistendi* is asserted within moral parameters, then there is no guarantee that A can enjoy X, even if X imposes a duty on B and C to respect the claim of A. The question then is, does B have an obligation to impose a duty to respect X on C? If that was not the case, then A

[258] In its opinion No. 826/2015 of 22 March 2021 (CDL-AD(2021)004) on Spain´s Citizen Security Law, the European Commission For Democracy Through Law (Venice Commission) noted that in view of the imprecise definition of some offences (most notably Article 36 para. 6 which speaks of the "disobedience to the authorities"), high economic fines may have a chilling effect on the exercise of the freedom of assembly. The Commission further points out the danger of article 36 of the Spanish law as it implies that any disobedience to any official order or regulation would be penalized, not only disobedience within the framework of that specific law (R. Barrett et al. 2021)para 72).

would not be able to enjoy X, and B would be in violation of its obligation to ensure that A can enjoy X (within moral parameters). A would be then entitled to not obey B because C is morally obligated to respect X.

The key question is, hence, the degree to which moral acceptability, as Caney puts it, honouring some moral constraints, imposes a legal duty on C to act in a way that A can enjoy X. Some parties may not be legally required to act in a way as to facilitate X, but they are nevertheless morally obligated to do so when X is within moral parameters (irrespective of the a-legality of the claim). A person (or a community) in need, is always "in a position" to make a claim (which may derive into a right), even when there is no one in the corresponding position to do anything about it (Feinberg 1970)P623). A claim "in need" (an injustice, a moral injury, an abuse), is always a moral right that imposes moral duties on others. Claim rights can express the desire for social change as well as our sense of justice, such that we are not simply demanding revenge, but social recognition of our injury as well as public accountability (Zivi 2012)P57–58).

4.2.2. Will and Interest theories.

Legal scholars have sought to place rights either in the "will" or in the "interest" theory to determine their nature and their functions. The main difference between will theory and interest theory is their different understanding about the directionality of duties and the nature of the rights to which duties correspond.

According to the will (or choice) theory of rights, right bearers must be able of agency so as to be able to choose and to affect the behaviour of others (Wenar, 2005) (Andersson, 2015) (Frydrych 2019). For will theorists, the function of rights is to allocate domains of freedom, an argument that explains why the choice theory vindicates that rights are often regarded as fundamental to one's personhood, individuality, and self-determination (Harel 2005)P194). Will has been typically understood to be the faculty that is most nearly proximate to rational action (Postema 2001)P480), because will, at least in the domain of the *ius politicum*, is about exerting (individual or collective) agency based on freedom. On the other hand, the interest theory of rights requires that right bearers share some morally relevant interests. Rights are portrayed as defenders of well-being or interests via the existence (or imposition), of correlative duties borne by other parties (Frydrych 2019)P456). The essence of the interest theory of legal rights is that rights protect some aspect of the right-holder's situation that is normally to the benefit of a human being, or of a collectivity.

Some argue that because there are various kinds of rights, the will theory and the interest theory are incompatible (Van Duffel 2012b)P105). To solve the apparent conundrum of incompatibility, Leif Wenar proposes a "several functions theory" with the argument that neither theory captures the ordinary understanding we have of rights (Wenar 2005)P238).

Wenar determines that each right, even indeterminate rights, can be identified with one or more of the Hohfeldian incidents, and "that any incident or combination of incidents is a right, but only if it performs one or more of the six functions: exemption, discretion, or authorization, or entitle their holders to protection, provision, or performance (Wenar 2005)P246). Others, like Rainer Forst, try to avert the difficulties that the interest and will theories of rights run into by proposing that basic rights are understood to specify what it means to be recognized as an equal and free normative authority, that is, not in terms of interest, or will, but as specifications of what it means to have the equal status of normative authority (Wolthuis, Mak, and ten Haaf 2017)P4). The question, however, is, equal to what, or to whom?

Although I agree that there may be different approaches to explaining rights, for the purposes of this thesis I chose to follow traditional theories, for any attempt to reformulate a theory of rights to deliberately fit my account of the *ius resistendi* would undermine the objective to prove that the right to resist possesses all the necessary elements of what we conventionally consider to be "a right". The will theory of rights, in fact, provides sufficient elements to explain the nature and function of the *ius resistendi*. Those engaging in resistance, civil disobedience or non-cooperation may share a common interest to change a policy, denounce a law, or pursue a change, but an interest alone, even if shared, is not sufficient to actualize a right. The *ius resistendi* requires an action to become "the right to", and not merely a right to. To become a right, the *ius resistendi* requires a will to act, not only an interest to do so.

People have the (rational) free choice (to resist, or not to resist), and to collectively form agency to do so[259]. Choice creates duties for others but also for those that choose. For the will theory, "a promisee (let´s say, the citizen) has a right because she has the power to demand (for instance, through a protest) performance of the promisor's duty (for instance, the state), or to waive performance (not to protest), as she likes" (Wenar 2005)P238). Will is, in Kantian terms, freedom, and freedom is the central value of democratically conceived political theory and practice (Celikates 2014b)P208). Freedom is a democratic value, and choice, whether it is translated into an engagement or not, is the expression of that value. For instance, if people waive the obligation of the state to fulfil its duties (for instance, for protection), then they waive their right (to be protected) and with it, they extinguish the power that they have over that duty, that is, their choice not to oppose the non-fulfilment of the state´s duty. There is nothing in the logic of Hohfeld's terminology that makes it

[259] In the liberal tradition, free choice belongs only to the "unencumbered" individual. What matters is not the end in itself, but the possibility of free choice (Spector 1995)P69).

impossible for a set of legal rules to require people to exercise a power that they have (Van Duffel 2012a)P327). In other words, a right becomes a right when is exercised through will.

The will theory of rights has been criticized as too narrow because some consider that it cannot account for many of the items that we commonly identify as rights (Van Duffel 2012a)P321). The will theory is also criticized because it does not recognize the existence of inalienable claim rights. Some also contend that one of the main shortcomings of the will theory is that it refuses to attribute claim-rights to senile people, children, or comatose people because they cannot exercise control over their will or other people´s duties. I have elsewhere argued that freedom (choice) must be bonded with reason, since freedom without a rational purpose may become a destructing force. Reason must exist in the assertion of a right, and in the responsibility derived from that right. Those that have a duty of care (whether an individual or society as a body politic) also have a responsibility of reasonableness, choosing on behalf of those that cannot in a way that it considers both their personal circumstances as well as the moral/ideological framework in which the choice is made. Unlike Rawls´s veil of ignorance, my reading of the will theory presupposes the full knowledge of one´s position in the order, as a moral agent, but also as a subject of rights. Those caring for children, or the comatose, are under a duty to choose for them in a way that promotes their wellbeing and their will-potentiality, that is, in a way that creates the conditions for their own (potential) choice in line with the fundamental rights and principles of the order. The non-will of children creates duties on those that act under a legally or morally delegated will. Those with a duty of care for democratic values also have a duty to act on behalf of those that cannot make a rational choice (because they are, for instance, unable to overcome their *akrasia*). The choices we make determine the degree to which the will of others is protected. It is through will that rights are formed, asserted, defended, or contended.

4.2.3. Fuller´s principles.

In his debate with H.L.A. Hart, Lon Fuller outlined the necessary conditions that law should satisfy in order to be considered law. Fuller argued that there is a fundamental difference between the principle that "*lex injusta non est lex*", and the positivist view that considers that unjust laws, as long as they are lawfully enacted, still count as law, yet with the caveat that they may not be applied if they are grossly immoral. For Fuller, a social arrangement is a legal system insofar that arrangement satisfies eight principles that he collectively called "the inner morality of law", moral procedural requirements that impose a minimal morality of fairness for laws to be considered valid laws: (1) sufficiently general, (2) publicly promulgated, (3) prospective, that is, applicable only to future behaviour and not retroactively, (4) minimally clear and intelligible, (5) free of contradictions, (6) relatively constant, so that they don't continuously change from day to day, (7) possible to obey, in

other words, no laws requiring the impossible, and (8) administered in a way that does not wildly diverge from their obvious or apparent meaning, in other words, congruence between the official action and the declared rule (Donelson and Hannikainen 2018)P2).

Fuller´s principles are meant to provide an objective validation of the soundness of laws, but this validation is nonetheless subjective in the sense that it is contingent on the order, the time, and the interpretation that lawmakers and duty-bearers have of the principles that underpin the law. Let us imagine, as an academic exercise, that a Parliament enacts a law on the *ius resistendi*, proclaiming that citizens have a right to resist if a determinate number of situations occur. Would such a law pass the inner morality scrutiny of Fuller´s principles?

A law grating the right to resist would satisfy the principle of generality both in terms of applicability and scope. Generality does not necessarily mean universality but rather, common applicability. Since law cannot legislate all human conduct, a truth stated by Hart himself, a law positivizing the right to resist could neither circumscribe all possible acts of resistance and, thus, any law sanctioning the right to resist would automatically constraint the *ius resistendi* to a specific sphere, one which would be generally applicable in the specific circumstances determined by the law. Because it is not in the nature of laws to be indeterminate, for the law would be inapplicable and rights would lack purpose, the *ius resistendi* would benefit from the specificity of a determination to acquire the features and the functions of a generally applicable right.

Most western liberal democracies already require that laws be publicized to be valid. As it currently stands, twenty per cent of world constitutions and other laws already contain direct references to the right to resist (Ginsburg, Lansberg-Rodriguez, and Versteeg 2013)P1218). A law developing the *ius resistendi* could not be retroactive (*"lex prospicit non respicit"*), because the actualization of the right to resist depends on inhabiting actuality (Caygill 2013)P210). A force can only be counteracted while the force is exerted. In many cases people have appealed to what Thoreau called "historical illegitimacy" (Simmons 2010)P1824) that is, wrongful conduct in the history of the state's subjection of persons or territories to its coercive powers. Yet for the *ius resistendi* to be legitimately asserted, even if appealing to manifestations of earlier subjection, it must refer to a situation where that force is still extant. If the actuality has changed and the force of subjection is no longer standing, acts (or laws) concerning circumstances in the past are not expressions of the right to resist, although these laws may retroactively recognize past legitimate expressions of the *ius resistendi*[260].

[260] Many countries (Austria, Belgium, France, Germany, Italy, the Netherlands and Romania) punish Holocaust and Nazi-crimes denial (Baranowska and Wójcik 2017). The European Parliament has also passed

A legal right to resist would (technically) end the debate between moral obligation and legal permissibility, between the legality and the legitimacy of doing so. Depending on the circumstances and the scope of the law, in principle there would be no contradiction between the act of resisting (of exerting a right) and the reasons for resisting (having that right). Having a right to resist would mean being able to use the right to resist. A law to resist would not demand the impossible, since the potentiality of the *ius resistendi* would be determined by the law and contingent on the circumstances in which the law would be asserted. A law to resist would posit a right that has remained relatively constant throughout history, although its external expressions have constantly adapted to historical circumstances[261]. Finally, the law would pose no incongruence or contradiction. There is no contradiction in a power allowing its subjects to oppose its commands when that power favours legitimacy and respect to the principles of democracy.

I am aware that the arguments above can be easily disputed. Such is the nature of law, and precisely the objective of this exercise; to reason that the morality of law is determined by the political narrative that creates the concept of rights. With a lax interpretation of the principles of legality, I seek to vindicate the need for legal systems (and legal theorists) to embrace a broader conception of rights, one in which the *ius resistendi* could reclaim its rightful place in the legal order, coexisting with, and reinforcing other rights. I also seek to challenge the narrow precepts of legal theory while agreeing with Fuller that law is not a

several resolutions on the issue, for instance, the European Parliament resolution on the European conscience and totalitarianism (CDL-AD(2013)004). Memory laws provide, in a way, retroactive legitimization (and even legalization) of acts that would have constituted (illegal) acts of resistance when they took place. By doing so, the legislator acknowledges the existence of the right to resist as a legitimate right, for it acknowledges, in the present, that the *ius resistendi* constituted a valid channel to change the normative status in a given moment, a status that it is now fully legal and legitimate. Anti-liberal memory laws imposing restrictive readings of history, or denying state responsibly for past acts, also recognize the potential threat that the *ius resistendi* represents to the official revisionist views. Those laws are enacted to constrain counter-resistance to the official version of history. Memory laws can be used with different purposes, they contribute to shaping and setting current values, or lead to censorship, threaten freedom of expression, incite historical revisionism, or ignite memory wars as purposeful attempts to modify past narratives to vindicate current policies. Without judging their moral or functional suitability, for the purpose of this thesis, memory laws evince the impact, power and normative value of a legally and politically recognizable *ius resistendi*.

[261] Mona Lilja and Stellan Vinthagen have attempted to identify the kind of resistance that would respond to the exercise of each form of power identified by Foucault (see footnote 11). Sovereign power would be countered by resistance that is claiming a different sovereignty that undermines the monopoly of the sovereign, or that defies the pressure to obey and to subordinate to the sword, that is, the monopoly of the use of force. Resistance to discipline power would be about either openly refusing to participate in the construction of subjectivities, narratives or organizations, or the de facto transformation of such social construction into something else. Resistance to biopower, an advanced form of power, poses particular challenges, but is would basically take the form of heterogeneous "counter-conducts" in which people question certain aspects of control over their lives (Lilja and Vinthagen 2014).

neutral concept, it should be inherently moral and must respect human agency and its constitutive freedom (Gandra Martins 2018)P327).

Some argue that failure to meet the eight principles of legality, even to some degree, "results in something that is not properly called a legal system at all" (Lovett 2015)P4). I disagree. Many laws are imperfectly legal, and in some cases, judging by Fuller´s principles, clearly illegal. It is not uncommon, and increasingly evident, that some laws that do not satisfy Fuller´s principles are nevertheless considered valid legal norms. For instance, an unprecedented build-up of secret law used by many governments, and especially in the U.S., in their fight against terrorism have become a feature of security governance (Goitein 2016), and of the governance of our daily lives. The principle of legality also requires that the description of offenses be sufficiently clear and specific in the criminal code because the vagueness of an offense prevents ordinary citizens from anticipating if their actions are unlawful. In most countries´ penal codes, the crimes of sedition or rebellion are purposefully unclear and even contradictory to serve the political purpose of the State.

Fuller argues that the existence of a legal order depends on effective interaction and cooperation between citizens and law-making and law-applying officials, an idea that it is essential to our idea of legal order (Postema 1994)P367). If we can politically accept as legal laws that are manifestly partially legal, or plainly illegal, then there is no legal reason to reject the idea that the *ius resistendi* could be the basis of a law, even if it failed to meet some of the eight principles outlined by Fuller. In fact, the very essence of the right to resist is in itself a corrective, a response to the failure of other laws (and the very concept of the law), to meet the eight (and other) principles of their inner morality.

In addition to the idea of prescribed correlations between rights and duties, traditional theories of rights consider that there are several formal legal characteristics necessary to distinguish rights from aspirations. For some, like Tony Honoré, rights need recognition and remedy. He argues that if we are sincere in imagining that the interests represented as rights are of sufficient importance to hold others responsible, then in cases of default or rights violation, there must be a secondary right to remedy, that is, the means to compel, even coerce, others into fulfilling or respecting the right in question (Honoré 1988)P 35). Others consider that enforceability is one of the main characteristics that give legal rights their legal character, because if a person or a community's claim can be set aside without remedy, then it is not really a right. That claim may be a statement of interest, perhaps even a vital interest, but if it does not generate an obligation, it cannot be a right (Blunt 2017)P9).

The *ius resistendi* defies the principle that there must be secondary right (or even an external agent) to sanction deviance. *Ubi ius, ibi remedium*. The *ius* in *ius resistendi is* a right, and the *remedium* to its own violation. The *ius resistendi* bestows a claim with the potential of its own

enforceability. Where fundamental rights and freedoms are subject to abuse, specifically through political oppression or social exploitation, that remedial right takes the form of a right to rebel (Honoré 1988)P41) (Finlay 2008)P88). Resistance compels rule to formalize, the formalization generates legitimacy, and that legitimacy appeases resistance (Daase and Deitelhoff 2019)P24). The right to resist creates both a duty to the obligation of a right as well as the remedy for the violation of its own nature, generating obligations to its own self.

4.3. Punishing dissent.

Part One of the thesis illustrates how in the western tradition the legitimately of *ius resistendi* had been measured against the benchmarks of the divine law, the principles of natural rights, the notion of the common good or the fairness of the law. In the past, external expressions of the right to resist could have been considered legitimate or not, politically, legally or socially reprehensible and deemed a threat to the established authority, but they had never been regarded as a criminal act[262]. Legal criminalization of the right to resist is a modern feature, beginning in the 18th century, when the masses of early industrial capitalism, increasingly numerous and oppressed, directly threatened the status of those that dominated the means of production and the means of opinion. A new narrative about the right to resist progressively portrayed it as a negative, destabilizing and illegitimate right, and most importantly, it changed the normative status of those that asserted it, they were no longer rights-bearing agents, but criminals. In liberal societies, the process of hyper-constitutionalization and the generally accepted narrow definition of civil disobedience further contributed to generating a mostly disapproving collective concept about resistance[263]. This process, in turn, helped the capitalist ideology, which tends to be very concerned with how to attenuate the people´s power (Brown 2018)P76), find a suitable philosophical justification to keep dissent in check while officially upholding the principles of liberalism.

If one was to strictly adhere to the legal principle "*nulla poena sine lege*"[264], one should have to argue that where there is no legal recognition of a right (e.g. to resist), then it would not be for the state to punish the conduct in question (e.g. resistance) (Mégret 2009)P13). If the

[262] Medieval Europe understood tyrannicide as an act seeking to reinstall a lawful and morally legitimate royal order, not as a subversive revolutionary act.

[263] Part of this process of hyper-constitutionalization consisted in removing the *ius resistendi*, the reserved right to deviant behavior, from the political ethos, and with it, the political responsibility of citizens who completely abandoned their ability of judgment to rely on the law, or rather, a law, hence consenting to a particular view of society.

[264] Art 49.1 of the EU Charter of Fundamental Rights declares that "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed".

ius resistendi is not considered a right, then it does not generate any duties. And yet, the *ius resistendi* illustrates the essential contradiction in the liberal legal system; it is a non-legal-right that it is punishable in the legal system by virtue of its political nature, not because of the legal correlations that it creates. It is a right that defines and challenges legal theory because it is both the origin and the potential end of the political system that supports all rights. In fact, the biggest challenge that democratic legal systems face is to find suitable, politically reasonable, and legally validating means to restraining and penalizing the right of people to oppose, disobey, challenge or resist specific manifestations of power, while maintaining the principles of democratic practice as the system´s legitimizers.

The moral character of the *ius resistendi* poses a fundamental test for democracies, that of distinguishing between the punishment of the external expression of a right, and the question whether asserting a moral right should be punishable. Lacking an intention, without an effective outcome that could be subjected to legal reprisal (e.g., acts of violence, or the violation of the rights of third parties), the right to resist remains a potential right, a political-discursive exercise[265]. It is the action that transforms the *ius resistendi* from *a* right to, to *the* right to. Its intent (along with its moral value, the *mens rea* if one will), is conditioned by its rational objective[266]. To be able to restrain the *ius resistendi*, the state asserts the power to act on the real, on the right to resist *qua* right, by acting on the representation of the real, the external expressions of the right to resist.

The complex circular relations around the *ius resistendi*[267], provide the democratic system with the possibility of penalizing the outcome of specific manifestations of a right while allowing it to protect the moral value of the very right that it seeks to restrain. Legal systems can indeed protect the right to do wrong, while not legally permitting the wrongdoing. From a strictly legal perspective the *ius resistendi* would be an absolute right if its assertion was free from prosecution[268]. But that is not the case. Because the right to resist relies on the normative and material weight of other rights to materialize, the *ius resistendi* is, by association, also subject to the legal sanctioning elements pertaining to those rights. In other words, the punitive features of the rights that the *ius resistendi* appeals to are transferred to

[265] Some consider resistance as a particular kind of act, not an intent or effect (Baaz et al. 2016)P142), not as part of a theoretical exercise but as an actual definition. But action without intent is, literally, pointless.
[266] If lawbreaking does not involve an act that is *mala in se* and if it has no harmful consequences, we do not ordinarily condemn it, nor do we think that its perpetrator must accept punishment, unless evading punishment itself has untoward consequences (M. B. E. Smith 1973)P972).
[267] A notion I will later develop.
[268] The consideration of "absolute right" is important in human rights discourse, and by association, with the right to resist, because "a broad understanding of that concept would run the risk of transforming all rights recognized in the (EU) Charter into absolute rights, which is simply untenable in a democratic system of governance such as the EU, where the balancing of competing interests occurs regularly" (Lenaerts 2019)P793).

the right to resist, giving the *ius resistendi* the full structure and the functions of a right. In a protest in front of a public building, for instance, the (strictly legal) sanctioning element is derived not from the act of resisting, but from the laws regulating the use of public space, the disruption of transport, the annoyance to by-passers or the obstruction of the work of public officials[269]. Legal, political and social incidents, demands, and connections formed around the *ius resistendi* shape the idea of the right. That also means that external expressions of the right to resist are subjected to the legal, political or social punitive elements that those connections create. Those penalizing components are, however, only the external factor in the adjudication of culpability. The punishment of the *ius resistendi* remains a moral and political matter in its essence.

In liberal democracies the purpose of punishing disobedience is both to convey the state's condemnation for a certain type of conduct and to lead the offender to repent and reform her conduct (Oljar 2014)P294)[270]. Although some contend that "courts, the legal system, and also the police react very differently once protest is successfully framed as civil disobedience" (Guerrero-Jaramillo and Whitehouse 2021)P159), in practice the label attached to an external expression of the right to resist bears little consequence. Even if that external engagement fulfils the requirements of the most restrictive liberal definitions of civil disobedience, liberal regimes mobilize law's arsenal not so much for punishing lawbreaking, but for indicating the threat perceived by the dominant forces and the limits of official tolerance (Douzinas 2014b)P162). The punishment carries both a legal and a communicative aspect, a penalty as a consequence of the performance of an apparent illegal engagement through the adjudication of criminal or civil responsibility, and the castigation of (moral)right-holders as exemplary measure to prevent or dissuade further expressions of dissent. The punishment of the law is usually more severe when the failure to obey it is accompanied by failure to conform to it (L. Green 2016)P13). External expressions of the right to resist, as a result, are judged through a much lower degree of tolerance compared to other expressions of non-compliance, not only because moral rights do not carry the same weight of recognition of legal protections[271], but because of the fundamentally political and communicative aspect of these expressions.

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[269] Edyvane argues that the attempt of states to ban "potential nuisance and annoying behavior" is nothing but an attempt to stifle the democratic voice of citizens and curtail what potentially constitutes an important and neglected mode of democratic activism (Edyvane 2020)P94.

[270] In State v. Wentworth, the New Hampshire Supreme Court affirmed a sentence of six months imprisonment and two months suspended sentence for a first-time offender convicted of criminal trespass at a nuclear power plant. The court reasoned that a severe sentence was required in order to convince the highly educated and motivated defendant to utilize lawful means of protest (Lippman 2012)P967).

[271] I refer to "moral" in the sense of public behavior, not as a private matter. But this "morality" is inevitably influenced by the traditional (Christian) sense of morality, one that has become a political category in itself.

What power (the state, courts, police…) generally does by prosecuting the exercise of the right to resist, is to attempt to break the universal moral appeal of the *ius resistendi* into specific punitive acts to dissolve, politically and legally, the collective and transform its will into a cluster of individual acts that can be effectively prosecuted and penalized. Although the interruption of traffic or the burning of trash cans may have minor material costs or carry no significant legal consequences, the criminalization of the communicative aspect of the engagement seeks to disrupt the will and extinguish the intent of the engagement. By demonizing and criminalizing protesters, ideological and political struggles turn into technical, quantifiable, limited legal disputes, and lose their collective character and political significance. The moral value of the right to resist and the moral worth of those that assert it is thus disrupted and extinguished[272].

