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

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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).