

Metamorphoses of the Right of Resistance in Constitutionalism: From Tyrannicide to the Reaction Against Global Injustice

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Michael Kohlhaas (...), einer der rechtschaffensten zugleich und entsetzlichsten Menschen seiner Zeit. (...) die Welt würde sein Andenken haben segnen müssen, wenn er in einer Tugend nicht ausgeschweift hätte. Das Rechtgefühl aber machte ihn zum Räuber und Mörder.

Michael Kohlhaas (...), one of the most upright and at the same time one of the most terrible men of his day. (...) The world would have had every reason to bless his memory, if he had not carried one virtue to excess. But his sense of justice turned him into a brigand and a murderer.

Heinrich von KLEIST, *Michael Kohlhaas*, 1808

SUMMARY

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INTRODUCTION

The courageous and solitary resistance of Heinrich von Kleist's hero did not have a happy ending; or maybe it did, if you consider death a price not too high to quench the thirst for justice. Far from being a time of reconciliation with the system and its laws, the tragic end of Kohlhaas can perhaps be interpreted as the last act of resistance by which an individual asserts their own dignity and their own reasons. Imagine that, from the early sixteenth-century Germany, made incandescent by Luther's words on Christian freedom, Michael Kohlhaas found himself in today's world, in a constitutional State, and discovered that even now the law is on the side of the "bad guys"... What solution could he find? Here is a possible answer, albeit certainly little uplifting: the private citizen who disobeys the law before the declaration of unconstitutionality (which, after all, may not happen) is acting legitimately only if his behaviour is followed by the constitutional court's examination of the question of constitutional legitimacy. "The right of the individual who has not obeyed an unconstitutional law"¹ results from the declaration of unconstitutionality, acting retroactively. But *quid juris* if a judge deems that norm not unconstitutional? If in doubt, whoever disobeys should know that "you do so at your own risk."² It is manifest that the idea of justice of such a citizen should correspond to a markedly anti-utilitarian parameter – like, for example, that outlined by Rawls.³

The interpretative hypothesis that I will adopt in this essay is the following: the birth and development of the rule-of-law constitutional State can be read in the light of the transformation of the right of resistance,⁴ no longer understood as a right of the individual, or the group, to resist abuse of power, but as an institutional mechanism aimed at the "global" protection of the legal system in its entirety. Such a mechanism of "resistance", therefore, is bound to translate, from time to time, into principles and institutions, such as the separation of powers, political responsibility, the opposition function, the rights of the minorities (including parliamentary ones),⁵ the prohibition of anti-system parties, conscientious objection, the freedom of expression of thought, and so forth.

This process of transformation begins with the State's partial - and gradually increasing - waiver of its omnipotence and ends with the almost total "atomization" of the right of resistance (of the individual or of the minorities), permanently engulfed in institutional mechanisms of *defence* of the constitutional State.⁶

The element that more than any other contributes to characterizing this dynamic is the disappearance of the original individualistic connotation of the right of resistance, which

¹ G. ZAGREBELSKY, *La giurisdizione costituzionale*, in *Manuale di diritto pubblico*, ed. by G. Amato-A. Barbera, vol. II, Il Mulino, Bologna, 1997, pp. 495-497.

² *Ibid.*, p. 497. See also H. HELLER, *Dottrina dello Stato*, It.trans. Edizioni Scientifiche Itahane, Napoli, 1988, p. 352.

³ J. Rawls, *A Theory of Justice*, Harvard University Press, Harvard, 1971. On "justified disobedience" in J. Rawls see G. Così, *Saggio sulla disobbedienza civile*, Giuffrè, Milano, 1984, pp. 6-27

⁴ "Aus dem iure resistendi erwächst das konstitutionelle Staatsrecht": this is the point made by R. WASSERMANN, *Zum Recht auf Widerstand nach dem GG*, 1986, in *Konsens und Konflikt- 35 Jahre Grundgesetz*, Walter de Gruyter, Berlin-New York, 1986, p. 352.

⁵ G. DE VERGOTTINI, *Diritto costituzionale comparato*, Cedam, Padova, 1993, pp. 205-208.

⁶ "Im Sinn einer Selbstentäusserung", notes H. SCHOLLER, *Widerstand und Verfassung in der Staat*, 1969, p. 20. R. WASSERMANN, op. cit., p. 351.

had characterized it, instead, in the American and French Constitutions of the eighteenth century: in them, the right of resistance had been conceived as a means of protection against governmental abuse and as one of the fundamental human rights. With the progressive affirmation of the rule-of-law State (*rectius*: of the constitutional State), it would be more and more incorporated in the institutional circuit; this process accentuated the relativization of the right of resistance, that is, its necessary relation to other rights and political-institutional values. During this evolution, therefore, the very nature and function of the right of resistance changed: the original defensive vocation (of the individual and, above all, of groups and minorities) was gradually replaced by a global function of defence of the established order.

There are two decisive "places" of modernity in which the metamorphosis of the right of resistance took place: the constitutions of the Revolutions of the late eighteenth century and the rules governing the amendment of the constitution (and its limits). In the modern age, the right of resistance became an *extrema ratio*, a last resort, a shut-off valve of a system that entrusts its permanence to the idea that there are absolute limits to the constitutional amendments - a system that only in the final analysis, only where that idea itself proves ineffective, sees resistance as legitimate.

Through the constitutionalisation of the right of resistance, implemented by the French and American revolutions, and its functionalization towards protecting the Constitutions themselves, revolution and right of resistance were finally differentiated in a definitive way: the ultimate purpose of the latter, in fact, is the preservation of the established constitutional order - therefore, its aim is not only profoundly different from, but entirely opposed to that of the revolution.⁷

The conceptual disintegration of the resistance / revolution pair favours the profound change that, in modern constitutionalism, marks the relations between time and right (*sub specie Constitutionis*): the Constitution stands as "future" norm, "ewig", eternal - one that wants and, now, can last over time, independently of the will of diverse and adverse majorities. From this point of view, the rigid Constitution can be seen as an intergenerational pact, and the right of resistance as the "life insurance" of the Constitution itself. But this could only happen because of the French Revolution: the historical dialectics - one could say with Hegel - taught the constitutionalism of the twentieth century that the revolutionary event is not unique; rather, after the Revolution, it has become something possible, frequent, even normal.⁸ Hence the need for a synthesis: a response aimed to avert the revolutionary event,⁹ to deny and overcome it.¹⁰ The solution suggested

⁷ F.M. DE SANCTIS, *Sul diritto di resistenza*, in *Dall'assolutismo alla democrazia*, Giappichelli, Torino, 1989, pp. 141-146, (see also *Resistenza (diritto di)*, in *Enc. dir.*, 1988, pp. 1000-1002). G. FIASCHI, *Rivoluzione*, in *Enc. dir.*, Giuffrè, Milano, 1989, p. 72. On the difference between rebellion (which can be somewhat compared to resistance) and revolution, see A. CAMUS, *L'Homme révolté*, Gallimard, Paris, 1951.

⁸See the article 28 of the French Constitution, 1793: "un peuple a toujours le droit de revoir, de réformer et de changer sa Constitution. Une génération ne peut pas assujettir à ses lois les générations futures".

⁹ In terms of "*Ewigkeitsklausel*" (Eternity clause) G. ROELLECKE, *Verfassungstreue und Schutz der Verfassung*, in *Die öffentliche Verwaltung*, 13/14, 1978, p. 457, defines art. 79, par. 3, of the German Basic Law, 1949 ("it is not permissible to amend this fundamental law if this affects the articulation of Bund in Länder, the participation of Länder to the law or the principles set out in articles 1 and 20").