As liberal democracies have transformed the narrative around fundamental rights into a matter of quantifiable social or economic outputs, potential benefits and measurable damages, social, economic and cultural rights have been relegated from their status as rights and transformed into commodities (de Lucas and Añón 2013)[273]. Commodity-rights have become the standard measure that the liberal order has adopted to justify the legitimacy of its actions and the rightfulness of the prevalent concept of freedom or justice[274]. Among those commodities**,** security has become the ultimate social good and the unbeatable political and legal argument that power uses to justify the necessity to balance the enjoyment of other rights.

Power has always relied on the fear of chaos and insecurity to tighten control of the dissenting. Once a protest is framed, for instance, as a riot, it then becomes a security problem, a police matter rather than a political one to be engaged with in the public sphere (Çıdam et al. 2020). The courts, in turn, when not being increasingly handmaidens of corporate power, are consistently deferential to the claims of national security (Wolin 2003). Through a combination of political, police and judicial performances, liberal democracies

[272] During the marches protesting the police killing of the young black man Mark Duggan on 4 August 2011, Prime Minister David Cameron claimed that there were "pockets of our society that are not only broken, but frankly sick" and in these pockets individuals lacked "proper parenting . . . upbringing . . . ethics . . . [and] morals" (Canaan, Hill, and Maisuria 2013), a statement that constitutes a clear attack not on the protest but even on the moral right, the personhood, the dignity and agency of those that opposed government action.
[273] Although it would be simplistic to reduce external expressions of the right to resist to a gradation of services, there is indeed a close relationship between material happiness (material security) and (legal and political) conformity, especially when material autonomy reflects deeper issues of injustice, undignified conditions of life, unworthiness of human subject or pure oppression. After all, economic growth is strongly negatively related to civil conflict (P. Barrett and Chen 2021)P5).
[274] In his essay "On the Duty of Civil Disobedience", Henry David Thoreau claimed that citizens should live simply so that there would be less need for the state's services and protection and, by extension, less need for government itself. Without the need for services and protection, people would be within their rights not to support the state (Alton 1992)P42). That is, however, a far-fetched option.

have strengthened the narrative about the criminal, anti-social nature of the right to resist and of those that assert it.

It is in the nature of all legal systems to provide the state with loosely worded, legally manageable, and politically open concepts as safeguards against political deviant behaviour[275], especially when that behaviour threatens the security of the state. In most European penal codes (Italy[276], Germany[277], France[278], Spain[279]) the crime of sedition, rebellion, or *attentat* constitute the ultimate protection of the *status quo* against the inference or the threat of any force external to the established power. The German *hochverrat* (high treason), is similar to the Spanish rebellion, and the French *attentat*, which are generally defined as a collective violent attack (emphasis added) to alter the political regime, whether against state institutions of the territorial integrity of the state. In Germany, however, the crime of non-violent collective turmoil was repealed in 1970.

In French law, since the Boissin judgment, the *Cour de cassation* has never accepted the idea of "legal resistance", and so by considering that rebellion cannot be excused by the illegality of the act of the (public) agent (articles 433-6 to 433-10 of the French Penal Code), the *Cour*, de facto, connected resistance with rebellion[280]. The simple incitement to oppose by violent resistance an allegedly illegal act is qualified as "direct provocation to rebellion" by article 433-10 of the penal code, which reduces to nothing any possibility of opposing public authority by exercising a right of resistance (Grosbon 2008). The outcome of the Catalan

[275] It is precisely for this reasons that the UN Human Rights Council (Res. 25/38, The Promotion and Protection of Human Rights in the Context of Peaceful Protests, 25th Session, 11 April 2014) called on Members States to promote a safe and enabling environment for individuals and groups to exercise their rights ensuring, inter alia, that any laws restricting assemblies are unambiguously drafted and that meet the legality, necessity, and proportionality tests, to ensure that these rights are protected in domestic legislation and effectively implemented, that is, not only permitted, but facilitated. For the ECHR, proportionality refers whether there is a fair balance between the means employed and the aim sought to be achieved. Case of İrfan Temel and others v. Turkey, Judgment 3 March 2009.

[276] Codice Penale, Libro Secondo, Dei Delitti In Particolare. Titolo I: Dei delitti contro la personalità dello Stato, Art. 241.: Attentati contro l'integrità, l'indipendenza o l'unità dello Stato.

[277] German Penal Code. Second Title, High Treason, Section 81, High Treason Against the Federation, Section 82 High Treason Against a Member State. Chapter Six Resistance Against State Authority, Section 113 Resisting Enforcement Officers.

[278] Code penal (24 novembre 2019), Chapitre II, Section 1: De l'attentat and Section 2: Du mouvement insurrectionnel (art 412) Chapitre II, Section 5: De la rébellion (art 433).

[279] Código Penal. Título XXI, Delitos Contra La Constitución, Capítulo I, Rebelión, Artículo 472. Título XXII, Delitos Contra El Orden Público. Capítulo I: Sedición. Artículo 544. Capítulo II: De los atentados contra la autoridad, sus agentes y los funcionarios públicos, y de la resistencia y desobediencia. Artículo 550.

[280] The French Court of Cassation in the Boissin judgment established a presumption of legality of acts of public authorities and prohibits individuals from the right to constitute themselves judge of acts emanating from public authority. Some actually argue that the reclassification of civil disobedience into rebellion is part of the logic of law (Ogien 2015)P585).

independentist process was labelled as sedition[281] by the Spanish Supreme Court[282], a Court that arbitrarily modelled the demarcations of sedition to fit this particular case *ad hoc* (Sinha 2019). The Court admitted taking actions to keep the Catalan process away from the ECHR (Redacción 2020), and in an attempt to use all its munition to protect the territorial integrity of the state[283], the Spanish Supreme Court clearly failed to uphold international human rights standards by, *inter alia*, subjecting public assemblies and mobilizations to ideological scrutiny[284]. This ruling of the Court effectively prohibited peaceful civil disobedience which can be punished with up to nine years of prison (Urias 2021)[285].

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[281] Article 544 of Spain's criminal code notes that a conviction for sedition shall befall those who (…) publicly and tumultuously rise to prevent, by force or outside the legal channels, applications of the laws, or any authority.

[282] The Spanish General Council of the Judiciary remarks, in the sentence, that "the Court finds that violence was proved to have been present. But, while violence indisputably occurred, this is not enough for the offence of rebellion to be made out. To resolve the issue of which type of offence was committed with a "yes" or "no" to the question of whether or not there was violence would be to adopt a reductionist approach" (Comunicaciones 2019). Violence "being present" is a crude excuse for not being able to prove that violence did in fact occur and having to argue disproportionate punishment for political reasons.

[283] Article 17 of the European Convention on Human Rights and article 54 of the EU Charter of Fundamental Rights include an abuse of rights provision. Article 17 of the Convention does not imply that one may not strive after an alteration of the form of government: "it is the essence of a democracy to allow diverse pollical programs to be proposed and debated, even those that call into question the way the state is currently organized, provided that they do not harm democracy itself" Case Socialist Party and Others v. Turkey (Application no. 21237/93) of 25 May 1998. Paragraph 4 of Resolution 2381 (2021) of the Parliamentary Assembly of the Council of Europe states that "Everyone, politicians in particular, has the right to make proposals whose implementation would require changes to the constitution, provided the means advocated are peaceful and legal and the objectives do not run contrary to the fundamental principles of democracy and human rights", and para 5, that "This includes calls to change a centralist constitution into a federal or confederal one, or vice versa, or to change the legal status and powers of territorial (local and regional) entities, including to grant them a high degree of autonomy or even independence". This same pronouncement was later reaffirmed in the report of the Council of Europe on "Freedom of political speech: an imperative for democracy" (SG/Inf(2022)36 of 6 October 2022, CoE 2022 P8).

[284] According to the International Commission of Jurists, the convictions represent a serious interference with the exercise of freedom of expression, association and assembly of the leaders. The resort to the law of sedition to restrict the exercise of these rights is unnecessary, disproportionate and ultimately unjustifiable (ICJ 2019).

[285] Paragraph 10.3 of Resolution 2381 (2021) of the Parliamentary Assembly of the Council of Europe, invited the Spanish authorities to: 10.3.1. reform the criminal provisions on rebellion and sedition so that they cannot be interpreted in such a way as to invalidate the decriminalization of the organization of an illegal referendum, as intended by the legislature when it abolished this specific crime in 2005, or lead to disproportionate sanctions for non-violent transgressions (Should politicians be prosecuted for statements made in the exercise of their mandate? 2021). On 10 November 2022, the President of the Spanish government announced that he intended to submit to parliament a proposal to modify the crime of sedition (a law of 1822) to harmonize it with European standards. The proposal was submitted and approved by the Spanish Congreso on 24 November 2022. A new legal figure, that of "aggravated public disorder", which would carry a maximum of 5 years imprisonment, would replace the crime of sedition. This poses a problem, because once the crime of sedition is clearly separated from the crime of rebellion and becomes a crime against public order, it is difficult to specify the place that should occupy in relation to other crimes that violate this same legal good, public order. The proposed new law delimitates the contours of the crime of social disorder to action by

On Monday, 1 June 2020, former President Trump threatened to use the insurrection Act of 1807 to mobilize federal forces to suppress the protests and violence that spread all over the country in June 2020 (Hauser 2020). In its original formulation, approved on 3 March 1807, the Act authorizes the President "in all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory" to "call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed". The act has been used in the civil rights movement, in the riots after the Rodney King killing, or to enforce desegregation (Elsea 2018)P27). The consideration of what is rebellion, or what constitutes domestic (national) violence is, fundamentally, a political matter. Whereas in most European countries the use of restrictive policies and widespread police and armed forces operations have been traditionally used to crash dissent, in the United States, the use of military force has been more accepted among the US public when defending rights and the constitution.

Regardless of the legal disposition applied, power has learned that in legal argumentation there are two strategies for neutralizing the potential for change: first, labelling the disobedient act as a private matter in order to deprive it of its political message, and second, labelling the act as violent, undemocratic behaviour so that it can be disregarded (Nieminen 2015) (Nieminen 2017)P19)[286]. The indeterminacy of the right to resist makes it vulnerable to being subdued by other rights that enjoy legal certainty and direct enforceability, and, especially, by extra-legal (political) considerations. In complex relations of rights, incidents completely external to a claim can change the normative and material value of the given claim and the understanding of the relationship between rights and duties.

While expressions of dissent should be treated not as a crime to be censured, but as a conflict to be resolved (Oljar 2014)P295), the last fifteen years show a trend in which the freedoms of speech, association and assembly have come under increasing pressure, both from states

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a group, with the purpose of attacking public peace, understood as the normality of coexistence with a peaceful use of rights, especially fundamental rights and, finally, and the existence of violence or intimidation. There are also problems with this interpretation, especially regarding the concept of "normality", which would serve as excuse to crash any attempt of public display or angst, and the concept of "intimidation", which is highly subjective, to the point that during the trial of Catalan independentist leaders Police officers reported during the trial they were intimidated because the way people looked at them. The new law is very clear on the collective character of the action (does not take into consideration "individual" resistance) but leaves open the threshold of number of people or the character or objective of the group. Public order, not the defense of fundamental rights or freedom of expression, is at the center of the proposed law. "Proposición de ley orgánica de transposición de Directivas europeas y otras disposiciones para la adaptación de la legislación penal al ordenamiento de la unión europea, y reforma de los delitos contra la integridad moral, desórdenes públicos y contrabando de armas de doble uso" of 11 noviembre 2020.

[286] As Antoine Buyse argues, the ways in which civil society actors – which one can consider primary claimants of the right to resist – are talked about among the general public and are labelled by authorities directly impacts on their freedom, safety, and potential to function (Buyse 2018)P971).

and from non-state groups (Buyse 2019)P16). States have increasingly passed laws expanding the scope of felony prosecutions, adopted decrees, rules[287], or have placed technical and administrative burdens to the exercise of the right to resist at the expense of the political. A host of governments across the world have pushed forward divisive policies that range from the suspension of free speech, to controversial judicial appointments, to bans on immigrant or refugee admissions (Chenoweth 2020)P70). Protesters, now labeled as anti-social, irrational, and unruly rioters, become criminals, and lose legitimacy as political actors (Loadenthal 2020). The state assimilates forms of opposition to a conspiracy, denying any space for political opposition outside the mainstream channels, an substitutes the principle of "what is dangerous for the State, for what is immoral" (Bifulco 2016)P12) in order to instil repressive actions with a veneer of moral legitimacy. Taken individually, some of those legislative measures may not necessarily violate fundamental rights[288], but a series of different measures may, when taken together, increase the regulatory burden on civil society actors to such an extent that it may undermine their ability to operate (EU Agency for Fundamental Rights 2017).

Although there is no real understanding as to what extent the elements of order in modern democracies (courts, rights, institutions, etc.), enable and shape the practices of protest (Volk 2018)P3), court developments provide evidence of the inherently restrictive nature of judicial interpretation concerning the *ius resistendi*, an interpretation that is oftentimes accompanied by abusive practices of the apparatus of the state, not only to support those interpretations, but also to generate them[289]. Law and national judiciaries are oftentimes used to silence political opponents and repress those who disagree with government

[287] In the U.S. alone, between January and February 2017, at least nineteen states announced legislation designed to limit protests, increase penalties for demonstrators, and provide increased powers to disrupt and prosecute dissenters. By April 2018, thirty-one states were considering sixty-two bills of this type. In June 2019, federal legislation was proposed in concert with the Department of Transportation further criminalizing protests adjacent to pipelines and energy infrastructure, with penalties of up to 20 years in prison for disrupting operation or conspiring to do so (Loadenthal 2020)P6). In the wake of the guilty verdict that a jury handed to Derek Chauvin in the killing of George Floyd, at least 31 U.S. states have considered over 60 anti-protest bills, all in the name of public order and safety (Delmas 2019b)P171). Republican legislators in Oklahoma and Iowa passed bills granting immunity to drivers whose vehicles strike and injure protesters in public streets. New laws in Arkansas and Kansas target protesters who seek to disrupt oil pipelines. Florida law imposed harsher penalties for existing public disorder crimes, turning misdemeanor offenses into felonies, creating new felony offenses, and preventing defendants from being released on bail until they have appeared before a judge (Epstein and Mazzei 2021).

[288] Although in October 2016, the UN expert on freedom of expression reported that individuals seeking to exercise their right to expression face all kinds of government-imposed limitations that are not legal, necessary or proportionate (Kaye 2016).

[289] Article 52 of the Spanish Organic Law on Citizens' Security ("Law no. 4/2015") presumes the truthfulness of the reports of the police as the basis for the immediate enforceability of heavy fines and other penalties.

policies, even in liberal democracies[290]. There are indeed many areas of law in which courts must either openly or covertly, consciously or unconsciously, formulate a political theory, or establish some vision of the behaviour of their fellow political actors (Shapiro 1964)P324). Their interpretation being necessarily biased and, in several cases, openly politicized[291]. Western democracies are being increasingly subjected to the jurisprudence of courts that seem determined to generate a chilling effect over expressions of dissent to warn potential disobedients of the legal consequences of deviant behaviour[292], instituting, in this manner, a sort "authoritarian legalism" (Habermas 1985)P112) where legal technicalities have replaced political debate, and where the law is operated no longer by the state, but by interests behind it. Because the implementation of judgements on human rights (and by extension on the rights enabling the *ius resistendi*) are a political issue[293], the case law dealing with external expressions the right to resist offers greater evidence about the political condition of a nation, and the health of its democracy, than about the strength of its legal system.

In exceedingly rare cases, an act of resistance may go unpunished because a court may find that the disobedient was exerting a right, because it was morally justifiable, or because the norm challenged was declared unconstitutional by the Court, and thus its violation would

[290] Parliamentary Assembly of the Council of Europe Debate of 11 October 2017 (33rd Sitting). Doc. 14405, report of the Committee on Legal Affairs and Human Rights.

[291] Fundamentalist also sit in courts, especially in the US Supreme Court, with appointees of a President that lost twice the popular vote, or in countries like Bulgaria, Spain, Poland or Hungary, where the Council of Europe raised concerns about the independence of the judiciary ("Challenges for judicial independence and impartiality in the member states of the Council of Europe" SG/Inf(2016)3rev).

[292] The Swiss Federal Supreme Court has acknowledged the "chilling effect" for the exercise of the right to assembly and free speech if the costs for policing a demonstration are charged indiscriminately, as they discourage those entitled to the fundamental right from exercising it (R. Barrett et al. 2021)para 63). In its 15 November 2018 judgment of the Case Navalnyy V. Russia (Applications nos. 29580/12 and 4 others), the ECHR stated that the seven arrests of Navalnyy by Russian police had a serious potential to have a chilling effect, by deterring future attendance at public gatherings and preventing an open political debate. In the opinion of some of the dissenting magistrates on the Ruling of the Spanish Constitutional Court 24 June 2021 (Press release 69/2021) punishing with three years' imprisonment some people that protested in front of the Catalan Parliament, the ruling constitutes a serious interference in the freedom of assembly that has a devastating discouragement effect on it, impoverishes democracy, aligns Spain with rigid societies that the abuse the penal system in the repression of conducts that take place within the material sphere of fundamental rights and moves Spain away from the application progressive development of those rights that enable the participation of citizens in the full democracies. Surprisingly, in its judgement of on the constitutionality of the conviction of the Catalan leaders for the referendum on independence of 1 October 2017 (Judgement 91/2021, of 22 April 2021 (BOE no. 119, of 19 May 2021, page 60336), the Spanish Constitutional Court denied that a chilling effect over civil disobedience was even possible, arguing that if the conduct of the appellant was not protected by any constitutional right, his condemnation (even if it was severe) could not affect the legitimate exercise of such rights by other people.

[293] Resolution 2178 (2017) on the implementation of judgments of the ECHR.

have no effect (Biondo 2016)P159)[294]. Judges have occasionally recognized the higher normative appeal of an external expression of the right to resist over the potential external nuisance of a protest[295]. In American courts, the principle of necessity defence (the Aquinian "*necessitas non habet legem*")[296], has been successfully employed in civil disobedience cases at least in the Illinois and Washington state courts (Quigley 2003)P26)(Boyle 2007)P28)[297].

Oliver Wendell Holmes advocated imposing liability on an ''objective'' basis that would ignore the mentality of the defendant, except where the reasonable man would have done as the defendant did (M. P. Golding and Edmundson 2005)P8). His concept of reasonable man precedes that of Rawls and his support for the moderation of systemic disturbances as the key to determining the morality, and thus the legitimacy of expressions of dissent. U.S. courts, however, have refused to recognize reasonable moral opposition as a legal defence to prosecution for criminal acts of defiance[298]. U.S. Courts have also normally refused to permit defendants to rely upon criminal defences (for instance the Nuremberg principles), which indirectly require the adjudication of the legality of United States foreign and national security policies (Lippman 2012)P954)[299]. Some, in fact, argue that "the real reason that courts do not want to allow protestors to offer evidence of necessity may well be that

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[294] But then, as some argue, if a finding of a law's unconstitutionality frees a person from punishment for breaking it, then so should a finding that a law fails to meet the higher law and the highest principles of humanity when the person breaking the law was speaking for humanity in doing so (Davis 1993)P47).

[295] In the United States, in the Williams v. Wallace regarding the Selma to Montgomery march in March of 1965, the then Chief Judge of the U.S. Alabama Middle District noted "it seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly" (Johnson 1970)P4).

[296] Necessity here is meant as the assertion that a conduct promotes some value higher than the value of literal compliance with the law.

[297] In 1985, in the case of People v. Jarka, an Illinois jury acquitted twenty defendants who protested against the American military invasion of Central America by conducting a sit-in which blocked the road to the Great Lakes Naval Training Center. The protestors successfully invoked the doctrine of necessity and were allowed to put eight expert witnesses on the stand to offer evidence of the effect of nuclear weapons, American intervention in Central America, and international law. The trial judge gave the jury an instruction that stated that the threat and use of nuclear weapons violated international law. In 1987, several dozen students at Evergreen State College sat in the Washington State Capitol in support of an anti-apartheid disinvestment bill. Seven students refused orders to leave and were arrested and charged with trespass and disorderly conduct. At their trial, the defendants were allowed to admit statistical and expert evidence of necessity, international law, and the Nuremberg defense about the situation in South Africa. The jury acquitted all of the defendants (Quigley 2003)P31-33).

[298] For instance, to the Vietnam War, in U.S. v. Berrigan in 1968.

[299] For some, citizens of any country have the right of civil disobedience to oppose criminal activities of countries (against the UN charter, the Nuremberg Charter or other international covenants) in pursuit of their foreign policies. In fact, "in direct reaction to the Reagan and Bush Sr. administrations' wanton attacks upon the international and domestic legal orders as well as on human rights, tens of thousands of American citizens engaged in various forms of civil-resistance activities to protest U.S. foreign policy (Boyle 2007)P18).

they fear the protestors might win" (Quigley 2003)P54). As a consequence, in the U.S. and in other liberal democracies, courts have resolutely dismissed the moral context that leads someone to do civil disobedience, which results in an inadequate response of the judicial system to expressions of dissent (Loesch 2014)P1095).

In Europe, although several cases brought before the European Court of Human Rights (ECHR) relate to civil disobedience, the Court has avoided articulating any opinion on it in its judgements[300] and, at most, has requalified the purported disobedience as the exercise of a legitimate right under the European Convention on Human Rights[301], especially freedom of expression and freedom of assembly[302]. Generally speaking, the case-law of the ECHR defends a very wide array of views in civil society, including those that are unpopular with those in power (Buyse 2019)P24), but that does not mean that it defends any political engagement of the civic space against states party. At a moment when the civic space is being squeezed, the European Court of Human Rights' approach to cases of disobedience shows that the law may be somehow tolerant of dissenting opinions as long as these remain unlikely to invoke any serious challenge for the *status quo*, and so, it ultimately defends it.

The ECHR has referred to the need to secure a forum for public debate and the open expression of protest[303], but has not provided judicial protection to external engagements of the *ius resistendi* as such[304]. Rather, its rulings can be generally read as tilting toward the

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[300] In the Case of Herrmann V. Germany (Application no. 9300/07) of 26 June 2012, in his partly concurring and partly dissenting opinion, Judge Pinto De Albuquerque of the European Court of Human Rights argued: "the applicant's legal and ethical position towards hunting is neither an act of resistance, peaceful or otherwise, against an unjust act or unjust conduct of a public authority (*ius resistendi*), nor an active refusal to obey an unjust rule or order of a public authority in order to have it changed (civil disobedience)". The brackets are not an editorial addition but appear in the original opinion. Interestingly, the Judge provides in this opinion his own understanding of the difference between the *ius resistendi* and civil disobedience, possibly as an attempt to separate the right from its exercise. The judge does not seem to limit the exercise of the *ius resistendi* solely to a peaceful engagement, as it leaves the "otherwise" open for interpretation as to which forms resistance may take. Whereas the *ius resistendi* constitutes resistance to unjust acts from the public authority, civil disobedience, for the judge, is an "active refusal" with a clear objective to change the law. The *ius resistendi* is being read as pro-active resistance, and civil disobedience as a passive exercise. What is key in the opinion is the use of the notion of *ius resistendi* as part of the Judge´s legal reasoning.

[301] For instance, in the Case of İrfan Temel and Others V. Turkey (Application no. 36458/02) of 3 March 2009, Turkey flagged that the Kurdistan Workers' Party´s strategy of action within the framework of civil disobedience included petitioning for education in Kurdish. The case referred to the request of some students in Turkish students that Kurdish language classes be introduced as an optional module.

[302] In Oya Ataman v. Turkey (application no. 74552/01) of 5 March 2007, in para 36 of the judgement "the Court also notes that States must not only safeguard the right to assemble peacefully but also refrain from applying unreasonable indirect restrictions upon that right".

[303] Case Navalnyy V. Russia (Applications nos. 29580/12 and 4 others), para 102.

[304] Article 17 of the European Convention on Human Rights stipulates that "nothing in this convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater

state[305], to the point that it has every so often justified the interference of the state to restrict rights while recognizing the wide margin of appreciation of the state in determining when pressing social needs justify that interference[306]. Given that the ECHR operates under the assumption that the European Convention of Human Rights is a living instrument, the reasons of the Court may stem from policy, particularly the desire to adjust its interpretation of Convection articles in light of present day conditions (Ellian and Molier 2015)P132). The living instrument philosophy eases the Court´s departure from the established case law, while using developments at the international level, within the domestic legal order of a State Party, or both, as the justification for substantial changes in jurisprudence[307].

