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*(Dis)obedience to an unlawful order in the military system from a constitutional perspective: a comparative analysis*

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## ABSTRACT

This essay examines (dis)obedience to unlawful military orders from a constitutional and comparative perspective. It traces the roots of the right to resistance and its incorporation into contemporary constitutions, focusing on the German *Grundgesetz* and the Italian Constituent debate. It analyses the link between loyalty and resistance, the civil–military divide, and case law from the Italian Constitutional Court and the US Supreme Court. It highlights tensions between hierarchy and rights, and reflects on soldiers' individual responsibility and disobedience as an expression of the constitutional rule of law.

## KEYWORDS

Unlawful orders; Right to resistance; Military constitutionalism; Individual responsibility; Rule of law.

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*(Dis)obedience to unlawful orders in the military system from a constitutional perspective: a comparative reflection*

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*1. The constitutional foundations of (dis)obedience to an unlawful order: the right to resistance*

If one chooses to address the issue of disobedience to an illegitimate (though not criminal) order within the military system from a constitutionalist perspective, the first concept or phenomenon one encounters – and which must be taken into consideration – is that of the right to resistance. In the Italian legal system, the Constituent Assembly had already addressed the issue of its codification<sup>2</sup>, just as, it will be noted, had occurred or was occurring in other Constitutions. As is well known, the conceptualisation of the right

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<sup>2</sup> The wording originally proposed was: ‘When public authorities violate the fundamental freedoms and rights guaranteed by the Constitution, resistance to oppression is the right and duty of the citizen’, but we shall return to this in paragraph 2.

of resistance dates back to medieval theories concerning resistance to a tyrannical king, in the event of a breach of the founding pact of power; these roots show that at the origins of the right of resistance there lies a reference to a state organisation founded on tyranny.

The development of the doctrine of resistance was accompanied and shaped, throughout the medieval period, by natural law thought, partly as a result of the incorporation of the Stoic doctrine of natural law into Christian thought. The transition of the right of resistance towards constitutionalism took place during the modern era, with the gradual replacement of the natural law paradigm by the contractualist model in defining the foundations of the political legitimacy of resistance<sup>3</sup>.

Locke's conception of the origins and purposes of the state forms the basis for the recognition accorded to the validity of the right of resistance<sup>4</sup>.

The right of resistance as an 'appeal to Heaven', which recurs in several passages of *the Second Treatise on Government*<sup>5</sup>, guides American theorists, who attempt to codify the right of resistance<sup>6</sup>, identifying a series of limitations on the exercise of this right, even in the presence of a desire to oppose unjust laws (illegitimate, insofar as they violate the norms/principles/values underpinning the legal system): firstly, the right of resistance, in its concrete manifestations, is always collective, meaning that it may be exercised by the majority of a community in the event of a violation of the fundamental law; secondly, the legitimacy of exercising the right to resistance is linked to its nature as *a last resort*, that is, as a tool that may be invoked in the presence of 'a long- d series of

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<sup>3</sup> A thorough and in-depth historical account of the right to resistance can be found in A. BURATTI, *Dal diritto di resistenza al metodo democratico. Per una genealogia del principio di opposizione nello Stato costituzionale*, Milan, Giuffr  2006.

<sup>4</sup> See J. LOCKE, *Second Treatise on Government*, II, 6, Italian translation by A. Gialluca, Milan, Rizzoli, esp. p. 67: 'The state of nature has a law of nature governing it, which binds everyone: and reason, which is this law, teaches every man who but inquires into it that, all being equal and independent, no one ought to harm another in his life, health, liberty, or property.'

<sup>5</sup> Ibid., pp. 20–21, 176, 242.

<sup>6</sup> See C. ROSSITER, *L'alba della repubblica. Le origini della tradizione americana di libert  politica*, Nischi-Lischi, Pisa 1962

abuses'<sup>7</sup> and as a final option, including the use of force, after every other attempt has been exhausted; finally, resistance must comply with a criterion of proportionality in relation to the violation or oppression suffered<sup>8</sup>. The scope of the right of resistance is clear, and this is what makes it a relevant concept for the purposes of the topic addressed here: the restoration of an existing order, violated by the (arbitrary) action of a person holding power. The legal-philosophical and political reflection on the right of resistance is situated, as is clear, within a public law framework relating to the relationship between the people and the sovereign, but its extension to the discussion here is justified, as will become clear in the course of this discussion, by the role assumed by the superior officer in the military 'subsystem', by the potential nature of the violations that an order in a military context is capable of causing, and by the particular intersection between loyalty, obedience and the defence of the Fatherland.

One of the issues that has been present from the outset in the formulation of the right to resistance is the relationship between its theory and practice. The right to resistance found its 'juridification' in the context of the French Revolution, as evidenced by Article 2 of the 1789 Declaration of the Rights of Man and of the Citizen, which states that 'The aim of every political association is the preservation of the natural and inalienable rights of man. These rights are liberty, property, security and resistance to oppression'. This statement, however, is highly formal; indeed, from the Constitution of 1795 onwards, there are no further references to the right of resistance in French constitutional texts, until, even from a theoretical perspective, this concept appears to lose credibility and substance: consider Kant's well-known assertions regarding the exclusive prerogative of legislative power belonging to the collective will, whereby 'each decides the same thing for all, and all decide it for each'<sup>9</sup>, such that each has the 'faculty of not obeying any law other than that to which they have given their consent'<sup>10</sup>. When legal formalism and the founding paradigm of legality become decisive factors in determining

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<sup>7</sup> See G. CASSANDRO, *Resistenza (Diritto di)*, in *Novissimo Digesto italiano*, vol. XV, UTET, Turin 1957, p. 611 ff.

<sup>8</sup> *Ibid.*

<sup>9</sup> SEE I. KANT, *Principi metafisici della dottrina del diritto*, 1797, par. 46, in Id., *La Metafisica dei costumi*, Rome-Bari, Laterza, 2001, pp. 142–143.

<sup>10</sup> *Ibid.*

the validity of a legal norm, the category of resistance loses its autonomous significance and merges with that of revolution<sup>11</sup>.

### *1.1. Its reflection in civil disobedience*

The issue of the legality of the right to resistance is linked to that concerning the nature of civil disobedience, which can be regarded as a form of its manifestation, even in a democratic constitutional state<sup>12</sup>. Since it is impossible to relegate civil disobedience to a purely theoretical hypothesis, or, conversely, to regard this phenomenon as incompatible with the constitutional state of law<sup>13</sup>, the question seems to be in what terms a 'right to civil disobedience' actually materialises, what its justiciability is, and the scope for its positive recognition<sup>14</sup>. The advent of the democratic constitutional state governed by the rule of law, by translating universal rights into rules of positive law, makes it possible to conceive of and act upon disobedience, but at the same time requires the identification of the forms in which to regulate such resistance against individual acts of public authority (let us consider, for the time being, public authority in a generic sense, without regard to the possible distinctions between civil and military power, which we shall attempt to assess later) which, whilst not constituting a symptom of a more profound change in the existing constitutional order, are found to be seriously detrimental to the fundamental rights and principles of the Constitution and are therefore perceived as being in conflict with the founding values generally shared within the social community. It is

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<sup>11</sup> See A. BURATTI, *Dal diritto di resistenza al metodo democratico*, op. cit., p. 148 ff.

<sup>12</sup> In this regard, see, among others, A. PASSERIN D'ENTRÈVES, *Legittimità e resistenza*, in «*Studi sassaresi*», 1973, III, *Autonomia e diritto di resistenza*, p. 35 ff., also cited by F. M. DE SANCTIS, *Resistenza (diritto di)*, in *Enciclopedia del diritto*, vol. XXXIX, Giuffrè, Milan 1988, esp. p. 998. Civil disobedience is characterised here as a refusal to obey adopted collectively, rather than individually.

