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

Claret, F.

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

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

5.1. A broader conception of rights.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.2. The normative value of the right to resist.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[347] "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law", preamble of the UDHR. The United Nations Human Rights Council included a provision on the right to resist oppression within the context of a proposed UN declaration on the right of peoples to peace (although in the framework of colonial or alien domination) (HRC 2011). The declaration has not been adopted, for obvious reasons.

Because of the legitimacy that they provide, many social movements, in different countries and cultures, avail themselves of the human rights discourse in their resistance practices (Wilson 2017)P20). Human rights not only enable but also legitimate external expressions of the right to resist because they can turn small-scale acts of resistance into acts that can be globally acknowledged[348] and bring a shared sense of global rightfulness into local or community engagements. Human rights provide a recognized normative framework and expand the range of legal defences available to political engagements. As a language of resistance and of even revolution, for instance, the human rights discourse speaks to the gap between power and justice (Teitel 2021), and appeals to the principles of democratic practice. Human rights have become the external benchmark against which to assess not only the rightfulness of the actions of the state in relation to "universally agreed" values, but also the legitimacy of the manifestations of the right to resist in relation to "universally agreed" standards of (legal, political and social) conduct in civilized nations.

A broader conception of rights allows us to frame all human values and (political and social) interests in the form of rights as long as these values can be translated into universal claims. Following that idea, one could argue that if we agree that human rights embody the highest moral claims within a political framework, then the right to resist is a necessary component of the political conception of human rights (Blunt 2017). The examination of the *ius resistendi* as an expression of the human rights ethos, that is, of fundamental interests that include non-exploitation, non-discrimination, non-repression and non-violence, is common among scholars (Estrada Tanck 2019)P381-382) (Wilson 2017)P57). If one accepts the principle of the universality of human rights in the sense of being claimable by any potential political subject (Aitchison 2017)P8), and that the right to resist represents the expression of that human rights ethos, then one must conclude that the *ius resistendi* is a human right. After all, the *ius resistendi* embodies universal claims of justice and recognition and it always expresses a compelling argument about the protection of fundamental interests.

Article 33 of the 1793 Declaration of the Rights of Man and of the Citizen declares that resistance to oppression is the consequence of other human rights. Those that agree with these words have persuasively argued that human rights and the *ius resistendi* pertain to the same normative space. Arthur Kaufmann proclaimed not only that the right to resistance is the original of all rights, but that it is the original right of human rights (Santos 2009)P351). Hersh Lauterpacht also described the right to resist as the supreme human right (Murphy 2011)P466), and others insisted that the right to rebel against oppression is not

[348] Arthur Kaufmann spoke about "small-coin right of resistance", that is, a "small" resistance in a nearly just society that will prevent it from becoming a lawless state, and with that, give life to the "larger" resistance (Kaufmann 1985).

only a fundamental human right, but the most important human right we have, and the only effective avenue of democratic defence when rights are under attack (Fiedler 2009)P44-45). Some even call for the international community to recognize a right of nonviolent resistance for those engaged in limited, proportionate actions in defence of fundamental human rights (Falk 1989). For those that follow this line of thought, the only valid criteria to justify the rights to resist is the violation of human rights themselves (Torres Caro 1993)P413) (Magoja 2016)P6)[349].

Yet despite this substantiation, I contend that the right to resist is not a human right**.** Labelling it as such would defeat my efforts to construct a universal theory of the *ius resistendi*.

Like other rights, human rights are artifacts created by narratives and, therefore, they are contingent on the value that the dominant actors in the international community give them. Rainer Forst contends that human rights (and by extension other fundamental, primary and basic rights), have no value per se, and that in the market, as it happens with rights, things without value are not protected or cared for (Forst 2017). It is tricky to resolve the question of which particular freedoms are crucial enough to count as human rights worthy of care and protection (Clapham 2006), because the answer always hinges on their actual value in the international "scale of worthiness" and on the volatile political market where they are asserted.

In its preamble, the Universal Declaration of Human Rights (UDHR) already warned us that "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge", that is, to protect human rights. Yet, since it was adopted, there has been an astonishing increase in the number of "new" human rights which, in many cases, have been justified by arguments that would normally pertain to the political sphere[350]. There is no common understanding of what human rights are, but rather a tendency to present every significant political or social theory in human rights language (Renzo 2015). And it is precisely the popularity of the human rights discourse that has led to a proliferation of either mutually incompatible, or simply implausible human rights claims, a development that damages the credibility of human rights discourse (Boot 2015)P215), thus complicating the task of discerning which ones should be protected and cared for.

[349] For Norberto Bobbio, in modern constitutionalism political power, in all its forms and levels, including the highest one, is limited by the existence of natural rights, including the right of resisting tyrannical power, of which individuals are the holders of said rights since before the creation of civil society (Salazar Ugarte 2007).

[350] In his dissenting opinion in the South-West Africa Cases, Judge Tanaka of the U.S. Supreme Court noted that "a State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more than declaratory" (Wilson 2017)P25).

Like any other normative system, human rights are the outcome of a particular phase in history and of certain expressions of power, and their realization ultimately depends on that very system of power[351]. Hans Lindal argues that "the moment human rights are positivized as fundamental rights, they are inevitably linked to a limited normative point of joint action under law, and that its moral dialogue must at that stage become political" (Loughlin 2014)P971). Law, even human rights law, is politics by other means.

For some, indeed, human rights are nothing but a political instrument, maintaining that because of the logic of domestication of universal aspirations, human rights have marginalized social justice and have become both the site of conduct and the reward of politics (Douzinas 2021). Focusing on universal features of humanity, others argue, has oftentimes meant turning a blind eye to rights that apply to some individuals, but not all (Frost 2018)P148), and so, even in liberal democracies, the language of human rights has become a refuge narrative for power to evade its domestic responsibilities whilst embracing the grand language of universal values to vindicate their own legitimate right to rule. In fact, human rights are not only claimed by those facing injustice, they have also been politically used as instruments against those who claim their protection, especially against those around the world that resist a conception of European universalism (Halper and Reifer 2019)P743), that is, against those that oppose the dominant narrative or lack normative status.

Hannah Arendt already referred to "the problematic nature of the rights of man, which is deeply rooted in the rise of the nation's sovereignty against the sovereignty of individuals" (Faghfouri Azar 2019). Arendt also observed that "the trouble with these (human) rights has always been that they could not but be less than the rights of nationals, and that they were invoked only as a last resort by those who had lost their normal rights as citizens" (Arendt 1990)P149). The enjoyment of human rights becomes contingent on the already pre-defined advantageous normative status of a person; a full citizen, or at least a grievable-worthy subject. Perhaps not in their essence or in their formal acknowledgement, but certainly in their effectuality, human rights seem to be more about the right humans than about rights.