It is not accidental that the normative and ideological parameters of what it means to be a "liberal democracy" should serve as a constraint for the exercise of fundamental rights and freedoms. Where democracy is confined within the strict limits of legality, non-legal rights that may pose a potential threat to the democratic *status quo* are ousted from the legal

extent than is provided for in the convention". One would deduce from this article that the Convention provides states, groups, or persons, the right to resist any activity that is aimed at engaging against the principles of the Convention or destroying the rights and freedoms embedded in it.

[305] In Giuliani and Gaggio v. Italy (Application no. 23458/02) of 24 March 2011, para 251, the ECHR stated that "where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance". It is concerning that the Court demanded only "some degree of tolerance" from the authorities, even in case of non-violent engagements, rather than supporting the application of article 11 in any situations of non-violence. In Oya Ataman v. Turkey (application no. 74552/01) of 5 March 2007, the Court again noted the importance for public authorities to show a certain degree of tolerance towards peaceful gatherings, even unlawful ones. The fact that a peaceful gathering or assembly is illegal does not mean is not protected by article 11 of the European Convention on Human Rights. The ECHR has also clearly stated that rights are interconnected. In para 37 of Case of Ezelin V. France (Application no. 11800/85) of 26 April 1991, the Court notes that "Notwithstanding its autonomous role and particular sphere of application, Article 11 must, in the present case, also be considered in the light of Article 10 of the Convention".

[306] ECHR Case of Chassagnou and Others v. France, Applications nos. 25088/94, 28331/95 and 28443/95 of 29 April 1999, para 113. The European Court of Justice (ECJ), in its "Schrems" judgement (Schrems, Case C-362/14), has also determined that the derogation and limitations of fundamental rights should only be when strictly necessary and that only the fight against serious crime may justify a serious interference (Lenaerts 2019)P786) and only if those limitations "are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others" (Article 52(1) of the EU Charter of Fundamental Rights).

[307] In "N.D. and N.T. Vs Spain (Application Ns 8675/15 and 8697/15) of 13 February 2020, the Grand Chamber of the ECHR ruled against N.D. and N. T. (one person from Mali and the other from Cote d`Ivoire) for "the consequences of the applicant`s own conduct in placing themselves in an unlawful situation" (they had attempted to enter Spain on 13 August 2014 as part of a large group). The Court blamed the victims, declaring that the rights of the Convention did not apply to them because they were in a position of illegality. The logical and worrisome assumption then is that anyone putting herself in a situation of illegality (e.g., an act of disobedience), does not have her rights guaranteed, and could not, in the same logic, obtain protection from the Court, even if fundamental rights were at stake.

discourse. Concurrently, when the rights that define the notion of democracy are attacked, it is not only the *status quo* of state that is at risk, but the very system that sustains the order. Interestingly, the European Convention of Human Rights differentiates between a "political democracy" (in its preamble), which I understand refers to a mostly vertical political organization of the state, and a "democratic society" (in the articles of the convention), which I believe refers to horizontal value-based rights and freedoms. It somehow balances the notions of power in the state and in the people. The acceptance of the expression of rights in the value-based space (that of society, expressed in the first paragraph of articles 9, 10 and 11), does not necessarily translate into an acceptance of that space at the vertical (power) level. In fact, the second paragraph common to articles 9, 10 and 11 of the European Convention on Human Rights provides that the these rights may be derogated under circumstances of public emergency, or if the restriction has a legal basis, pursues a legitimate aim and is necessary (Buyse 2018)P980). Yet in an age when everything can potentially be interpreted as terrorism, as a threat to public health, as an immoral public engagement, as affecting the reputation of others, or as violence, everything becomes potentially exposed to serious interference by the state and subject to derogation[308].

Sheldon Wolin contends that "the current censorship of popular protest against superpower and empire serves to isolate democratic resistance, to insulate society from hearing dissonant voices, and to hurry the process of depoliticization" (Wolin 2008)P108). We are witnessing an increasing number of external expressions of what one can call *"contra iuria resistendi"* ascertained by power, a form of state resistance against its own citizen-aggressors. Some scholars consider that to criminalize (non-violent) behaviours associated with the exercise of freedom of expression, or assembly, is comparable to penalizing the exercise of these rights, and to punish a person for engaging in public disobedience, is equivalent to punishing a person for exercising the right to vote, or the right to free speech (Lefkowitz 2007)P219). For others, constraining legal forms of resistance to the law is the most refined form of tyranny (Sopena 2010), and still others refuse any false choice between justice and freedom that states flags as the reason for the harsh punishments on those that resist (Chomsky et al. 2020).

4.3.1. Protections against punishment.

More often than not, rights matter the most because of the protections that they afford to the interests and choices of right-holders from external interference, and not in validating

[308] The Council of Europe´s Parliamentary Joint Committee on Human Rights has recommended that domestic legislation designed to counter terrorism or extremism should narrowly define these terms so as not to include forms of civil disobedience and protest; the pursuit of certain political, religious, or ideological ends; or attempts to exert influence on other sections of society, the government, or international opinion. *Joint Committee Report, "Demonstrating respect for rights? A human rights approach to policing protest", published in March 2009.*

or justifying those interests and choices (Herstein 2013)P3). It is generally accepted that when agency is legitimately asserted, but not recognized, moral rights should still protect us from being treated with illegitimate disregard in a certain sense (Andersson 2015). Will theories understand rights as providing right-holders with a certain dominion of freedom and enforcement power which affords (some limited sense of) control, along with the status and standing afforded within a normative system (Frydrych 2019)P462) (Harel 2005)P194). For Carl Wellman, legal and moral rights are clusters of Hohfeldian positions in which we can always discern the existence of a core protected by a number of associated normative positions (Toscano 2014)P232). H.L.A. Hart used the metaphor of the protective perimeter to refer to that space (Duarte d'Almeida 2016), and Dworkin argued that when the law is uncertain, a prosecutor should exercise his discretion not to prosecute the individual who chooses to follow his or her own judgment of the law, when the law in question is not supported by an official decision that it protects citizens' moral rights, but by economic or social utility (Davis 1993)P47).The same logic applies to the *ius resistendi*.

The former president of the Federal Court of Justice of the West German Republic, Hermann Weinkauff hold that "he who exercises a genuine right of resistance acts lawfully even if he must breach common law" (Schwarz 1964)P128). Others argue that the validity of the right to resist rests in its capacity to "serve as a means of defence for the individual who has disobeyed, or if it can support a request for sanction or reparation in the event of infringements of this right" (Grosbon 2008). Still, others presume that if the right to resist is properly exercised, the state has a duty not to repress those engaged in it (Ginsburg, Lansberg-Rodriguez, and Versteeg 2013)P1195), and that legal restrictions should be read elastically to "help to assure the public that grievances may be forcefully protested in our liberal democratic polity, that the authority of law and the State does not require blind obedience" (Macpherson 2003)P373).

From a legal perspective, some scholars assert that there is a positive obligation in the European Convention on Human Rights to enable demonstrations and to protect them against violence by counter-demonstrations (Buyse 2019)P30)[309]. Others claim that people who engage in civil resistance have, at least in the U.S., "a constitutional right to rely on whatever statutory and common-law defences are generally made available to every other criminal defendant in the jurisdiction concerned (…). After all, alleged murderers, robbers,

[309] Regarding utterances attacking the governments, some note that the European Court of Human Right's objective is not only to prevent violence, which in any case is against the spirit of the convention, but to provide State with the prerogative (at least initially) to determine when those hatreds can lead to violence and when is allowable to intervene to prevent possible outbursts (Ellian and Molier 2015)P44). Realpolitik approaches would confer that the Court, and the Convention, were very much aware of the imbalance between the State and its citizens and that for citizens to make their voice heard, unless freedom of expression is assured, there are limited effective channels.

and rapists are entitled to the presumption of innocence, a vigorous defence, and all the protections of due process of law" (Boyle 2007)P25). In other words, those asserting the *ius resistendi* should be offered, as a minimum, all defences afforded to other criminals. Yet, rather than serving as a legal justification to vindicate the protection against punishment for the assertion of the right to resist, these types of arguments harm the efforts to de-demonize or de-criminalize the *ius resistendi* because they implicitly suggest that it is a wrong or a criminal act[310]. The protections offered by the right to resist do not emanate from the consequences of its assertion, or by the inherent protections of specific rights that enable its expression, or even by the protection offered by law against specific punitive outcomes of some of its external manifestations. The protections offered by the *ius resistendi* emanate from its nature, from interpreting the right within a broader conception of rights and from the complex moral, legal, social and political relations formed around the expression of the right.

The right to resist is a claim-right, and "a claim-right can entitle its bearer to protection against harm or paternalism[311], or to provision in case of need, or to specific performance of some agreed-upon, compensatory, or legally or conventionally specified action" (Wenar 2005)P229). Claims have a peremptory or categorical force, as they amount to constraints upon the behaviour of other agents (Toscano 2014)P230). One presumes that claim rights should also constrain the behaviour of the state. Ideally then, as a claim-right, the right to resist would technically offer "protection against all forms of state interference, including penalization and punishment" (Brownlee 2018)P295) (Moraro 2018)P505). David Lefkowitz argues that subjects of a legitimate liberal-democratic state enjoy a moral right to civil disobedience, one that precludes the state from punishing, though not from penalizing, those who engage in suitably constrained civil disobedience (Lefkowitz 2018)P2). In other words, even if they are punished, those that assert their right to resist have a claim not to be prevented from breaking the law (Haksar 2003)P413).

One thing, however, is to examine whether the *ius resistendi* provides any moral or legal protections against punishment, and another is to consider whether those asserting their right to resist should voluntarily accept that punishment. Liberal notions of civil disobedience have always emphasized the need to voluntarily submit to punishment like

[310] In the wave of the 60s demonstrations in the U.S., Frank Johnson, then Chief Judge of the U.S., Middle District of Alabama, observed that there "is no immunity conferred by our Constitution and laws of the United States to those individuals who insist upon practicing civil disobedience under the guise of demonstrating or protesting for "civil rights" (Johnson 1970)P2). Nevertheless, he followed, there are circumstances where it is clear that the moral duty to obey the law ceased.

[311] Civil disobedience is made into an excuse rather than a justification, and the focus is thus on indulgence vis-à-vis the particular characteristics of the accused, rather than an endorsement of his cause preferring to see the protester as someone who is fundamentally misguided (Mégret 2009)P12).

any other law breaker (Moraro 2018)P503). In principle, one could concede that if there was no cost for those that engage in disobedience, it would reduce the ability of the state to successfully apply laws and would generate a state of lawlessness. Still, I agree with those that argue that a morally justifiable act of civil disobedience does not necessarily require that the actor be willing to accept punishment (Greenawalt 1970)P70). The requirement of voluntary submission to the sanction does not in itself determine any kind of *prima facie* consideration about the validity of the legal system. One thing is to voluntarily accept to be punished and another is to acknowledge that there is a risk involved in the contentious behaviour one undertakes (Douzinas 2013)P96), and, therefore, that one can be punished. Some may think strategically about punishment to enhance the communicative aspect of their appeal (à la Thoreau or à la King), yet there is no reason to believe that most people would willingly accept publishment for performing an action that they believe is right.

The fact that one declares one's voluntary surrender to the punishment does not change the content of the law or the legal consequences of its violation. It does not mean, either, that one rejects the lawfulness of the law and the possibility of being punished for breaking that law. Whereas in the definition of civil disobedience acceptability of submission to punishment is critical (others call it "non-evasion" (Delmas 2019b)), I maintain that neither the disposition of the resister vis-à-vis the possible punishment, nor the political categorization of the engagement changes the nature of the right to resist *qua* right, and therefore, that the idea of voluntary submission to punishment is a feature that may pertain only to the political definition of a specific external expression of the right to resist, that of civil disobedience, but that it is not a defining feature of the *ius resistendi qua right.*

As I have argued elsewhere, in a democracy a high correlation between disobedience and punishment increases the incentives for disobedience because people associate the normative value of the law, and thus its obligatoriness, with its justice and righteousness. It is in no way hypocritical to break the law and not submit to its punishment when the objective of the disobedience is to denounce an injustice. In fact, it should be commonly established that because there is no duty to obey unjust laws, there is no duty to accept punishment as well (Zinn 2012)P918). To impose a penalty for denouncing an injustice does nothing but to increase the injustice, and with it, the reasons for non-compliance and resistance. In states of exceptionality (in post war periods, or after revolutionary or convulsive times), many countries have used transitional justice systems to balance the need for peace, justice and reconciliation. Punitive systems have only sustained the sense of injustice and discontent. In states of democratic exceptionality, when the principles of the ideology are threatened by power and injustice prevails, a restorative justice system should also be applied, one seeking to reinstate the political through accountability and recognition, not by punishing those that already feel oppressed and deprived.

Yet principled declarations of reason and righteousness to disobey or to resist offer little practical protection from the consequences of breaking the law. The current legal status of civil disobedience is rather clear regarding its use as a defence to any crime: it generally is not (Wilt 2017)P45). Yet it is not the same to speculate whether to resist *qua* right offers or not legal protections and the question whether the assertion of the right to resist is protected by other legal provisions. Positive human rights law protects the human rights of those participating in civil resistance movements (Wilson 2017)P61), although in different degrees of efficacy. One must assess the effectiveness of the *ius resistendi* not only through the political outcome of its proclamation (whether a law is changed, or a policy annulled), or through the judicial interpretation that courts may dispense on the legitimacy of the right to resist as justification of an engagement, but through the degree to which its assertion effectively interlocks the normative value and legal protections of other rights, that is, in the jurisdictional guarantees granted to other fundamental rights (Grosbon 2008)[312].

[312] Erica Chenoweth argues that the effectiveness of nonviolent resistance is on the decline, even before the Covid-19 pandemic hit the world (Chenoweth 2020)P70).

CHAPTER V: A RIGHTS-BASED THEORY OF THE RIGHT TO RESIST

The right to resist has a particular structure that makes it different from other rights[313]. It is neither a positive nor a negative right. It satisfies all requirements to qualify as a right, yet it always remains indeterminate. It has the capacity to modify the normative status of those that assert it, but also of the disengaged, even against their will. It imposes direct duties on the state and imperfect obligations on people. It is a right that opposes the coercive nature of the law, but it is a right inherently coercive. The following pages develop a rights-based theory of the *ius resistendi* as a universally claimable, recognizable, enforceable right, a right that is defined in relation to its externality, but a right that cannot exist separate from the fundamental values of the society that proclaims it. To examine the *ius resistendi*, I challenge the traditional liberal interpretation of rights and develop a broader conception, one where rights are a constituent part of the genetic reasons that provide the democratic order with its value.

5.1. A broader conception of rights.

Liberal interpretations have traditionally constrained the view on rights. If one considers that rights are trumps that protect individuals from the excesses of the popular will, then the justification of rights is a matter of obligation and duty that limits the freedom of our actions (Zivi 2012). Where rights are thought to provide a standard of legitimacy, their justification is tied to regulation, in which necessary principles constrain our action by limiting the diversity of our ends (Hoover 2019)P2). Some perceive rights as barriers that prevent the uninhibited pursuit of collective and social goals, or even consider that the discourse of rights is inherently sectarian in that it reflects a masculine or Eurocentric mode of reasoning (Harel 2005)P203). Others, more pragmatic, suggest that it is always a good idea to maintain a certain level of scepticism towards rights and other humanistic social categories, while acknowledging their indispensable value in certain contexts (Aitchison 2017)P14).

In the traditional liberal conception, rights are rights because they generate a claim-based relationship between those making a claim, and those to whom the claim is addressed (Blunt 2017) (Honoré 1988). They constrain the freedom of the rights-bearer, or that of the rights-granter, because claims always entail a duty on the other part, even if they are

[313] The right to resist is, in a Foucauldian perspective, which I share, a tactical indeterminate right, in the sense that it is a right that can be used in a way that does not "conform to the function allocated to rights within the prevailing terms of engagement" (Golder as cited in (Aitchison 2017)P6).

imperfect duties, that is, duties that are general and unspecific (Van Duffel 2012b)P107). Hohfeld spoke about "strictly fundamental relations" to refer to the correlativity axiom assuming that every legal position must correlate, as one side of a legal relation, with a legal position of someone else (Duarte d'Almeida 2016)P6), and Lon Fuller spoke of "the relatively stable reciprocity of expectations" (Postema 1994)P369). A linear right-duty correlation establishes the rights-bearer´s rational understanding of her privileges ("I have a right to X"), as well as the necessary conditions to determine a violation of that right. The recognition of the right-duty relationship generates the claim, establishes the basis to assess the legal/illegal, the deviant/compliant, or the moral/immoral nature of the correlativity, and categorizes the actors involved in the contestation.

This traditional notion of the correlativity between right and duty is now being challenged because the requirement of recognition has been lifted, with people simply presuming that because they belong to a specific normative setting (usually liberal democracies), they are entitled to (moral, political and legal) rights and that those rights carry no responsibilities for their bearing. The language of rights has become the language of entitlement[314], and "whereas in the past, moral problems were analysed in terms of duty (often to the exclusion of rights), today it has become nearly impossible to speak about normative matters in a way that does not include rights" (Boot 2015)P215).

The opposite notion has also been disrupted. In the liberal conception, one accepts that there are numerous classes of duties, both of a legal and non-legal kind, that are not logically correlated with the rights of other persons (Feinberg 1970)P161). The (mostly political) contemporary language of rights has disrupted the correlativity between rights and duties because it does not necessarily speak of (or assumes that there are), corresponding obligations to the enjoyment of rights. And even though the correlativity between rights and obligations has been upset, no one contends that those rights cease to be rights, or that the laws that create, frame or restrict them cease to be law. As it turns out, the basic tenets of western legal theory can be challenged without necessarily questioning the very existence of the concept of rights or of duties.

Complex societies require complex models that allow for the expression of multiplicity of human interactions. From a sociological perspective, in the study of contentious politics, the increase complexity from linear (right-duty), to the circular correlativity (the foundation of my broader conception of rights) is reflected in a more complex hierarchy of action

[314] Since rights assertions suggest conclusive reasons, people are usually tempted to claim rights when they want to end a discussion or impose their will on others. The outrageous use of rights language causes people to make unreasonable demands, not even pretending to burden others with the corresponding obligations. The language of rights is used as language to obtain personal entitlement, benefits of protection, disregarding the moral values they represent and the normative context in which they are claimed.

components that evolve and change and create, in return, more complex legal relationships (Kriesi 2009)P342). In a Foucauldian sense, the concept of a right, as part of the ideology, or what he called the regime of truth, is linked "by a circular relation to systems of power which produce it and sustain it, and to effects of power which it induces and which redirect it" (Lorenzini 2015)P2). In this way, some argue, law is formed in the diversity of its links with other social relations (Fitzpatrick 1992)P34).

In my broader conception of rights, the thesis about the correlativity between rights and duties exists, but it is only part of what defines a right. In my broader conception of rights, the correlativity between right and duty is circular, not in the sense of a Hohfeldian package in which privilege, claim, power, and immunity are all interconnected, but rather in a configuration where legal and extra-legal, moral, political or social incidents converge, affecting each other in a way that can modify the normative status of those engaged in the correlation, of third agents, and of the order itself. In my conception, each relation is formed by a multiplicity of claims, duties, moral orders, and power-performative engagements that transform the essence of the right-duty connection in ways that can affect the essence of the claim because it modifies the narrative that creates the very idea of that right. As a result, incidents completely external to a claim can change its normative and material value[315] as well as the understanding of the relationship between rights and duties associated to that specific claim[316]. In my conception of rights, when the circular correlativity between rights and duties is more complex, the interactions that are at play reinforce the nature of the claims because of considerations other than the purely legal, and transform the assumptions that we have of that right and of its value, and with it, of the order where it materializes.

Some scholars note that one should always distinguish between the question of what it means to have a right, as a notional understanding, and the question of which rights we have, in a factual sense. To have a right, they contend, is to be able to make independent decisions about the thing to which one has a right (Van Duffel 2003)P1,9). Having rights certainly makes claiming possible, but not all claims put forward as valid are actually valid, and only the valid ones can be acknowledged as rights (Feinberg 1970)P622). In my conception of rights there are considerations that make the insistence on the correlativity of rights and duties entirely consistent with a recognition that the domain of morality extends beyond the right–duty relationship (Kramer 2005)P189). By proclaiming a right, we create the right by negotiating with others the interpretation that they have of that right, we generate the idea of its content, and establish a relation with the object of that right. The proclamation of the right determines its purpose, and with it, the substantiation of its

[315] E.g., international dynamics in the understanding of the right to resist aggression in Palestine.
[316] E.g., international dynamics in the understanding of the right to resist aggression in Ukraine.

validity. The ideological framework where the claim occurs determines the moral and performative value of the right that we claim, a value that is assigned in the "scale of worthiness" in relation to other normative principles in a specific social, cultural and historic moment. Liberal societies consider that for a moral appeal to be valid as a right, it should have the capacity to be translated into genuinely universal claims such as dignity, justice, and freedom. In my conception of rights, moral claims that cannot be translated into basic moral appeals cannot be rights because they defy the basic tenets of the ideological order[317].

In my broader conception, rights are not bound to the existence of specific legal conditions for their compliance. Rights are bound to the principles of the ideology and to the shared understanding about the way that rights need to function and about their functions, an interpretation that provides the legal and normative conditions for the compliance of any right within the legitimate legal order. In this conception, freedom, dignity, and justice, serve as the foundational values of the *ius politicum* in its role of governing relations between individuals and the state. The principles that ground and legitimatize the order function as the benchmark to attribute (civil, penal or administrative) responsibility to the individual, the people or the state, for their actions. In this model, one can determine the validity of rights by referring to the remedies they provide in terms of protection to the values of freedom, dignity and justice, rather than on the punishment that they carry. For instance, in my concept of rights, a good manner to consider the level of acceptable dissent is to "talk (…) about the enforcement and sanctioning features of law not in terms of how they limit freedom to violate the law, but rather in terms of the level of freedom they leave for violating the law" (Herstein 2013)P6) that is, the space provided for the right to resist to perform its functions.

A broader conception of rights serves the right-bearers by restoring their liberty, and by constraining the action of rights-granting agents to generating the conditions for the exercise of bearer´s freedom, that is, basically, to concerning the action of the state to the principles of democratic practice[318]. This conception of rights elevates the political subject matter of freedom, accountably, and recognition, above the other political considerations

[317] The universal aspiration of human rights constitutes a clear example of this argument. Those that defend human rights by asserting, for instance, their right to resist, implicitly work to defend legal generality, because only laws embodying the quest for generality typically are just and worthy of respect (Scheuerman 2015)P433).

[318] To recognize people as right-bearers is to acknowledge that they are agents whose coercive demands (especially those involving liberties, justice or services) are recognized "on the ground of substantive principles of distributive equality in goods essential to respect for dignity or autonomy" (D. A. J. Richards 1983)P418). This however also applies in the opposite direction. Ultimately, people grant rights to the state through consent and political participation, and thus people must also act in accordance with the principles of democratic practice in their relations with the state.

like duty, wrongness, and permissibility that are, although relevant to rights, not confined to the area of rights (Waldron 1981)P24)[319]. In a broader conception of rights, the democratic system embraces the principle of recognition, rather than consensus, as its foundation.

Recognition underpins the broader conception of rights because the rights-bearing agent is not limited to a liberal concept of the individual but also includes collectivities (the inexistent, the unrecognized or the ungrievable) and other groups that can assert agency through will[320]. In a broader conception of rights, the ideology imposes a duty from others, especially on the state, but also on other agents, to recognize agency to degrees contingent on the nature of the right as the basis of the legitimate order, and to provide agents with the (social, political, and moral) means of asserting that agency. In democracies, agents should be judged not only in terms of their duties (of good citizenship), but on their capacity to assert legitimate claims, for democracies cannot deny agency when fundamental principles are at stake at the risk of forsaking their own nature.