<sup>13</sup> This would appear to be the view of R. DREIER, *Der Rechtsstaat im Spannungsverhältnis zwischen Gesetz und Recht*, in 'Juristen Zeitung', 40, no. 8/1985, pp. 353–359, who argues that the provision for the right of resistance within the rule of law amounts to a question of balancing competing interests, guided by the principle of proportionality.

<sup>14</sup> This essentially concerns the dilemma posed in the well-known story of Antigone, and discussed in A. BURATTI, *Dal diritto di resistenza al metodo democratico*, op. cit.

above all in this context that the question arises as to whether civil disobedience can effectively and unquestionably be situated within a purely factual framework.

A first aspect concerns the nature of the conduct to be considered as a form of civil disobedience<sup>15</sup>. However, attempting, from a legal perspective, to categorise the behaviours falling within the ‘spectrum’ does not appear to be a simple objective to achieve; not even the German Federal Constitutional Court, in its well-known KPD ruling of 1956, sought to provide an answer, limiting itself rather to outlining the modalities and prerequisites for the assessment of resistant conduct<sup>16</sup>, and reproducing those paradigms of resistance already mentioned, with an emphasis on the reference to conscience as the driving force of resistance, fuelled by a genuine, real confusion, in the disobedient subject, between ethical assessment and legal value, in the exercise of conduct that is considered an expression of a fundamental right or freedom.

A contribution to the legal definition of disobedient conduct comes from German legal doctrine which, following the Second World War and the fall of Nazism, developed a distinction between law and superior right, asserting the non-existence of unjust law, defined as that which conflicts with a superior right<sup>17</sup>.

The crux of the matter would therefore not lie merely in anticipating the outcome of the conflict between the law and a formally superior right, but in the opposition between the possible irrationality inherent in the legislative will, and a right that presents

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<sup>15</sup> On this subject, see V. BALDINI, *La disobbedienza civile come forma (illegittima?) di resistenza contro la legge ingiusta. La condotta individuale di opposizione tra imperativo etico ed (auto) tutela costituzionale*, in ‘Dirittifondamentali.it’, no. 1/2019.

<sup>16</sup> See BVerfGE (KPD-Urteil), 5, p. 85 ff. (*bundesarchives.de*). In the well-known case concerning the dissolution of the German Communist Party, the Court held that the right to resistance may be invoked only when it is a matter of preserving the existing order, and in an emergency situation, in the face of manifest injustice, as *a last resort*, a residual possibility for the restoration of constitutional legality that has been violated.

<sup>17</sup> See G. RADBRUCH, ‘*Gesetzliches Unrecht und übergesetzliches Recht*’, in ‘Süddeutsche Juristen-Zeitung’, 1946, pp. 105–108, on which L. AVITABILE, ‘*Le questioni della formula di Radbruch. Riflessioni a partire da Giuliano Vassalli*’, in ‘Archivio penale’, no. 1/2018, p. 11 ff. The article discusses Vassalli’s interpretation of Radbruch’s formula, in G. VASSALLI, *Formula di Radbruch e diritto penale. Note sulla punizione dei ‘delitti di Stato’ nella Germania postnazista e nella Germania postcomunista*, Milan, Giuffrè 2001.

itself as just because it is founded on absolute values deemed universal. This claim to material superiority calls into question the idea of the law as the exclusive source of right and diminishes its function. On this basis, the German reflection mentioned above undermines the automatic identification between the validity of the law and positive law, and instead emphasises an ‘absolute’ right, rooted in nature or reason. Where the law proves incompatible with the latter, it loses its normative force and is reduced to a mere fact, with the consequence that neither the individual nor the authority is any longer bound by the obligation to obey it<sup>18</sup>.

Without being able to dwell here on how the issue under consideration—that of (dis)obedience to an illegitimate order—can and should be addressed in relation to the impact of supranational legal systems, international law, and even the ideal international public order established following the Nuremberg trials<sup>19</sup>, there is no doubt that the approach referred to above gained particular momentum when the universality of values was articulated in a supra-state dimension and, more fully, at least in declaratory terms, a universalistic one.

But if one asks what impact this has had on Constitutions, as regards the recognition of resistance as a right, and thus the legitimacy of acts of civil disobedience, the results do not appear particularly significant.

### *1.2. The right to resistance in contemporary constitutions*

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<sup>18</sup> See V. BALDINI, *La disobbedienza civile come forma (illegittima?) di resistenza contro la legge ingiusta. La condotta individuale di opposizione tra imperativo etico ed (auto)tutela costituzionale*, op. cit.

<sup>19</sup> On this new yet pervasive general limit on the expression of thought, see A. PACE-M. MANETTI, *La libertà di manifestazione del proprio pensiero, sub art. 21, in Commentario della Costituzione*, edited by G. Branca and A. Pizzorusso, Zanichelli, Bologna-Rome, 2006, p. 230 ff.; the principles that emerged in the aftermath of the Second World War, such as those of equality, peace and human dignity, thus seem to delineate an ‘ideal international public order’, which would become a privileged and essential component of the democratic form of state, a complex parameter in relation to which to determine whether or not a state legal system belongs to the global system that identifies in ‘a new universal morality, which no longer claims to be founded on (declining) *raison d’état*, but rather on the necessity of humanity’s survival’ the lowest common denominator uniting every regulated society, see M. MANETTI, *L’incitamento all’odio razziale tra realizzazione dell’eguaglianza e difesa dello Stato*, in *Studi in onore di Gianni Ferrara*, vol. I, Giappichelli, Turin 2005, esp. p. 116.

First of all, it should be noted that explicit references to the right to resistance are not frequently found in contemporary constitutions. What can be observed, rather, is that the codification of the right to resistance, where present, mainly concerns constitutions belonging to the most recent cycles. A significant example is Article 21 of the 1976 Portuguese Constitution, which states that ‘everyone has the right to resist any order that infringes their rights, freedoms and guarantees, and to repel by force any aggression, when it is not possible to have recourse to the public authorities’. This provision, included within the non-judicial guarantees of fundamental rights and freedoms, forms part of a broader framework of provisions concerning the right to resistance: in particular, Article 7(3), which enshrines the ‘right of the people to rise up against oppression’, and Article 106(3), which grants citizens the right not to pay taxes ‘that have not been established in accordance with the Constitution and whose collection does not take place in the manner prescribed by law’. In reality, in Portugal, the right of resistance had already been enshrined in constitutional texts prior to the 1976 Constitution, owing to the Enlightenment roots of Portuguese constitutionalism, which were revived in the aftermath of the authoritarian era.

On the other hand, in France itself, where, as one will recall, the right of resistance first appeared in the Revolutionary Declaration of 1789, its mention in subsequent constitutional documents represented a mere formal reiteration, devoid of substantive value.

In Germany, constitutional traditions are reflected in the codification of a right and duty to resist in various *state* constitutions<sup>20</sup>.

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<sup>20</sup> Among these, the 1947 Constitution of Brandenburg stipulates: ‘There remains a right of resistance against laws that violate morality and humanity’ (Art. 9, para. 6). The 1950 Constitution of the City of Berlin, in Article 23, paragraph 3, states that ‘everyone has the right to resist if the fundamental rights established in the Constitution are violated’. Article 147 of the 1947 Constitution of Hesse stipulates, in a more complex and detailed manner, that ‘it is the right and duty of every person to resist unconstitutional violence on the part of the public authorities. Anyone who becomes aware of a breach of the Constitution or of an action aimed at violating the Constitution is obliged to seek criminal prosecution against the perpetrator by bringing the matter before the State Court of Justice. The details are laid down by law’. The constitutions of *the* eastern *Länder* have introduced provisions on the right to resistance,



The *Grundgesetz*, in the original text of the Basic Law of 1949, contained no reference to the right to resistance; this was added by the Constitutional Act of 1968, which amended Article 20 by inserting a fourth paragraph which now states: ‘All Germans have the right to resist anyone who attempts to abolish the existing constitutional order, if no other remedy is available’. This addition does not represent a single, isolated amendment, but is linked to the so-called emergency laws (*Notstandsgesetze*), designed to regulate the exercise of public powers in extraordinary situations (war, internal crises, disasters).