¹⁰Not entirely, it seems: art. 79, par. 3 - notes G. ROELLECKE, *op. cit.*, p. 457 - does not protect in an absolute way from the risk of a revolution; the Constituent Assembly itself was aware that the "Eternity clause" could not act as an impregnable barrier against historical evolution, as the tragic experience of the Weimar Republic had demonstrate.. ("Eine Revolution kann und soll dadurch nicht verhindert werden", heisst es in der Begründung des Allgemeinen Redaktionsausschusses zum heutigen Art. 79, Abs.3, GG", *ibidem*).

by constitutionalism consists in turning revolution into resistance and (first, in American constitutionalism) in conceptualizing the limits of the constitutional review within the theoretical coordinates of the eponymous power, seen as the constituted power and therefore opposed to the constituent power. Following a more extreme interpretative option, we could say that the response of constitutionalism consists of a *de-politicization of this right*.

Thus framed in the historical and theoretical coordinates of constitutionalism, the right of resistance differs from certain forms (new and not so new) of dissent, such as the “constituent disobedience”, which, by resorting to the myth of the permanent revolution *à la Rosa Luxemburg*, tends to leverage “on the Constitution, recognized in its role as guarantor of fundamental rights,” but requiring from it “a constant readiness to adapt the institutional structures to the social changes”.¹¹ Rather than solving the problem of change and adaptation of the constitution to social changes, the right of resistance has the task of safeguarding the intangible axiological nucleus of the Constitution, therefore acting as *Verfassungsschutznorm* (norm in defense of the constitution).

1. ORIGIN AND EVOLUTION OF THE RIGHT OF RESISTANCE

1.1. The roots of the concept of resistance: ancient Greece and the transition from “genos” to “the polis.” Tyrannicide

A significant part of the literature is unanimous in finding the “chosen land of the right of resistance” in the German medieval *Ständestaat*, that is, feudal Germany, divided into social classes.¹² Probably this is true, but only if one refers to the *legal* concept of resistance - indeed, to the *right* of resistance. It is in Germany in the fourteenth century that the right of resistance begins to take on a legal aspect, being perfected and legitimated only if and when exercised in accordance with certain procedures. In particular, it was the means by which social classes, in defence of their interests and privileges, fought against the impositions (in particular, and especially at the beginning, of fiscal nature) of the senior or the lord. In this context one can glimpse the first traces of answers to crucial legal questions, such as the identification of the holders of the legal position describable in terms of “right of resistance”, its content and, above all, the subject “entitled to decide if and when resistance is a right.”¹³

Moving away, for a moment, from what can be described in strictly legal terms, it should be remembered that the origin of the *concept* of resistance is rooted in much more distant times, preceding even the affirmation of Christianity, which is often referred to as the first cradle of the right of resistance; the first form that the right of resistance seems to

¹¹T. SERRA, *La disobbedienza civile*, in www.costituzionalismo.it, 3/2003; ID., *La disobbedienza civile. Una risposta alla crisi della democrazia*. Giappichelli, Torino, 2003.

¹²G. CASSANDRO, *Resistenza (diritto di)*, in *Noviss. Dig. it.*, Utet, 1968, p. 596; F. BERTRAM, *Widerstand und Revolution. Ein Beitrag zur Unterscheidung der Tatbestände ihrer Rechtsfolgen*, Dunker & Humblot, Berlin, 1964, pp. 14-31; H. GANSEFORTH, *Das Widerstandsrecht des Art. 20,4 Abs. GG im System des Verfassungsschutzes*, Herbert Lang, Peter Lang, Bern-Frankfurt/M., 1971, p. 6 ss.; R. SCHNEIDER, *Das Widerstandsrecht in Staatsrecht und Staatstheorie der Gegenwart*, Schultess & Co. AG., Zürich, 1964, pp. 50-64.

¹³F.M. DE SANCTIS, *Sul diritto di resistenza*, cit., p. 128. But a significant previous case of resistance activated in accordance with formal procedures was already present in the English *Magna Charta* (1215).

take on in Western civilization is rooted, in fact, in the transition from a *genos* conception of associated life to a *polis* view of it, i. e. in a passage - and, at the same time, a struggle - "between a legality rooted in blood relations and a less necessitated, more elective one, thereby implying a share of arbitrariness."¹⁴

It is the legality of Creon, which hopes to take over Antigone's "unwritten" law. The - moving - resolution to bury her brother harbours a gesture of revolt, indeed of resistance (as a gesture made in defense of unwritten laws), which is all the more heroic as it is doomed to failure. Complying with the "agrophoi nomoi" (unwritten laws) of her heart and, at the same time, rebelling against those of Creon, Antigone brings into being a behavior that is paradigmatic of the end of the "legality rooted in blood relations."¹⁵

But Antigone's resistance also marks the beginning of a dualism that will take hold of Western Christianity: the dualism between conscience and law, between moral and legal norm, between the concept of sin as disobedience to moral law and that of crime as disobedience to the positive law.¹⁶ In the Greek world (at least in the one described in Sophocles' tragedy), it is still impossible to conceive of a dualism in which the "order" can be questioned without incurring into death (and Antigone, like Socrates, provides an eloquent testimony to that effect). This is because, for the Greeks, the political order coincides with the ideal of a natural "order", which, as explained by Benveniste, is a central notion of the Indo-European universe (religious, legal and moral): "it is the order that issues a rule both for the organization of the universe, the movement of the stars, the regularity of the seasons and the years, and to the relationship between men and the gods, as well as among men themselves. Nothing related to human beings, or the world, escapes the domain of the 'order'. Without this principle - that arises, therefore, as both a religious and a moral foundation of any human assembly - everything would turn to chaos."¹⁷ In such a world, the place of justice is with gods and, therefore, outside the reach of human beings.

It is when it becomes possible to think of a dualism between moral norms and positive norm (infra, 1.2), that the practicability of the right of resistance also becomes concrete. Even tyrannicide confirms that resistance dates back well before the Middle Ages, if it is true that the democratic hatred of tyrants is exemplified in Athens by the mythization of tyrannicides, even judicially institutionalized in the *tyrannidos graphé* (the penalty for those who harbored tyrannical aspirations was *Vatimia*: infamy). The experience of tyranny is one of the first examples offered by history allowing for an early form of the right of resistance: it takes hold "in a well-determined time of the very complex Greek history (the first half of the seventh century BC), that is, the crisis of the aristocratic polis in which, mainly because of harsh rural crises, a popular party was built against the dominant oligarchy. This party, finding its 'strong man' in a demagogue, would organize a coup, generally not aiming to establish a new city order (traditional legislation was mostly always respected), but simply to wipe out the formerly dominant oligarchy. The tyrant is one who, having been able to identify the possibility of coming to power by exploiting this situation,

¹⁴ *Ibidem*.

¹⁵ On the relations between the right to resistance and the tragedy of Antigone, see A. ARNDT, *Agraphoi Nomoi* {*Widerstand und Aufstand*}, in *Neue juristische Wochenschrift*, 1962, p. 430 ss.; G. PONTARA, *Le ragioni di Creonte e quelle di Antigone. Etica e politica nell'era dell'atomica*. Editori Riuniti, Roma, 1990.

¹⁶P. PRODI, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*. Il Mulino, Bologna, 2000, p. 17.

¹⁷E. BENVENISTE, *Il vocabolario delle istituzioni indoeuropee*, vol. II, It. Transl., Einaudi, Torino, 1976, pp. 357-358.

grasps it and knows how to turn it to their advantage: tyranny, says Oedipus to Creon, is gained with the people and with the money.”¹⁸

Despite being “conservatives from a strictly ideological point of view”, tyrants often put in place a socially progressive policy (confiscating and redistributing land, promoting public works, etc.). But the originally anti-oligarchic and popular vocation of tyranny often turned into a despotic attitude, so that the tyrants were the object of visceral hatred. This laid the foundations for their “demonization”, which, though not always entailing a complete break, at least paved the way to the very idea of a legitimate rebellion against the tyrannic power. The democratic hatred towards the tyrant almost had the connotation of a “disappointed love”,¹⁹ which made it legitimate to undermine the hegemony of the one who, though once supported by the people as the bearer of “democratic” values, has not really lived up to those values. Resistance is legitimate because it aims to restore them.