My conception is Lockean in that it recognizes that people preserve a number of reserved rights, even if those rights are purposedly made invisible or are unrecognized by liberal regimes. I, nonetheless, agree that whether or not embedded in the constitution, fundamental and primary rights, like the right to resist, are an integral part of any genuine legal order (Allan 2017)P2), and a condition of democratic legitimacy. In the critical legal tradition, rights are mediators between the domain of pure value judgments and the domain of factual judgments (D. Kennedy 2013)P184). Similarly, in my broader conception of rights, the *ius resistendi* is always part of the debate about rights because it actualizes the potentiality of values and translates principled aspirations into claim rights. This actualization takes place in a continuous process of re-examination of the normative weight of rights within the value-parameters of the ideological framework (the scale of worthiness) and the potentiality of new normative spaces. In this sense, the right to resist reveals itself as the void that sustains and transforms the legal system, because "without it, the law becomes moribund" (Douzinas 2019). The *ius resistendi* becomes the instrument to capture normative spaces that actualize the value of the existing order.

In the debate about the ideology, positive laws, the moral, reserved and unenumerated rights, the *ius resistendi* connects the extra-legal with the normative, and the potential with the laws that embody the values of the ideology. My conception of rights is inspired by a Foucauldian approach in that it considers that the creative process of contestation allows

[319] Karen Zivi argues that "one of the fundamental reasons for making rights claims is to put an end to injustice, misery, violence, and other harms once and for all" (Zivi 2012)P10).

[320] A necessary component of basic rights, Forst argues, is the "active" status of persons as members of a normative order (the universal application of human rights), not necessarily as member of a political community in the sense of citizenship (Forst 2017).

us to change how we conventionally think about rights, and how rights represent a critical call to change the game. For Foucault, and I agree, rights can be used as tactical instruments of resistance in political struggles (Sokhi-Bulley 2016).

5.2. The normative value of the right to resist.

My broader conception of rights is based, to a certain extent, on what Jeremy Waldon calls the "generality" of moral rights, that is, the fact that the moral right of an individual to perform a particular action never stands on its own. Rather, that moral right is usually supported by indicating that the individual is a member of a certain set of actions, any of which that individual has a right to perform in the circumstances (Waldron 1981)P31-32). A moral right provides value to more specific material incidents. We first determine the general moral claim within a certain ideological context (for instance, the right to resist oppression), and then derive more specific propositions from it (determining the moral, legal, and political validity of a concrete expression of that general moral right). In the generality principle, a set of circular correlations between the general claim and the specific action is created, so that the specific action never stands alone in the generality of the right, it is only one of its possible expressions which is determined by a set of circumstances that allow the individual or the group to perform it. It is from this proposition that one can determine both the moral value of rights, and their performative content.

In my broader conception of rights, the normative value of the *ius resistendi* can be determined by the extent to which it provides the missing normative value in the structure of rights that may otherwise be incomplete in the sense of lacking enforceability, for instance, principles that do not find corresponding positive norms, rights that have been stripped of their protection, or when the essence of a right is threatened or neglected. In those situations, the value of the right to resist is determined in relation to that missing performative or value content[321]. In fact, it is by examining how rights are neglected or violated that we can determine their content. Because the generality of the moral claim hinges on the normative and the material weight of an identifiable object (a law, policy, principle, right, or political subject), to resolve the content of the moral claim the *ius resistendi* transmutes itself into a recognizable right, it mutates from being "*a* right to", to being "*the* right to" so that it can complete or create the normative and the performative value of existing or latent rights connected with that moral claim. The higher the position

[321] The European Court of Justice in its Schrems case decided that the essence of fundamental rights prevail against any other measure. "Once it is established that the essence of a fundamental right has been compromised, the measure in question (that has compromised the right) is incompatible with the Charter (of fundamental rights). This is so without it being necessary to engage in a balancing exercise of competing interests" (Lenaerts 2019)P781). This is an incredibly powerful statement, although apparently still needed serious implementation by national courts.

in the legal hierarchy of the rights forming a circular correlation with the *ius resistendi* in a specific claim (e.g., fundamental, constitutional, or human rights), the higher the normative value of the right to resist. If, for instance the external expression of the right to resist invokes provisions entrenched in a constitutional order, then all legitimacy that the right to resist can muster must be a reflex of that order (Niesen 2019b)P33). The normative value of the right to resist is hence determined not only by how it enables other rights, and itself, to perform, but also by how it resolves the object of the content of the right, that is, by its function. In liberal regimes, the normative value of the *ius resistendi* emanates from the very idea of democracy. It acquires its recognizable (historically definite) meaning from the contention that democracy creates between rights and obligations, between the democratic universal claim to having a "right to" (Forst 2017)P19) and the actualization of political and legal obligations.

As a right, the *ius resistendi* cannot be realized in and by itself, it does not have normative value *per se*, it needs to draw on the normative value and on the performative aspects of other rights and principles within a specific order: the enabling rights. Enabling rights afford a (mostly) positive, legally-binding, even an enforceable framework for the right to resist to be actualized. Within democratic settings, enabling rights provide the context to assess the legitimacy (and to a certain extent, the legality) of contemporary external expressions of the right to resist, because they embody the value-narrative in which western societies are constructed[322]. Enabling rights afford the normative value and the performative means for the right to resist to exist. They are, saving the distance, the *ius commune* of our time[323].

A right becomes an enabling right when it facilitates, qualifies, or it is fundamentally associated to legitimate expressions of the *ius resistendi*. If "to understand the right to free speech, one must see that it grounds in others a duty not to silence" (L. Green 2004)P514), to understand the *ius resistendi*, one must see that it grounds in others a duty to respect, *inter alia*, one´s freedom of expression, of association, of peaceful assembly or the right to participate in public affairs.

[322] Although appeals to the *ius resistendi* are essentially related to fundamental values (usually taking the form of human rights), coordination (non-fundamental) rights are also necessary to facilitate expressions of dissent. Local ordinances, traffic laws, regulations about the use of public space or those related to certain permits may not be enabling rights in the sense of fundamental rights, but they are also key to enabling the action of dissent.

[323] The origins of the concept of natural rights, and later human rights, are found within the medieval traditions of the *ius commune*. The reason for the existence of those rights, however, was not to vindicate human choice, to promote the sacredness of human life, or to allow men and women to flourish as they chose. It was to vindicate and promote God's plan for the world (Helmholz 2003)P302-304).

Enabling rights are exceptionally connected[324], they are a significant part of the circular correlativity that is created around the right to resist, together with other moral, legal and political incidents. In this circularity that enables the expression of indeterminate rights, one right strongly supports another when it is logically or practically inconsistent to endorse the implementation of the second right without endorsing the simultaneous implementation of the first (Wenar 2020). James Nickel argues that the strength of supporting relations between rights varies with the quality of implementation. Not all legal relations have the same strength. Poorly implemented rights provide little support to other rights, while ones that are more effectively implemented tend to provide greater support to other rights (Nickel 2010)P445). Rights that weakly support each other are interdependent. Rights that strongly support each other are indivisible. The right to resist is indivisible from its enabling rights because one cannot be asserted without the support of the others[325]. One cannot actualize the *ius resistendi* without endorsing other fundamental rights and freedoms. One cannot endorse the right to resist without freedom of expression, and one cannot endorse freedom of expression without, even if tacitly, also endorsing the right to resist, for the *ius resistendi* constitutes the ultimate guarantee of the assertion of that right. And so, denying the right of free speech as an act of resistance is denying the legality of the positive right to free speech, not only of the right to resist. Asserting a right means leaving open the potentiality of protecting its value by means other than the assertion of that specific right. And it is at that point that the right to resist becomes in itself an enabling right, because it supports other rights and their external manifestations to be realized (McDaniel 2018)P398).

Because the *ius resistendi* finds its expression in the public, enabling rights must also find their expression in the political[326]. Enabling rights are a basic condition for a democratic

[324] Para 13 of the 1968 Proclamation of Teheran (Final Act of the International Conference on Human Rights celebrated in Tehran (A/CONF.32/41), establishes that "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible".

[325] This is true to the point that for some in the U.S. judiciary, the possibility of acting on the enabling rights is entirely sufficient to toss the right to resist to obscurity. Justice Abe Fortas in 1969 declared that by protecting voting rights and freedom of speech, the U.S. Constitution afforded citizens effective—and sufficient—means of protesting governmental policies with which they disagreed (Delmas 2019b)P172).

[326] In Case Primov and Others v. Russia (Application no. 17391/06) of 12 June 2014, para. 91, the ECHR high lighted that in the exercise of the right to freedom of assembly the participants would not only be seeking to express their opinion, but to do so together with others.

society[327], central to civic activity (OHCHR 2014)[328], and part of the foundational principles of the European Union[329]. Enabling rights are part of the *ius politicum* in that they underline the basic conditions that must inform the relation between the state and the people, but they are outside of the *ius politicum* in that they should not be artificially constrained by that relation, at the risk of rendering the *ius resistendi* inoperable.

Although critical for its realization, enabling rights do not solely determine the normative value or the existence of the right to resist. Except for freedom of thought, conscience, and religion in Article 18 of the UDHR, no enabling right is unlimited. Derogation of enabling rights may inhibit the actualization of the *ius resistendi*, but that does not invalidate the right, or make it illegal. It is precisely when conditions of democratic practice are hampered that the right to resist restores the proscribed rights and provides them with renewed meaning and strength.

Some scholars suggest that since we do not have predetermined justifications to assert a right, then we are not guaranteed, by the mere fact of being entitled to a right, that we can access its content (Blunt 2019)P45). For them, we need to have a reason to act on a right, but we also need to be able to access its normative substance. Others take the opposite stance, wondering whether we should resist the suggestion that action on a right can be predetermined in accordance with particular, or readily identifiable normative values (Porter 2016)P38), for instance, that expressions of resistance necessarily correlate to normative values like freedom or autonomy. The right to resist is a general claim that contains both a predetermined and an indetermined normative value that is accessed through the performative value of the enabling rights. The object of the content of the *ius resistendi* is resolved by the function that the right performs.

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[327] The International Covenant on Civil and Political Rights provides a basic framework for democratic governance, in particular, article 18 (freedom of thought, conscience and religion); article 19 (freedom of opinion and expression); article 21 (freedom of peaceful assembly); article 22 (freedom of association); article 25 (right to political participation), as well as bodily integrity rights, in particular article 6 (right to life), article 7 (freedom from torture; cruel, inhuman and degrading treatment); article 9 (liberty and security; freedom from arbitrary arrest and detention); and article 10 (dignity). These are replicated in the European Convention on Human Rights Articles 9 (freedom of thought, conscience, and religion), 10 (freedom of expression) and 11 (freedom of assembly and association). Most core international human rights instruments include provisions which are directly relevant to the protection of public freedoms, and all refer to the principle of non-discrimination.

[328] For instance, in Case of Handyside V. The United Kingdom (Application no. 5493/72) of 7 December 1976, para 49, the ECHR established that freedom of expression constitutes one of the essential foundations of democratic society, holding that expressions that are shocking, offending or disturbing should in principle be protected because such "are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society".

[329] Article 51 (1) of the EU Charter of Fundamental Rights obliges the Union and Member States to respect all Charter rights and to create enabling environments in which civil society can do its work.

If the *ius resistendi* is asserted to defend the basic tenets of the ideology, it acquires its normative value through the appeal to the principles and rights that have been violated or dismissed, as well as through the exercise of the enabling rights, that is, by accessing the full normative and performative content of other rights and freedoms forming a circular correlation with the right to resist. Article 18 of the Universal Declaration of Human Rights (UDHR) protects freedom of thought, conscience, and religion. Yet there is a difference between the universal moral value of the freedoms that Article 18 claims to protect, and the actual possibility of accessing the normative content of those freedoms in a manner consistent with the meaning of article 18 of the UDHR[330]. The normative value of freedom of religious belief varies depending on the ideological setting where it is proclaimed.

Catholics in Rome would normally have no problem to attend mass, they are free to do so. There is a linear correlativity between the value of the freedom of religion, its accepted moral interpretation, and its actualization[331]. In Rome there is no need, neither a legitimate reason, to contest the universal understanding of Article 18 of the UDHR as long as freedom of religious belief applies equally to Catholics and to members of other religions. Catholics in Kabul have the same right, yet the different moral interpretation of freedom of religious belief in parts of that society hampers the possibility of accessing its normative content in conditions of freedom and equality, that is, in the envisioned universal moral function of article 18. In Kabul, the actualization of the freedom of belief may require an act of defiance, a proclamation of the general moral claim to freedom in order to protect the missing normative content of the moral interpretation of Article 18 of the UDHR. Freedom of religious belief in Kabul carries a higher normative value than that in Rome because its assertion requires that other fundamental rights be protected and realized: the right of non-discrimination, the right to life, the right of personal security, or the right to free assembly, for instance. Catholics defying norms in Kabul fill the right to resist with the normative content of other fundamental rights that are missing in the actualization of the initial claim, that of freedom of religious belief.

Differences in the interpretation of rights and in their actualization (that is, in the manner we access their content) is not contingent on the democratic character of the regime where they are asserted. Homosexuals in Amsterdam usually face no harassment when gathering

[330] "a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people" (preamble of the UDHR).

[331] There are, of course, a number of other legal relationships that are established in order to actualize the right, but as long as those do not involve fundamental rights – only coordination rights – the correlativity remains simple(r). If Catholics in Rome had their right to mobility curtailed, thus preventing them from attending mass (for instance though covid-19 restrictive measures) the relationship between the right and its actualization becomes more complex, but that does not affect the nature of the right.

in a public space, for instance a bar, or when walking in the streets holding hands[332]. Homosexuals in Poland or Hungary, formally EU democracies, carry a much heavier normative value in their right to do so. In those countries, gathering in a public space may require that the states fulfil their obligation to (physically) protect all citizens, the right not to be degraded or humiliated, or the fundamental right of equal protection of the law. Even in formal democracies the *ius resistendi* reaccommodates and reallocates the normative value of rights, to protect and care for them, because even in democracies people can, and do, suffer from legal alienation, that is, people can be mere victims of a legal system that does not represent them (Gargarella 2003).

If the function of the *ius resistendi* is to capture normative spaces, its content and normative value are indeterminate. These will be contingent on whether one appeals to new, latent or to predetermined values, the external form of the appeal, the value bestowed on the new normative space, and well as by the position of the newly conquered right or freedom in the moral and normative hierarchy. As I argued elsewhere, indeterminacy of content does not imply that the methods used to seize the space can also be value indeterminate.

Joel Feinberg asserts that those that have no notion of rights do not have a notion of what is their due and, hence, they do not claim before they take (Feinberg 1970)P619). When the suffragettes fought for the right to vote, or the Black Lives Matter movement protested against incidents of police brutality and all racially motivated violence against black people, it was because they recognized themselves as actors being entitled to, at least, recognition of equal (existing) rights in relation to other agents (men, or white people). When transexual people demanded recognition of the right of self-determination of their gender identities, or when the first environmental movements started claiming the right to a healthy planet, they were asserting the right to resist to appeal to "new" claims that were or had been acknowledged through moral dialogues (at least in the social context where they claimed it). Discursive formations of moral concepts (e.g., freedom of choice of one´s gender identity, or the recognition of the earth as subject of rights) within a political narrative (for instance, that of human rights), that builds on the basic tenets of the ideology (dignity and justice), allows for rights to be recognized and contested (in the political). Ultimately, the positivization of a normative expectation, that is, the creation of a right, consists in the recognition of a moral claim (Hidalgo Andrade 2018)P279). The formation of a sufficiently

[332] Judith Butler puts the example of the Netherlands, where new applicants for immigration are asked to look at photos of two men kissing and to report on whether the photos are offensive, whether they are understood to express personal liberties, and whether the viewers are willing to live in a democracy that values the rights of gay people to free expression. Those who are in favor of this policy claim that acceptance of homosexuality is the same as acceptance of modernity (J. Butler 2009)P105). She warns though that irrational association of the notion of freedom with certain aspects of "progressive" or "modern" or culturally advanced politics can lead to bigotry.

strong shared political interpretation of the content of the moral claim determines whether that right (the seizing of the space) is actualized (the recognition of the universal human right to a health planet[333]) or not (the rejection of legal frameworks for gender self-determination in specific jurisdictions[334]).

The expansion in the number of external manifestations of the *ius resistendi* is not only the result of living in more complex societies, rather, it is the result of our increased awareness of our rights, entitlements, duties and obligations as human and social beings. In its role of capturing normative spaces, *the ius resistendi* responds to the pressures of social and political forces that enhance and expand legal frameworks to cover a greater range of legitimate, legally binding, or at least potentially enforceable rights associated with external expressions of the right to resist (Bellal and Bartkowski 2011)[335]. As the value and the notion of rights expand, the normative value of the right to resist also expands. Its external expressions strategically adapt to the political and social environment[336], a political expression of the claim for the protection of existing rights or the acknowledgement of new ones. Enabling the right to resist means enabling forms of collective democratic politics that are necessary for effective resistance (Aitchison 2017)P2). The *ius resistendi* is, in Hannah Arendt´s words, the right to have rights (Arendt 1973)P296).

5.3. The place of the *ius resistendi* in the legal order.

Since the *ius resistendi* acquires its normative value in relation to the extant (legal) order, one must conclude that the right to resist belongs somewhere in that (legal) order. Consequently, one should be able to empirically identify the place that the right to resist

[333] On 8 October 2021, the UN Human Rights Council adopted resolution A/HRC/48/L.23/Rev.1, recognizing the human right to a safe, clean, healthy and sustainable environment. On 28 July 2022, the United Nations General Assembly declared the ability to live in "a clean, healthy and sustainable environment" a universal human right. On 14 October 2021, a ruling of the Paris Administrative Court ordered the French Government to fix climate deterioration that occurred in four years of neglect.

[334] On 18 May 2021, Spain's Congress of Deputies rejected a landmark legislative proposal that would have allowed legal gender recognition based on self-determination.

[335] Since 2016, protests have escalated, often becoming "omnibus protests" (protesting on multiple issues) against the political and economic system (Ortiz et al. 2022).

[336] Neither Thoreau nor Gandhi would have imagined that cyber activism targeting public web domains could be used a form of political resistance. Anonymous 16, a hacking group used a DDoS cyber-attack (crashing websites by flooding them with data) on PayPal after it was revealed that PayPal, Amazon, Visa, and Mastercard had refused service to WikiLeaks after its release of thousands of classified U.S. State Department cables. Anonymous and its lawyers interpreted this act as a "virtual sit-in" where, instead of using physical bodies to obstruct business, computer data were used to block web sites (Edyvane and Kulenovic 2017). To legitimate their actions, the lawyer of Anonymous 16 revisited some of the traditional elements of civil disobedience (a concept that is understood by a Court of justice and used as part of the political and legal reasoning) and adapted it to the virtual world. The right they asserted, the right to resist, remained the same. The form of external engagement was completely new.

occupies in the normative structure of societies. One would not be able to affect the production of cars if one stopped producing oranges. That means that one would have to be somewhere in the car-producing chain (for example as a vendor, a client, a state regulator, or as a worker) to influence the production or the sale of vehicles. If the *ius resistendi* was completely alien to the "legal-producing chain", its assertion would have no impact on the implementation of laws, on the legitimacy of the legal order, or on the very concept of rights. Because asserting the right to resist generates disruptions in the legal chain, one must assume that it belongs in that order[337].

Some label external expressions of the right to resist as "extra-*ordinem*" (Biondo 2016)P19), because they consider that resistance is not part of the normal order of things or of ordinary political action[338] but rather, that it is an engagement that implies some sort of democratic exceptionality, signalling that there is an element of (ideological) disputation or some contention in the order. Yet any perception of deviant behaviour, as argued in Part One, necessarily occurs within the context of a normative order, a setting that serves both as a reference to identify the exception, and as a measure of the degree to which the exception can be managed within extant parameters. The *ius resistendi* is part of, and cannot occur outside of the political, because it embodies, in essence, the right to remain in the polis. If the *ius resistendi* was to be considered extra-*ordinem*, then the political itself would be extra-*ordinem*, because the political is the order of things, and without a political order we would revert to a Hobbesian state of nature. External expressions of the right to resist are not exceptional behaviours (whether they are recognized as such or not), or expressions of a right outside the order, they are part of a never-ending circle of dichotomies and opposing conceptions of power that maintains the order, and life in the polis.

Others label the right to resist, as "extra-legal" (Majumdar 2009)P6) because they consider that it is not a positive right. For some, the extra-legal happens "in a situation where an empty space of law is formed, a zone of anomy where all legal determinations are deactivated" (Fragkou 2013)P482). In my broader conception of rights, the legitimate assertion of a right, including the *ius resistendi*, cannot be extra-legal. The right to resist transforms the legal anomy that results from the emergence of pre-legal social norms or standards, or the repudiation of old ones, into new normative spaces, and a (re)new normative order. Many legal scholars also insist on pairing the notion of legality with that of a positive form of a law, and repudiate the legal nature of the *ius resistendi* because of its indeterminate nature. In a liberal democracy, as I have argued before, the determinacy (and

[337] For Tony Honoré, the right to resist has a valid claim to a recognized place in international law and political morality, and possesses a plausible theoretical basis in peremptory notions of human dignity (Honoré 1988)P37).

[338] Beyond the concepts of "everyday resistance" that belong to the sociological order (Baaz et al. 2016)P138)

thus the legality) of the right to resist stems both from its nature, that refers to the fundamental values of the society that proclaims it, but also from its reliance on other norms and legal precepts that have a positive character. What belongs to the legal order is *the* right to resist, not just *a* right to resist.

The *ius resistendi* is not extra-*ordinem* or extra-legal, rather, I submit, the right to resist belongs "*in periferia ratio*", that is, in the periphery of the order, a position that constitutes a defining characteristic of its nature and that enables it to perform its functions. As Foucault remarked "where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power" (Toplišek 2016)P151) (Demirović 2017)P34) (Fitzpatrick 1995)P107)[339]. Translate this idea into the domain of the *ius politicum* (where law is power), and we observe the same type of correlativity between the legal system and the right to resist. The *ius resistendi* is, in brief, a right that "stands outside the normally valid legal system, he nevertheless belongs to it" (Gullì 2009)P23)[340].

Hans Lindahl re-frames the concept of the *ius politicum* into what he calls the "a-legality", a notion that calls into question the distinction between legality and illegality. A-legality, for him, "refers to an emergent normative order that is strange by dint of challenging how a given legal order draws the spatial, temporal, subjective, and material boundaries through which it configures what counts as (il)legal behaviour" (Lindhal 2019)P7). The concept of a-legality provides a suitable theoretical framework to vindicate the claim that the *ius resistendi* belongs in the periphery of the system, in the intersection between the legal and the pre-legal, between the prescriptive and the possibility. As Loughlin notes, "the most obvious manifestation of a-legality is found in the action of a political movement to disrupt the institutionalized conditions of legal intelligibility for the purpose of postulating an alternative account of legal order" (Loughlin 2014)P966). The *ius resistendi* is positioned in the very line that separates positive norms and value-based behaviours, pointing at possible

[339] Power relations penetrating the new world order are characterized by the shift from geopolitics toward biopolitics, in in which ''no outside exists'' (Piška 2011)P251).

[340] Herbert Marcuse describes this idea (of being inside and outside, of being in opposition and at the same time assisting the system) in a brilliant way, as he argued that "within a repressive society, even progressive movements threaten to turn into their opposite to the degree to which they accept the rules of the game. To take a most controversial case: the exercise of political rights (such as voting, letter-writing to the press, to Senators, etc., protest-demonstrations with a priori renunciation of counterviolence) in a society of total administration serves to strengthen this administration by testifying to the existence of democratic liberties which, in reality, have changed their content and lost their effectiveness. In such a case, freedom (of opinion, of assembly, of speech) becomes an instrument for absolving servitude. And yet (and only here the dialectical proposition shows its full intent) the existence and practice of these liberties remain a precondition for the restoration of their original oppositional function, provided that the effort to transcend their (often self-imposed) limitations is intensified" (Marcuse 1965)P83-84).

new elements of the order while remaining within the value-recognizable ideological boundaries.