These measures, welcomed amidst fears of a return to certain constitutional mechanisms of the Weimar Republic—which were held responsible for the rise of the National Socialist regime—and aimed primarily at strengthening governmental powers, are thus balanced by the introduction of the right to resistance. It is clear from parliamentary proceedings that the clause was intended to have primarily symbolic value: no constitution can effectively prevent an act of disobedience, but including its recognition meant reaffirming democratic principles as supreme values<sup>21</sup>; it is significant that the clause was widely regarded as conferring political and moral legitimacy, and as a measure of the law’s validity, but not as a genuine, enforceable subjective right<sup>22</sup>.

Certainly, the right to resistance, and any form of civil disobedience that manifests it, represents, within the framework of *the Grundgesetz*, an entirely residual instrument, exercisable only when all other instruments of constitutional protection prove ineffective<sup>23</sup>, and this seems to be a common feature.

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drawing on the wording inserted into *the Grundgesetz* in the late 1960s, to which reference is made in the main text.

<sup>21</sup> See *Deutscher Bundestag, Plenary Minutes* 5/163, 30 May 1968. See D.P. KOMMERS, R.A. MILLER, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed., Duke University Press, Durham, 2012.

<sup>22</sup> See E. DENNINGER, in T. MAUNZ AND G. DÜRIG (eds.), *Commentary on the Basic Law, Art. 20(4) GG*, Munich, C.H. Beck, 2019.

<sup>23</sup> See T. MAUNZ, G. DÜRIG, *Grundgesetz-Kommentar*, Beck, Munich, 2019, and S. KÖYBAŞI, *Amending the Unamendable: The Case of Article 20 of the German Basic Law*, in *An Unamendable Constitution? Unamendability in Constitutional Democracies*, Springer International Publishing, Dordrecht 2018, esp. pp. 259–280.

## *2. The right to resistance and the duty of loyalty in the Italian constitutional system: a controversial relationship or two sides of the same coin?*

Having briefly outlined the theoretical and historical significance of resistance and disobedience, and beginning to apply these premises to the issue under consideration, it is useful to focus on the Italian constitutional system.

In Italy, given the constitutional silence on the right to resistance, the basis for a discussion on disobedience to an illegitimate order is provided by the combined provisions of the aforementioned Article 54 of the Constitution, concerning the duty of loyalty to the Republic, and Article 52, the (sacred) duty to defend the Fatherland. The latter, which may in fact be understood as a manifestation of the duty of loyalty, is now, as is well known, universally interpreted in accordance with a broad conception of defence, such as to encompass the exercise of activities aimed at the civil, social and cultural development of the community. On the other hand, the Constitutional Court itself, as early as 1985 in Judgment No. 164, and subsequently in Judgment 229/2004, held that the duty to defend the Fatherland may also take the form of ‘unarmed’ defence (we shall return to this shortly). This clarification became *de facto* necessary following the approval of the law abolishing compulsory military service (Law No. 226/2004).

From the letter of the constitutional provision, it is possible to identify evolving lines of interpretation, both of the concept of loyalty to the Republic and of the (organising) principles of discipline and honour (provided for by the same provision). By providing for the duty of loyalty to the Republic, the Constitution introduces a requirement for citizens to be loyal not only to the state entity – in a contingent, material sense (towards which, moreover, loyalty is actively manifested in the civil and military defence of the territory in the *broadest sense*), but also to its constitutional foundations. Precisely a ‘democratically oriented’ reading, so to speak, of the duty of loyalty tends to reconstruct it in the light of the relationship that exists between the duty of loyalty and the right to resistance. If one considers the Italian institutional reality, and the *status* formally accorded to resistance, it must be recalled that the proceedings of the Constituent Assembly included a significant debate regarding the inclusion, within the Constitution, of the so-called right to resistance, to be understood primarily as the right to collective

resistance, and in this sense already well established in ‘constitutional documents’ such as the French Revolutionary Declaration of 1789 (see *above*), but also, outside Europe, the Declaration of Independence of 1776<sup>24</sup>.

The Sub-Committee of the Seventy-Five, in fact, includes in the proposal relating to Article 50, paragraph 2, a provision stating that ‘When public authorities violate the fundamental freedoms and rights guaranteed by the Constitution, resistance to oppression is the right and duty of the citizen’. The provision, drafted by Dossetti and Cevolotto, draws its wording in particular from Article 21 of the Constitution of the Fourth French Republic, which stated that ‘Where the government violates the freedoms and rights guaranteed by the Constitution, resistance, in whatever form, is the most sacred of rights and the most imperative of duties’.

In reality, during the subsequent debate on Part One of the Constitution, this provision was called into question, and consequently disappeared from the text of Article 54 of the Constitution (formerly Article 50 of the initial draft), leaving room for interpretations aimed at denying any legitimacy to potential popular movements opposing public decisions deemed incompatible with constitutional principles<sup>25</sup>. On the other hand, there are authoritative interpretations that assert that the absence of an explicit proclamation of the right to resistance within the Constitution does not imply that this right is denied, but rather merely acknowledges the ontologically foundational, and almost normatively indefinable, nature of the right itself<sup>26</sup>. It seems, however, that this interpretation, rather than being linked to Article 54 of the Constitution (the origin of which, as mentioned, lies in an express and conscious decision not to include the right to resistance as a counterbalance to the duty of loyalty), derives directly from Article 1 of the Constitution, and thus from the role that popular sovereignty (interpreted ‘consistently’ with the notion of constituent power) plays within the legal system. A role

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<sup>24</sup> ‘When a long train of abuses and usurpations, pursued with a single purpose, reveals a design to reduce them [the people] to absolute despotism, it is their right, it is their duty, to overthrow such a government and to provide new safeguards for their future security’.

<sup>25</sup> See L. VENTURA, *Sub Art. 54, in Commentario della Costituzione, Rapporti politici*, vol. II, edited by G. Branca and A. Pizzorusso, Zanichelli, Bologna 1994.

<sup>26</sup> Permit me to refer to E. STRADELLA, *La libertà di espressione politico-simbolica e i suoi limiti: teorie e ‘prassi’*, Giappichelli, Turin 2008.

which would entail the condition that, if the public authorities (obviously including entities that hold such powers or act in a public capacity) are found to be ‘involved in subversive action’, including through the commission of ‘acts contrary to the values and aims embraced by the collective conscience and set out in the Constitution’<sup>27</sup>, it would be legitimate (if not desirable) for the people to exercise a right to resistance, as this would constitute the expression of the sovereignty that belongs solely to them.

In light of the considerations set out thus far, it is clear that the express provision of the duty of loyalty to the Republic, as set out in Article 54 of the Constitution, not only does not prevent the recognition of a right of resistance to protect legality, but actually confirms the correctness of that doctrinal approach which, starting from the primacy of the duty of loyalty over the obligation to obey the laws of the State where these conflict with republican principles, inferred the constitutional nature of the right of resistance<sup>28</sup>.