Even though the opposition to the tyrant perhaps constitutes one of the first examples of resistance, one cannot easily conceptualize such a practice in terms of a *right* to resistance, nor can one affirm its legitimacy, at least considering Plato’s reflection. In his *Republic*, Plato addresses tyranny from the point of view of the forms of government; tyranny is one of the forms of government/constitutions that have occurred historically, all “bad”, as degenerate forms of the ideal, perfect form: aristocracy. In Plato’s depiction of the forms of government, they follow each other in a downward movement²⁰: timocracy is the degeneration of the aristocracy, oligarchy a degeneration of timocracy, and tyranny is the lowest form, with which the degradation reaches the bottom. “How and whether there is a way out, Plato doesn't say”.²¹ That is, Plato does not say if there is some room for the exercise of the right of resistance.

The reference to Plato is important because he, as a “conservative,” doesn’t deal with the political problem *ex parte populi*, from the point of view of freedom, but *ex parte principis*, that is, from the perspective of those who hold power and have the duty to preserve it. The way to retain power is not the guarantee of freedom, but the maintenance of unity. “Discord is the beginning of the disintegration of unity”²² because it leads to anarchy, which, in turn, is the outbreak of the worst form of government: indeed, tyranny.

1.2.Right and duty of (passive and active) resistance in Christianity. The ecclesiastical resistance to the temporal power

The second chosen land of resistance is religion, and Christianity in particular. The link between the right to resistance and Christianity²³ - born, not by chance, as the faith of a religious minority - necessarily arises, in this context, in the fact that man cannot be

¹⁸D’AGOSTINO, *Tirannide*, in *Enc. dir.*, Giuffrè, Milano, 1992, p. 547. On the *tyrannidos graphè*, the author refers to ARISTOTLE, *Constitution of the Athenians*, 16,10 e a PLUTARCH, *Solon*, 19.

¹⁹*Ibid*, p. 546.

²⁰ PLATO, *The Republic*, It.transl.(*Repubblica*, libro VIII, IX)

²¹ N. BOBBIO, *La teoria delle forme di governo nella storia del pensiero politico*, Giappichelli, Torino, 1976, p. 19.

²² *Ivi*, p. 24-25.

²³ On the same topic, see: G. CASSANDRO, *op. cit.* pp. 591-92; P. MEINHOLD, *Revolution im Namen Christi. Ein Beitrag zur Frage von Kirche und Widerstand*, 1959, in A. KAUFMANN (ed. by), *Rechtsphilosophie im Wandel*, Athenäum Verl., Frankfurt, 1972, 1; A. MARRANZINI, *Cristianesimo e diritto alla resistenza*, in *Autonomia e diritto di resistenza* (Autori vari), in *Studi Sassaresi*, 1973, III, pp. 169-183; F. VON SCHLABRENDORFF, *Staat und Widerstand*, in *Festschrift für Gerhard Leibholz zum 65. Geburtstag*, vol.1, pp. 434-436.

reduced to an exclusively earthly order, but belongs to a transcendent one, whose reasons legitimate his resistance to the power of earthly institutions. "Render unto Caesar what is Caesar's and to God what is God's": this is Jesus' answer to those who, in an attempt to catch him at fault, ask him if it is lawful for them to pay taxes to Caesar, and herein lies the Christian touchstone in relation to the contrast between spiritual and temporal duties. This distinction legitimizes Christians to resist, or at least, to disobey, as the only form of resistance granted to the Christian is passive: in fact, at this stage of history, there are no legal preconditions to speak of a real right of resistance, but only of non-obedience or passive resistance to the "State" authority.

The Christian legacy (as well as the Jewish one) thus stands as a decisive gap between the sphere of temporal power and positive norm on the one hand, and the internal sphere or moral norm on the other: in the Jewish world, "Justice is taken away from power and returned to the sphere of the sacred: with the idea of the Covenant, the Alliance, which involves Him in person, Javhè directly becomes the guarantor of justice of the socio-political sphere". The sovereignty and the sacred are split, "allowing not only for resistance in the face of abuse of power, but also for the search for an earthly site of justice other than the very rooms of power."²⁴ Contrary to the widespread clichés, the assertion of God's transcendence "does not lead to a sacralization of the law, but to a dialectic between the order of Javhè and the natural order of the world: it is the presence of God that de-sacralizes institutions"²⁵, reducing the right to the relativity and pragmatism of its value. This also opens up the possibility of a "forum, a place of administration of justice that is not identified with the State and that sometimes can also coagulate in an anti-State".²⁶ The birth of jurisdictional forums other than State ones arises, therefore, as the very condition for the exercise of resistance against the king's abuse of power. "Ecclesiastical" resistance is a proof of this, as discussed below.

The resistance to temporal power also started to legitimize itself in its active version when Christianity became the religion of "the State"; in fact, contributing to establish the power of the king through the rite of consecration, the Church could claim that the king, who was also a Christian, had to agree to undergo the sentence (and its consequences on the political level) of a regular hearing after which the resistance - the disobedience to the king - of the Church would be legitimate. That's the case of what German historians called "Ecclesiastical resistance", which allegedly differs from the "feudal" one for its formal character – that is, for the decisive role played by a regular procedure to the end of making resistance legitimate.²⁷ A significant example for the purposes of a clearer configuration of ecclesiastical resistance is that of Innocent the third, who turned the idea of "utilitas publica" into a real political principle: the Pope, in the case of abuse of power by the king, is authorized to intervene with ecclesiastical censure to remove him.²⁸

Beyond the potential groundness of the tripartition adopted by the indicated literature (and, in any case, sticking to the clear distinction between the various types of resistance in the medieval period), what perhaps is mostly relevant is that, in the theory and practice of the medieval right to resistance, one can discern the roots of the principle

²⁴ P. PRODI, *op. cit.*, p. 24.

²⁵ *Ibidem.*

²⁶ *Ibidem.*

²⁷ G. CASSANDRO, *op. cit.*, p. 592.

²⁸ *Ibidem.*

of political responsibility.

1.3. Right of resistance in the feudal system (feudal resistance)

“Nos que valemus tanto corno vos, y quepodemos mas que vos, vos hazemos nuestro rey y segnor con tal, que guardeis nuestros fueros. Si no, no”²⁹

The reason why, in exergue to a paragraph dedicated to the German *Ständestaat* - “the chosen land of the right of resistance” - I inserted the oath of allegiance (1461) of the subjects of the Cortes of Aragon to the king, is the following: if it is true that the primary breeding ground of that right was Germany starting from the very early 1300s, it is also true that only in later times, or in different times and places (like England at the time of the *Magna Carta*, 1215),³⁰ the right of resistance assumed a dissenting value - that is, when the actual episodes of opposition between principals and classes became more frequent.

A real “duplicity or duality of power” between classes and lords - and, simultaneously, a more distinct dissenting value of the right of resistance - appeared later and with no sufficient uniformity to indicate that dualism as a characteristic of the medieval *Ständestaat* (feudal State). That dualism, ultimately, “stuck within limits such as not to constantly threaten the unified life of the State”.³¹ And yet, precisely the oath of the Aragonese subjects marks an increase, over time, of the bargaining power of the classes (as perhaps is shown by that “*nos*” que podemos mas que “*vos*”) and thus, the emergence of the right of resistance, even armed, as a concrete instrument to protect the classes against sovereign prerogatives.