In Peter Fitzpatrick's concept of law, if pre-legality (what falls outside the law, the possibility), is indeterminate (it not being knowable within the boundary of the familiar forms), then the horizon or boundary must separate the determinate laws from the indeterminate chaos of pre-legality. Law must respond to the chaos in order to represent particular determinate content to its forms (Conklin 2009)P234). Law is dependent on what it excludes, it is self-contained, yet its form is shaped by the non-legality that it resists, and its shape depends on the forces that the pre-legal exert on the order. While one tends to recognize the "unbridgeable nature of the gulf between reality and ideal" (Loughlin 2016)P19), the *ius resistendi* represents, precisely, the catalyst to bridge that gap, connecting the determinate with the potentiality of the pre-legal, wielding pressure on the law to shape its form, not only in relation to the pre-legal, but also, one can argue, in relation to the post-legal, that is, in relation to norms that have lost their original shape or their primary intent[341].

To do so, the *ius resistendi* cannot occupy a central place in the legal order, for it would be unable to delineate the boundary between the determined and the indeterminate. When the boundaries of legality are clear (understood not only in positive terms, but particularly in its value-ideological structure), the position of the right to resist is conspicuous. When the horizon is a-legal, when the boundary between the legal and the pre-legal is unclear, when the normative value of rights and principles becomes veiled and the complexity of the circular correlations makes it difficult to identify a clear connection between right and grievance, the exact position of the *ius resistendi* in the order is harder to identify. And paradoxically, this ambiguous position becomes the strategic strength of the right to resist, for the potentiality of contestation is concealed and protected from possible interference and regulation from the state or other agents.

The peripherical position of the *ius resistendi* is what enables its primary function, that of being a "conveyance right", a right-instrument that restores rights and principles (and their normative value) from the periphery back to the core of the order, or at least back to the public space where rights are created and contested, and conveys the captured normative spaces into the structure of factual legal realities. The right to resist serves as the determining factor to identify the degree to which rights and principles have been disengaged from the core or lost their normative value, as well as those normative spaces

[341] The right to resist arises not only against the consequences of positive norms, but also in opposition to the lack of appropriate laws. For instance, in Argentina, the "NiUnaMenos" movement protested against the lack of effective legislations and procedures to effectively prevent feminicides in the country. http://niunamenos.org.ar/

that are posited to acquire the structure and function of a right. The *ius resistendi* unveils the moral and legal hierarchical prioritization by identifying the actual position of rights and principles in a normative order, and by re-adjusting or re-claiming the position that those that assert their right to resist believe specific rights should have[342].

One can understand better the convening function of the *ius resistendi* drawing a parallelism with Habermas´ communicative theory. For him, key issues faced by those that live in the periphery of the system are given an opportunity to be discussed only when the media informs the public. Lacking the media´s interest in bringing specific issues to the core (to the mainstream public opinion or to the attention of policymakers), the *ius resistendi* allows those that assert their right to put their claim in the public space[343]. External expressions of the right to resist constitute a fundamental element to guarantee communicative opportunities for society, keeping participatory channels open, even if through unorthodox conduits, and even when majorities or groups of powerful interests control the communication instruments and put them at their service (Quintana 2009)P64)[344]. Asserting the right to resist to bring rights back to the core of the *ius politicum* (to regain their status or to capture a new one) does not guarantee the success of the enterprise. It only signals the beginning of a process of demand for recognition of the claim, a process that is a necessary condition in the political. The outcome of that process will be contingent, as I will argue later, on the strength of the claim and on the power of each sovereignty.

The first article of the 1789 French Declaration of the Rights of Man and of the Citizen declares that "Men are born and remain free and equal in rights" and adds, in its second article, that "these rights are liberty, property, security and resistance to oppression". Unlike in the U.S. Declaration of Independence, where the *ius resistendi* had a declarative intent, in the French declaration the right to resist oppression was recognized as a natural right, and for a short while, as a positive right. With the French declaration, the *ius resistendi* became determinate because its legal dimension was generally accepted, and its specific normative meaning socially recognized. With the French revolution (an external political engagement of resistance against oppression that changed the ideological principles of a regime), the right to resist itself moved from the periphery of the system, from a moral right

[342] The U.S. Founding fathers acknowledged this function of the *ius resistendi* when declaring that "No free government, nor the blessings of liberty, can be preserved to any people, but by a frequent recurrence to fundamental principles." George Mason, 1776 (US Congress 1776).

[343] The Audiencia Nacional of Spain, in its ruling 6/2013 of 7 of July 2014 regarding the blockade to the Catalan parliament in 2011, noted that "when the channels of expression are controlled by private media, it is necessary to admit a certain excess in the exercise of the freedoms of expression or manifestation" that ruling, however, was later dismissed by the Spanish Supreme Court (Sentencia Nº 161/2015) and by the Constitutional Court.

[344] From Edward Snowden´s perspective, it is the U.S. government which has systematically abandoned the rule of law, while his actions merely bring its illegalities to public light (Scheuerman 2015)P448).

only exceptionally recognized, to the very core of the new legal and political order, and with it, it carried the values of the principles of modernity: freedom, equality, and fraternity. The *ius resistendi* became a right able to hold the new order together and provide it with ideological and political coherence, at least while a *nouveau regime* was settling into its new form.

Once the revolution had been successful it was important to consolidate the new organization of power and the ideals that came with it, especially the centricity of individual rights. After the French revolution, equality remained as the core of the new regime because it was a principle around which the new order could be constructed. The *ius resistendi,* however, was sent back to the periphery, for it was not a right around which society could be built. The 1793 version of the French Declaration removed the right to resistance from the list of foundational rights, a sort of demotion (Douzinas 2019)P163), and in the 1795 version, it was totally deleted. Robespierre instrumentalized the notion of the *ius resistendi* to consolidate his power arguing that the right to resist contained the seeds of instability and anarchy (Sopena 2010). If the right to resist was to permanently remain at the core of the system, it could consume society from within and would impede other rights and principles from developing the new society by continuously challenging their status. It would generate anarchy. Yet if it was completely eliminated from the ideological ethos, and its potentially erased from society, it would prevent democracy from healing itself and surviving, for democracy is not a finished product, but rather "a susceptible, precarious undertaking which is constructed for the purpose of establishing or maintaining, renewing or broadening a legitimate legal order under constantly changing circumstances" (Habermas 1985)P104).

5.4. The right to resist is not a human right.

The advent of human rights implied, at the international level, what the process of constitutionalization of fundamental rights meant for countries in the liberal sphere. In the same way that in liberal democracies law contains and constrains some of the resistances that are inherent to the order, after the Second World War the international human rights regime was created, in theory, if not in practice, to contain resistances to the liberal ideals and its newly established world order. Human Rights became the defence mechanism against potential illiberal destabilization. They legitimized appeals to freedom and equality in illiberal regimes, and to accountability and recognition in liberal democracies. Human rights became the new "higher law", a source of legitimacy and a normative tenet that embodied the post-war ideals of justice and moral rightness. With the words "We, the Peoples of the United Nations", the UN Charter aimed at translating the principles of the American revolution into universal aspirations. And with the appellatives of "social",

"democratic" and "rule of law" added to the description of the liberal ideal (and oftentimes in their constitutions), the West evinced the fundamental connection between human rights and democracy.

A "human right" is at the centre of a circular correlativity between aspirations, obligations, legal and extra-legal contentions, morality, and political conceptions that is formed around a specific moral claim that is considered to be indispensable for human protection or for human realization. Some consider that human rights are "a series of compelling arguments about the need to protect certain fundamental interests and aspects of human existence that, over time, have materialized in a number of legal instruments that recognize them" (Torbisco Casals 2006)P10). Others contend that human rights serve the important purpose of restricting states' sovereignty to the extent necessary to ensure the protection of the rights of individuals and communities within their borders because they instil a sense of entitlement into a language in which it obligates the state (Frost 2018)P149)[345]. As a moral aspirational construct, the human rights discourse has undoubtedly expanded the normative possibilities for those that need to rely on protections external to the conditions established by the power that subjugates them.

Human rights allow most of us to recognize and clarify the desired outcome of what we believe are fundamental ethical claims, and actualize that recognition in terms that we can understand and apply. For many of the oppressed around the world, human rights have indeed been instrumental in helping them identify the source of the injustice and the constrains on their rights because human rights, in essence, represent subjective desires which are being presented as legal imperatives[346]. Even domestically felt injustices are now increasingly analysed as violations of international law, most prominently, but not only, as violations of international human rights law (Mégret 2009)P3) (Lippman 2012)P951).

The language of human rights has helped create spaces of resistance (Halper and Reifer 2019)P751). The Universal Declaration of Human Rights, some argue, vindicates appealing to the right to resist because it speaks of the fundamental values of equality and freedom[347].

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[345] During the UN World Summit in September 2005, world leaders endorsed the notion of the "responsibility to protect" to serve as a basis for collective action against genocide, ethnic cleansing, war crimes and crimes against humanity.

[346] For some, the emergence of some sort of global constitutionalism in international law and politics (a mixture of the notions of human rights, democracy and rule of law) has re-introduced the concept of constituent power so that organizations and individuals can frame their claims in a "constitutive" (obligatory) and less in a "reactive" language (Niesen 2019a).

[347] "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law", preamble of the UDHR. The United Nations Human Rights Council included a provision on the right to resist oppression within the context of a proposed UN declaration on the right of peoples to peace (although in the framework of colonial or alien domination) (HRC 2011). The declaration has not been adopted, for obvious reasons.

Because of the legitimacy that they provide, many social movements, in different countries and cultures, avail themselves of the human rights discourse in their resistance practices (Wilson 2017)P20). Human rights not only enable but also legitimate external expressions of the right to resist because they can turn small-scale acts of resistance into acts that can be globally acknowledged[348] and bring a shared sense of global rightfulness into local or community engagements. Human rights provide a recognized normative framework and expand the range of legal defences available to political engagements. As a language of resistance and of even revolution, for instance, the human rights discourse speaks to the gap between power and justice (Teitel 2021), and appeals to the principles of democratic practice. Human rights have become the external benchmark against which to assess not only the rightfulness of the actions of the state in relation to "universally agreed" values, but also the legitimacy of the manifestations of the right to resist in relation to "universally agreed" standards of (legal, political and social) conduct in civilized nations.

A broader conception of rights allows us to frame all human values and (political and social) interests in the form of rights as long as these values can be translated into universal claims. Following that idea, one could argue that if we agree that human rights embody the highest moral claims within a political framework, then the right to resist is a necessary component of the political conception of human rights (Blunt 2017). The examination of the *ius resistendi* as an expression of the human rights ethos, that is, of fundamental interests that include non-exploitation, non-discrimination, non-repression and non-violence, is common among scholars (Estrada Tanck 2019)P381-382) (Wilson 2017)P57). If one accepts the principle of the universality of human rights in the sense of being claimable by any potential political subject (Aitchison 2017)P8), and that the right to resist represents the expression of that human rights ethos, then one must conclude that the *ius resistendi* is a human right. After all, the *ius resistendi* embodies universal claims of justice and recognition and it always expresses a compelling argument about the protection of fundamental interests.

Article 33 of the 1793 Declaration of the Rights of Man and of the Citizen declares that resistance to oppression is the consequence of other human rights. Those that agree with these words have persuasively argued that human rights and the *ius resistendi* pertain to the same normative space. Arthur Kaufmann proclaimed not only that the right to resistance is the original of all rights, but that it is the original right of human rights (Santos 2009)P351). Hersh Lauterpacht also described the right to resist as the supreme human right (Murphy 2011)P466), and others insisted that the right to rebel against oppression is not

[348] Arthur Kaufmann spoke about "small-coin right of resistance", that is, a "small" resistance in a nearly just society that will prevent it from becoming a lawless state, and with that, give life to the "larger" resistance (Kaufmann 1985).

only a fundamental human right, but the most important human right we have, and the only effective avenue of democratic defence when rights are under attack (Fiedler 2009)P44-45). Some even call for the international community to recognize a right of nonviolent resistance for those engaged in limited, proportionate actions in defence of fundamental human rights (Falk 1989). For those that follow this line of thought, the only valid criteria to justify the rights to resist is the violation of human rights themselves (Torres Caro 1993)P413) (Magoja 2016)P6)[349].

Yet despite this substantiation, I contend that the right to resist is not a human right**.** Labelling it as such would defeat my efforts to construct a universal theory of the *ius resistendi*.

Like other rights, human rights are artifacts created by narratives and, therefore, they are contingent on the value that the dominant actors in the international community give them. Rainer Forst contends that human rights (and by extension other fundamental, primary and basic rights), have no value per se, and that in the market, as it happens with rights, things without value are not protected or cared for (Forst 2017). It is tricky to resolve the question of which particular freedoms are crucial enough to count as human rights worthy of care and protection (Clapham 2006), because the answer always hinges on their actual value in the international "scale of worthiness" and on the volatile political market where they are asserted.

In its preamble, the Universal Declaration of Human Rights (UDHR) already warned us that "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge", that is, to protect human rights. Yet, since it was adopted, there has been an astonishing increase in the number of "new" human rights which, in many cases, have been justified by arguments that would normally pertain to the political sphere[350]. There is no common understanding of what human rights are, but rather a tendency to present every significant political or social theory in human rights language (Renzo 2015). And it is precisely the popularity of the human rights discourse that has led to a proliferation of either mutually incompatible, or simply implausible human rights claims, a development that damages the credibility of human rights discourse (Boot 2015)P215), thus complicating the task of discerning which ones should be protected and cared for.

[349] For Norberto Bobbio, in modern constitutionalism political power, in all its forms and levels, including the highest one, is limited by the existence of natural rights, including the right of resisting tyrannical power, of which individuals are the holders of said rights since before the creation of civil society (Salazar Ugarte 2007).

[350] In his dissenting opinion in the South-West Africa Cases, Judge Tanaka of the U.S. Supreme Court noted that "a State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more than declaratory" (Wilson 2017)P25).

Like any other normative system, human rights are the outcome of a particular phase in history and of certain expressions of power, and their realization ultimately depends on that very system of power[351]. Hans Lindal argues that "the moment human rights are positivized as fundamental rights, they are inevitably linked to a limited normative point of joint action under law, and that its moral dialogue must at that stage become political" (Loughlin 2014)P971). Law, even human rights law, is politics by other means.

For some, indeed, human rights are nothing but a political instrument, maintaining that because of the logic of domestication of universal aspirations, human rights have marginalized social justice and have become both the site of conduct and the reward of politics (Douzinas 2021). Focusing on universal features of humanity, others argue, has oftentimes meant turning a blind eye to rights that apply to some individuals, but not all (Frost 2018)P148), and so, even in liberal democracies, the language of human rights has become a refuge narrative for power to evade its domestic responsibilities whilst embracing the grand language of universal values to vindicate their own legitimate right to rule. In fact, human rights are not only claimed by those facing injustice, they have also been politically used as instruments against those who claim their protection, especially against those around the world that resist a conception of European universalism (Halper and Reifer 2019)P743), that is, against those that oppose the dominant narrative or lack normative status.

Hannah Arendt already referred to "the problematic nature of the rights of man, which is deeply rooted in the rise of the nation's sovereignty against the sovereignty of individuals" (Faghfouri Azar 2019). Arendt also observed that "the trouble with these (human) rights has always been that they could not but be less than the rights of nationals, and that they were invoked only as a last resort by those who had lost their normal rights as citizens" (Arendt 1990)P149). The enjoyment of human rights becomes contingent on the already pre-defined advantageous normative status of a person; a full citizen, or at least a grievable-worthy subject. Perhaps not in their essence or in their formal acknowledgement, but certainly in their effectuality, human rights seem to be more about the right humans than about rights.

The *ius resistendi*, in contrast, is not about humans, but about political agents. The *ius resistendi* is a right that is universal, autonomous and includes everyone that is enmeshed in a relationship of power. It is inherent to the political nature of the person, not to her human condition[352]. The *ius resistendi* is not a human right in the sense that it is atemporal

[351] And international law, as some note, is conservative (state centered) by nature (Mégret 2009)P27).

[352] In the German and Greek constitutional, for instance, the right of resistance was conceived as a right of citizens and not as a human right, that is, as a political right exercised by the citizen as *homo politicus* for a collective purpose (Fragkou 2013)P852).

to any social or political description of rights, it is a right derived from an essential correlativity that arises out of power relationships, regardless of their form. Although in liberal democracies, the *ius resistendi* is mostly understood as an engagement within the political space performed through the language of human rights, especially the enabling rights, that does not make the right to resist a human right.

Irrespective of the order in which it is asserted, the actualization of the *ius resistendi* must nevertheless rely on some form of relational framework, even if primary, that provides a political space of contestation, a framework that is somehow shaped by the *ius resistendi* itself. I have elsewhere argued that when a person asserts her agency in the space where rights are created and contested, she becomes entitled to *the* right to, instead of just having *a* right to. But the right to resist in not even contingent on the constitution of a formal notion of rights within that political space. It is not because there are laws, and not because I have rights, that I am entitled to defend myself, Foucault held, "it is because I defend myself that my right exists and the law defends me" (Aitchison 2017)P8). I share Foucault´s view that the political promise of human rights would be utterly exhausted if we ever arrived at a definitive and enduring statement of humanity and its rights. Freedom or human rights should not be limited at certain frontiers (Golder 2015). The *ius resistendi* is not a human right because is not merely a discourse-dependent right, it is both a natural incident and a man-made concept that expounds beyond narratives to build on the attributes of a physical phenomenon.

And while, for some, rather than in legal or constitutional terms human rights are mostly understood as human demands for protection (Teitel 2021), I contend, precisely, that the right to resist is not a human right because it cannot be constrained to a theoretical framework that attempts to rationalize universal trust in the idea that one is entitled to protection for the mere fact of belonging to the human family.

The right to resist is not a human right, is a primary right[353], not in the sense of being in a hierarchical position within a normative system, but as a right that is basic, original, primal, not contingent on other rights but only on the idea of rights. It is a right that it is not gifted, allowed or regulated by the state, it is not an acquired right, a right granted by the sovereign, or even by the constituent power. The *ius resistendi* is a primary right in the sense of being a constitutive right of the political, the place where all other rights are created and contested.

[353] Kimberley Brownlee coins the term "primary right to civil disobedience" (as a remedial right to preserve one´s integrity) (ÓNéill 2012). She however frames the "primary" in terms of the external expression of the right to resist, whereas for me, the primary lies in the very essence of the right.

5.5. An individual right of collective expression.

Except for key historical figures and unsung heroes, we normally exercise our political rights within a certain safety zone. We are more reluctant to publicly proclaim a right[354], assert a position, or make a claim if we feel that we are alone (or in a significant minority[355]). There is definitively strength in numbers[356]. We also have confidence that we are doing the right thing when we act in a way that resonates with the community, with a political, ethnic, cultural or social group, or with the like-minded. This is so because our normative status and our identity are largely defined by our participation in a community. Collective identity is a rational or moral, autonomy-based exercise by the individual to voluntarily be bound by and accept conditions external to herself[357]. The community enables the expression of individual rights but also constrains them, because the community determines the content of the rules by which the individual abides while reinforcing the expression of the self within those constraints.

We share a normative space with others that are also entitled to their individual rights (in our modern conception), and that have certain obligations. For those rights and obligations to be recognized, that shared space must be somehow constituted, that is, it must exist as an autonomous construct to sustain itself but also to be able to recognize, protect, enable, or constrain the rights of others[358]. To establish a scale of worthiness to measure the value of rights, the public space can only be constituted through a narrative of rights because otherwise there could be no dimension to balance and evaluate them. In classical legal theory, rights are rights because they generate a claim-based relationship between those making a claim and those to whom the claim is addressed. If the space against which claims are made is not constituted, it cannot generate obligations. The state, as a constituted space,

[354] Clandestine political activity tends to render its effects illegitimate, because other citizens do not have the opportunity to hear, to understand, and to counter one's justification for the project that one supports (Hutler 2018)P75). Clandestine activity does not fulfill the requirement of accountability.

[355] I use the term minority not in reference to the numbers but in terms of the access to power of a group. A "majority" of population can indeed be a minority in terms of power share vis-à-vis a much smaller group (e.g., economic elites). A "minority" can (and does) affect the normative status of others and control the fundamental processes in a state affecting the majority.

[356] There is strength in numbers, but numbers cannot be a determining factor to define the legitimacy of an expression of the right to resist. I agree with those that assert that it is arguably not acceptable to circumscribe the right of civil disobedience with a number quota (D. D. Smith 1968)P709).

[357] Will Kymlicka, too, holds that the membership of a cultural community is a basic value of liberal democracies. Cultural structures are important inasmuch as they constitute a pre-requisite for people to be able to exercise their personal autonomy (Spector 1995)P72).

[358] Different degrees of complexity in the constitution of the space entails different levels of recognition and protection of rights.

has duties and generates obligations[359]. The community, as a constituted space also generates obligations. Some of those obligations are legal, others are moral, social or political. The human intention in creating social and institutional objects, whether legally constituted or not, always presupposes a collective purpose (Thomasson 2007)P52), and having a purpose, a common will, is the core element to having rights, both individually and as a collective.

Alluding to the idea of human rights derived from the French Declaration of the Rights of Man and of the Citizen, Hannah Arendt argued that "as mankind, since the French Revolution, was conceived in the image of a family of nations, it gradually became self-evident that the people, and not the individual, was the image of man" (Arendt 1973)P291)[360]. And Foucault argued that in the liberal art of government, the overarching objective is to serve the balanced, multifarious interests of individuals, groups, and the collectivity (Brännström 2014)P181).

The idea of the collective, rather than the individual, is fundamental in understanding the liberal ideology: the consumers, the citizens, the elites, the corporations, they are all groups with specific legal and political rights and obligations. The market functions because of the collective, and power is reduced to the exercise of a (small) collective enterprise, not only of an individual as sovereign. The security and the survival of the collective, not of its individual members, are the non-negotiable and unalterable values for the members of the elite (Habermas 1999). Liberalism has obsessively sanctioned a normative framework that under the guise of individual rights has indeed endorsed and protected the rights of collectivities as the only means to ensure that the elites remained in power. But the same is true for any other political form of organization.

Neoliberalism is not concerned with individual expressions of freedoms (or of dissent) that can be prosecuted and controlled. Rather, it fears collective expressions of rights[361],

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[359] Leslie Green argues that rights are not merely correlated with duties on the part of others, but constitute the grounds of those duties, and duties have peremptory force, establishing what one must do, not merely what it would desirable (L. Green 1991)P317-318). The fact that the state has a peremptory duty toward its citizens, implies that citizens, collectively, have rights, from which the peremptory duty of the state originates. The state would not exist to provide one single person with security, or with health, or with economic development.

[360] The Declaration of the Rights of Man and Citizen from the Constitution of Year I (1793) proclaims the collective character of rights. Article 34 declares that "there is oppression against the social body when only one of its members is oppressed. There is oppression against each member when the social body is oppressed", and article 35 declares that "when the government violates the rights of the people, insurrection is for the people and for each portion of the people the most sacred of rights and the most indispensable of duties".

[361] Some liberals fear that by grating rights to the collective, the rights of individuals, even of group members, may at times be sacrificed for the sake of group protection (Jovanović 2012)P201).

especially appeals against inequality and discrimination because they challenge the principles of democratic practice. The idea of non-accountable, loose political agents terrifies liberalism because these agents cannot only affect the rights of individuals, by subduing them, but also the normative and legal foundations in which liberal democracies rely. Those that only acknowledge individual rights should consider this: an individual may be bound or obligated to comply with the law, but if collectives are not right-bearers and they do not have rights, then the collective as such is not bound (or obligated) by the law (Gianolla 2009). That means that there would be no legal recourse to the collective behaving in an unlawful manner because collectives would be irresponsible in front of the law.

In spite of the political suspicions that may resist the recognition of collective rights, one should really stand outside the confines of any theory of law to argue against them (Sauca 2019)P102). General legal theory certainly possesses enough legal material, as well as resources, for the conceptualization of collective rights (Jovanović 2012)P196). Some authors contend that collective rights are rights because the right holder is a collective, which is not created by law, cannot be reduced to a simple sum of individuals, has an intrinsic moral value and is determinant for the life of its members (Dávila 2015). In other words, collective rights are rights because of their value collectivism (Jovanović 2012)P44). Others maintain that groups can have rights as far as full-blown or autonomous agency is not required for the possession of choice theory rights, groups can be seen as agents, albeit in a limited sense, and they can make irreducibly collective choices in spite of their limited agency (Preda 2012)P229)[362]. Still others propose the concept of the "law of crowds" in which the collective is a social agent, and a legal subject, because of the material similarity of the subject involved, that is, the crowd (Wall 2016)P24).