The duty of loyalty and the irrevocability of the republican form of government referred to in Article 139 of the Constitution go hand in hand with the proclamation of popular sovereignty (Article 1, paragraph 2, Constitution) and the democratic method (Article 49 of the Constitution), thus allowing the possibility of a right to resistance to emerge, almost as if by osmosis, as a safeguard of the republican order and the will of the people, which may manifest itself in the oppositional practices of civil society<sup>29</sup>. We shall consider below, for the purposes of the issue addressed in this volume, the extent to which the civil or military nature of the ‘society’ in which oppositional practices are embedded is relevant to their existence and acceptance.

### *3. The question of obedience to an illegitimate or criminal order from a constitutional perspective*

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<sup>27</sup> See G. AMATO, *La sovranità popolare nell’ordinamento italiano*, in «*Rivista trimestrale di diritto pubblico*», no. 1/1962.

<sup>28</sup> See A. BURATTI, *Dal diritto di resistenza al metodo democratico. Per una genealogia del principio di opposizione nello Stato costituzionale*, esp. pp. 268–269.

<sup>29</sup> A conclusion that can also be drawn from the reflections of A. BURATTI, op. cit., p. 99.

In light of these preliminary assumptions, the issue of obedience and illegitimate (if not criminal) orders seems to me to be divisible: on the one hand, by setting the constitutional framework as the conceptual backdrop; on the other, by placing that same constitutional framework within an ‘exceptional’ perspective. That is to say, given a general duty of obedience and defence, and taking for granted the counterpart of a ‘right of resistance’ – well known, moreover, in the civil sphere as well, and translated into the legal concept of conscientious objection (known as *secundum legem* in our legal system, but conceivable also *praeter legem* in light of the – perhaps paradoxical – contradiction between the positivised residual nature of the right to resistance and its implicit nature<sup>30</sup>), it is worth highlighting the emergence of (dis)obedience to criminal orders as a further ‘aspect’ of the relationship between obedience and resistance.

The aim could then be to review the very scope of meaning of the ‘duty of defence’ in general, which, in fact, also varies with changing social dynamics.

The category of disobedience to criminal orders thus appears to be considered along three main lines: a) the sustainability of the separation between the civil and military spheres from the perspective of the factors determining their action (and activity); b) the limits and scope of obedience – *conversely* – that is, the nuances that characterise its nature in relation to the order (legitimate, illegitimate, criminal); c) the essentiality and inseparability of the principles that, conversely, characterise the act of obedience, and thus the ‘interpretative’ criteria (legal, moral and even ethical) regarding obedience to the order itself.

### *3.1. The constitutional sustainability of the civil-military separation*

With regard to the first premise, we must start from (and systematise) the intrinsic distinctiveness of the military sphere compared to the civilian one: that is to say, the foundations of that special supremacy over civilian action, or, to put it in other terms, that

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<sup>30</sup> On the various distinctions regarding conscientious objection, see E. ROSSI, E. STRADELLA, *La coscienza tra regole ed esenzioni: considerazioni sull'esperienza giuridica italiana*, in *Problemi attuali delle libertà costituzionali*, edited by E. ROSSI, Pisa University Press, Pisa 2009, and the references cited therein.

*culture* of a ‘separate community’<sup>31</sup>. Investigating such layers of meaning appears useful, primarily, for reinterpreting the principles that underpin the very structure of the military, in relation to the rules of the civilian sphere and, needless to say, the constitutional framework, beyond the sphere of defence, so to speak. The legal system of the military has been reconstructed, by the earliest doctrine, as a genuine legal system, in which relations with the state legal system are therefore regulated not in terms of resolving contradictions between norms, but rather in terms of the space that the military legal system manages to carve out without the state legal system being able to intervene<sup>32</sup>. A system, therefore, characterised by norms and rules of conduct relating to military discipline, understood as ‘the set of duties connected with military status’ or, in other words, as that set of prescriptions, autonomously established and, in the event of violation, autonomously sanctioned, but in any case ‘unified, which regulate precisely the duties and legal situations in general connected with that status’<sup>33</sup>.

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<sup>31</sup> See V. BACHELET, *Disciplina militare e ordinamento giuridico statale*, Giuffrè, Milan 1962, p. 166 ff. The concept of separateness can, on the other hand, be applied to institutions which, from the perspective of ‘constitutional imperatives’, exhibit opposing characteristics: on the one hand, those more directly linked to the aims and content of Article 2 of the Constitution, insofar as it promotes social pluralism; this refers to communities arising from the spontaneous association of individuals, such as the sporting system; on the other hand, those that are in tension, if not in outright opposition, with the full protection of fundamental rights within social formations – one might think of the prison system (where these rights are effectively neutralised), or, indeed, the military. On the recognition of individual fundamental rights within ‘special’ legal systems, see, *among many others*, and to refer to a fairly recent work, D. MARTIRE, *Pluralità degli ordinamenti giuridici e Costituzione repubblicana*, Jovene, Naples 2020.

<sup>32</sup> See M.S. GIANNINI, *Lezioni di diritto amministrativo*, Giuffrè, Milan 1950, p. 169 ff., which refers to state legal systems or specific legal systems based on organisational facts; for A.M. SANDULLI, *Manuale di diritto amministrativo*, Jovene, Naples 1984, p. 84 ff., the Armed Forces have ‘an autonomous existence, which is not subject to the general legal system’.

<sup>33</sup> See V. BACHELET, *Disciplina militare e ordinamento giuridico statale*, op. cit., p. 81. There is a wealth of legal literature on military discipline from a constitutional perspective; see, *among others*, A. BALDASSARRE, *Disciplina militare e Costituzione*, in “Democrazia e diritto”, XV, no. 2/1975, p. 635 ff., A.M. SANDULLI, *Disciplina militare e valori costituzionali*, (1978), in ID., *Scritti giuridici*, II, Naples, Jovene, 1990, pp. 613 and 702 ff.

On the other hand, the Constitution identifies an unavoidable reference in Article 52(3) of the Constitution, which establishes that the organisation of the Armed Forces is guided by the democratic spirit of the Republic. This guidance by the democratic spirit highlights an axiological conflict which, in light of the constitutional provision, must necessarily be re-evaluated and redefined by reversing the relationship between authority and freedom<sup>34</sup>. On the one hand, the military system, which has a specific axiological framework based on the supremacy of the principle of authority over the fundamental freedoms of the individual; on the other, the Republican Constitution, which places the individual and their freedoms at the centre, and for this reason influences the aforementioned military system and its multi-subjectivity. As is well known, Article 52(3) of the Constitution provided the fundamental basis for the absorption of the military legal system into the state legal system. The fact that the constitutional provision uses the term ‘system’ of the Armed Forces in the same phrase, suggesting that one can still speak of a legal system in the strict sense, and that this system must conform to the democratic spirit of the Republic, may, from the perspective of a section of legal scholarship, mean two things: ‘that what must be informed by the democratic spirit is not already informed by that same spirit’, hence the axiological conflict; ‘that the supposed legal system of the Armed Forces must be informed by the spirit of another legal system, thereby ceasing to be a legal system. But this apparent contradiction is easily overcome if one considers the non-technical use of the term ‘legal system’<sup>35</sup>. The Constitution’s choice would therefore seem clear: the military legal system, understood in the strict sense, has no legitimacy, is not recognised by the state legal system, and must be absorbed into the state legal system and cease to exist.

However, this absorption has not been effectively and fully implemented in law in Italy, as in most other legal systems belonging to the Western legal tradition, given that the legislature has progressively established a regime of special provisions, starting with the judicial sphere, thereby creating an autonomous legal subsystem (perhaps it is preferable to define it as such rather than a system), aimed at ensuring the efficiency,

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<sup>34</sup> See D. MARTIRE, *Pluralità degli ordinamenti giuridici e Costituzione repubblicana*, op. cit.