The *ius resistendi*, in contrast, is not about humans, but about political agents. The *ius resistendi* is a right that is universal, autonomous and includes everyone that is enmeshed in a relationship of power. It is inherent to the political nature of the person, not to her human condition[352]. The *ius resistendi* is not a human right in the sense that it is atemporal

[351] And international law, as some note, is conservative (state centered) by nature (Mégret 2009)P27).

[352] In the German and Greek constitutional, for instance, the right of resistance was conceived as a right of citizens and not as a human right, that is, as a political right exercised by the citizen as *homo politicus* for a collective purpose (Fragkou 2013)P852).

to any social or political description of rights, it is a right derived from an essential correlativity that arises out of power relationships, regardless of their form. Although in liberal democracies, the *ius resistendi* is mostly understood as an engagement within the political space performed through the language of human rights, especially the enabling rights, that does not make the right to resist a human right.

Irrespective of the order in which it is asserted, the actualization of the *ius resistendi* must nevertheless rely on some form of relational framework, even if primary, that provides a political space of contestation, a framework that is somehow shaped by the *ius resistendi* itself. I have elsewhere argued that when a person asserts her agency in the space where rights are created and contested, she becomes entitled to *the* right to, instead of just having *a* right to. But the right to resist in not even contingent on the constitution of a formal notion of rights within that political space. It is not because there are laws, and not because I have rights, that I am entitled to defend myself, Foucault held, "it is because I defend myself that my right exists and the law defends me" (Aitchison 2017)P8). I share Foucault´s view that the political promise of human rights would be utterly exhausted if we ever arrived at a definitive and enduring statement of humanity and its rights. Freedom or human rights should not be limited at certain frontiers (Golder 2015). The *ius resistendi* is not a human right because is not merely a discourse-dependent right, it is both a natural incident and a man-made concept that expounds beyond narratives to build on the attributes of a physical phenomenon.

And while, for some, rather than in legal or constitutional terms human rights are mostly understood as human demands for protection (Teitel 2021), I contend, precisely, that the right to resist is not a human right because it cannot be constrained to a theoretical framework that attempts to rationalize universal trust in the idea that one is entitled to protection for the mere fact of belonging to the human family.

The right to resist is not a human right, is a primary right[353], not in the sense of being in a hierarchical position within a normative system, but as a right that is basic, original, primal, not contingent on other rights but only on the idea of rights. It is a right that it is not gifted, allowed or regulated by the state, it is not an acquired right, a right granted by the sovereign, or even by the constituent power. The *ius resistendi* is a primary right in the sense of being a constitutive right of the political, the place where all other rights are created and contested.

[353] Kimberley Brownlee coins the term "primary right to civil disobedience" (as a remedial right to preserve one´s integrity) (ÓNéill 2012). She however frames the "primary" in terms of the external expression of the right to resist, whereas for me, the primary lies in the very essence of the right.

5.5. An individual right of collective expression.

Except for key historical figures and unsung heroes, we normally exercise our political rights within a certain safety zone. We are more reluctant to publicly proclaim a right[354], assert a position, or make a claim if we feel that we are alone (or in a significant minority[355]). There is definitively strength in numbers[356]. We also have confidence that we are doing the right thing when we act in a way that resonates with the community, with a political, ethnic, cultural or social group, or with the like-minded. This is so because our normative status and our identity are largely defined by our participation in a community. Collective identity is a rational or moral, autonomy-based exercise by the individual to voluntarily be bound by and accept conditions external to herself[357]. The community enables the expression of individual rights but also constrains them, because the community determines the content of the rules by which the individual abides while reinforcing the expression of the self within those constraints.

We share a normative space with others that are also entitled to their individual rights (in our modern conception), and that have certain obligations. For those rights and obligations to be recognized, that shared space must be somehow constituted, that is, it must exist as an autonomous construct to sustain itself but also to be able to recognize, protect, enable, or constrain the rights of others[358]. To establish a scale of worthiness to measure the value of rights, the public space can only be constituted through a narrative of rights because otherwise there could be no dimension to balance and evaluate them. In classical legal theory, rights are rights because they generate a claim-based relationship between those making a claim and those to whom the claim is addressed. If the space against which claims are made is not constituted, it cannot generate obligations. The state, as a constituted space,

[354] Clandestine political activity tends to render its effects illegitimate, because other citizens do not have the opportunity to hear, to understand, and to counter one's justification for the project that one supports (Hutler 2018)P75). Clandestine activity does not fulfill the requirement of accountability.

[355] I use the term minority not in reference to the numbers but in terms of the access to power of a group. A "majority" of population can indeed be a minority in terms of power share vis-à-vis a much smaller group (e.g., economic elites). A "minority" can (and does) affect the normative status of others and control the fundamental processes in a state affecting the majority.

[356] There is strength in numbers, but numbers cannot be a determining factor to define the legitimacy of an expression of the right to resist. I agree with those that assert that it is arguably not acceptable to circumscribe the right of civil disobedience with a number quota (D. D. Smith 1968)P709).

[357] Will Kymlicka, too, holds that the membership of a cultural community is a basic value of liberal democracies. Cultural structures are important inasmuch as they constitute a pre-requisite for people to be able to exercise their personal autonomy (Spector 1995)P72).

[358] Different degrees of complexity in the constitution of the space entails different levels of recognition and protection of rights.

has duties and generates obligations[359]. The community, as a constituted space also generates obligations. Some of those obligations are legal, others are moral, social or political. The human intention in creating social and institutional objects, whether legally constituted or not, always presupposes a collective purpose (Thomasson 2007)P52), and having a purpose, a common will, is the core element to having rights, both individually and as a collective.

Alluding to the idea of human rights derived from the French Declaration of the Rights of Man and of the Citizen, Hannah Arendt argued that "as mankind, since the French Revolution, was conceived in the image of a family of nations, it gradually became self-evident that the people, and not the individual, was the image of man" (Arendt 1973)P291)[360]. And Foucault argued that in the liberal art of government, the overarching objective is to serve the balanced, multifarious interests of individuals, groups, and the collectivity (Brännström 2014)P181).