Rainer Forst develops a rights-theory based on the "freedom from domination" as part of the collective right to determine one´s political structure (Forst 2017). Forst argues that non domination comes from members of an active society. And Joseph Raz develops a collective conception of groups rights, which includes formal conditions based on the interest theory of rights, in which duties are imposed to individuals when the interests of human beings justify so (Jones 1999)P208). Another way of analysing the existence of collective rights is to focus on the community to determine whether it can be entitled to rights, an acknowledgement that is contingent on three questions: 1) whether communities have

[362] A group (the collective that resists) can be considered a claim holder. There are legal precedents to do so. For instance, the German Constitutional Court recognizes that a group without legal personality can benefit of fundamental rights (Grosbon 2008). Article 19 (3) of the German Basic Law states that "The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits", understanding "artificial persons" as associations, companies, or other collectives.

value per se, 2) whether the value-importance of communities justifies their having collective moral rights; and 3) whether the protection of certain values or moral rights is best canalized by the attributes of legal collective rights (Spector 1995)P68). The notion of individual rights and collective rights, I contend, can co-exist and reinforce each other, especially when the individual, voluntarily subordinates his or her own rights to the common political will of a collective.

Radical democratic postulates explain the collective not by extending or protecting the assertion of individual rights, as in the liberal tradition, but by analysing the type of power relationship between social groups, classes or collective identities within society. In radical thinking, a collective political identity, based on the notion of a common purpose, forms against negation and non-acknowledgment of the "us" versus the "they". This antagonism is reflected in a resistance to being overcome by the other that emerges as a shared identity that may have a different or conflicting view of the political, social and economic situation because the collective subject of resistance is itself the result of the power of another collective (Demirović 2017)P33). For Habermas, it is the socially irreducible common good (or the common political purpose), not the agent, that determines the existence of the collective.

Sanders differentiates between groups rights and collective rights (Sanders 1991)P368-370). Group rights are simply the sum of the rights of the individual members of the group, and while the group may use collective action to fight discrimination, the major limitation of group rights is that they only exist while the discrimination continues[363]. Collective rights arise as members of the group are joined together not simply by external discrimination, but by an internal cohesiveness (a will) that seeks to create, protect and promote its own identity. The collective can manage the group's rights beyond the individual sum of rights or of interests. Leslie Green further divides collective rights between the rights of collective agents (political parties, trade unions…), and the rights of collective goods (L. Green 1991). For him, it is only the second that may, to some degree, fulfil the political function assigned to collective rights.

I speak of collective rights, not of group rights. I maintain that collectives that can assert agency through common will, a will different from the individual will of its member, can be agents with rights. The will theory of rights not only explains the nature of individual rights, but also that of collective agency. A collectivity with a political (rational) purpose exerts agency as it engages in the pursuit of an objective that has the potential to modify

[363] Discrimination, I argue, always remains a matter of collective nature, because it is through an evaluation of our individual condition in relation to that of others that we determine the circumstances that affects us.

the normative status of the group, and not only of its individual members[364]. Collectives can have rights when they share a common will, not just because they may share a common interest. For those defending the interest theory of rights, what qualifies the right as collective is the fact that it ultimately serves the interests of the group as such, and not of individuals (Jovanović 2012)P9). Rather, from a will theory perspective, collective rights reveal the will of the collective that ultimately serve the conscious political decision of the collective. It is the political will that qualifies the right, for without an action there is no *right to*.

The fundamental question, however, is not whether collectivities can have rights. Law can, and does, create collective entities and assigns them with rights[365]. Companies, association, lobbies[366] and in many countries, indigenous or linguistic minorities, or even rivers[367] have rights and legal personality. International law recognizes roles, rights, and duties of nations, tribes, peoples, belligerents, and other entities and communities in addition to the state[368]. The question is, rather, whether the system can shoulder the consequences of granting rights to collectivities that may assert their will to resist, oppose or challenge the *status quo*[369]. Sanders, for instance, argues that the reason why collective rights are ostracized by the liberal state is, in part, because minority groups are often seen as destabilizing factors in an international system based on states (Sanders 1991)P375). Jovanović considers collectives as the third type of right-holders, neither natural nor legal persons. He notes that whether groups can hold rights at all becomes intricately connected to considerations about consequences (Jovanović 2012)P199). The recognition of collective rights is only important

[364] Some argue that the articulation of constituent power can apply only to collectives that aim at a certain tenacity and longevity, and not to the more fleeting campaigns that enact ambitious, but short-lived glimpses of alternative forms of life (Niesen 2019b)P43).

[365] In his analogy to King Midas, Hans Kelsen argued that everything to which law refers becomes law (Sauca 2019)P102), and therefore, if we, as legislators, decided to grant legal personhood and rights to a collective, there should be no obstacle to our will.

[366] Collectives asserting their collective right to resist through enabling rights in pursuit of legitimate political objectives, should be grated the same rights as other collectives engaging in the political, for instance, lobbies.

[367] The Colombian Constitutional Court, through ruling T-622 of 2016, recognized the Atrato river as a subject of rights, with a view to guaranteeing its conservation and protection.

[368] Some argue that "groups, including nations, can and do hold a variety of rights. But these are not human rights" (Donnelly 1989). According to the 1951 Genocide convention (art II) "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group (…)". The rights attacked are those of the collectivity though the maiming of its members. One can argue that collectives may have human rights, but that discussion is relatively unimportant. Many individual rights are not human rights but are still rights. Groups can have rights and their rights can matter, even if those rights are not human rights. It is the response to the violation of the right determines its normative value, not its formal characterization.

[369] Brian Tamanaha argues that "beliefs, theories and concepts are given meaning by and evaluated in terms of the consequences that follow from actions based thereon" (Tamanaha 2017)P3). The *ius resistendi* is ignored not because of a legal impossibility, but because no power willingly chooses to take on the consequences of granting the right to oppose power itself.

if the definitory process carries some normative weight with it. For the liberal state, the consequences of rights recognition to collectives are not a matter of law or legal orthodoxy, but of political survival.

Rights are formed and contested in the polis, and the polis is a collective endeavour. The non-recognition of rights is tantamount to the expulsion of the polis. Not being able to participate in the polis leads to the political, social and cultural demise (even physical in most cases) of a subject or of a collective, for the only possible way for an individual or a collective to have their rights protected depends on a larger encompassing order, which in turn implies membership in a political community (Faghfouri Azar 2019). The life of the polis is the assertion of rights in the common space, or what Charles Tilly calls, the public participation in the collective making of claims (Kriesi 2009)P342). Collective rights, therefore, are anchored both in the value of cultural belonging for the development of individual autonomy, as well as in each person's need for a recognition of her identity (Torbisco Casals 2006).

And so, if the *ius resistendi* is the right to remain in the polis, does that mean that the right to resist is a collective right? Even John Locke acknowledged that resistance and other forms of opposition are collective endeavours motivated by a collective conscience, not the conscience of man alone[370]. The collective, as a political body, bestows the *ius resistendi* with its performative power. In every square where there is an external expression of the right to resist, there is a group of people joined by an individually held common will[371]. Others, note that resistance to oppression is "collective in its exercise, but individual in its foundation" (Fragkou 2013)P851)[372]. For Costas Douzinas disobedience is an individual moral act, and resistance a collective political event (Douzinas 2013)P90). The right to resist is, actually, an individually held right that can be asserted individually (which is different from contentious objection[373]), but to be considered a legitimate expression of the *ius*

[370] "But if either these illegal acts have extended to the majority of the people; or if the mischief and oppression has lighted only on some few, but in such cases, as the precedent, and consequences seem to threaten all; and they are persuaded in their consciences, that their laws, and with them their estates, liberties, and lives are in danger, and perhaps their religion too; how they will be hindered from resisting illegal force, used against them, I cannot tell" (Locke 2017). Chapter XVIII of his 2d Treatise on Government: Of Civil Government, Of Tyranny (§. 209).

[371] For some, the right of resistance is an independent, neo-Kantian right regarding the autonomy of collective groups, such as nations or peoples, that is not reducible to the right to exist (Ohlin 2014)P2).

[372] The New York declaration of the Occupy Movement exhorts everyone to "Exercise your right to peaceably assemble; occupy public space; create a process to address the problems we face and generate solutions accessible to everyone" (Square 2011). It speaks of "your right" and "solutions to everyone"; exercise your individual right, for the collectivity.

[373] Although some argue that resistance "can be characterized as either opposing or counteracting (external resistance) or withstanding (internal resistance)" (Silvermint 2013)P408), most authors agree that

resistendi, even individually asserted resistance must seek to redress a situation that affects the general interest rather than a remedy to the violation of an individual right. The first president of the Federal Court of Justice of the Federal Republic of Germany, Hermann Weinkauff, stressed the collective character of resistance, declaring that "resistance will be justified only if it turns the fate of the whole, not if it turns the fate of the individual" (Schwarz 1964)P129). What one deduces from Weinkauff´s statement, is that external expressions of the right to resist must be founded on ethical/moral judgements based on specific convictions that contemplate the fate of the collective as the corollary of their very existence.

To reconcile the apparent contradiction between individual versus collective rights, I contend that the *ius resistendi* is an individual right of collective expression. It combines the two major sources of normativity in western tradition, that of autonomy (individual rights), and that of the common good (the collective) (Etzioni 2014)P244). The individual domain has traditionally been considered within the sphere of rights, the collective sphere has traditionally fallen within the moral, ethical and political domain. The *ius resistendi* is an individual right pertaining to the political nature of the person, expressed in the polis through narratives and public engagements that relate to the general interest.

The "right to resist", "the collective right to resist", or "collective resistance rights" are analogous. There is only one *ius resistendi* that is actualized through collective expressions or that is defined because of its collective purpose. In the communitarian approach, neither the individual domain nor the collective sphere takes precedence over the other, but rather, individual and collective rights are complementary[374]. Because the *ius resistendi* is an individual right of collective expression, those that assert it have a double responsibility; as

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conscientious refusal is not a form of resistance. Contentious objection is not necessarily about a subject resisting a rule, for instance advocating for the complete elimination of the military, but rather is about a subject as seeking exemption from particular order, for instance, being personally exempted from military service. The concept of conscientious refusal "(…) was non-violent individual action with the purpose of preserving the moral virtue of the individual. It was justified when a ruler tried to force a subject to lie or to kill an innocent, going against natural law and divine law" (Maliks 2018)P450). For the ECHR, "the ambit of the right to conscientious objection includes not only the freedom to act according to one's beliefs, but also the freedom not to act, not to associate and not to tolerate actions from others which contradict one's personal convictions" ECHR Case of Herrmann V. Germany (Application no. 9300/07) of 26 June 2012. The lines between what constitutes resistance in relation to other individually or collective moral choices regarding the obeyance to the law is not always evident. What is interesting is that some argue that "private forms of dissent have generally been viewed as normatively superior to the public challenge to democracy that civil disobedience represents, and thus deserving of greater moral and legal protection" (Oljar 2014)P293). In other words, because contentious objection does not represent, in its individual form, a significant threat to the order, it is treated with higher consideration regarding the normative aspects of its assertion.

[374] Communitarians often suggest supplementing the language of rights with another discourse, for instance discourse which highlights the importance of obligations owed to the society without discarding the discourse of rights altogether (Harel 2005)P204).

individual agents appealing to rights, and as collective agents performing that right. The right to resist bridges the gap between the "self", the "us" and the "they". It is a right that defines the role of the political agent within the political itself because it ultimately challenges collective narratives that create individual rights.

5.6. The right to resist as sovereignty: the exception over the exception.

Immanuel Kant rejected the possibility of resistance because, for him, legal resistance to the monopoly of power implied having authority to define the conditions, analyse the criteria, and choose the means for disobedience. If that was the case, every political opponent would then assume the power of decision and acquire the privileges of a ruler (Heck 2012)P189). But Immanuel Kant did not live in a liberal democracy. The modern concept of democracy is grounded, to a significant extent, on realizing a carefully crafted balance between individual autonomy and collective social order. Autonomy, as communitarians argue, is used to mean one's right to act on one's preferences. Social order is used to express the idea that some constraints on the right to act on one's preferences are needed. Carefully crafted balance refers to the notion that a society that maximizes either value is not a tolerable one (Etzioni 2014)P253).

The balance between autonomy and social order, between constituent power (the people) and the power of the constituted authority (the ruler), is reflected in the constant tension between the limits of sovereignty and the limits of the normative framework in which sovereignty rules, between freedom and restraint. Peter Fitzpatrick argues that law extends to, and sustains sovereignty, but sovereignty contains a lack intrinsic to its identity, as a result of which sovereignty is dependent upon law and the capacity of law to encompass that which exceeds it (Madsen 2010). Law, as a reflection of power, cannot in its own terms be limited in the interests of a power outside of itself (Fitzpatrick 1992), and so, it is the constituent power that determines the content of the sovereignty, the essence of what law encompasses, and its relation to the normative potentiality outside it.

The sovereignty of the constituted power, and the sovereignty of the constituent power are not necessarily contradictory or exclusionary terms, for asserting our own (constituent) power should not represent a threat to the constituted power, neither a contradiction in Kantian terms[375]. If as constituent power we surrender some of our rights and freedoms to the constituted power, then as constituent power, we should be able to appeal to our

[375] According to Kant, it is not up to a people already subjected to civil law to investigate "into the origins of the supreme authority to which it is subject, that is, a subject ought not to reason subtly for the sake of action about the origin of this authority" (Heck 2012)P193). One wonders, in fact, what Kant would think of the profound systematic and conceptual analogy between constituent power and democracy, insofar as they both describe collective acts of self-legislation (…) and of liberty as political autonomy (Kalyvas 2013).

reserved rights to reformulate the terms of the relationship with the constituted power[376], with the caveat that the sovereignty to formulate does not necessarily imply the sovereignty to execute. The sovereignty of the constituent power is the ability of individuals and collectives to reclaim their *potestas*[377] to reaffirm their own position (their autonomy) in relation to rule that they have given themselves to command their lives. In liberal democracies, the constituent power continuously seeks recognition of the constitutive nature of its own sovereignty as part of the process derived from the concept of democratic practice, and as means to revealing the nature of its ever-present potentiality behind the constituted form. In most cases, as Costas Douzinas argues, "what happens is that the constituent power establishes a new society but is marginalized by its institutional creations, only the constituted form becomes legitimate. The constituent, which gave rise to it, recedes, but remains active, becoming an ever-present potentiality: it lies behind every constituted form" (Douzinas 2021). The sovereignty of the constituent power seeks recognition and validation of its agency in a broader system of legitimization, not necessarily to seize power to execute its demands.

So how does the constituent power become constituent again? The *ius resistendi* is the expression of constituent power as an expression of sovereignty[378]. It restores the right to being constituent power by forcing the constituted power to confront those that refuse to recede. Asserting the *ius resistendi* allows the individual and the community to consent to the order without surrendering their sovereignty[379] and without relinquishing the power to determine their own normative status in relation to themselves, in relation to their external circumstances, and in relation to those that can potentially affect their normative status. The *ius resistendi* represents the alternative between anarchy[380] or submission (Wolff 1970)P35)

[376] The main difference between my argument and regular democratic procedure (e.g., elections that articulate the terms of engagement with the constituted power), is the recognition that the Lockean reserved rights (including the *ius resistendi*), are integral part of constituent power.

[377] "As in the power intrinsic to political jurisprudence that creates authority as a product of the people's capacity to act in common" (Loughlin 2016).

[378] "Civil resistance is a merely practical illustration of the exercise of the authority of the people" (Bellal and Bartkowski 2011).

[379] In his limited vision of rights, John Rawls argues that "to act autonomously and responsibly a citizen must look to the political principles that underlie and guide the interpretation of the constitution" (Rawls 1991)P120). The narrow liberal interpretation of civil disobedience disservices the cause of the *ius resistendi* and with it the domain of personal autonomy necessary to become constituent power. The underlying objective of the liberal definition, I suspect, is to prevent personal sovereignty from actually becoming effective constituent power.

[380] John Rawls argues, idealistically, that in instances of civil disobedience "there is no danger of anarchy so long as there is a sufficient working agreement in citizens' conceptions of justice and the conditions for resorting to civil disobedience are respected" (Rawls 1991)P121).

by refusing to be bound by either, and instead allowing for the (re)creation of a new or alternative constituted form.

Like law, the *ius resistendi* is paradoxical regarding the freedom versus constriction paradigm. Asserting the right to resist does not necessarily imply resistance to being governed, it is rather a declaration of sovereignty to reclaim the power to decide on how to be governed. Through external manifestations of the right to resist we seek to liberate ourselves from structural injustice, and yet, it is through those engagements that we resolve the ideological and legal frameworks of the institutionalized space. When we assert our right to resist, we widen the effective power of the constituted sovereign and limit the space for resistance. It is by asserting our individual or collective sovereignty through the *ius resistendi* that we publicly, and thus politically, announce our readiness to renounce our constitutive power when certain conditions are met.

Through claiming rights, as an expression of the right to resist, we shape (indeed, at times constitute) our world and ourselves (Zivi 2012)P10). The right to resist is the embodiment of a claim in Foucauldian sense, "seeing rights claims as a vehicle for forging new emancipated forms of personal identity" (Aitchison 2017)P2). To resist implies the ability to say no (Brumlik 2017)P19), which indicates an act of freedom that creates obligations on the duty-bearer, that is, on the object of our grievance, the constituted power. H.L.A Hart said it clearly; "the individual who has the right is a small-scale sovereign to whom the duty is owed" (Wenar 2005)P238). The *ius resistendi* is the ultimate expression of validation of the conception of the rights-holder as a sovereign individual (Van Duffel 2003). As it turns out, Kant´s arguments to reject resistance provide the strongest reasons to validate the *ius resistendi*, for it is a right that bestows the power to define the conditions (recognition), analyse the criteria (reason), and choose the means (freedom) of disobedience, not necessarily to the monopoly of the constituted power, but to the relegation of people´s own constituent power[381].

It is precisely in this regard that the right to resist and the right to exist are analogous[382]. Regardless of the source of oppression (by a public authority or a non-public agent[383]), or

[381] Some in fact argue that every member of a legal community has the obligation to examine whether commands which are directed to him are lawful and that when for some reason the rule of law breaks down or falls into disarray that the whole responsibility reverts to the individual, hence also the competence of examination and rejection (Marcic 1973)P111).

[382] Some argue that the right to resist and the right to exist are not similar because resistance may be futile, and one may be annihilated (Ohlin 2014)P3). However, I believe one does not have a right contingent on its utility. Whether one is finally annihilated or not, the right to resist is an expression of the right to exist (politically, socially and morally), which is analogous to the right to remain in the polis.

[383] Self-defence, for instance, may not be an expression of the right to resist within the concept of the *ius politicum*, but it is an expression of resistance to harm, a true expression of the right to exist.

whether the domination and the oppression are the result of structural or temporal circumstances, asserting the right to resist reaffirms the will to exist, and where there is will, there is right. The *ius resistendi* engages the process through which existence is acknowledged. To resist is to claim the primary right of existing, of being recognized, and of being able to assert one´s will and autonomy in conditions of freedom. In the *ius politicum*, the right to resist is the right to exist in the polis, a proclamation of one´s sovereignty as a political agent. To resist, then, is to become a potential source of normative change. The *ius resistendi* is constituent power in that its assertion can significantly modify the normative status of the defining elements of the *ius politicum*, and even of the very narrative that creates rights that allows oneself and others to exist.

Legal theorists have traditionally accepted the idea that "the rule is freedom and corresponds to the individual; the exception is the penalty and corresponds to the State" (Pelloni 2000)P2). For Carl Schmitt, "sovereign is he who decides on the exception" through an act that demonstrates the primacy of the existential over the merely normative (Loughlin 2017) that is, he who has the ability to decide on when to suspend rules and make a decision (Gullì 2009)P23)[384].

For Carl Schmitt, the discussion about the sovereign is also a discussion about legal limits. Although the exception remains outside the law, Schmitt maintains that the decision concerning the exception has a definite place within "a systematic legal-logical foundation (…). The sovereign decides whether or not the law applies" (Mcquillan 2010)P98). Being at the outermost sphere of legal power, the sovereign (in whatever form) occupies the boundary between law and non-law (Liew 2012)P1). Like the concept of law, as maintained by Fitzpatrick, or the notion of resistance, as asserted by Foucault, Schmitt argues that "the sovereign stands outside the juridical order and nevertheless belongs to it, since it is up to him to decide if the constitution is to be suspended in toto" (Pottage 2013)P272). When acting on the exception, the state acts illegally, it is a beast applying its own force but, at the same time, the sovereign is the only one capable of instituting the law (Sandoval 2017)P25).

[384] I agree with Schmitt´s "exception" only insofar as it relates to the *ius politicum*. Resistance is about power, and power is a game played in the domain of the political. Political order, as Schmitt noted, could not be safeguarded by constitutional provisions, but by an extra-legal authority, that is, by that which by definition cannot be part of constitutional arrangements (Emden 2006). Schmitt´s concept of politics is rooted in the friend-enemy distinction, and so a theory of the right to resist could potentially be based on that dichotomy too; power is friend or enemy, and whatever form it takes, the other will resist it by becoming the friend, or the enemy. He also stated that "having a political commitment means being able to distinguish friend from enemy and, ultimately, demonstrating a willingness to fight the enemy to death" (Werner 2009)P128). That fight is not an external expression of the right to resist, is pure irrational war, because without reason there is no politics, and without politics then there is death. Some also assert that Carl Schmitt´s state of exception can be a mere fabrication of the sovereign, which acquires dubious legitimacy on the basis neither of ethics nor of a violence travestied as force of law, but of mere and raw violence (…) the sovereign decision creates the exception, or state of emergency (Gullì 2009)P24).

Law, sovereignty and the right to resist occupy the same space because they are complementary concepts: they are all fundamental parts of an order that none of them can fully dominate.

The concept of sovereignty is connected to the power to decide on the exception, and being a matter of power, I contend, sovereignty also refers to the power to oppose or to not accept the decision over the exception. Sovereignty is the power to establish an alternative exception, or an exception over the exception. Where there is sovereign power to decide on the exception, there will be resistance to the prerogative to decide on the exceptionality[385], whether from the constituent or from the constituted sovereign. A sovereign can assert its power by deciding on the exception, opposing the exception, or by imposing its will over the will of other sovereigns[386]. If a sovereign is justified in using its power to impose its exception, those who oppose that exception should also be able to use their power. Whichever sovereign acts on the exception places itself in the periphery of the political and of the legal order.

Democracy is (or should be), a system of continuous negotiation between sovereignties. The health of a democracy depends on its ability to generate suitable spaces where sovereignties can articulate and re-balance their spheres of sovereignty when crises arise, that is, when a constituent or a constituted part of the order appeals to its prerogative over the exception. Some argue that to limit the exercise of sovereign decision, liberalism has only emphasized the exceptional character of those moments, making it even more obvious that there are cases in which the norm does not apply (Mcquillan 2010)P103). Yet that "liberal exceptionality", it seems, is becoming increasingly conventional. In most ideological regimes around the world, and especially in neoliberal systems, the unconventional actions taken in response to crises have become quasi-permanent (White 2017)P3). In other words, the exception is frequently applied. What some call the "real state of emergency" transcends the liberal questions of declared and undeclared emergency to define the situation we lived in or in which we live in (Mcquillan 2010)P96). The real state of emergency means that some are subjected to exceptional powers, while most of us remain unaware or, as I argued elsewhere, unwilling to be aware. Some will assert their sovereignty by resisting the exception imposed on them, while most will remain oblivious to the fact that their

[385] For John Locke, "prerogative is nothing but the power of doing public good without a rule" (Locke 2017)Chapter XIV, para 166).

[386] Sovereign is that who has the possibility to decide on the exception, even if in a covered manner. Large corporation or supranational organizations are sovereign in that they can affect their own normative status, ergo the argument that the right to resist can also be legitimately asserted against non-public interests. Nevertheless, the argument here is focused on the traditional understanding of constituent (people) and constituted (state) sovereign.

sovereign power is being weakened. After all, "the genuinely exceptional power is to strip off someone of protection while they are before the law" (Wall 2016)P25).

