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

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Summary in English

Expressions of discontent, opposition and resistance are common in the streets of Europe, the US and in other places that we still characterize as liberal democracies. The reactions of governments are increasingly harsh, using the whole state apparatus, the police, the judiciary, and the media to respond to public engagements that are considered to be a threat to the *status quo*, or just a mere nuisance to security and order.

At academic level, most scholars have focused their attention on defining the act of resistance with respect to its public expression and its political function. Legal scholars have sought to examine resistance in relation to the obligation to obey the law while refusing to acknowledge its legality, arguing that liberal democracies already provide sufficient channels of political participation. The thesis fills the gap between those that have obsessively attempted to define resistance as a political phenomenon and those that dismiss it as a mere moral claim. It focuses, instead, on the element that instils an expression of resistance with its universal character: its value as a right.

My hypothesis is that it is possible to formulate a universal rights-based theory of the right to resist through legal probe. This claim is based on the proposition that because the *ius resistendi* embodies the resistances inherent to the political order that shape, in turn, the structure of the law, we can derive its normative value from the power dynamics that recreate the order in positive form, or that constrain it through political and other narratives. There is, consequently, no understanding of the *ius resistendi* without an understanding of the actualization of power in the *ius politicum*, the space where rights are created and contested. I contend that the *ius resistendi* is the element that connects the forces that collide when power is exercised, for it attempts to close the gap between the expectations of the ruled and the actuality of the rule.

Through historical inquire, the thesis identifies the external benchmarks that are considered necessary to assess the legitimacy of any expression of resistance in the western tradition; for those that resist, to demonstrate their fidelity to the fundamental values of the ideology (the higher law), and for the state not to be subjected to resistance, to fulfil its obligations, especially the pursuance of the common good and the defence of fundamental rights. History also helps unveil the functions that scholars have traditionally assigned to the right to resist: to keep a watchful eye on power, to protect the legal (constitutional) order, and to expose the real character and truthfulness of the system. I contend, however, that its most important function is that of capturing new normative spaces, transcending normative claims that are either inherent or latent in practices and beliefs of society, but that require a purposeful societal engagement to become actual.

And yet, despite its different functions the nature of the *ius resistendi* has remained unchanged throughout history. The external political expressions of the right to resist have shifted over time, they have adapted their performative features, as the state, and the legal system, have also adjusted the use of coercive mechanisms to respond to particular challenges. These external manifestations do not determine the nature of the right to resist, but they may qualify its normative and performative value depending on the context of their actualization.

During the historical inquire I seem to defend a certain contractualist view of society. I argue that, for the most part, it is in the enlightenment, in the ideas of *liberté* and *egalité* that the right to resist finds its strongest validation. If consent to the ruler was given, consent could be withdrawn. Yet the idea behind this approach is purportedly deceitful. It serves to attest that those that proclaimed and consented to the contract have always been those that had what Costas Douzinas calls "the right to law" (Douzinas 2014b)P165). The depersonalized sovereign is the expression of the domination of a system without a face against which it is hard to resist and hold to account. It is in man´s nature to question obligations that are external to his will, but it is also in his nature to examine whether complying with those external obligations can harm his, and his group's, political, moral, social or physical survival. Behind every expression of the right to resist there is a rational calculation of power, not just dogmatic justifications about contractual obligations.

Those calculations can only be made against a specific normative order, one that is formed by the ideology (the *grundnorm*), the basic system of values and ideas that provides the rest of the system with its legitimacy and that establishes a "scale of worthiness" to determine the value of social and cultural objects, including rights. It is through the appeal to the ideology that one opposes deviant power, particularly in the form of challenging the legitimacy of the law that represents the manifestation of that power. And it is through the examination of the role of ideology as the *grundnorm*, that one arrives at the conclusion of the inseparability of law and politics as expressions of power.