The idea of the collective, rather than the individual, is fundamental in understanding the liberal ideology: the consumers, the citizens, the elites, the corporations, they are all groups with specific legal and political rights and obligations. The market functions because of the collective, and power is reduced to the exercise of a (small) collective enterprise, not only of an individual as sovereign. The security and the survival of the collective, not of its individual members, are the non-negotiable and unalterable values for the members of the elite (Habermas 1999). Liberalism has obsessively sanctioned a normative framework that under the guise of individual rights has indeed endorsed and protected the rights of collectivities as the only means to ensure that the elites remained in power. But the same is true for any other political form of organization.

Neoliberalism is not concerned with individual expressions of freedoms (or of dissent) that can be prosecuted and controlled. Rather, it fears collective expressions of rights[361],

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[359] Leslie Green argues that rights are not merely correlated with duties on the part of others, but constitute the grounds of those duties, and duties have peremptory force, establishing what one must do, not merely what it would desirable (L. Green 1991)P317-318). The fact that the state has a peremptory duty toward its citizens, implies that citizens, collectively, have rights, from which the peremptory duty of the state originates. The state would not exist to provide one single person with security, or with health, or with economic development.

[360] The Declaration of the Rights of Man and Citizen from the Constitution of Year I (1793) proclaims the collective character of rights. Article 34 declares that "there is oppression against the social body when only one of its members is oppressed. There is oppression against each member when the social body is oppressed", and article 35 declares that "when the government violates the rights of the people, insurrection is for the people and for each portion of the people the most sacred of rights and the most indispensable of duties".

[361] Some liberals fear that by grating rights to the collective, the rights of individuals, even of group members, may at times be sacrificed for the sake of group protection (Jovanović 2012)P201).

especially appeals against inequality and discrimination because they challenge the principles of democratic practice. The idea of non-accountable, loose political agents terrifies liberalism because these agents cannot only affect the rights of individuals, by subduing them, but also the normative and legal foundations in which liberal democracies rely. Those that only acknowledge individual rights should consider this: an individual may be bound or obligated to comply with the law, but if collectives are not right-bearers and they do not have rights, then the collective as such is not bound (or obligated) by the law (Gianolla 2009). That means that there would be no legal recourse to the collective behaving in an unlawful manner because collectives would be irresponsible in front of the law.

In spite of the political suspicions that may resist the recognition of collective rights, one should really stand outside the confines of any theory of law to argue against them (Sauca 2019)P102). General legal theory certainly possesses enough legal material, as well as resources, for the conceptualization of collective rights (Jovanović 2012)P196). Some authors contend that collective rights are rights because the right holder is a collective, which is not created by law, cannot be reduced to a simple sum of individuals, has an intrinsic moral value and is determinant for the life of its members (Dávila 2015). In other words, collective rights are rights because of their value collectivism (Jovanović 2012)P44). Others maintain that groups can have rights as far as full-blown or autonomous agency is not required for the possession of choice theory rights, groups can be seen as agents, albeit in a limited sense, and they can make irreducibly collective choices in spite of their limited agency (Preda 2012)P229)[362]. Still others propose the concept of the "law of crowds" in which the collective is a social agent, and a legal subject, because of the material similarity of the subject involved, that is, the crowd (Wall 2016)P24).

Rainer Forst develops a rights-theory based on the "freedom from domination" as part of the collective right to determine one´s political structure (Forst 2017). Forst argues that non domination comes from members of an active society. And Joseph Raz develops a collective conception of groups rights, which includes formal conditions based on the interest theory of rights, in which duties are imposed to individuals when the interests of human beings justify so (Jones 1999)P208). Another way of analysing the existence of collective rights is to focus on the community to determine whether it can be entitled to rights, an acknowledgement that is contingent on three questions: 1) whether communities have

[362] A group (the collective that resists) can be considered a claim holder. There are legal precedents to do so. For instance, the German Constitutional Court recognizes that a group without legal personality can benefit of fundamental rights (Grosbon 2008). Article 19 (3) of the German Basic Law states that "The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits", understanding "artificial persons" as associations, companies, or other collectives.

value per se, 2) whether the value-importance of communities justifies their having collective moral rights; and 3) whether the protection of certain values or moral rights is best canalized by the attributes of legal collective rights (Spector 1995)P68). The notion of individual rights and collective rights, I contend, can co-exist and reinforce each other, especially when the individual, voluntarily subordinates his or her own rights to the common political will of a collective.

Radical democratic postulates explain the collective not by extending or protecting the assertion of individual rights, as in the liberal tradition, but by analysing the type of power relationship between social groups, classes or collective identities within society. In radical thinking, a collective political identity, based on the notion of a common purpose, forms against negation and non-acknowledgment of the "us" versus the "they". This antagonism is reflected in a resistance to being overcome by the other that emerges as a shared identity that may have a different or conflicting view of the political, social and economic situation because the collective subject of resistance is itself the result of the power of another collective (Demirović 2017)P33). For Habermas, it is the socially irreducible common good (or the common political purpose), not the agent, that determines the existence of the collective.

Sanders differentiates between groups rights and collective rights (Sanders 1991)P368-370). Group rights are simply the sum of the rights of the individual members of the group, and while the group may use collective action to fight discrimination, the major limitation of group rights is that they only exist while the discrimination continues[363]. Collective rights arise as members of the group are joined together not simply by external discrimination, but by an internal cohesiveness (a will) that seeks to create, protect and promote its own identity. The collective can manage the group's rights beyond the individual sum of rights or of interests. Leslie Green further divides collective rights between the rights of collective agents (political parties, trade unions…), and the rights of collective goods (L. Green 1991). For him, it is only the second that may, to some degree, fulfil the political function assigned to collective rights.

I speak of collective rights, not of group rights. I maintain that collectives that can assert agency through common will, a will different from the individual will of its member, can be agents with rights. The will theory of rights not only explains the nature of individual rights, but also that of collective agency. A collectivity with a political (rational) purpose exerts agency as it engages in the pursuit of an objective that has the potential to modify

[363] Discrimination, I argue, always remains a matter of collective nature, because it is through an evaluation of our individual condition in relation to that of others that we determine the circumstances that affects us.

the normative status of the group, and not only of its individual members[364]. Collectives can have rights when they share a common will, not just because they may share a common interest. For those defending the interest theory of rights, what qualifies the right as collective is the fact that it ultimately serves the interests of the group as such, and not of individuals (Jovanović 2012)P9). Rather, from a will theory perspective, collective rights reveal the will of the collective that ultimately serve the conscious political decision of the collective. It is the political will that qualifies the right, for without an action there is no *right to*.