Beyond the (surely relevant) examples of formalization of the right of resistance outside the Germanic area, it should be stressed that this right experienced a decisive turn - in relation to its increasingly precise legal configuration and political legitimacy - in the German *Ständestaat*, in the form of a so-called feudal State (always assuming, of course, that one can apply the category “form of State” to the Middle Ages).³² In fact, it is there that the senior’s authority threatened to progressively weaken based on the claims of the classes, especially as regards their freedom from unilaterally enforced fiscal impositions.³³

In addition to guarding the right to intervene in decisions concerning taxes, the right to resistance gradually extended its scope to additional ways to protect the classes: among other things, the possibility to affect the administration (also of justice), to allow for the

²⁹ This quote appears in K. WOLZENDORFF, *Staatsrecht und Naturrecht in der Lehre vom Widerstandsrecht des Volkes gegen rechtswidrige Ausübung der Staatsgewalt*, M. & H. Marcus, Breslau, 1916, p. 25.

³⁰ In addition to the Cortes of Aragon, Wolzendorff indicates as examples: Poland (where the right to resistance was contemplated in the 1501 constitution draft, then in the 1573 *artículo Heinrichiani*, and then in the 1607 constitution), Sweden, where in the eighteenth century is the right of resistance of classes is positivised (1720) and Denmark (1466). *Ibid*, pp. 24-26. As for examples of positivization of the right to resistance, prior to the indicated ones and to fourteenth and fifteenth century Germany, the author indicates the Hungary under Andrea II (Golden Bull of 1222) and the Magna Carta of 1215.

³¹ G. CASSANDRO, *op. cit.*, p. 596.

³² The application of the category “form of State” to medieval history must undoubtedly be understood with benefit of doubt, particularly in light of the fact that the authority was based on relations of exchange and not of (actual) investiture or reasons for statehood (see G. AMATO, *Forme di Stato e forme di Governo*, in *Manuale di diritto pubblico*, ed. by G. Amato-A. Barbera, vol. I, Il Mulino, Bologna, 1997, p. 34; P. CARETTI-U. DE SIERVO, *Istituzioni di diritto pubblico*, Giappichelli, Torino, 1998, p. 26).

³³ G. CASSANDRO, *op. cit.*, p. 597, K. WOLZENDORFF, *op. cit.*, pp. 27-32

alienation of parts of the territory and to consent to war. But, beyond this or that interest, the right to resistance - as it was being positivized in so-called *Freiheitsbriefe* (letters of freedom) and in other documents - increasingly aimed at ensuring not only class prerogatives, but also privileges and exemptions of cities and principalities: the “mirror of the diverse and fragmented legal form of the medieval State”.³⁴

At that stage, therefore, the right to resistance already appeared no longer as a right of the single individual, but as a right of the classes: they were the only ones entitled to act (provided they were legitimated by an act, a *Briefe* or a statute *ad hoc*) as carriers of both their own and general interests (although it cannot be doubted “that the classes were primarily bearers of their own interests, and that the classes’ representation of the people was an invention of the scholarship”).³⁵ The instance of the individual could only trigger the procedure, with respect to which, however, she was destined to remain on the outside. In this experience, the (legal and political) legitimacy of the right of resistance acquires a contractual connotation that would become one of the constants of the institution; indeed, in the class order, upon “violation of the feudal contract by the senior” the right of resistance legitimated the vassus “to break the bond of vassalage and take over the feud; all of this after regular trial before the court of the House of Peers.”³⁶

The other characterizing feature of the right to resistance in the medieval legal order, as already mentioned, was its compliance with formal procedures, necessary for a successful outcome of the claims advanced. The progressive establishment of a process through which to exercise the right of resistance coincided, moreover, with a gradual process of positivization of it: consider, for example, the *Magna Charta* and its notion of a “resistance committee”, which the person offended could turn to so as to induce the king to end and make amends for his wrong; such a remedy was provided for in the *Joyeuse Entrée*, but the procedure for exercising the right of resistance started being much more complex in the legal system of the Principality of Lüneburg (late fourteenth century), where there were severe sanctions against the prince who violated class prerogatives.³⁷

1.4. The right of resistance in the absolute State and in revolutionary Constitutions

In the absolute State, the configurability of the right of resistance becomes, at least in principle, more problematic than ever. This is due to the obvious reason that the sovereign, in this State form, is *legibus solutus* and the recognition of rights of freedom, at that stage, is still *in mente dei*. But, at the same time, the concentration of powers in the hands of the sovereign makes the abuse of power all the more likely. Such an eventuality will be a very fertile field for reflection on the right of resistance (and, later, for its exercise):

³⁴ P. GROSSI, *L'ordine giuridico medievale*. Laterza, Roma-Bari, 2002, *passim*.

³⁵ G. CASSANDRO, *op. cit.*, p. 597.

³⁶ *Ibid*, p. 592. In his textbook on Danish constitutional law, Alf Ross states: “The law was superior to the prince, was the prerequisite of the exercise of his powers, not the other way round. If the king was to rupture those ties, he would become a tyrant and his people would no longer owe allegiance to him. It would have the right to resist his orders and if necessary depose him. This *restricted allegiance* and the corresponding *right of resistance* constitute the effective core of the democratic theory of the Middle Ages” (The quote appears in H. KOCH, *Right of Resistance- A European Democratic Notion*, in *Scandinavian Studies in Law*, 1999-2000, p. 172).

³⁷ *Ibid*, p. 597.

consider Althusius who, starting from the principle of popular sovereignty and adhering to the positions of monarchomachs,³⁸ theorized the right of active resistance against traitor lords. The theories of Althusius also include one of the first and most elaborate conceptualizations of individual rights as belonging to a legal sphere different from that of the community: This had several consequences for the theory of the right of resistance, which was later brought back mainly to the single individual.³⁹ Later, Locke's contribution would determine the theoretical legitimation of the right to rebel: for Locke, in fact, men - born free - created the State not to cancel their rights, but to defend them. If the government does not act in accordance with those purposes, the people have the right to rebel and overthrow it.⁴⁰ Thanks being to Locke, resistance to authority appeared as "one of the four ideas that distinguished constitutionalism in its origins",⁴¹ together with the concept of the "unalienable character of certain basic rights"; the idea that "authority is legitimate as long as it rested on the consensus of the governed, and the idea that the first duty of any government was to protect the inalienable rights of the people".⁴²

The history of constitutionalism between the sixteenth and seventeenth centuries is, first of all, the history of the English Constitution, and the same can be said for right of resistance: it is in there and then, in fact, that the right of resistance is "institutionalized" against the illegitimate acts of the sovereign. During the seventeenth century, in the context of the struggle between the crown (the Tudors, then the Stuarts) and Parliament, arose the principle that "the subjection of the lord to the law is to be guaranteed by sanctions 'internal' to the public right and not only left to the 'exercise of the right of revolt'".⁴³ The novelty, the turn in modern Constitutionalism marked by the English revolution, is therefore the idea - gradually realized in that experience - that the acts of the king entail political responsibility, punishable, if appropriate, by Parliament⁴⁴: "a political organ monopolized the right to proclaim the illegality of king's actions – a right that, according to the medieval conception, was a common right... The English revolutions served to institutionalize the sanction."⁴⁵

The existence of a right of resistance in the strict sense will undergo a progressive weakening in modernity, in connection with the equally progressive "scientification (in a

³⁸ K. WOLZENDORFF, *op. cit.*, pp. 180-325, 95-179. For the parallelism between Althusius and Rousseau's social contract, see O. VON GIERKE, *Giovanni Althusius e lo sviluppo storico delle teorie politiche giusnaturalistiche*, It. transl., Einaudi, Torino, 1943, p. 21.

