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

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PART TWO

CHAPTER IV: THE LEGAL CHARACTER OF THE RIGHT TO RESIST

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

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

4.1. A positive right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2. A legal analysis of the right to resist.

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

4.2.1. The Hohfeldian incidents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2.2. Will and Interest theories.

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

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

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

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

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

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

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

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

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

4.2.3. Fuller´s principles.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3. Punishing dissent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3.1. Protections against punishment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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