The fundamental question, however, is not whether collectivities can have rights. Law can, and does, create collective entities and assigns them with rights[365]. Companies, association, lobbies[366] and in many countries, indigenous or linguistic minorities, or even rivers[367] have rights and legal personality. International law recognizes roles, rights, and duties of nations, tribes, peoples, belligerents, and other entities and communities in addition to the state[368]. The question is, rather, whether the system can shoulder the consequences of granting rights to collectivities that may assert their will to resist, oppose or challenge the *status quo*[369]. Sanders, for instance, argues that the reason why collective rights are ostracized by the liberal state is, in part, because minority groups are often seen as destabilizing factors in an international system based on states (Sanders 1991)P375). Jovanović considers collectives as the third type of right-holders, neither natural nor legal persons. He notes that whether groups can hold rights at all becomes intricately connected to considerations about consequences (Jovanović 2012)P199). The recognition of collective rights is only important

[364] Some argue that the articulation of constituent power can apply only to collectives that aim at a certain tenacity and longevity, and not to the more fleeting campaigns that enact ambitious, but short-lived glimpses of alternative forms of life (Niesen 2019b)P43).

[365] In his analogy to King Midas, Hans Kelsen argued that everything to which law refers becomes law (Sauca 2019)P102), and therefore, if we, as legislators, decided to grant legal personhood and rights to a collective, there should be no obstacle to our will.

[366] Collectives asserting their collective right to resist through enabling rights in pursuit of legitimate political objectives, should be grated the same rights as other collectives engaging in the political, for instance, lobbies.

[367] The Colombian Constitutional Court, through ruling T-622 of 2016, recognized the Atrato river as a subject of rights, with a view to guaranteeing its conservation and protection.

[368] Some argue that "groups, including nations, can and do hold a variety of rights. But these are not human rights" (Donnelly 1989). According to the 1951 Genocide convention (art II) "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group (…)". The rights attacked are those of the collectivity though the maiming of its members. One can argue that collectives may have human rights, but that discussion is relatively unimportant. Many individual rights are not human rights but are still rights. Groups can have rights and their rights can matter, even if those rights are not human rights. It is the response to the violation of the right determines its normative value, not its formal characterization.

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

if the definitory process carries some normative weight with it. For the liberal state, the consequences of rights recognition to collectives are not a matter of law or legal orthodoxy, but of political survival.

Rights are formed and contested in the polis, and the polis is a collective endeavour. The non-recognition of rights is tantamount to the expulsion of the polis. Not being able to participate in the polis leads to the political, social and cultural demise (even physical in most cases) of a subject or of a collective, for the only possible way for an individual or a collective to have their rights protected depends on a larger encompassing order, which in turn implies membership in a political community (Faghfouri Azar 2019). The life of the polis is the assertion of rights in the common space, or what Charles Tilly calls, the public participation in the collective making of claims (Kriesi 2009)P342). Collective rights, therefore, are anchored both in the value of cultural belonging for the development of individual autonomy, as well as in each person's need for a recognition of her identity (Torbisco Casals 2006).

And so, if the *ius resistendi* is the right to remain in the polis, does that mean that the right to resist is a collective right? Even John Locke acknowledged that resistance and other forms of opposition are collective endeavours motivated by a collective conscience, not the conscience of man alone[370]. The collective, as a political body, bestows the *ius resistendi* with its performative power. In every square where there is an external expression of the right to resist, there is a group of people joined by an individually held common will[371]. Others, note that resistance to oppression is "collective in its exercise, but individual in its foundation" (Fragkou 2013)P851)[372]. For Costas Douzinas disobedience is an individual moral act, and resistance a collective political event (Douzinas 2013)P90). The right to resist is, actually, an individually held right that can be asserted individually (which is different from contentious objection[373]), but to be considered a legitimate expression of the *ius*

[370] "But if either these illegal acts have extended to the majority of the people; or if the mischief and oppression has lighted only on some few, but in such cases, as the precedent, and consequences seem to threaten all; and they are persuaded in their consciences, that their laws, and with them their estates, liberties, and lives are in danger, and perhaps their religion too; how they will be hindered from resisting illegal force, used against them, I cannot tell" (Locke 2017). Chapter XVIII of his 2d Treatise on Government: Of Civil Government, Of Tyranny (§. 209).

[371] For some, the right of resistance is an independent, neo-Kantian right regarding the autonomy of collective groups, such as nations or peoples, that is not reducible to the right to exist (Ohlin 2014)P2).

[372] The New York declaration of the Occupy Movement exhorts everyone to "Exercise your right to peaceably assemble; occupy public space; create a process to address the problems we face and generate solutions accessible to everyone" (Square 2011). It speaks of "your right" and "solutions to everyone"; exercise your individual right, for the collectivity.

[373] Although some argue that resistance "can be characterized as either opposing or counteracting (external resistance) or withstanding (internal resistance)" (Silvermint 2013)P408), most authors agree that

resistendi, even individually asserted resistance must seek to redress a situation that affects the general interest rather than a remedy to the violation of an individual right. The first president of the Federal Court of Justice of the Federal Republic of Germany, Hermann Weinkauff, stressed the collective character of resistance, declaring that "resistance will be justified only if it turns the fate of the whole, not if it turns the fate of the individual" (Schwarz 1964)P129). What one deduces from Weinkauff´s statement, is that external expressions of the right to resist must be founded on ethical/moral judgements based on specific convictions that contemplate the fate of the collective as the corollary of their very existence.

To reconcile the apparent contradiction between individual versus collective rights, I contend that the *ius resistendi* is an individual right of collective expression. It combines the two major sources of normativity in western tradition, that of autonomy (individual rights), and that of the common good (the collective) (Etzioni 2014)P244). The individual domain has traditionally been considered within the sphere of rights, the collective sphere has traditionally fallen within the moral, ethical and political domain. The *ius resistendi* is an individual right pertaining to the political nature of the person, expressed in the polis through narratives and public engagements that relate to the general interest.