<sup>35</sup> See F. MODUGNO, *L’ordinamento militare è in estinzione?*, in *Studi in memoria di V. Bachelet*, Giuffrè, Milan 1987, p. 457.

promptness and cohesion of the armed forces. An autonomy which, in practice, translates into special rules of conduct, distinct and specific disciplinary proceedings, and circumscribed limitations on fundamental rights, justified in the name of the function of defending the State. However, this exceptional structure faces an inherent tension with respect to pacifist, personalist and democratic principles.

If we consider the two constitutional systems that we have chosen to examine in particular detail in these brief reflections, namely the Italian and the US systems, we can highlight some key issues in the construction of the relationship between the civil and military legal orders.

Firstly, the reasons for the (partial and limited) exception, which can be traced back to a (variable) relationship between discipline, cohesion and security.

The military system values the principle of obedience and hierarchical rigidity as essential tools for the proper functioning of the institution. In Italy, the Constitutional Court has recognised that ‘the status of a member of the military entails particular discipline and hierarchy, necessary for the proper functioning of the military’<sup>36</sup>, whilst affirming that this does not imply a suspension of fundamental rights. In the United States, the Supreme Court has held that the armed forces constitute a ‘*separate society*’ and that, for this reason, particular restrictions on constitutional rights are justified in the name of readiness and efficiency: we shall focus below on the most significant case in the Supreme Court’s jurisprudence<sup>37</sup>.

Secondly, the significance that the pacifist principle can assume, and the implications it may entail in relation to the margins of ‘separateness’ of the military legal system.

In Italy, the inclusion of Article 11 of the Constitution is a defining feature of the legal system. The force – including its linguistic weight – attributed to the rejection of war as a means of aggression is not merely symbolic: it requires a restrictive interpretation of the legitimate functions attributable to the military apparatus and limits, at the domestic level, the possibility that military logic might prevail over democratic principles. Article 11, in conjunction with Articles 2 and 3 of the Constitution, imposes a personalist and

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<sup>36</sup> See Constitutional Court, judgment no. 449/1999.

<sup>37</sup> See *Parker v. Levy*, 417 U.S. 733 (1974)



pacifist vision of the legal system, in which obedience can never override the dignity of the individual<sup>38</sup>.

This has led to an emphasis on the need for a ‘constitutionalisation of military law’<sup>39</sup>, such as to prevent authoritarian or dehumanising tendencies, ensuring the compatibility of military ‘subordination’ with the pacifist principle, as well as with the democratic principle, without compromising its effectiveness.

Then there is the question of the link between obedience, conscience and individual responsibility. In the military context, the principle of obedience is naturally more binding than elsewhere. However, developments in case law and legal doctrine, in both the Italian and US legal systems, have defined the individual responsibility of military personnel, particularly in cases where the order received conflicts with the law or fundamental rights (please refer to other articles in this volume for further discussion of this aspect).

In the US legal system, whilst a functional and hierarchical logic prevails, scope has been recognised – albeit limited – for disobedience motivated by reasons of conscience, for example in the refusal of compulsory military service<sup>40</sup>, but not in the case of selective disobedience<sup>41</sup>.

The asymmetry between the duty of obedience and freedom of conscience, which is in itself deeply rooted in the constitutional framework, presents, with reference to the military sphere, the full complexity of the balance between authority and freedom, political power and *the rule of law*. And it opens up a grey area regarding the operation of transparency and democratic control, which affects issues of various kinds, some of

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<sup>38</sup> For a commentary on the provision, see A. CASSESE, *Sub Art. 11*, in *Commentario della Costituzione*, op. cit.

<sup>39</sup> Cited by D. BRUNELLI AND G. MAZZI, *Diritto penale militare*, Giuffrè, Milan 2007; this issue is discussed, with reference to jurisdiction, by G. DE VERGOTTINI, *Giurisdizione militare: la crisi della specialità*, in “Quaderni costituzionali”, no. 2/2007, p. 364 ff.

<sup>40</sup> See *Seeger v. United States* 380 U.S. 163 (1965), on which A. BRODIE AND H.P. SOUTHERLAND, *Conscience, the Constitution, and the Supreme Court: The Riddle of United States v. Seeger*, in “Wisconsin Law Review”, no. 2/1966, p. 306 ff., and R.L. RABIN, *When Is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, in “Cornell Law Quarterly”, vol. 51, 1965, p. 231 ff.

<sup>41</sup> See *Gillette v. United States* 401 U.S. 437 (1971), on which J. C. WITT JR., *Gillette v. United States: The End of Selective Conscientious Objection*, in “Tennessee Law Review”, vol. 39, 1971, p. 157 ff.

which are not discussed here (one might consider the question of Parliament's role in decisions regarding military interventions), others relating, on the one hand, to freedom of expression and, as a reflection of this, the military's freedom of association<sup>42</sup>, and, on the other, to the relationship between military and civilian service as forms of fulfilling the duty to defend the homeland<sup>43</sup>.

In the United States, case law has explicitly recognised a separation—ontological, so to speak—between the military and civilian spheres, starting with the landmark 1974 ruling in *Parker v. Levy*, in which the separation and distinctiveness of another community (within the community) were examined precisely in light of specialisation, as well as the different nature of the value framework underpinning the action (in particular, a special treatment of freedom of expression thought, within a legal system which, as is

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<sup>42</sup> Significant in this regard is the aforementioned Constitutional Court judgment No. 449/1999, in which the question of the constitutional legitimacy of Article 8(1) of Law No. 382/1978 (principles governing military discipline) was declared unfounded, with reference to Articles 3, 39 and 52, para. 3 of the Constitution, raised by the Council of State. The Court recognises that the organisation of the Armed Forces referred to in Article 52, para. 3, of the Constitution does not entail an impermissible separation from the general legal order of the State but simply reflects the specific nature of the function. The Court recalls (referring to the previous judgment No. 278/1987) that the Republican Constitution radically transcends the institutionalist logic of the military system, since the latter must be brought within the scope of the general state legal system 'which respects and guarantees the substantive and procedural rights of all citizens'.

The Court concludes on this point by stating that the guarantee of the fundamental rights enjoyed by individual military personnel does not give way to the requirements of the military structure, so that the collective interests of members of the Armed Forces also deserve protection, in order to ensure the conformity of the military system with the democratic spirit of the Republic. On the other hand, however, the prohibition, set out in the contested provision, on military personnel forming trade union-style professional associations and joining other trade unions – rights generally guaranteed by Article 39(1) of the Constitution – is not deemed unconstitutional, in light of the special nature of the service rendered.

<sup>43</sup> Following the Constitutional Court's affirmation of equal dignity in its historic judgment No. 164/1985. Among the numerous commentaries on the ruling, see A. REPOSO, *Corte costituzionale e obiezione di coscienza al servizio militare: un altro passo avanti*, in «Pace, diritti dell'uomo, diritti dei popoli», No. 2/1989. These principles are reaffirmed by Judgment No. 228/2004, which identifies the National Civil Service as a form of defence of the Fatherland.

well known, makes of the First Amendment, and therefore of *freedom of expression, an absolute*<sup>44</sup> ).

### 3.1.1. *The Parker v. Levy case*

The *Parker v. Levy* case<sup>45</sup> represents a landmark in the case law of the US Supreme Court, as it defines for the first time the limits on freedom of political expression to which military personnel are subject. In its ruling, the Court establishes that, within the armed forces, the requirements of military discipline and order may take precedence over individual constitutional rights. Since this *leading case*, numerous decisions have tended to prioritise military interests over individual freedoms, striking a balance between military interests – understood as the need arising from the functionalisation of hierarchical structures to ensure the effectiveness and operational capability of the armed forces – and the individual rights guaranteed by the First Amendment. And this balancing act, starting precisely with *Parker v. Levy*, has favoured the autonomy and distinctiveness of the military ‘legal system’.