³⁹The individualistic profile of the right of resistance was underlined with conviction by A. KAUFMANN, *Das Widerstandsrecht der kleinen Münzen*, in W. Krawietz-T. Mayer Maly-0. Weinberger (ed. by), *Objektivierung des Rechtsdenkens. Gedächtnisschrift für Ilmar Tammelo*, Duncker & Humblot, Berlin, 1984, pp. 87-88: "Gemeint (art. 20, par. 4, GG) ist zweifellos ein Abwehrrecht des Bürgers gegenüber einer rechtswidrig ausgeübten Staatsgewalt" (my italics); ID., *Das Widerstandsrecht in Geschichte und Grundgesetz*, in *Beiträge der Tagung 'Der Rechtsstaat und seine Feinde' der Akademie für Politik und Zeitgeschehen der Hanns-Seidel-Stiftung*, Heidelberg, 1986.

⁴⁰J. LOCKE, *Second Treatise of Civil Government* (1690), Chapt. XIX (espec. Sectt. 220, 222, 225, 229), (*Trattato sul governo*, (1690), It. Transl. Editori riuniti, Roma, 1984, p. 202).

⁴¹R. Gargarella, *The Last resort: The Right of Resistance in Situations of Legal Alienation*, in Yale Law School Legal Scholarship Repository (www.digitalcommons.law.yale.edu/yls_sela/23), who highlights the importance and influence of Locke's approach to resistance in the eighteenth-century Latin-American constitutions and, of course, in the U.S. constitution and in Thomas Jefferson's thought.

⁴² *Ibidem*.

⁴³ M. DOGLIANI, *Introduzione al diritto costituzionale*. Il Mulino, Bologna, 1994, p.153.

⁴⁴For this link, see M. Dogliani, *ibidem*.

⁴⁵*Ivi*, p. 156.

positivist sense) of jurisprudence and the technicalization of the law. Indeed one could say that (...) the existence of such a right became particularly problematic precisely in and from the moment when it was taken as one of the natural and imprescriptible human rights in art. 2 of the *Déclaration des droits de l'Homme et du Citoyen* on 26 August 1789".⁴⁶

When the State became a *Rechtsstaat*, the recognition of a right of resistance "in the strong sense" became a contradiction in terms, as that recognition implied the state's renunciation of the legal monopoly of the use of force. Not surprisingly, Kant, "the greatest theoretician of the notion (...) of rule-of-law State," decidedly denied "the existence of such a right."⁴⁷ In eighteenth-century Constitutions, then, one can clearly see the distinction between the right of resistance and revolution: the first falls within the measures aimed at defending the order (and the right of resistance appears, in that system, as the last possible measure, a last resort to deal with "desperate times", that is, with the subversion of the constitutional order), while the second belongs to the *extra ordinem* sphere.⁴⁸

The recognition of the right of resistance in the supreme sources of legal systems born from the great revolutions of the late eighteenth century⁴⁹ will also mark the definition, more or less conclusive, of its (now only) conceivable function: the preservation of the constitutional State. The more the right of resistance is regarded as a mechanism to preserve the system (the more its content is "functionalized" to defend the values of the rule-of-law State), the more its original individualistic connotation fades, also in terms of its theoretical elaboration. It is no coincidence that, in the past few decades, the legitimacy of resistance as a right of the single individual (so that her rights are "taken seriously")⁵⁰ was affirmed by a – mainly American and English – literature rooted in an individualistic view of the law and very careful to protect the fundamental rights⁵¹ rather than functionalizing them to defend the system. The same can be said about the reflections of the scholarship concerning the particular declination of the right of resistance we call civil disobedience, which can be considered an "updated" expression of the former only if, indeed, one doesn't forget the original individualistic vocation of the latter.⁵²

⁴⁶F.M. DE SANCTIS, *Sul diritto* cit., pp. 128-129.

⁴⁷ K. WOLZENDORFF, *op. cit.*, p. 461. But, for a different perspective on Kant's approach to the right of resistance, see W. SCHWARZ, *The Right of Resistance*, in *Ethics*, vol. 74, no. 2 (1964), p. 127, 129-130 ("Even on the level of constitutional law a however restricted, yet important right of resistance is developed by Kant in his Doctrine of Law, XXXVI: 'In a constitution' he says, "(...) the people (...) can lawfully resist the executive and its representative (the minister) (...) Nevertheless, no active resistance (...) but only a *negative* resistance, i.e., *refusal* of the people (in parliament) is provided and permitted"). The configurability of the right of resistance as a legal concept is denied by M. KRIELE, *Widerstandsrecht in der Demokratie? Über die Legitimität der Staatsgewalt*, in B. Streithofen (ed. by), *Frieden im Lande. Vom Recht auf Widerstand*, Bergisch Gladbach, 1983, pp. 139-154.

⁴⁸F.M. DE SANCTIS, *op. cit.*, p. 130.

⁴⁹Cf., for instance, the constitutions of Virginia (1776), Massachusetts (1780), Pennsylvania (1776), Maryland (1776), Vermont (1777), and the French Constitution of 1791 and 1793.

⁵⁰The reference, of course, is to R. DWORKIN, *Taking Rights Seriously*, Duckworth, London, 1977.

⁵¹ "Rights are entitlements: they specify what people can demand from others. Given this, it would seem very odd to say that X is entitled to Y and yet is morally forbidden from taking steps to secure Y. Furthermore, we recognize that if someone's rights have been violated, then he or she may seek to rectify that": S. CANEY, *Responding to Global Injustice: on the Right of Resistance*, in *Social Philosophy & Policy Foundation*, 2015, p. 60.

⁵² The political and cultural background more conducive to the theory (and practice) of civil disobedience was, in fact, the American one, although it should be noted that the legitimacy of the various forms of disobedience is never separated, in that system, from a fundamental *consensus* for the legal and axiological foundations of democratic and liberal institutions. So, even when the protest movements, calling for civil disobedience, came into very strong conflict with liberal institutions, "they never come to call into question their legal and moral foundation; the attitude has almost always been that of a

2. TRANSFORMATION OF THE RIGHT OF RESISTANCE IN THE RULE-OF-LAW STATE (AND IN THE SOCIAL RULE-OF-LAW STATE)

In the liberal State, and in its subsequent "social" declination, the gap between the right of resistance and the revolutionary phenomenon was established in a more or less permanent way. This opposition would become even more pronounced following the dictatorial States and national-socialism of the twentieth century, which, in their radicalism, re-proposed the need to think of mechanisms to avert the danger of any further future deconstruction of the legacy of the liberal rule-of-law state. The constitutionalization of the right of resistance, a weapon - in theory, at least - so powerful in the hands of the people, had to go through pure horror to be thought (or rather, re-thought, after the constitutions immediately following the Revolution): not surprisingly, countries such as Germany and Portugal - and, later, the new democracies of Latin America and Eastern Europe - were the ones that provided for its constitutional establishment.

Following the perversion of the rule of law committed by the dictatorships of the twentieth century, some of the most significant theoretical contributions on the right of resistance focused on the legality / legitimacy paradigm, sometimes succeeding in cleverly questioning the exclusion - operated by continental positivism - of the right of resistance from the conceptual circuit of the rule of law. In Hermann Heller's thought, in particular, the pair legality / legitimacy, tragically torn apart by totalitarianism, comes together in a wonderful synthesis also operated along the lines of the ethical legitimacy of the right of resistance.⁵³

Before the twentieth century, for the liberal State the problem was above all to operate a clear distinction between anti-institutional conduct, repressible criminally, and forms of political dissent, which were not only tolerable, but necessary for the very existence of a legal system based on the rule of law. Guizot, who, risking unpopularity, took a public stand against the death penalty for political crimes, quickly realized the fact that the liberal State should accept political dissent, not suppressing it in a preliminary way. If the death penalty found its justification in the Ancien Régime, says Guizot, as a deterrent to peasant revolts or aristocratic conspiracies, it would have no sense in the new French regime: assimilating all forms of opposition to a conspiracy would mean denying political opposition the space it now conquered, mistaking, in the concept of political crime, "what is dangerous for the State for what is immoral."⁵⁴

rebellion, not a revolution; in particular, a rebellion *for* the law." G. Cosi, *op. cit.*, pp. 2-3. On the "purely American" essence of the origin and nature of civil disobedience, I refer mainly to the reflections of H. ARENDT, *Civil disobedience*, in "The Crises of Republic", Harvest Books, 1972 (*La disobbedienza civile e altri saggi*, It. transl., Giuffrè, Milano, 1985, pp. 68-88) A similar (relating to the *consensus* issue) idea (i.e. the assumption of a "nearly just state" in which civil disobedience can take place, thus the idea that civil disobedience arises only in the context of a more or less just democratic state for those citizens who accept the legitimacy of the constitution) is to be found in J. RAWLS, *A Theory of Justice*, Oxford University Press, Oxford, 1999, p. 139. Similarly, R. Dworkin, *A Matter of Principle*, Harvard University Press, Cambridge, 1985, p. 105.