The "right to resist", "the collective right to resist", or "collective resistance rights" are analogous. There is only one *ius resistendi* that is actualized through collective expressions or that is defined because of its collective purpose. In the communitarian approach, neither the individual domain nor the collective sphere takes precedence over the other, but rather, individual and collective rights are complementary[374]. Because the *ius resistendi* is an individual right of collective expression, those that assert it have a double responsibility; as

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conscientious refusal is not a form of resistance. Contentious objection is not necessarily about a subject resisting a rule, for instance advocating for the complete elimination of the military, but rather is about a subject as seeking exemption from particular order, for instance, being personally exempted from military service. The concept of conscientious refusal "(…) was non-violent individual action with the purpose of preserving the moral virtue of the individual. It was justified when a ruler tried to force a subject to lie or to kill an innocent, going against natural law and divine law" (Maliks 2018)P450). For the ECHR, "the ambit of the right to conscientious objection includes not only the freedom to act according to one's beliefs, but also the freedom not to act, not to associate and not to tolerate actions from others which contradict one's personal convictions" ECHR Case of Herrmann V. Germany (Application no. 9300/07) of 26 June 2012. The lines between what constitutes resistance in relation to other individually or collective moral choices regarding the obeyance to the law is not always evident. What is interesting is that some argue that "private forms of dissent have generally been viewed as normatively superior to the public challenge to democracy that civil disobedience represents, and thus deserving of greater moral and legal protection" (Oljar 2014)P293). In other words, because contentious objection does not represent, in its individual form, a significant threat to the order, it is treated with higher consideration regarding the normative aspects of its assertion.

[374] Communitarians often suggest supplementing the language of rights with another discourse, for instance discourse which highlights the importance of obligations owed to the society without discarding the discourse of rights altogether (Harel 2005)P204).

individual agents appealing to rights, and as collective agents performing that right. The right to resist bridges the gap between the "self", the "us" and the "they". It is a right that defines the role of the political agent within the political itself because it ultimately challenges collective narratives that create individual rights.

5.6. The right to resist as sovereignty: the exception over the exception.

Immanuel Kant rejected the possibility of resistance because, for him, legal resistance to the monopoly of power implied having authority to define the conditions, analyse the criteria, and choose the means for disobedience. If that was the case, every political opponent would then assume the power of decision and acquire the privileges of a ruler (Heck 2012)P189). But Immanuel Kant did not live in a liberal democracy. The modern concept of democracy is grounded, to a significant extent, on realizing a carefully crafted balance between individual autonomy and collective social order. Autonomy, as communitarians argue, is used to mean one's right to act on one's preferences. Social order is used to express the idea that some constraints on the right to act on one's preferences are needed. Carefully crafted balance refers to the notion that a society that maximizes either value is not a tolerable one (Etzioni 2014)P253).

The balance between autonomy and social order, between constituent power (the people) and the power of the constituted authority (the ruler), is reflected in the constant tension between the limits of sovereignty and the limits of the normative framework in which sovereignty rules, between freedom and restraint. Peter Fitzpatrick argues that law extends to, and sustains sovereignty, but sovereignty contains a lack intrinsic to its identity, as a result of which sovereignty is dependent upon law and the capacity of law to encompass that which exceeds it (Madsen 2010). Law, as a reflection of power, cannot in its own terms be limited in the interests of a power outside of itself (Fitzpatrick 1992), and so, it is the constituent power that determines the content of the sovereignty, the essence of what law encompasses, and its relation to the normative potentiality outside it.

The sovereignty of the constituted power, and the sovereignty of the constituent power are not necessarily contradictory or exclusionary terms, for asserting our own (constituent) power should not represent a threat to the constituted power, neither a contradiction in Kantian terms[375]. If as constituent power we surrender some of our rights and freedoms to the constituted power, then as constituent power, we should be able to appeal to our

[375] According to Kant, it is not up to a people already subjected to civil law to investigate "into the origins of the supreme authority to which it is subject, that is, a subject ought not to reason subtly for the sake of action about the origin of this authority" (Heck 2012)P193). One wonders, in fact, what Kant would think of the profound systematic and conceptual analogy between constituent power and democracy, insofar as they both describe collective acts of self-legislation (…) and of liberty as political autonomy (Kalyvas 2013).

reserved rights to reformulate the terms of the relationship with the constituted power[376], with the caveat that the sovereignty to formulate does not necessarily imply the sovereignty to execute. The sovereignty of the constituent power is the ability of individuals and collectives to reclaim their *potestas*[377] to reaffirm their own position (their autonomy) in relation to rule that they have given themselves to command their lives. In liberal democracies, the constituent power continuously seeks recognition of the constitutive nature of its own sovereignty as part of the process derived from the concept of democratic practice, and as means to revealing the nature of its ever-present potentiality behind the constituted form. In most cases, as Costas Douzinas argues, "what happens is that the constituent power establishes a new society but is marginalized by its institutional creations, only the constituted form becomes legitimate. The constituent, which gave rise to it, recedes, but remains active, becoming an ever-present potentiality: it lies behind every constituted form" (Douzinas 2021). The sovereignty of the constituent power seeks recognition and validation of its agency in a broader system of legitimization, not necessarily to seize power to execute its demands.

So how does the constituent power become constituent again? The *ius resistendi* is the expression of constituent power as an expression of sovereignty[378]. It restores the right to being constituent power by forcing the constituted power to confront those that refuse to recede. Asserting the *ius resistendi* allows the individual and the community to consent to the order without surrendering their sovereignty[379] and without relinquishing the power to determine their own normative status in relation to themselves, in relation to their external circumstances, and in relation to those that can potentially affect their normative status. The *ius resistendi* represents the alternative between anarchy[380] or submission (Wolff 1970)P35)

[376] The main difference between my argument and regular democratic procedure (e.g., elections that articulate the terms of engagement with the constituted power), is the recognition that the Lockean reserved rights (including the *ius resistendi*), are integral part of constituent power.

[377] "As in the power intrinsic to political jurisprudence that creates authority as a product of the people's capacity to act in common" (Loughlin 2016).

[378] "Civil resistance is a merely practical illustration of the exercise of the authority of the people" (Bellal and Bartkowski 2011).

[379] In his limited vision of rights, John Rawls argues that "to act autonomously and responsibly a citizen must look to the political principles that underlie and guide the interpretation of the constitution" (Rawls 1991)P120). The narrow liberal interpretation of civil disobedience disservices the cause of the *ius resistendi* and with it the domain of personal autonomy necessary to become constituent power. The underlying objective of the liberal definition, I suspect, is to prevent personal sovereignty from actually becoming effective constituent power.

[380] John Rawls argues, idealistically, that in instances of civil disobedience "there is no danger of anarchy so long as there is a sufficient working agreement in citizens' conceptions of justice and the conditions for resorting to civil disobedience are respected" (Rawls 1991)P121).

by refusing to be bound by either, and instead allowing for the (re)creation of a new or alternative constituted form.

