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

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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).