The case concerned Dr Levy, an army captain serving at a military hospital in South Carolina, who had encouraged African-American soldiers to refuse service in Vietnam, arguing that in the United States they were victims of systematic and deep-rooted discrimination, and that in Vietnam they were deployed on the most dangerous missions and suffered the heaviest casualties; Levy himself had, moreover, spoken out very harshly against members of the Special Forces.

Levy was court-martialled and convicted under Articles 133 and 134 of the Code of Military Justice, for unbecoming conduct and for statements prejudicial to good order and discipline. The conviction was initially upheld by the federal district court, but was subsequently overturned by the court of appeal, which held that the articles were flawed

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<sup>44</sup> To quote the well-known expression of A. MEIKLEJOHN, ‘*The First Amendment is an Absolute*’, in ‘Supreme Court Review’, no. 1/1961, p. 245 ff.

<sup>45</sup> See *Parker v. Levy*, op. cit.

due to vagueness and lack of specificity. The Supreme Court, by a majority of 5 to 3, overturned this decision and reinstated the conviction<sup>46</sup>.

In the majority opinion, written by Justice William H. Rehnquist, the Court acknowledges that members of the military enjoy constitutional rights, but emphasises that obedience and discipline – which are fundamental to the functioning of the armed forces – may justify stricter restrictions than those applicable in civilian life. The Court describes the military as a ‘specialised society, separate from civilian society’, ready to obey without hesitation. Consequently, it rejects objections regarding *the vagueness* and<sup>47</sup> and denies military personnel the opportunity to challenge the contested provisions on the grounds of excessive scope. The points raised in the dissenting opinions are significant. Douglas argues that the majority placed too much weight on the position of the military authorities, reaffirming the sanctity of the constitutional protection of *free speech*; another point emphasised in Potter Stewart’s *dissent*, joined by Douglas and Brennan, concerns the unconstitutionality of the rules applied, due to their *vagueness* (already highlighted in the appeal ruling). The significance of the Supreme Court’s decision in this case is evident from the fact that it has become an important precedent, legitimising subsequent military convictions for conduct that varied widely, such as the possession of marijuana off-base<sup>48</sup>, the exercise of the right to petition without

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<sup>46</sup> On the case, see R. O. EVERETT, *Military Justice in the Wake of Parker v. Levy*, in «Military Law Review», vol. 67, 1975.

<sup>47</sup> *Vagueness*, as interpreted by the US Supreme Court, represents the doctrine of vagueness and is linked to a constitutional requirement, namely the constitutional necessity that criminal laws clearly define and specify the conduct that is prohibited and punishable. According to this *doctrine*, a criminal law cannot be so obscure or ambiguous as to be incomprehensible to the average person, because if it were, it would be unconstitutional on the grounds of indeterminacy. *Vagueness* is often accompanied by *overbreadth* – the two representing aspects of a fundamentally single defect – namely, excessive scope. In both cases, the constitutional anchors are the *due process* provisions set out in the Fifth and Fourteenth Amendments to the Constitution. A. E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, in «American Journal of Criminal Law», vol. 30, 2002, p. 279 ff., E.M. Snoddon, *Clarifying Vagueness*, in «The University of Chicago Law Review», vol. 86, n. 8/2019, pp. 2301-2354, e R.C. Post, *Reconceptualizing vagueness: legal rules and social orders*, in «California Law Review», vol. 82, 1994, p. 491.

<sup>48</sup> See *Schlesinger v. Councilman*, 420 U.S. 738 (1975).

authorisation from the base commander<sup>49</sup>, or the wearing of religious attire in violation of military regulations<sup>50</sup>.

This decision thus establishes the concept of a '*specialised society separate from civilian society*', as well as a 'smaller', professional and 'selected' community within the segments that make up society as a whole. It is clear that the consequences of such separation can be paradoxical: on the one hand, the principles underpinning the general defence of the legal order are, precisely, special and often derogatory in relation to the general principles of the (constitutional) order itself; on the other, separation from the civilian sphere entails an internal resistance to changes that may occur there, by virtue of that special nature which seems to crystallise beyond social transformations. In this regard, moreover, one might also mention the intrinsic 'apolitical' nature of the bodies (military, defence, garrison) which would thus seek to confirm that very detachment from the democratic (and participatory) 'civil' and social order, as well as their presumed 'neutrality' with regard to the dynamics of the political dialectic itself, as a hallmark of the very democracy to which defence action is primarily directed (and inspired). Moving from the 'external' to the internal sphere, one can also highlight the implications that such 'special supremacy' or culture of the 'separate community' has for the individuals of that 'special', separate and professional community.

As a system within the system, for example, the entire *body* of rules relating to 'internal' conduct, actions and sanctions, combined with hierarchies essential to the very performance of the (public) function, is governed by criteria which are, in part, exceptional in nature. In addition to the obvious fact of military justice, one should bear in mind the discretion and elusiveness of the criteria that inform the disciplinary aspects of that profession: a paradoxical lack of rigour in decision-making processes, which, ultimately, stems directly from the professional hierarchy, affecting not only the *extent* of discretion regarding obedience (with the threat, precisely, of possible disciplinary sanctions, unbound by a principle of general 'legality' and with potentially 'punitive' implications insofar as they are discriminatory), but also the subjective rights of the subordinate. In this regard, with reference in this case to the Italian legal system, one

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<sup>49</sup> See *Brown v. Glines*, 444 U.S. 348 (1980).

<sup>50</sup> See *Goldman v. Weinberger*, 475 U.S. 503 (1986).

might cite by way of example the TUROM (Consolidated Act on Regulatory Provisions concerning the Military System), in which Article 887, regarding representation within the corps, the military voter has a duty to participate, in a context where such representation ends up dissolving ‘functionally’ within the special and separate community. Representation, too, that is, in addition to being characterised by duty rather than by right (or freedom), operates according to rules of obedience *separate* from the ‘constitutional’ and civil context. The right or freedom not to act—that ‘negative’ sphere, so to speak, recognised by the Constitution in various provisions—is, too, to some extent derogated from<sup>51</sup>.

### 3.2. *The relationship between the nature of obedience and the type of order*

Another aspect under discussion is the limit and scope of obedience – *conversely* – that is, the nuances that characterise its nature in relation to the order (legitimate, illegitimate, criminal).

With regard to this point, building on the preceding premises, the lines of analysis may well take their cue from *the essential* nature of the order (directly derived from that of the hierarchical organisation), as well as from its *obligatory nature*, in relation to the sphere of (non-)freedom regarding the decision of who must carry it out.

Here too, a traditional anchor within the Italian legal system could be reinterpreted and (re)constructed differently. As is well known, Article 51 of the Criminal Code provides that ‘a person who carries out an unlawful order is not punishable where the law does not allow them any discretion as to the lawfulness of the order’ (paragraph 4). Similarly, with regard to the Code of Military Justice, Article 1349 states that ‘orders must, in accordance with the rules in force, relate to discipline [...]’ (paragraph 1), and that ‘a member of the armed forces who is given an order manifestly directed against the institutions of the State or whose execution in any case manifestly constitutes a criminal offence has the duty not to carry out the order [...]’ (paragraph 2). These provisions merely confirm the many nuances of meaning, and therefore of interpretation, that may

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<sup>51</sup> See C. IAFRATE, *Obbedienza, ordine illegittimo e ordinamento militare*, in «Diritto & Questioni Pubbliche», No. 2/2016, pp. 313–335.

arise both with regard to the concept of discipline—which is then linked to that of honour, *pursuant* to Article 54 of the Constitution—and with regard to the obligation (not to carry out the order) in the face of, so to speak, manifest illegality (or even unlawfulness). These are parameters, in other words, that are intended to be rigorous, but which in reality constitute a further open-ended element.