⁵³ H. HELLER, *op. cit.*, pp. 333-352.

⁵⁴ The category of political crime offers a critical perspective to the understanding of the right of resistance, if it is true that it allows for "the deciphering of a very significant 'social code'". The system of political crimes, in fact, reflects "a very large part of the mechanisms that drive the structure of society and brings together the concerns of the dominant and stability,

But, with the fracture following the dictatorships of the twentieth century, that problem - we could say - was solved: after that, the point was no longer to locate, one by one, the forms of lawful dissent, but rather to avoid, once and for all, the possibility of a return to the zero degree in politics and law imposed by dictatorships, and therefore to exorcise the risk that legality might once again dissociate itself from legitimacy. Or, which is the same, that the (positive) law might once again move away from justice (in this sense, art. 20, par. 3, German Basic Law, subjecting the judge not only to the law but also to justice, provides a telling example: "The legislature shall be bound by the constitutional order, the executive and the judiciary *by law and justice*").

When, in the forms of liberal and then social State, consolidated legal mechanisms to protect the individual from the interference of the State - when, therefore, the right of resistance was "institutionalized" - it became less and less possible to confuse it or overlap it with the right of revolution. A telling example of the functionalization of the right of resistance to defend the welfare State can be found in Gurvitch. The first foundational act of the Fourth French Republic, according to Gurvitch, should have been a Statement containing a detailed catalogue of social rights, with respect to which the 1789 Declaration had proven to be perhaps too generic. Such is the "declaration of social rights" of the producer, consumer and man. The main legal guarantee of such rights lies in "different order courts", as well as in "groups and unions."⁵⁵ *The non-jurisdictional and extreme guarantee of social rights is the right to resistance.* Article VII of the declaration conceived by Gurvitch ends with: "If despite these various means of protection, their social rights are not safeguarded, individuals and groups have the supreme remedy of the right to resist oppression".⁵⁶

The positivization of the right of resistance by some constitutions of the later twentieth century (see below, § 2.1) marks the final transformation of the function of the right of resistance: *from anti-authoritarian right par excellence* - as such, according to many, not subject to positivization: how it could a right to revolution be constitutional? - *to the right to defend the constituted order* and, as such, susceptible to positivization in the supreme source of law.⁵⁷

2.1 The (missed) constitutionalization of the right of resistance in Italy. The right of resistance in the German Basic Law (1949)

That the meaning and function of the right of resistance had shifted to a new paradigm (the preservation of the established order), opposite to the traditional one (the overturning of the *status quo*) is a fact that emerges from the original art. 50 of the draft of the Italian Constitution (1948), which reads: "When the public authorities violate the fundamental

'propensity to obedience', and the reactivity of the dominated." M. SBRICCOLI, *Crimen laesae maiestatis. Il problema del reato politico alle soglie della scienza penalistica moderna*, Giuffrè, Milano, 1974, p. 4; on Guizot, see B. BARRET-KRIEGEL, *Regicidio-Parricidio*, in M. FOUCAULT (ed.), *Moi, Pierre Rivière, ayant égorgé ma mère, ma soeur et mon frère... Un cas de parricide au XIXe siècle*, 1973, Gallimard, Paris, 2007, (*Io, Pierre Rivière, avendo sgozzato mia madre, mia sorella e mio fratello ...*, It. transl., Einaudi, Torino, 2000, p. 240).

⁵⁵ G. GURVITCH, *La Déclaration des droits sociaux*, 1944, Dalloz, Paris, 2009 (*La dichiarazione dei diritti sociali*, trad. it.. Edizioni di Comunità, Milano, 1949, p. 34).

⁵⁶ *Ibidem*.

⁵⁷ F. BERTRAM, *Widerstand und Revolution. Ein Beitrag zur Unterscheidung der Tatbestände und ihrer Rechtsfolgen*, Duncker & Humblot, Berlin, 1964. G. FIASCHI, *Rivoluzione*, cit., *passim*.

freedoms and rights guaranteed by the Constitution, resistance to oppression is a right and duty of the citizen". As envisaged in this formulation, the right of resistance follows the hypothesis that the German scholarship defines "*Widerstandsrecht von oben*" (upward resistance): resistance is legitimated only if goes from the bottom up, from the community against the State power, in the event that the latter betrays its mission. The "*Widerstandsrecht von unten*" (downward resistance), instead, is not contemplated: assuming that civil society might resist against groups, minorities, and fringes internal to society itself would, perhaps, recall the spectre of civil war. The provision in question was rejected based on objections that were not entirely relevant, given the challenged unrealisticness of a provision intended to normatively regulate a revolutionary phenomenon.⁵⁸

The foundation of the right (and duty) of resistance, according to Mortati, necessarily arises in the principle of popular sovereignty (article 1 of the Italian Constitution). Sovereignty, as conceived in Mortati's understanding,⁵⁹ is not a vague principle formula but, on the contrary, it claims an undeniable implementation power in the form of popular powers, be they expressly provided for by the Constitution or not. In the latter case Mortati alludes to the "spontaneous formation of specific clusters having a (...) task to take on political decision powers, instead of the organs to which they would compete but which neglect them or exercise them badly. Such movements (...) can be traced back to the (...) figure of resistance."⁶⁰

The idea that the *fundamental political choices* should return to the hands of the people, when this proves necessary for the protection of the intangible values of a democracy, brings the law closer to politics. In this sense, we could say that Mortati's reading returns some legal force to the institute of resistance, questioning the operation of "depoliticization of the law" (see Introduction) undertaken by contemporary Constitutionalism through, among other things, the classification of the right of resistance as a last resort. "With an interesting shift" and in line with the development of his theory of "material Constitution", Mortati further accentuates the broad interpretation of popular sovereignty, claiming that the right of resistance is "justified by the need to win, through direct action of the popular base, *against the occult qualms opposed by those who hold economic power to the changes required by the Constitution.*"⁶¹

In this perspective, the right of resistance becomes evidently functional to that "promise" of radical transformation implicit in the constitutional rules protecting equality and the principles of the social State. Mortati's reflection confirms the vocation, typical of the right of resistance, to overstep the purely factual sphere and claim more precise normative declinations.⁶² Therefore it is as a positive legal remedy that much contemporary constitutionalism has come to regard the right to resistance, which, in the final analysis, is entrusted with the effectiveness of the constitutions: in the face of any radical violations and, in particular, of the illegal unrecognition of the rights enshrined in them, the right of resistance is the ultimate sanction.

⁵⁸ C. MORTATI, *Commento all'art. 1*, in *Commentario della Costituzione Scialoja-Branca*, Zanichelli, Bologna-Roma, 1975, p. 32

⁵⁹ *Ibidem*

⁶⁰ *Ibidem*

⁶¹ C. MORTATI, *Istituzioni di diritto pubblico*, Cedam, Padova, 1975, p. 1038.