Like law, the *ius resistendi* is paradoxical regarding the freedom versus constriction paradigm. Asserting the right to resist does not necessarily imply resistance to being governed, it is rather a declaration of sovereignty to reclaim the power to decide on how to be governed. Through external manifestations of the right to resist we seek to liberate ourselves from structural injustice, and yet, it is through those engagements that we resolve the ideological and legal frameworks of the institutionalized space. When we assert our right to resist, we widen the effective power of the constituted sovereign and limit the space for resistance. It is by asserting our individual or collective sovereignty through the *ius resistendi* that we publicly, and thus politically, announce our readiness to renounce our constitutive power when certain conditions are met.

Through claiming rights, as an expression of the right to resist, we shape (indeed, at times constitute) our world and ourselves (Zivi 2012)P10). The right to resist is the embodiment of a claim in Foucauldian sense, "seeing rights claims as a vehicle for forging new emancipated forms of personal identity" (Aitchison 2017)P2). To resist implies the ability to say no (Brumlik 2017)P19), which indicates an act of freedom that creates obligations on the duty-bearer, that is, on the object of our grievance, the constituted power. H.L.A Hart said it clearly; "the individual who has the right is a small-scale sovereign to whom the duty is owed" (Wenar 2005)P238). The *ius resistendi* is the ultimate expression of validation of the conception of the rights-holder as a sovereign individual (Van Duffel 2003). As it turns out, Kant´s arguments to reject resistance provide the strongest reasons to validate the *ius resistendi*, for it is a right that bestows the power to define the conditions (recognition), analyse the criteria (reason), and choose the means (freedom) of disobedience, not necessarily to the monopoly of the constituted power, but to the relegation of people´s own constituent power[381].

It is precisely in this regard that the right to resist and the right to exist are analogous[382]. Regardless of the source of oppression (by a public authority or a non-public agent[383]), or

[381] Some in fact argue that every member of a legal community has the obligation to examine whether commands which are directed to him are lawful and that when for some reason the rule of law breaks down or falls into disarray that the whole responsibility reverts to the individual, hence also the competence of examination and rejection (Marcic 1973)P111).

[382] Some argue that the right to resist and the right to exist are not similar because resistance may be futile, and one may be annihilated (Ohlin 2014)P3). However, I believe one does not have a right contingent on its utility. Whether one is finally annihilated or not, the right to resist is an expression of the right to exist (politically, socially and morally), which is analogous to the right to remain in the polis.

[383] Self-defence, for instance, may not be an expression of the right to resist within the concept of the *ius politicum*, but it is an expression of resistance to harm, a true expression of the right to exist.

whether the domination and the oppression are the result of structural or temporal circumstances, asserting the right to resist reaffirms the will to exist, and where there is will, there is right. The *ius resistendi* engages the process through which existence is acknowledged. To resist is to claim the primary right of existing, of being recognized, and of being able to assert one´s will and autonomy in conditions of freedom. In the *ius politicum*, the right to resist is the right to exist in the polis, a proclamation of one´s sovereignty as a political agent. To resist, then, is to become a potential source of normative change. The *ius resistendi* is constituent power in that its assertion can significantly modify the normative status of the defining elements of the *ius politicum*, and even of the very narrative that creates rights that allows oneself and others to exist.

Legal theorists have traditionally accepted the idea that "the rule is freedom and corresponds to the individual; the exception is the penalty and corresponds to the State" (Pelloni 2000)P2). For Carl Schmitt, "sovereign is he who decides on the exception" through an act that demonstrates the primacy of the existential over the merely normative (Loughlin 2017) that is, he who has the ability to decide on when to suspend rules and make a decision (Gullì 2009)P23)[384].

For Carl Schmitt, the discussion about the sovereign is also a discussion about legal limits. Although the exception remains outside the law, Schmitt maintains that the decision concerning the exception has a definite place within "a systematic legal-logical foundation (…). The sovereign decides whether or not the law applies" (Mcquillan 2010)P98). Being at the outermost sphere of legal power, the sovereign (in whatever form) occupies the boundary between law and non-law (Liew 2012)P1). Like the concept of law, as maintained by Fitzpatrick, or the notion of resistance, as asserted by Foucault, Schmitt argues that "the sovereign stands outside the juridical order and nevertheless belongs to it, since it is up to him to decide if the constitution is to be suspended in toto" (Pottage 2013)P272). When acting on the exception, the state acts illegally, it is a beast applying its own force but, at the same time, the sovereign is the only one capable of instituting the law (Sandoval 2017)P25).

[384] I agree with Schmitt´s "exception" only insofar as it relates to the *ius politicum*. Resistance is about power, and power is a game played in the domain of the political. Political order, as Schmitt noted, could not be safeguarded by constitutional provisions, but by an extra-legal authority, that is, by that which by definition cannot be part of constitutional arrangements (Emden 2006). Schmitt´s concept of politics is rooted in the friend-enemy distinction, and so a theory of the right to resist could potentially be based on that dichotomy too; power is friend or enemy, and whatever form it takes, the other will resist it by becoming the friend, or the enemy. He also stated that "having a political commitment means being able to distinguish friend from enemy and, ultimately, demonstrating a willingness to fight the enemy to death" (Werner 2009)P128). That fight is not an external expression of the right to resist, is pure irrational war, because without reason there is no politics, and without politics then there is death. Some also assert that Carl Schmitt´s state of exception can be a mere fabrication of the sovereign, which acquires dubious legitimacy on the basis neither of ethics nor of a violence travestied as force of law, but of mere and raw violence (…) the sovereign decision creates the exception, or state of emergency (Gullì 2009)P24).

Law, sovereignty and the right to resist occupy the same space because they are complementary concepts: they are all fundamental parts of an order that none of them can fully dominate.

The concept of sovereignty is connected to the power to decide on the exception, and being a matter of power, I contend, sovereignty also refers to the power to oppose or to not accept the decision over the exception. Sovereignty is the power to establish an alternative exception, or an exception over the exception. Where there is sovereign power to decide on the exception, there will be resistance to the prerogative to decide on the exceptionality[385], whether from the constituent or from the constituted sovereign. A sovereign can assert its power by deciding on the exception, opposing the exception, or by imposing its will over the will of other sovereigns[386]. If a sovereign is justified in using its power to impose its exception, those who oppose that exception should also be able to use their power. Whichever sovereign acts on the exception places itself in the periphery of the political and of the legal order.