That is to say, on the one hand, criteria that appear objective, but which, in a sphere of action and conduct, cannot but be heavily influenced by subjective and individual ‘perceptions’. In what has been termed the ‘machine of obedience’<sup>52</sup> – in which, it should be noted, there is subjection to disciplinary rules and a sort of immediacy of execution based on the ideal dichotomy of ‘obeying without reflecting’ – assessments of manifest illegality may not find (sufficient) scope for consideration. On the other hand, however, one might reflect on the aforementioned effective sphere of individual discretion, not only with regard to the ‘discipline’ and honour inherent in the role, but also to the principle of loyal and (yet) conscious obedience.

Law No. 382 of 1974 had already established a very general principle of informed participation, with a view to moving beyond a paternalistic approach to both the concept of ‘honour’ and that of ‘discipline’, which underpin a value system distinct from and separate from civil ‘ethics’ or ‘morals’. Here (and we shall omit purely criminal law references and issues, which are dealt with in other contributions to this volume), the (non-)execution of the order, rather than being considered disobedience in the strict sense – as an expression of a right to resistance, as positivised in other systems – could be interpreted, *on the contrary*, as the realisation of conscious honour and discipline, from a (reversed, once again) perspective of defending the democratic order and its principles (according to a constitutionally oriented interpretation of loyalty).

Then there is the question of the complex contours of the knowability of the duty linked to the manifest nature of the order, strongly emphasised by criminal law and military regulations. The terminology used by criminal law, as indeed that of military regulations, insists in a pervasive – and almost decisively ‘ ’ – manner on the manifest nature of the order and its (il)legitimacy. Two considerations therefore seem to be in order: the problem that arises is that, on the one hand, the orders from which a duty to

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<sup>52</sup> Ibid.

carry out an action derives do not always appear manifest at a procedural level. As is well known, the military sphere is also based on codes of conduct, codes of language, and expressions (including physical ones) that are neither codified nor, again, always (re)cognisable. Obedience (and its mechanism), when linked to individual reflection, once again comes up against parameters that are only formally objective.

Secondly, as effectively (and provocatively) noted, another objection—or rather, exception—might be raised: ‘manifestly illegal to whom?’<sup>53</sup>. Here, at this juncture, a convergence can be observed between the approach of the Italian legal system and the suggestions drawn from the US system, noting that it is not possible, ultimately, to demand a form of clarity, a sort of categorisation of what might be manifestly (il)legitimate. By virtue of that individual sense, ‘like obedience, disobedience often has a sociological dimension’, or, as Walzer explains: ‘commitments to principles are usually also commitments to other men, from whom or with whom the principles have been learned and by whom they are enforced’<sup>54</sup>.

### *3.3. Interpretative criteria in defining the relationship between obedience and refusal (resistance?)*

A third element that may be considered concerns the essential nature and inseparability of the principles that, conversely, characterise the act of obedience, and thus the ‘interpretative’ criteria (legal, moral and even ethical) that underpin obedience to the order itself. On this point, a proposal to identify criteria for (re)defining the relationships and interactions between the sphere of (obligatory) obedience and the dimension of (non-)compliance linked to the connotation of (il)legitimacy is of interest<sup>55</sup>. Starting from the necessarily individual aspects regarding what may be evident with respect to (dis)obedience to the order itself, the proposal puts forward two parameters to

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<sup>53</sup> See M. WALZER, *The Obligation to Disobey*, in ‘Ethics’, vol. 77, no. 3/1967, pp. 163–175, and ID., *Just and Unjust Wars*, Basic Books, New York, 1977.

<sup>54</sup> Ibid.

<sup>55</sup> See J. M. OSIEL, *Obedying Orders: Atrocity, Military Discipline, and the Law of War*, in «California Law Review», vol. 86, no. 5/1998, pp. 943–1129.



escape dichotomies and categories and to enter the grey areas inherent *in the very essence* of the order. These (individual aspects) inevitably also involve an (in)novated conception of honour, discipline and the vocation of defence. This is done from a perspective mindful of loyalty and obedience, in the terms already analysed in the light of the concepts of resistance and fidelity. The proposal in question suggests, first and foremost, a general scope for the excusability of carrying out an order based on a criterion of reasonableness: barring special rules, a sort of standard of reasonable error is introduced for those who, through their conduct, obey an order (within a spectrum that even encompasses their ‘imprudence’ beyond any objective illegality). Given, then, the often ambiguous nature of the order – accompanied, moreover, by an absence of a corresponding duty to justify it – arising also from ‘practical codes of conduct’, Osiel, the author of the proposal, puts forward two (interpretative) options: ‘misreading orders morally’, as well as (dis)obedience as ‘creative compliance’. With regard to the first, it is observed that, in the doubt (sometimes deliberately) generated by orders (which are themselves sometimes unwritten and unmotivated) that lie somewhere between illegitimate and (even) unlawful, and in accordance with the general principle of the duty of obedience, the ‘executor’ is bound by the content, but not by the meaning of that content. Here, therefore, ‘where its wording allows both a lawful and an unlawful interpretation of its aims [...] the duty is to adopt the interpretation that will allow the order to be obeyed lawfully’<sup>56</sup>. A sort of paradigm linked to a constitutionally legitimate interpretation of the order, therefore.

As regards *compliant* yet creative behaviour, in this context, however, whilst legislators and judges may devise (new) interpretations where a provision is unclear, so too, in cases of doubt regarding the execution of an order arising from its very nature, those bound by the duty to obey it may interpret the content of the order itself in a manner consistent with its legitimacy. That order which, otherwise, ‘if obeyed mechanically and uncritically, would have had catastrophic consequences’. This would, in this case, be a sort of ‘constitutionally oriented interpretation. Moreover, both indices bring the system back to (a principle of) legality, despite the vagueness, indefiniteness and specificity of the sphere of (dis)obedience. Osiel illustrates the relationship between obedience and refusal (including in terms of resistance), also through a diagram, which can be

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<sup>56</sup> Ibid.

summarised to mean that there are no possible justifications for disobeying lawful orders; there may be justification for obedience to illegal orders where such obedience is attributable to a reasonable belief, on the part of the individual, regarding their legality, regardless of whether the illegality of the orders is manifestly evident. The point is what the justification for obedience to illegal orders can and should be made to serve, but, from this perspective, disobedience to an illegal order is always legitimate, as well as *fair*.

#### *4. The North American experience*

Even a brief and summary analysis of the North American legal experience may be useful in ascertaining what balances have been established over time within a legal system in which a principle of hierarchical obedience in the military sphere the duty to disobey a manifestly illegal order as provided for in the sources of military law, and a general and pervasive principle of freedom of thought and speech, which is particularly pronounced when it comes to expressions of a political nature.

##### *4.1. The regulatory framework: between discipline and individual legal conscience*

As already noted, in the US military legal system, the principle of hierarchical obedience finds its central reference in *the Uniform Code of Military Justice*, i.e. the code governing federal military criminal law.

Relevant to our purposes is Section 92, '*Failure to obey order or regulation*'<sup>57</sup>, which severely punishes disobedience to a lawful order. The term '*lawful*' is decisive: the duty of obedience, in fact, exists only when the order is in accordance with the law. Consequently, a manifestly unlawful order is not legally binding and, indeed, carrying it out may entail criminal liability. This approach is rooted in a well-established principle

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<sup>57</sup> 'Any person subject to this chapter who ... (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by any member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties shall be punished as a court-martial may direct' (UCMJ, 10 U.S. Code § 892).

of international and domestic military law: ‘an illegal order is no defence’ (*Nuremberg Principle IV*), but at the same time: ‘a manifestly illegal order must be disobeyed’<sup>58</sup>.