⁶² Among other things, for Mortati resistance is also a duty. He traces it back to art. 54 of the Italian constitution, assuming that the duty to comply with the Constitution must also include the duty to enforce it "when this compliance appears to be necessary to realize the democratic solidarity (Art. 2)"

It is no coincidence that the attempt to inscribe resistance within the boundaries of positive law, in Germany, was coeval with the constitutionalisation of the State of emergency and defense. The fact that such concepts - compared to the positive legal network – are hard to define is unquestionable, as they both lie in that ambiguous and uncertain margin of intersection between the legal and the political. The constitutionalization of the right of resistance, in the GG (German Basic Law), is dated 1968. As if to mark the failure of other mechanisms, already provided for in the GG of 1949, the constitutional legislator, in 1968, adds a further norm in defence of the Constitution, namely paragraph 4 of Art. 20: “All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.”

A significant part of the German legal literature commented on this norm in terms of an unexpected concession, almost a hiccup, in favor of certain political groups, through which to ensure a broader consensus to the intricate question of an “emergency Constitution” (*Notstandsverfassung*). And, indeed, it appears impossible to understand the reasons for the formalization of the right of resistance in the GG, except through the reference to the contemporary *Verteidigungsverfassung*, namely that set of constitutional provisions that, regulating the State of necessity and defense, provide for special emergency measures to protect the so-called public order and national security. These measures empower the federal government to restrict certain fundamental freedoms and responsibilities of the *Länder*.⁶³

But, even before engaging in the debate on the constitutionalization of the State of necessity and defense, the issue of the right of resistance crossed with that of the so-called political strike; particularly in the years between 1960 and 1962, the German trade unions propounded the reception of such a strike (*Widerstandsstreik* : resistance-strike) in the GG, assimilating its nature and function to the right of resistance. In fact, some scholars have configured political strike as a form of collective resistance, which may result in a public participation tool for policy-making decisions and for the self-assumption of the policy-making powers, in place of the organs entitled.⁶⁴ Others have seen the right to strike as the most manifest expression of “negative” sovereignty, consisting in the tension *against* (and not *towards*) power. In this perspective, the right to strike is granted such a wide scope that the distinction between economic strike and strike for political purposes is rejected *ab origine*.⁶⁵

As for the German debate on political strike, the parliamentary majority deemed the connection between the latter and the right of resistance misleading and politically unwise. Returning to the parliamentary debate on art. 20, last paragraph of GG, it should be remembered that the proposal to formalize the right of resistance came from the Social Democrat side; advocating its case, the SPD followed on both the well-known judgment (KPD-Urteil) of the Federal constitutional Tribunal (related to the exclusion of the KPD - German Communist Party- from the institutional party circuit), arguing that this matter had basically left open the question of the recognition and the role of the right of resistance, and the Nazi past of Germany along with the lack of reaction of the German people against the “internal” enemy. The opportunity that facilitated the introduction of paragraph

⁶³CH. BÖCKENFÖRDE, *Die Kodifizierung des Widerstandsrechts im Grundgesetz*, in *Juristenzeitung*, 1970, p. 168 ff.

⁶⁴C. MORTATI, *Commentario alla Costituzione*, cit.

⁶⁵P.A. CATALANO, *Diritti di libertà e potere negativo (note per l'interpretazione dell'art. 40 Cost. nella prospettiva storica)*, in *Studi in memoria di Carlo Esposito*, Cedam, Padova, 1973, p. 2014 ff..

4 of art. 20 into GG was provided by a student revolt, which took place in Berlin in 1968; students appealed to the right of resistance against the Berliner Senate decision banning demonstrations and student protests. At that point, the major political parties (CDU and SPD), until then lined up on opposing sides as to whether to constitutionalise resistance, found a compromise.

Surely the banality of the event that acted as a trigger is significant: despite the underwhelming political relevance of Berlin's protest, it evidently helped awaken Parliament's most conservative instincts. This story clearly shows the preservation function which the newly born right of resistance would have to fulfil. Not surprisingly, the wording of paragraph 4 provides that such a right should be exercised against anyone "seeking to abolish this constitutional order." So conceived, the right of resistance takes on an even more defensive value, seeing as the legal system must be protected against *anyone* (and not only against public authorities). This also means that the "enemy" of the Constitution can be *anywhere*. And if that is the case, a legal system, as democratic and liberal as it claims to be, thinks about how to defend itself.

In this situation, we could say with Hardt and Negri, the fundamental problem of political philosophy is overthrown: the issue is no longer "to know if and when there will be resistance and rebellion, but rather *to identify the enemy against whom to rebel*."⁶⁶ A few years after the constitutionalization of the right of resistance, the "enemy" was identified in the communists: 1972 is the year of the so-called *Berufsverbot*, (literally: Prohibition of Use) the decision to exclude from public administration "people hostile to the Constitution" who, in this case, were identified in those who professed communist ideas.⁶⁷

2.2 Defending democracy and human rights. New aspects and functions of the right of resistance in globalised economy and global injustice.

The constitutionalization of the right of resistance in Germany appears paradigmatic of the trend of self-defending democracies to institutionalize mechanisms to safeguard their fundamental values: not surprisingly, paragraph 4 of Art. 20 sets itself as a "safety valve" of the principles of the federal and liberal order enshrined in the three preceding paragraphs. This trend will be confirmed by post-1968 constitutional experiences: in addition to the Iberian democracies, the analysis of many constitutional texts of the so-called "third wave of democracy" (which, in the theory proposed by Huntington, begins in Portugal in the seventies) shows a clear trend towards the strengthening of the defence systems, notably through the control of the purposes of the political parties and, therefore, the provision of constitutional mechanisms to "isolate" the so-called anti-system parties, up to the extreme measure of the dissolution of the latter.⁶⁸ In this sense, the faith that the Constitutions of the established democracies had placed in the integrative capacity of democracy cannot

⁶⁶M. HARDT, A. NEGRI, *Empire*, Harvard University Press, Cambridge, Mass., 2000, (It. Tr. *Impero. Il nuovo ordine della globalizzazione*, Rizzoli, Milano, 2002, pp. 201-202).

⁶⁷ On this, see at least W. ABENDROTH, "Berufsverbot": *stato di diritto o diritto dello stato?*, in *Democrazia e diritto*, 1975, p. 733 ff.; D. DAMM, *Berufsverbot durch Verfassungsschutz*, in *Kritische Justiz*, 1975, p. 447 ff.

⁶⁸ For an analysis of the essential differences between open and protected democracies, see A. CERRI, *Fedeltà (dovere di)*, in *Enc. giur. Treccani*, Roma, 1989. S. CECCANTI-D. TEGA, *La protezione della democrazia dai partiti antisistema*, ed. by A. Di Giovine, Giappichelli, Torino, 2005, p. 39.

be said to be entirely confirmed.

In recent interpretations of the concept of “protected democracy” it is stated that this type occurs when the limitation of the purposes pursued by the parties is drafted by the constitutional texts in a non-generic way, but rather through detailed cases, or cases that, albeit general, are nevertheless associated by certain evidence showing the will to protect the order. Such elements include the indication of an organ entitled to disband the anti-system party, the presence of a mandatory oath for the Deputies, the presence of a provision for the case of “abuse of rights” and, finally, the *recognition of a right of resistance* “that canonizes the principle of fallibility of the representatives” and “the unquestionability of the sovereignty of the people as normally expressed through their representatives”.⁶⁹

This recognition of the right of resistance in several contemporary constitutions⁷⁰ raises new questions and, above all, radically changes the way we usually analyse this right, especially in the context of globalization.