Agamben notes that "not only in economics and in politics, but in every aspect of social life, the crisis coincides with normality and becomes, in this way, just a tool of government" (Stijn De Cauwer 2018)xv). Governments use crisis to increase their political and legal power by creating recurrent exceptions in which to assert their power to decide, while maintaining the potentiality of the constituent sovereignty coerced under the pretext of a continuous threat to the fulfilment of basic commodity rights (security, hunger, unemployment…)[387]. The state of exception has become the norm (from anti-terrorism laws to COVID-19 restrictions), to the point that emergency legislation is now presented as ordinary within the constitutional framework (Gómez Orfanel 2021)P209). Because constitutionalist theories are based on the idea that states of emergency are not extra-constitutional, but singularly constitutional (Gómez Orfanel 2021)P202)[388], one must conclude that the assertion of the right to resist is not extra-*ordinem*, or extra-legal or unconstitutional, but singularly constitutional, in the sense of being part of the sovereign response to the exception imposed by another sovereign. The *ius resistendi* is not a democratic exceptionality, but a constitutive element of the negotiating processes among sovereignties. As the collision between sovereignties becomes more recurrent, the right to resist is appealed to more often, and becomes a fixture in the constituent-constituted discourse.

Spinoza already demonstrated that the key to assessing the quality of governance is a critically engaged, active society conscious of its sovereignty (de Lucas and Añón 2013). The right to resist is a primary right that restores an awareness of sovereignty to the individual and to the community (to the constituent power), as it forces the constituted sovereign to expose the meaning, the purpose and the measures of the permanent state of emergency and, with it, the real nature of the order. Sovereignty is not about rightness, is about power, sovereignty is decision and domination (Gullì 2009)P23). The right to resist is about power, but it is, fundamentally, about rightness.

[387] "Often the most vigorous political debates are centered around concerns relating to food security, risk management, catastrophic imaginaries, and global non-state actors" (Muller 2011)P15).

[388] Exceptionality is not incompatible with the existence of a regular, legally binding legal order. France is an example. Article 16 of the French Constitution of 1958 provides for exceptional powers to the President in case acute crisis, article 36 allows a possible state of siege, law 55-385 of 3 April 1955 (on Algeria) provides for the state of emergency, and the law 2020-2090 of 23 March 2020 allows the declaration of a sanitary state of emergency.

5.7. The ultima ratio.

The mere fact of having a right indicates that there is a normative framework (a constituted space) where it can be actualized. In many instances laws determine how rights can be enjoyed, how they are protected, and the remedies for their violation. But not all laws are applied all the time. There are moments when it is necessary to apply the law, and others when only its potentiality is sufficient to guide or prevent specific behaviours. For many legal scholars, for instance, a criminal code should only be resorted to as a final recourse, the proper "*ultimum remedium*" (Ellian and Molier 2015)P5). It makes sense that one should wait until a crime is committed before enforcing the laws that punish that behaviour. Other laws are timed in a way that can be applied preventively, for instance in the case of most anti-terrorism legislations around the world, where a whole new body of national and international law has been designed to avert forms of potential terrorism. Laws preventing demonstrations or other external expressions of the right to resist that "may" result in violence also have a pre-emptive character. These laws, as argued elsewhere, are designed to strike fear into potential protesters, dissidents or even observers, seeking to provoke a chilling dissuasion effect.

In international law, the doctrine of the pre-emptive strike has blurred the lines between legality, legitimacy, and accountability[389]. At national level, anti-demonstration legislation also distorts the relationship between culpability and legality. How far can criminal law be stretched in the name of prevention before the connection between the individual or the group and the wrongful conduct is lost? Where is the line that separates the exercise of a legitimate political exercise and the legal culpability derived of particular interpretations of order?

Most orders are bound to the timing of the law, that is, to a political/legal calculation about when a specific law should be applied to obtain its strongest normative effect in the desired direction, punitive or pre-emptive. This notion, furthermore, can also be applied to the very concept of rights. There is, I argue, a correlation between the time when one asserts a right, and the measure of the legitimacy and normative effectiveness of that right. This includes the *ius resistendi*.

Political theorists typically regard the right to resist as a form of voice exercised by the people in extreme circumstances. For some, it is justified only in cases of considerable legal alienation wherein the law (or its application), differs drastically and systematically from the will of the community at large (Gargarella 2003). For others, there must be a level of abuse that admits no alternative path other than resistance; the normal channels of voice

[389] Article 2(4) of the United Nations Charter states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."

must not be available or effective and must not be used for "small-scale" illegalities (Ginsburg, Lansberg-Rodriguez, and Versteeg 2013)P 1192). In the view of others, the *ius resistendi* is the ultimate guarantee intended to ensure the safeguard of the supreme norm (Fragkou 2013)P848). As a guarantee right, that is, as a means to ensure that other rights are warranted, they consider that the right to resist is the right of last resort, since there is no further remedial right to which resisters can appeal (Honoré 1988) P41). The Universal Declaration of Human Rights articulates the idea of the relevance of legitimate timing for resistance in its third preambular paragraph, declaring that "whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"[390]. Many scholars indeed seem to agree that the right to resist is the *ultimum remedium*, the ultimate means of redress, the supreme unorganized sanction, the right of last resort when other political avenues have been exhausted and the levels of discrimination and injustice have become unbearable (UNESCO 1984). Even John Rawls concurred that the right to resist should be considered an emergency right and used only in extremely exceptional situations as a last resort (Rawls 1999)P328).

For others, however, the right to resist is not the *ultimum remedium*, but the initial right. For Arthur Kaufmann "resistance is not the last resort against a complete abuse on the part of the state, but rather the first instrument against discrepancies, its function being to defend against the beginnings of abuse" (Santos 2009)P356). Article 120.4 of the 1975 Constitution of Greece declares that "Observance of the constitution is entrusted to the patriotism of the Greeks who shall have the right and the duty to resist by all possible means whoever attempts the violent abolition of the Constitution". The majority of Greek constitutional doctrine states that the right of resistance is not subordinated to the principle of the prior exhaustion of all domestic legal remedies (Fragkou 2013)P 849-850), and thus it leaves open the possibility of asserting the right to resist without having beforehand exhausted all other options.

Some scholars disagree with the principle that it is necessary that the efforts to change a challenged law through the legislative process must have first been unsuccessfully attempted before a person resorts to morally justifiable civil disobedience (Greenawalt 1970)P77). In a certain way, even Foucault argued about the primacy of resistance, stating that "resistance comes first, and resistance remains superior to the forces of the process; power relations are obliged to change with resistance". For him, "resistance is irreducible in that it pinpoints the limit of power and acts as the principle of intelligibility from which

[390] In this case, the *ultimum remedium* not only refers to the temporality of the claim, but rather makes a political statement that would later serve as moral legitimization for humanitarian interventions or the doctrine of the responsibility to protect.

to read power relations" (D. C. Barnett 2016)P286-287). Some authors justify the assertion of the right to resist as a form of *ex ante* control of decisions permeated by the public debate, and as a way of measuring the legitimacy of standards enacted by parliaments. One can also claim the right to resist to prevent the enactment of some law or policy thought to be unjust[391], or it may also be asserted in order to protest the actual operation of some unjust law or policy (Bedau 1991)P50). The timing of asserting the right to resist carries with it a symbolic and communicative aspect. It speaks of the resilience and the trust in the system of those that assert their *ius resistendi*. It also speaks of the conditions that lead to that assertion, and of the real state of the regime.

The *ius resistendi* does not function as *an ex-ante* control, neither it is the *ultimum remedium*, but rather, I submit, is the *ultima ratio*. *Remedium* refers to remedy, which presumes that the situation where the right to resist is asserted has become so unmanageable that either part decides to trigger a final, irrefutable closing of the dispute. *Ultimum remedium* conveys a message of irrevocability, a negation of the political and a degree of imposition on the other, including (possibly) by violent means. It removes the option of a final solution in the form of a process of re-accommodation in which new rights can be formed and alternative normative fields can be seized. An expression of the right to resist as *ultimum remedium* abrogates the engagement of other rights and reasons and cancels the multiplicity of circular correlatives that can provide options, other than the legal, to settle the dispute between sovereignties and the material or normative nature of the grievance. The *ultimum remedium* negates the possibility of a broader conception of rights. And the same arguments apply in toto to a conception of an *ex-ante* function for the *ius resistendi*. Control and censure are close notions that negate the political.

When I speak of the *ultima ratio,* I refer to the inherent rationality of a legitimate expression of the right to resist, the formation of a narrative within the right that encompasses, legitimates and provides moral (and legal) value to the will, and with it, to all relevant incidents and strategies within a circular correlativity that are engaged to provide options within the legal, the social and the political. An expression of the right to resist can materialize while other political, legal or social measures are pursued through

[391] "Thirty-five years ago, Central American solidarity activists developed a model for building resistance before disaster strikes. Their efforts may have stopped a U.S. invasion of Nicaragua". There was a Pledge of Resistance in case the Reagan would invade Central America (Engler 2019)(Boyle 2007)(Lippman 2012). Extinction Rebellion organizers in the UK (https://extinctionrebellion.uk/) have made extensive use of action pledges and made written about how "conditional commitments"—vows that make use of the idea "I will if you will, too"—can encourage widespread collective action. As soon as Donald Trump was elected president and started outlining his policies, especially on migration, a group liberal lawyers planed a wave of legal resistance to his policies (Savage 2017), leading scholars and advocates openly called on judges to modify how they review the President's actions because of Trump's own behavior (Blackman 2017)P53).

institutionalized channels. The *ultima ratio* is the ultimate reason, a guide to the final purpose, an expression of the ultimate commitment of people toward a common objective that engages the will of the people to realize their right to resist.

In his 16 April 1963 Letter from Birmingham Jail, Martin Luther King reveals the nature of the *ultima ratio*, the assertion of the right to resist while continuing advocating for other acceptable actions within the system in pursuit of its final objective. He noted: "We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have yet to engage in a direct-action campaign that was "well timed" in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never." We must come to see, with one of our distinguished jurists, that "justice too long delayed is justice denied" (King 1963). In Bączkowski and Others v. Poland (Application no. 1543/06) of 3 May 2007, the ECHR noted that "The freedom of assembly, if prevented from being exercised in good time, could even be rendered meaningless". Timing is everything. Not all claims carry the same urgency. Some require serene reflection and a thought strategy, yet in other cases, timing legitimizes direct, stronger forms of engagement.

I agree that to legitimately assert the right to resist it is not necessary to have exhausted all other ordinary procedures, because resistance is oftentimes a response to the ineffectiveness, the slowness, or the high cost of regular systemic procedures. Rather, the *ius resistendi* becomes the expression of an engagement that aims at maintaining all other options open[392]. The *ius resistendi* is the *ultima ratio* not in the sense of temporality, but in the sense of being the decisive element of a political strategy. The *ultima ratio* does not represent the culmination of the potentiality of *ius resistendi*, is the reason that provides the reason behind the right to resist. Only the end of the political would entail the end of the *ius resistendi*.

[392] As far as the justification for resistance (or in this case civil disobedience), the New York Times noted that "The evils being combated have to be serious evils that are likely to endure unless they are fought. There should be reasonable grounds to believe that legal methods of fighting them are likely to be insufficient by themselves" ("Is It Right to Break the Law?" The New York Times, Jan. 12, 1964, page 17).

VI. CONCLUSIONS

From Iran to Israel or the United Kingdom, streets all over the world continue to be the scenario of an array of demonstrations, protests, expressions of discontent and of opposition. Power acts with severity, using political and legal tactics to crush expressions of dissent and provoke a chilling dissuasion effect over those that dare express their views. Whereas in some places the state employs capital punishment to that effect[393], in liberal democracies power relies on judicial decisions and uses arguments about the illegality of public demonstrations and the danger for stability, security and coexistence (Ahmed 2022). In this thesis I have established that, in democracies, arguments about the legality of the right to resist should not be an incumbrance for people to assert their right to oppose injustice and reclaim their sovereignty. Yet current events continuously challenge that perception. The objective of the thesis has been, therefore, to provide those that legitimately assert their right to resist with legal arguments about the rightfulness of their claiming. Just in case.

I commenced this thesis arguing that the fixation on defining the right to resist as a political expression, rather than as a right, is what constitutes the main fallacy of many theories of the right to resist. The debate among legal and political scholars about whether the political significance of acts of resistance is more important than the right to resist *qua* right goes on[394]. Scholars continue to wonder whether the *ius resistendi* should be considered in relation to the object resisted, or in relation to its very own nature. In other words, whether we can vindicate the right to resist for its potentiality of transformation, or whether we should justify it simply because it is a right. Both viewpoints, I contend, are incompletely valid since they both provide acceptable claims but are limited in the understanding of the complexity and the indeterminacy of the right to resist.

Amie Thomasson argues that, at some level, human concepts about the nature of man-made things, like law, play a crucial role in the reference and meaning of those things, whereas this is never the case for natural kind terms (Thomasson 2007)P70). But there are always important caveats. As a natural kind term, the occurrence of resistance is not contingent on a man-made definition, its meaning or performance is not dependent on the concept we attach to it. In the natural world, resistance is a material occurrence, a physical reaction in

[393] "Iran Starts Executions by Hanging First Protester". Thursday, 12/08/2022. Iran International. https://www.iranintl.com/en/202212088960

[394] David Lefkowitz (Lefkowitz 2018) and Kimberley Brownlee (Brownlee 2018), for instance, engage in an interesting exchange regarding the grounds and scope of civil disobedience as an external expression of the right to resist. They debate what is more important, whether the political significance of the right to resist (the action), in the case of Lefkowitz, or the right *qua* right (its value), in the case of Brownlee.

opposition to a force[395]. Resistance is an action that has an impact, a significance. On the other hand, and as long as we consider resistance, and the *ius resistendi*, exclusively a theoretical exercise and therefore a man-made thing, there should be no reason why it could not be considered as a legal phenomenon independent from its content, or as a normative standalone occurrence that does not need to be objectively validated. Just as *actio* and *reactio* are all pervasive in the physical world, so they are on the intellectual level (Schwarz 1977)P256).

The right to resist builds on the nature of the physical attributes of the phenomenon of resistance, but as a right, and thus as a man-made concept, is inevitably contingent on the meaning we give it within a specific ideological and normative framework. It is a right vindicated by its nature but only in relation to its object.

In Chapter One, I tried to demonstrate how the essence of the *ius resistendi* transcends the historical moment of its claiming and the form of political organization where it is asserted. This suggests that the *ius resistendi* is an indeterminate right and that its understanding must remain unhindered, relying on the motive and the goal of the actor, on the object of transformation, and on the external benchmarks of its legitimacy rather than on the external appearance of the resistance. There is only one *ius resistendi*. Its external expressions are political engagements that adapt to the extant legal, political and social circumstances depending on the pursued strategy of those that assert their right in reaction to specific operations of power. These manifestations do not determine the nature of the right to resist, but they may qualify its normative and performative value depending on the context of their actualization.

The *ius resistendi* is, consequently, a right that is pre-normative, and yet, although it is not innately bound to a specific context, the right to resist is always defined in relation to *a* normative order. The fact that the *ius resistendi* is pre-normative does not mean that it is pre-political. The right to resist is never pre-political because it can only be asserted in *the public* and in relation to the exercise of power.

Since the *ius resistendi* is pre-normative, one must conclude that the right to resist is a primary right, a right that is constitutive of the political, a right that is not gifted, allowed or regulated by the state. This constitutes a key finding of the thesis. Any legal theory would be incomplete and inaccurate without due consideration of the right to resist because every right, every law, every norm, and standard that ever was, was born out of pressures for them not to become. The *ius resistendi* is the right that gives people the right to legislate their own circumstances, it is a right that shapes the very idea of law and outlines the edges of

[395] "*Materiae vis insita est potentia resistendi*" (the force residing within matter is the power of resistance). Newton´s third law of motion.

the system. The *ius resistendi* is sovereignty in itself. It is the right that provides the exception over the exception. It is a right intrinsic to nature, and to people, yet it is not a human right within the modern understanding of human rights, nor a natural right in the sense of a God given or discovered by reason. The *ius resistendi* is not an inalienable right belonging to people because of their human condition, but because of their political nature. Yet because "the human" is, by nature, a political being, the right to resist defines both the human and the political condition, it is key to the survival of the person as a moral and as a political agent.

But having a right, even if primary, some argue, is not sufficient reason for acting on it (Waldron 1981)P28). Others claim that "having a right does not give one any reason to exercise it, let alone insist on it" (L. Green 1991)P316). To have a right is not sufficient to access its normative and performative content, but having a right, I contend, is sufficient reason to be able to do so. All rights, including the Lockean reserved rights, contain an active element, an entitlement or authorization for the right-holder to act on behalf of the right (Frydrych 2019)P461). To claim a right is a performative, a practical, an actionable exercise without which the right remains in its potentiality.

We have *a* right to resist, but it is only when it is actioned that it becomes *the* right to resist. The action provides material normative value to expressions of resistance and actualizes the potentiality of an indeterminate right into the actuality of a political expression. The action translates interests and claims into legal language, humanizing concepts like dignity and justice to create political narratives, and with them, the expression of rights. For Hannah Arendt, inner freedom was the freedom to think, a natural given that no one could take away from a human being. An inner sense without an external manifestation that could not and cannot be denied to slaves and prisoners (Ellian and Molier 2015)P238). Yet, as she noted, an inner sense without external sings is, by definition, politically irrelevant. Inner freedom is a right but is not the right to freedom. Like freedom, the right to resist is a right, but is no resistance. Without an external manifestation, a right to resist cannot adopt any of the expressions that realize the engagement to become the right to resist. Claim rights generate normative values that are actualized by way of will. The right to resist is not subject to the will in its existence, but it is subject to the will in its actualization.

The indeterminate and primary nature of *ius resistendi* reflects both the performative practice of rights claiming (Zivi 2012)P15), as well as the political actuality of the proclamation of rights. One thing is to have the power to act on the right, another question is whether we are (politically) entitled to that right. Having a claim to *a* right does not mean that one has *the* right. Rather, it implies that one is entitled to being recognized in the act of claiming a right, for recognition is necessary to establish the validity of the claim in liberal

democracies. In the liberal tradition, having a claim implies a process of recognition, not necessarily agreement on whether the claim is indeed a valid right, or about the legal and political consequences of actively asserting the claim, but agreement among those that participate in the moral dialogue, that is, in the political, on the need involve a broader set of agents and issues in the recognition process.

Those that assert the right to resist in liberal democracies have the challenge to appropriately formulate the political narrative of their objections in a language that can translate claims into morally worth, universally recognized, or recognizable rights. And the stronger the narrative and the associated political strategies to ensure recognition, the better, because those that have the right to law have already constructed a counter narrative in a language that has translated morally worth, universally recognized, or recognizable rights into individual illegal, illegitimate or unpolitical acts. The habit of de-legalizing and politicizing the *ius resistendi* by removing the concept of right and emphasizing its external political expression is precisely so that it can be isolated as an event and restrained by power. Rather than the political act of defiance, it is the appeal to the "right to" that forces power to speak about rights, balancing the tendency to delegalize and delegitimate acts of resistance as mere illegal engagements.

Despite the many attempts to criminalize it or delegalize it, a close examination of the legal nature of the *ius resistendi* in liberal democracies leads to one simple conclusion: denying the recognition of the *ius resistendi* as a right might be a matter of political opportunity, even of system survival, but it is not a matter of legal orthodoxy. As per traditional legal analysis, the *ius resistendi* fulfils every requirement to be considered a right. It is a claim right that creates obligations and provides a remedy for its own violation. It is a right that supports the Arendtian "human right" of political membership, the right to remain in the polis and the right that protects the right to engage in the political. The *ius resistendi* does not represent a contradiction with established political rights, it does not challenge the core of the democratic system and is perfectly consistent with liberal legal theories. It is, indeed, a right that it is relevant within a performative account that submits that rights are tools of political creativity that can justify both change and stability (Hoover 2019)P2).

And so, as I argued, the key function of the *ius resistendi* is not that of keeping a watchful eye on power, or protecting the constitutional order, but its role in reclaiming, reengaging, and expanding the notion and the understanding of rights. Like the narratives that create rights, the *ius resistendi* evolves. Its normative value expands as individuals and societies claim recognition and acknowledge that they are entitled to rights. Its performative capacity strengthens in relation to the rights that it carries with it and those that it conveys from the periphery to the core of the order, rights that do not only enable external expressions of the

ius resistendi, but more importantly, provide normative value, performative weight, and sustenance to its very existence. The right to resist actualizes the potentiality of the aspiration into the certainty of the current and allows for further acknowledgement of rights.

In principle, the assertion of the right to resist necessarily implies the existence of non-ideal conditions, otherwise the provisions for its own retreat would be met and the *ius resistendi* would be no more. But the right to resist has a place in ideal theory too, as a right that supports the creation of the necessary conditions for democracy. With the development of my broader theory of rights I seek to vindicate the rightful place of the *ius resistendi* in the legal order beyond the political expressions which are commonly identified with confrontation and disobedience.

My theory understands democracy as an ideology sustained by a normative order based on freedom, dignity and justice, that adopts the principles of democratic practice as the guiding tenets of the performative occurrence of the political in a manner consistent with its fundamental values. And those values are worth defending, because those are the values on which the western world has sustained the longest period of peace and development in recent history. In that ideal condition there is a *prima facie* obligation to obey the law, in freedom, and in a manner consistent with the fundamental terms of the original agreement by which we declared and accepted that the law must be obeyed. My concept of democracy can only flourish within a broader conception of rights where the indeterminacy and the complexity of the *ius resistendi* both challenge and complement traditional notions of rights and duties as well as the concepts of political obeyance, legitimacy, and the rule of law.

A broader conception of rights is one in which the function of rights responds to social transformations, one in which the stabilization effect of law is not construed at the expense of freedom, where a non-homogeneous ascription of rights acknowledges, rather than transcends, difference, and where the moral value of rights provides the benchmark that legitimizes law itself. In a broader conception of rights there are no invisible rights, they are always present in a normative system that remains incomplete and unstable without them. It is a conception that builds on the traditional assumption regarding the right-duty correlation and accepts the requirement of the time-content relationship, but it preserves the potentiality of rights and recognizes agents for being right bearers, not only duty holders.

In a broader conception of rights, the *ius resistendi* allows society to readjust the meaning of the basic principles that sustain democracies in order to preserve, advance and realize rights that serve a purpose, and where external expressions of the right to resist are not regarded as transgressions, but rather as opportunities to reflect about the structure of the legal

system that supports a political organization that permits injustice to flourish. A broader conception of rights can, perhaps, bridge the unnatural gap between legal, political and social incidents and present them as a coherent outcome of a particular claim.

A broader conception of rights compels democracies to recognize both the right and the duty to resist. The *ius resistendi* embodies the axiom that "one should not be constrained by the Hobbesian/Lockean misnomer that one is either a revolutionary or a citizen" (Illan Rua Wall 2004)P5). The right to resist is, if anything, true to social truths, those that reflect, as Gramsci said, the pessimism of the intellect and the optimism of the will (Canaan, Hill, and Maisuria 2013)P199). In other words, one resists hoping that, by resisting, the object of the resistance will be no more.

But not even within a broader conception of rights all manifestations of the *ius resistendi* are valid, and only legitimate ones can be considered as appeals to the right to resist. The fact that an external expression of the right to resist suggests the existence of an exceptional moment, or the claim to a special standing, or to a normative exception, does not necessarily (or automatically) denote that the engagement is legitimate, or that one is entitled to a special political or legal treatment. The moral justification to assert the right to resist in liberal democracies – the defence of the notions of freedom, recognition, accountability, justice, or dignity – is central to vindicating the moral value of the concept of rights, and consequently of the *ius resistendi*, which in turn serves as basis to evaluating the legitimacy of its claiming and the external form of its expression (including the use of object violence), within a specific normative context.

I contend that the legitimacy of the *ius resistendi* is generated by the relationship between the historical moment when it is asserted and the external form of its expression, and both, in relation to the source of the moral and the legal legitimacy that frames the political (the ideology as the measure of the "scale of worthiness"). I call this the overlapping thesis, an idea that is "rooted in the overlapping, interacting discourses and practices of law" (Piška 2011)P256), and the "overlapping relations involved directly in the production of regimes of truth" (Muller 2011)P5).