Democracy is (or should be), a system of continuous negotiation between sovereignties. The health of a democracy depends on its ability to generate suitable spaces where sovereignties can articulate and re-balance their spheres of sovereignty when crises arise, that is, when a constituent or a constituted part of the order appeals to its prerogative over the exception. Some argue that to limit the exercise of sovereign decision, liberalism has only emphasized the exceptional character of those moments, making it even more obvious that there are cases in which the norm does not apply (Mcquillan 2010)P103). Yet that "liberal exceptionality", it seems, is becoming increasingly conventional. In most ideological regimes around the world, and especially in neoliberal systems, the unconventional actions taken in response to crises have become quasi-permanent (White 2017)P3). In other words, the exception is frequently applied. What some call the "real state of emergency" transcends the liberal questions of declared and undeclared emergency to define the situation we lived in or in which we live in (Mcquillan 2010)P96). The real state of emergency means that some are subjected to exceptional powers, while most of us remain unaware or, as I argued elsewhere, unwilling to be aware. Some will assert their sovereignty by resisting the exception imposed on them, while most will remain oblivious to the fact that their

[385] For John Locke, "prerogative is nothing but the power of doing public good without a rule" (Locke 2017)Chapter XIV, para 166).

[386] Sovereign is that who has the possibility to decide on the exception, even if in a covered manner. Large corporation or supranational organizations are sovereign in that they can affect their own normative status, ergo the argument that the right to resist can also be legitimately asserted against non-public interests. Nevertheless, the argument here is focused on the traditional understanding of constituent (people) and constituted (state) sovereign.

sovereign power is being weakened. After all, "the genuinely exceptional power is to strip off someone of protection while they are before the law" (Wall 2016)P25).

Agamben notes that "not only in economics and in politics, but in every aspect of social life, the crisis coincides with normality and becomes, in this way, just a tool of government" (Stijn De Cauwer 2018)xv). Governments use crisis to increase their political and legal power by creating recurrent exceptions in which to assert their power to decide, while maintaining the potentiality of the constituent sovereignty coerced under the pretext of a continuous threat to the fulfilment of basic commodity rights (security, hunger, unemployment…)[387]. The state of exception has become the norm (from anti-terrorism laws to COVID-19 restrictions), to the point that emergency legislation is now presented as ordinary within the constitutional framework (Gómez Orfanel 2021)P209). Because constitutionalist theories are based on the idea that states of emergency are not extra-constitutional, but singularly constitutional (Gómez Orfanel 2021)P202)[388], one must conclude that the assertion of the right to resist is not extra-*ordinem*, or extra-legal or unconstitutional, but singularly constitutional, in the sense of being part of the sovereign response to the exception imposed by another sovereign. The *ius resistendi* is not a democratic exceptionality, but a constitutive element of the negotiating processes among sovereignties. As the collision between sovereignties becomes more recurrent, the right to resist is appealed to more often, and becomes a fixture in the constituent-constituted discourse.

Spinoza already demonstrated that the key to assessing the quality of governance is a critically engaged, active society conscious of its sovereignty (de Lucas and Añón 2013). The right to resist is a primary right that restores an awareness of sovereignty to the individual and to the community (to the constituent power), as it forces the constituted sovereign to expose the meaning, the purpose and the measures of the permanent state of emergency and, with it, the real nature of the order. Sovereignty is not about rightness, is about power, sovereignty is decision and domination (Gullì 2009)P23). The right to resist is about power, but it is, fundamentally, about rightness.

[387] "Often the most vigorous political debates are centered around concerns relating to food security, risk management, catastrophic imaginaries, and global non-state actors" (Muller 2011)P15).

[388] Exceptionality is not incompatible with the existence of a regular, legally binding legal order. France is an example. Article 16 of the French Constitution of 1958 provides for exceptional powers to the President in case acute crisis, article 36 allows a possible state of siege, law 55-385 of 3 April 1955 (on Algeria) provides for the state of emergency, and the law 2020-2090 of 23 March 2020 allows the declaration of a sanitary state of emergency.

5.7. The ultima ratio.

The mere fact of having a right indicates that there is a normative framework (a constituted space) where it can be actualized. In many instances laws determine how rights can be enjoyed, how they are protected, and the remedies for their violation. But not all laws are applied all the time. There are moments when it is necessary to apply the law, and others when only its potentiality is sufficient to guide or prevent specific behaviours. For many legal scholars, for instance, a criminal code should only be resorted to as a final recourse, the proper "*ultimum remedium*" (Ellian and Molier 2015)P5). It makes sense that one should wait until a crime is committed before enforcing the laws that punish that behaviour. Other laws are timed in a way that can be applied preventively, for instance in the case of most anti-terrorism legislations around the world, where a whole new body of national and international law has been designed to avert forms of potential terrorism. Laws preventing demonstrations or other external expressions of the right to resist that "may" result in violence also have a pre-emptive character. These laws, as argued elsewhere, are designed to strike fear into potential protesters, dissidents or even observers, seeking to provoke a chilling dissuasion effect.

In international law, the doctrine of the pre-emptive strike has blurred the lines between legality, legitimacy, and accountability[389]. At national level, anti-demonstration legislation also distorts the relationship between culpability and legality. How far can criminal law be stretched in the name of prevention before the connection between the individual or the group and the wrongful conduct is lost? Where is the line that separates the exercise of a legitimate political exercise and the legal culpability derived of particular interpretations of order?

Most orders are bound to the timing of the law, that is, to a political/legal calculation about when a specific law should be applied to obtain its strongest normative effect in the desired direction, punitive or pre-emptive. This notion, furthermore, can also be applied to the very concept of rights. There is, I argue, a correlation between the time when one asserts a right, and the measure of the legitimacy and normative effectiveness of that right. This includes the *ius resistendi*.

Political theorists typically regard the right to resist as a form of voice exercised by the people in extreme circumstances. For some, it is justified only in cases of considerable legal alienation wherein the law (or its application), differs drastically and systematically from the will of the community at large (Gargarella 2003). For others, there must be a level of abuse that admits no alternative path other than resistance; the normal channels of voice

[389] Article 2(4) of the United Nations Charter states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."

must not be available or effective and must not be used for "small-scale" illegalities (Ginsburg, Lansberg-Rodriguez, and Versteeg 2013)P 1192). In the view of others, the *ius resistendi* is the ultimate guarantee intended to ensure the safeguard of the supreme norm (Fragkou 2013)P848). As a guarantee right, that is, as a means to ensure that other rights are warranted, they consider that the right to resist is the right of last resort, since there is no further remedial right to which resisters can appeal (Honoré 1988) P41). The Universal Declaration of Human Rights articulates the idea of the relevance of legitimate timing for resistance in its third preambular paragraph, declaring that "whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"[390]. Many scholars indeed seem to agree that the right to resist is the *ultimum remedium*, the ultimate means of redress, the supreme unorganized sanction, the right of last resort when other political avenues have been exhausted and the levels of discrimination and injustice have become unbearable (UNESCO 1984). Even John Rawls concurred that the right to resist should be considered an emergency right and used only in extremely exceptional situations as a last resort (Rawls 1999)P328).