As previously said (see the Introduction), in modern constitutionalism the right of resistance has undergone a process of de-politicization, and the protection of a constituted order – as matter of principle – is guaranteed by judicial review or, more generally, legal instruments: *the underlying idea being that law can be protected through law itself*. From this point of view, modern constitutionalism (especially in the liberal form which prevailed after American and French revolutions), even when recognizing the right of resistance, can be seen as a tool to disconnect the latter from the concept of revolution, and to defuse the subversive potential it had in the Middle Ages.

Nonetheless, and even disconnecting the right of resistance from the concept of revolution, there could be another reason to consider its constitutionalization a paradox, or a contradiction with the theoretical premises of modern constitutionalism itself: *by recognizing the possibility to protect a “higher law” through the breach of “ordinary law”, it creates a form of protection of constituted order which is not strictly legal (in its positivist meaning)*. How to deal with this paradox? Unexpectedly, the phenomenon of globalization could provide a key to (at least partially) solve it.

The theoretical structures of modern constitutionalism (contrary to its material values) are still founded on the liberal assumption that power relations (to be limited by law) always occur vertically, between an individual and the State. The right of resistance, in this context, can only be exercised against the State: the subject that monopolistically retains the ultimate power within a determined territory. Beyond that, no right of resistance is conceivable at all (*ne cives ad arma ruant!*) and the only room left to the infringement of law in inter-private relations is represented by legitimate defense and state of necessity, two hypotheses limited to cases where State intervention is not immediately available or individual compliance is not reasonably possible.

Now, it is well known that globalization caused the rise of powerful private transnational actors, such as transnational corporations (TNCs), which most of the

⁶⁹ *Ivi*, p. 39-40.

⁷⁰ For an extensive overview, see T. GINSBURG, D. LANSBERG-RODRIGUEZ, M. VERSTEEG, *When to Overthrow your Government: The Right to Resist in the World's Constitutions*, in *UCLA Law Review*, 2012-2013, 60, 5, p. 1084.

time are able to escape instruments of both domestic and international law enforcement: at the current stage of the globalization process, these private actors have the power to affect individual and collective rights just as an authoritarian State and, what's worse, most of State-nations are unable or unwilling to enforce human rights against them in their own territory.⁷¹ In other words: we are witnessing a situation of *power without responsibility, the worst nightmare for modern constitutionalism*, whose enemies have become more and more pervasive, elusive, "liquid".

How to reconstruct a form of legal responsibility for actors that cannot be tamed by State law⁷²? To put it differently: how to limit the power of the new Leviathans⁷³? The potential contribution of the right of resistance to contemporary constitutionalism becomes now apparent: just like inter-private legitimate defense in the Westphalian State, it can protect recognized constitutional rights and values when State ordinary law cannot intervene, is ineffective or even facilitates the violations of constitutional rights; the only difference is that the subjects of resistance are not internal, and the power relations are not necessarily vertical anymore. Rather, power is exercised horizontally, selectively, strategically, and according to the specific features of the social system where the power of these actors unfolds⁷⁴: the question "*against whom?*" (i.e. *how to identify the enemy against whom to rebel*: see *retro*, nt. 66) must be re-adapted to the context of globalization, and becomes even more crucial.

This holds true even in situations of "global injustice", "where there is not necessarily a single clearly defined unified agent behind the injustice",⁷⁵ as in the case of climate change. *In other words, globalization highlights the difference between the right of resistance and other similar tools (domestic revolution, civil disobedience, "just war"): it represents the last resort in situations where the violation does not come from defined subjects, but from de-personalized communicative processes affecting the psycho-physical integrity of people*⁷⁶.

In this regard, even though the people who resist against "global injustice" may call into question the very essence of the economic system, the right of resistance does not necessarily entail revolution⁷⁷ as long as it is exercised to protect constitutionally recognized rights. And even in the absence of a situation of consent about these rights, it would be questionable to use revolution as a conceptual tool: in

⁷¹ See A. Jr GOLIA, *La Résolution 'Equateur' entre Idéal et Pragmatisme*, in www.conventions.org (Réguler la Mondialisation). ID., *La Responsabilità delle Imprese Transnazionali per Violazione dei Diritti Fondamentali. Una prospettiva di Diritto Costituzionale Comparato*, in www.gruppodipisa.it.

⁷² See the highly influential article by S.R. RATNER., *Corporations and Human Rights: A Theory of Legal Responsibility*, in *Yale Journal of International Law*, 2001, 111, 3, p. 443, which overcomes the traditional doctrine of State action (arguing that TNCs should be held liable not only when they exercise – directly or indirectly – a State power or function, but also when they exercise toward a community the same kind of authority).

⁷³ See S. JOSEPH, *Taming the Leviathans: Multinational Enterprises and Human Rights*, in *Netherlands International Law Review*, 1999, 46, 2, p. 171.

⁷⁴ See B. FRYDMAN, *A Pragmatic Approach to Global Law*, Working Paper Nov. 2012, available at www.ssrn.com/abstract=2312504 (who, using the terminology of Zitrain and Rifkin, individuates the largest firms as "points of control" of the system of globalized economy).

⁷⁵ S. CANEY., *Responding to Social Injustice: On the Right to Resistance*, cit. p. 59.

⁷⁶ See G. TEUBNER, *The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors*, in *Modern Law Review*, 2006, 69, 3, p. 327.

⁷⁷ In this sense, the right to resistance does not necessarily express a form of constituent power: see anyway S. BAILEY, U. MATTEI, *Social Movements as Constituent Power: The Italian Struggle for the Commons*, in *Indiana Journal of Global Legal Studies*, 2013, 20, 2, p. 965; T. POGGE, *Politics as Usual: What Lies Behind the Pro-poor Rhetoric*, Cambridge, Polity Press, 2010.

the transnational legal order there is no unique political order to overthrow, nor is there a single constitution to overcome. *In the global context, a “revolution”, in the proper meaning of the word, seems hardly conceivable: more likely, and quite paradoxically, the “new global order”, if anything, will be the result of local, pervasive and strategically oriented acts of resistance, aimed to defend recognized constitutional rights.* From this point of view, the domestically de-politicized right of resistance becomes, in the global arena, *a tool of constitutionalization, that is, of re-politicization.*

That is why the constitutional recognition of the right of resistance represents one of the main tools of the so called “constitutionalism from below”⁷⁸, that is, the exercise of non-institutionalized social pressures, which implies a self-limitation of the relevant actors (especially TNCs), even when there is no direct legal obligation. This process happens beyond ordinary State legal instruments, but it can nevertheless be incentivated by the constitutional recognition of the right of resistance, which provides *a legal basis for the expansion of constitutionalism in the transnational legal order*⁷⁹: it is essential to the construction of “capillary constitutions”,⁸⁰ which are the only ones that can limit contemporary capillary powers.

By connecting the right of resistance to the protection of constitutional rights and values against transnational private actors in the context of globalization, when the States’ ordinary legal instruments are absent, ineffective or counterproductive, we: (1) fully exploited the defensive potential of this right; (2) still kept it separate from the subversive concept of revolution; and (3) *overcame the paradox of its recognition in State constitutions.*

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⁷⁸ See generally G.W. ANDERSON, *Societal Constitutionalism, Social Movements, and Constitutionalism from Below*, in *Indiana Journal of Global Legal Studies*, 2013, 20, 2, p. 881; B. RAJAGOPAL, *International Law from Below. Development, Social Movements and Third World Resistance*, Cambridge University Press, Cambridge, 2003; B. DE SOUSA SANTOS, C.A. RODRIGUEZ-GARAVITO (eds.), *Law and Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge University Press, Cambridge, 2005.

⁷⁹ See G. TEUBNER, A. BECKERS, *Expanding Constitutionalism*, in *Indiana Journal of Global Legal Studies*, 2013, 20, 2, p. 523.

⁸⁰ See J. DERRIDA, *L'autre cap*, Éditions de minuit, Paris, 1991.