Following the overlapping thesis, an appeal to the right to resist would be legitimate when the interpretation of the genetic reasons of the ideology (the legitimacy of the moral basis of the assertion of the right), and the political suitability of the external engagements of the right to resist (the functional role in translating claims into political actions), overlap in a particular historical (social, cultural and political) moment, and are able to modify the epistemic nature of the ideology, the nature of power, as criteria for moral, legal and political progress. My claim, however, should be further researched.

I have purposedly created ideal conditions to analyse the *ius resistendi* from a legal standpoint, but ideal conditions are not real. Liberal democracies are in crisis, a situation that creates a constraining awareness of the human in relation to its immediate political and social reality. Some contend that we have moved from the age of geopolitics to biopolitics[396], and that algorithms and data are the new tyrants[397]. And yet, new normative or social environments do not change the nature of the right to resist. Within a biopolitical approach, one must wonder whether people resist external, man-made normative frameworks, or rather if resistance is set against the exploitation of the body (as an individual first) and the exploitation of the species (the body public). Even in a world of algorithms, the right to resist is about bringing core issues, human issues, back at the centre of the political, challenging the role of non-public interests (and of machines) in public decision making. In a world where freedom of choice is in fact enforced freedom, the *ius resistendi* reinstates human agency and reallocates a domain of freedom to rights-bearers.

Whether through a biopolitical approach or literally raging against the machine, ultimately, the fight between order and resistance has little to do with concepts of justice and moral truth and more with the power (broadly understood) behind each action. The *ius resistendi* is the element that connects the forces that collide when power is exercised, for it attempts to close the gap between the expectations of the ruled and the actuality of the rule. But as any operation of power, whether the right to resist can close that gap depends on forces other than its normative strength. The outcome of an expression of the *ius resistendi* may not always be on the side of justice. Each leap of social and political evolution, every major disruption of the status quo, and the entire fight for rights and freedoms, has involved a performance starring the right to resist, but not always as the winning protagonist. One then cannot but wonder, what about all those fights that never succeeded. All those resistances that led to nothing. Weren't they just?

The outcome of the clash of sovereignties is not ultimately contingent on fairness or justice or dignity or recognition, but on power. Political, economic, moral, legal, intellectual, philosophical, social power. Power is reflected in the strategic, legal and material elements that it can mobilize. Behind an external expression of the right to resist there is a calculation of power. Sometimes justice prevails because it can harness enough social, moral or political power to overcome evil. Sometimes justice does not prevail because it does not harness sufficient power to counter the resistance of those that oppose change.

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[396] Biopower is reflected through the control of the body, as an individual, first, and then as the body of society (the population) to either nullify the other. Because biopolitics merges with the problem of governmentality (Wallenstein 2013)P12), the paradigms of the *ius politicum*, I contend, must also be transformed, for it is in that space that relations of power are structured

[397] #TyrannyOfAlgorithms

In the animal, as in the social world, the strongest, the better organized, the more able can successfully assert its rights and shape the milieu where they are executed. The weakest, even though they may suffer the oppression the most, are oftentimes unable to successfully do so without the acquiescence of the powerful. Does the success of an appeal to the right to resist have anything to do with the moral justice of the cause? Evolution considers not necessarily the fairest option, but the strongest. Those that are defeated insist on their fight until they harness the strength to be rewarded, but that is not necessarily connected to the justice of their claim. Or is it?

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Summary in English

Expressions of discontent, opposition and resistance are common in the streets of Europe, the US and in other places that we still characterize as liberal democracies. The reactions of governments are increasingly harsh, using the whole state apparatus, the police, the judiciary, and the media to respond to public engagements that are considered to be a threat to the *status quo*, or just a mere nuisance to security and order.

At academic level, most scholars have focused their attention on defining the act of resistance with respect to its public expression and its political function. Legal scholars have sought to examine resistance in relation to the obligation to obey the law while refusing to acknowledge its legality, arguing that liberal democracies already provide sufficient channels of political participation. The thesis fills the gap between those that have obsessively attempted to define resistance as a political phenomenon and those that dismiss it as a mere moral claim. It focuses, instead, on the element that instils an expression of resistance with its universal character: its value as a right.

My hypothesis is that it is possible to formulate a universal rights-based theory of the right to resist through legal probe. This claim is based on the proposition that because the *ius resistendi* embodies the resistances inherent to the political order that shape, in turn, the structure of the law, we can derive its normative value from the power dynamics that recreate the order in positive form, or that constrain it through political and other narratives. There is, consequently, no understanding of the *ius resistendi* without an understanding of the actualization of power in the *ius politicum*, the space where rights are created and contested. I contend that the *ius resistendi* is the element that connects the forces that collide when power is exercised, for it attempts to close the gap between the expectations of the ruled and the actuality of the rule.

Through historical inquire, the thesis identifies the external benchmarks that are considered necessary to assess the legitimacy of any expression of resistance in the western tradition; for those that resist, to demonstrate their fidelity to the fundamental values of the ideology (the higher law), and for the state not to be subjected to resistance, to fulfil its obligations, especially the pursuance of the common good and the defence of fundamental rights. History also helps unveil the functions that scholars have traditionally assigned to the right to resist: to keep a watchful eye on power, to protect the legal (constitutional) order, and to expose the real character and truthfulness of the system. I contend, however, that its most important function is that of capturing new normative spaces, transcending normative claims that are either inherent or latent in practices and beliefs of society, but that require a purposeful societal engagement to become actual.

And yet, despite its different functions the nature of the *ius resistendi* has remained unchanged throughout history. The external political expressions of the right to resist have shifted over time, they have adapted their performative features, as the state, and the legal system, have also adjusted the use of coercive mechanisms to respond to particular challenges. These external manifestations do not determine the nature of the right to resist, but they may qualify its normative and performative value depending on the context of their actualization.

During the historical inquire I seem to defend a certain contractualist view of society. I argue that, for the most part, it is in the enlightenment, in the ideas of *liberté* and *egalité* that the right to resist finds its strongest validation. If consent to the ruler was given, consent could be withdrawn. Yet the idea behind this approach is purportedly deceitful. It serves to attest that those that proclaimed and consented to the contract have always been those that had what Costas Douzinas calls "the right to law" (Douzinas 2014b)P165). The depersonalized sovereign is the expression of the domination of a system without a face against which it is hard to resist and hold to account. It is in man´s nature to question obligations that are external to his will, but it is also in his nature to examine whether complying with those external obligations can harm his, and his group's, political, moral, social or physical survival. Behind every expression of the right to resist there is a rational calculation of power, not just dogmatic justifications about contractual obligations.

Those calculations can only be made against a specific normative order, one that is formed by the ideology (the *grundnorm*), the basic system of values and ideas that provides the rest of the system with its legitimacy and that establishes a "scale of worthiness" to determine the value of social and cultural objects, including rights. It is through the appeal to the ideology that one opposes deviant power, particularly in the form of challenging the legitimacy of the law that represents the manifestation of that power. And it is through the examination of the role of ideology as the *grundnorm*, that one arrives at the conclusion of the inseparability of law and politics as expressions of power.

I explore the concept of law through the lens of the structure of ideologies. The analysis focuses on three elements: 1) law´s epistemic nature, that is, its origins, 2) the genetic reasons that make people determine the morality (or the legitimacy) of the law, and c) the functional nature that determines the degree to which law assists in reproducing social forms of rule. In other words, the role of democracy in maintaining the *status quo*. The purpose of examining the *ius resistendi* through this lens, that is, in its legal dimension, is to offset the anti-legal turn that robs the right to resist and its advocates of an impressive line of defence (Scheuerman 2015)P427). I expose the positive character of the right to resist (which is embodied in at least twenty percent of the world constitutions, including the

German and the French), and test it through some of the mainstream legal theories that provide the standards, in western legal theory, of the constitutive features and necessary characteristics that rights should have.

This analysis brings me to conclude that the right to resist is indeed a claim-right, a right that carries the power of the moral force of the claim, of the normative and performative weight of the rights enabling its manifestation, and the strength of the political, social or cultural significance of its external expression, in other words, of its function. The *ius resistendi* provides the missing normative value in the structure of rights that may otherwise be incomplete and determines the degree to which rights and principles have been disengaged from the core. A right that builds on the attributes of the natural phenomenon of resistance, the *ius resistendi* is both a natural and a man-made concept. It has a legal structure and a place in the legal order. And while human rights are mostly about the right humans, the right to resist is a right inherent to the political nature of the person, not to her human condition.

A primary, indeterminate right, the ius resistendi embodies the Arendtian right to have rights, the right to remain in the polis as long as there is a will, a political engagement that turns "a" right to resist into "the" right to resist. An individual right of collective expression that breaks people´s *akrasia* and reinstates their sovereignty to legislate on their own circumstances and decide on the exception, or on the exception over the exception. And yet, paradoxically, it is through asserting the right to resist that we publicly, and thus politically, announce our readiness to renounce our constitutive power when certain conditions are met. The *ius resistendi* does not challenge the democratic order, it provides the space for the continuous negotiation, and recognition, between the constitutive and the constituted sovereignties.

Besides political opportunity, there is clearly no legal justification for the liberal system to deny the *ius resistendi* the status of a right. And despite this persistent refusal, the significance of the right to resist in the system becomes evident in the efforts that the state displays to offset it. It is a non-legal-right that it is punishable by virtue of its political nature. Punishing disobedience serves to condemn certain types of conduct, but it mostly serves to indicate the threat perceived by the dominant forces and the limits of official tolerance. Liberalism is not concerned with individual expressions of freedoms (or of dissent) that can be prosecuted and controlled, rather, it fears collective expressions of rights. Dissolving the collective (as a political body) and transforming its will into a cluster of individual acts that can be effectively prosecuted and penalized, the liberal order seeks to create a chilling effect among those who dare resist. All in the name of security and other commodity-rights that have become the standard measure that the liberal order has

adopted to justify the legitimacy of its actions and the rightfulness of its concept of freedom or justice.

The two fundamental elements in which modern democracies rely on, the pairing of the concepts of legitimacy and legality, and the merging of the notions of the obligation to obey the law with that of being a good citizen, are strongly contested. In my work, I rethink the necessary conditions for democracy to flourish by establishing a quasi-ideal theory that contemplates dignity and justice as the moral underpinnings of the order, freedom coupled with reason as the central value of democratically conceived political theory, and the principles of democratic practice (accountability and recognition) as the performative occurrence of democracy in a manner consistent with its fundamental values. Legitimacy is not at odds with legality.

I challenge the traditional liberal interpretation of rights and develop a broader conception, one where rights are a constituent part of the genetic reasons that provide the democratic order with its value and where the principle about the correlation between rights and duties exists, but it is only part of what defines a right. My theory of the *ius resistendi* in liberal democracies revolves around a broader conception of rights, one in which there are no hidden rights and where reserved Lockean rights are always present in a system that cannot fully explain itself without them. My broader conception of rights can, perhaps, bridge the unnatural gap between legal, political, moral and social incidents and present them as a coherent outcome of a particular claim, in other words, where the assertion of the *ius resistendi* can fulfil a normative, social and political function that actualizes the potentiality of the aspiration into the certainty of the current and allows for further acknowledgement of rights.

Samenvatting (Summary in Dutch)

Uitingen van ontevredenheid, oppositie en verzet zijn gemeengoed in de straten van Europa, de VS en andere plekken die we nog steeds kunnen kenmerken als liberale democratieën. In toenemende mate reageren overheden hardhandig, met gebruik van het gehele staatsapparaat, de politie, de rechterlijke macht, en de media om te reageren op publieke zaken die als bedreiging voor de status quo worden gezien, of slechts als overlast voor de veiligheid en orde.

Op academisch niveau hebben de meeste wetenschappers hun aandacht gericht op het definiëren van de verzetsdaad met betrekking tot haar publieke uiting en haar politieke functie. Rechtsgeleerden hebben getracht om het verzet te onderzoeken in relatie tot de plicht de wet te gehoorzamen terwijl ze geweigerd hebben om de wettigheid ervan te erkennen door te bepleiten dat liberale democratieën al voldoende kanalen voor politieke participatie bieden. Dit proefschrift dicht de kloof tussen degenen die obsessief gepoogd hebben om verzet als politiek fenomeen te definiëren en degenen die het afwijzen als een louter morele claim. In plaats daarvan richt het zich op het element dat een uiting van verzet zijn universele aard verleent: zijn waarde als recht.

Mijn hypothese is dat het mogelijk is om een universele, op rechten gebaseerde theorie van het recht op verzet te formuleren door middel van juridisch onderzoek. Deze bewering is gebaseerd op de stelling dat, omdat het ius resistendi de verzetten belichaamt die inherent zijn aan de politieke orde, die op hun beurt de structuur van het recht vormen, we de normatieve waarde ervan kunnen afleiden uit de machtsdynamiek die de orde in positieve zin herschept, of die het inperkt door politieke en andere narratieven. Het begrijpen van het ius resistendi is derhalve onmogelijk zonder de verwerkelijking van de macht in het ius politicum te begrijpen, de ruimte waar rechten gecreëerd en betwist worden. Ik stel dat het ius resistendi het element is dat de krachten verbindt die botsen wanneer macht uitgeoefend wordt, omdat het poogt de kloof te dichten tussen de verwachtingen van de geregeerden en de werkelijkheid van de heerschappij.

Aan de hand van historisch onderzoek worden in dit proefschrift de externe ijkpunten geïdentificeerd die noodzakelijk geacht worden om de legitimiteit van elke uiting van verzet in de Westerse traditie na te gaan; voor degenen die zich verzetten, om hun trouw aan de fundamentele waarden van de ideologie (het hogere recht) te laten zien, en voor de staat die niet aan verzet wordt onderworpen, om zijn verplichtingen na te komen met name in het nastreven van het algemene goed en de verdediging van fundamentele rechten. De geschiedenis helpt ook om de functies die wetenschappers traditioneel aan het recht op verzet toegekend hebben te onthullen: de macht in het oog houden, het beschermen van de

(constitutionele) rechtsorde, en het blootleggen van het ware karakter en de waarachtigheid van het systeem. Ik stel echter dat de belangrijkste functie het veroveren van nieuwe normatieve ruimtes is, die normatieve claims, die inherent of latent aanwezig zijn in praktijken en overtuigingen van de samenleving, overstijgen, maar die een doelgericht maatschappelijk engagement vereisen om verwerkelijkt te worden.

En toch, ondanks zijn verschillende functies is de aard van het ius resistendi door de geschiedenis heen onveranderd gebleven. De externe politieke uitingen van het recht op verzet zijn in de loop der tijd veranderd, hun performatieve kenmerken zijn aangepast zoals ook de staat en het rechtsstelsel het gebruik van dwingende maatregelen hebben aangepast om op bepaalde uitdagingen te kunnen reageren. Deze externe manifestaties bepalen niet de aard van het recht van verzet, maar zij kunnen de normatieve en performatieve waarde ervan kwalificeren afhankelijk van de context van hun verwerkelijking.

Tijdens het historisch onderzoek lijk ik een zekere contractualistische visie op de samenleving te verdedigen. Ik betoog dat het recht op verzet zijn sterkste legitimatie grotendeels vindt in de Verlichting, in de ideeën van liberté en egalité. Als er instemming was gegeven aan de heerser, kon die instemming weer ingetrokken worden. Echter is het idee achter deze benadering ogenschijnlijk misleidend. Het dient ter bevestiging dat zij die het contract hebben uitgeroepen en ermee ingestemd hebben, ook altijd degenen zijn geweest die hadden wat Costas Douzinas ''het op recht op recht'' noemt (Douzinas 2014b)P165). De gedepersonaliseerde soeverein is de uitdrukking van de dominantie van een systeem zonder gezicht waartegen het moeilijk is om zich te verzetten en verantwoording te vragen. Het ligt in de aard van de mens om verplichtingen die buiten zijn wil liggen te bevragen, maar het ligt ook in zijn aard om te onderzoeken of het zich schikken aan die externe verplichtingen de politieke, morele, sociale of fysieke overleving van hem of zijn groep kan schaden. Achter elke uiting van het recht op verzet zit een rationele berekening van macht, niet alleen dogmatische rechtvaardigingen over contractuele verplichtingen.

Deze berekeningen kunnen alleen gemaakt worden tegen een specifieke normatieve orde die wordt gevormd door de ideologie (de Grundnorm), het basissysteem van waarden en ideeën die de rest van het systeem zijn legitimiteit verschaft en die een ''waardeschaal'' vaststelt om de waarde van sociale en culturele objecten, waaronder rechten, te bepalen. Door een beroep te doen op de ideologie verzet men zich tegen afwijkende macht, met name in de vorm van het betwisten van de legitimiteit van de wet die de manifestatie van die macht vertegenwoordigt. Het is door het onderzoek van de rol van ideologie als Grundnorm dat men tot de conclusie komt dat recht en politiek onlosmakelijk met elkaar verbonden zijn als uitingen van macht.

Ik onderzoek het concept van recht door de lens van de structuur van ideologieën. De analyse richt zich op drie elementen: 1) de epistemische aard van het recht, dat wil zeggen, zijn oorsprong, 2) de genetische redenen waardoor mensen de moraliteit (of de legitimiteit) van het recht bepalen, en 3) de functionele aard die bepaalt in welke mate het recht bijdraagt aan de reproductie van sociale vormen van regeren. Met andere woorden, de rol van de democratie in het handhaven van de status quo. Het doel van het onderzoeken van het ius resistendi door deze lens, in zijn juridische dimensie, is om tegenwicht te bieden aan de anti-juridische wending die het recht op verzet en zijn voorstanders berooft van een indrukwekkende verdedigingslinie (Scheuerman 2015)P427). Ik belicht het positieve karakter van het recht op verzet (dat in minstens twintig procent van de grondwetten ter wereld, waaronder de Duitse en de Franse, is belichaamd), en toets het aan enkele van de gangbare rechtstheorieën die in de Westerse rechtstheorie de normen leveren voor de constitutieve kenmerken en noodzakelijke eigenschappen die rechten moeten hebben.

Deze analyse brengt mij tot de conclusie dat het recht op verzet inderdaad een claimrecht is, een recht dat het vermogen van de morele kracht van de claim draagt, van het normatieve en performatieve gewicht van de rechten die de manifestatie ervan mogelijk maken, en de kracht van het politieke, sociale of culturele belang van de externe uitdrukking ervan, met andere woorden, zijn functie. Het ius resistendi levert de ontbrekende normatieve waarde in de structuur van rechten die anders onvolledig zou kunnen zijn en bepaalt de mate waarin rechten en principes van de kern zijn losgemaakt. Het ius resistendi is een recht dat voortbouwt op de eigenschappen van het natuurlijke verschijnsel van verzet en is zowel een natuurlijk als door mensen gemaakt concept. Het heeft een juridische structuur en een plaats in de rechtsorde. En terwijl mensenrechten meestal gaat over het recht van mensen, is het recht op verzet een recht dat inherent is aan de politieke aard van de persoon, niet aan haar menselijke conditie.

Een primair, onbepaald recht, het ius resistendi belichaamt het Arendtiaanse recht om rechten te hebben, het recht om in de polis te blijven zolang er een wil is, een politiek engagement dat van ''een'' recht op verzet ''het'' recht op verzet maakt. Een individueel recht van collectieve expressie dat de akrasia van de mensen doorbreekt en hun soevereiniteit herstelt om wetten te maken over hun eigen omstandigheden en te beslissen over de uitzondering, of over de uitzondering boven de uitzondering. En toch, paradoxaal genoeg, kondigen we onze bereidheid om afstand te doen van onze constitutieve macht als aan bepaalde voorwaarden voldaan is aan wanneer we het recht op verzet doen gelden. Het ius resistendi stelt de democratische orde niet ter discussie maar biedt ruimte voor voortdurende onderhandelingen en erkenning tussen de constitutieve en de geconstitueerde soevereiniteiten.

Voor het liberale systeem is er naast politieke opportuniteit duidelijk geen juridische rechtvaardiging om het ius resistendi de status van een recht te ontzeggen. En ondanks deze hardnekkige afwijzing wordt de betekenis van het recht op verzet in het systeem duidelijk door de inspanningen die de staat laat zien om het teniet te doen. Het is een niet-juridisch recht dat vanwege zijn politieke aard strafbaar is. Het bestraffen van ongehoorzaamheid dient om bepaalde soorten gedrag te veroordelen maar het dient vooral om te bepalen welke dreiging door de dominante krachten worden opgemerkt en wat de officiële grenzen van tolerantie zijn. Het liberalisme houdt zich niet bezig met individuele uitingen van vrijheden (of van afwijkende meningen) die kunnen worden vervolgd en gecontroleerd, maar het is bang voor collectieve uitingen van rechten. Door het collectief (als politiek lichaam) te ontbinden en om te zetten in een cluster van individuele handelingen die effectief vervolgd en bestraft kunnen worden, tracht de liberale orde een afschrikkend effect te creëren bij degenen die zich durven te verzetten. Dit alles in de naam van veiligheid en andere commodity-rights die de standaardmaat zijn geworden die de liberale orde heeft aangenomen om de legitimiteit van haar daden en de rechtmatigheid van haar concept van vrijheid of rechtvaardigheid te rechtvaardigen.

De twee fundamentele elementen waarop moderne democratieën steunen, de koppeling van de concepten van legitimiteit en legaliteit, en de samenvoeging van de noties van de verplichting om de wet te gehoorzamen en het zijn van een goede burger, worden sterk betwist. In mijn werk heroverweeg ik de noodzakelijke voorwaarden om een democratie te doen bloeien door een quasi-ideale theorie op te stellen die waardigheid en rechtvaardigheid als de morele fundamenten van orde en vrijheid samen met de rede als de centrale waarde van een democratisch opgevatte politieke theorie beschouwt en de beginselen van de democratische praktijk (verantwoordingsplicht en erkenning) als het performatieve voorkomen van de democratie in overeenstemming met haar fundamentele waarden beschouwt. Legitimiteit staat niet op gespannen voet met wettigheid.

Ik stel de traditionele liberale interpretatie van rechten ter discussie en ontwikkel een bredere opvatting, waarin rechten een bestanddeel zijn van de genetische redenen die de democratische orde haar waarde verlenen en waarin het principe over de correlatie tussen rechten en plichten bestaat, maar slechts een deel is van wat een recht definieert. Mijn theorie van het ius resistendi in liberale democratieën draait om een bredere opvatting van rechten, een waarin er geen verborgen rechten zijn en waarin gereserveerde Lockeaanse rechten altijd aanwezig zijn in een systeem dat zich zonder die rechten niet volledig kan verklaren. Mijn bredere opvatting van rechten kan misschien de onnatuurlijke kloof tussen juridische, politieke, morele en sociale incidenten overbruggen en ze presenteren als een samenhangende uitkomst van een bepaalde claim, met andere woorden, waar de bewering van het ius resistendi een normatieve, sociale en politieke functie kan vervullen die het

potentieel van het streven verwerkelijkt tot de zekerheid van de actualiteit en verdere erkenning van rechten mogelijk maakt.

Curriculum Vitae

Francesc Claret Traïd was born on 4 august 1971 in Barcelona. He studied political sciences at the Autonomous University of Barcelona, where he obtained a Llicenciatura with a major in international relations in 1994. Having graduated top in his class, he was the first political science graduate awarded a research scholarship "in European integration" from the Catalan government to pursue studies at master´s level. In 1996, he obtained a post graduate degree in international and european relations at the Amsterdam School of International Relations (University of Amsterdam). In 2005, Francesc took a sabbatical from the United Nations. He went to the University of Sussex, where he graduated with an LLM in international criminal law, with distinction. His thesis explored the legal implications of the doctrine of the responsibility to protect. In December 2019, while working at the UN, he started his research as an external PhD candidate at Leiden Law School of Leiden University under the supervision of Professor Afshin Ellian.

Francesc is currently the Representative of the Government of Catalonia to the United Kingdom and Ireland based in London. For over two decades, from 1997 to 2022, he was an official of the United Nations. He served at UN Headquarters in New York as well as in a number of peacekeeping operations in the field, including in Gaza, Angola, Rwanda, the DRC and Colombia.