For others, however, the right to resist is not the *ultimum remedium*, but the initial right. For Arthur Kaufmann "resistance is not the last resort against a complete abuse on the part of the state, but rather the first instrument against discrepancies, its function being to defend against the beginnings of abuse" (Santos 2009)P356). Article 120.4 of the 1975 Constitution of Greece declares that "Observance of the constitution is entrusted to the patriotism of the Greeks who shall have the right and the duty to resist by all possible means whoever attempts the violent abolition of the Constitution". The majority of Greek constitutional doctrine states that the right of resistance is not subordinated to the principle of the prior exhaustion of all domestic legal remedies (Fragkou 2013)P 849-850), and thus it leaves open the possibility of asserting the right to resist without having beforehand exhausted all other options.

Some scholars disagree with the principle that it is necessary that the efforts to change a challenged law through the legislative process must have first been unsuccessfully attempted before a person resorts to morally justifiable civil disobedience (Greenawalt 1970)P77). In a certain way, even Foucault argued about the primacy of resistance, stating that "resistance comes first, and resistance remains superior to the forces of the process; power relations are obliged to change with resistance". For him, "resistance is irreducible in that it pinpoints the limit of power and acts as the principle of intelligibility from which

[390] In this case, the *ultimum remedium* not only refers to the temporality of the claim, but rather makes a political statement that would later serve as moral legitimization for humanitarian interventions or the doctrine of the responsibility to protect.

to read power relations" (D. C. Barnett 2016)P286-287). Some authors justify the assertion of the right to resist as a form of *ex ante* control of decisions permeated by the public debate, and as a way of measuring the legitimacy of standards enacted by parliaments. One can also claim the right to resist to prevent the enactment of some law or policy thought to be unjust[391], or it may also be asserted in order to protest the actual operation of some unjust law or policy (Bedau 1991)P50). The timing of asserting the right to resist carries with it a symbolic and communicative aspect. It speaks of the resilience and the trust in the system of those that assert their *ius resistendi*. It also speaks of the conditions that lead to that assertion, and of the real state of the regime.

The *ius resistendi* does not function as *an ex-ante* control, neither it is the *ultimum remedium*, but rather, I submit, is the *ultima ratio*. *Remedium* refers to remedy, which presumes that the situation where the right to resist is asserted has become so unmanageable that either part decides to trigger a final, irrefutable closing of the dispute. *Ultimum remedium* conveys a message of irrevocability, a negation of the political and a degree of imposition on the other, including (possibly) by violent means. It removes the option of a final solution in the form of a process of re-accommodation in which new rights can be formed and alternative normative fields can be seized. An expression of the right to resist as *ultimum remedium* abrogates the engagement of other rights and reasons and cancels the multiplicity of circular correlatives that can provide options, other than the legal, to settle the dispute between sovereignties and the material or normative nature of the grievance. The *ultimum remedium* negates the possibility of a broader conception of rights. And the same arguments apply in toto to a conception of an *ex-ante* function for the *ius resistendi*. Control and censure are close notions that negate the political.

When I speak of the *ultima ratio,* I refer to the inherent rationality of a legitimate expression of the right to resist, the formation of a narrative within the right that encompasses, legitimates and provides moral (and legal) value to the will, and with it, to all relevant incidents and strategies within a circular correlativity that are engaged to provide options within the legal, the social and the political. An expression of the right to resist can materialize while other political, legal or social measures are pursued through

[391] "Thirty-five years ago, Central American solidarity activists developed a model for building resistance before disaster strikes. Their efforts may have stopped a U.S. invasion of Nicaragua". There was a Pledge of Resistance in case the Reagan would invade Central America (Engler 2019)(Boyle 2007)(Lippman 2012). Extinction Rebellion organizers in the UK (https://extinctionrebellion.uk/) have made extensive use of action pledges and made written about how "conditional commitments"—vows that make use of the idea "I will if you will, too"—can encourage widespread collective action. As soon as Donald Trump was elected president and started outlining his policies, especially on migration, a group liberal lawyers planed a wave of legal resistance to his policies (Savage 2017), leading scholars and advocates openly called on judges to modify how they review the President's actions because of Trump's own behavior (Blackman 2017)P53).

institutionalized channels. The *ultima ratio* is the ultimate reason, a guide to the final purpose, an expression of the ultimate commitment of people toward a common objective that engages the will of the people to realize their right to resist.

In his 16 April 1963 Letter from Birmingham Jail, Martin Luther King reveals the nature of the *ultima ratio*, the assertion of the right to resist while continuing advocating for other acceptable actions within the system in pursuit of its final objective. He noted: "We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have yet to engage in a direct-action campaign that was "well timed" in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never." We must come to see, with one of our distinguished jurists, that "justice too long delayed is justice denied" (King 1963). In Bączkowski and Others v. Poland (Application no. 1543/06) of 3 May 2007, the ECHR noted that "The freedom of assembly, if prevented from being exercised in good time, could even be rendered meaningless". Timing is everything. Not all claims carry the same urgency. Some require serene reflection and a thought strategy, yet in other cases, timing legitimizes direct, stronger forms of engagement.

I agree that to legitimately assert the right to resist it is not necessary to have exhausted all other ordinary procedures, because resistance is oftentimes a response to the ineffectiveness, the slowness, or the high cost of regular systemic procedures. Rather, the *ius resistendi* becomes the expression of an engagement that aims at maintaining all other options open[392]. The *ius resistendi* is the *ultima ratio* not in the sense of temporality, but in the sense of being the decisive element of a political strategy. The *ultima ratio* does not represent the culmination of the potentiality of *ius resistendi*, is the reason that provides the reason behind the right to resist. Only the end of the political would entail the end of the *ius resistendi*.

[392] As far as the justification for resistance (or in this case civil disobedience), the New York Times noted that "The evils being combated have to be serious evils that are likely to endure unless they are fought. There should be reasonable grounds to believe that legal methods of fighting them are likely to be insufficient by themselves" ("Is It Right to Break the Law?" The New York Times, Jan. 12, 1964, page 17).