I explore the concept of law through the lens of the structure of ideologies. The analysis focuses on three elements: 1) law´s epistemic nature, that is, its origins, 2) the genetic reasons that make people determine the morality (or the legitimacy) of the law, and c) the functional nature that determines the degree to which law assists in reproducing social forms of rule. In other words, the role of democracy in maintaining the *status quo*. The purpose of examining the *ius resistendi* through this lens, that is, in its legal dimension, is to offset the anti-legal turn that robs the right to resist and its advocates of an impressive line of defence (Scheuerman 2015)P427). I expose the positive character of the right to resist (which is embodied in at least twenty percent of the world constitutions, including the

German and the French), and test it through some of the mainstream legal theories that provide the standards, in western legal theory, of the constitutive features and necessary characteristics that rights should have.

This analysis brings me to conclude that the right to resist is indeed a claim-right, a right that carries the power of the moral force of the claim, of the normative and performative weight of the rights enabling its manifestation, and the strength of the political, social or cultural significance of its external expression, in other words, of its function. The *ius resistendi* provides the missing normative value in the structure of rights that may otherwise be incomplete and determines the degree to which rights and principles have been disengaged from the core. A right that builds on the attributes of the natural phenomenon of resistance, the *ius resistendi* is both a natural and a man-made concept. It has a legal structure and a place in the legal order. And while human rights are mostly about the right humans, the right to resist is a right inherent to the political nature of the person, not to her human condition.

A primary, indeterminate right, the ius resistendi embodies the Arendtian right to have rights, the right to remain in the polis as long as there is a will, a political engagement that turns "a" right to resist into "the" right to resist. An individual right of collective expression that breaks people´s *akrasia* and reinstates their sovereignty to legislate on their own circumstances and decide on the exception, or on the exception over the exception. And yet, paradoxically, it is through asserting the right to resist that we publicly, and thus politically, announce our readiness to renounce our constitutive power when certain conditions are met. The *ius resistendi* does not challenge the democratic order, it provides the space for the continuous negotiation, and recognition, between the constitutive and the constituted sovereignties.

Besides political opportunity, there is clearly no legal justification for the liberal system to deny the *ius resistendi* the status of a right. And despite this persistent refusal, the significance of the right to resist in the system becomes evident in the efforts that the state displays to offset it. It is a non-legal-right that it is punishable by virtue of its political nature. Punishing disobedience serves to condemn certain types of conduct, but it mostly serves to indicate the threat perceived by the dominant forces and the limits of official tolerance. Liberalism is not concerned with individual expressions of freedoms (or of dissent) that can be prosecuted and controlled, rather, it fears collective expressions of rights. Dissolving the collective (as a political body) and transforming its will into a cluster of individual acts that can be effectively prosecuted and penalized, the liberal order seeks to create a chilling effect among those who dare resist. All in the name of security and other commodity-rights that have become the standard measure that the liberal order has

adopted to justify the legitimacy of its actions and the rightfulness of its concept of freedom or justice.

The two fundamental elements in which modern democracies rely on, the pairing of the concepts of legitimacy and legality, and the merging of the notions of the obligation to obey the law with that of being a good citizen, are strongly contested. In my work, I rethink the necessary conditions for democracy to flourish by establishing a quasi-ideal theory that contemplates dignity and justice as the moral underpinnings of the order, freedom coupled with reason as the central value of democratically conceived political theory, and the principles of democratic practice (accountability and recognition) as the performative occurrence of democracy in a manner consistent with its fundamental values. Legitimacy is not at odds with legality.

I challenge the traditional liberal interpretation of rights and develop a broader conception, one where rights are a constituent part of the genetic reasons that provide the democratic order with its value and where the principle about the correlation between rights and duties exists, but it is only part of what defines a right. My theory of the *ius resistendi* in liberal democracies revolves around a broader conception of rights, one in which there are no hidden rights and where reserved Lockean rights are always present in a system that cannot fully explain itself without them. My broader conception of rights can, perhaps, bridge the unnatural gap between legal, political, moral and social incidents and present them as a coherent outcome of a particular claim, in other words, where the assertion of the *ius resistendi* can fulfil a normative, social and political function that actualizes the potentiality of the aspiration into the certainty of the current and allows for further acknowledgement of rights.