The question of defining the criteria for recognising the lawfulness of an order is addressed by the *Manual for Courts-Martial (MCM)*, which specifies the essential requirements that render a military order binding. In *Part IV*, section 16 (relating precisely to Article 92), the MCM clarifies that an order is lawful if it is issued by a legitimate authority, relates to a lawful military activity and not to private purposes, is not contrary to the law (domestic or international), and is also explicit, specific and comprehensible. The element of hierarchical origin is therefore not sufficient to imply an obligation to obey, which is in any case always subject to the substantive legality of the order.

Case law has helped to clarify the scope of Article 92 of the UCMJ and the concept of a *lawful order*: from the recognition of the manifest illegality of an order to kill civilians<sup>59</sup>, to the illegality of an order which, whilst not violating military laws, conflicts with constitutional or international norms<sup>60</sup>; from the distinction between selective objection and an unlawful order<sup>61</sup>, to the confirmation of the lawfulness of an order to wear a UN uniform<sup>62</sup>.

In all these cases, there is a tension between the operational needs of the armed forces and the recognition – albeit limited – of the individual soldier’s responsibility to assess the lawfulness of the orders received. US legal and ethical doctrine emphasises that the soldier is not merely an executor, but a morally and legally responsible individual. Military academies, such as *West Point* or the *U.S. Naval Academy*, include modules on

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<sup>58</sup> This naturally refers to the text adopted by the United Nations International Law Commission and included in the Commission’s Report to the General Assembly on the work of the second session (1950) (*Yearbook of the International Law Commission*, 1950, vol. II).

<sup>59</sup> See *United States v. Calley*, 46 C.M.R. 1131 (U.S. Army Court of Military Review 1973), on which R.E. QUINN, W.H. DARDEN, *United States v. William L. Calley*, in «Journal of International Law» vol. 8, 1974.

<sup>60</sup> See *United States v. Kisala*, 64 M.J. 50 (C.A.A.F. 2006).

<sup>61</sup> *United States v. Kinder*, 14 M.J. 109 (C.M.A. 1982).

<sup>62</sup> *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001).

*Human Rights Law, Rules of Engagement* and the duty to disobey orders contrary to fundamental constitutional principles in their training programmes<sup>63</sup>.

Therefore, whilst the principle that ‘unlawful orders must not be obeyed’ represents a legal rule, as well as a moral imperative, within the US legal system, the definition of the threshold of unlawfulness is subject to significant interpretative variations, in some cases clashing with a view of unlawfulness that extends to encompass any order that infringes upon or restricts the ‘right to be oneself’, even in the military, and thus the risk of abuse of hierarchy remains, as does the tension between functional obedience and personal responsibility, operational efficiency and individual conscience, formal legality and substantive justice.

On the other hand, the issue concerning the consequences of disobedience must be considered alongside that of obedience to an unlawful or criminal order, or rather, the possibility for a member of the armed forces to invoke the execution of a superior order as a justification even when the latter is unlawful: it is the tension between obedience and responsibility, in fact, that characterises this relationship.

In short, *the ‘obedience to orders defence’*—that is, the possibility for a member of the military to invoke the execution of a superior order as a justification, even when the latter is illegal—seems to represent the other side of the issue at hand. For this reason, it might also prove useful for our purposes to revisit the ‘ ’ issue raised, some ten years ago now, by Monu Bedi<sup>64</sup>, from a perspective which, by combining constitutional theory, criminal law and moral philosophy, sought to shift the focus of legal discourse from individual responsibility to systemic responsibility.

As is well known, and as has already been emphasised (and please allow me to refer on all these points to the other contributions in this volume), according to traditional legal

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<sup>63</sup> Further cases confirm the tension between discipline and individual rights, a tension that goes beyond the mere issue of compliance with a single order; for example, *Schlesinger v. Councilman*, 420 U.S. 738 (1975), addresses the relationship between military and civil jurisdiction in the handling of charges against members of the armed forces, and *Goldman v. Weinberger*, 475 U.S. 503 (1986), restricts religious freedom (in this instance, in relation to the wearing of *the kippah*) within the military environment, reaffirming in such cases the supremacy of military discipline.

<sup>64</sup> See M. BEDI, *Entrapped: A Reconceptualization of the Obedience to Orders Defence*, in «Minnesota Law Review», Vol. 99, No. 3/2014, pp. 885–940.

doctrine—which has been consolidated since the Nuremberg trials—obedience to an order is not an automatic justification for the commission of unlawful acts. But for Bedi, this position is based on an unrealistic view of the psychological condition of the soldier, who operates within a highly hierarchical system designed to foster obedience rather than critical autonomy.

Bedi argues, in fact, that the subordinate soldier finds himself in a position structurally analogous to that of the defendant in the context of the *entrapment defence*: a category of US criminal law under which an individual cannot be held guilty if the State has induced him to commit a crime that he would never have committed of his own accord. *Entrapment*, according to the Supreme Court<sup>65</sup>, consists of the government inducing and predisposing the defendant to commit the unlawful act. Bedi proposes extending this framework to cases of military obedience as well.

The structure of military life, in fact, with its elements of training, hierarchy, discipline and ideology, effectively represents a form of ‘state inducement’, capable of severely restricting the decision-making freedom of subordinates. According to Bedi, a soldier who acts on an illegal order but in good faith, without having the means to assess its legitimacy, is more akin to a victim of *entrapment* than to a morally culpable individual.

This argument is supported by numerous studies in psychology and sociology: starting with Stanley Milgram’s obedience experiments, which demonstrated how ordinary individuals, placed in authoritarian contexts, tend to follow orders even when these violate their moral conscience<sup>66</sup>. And so, similarly, the military system would create a form of ‘structural vulnerability’ which, from the perspective of this interpretative proposal, the law should recognise not only as a mitigating factor, but as the basis for an autonomous category of defence<sup>67</sup>.

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<sup>65</sup> See in particular *Jacobson v. United States*, 503 U.S. 540 (1992).

<sup>66</sup> See S. MILGRAM, *Behavioural study of obedience*, in «The Journal of Abnormal and Social Psychology», vol. 67, no. 4/1963, p. 371 ff.

<sup>67</sup> Among the situations considered by Bedi, see the case studies examined in H.S. LEVIE (ed.), *International Law Studies, Documents on Prisoners of War*, Naval War College, R.I., vol. 60, Document No. 171, 1979, pp. 804–811.

Ultimately, the paradigm around which the idea of a different role for the legal system in upholding the position of the hierarchically subordinate individual revolves is always that of *due process*, a constitutional clause from which derives the need to prevent the State, through its own institutions (in this case the army), places the citizen in a psychological and organisational condition that makes it impossible for them to respect the *rule of law*, including in its constitutional dimension.

The interpretation cited does not therefore merely redefine a legal category, but calls for a comprehensive reconsideration of the relationship between power, authority and individual responsibility within the military sphere. Treating obedience to orders as a form of *entrapment* does not mean justifying every unlawful act, but recognising the systemic dynamics that make it possible, with the more specific consequences that are reflected in the sphere of military justice, which is not the subject of this discussion.

It is interesting to consider how the theory of *entrapment* might instead be applied to the case of disobedience; namely, to what extent the systemic dynamics of the internalisation of hierarchical subordination and, so to speak, the ‘de-moralisation’ of the position of the person receiving the order, might foster a sort of presumption of the validity of disobedience arising from reasons of conscience, thereby upholding the choice of those who overcome their vulnerable position by acting in accordance with the Constitution.

In this regard, *defences* under US military law play an important role, particularly in relation to freedom of conscience as enshrined in the First Amendment. The concept of *defence* applies, in fact, to cases of disobedience to orders deemed unlawful. Among these, the *lawful order defence* (a defence based on the unlawful nature of the order received) and the *conscience defence* stand out, that is, the assertion of ethical, moral or religious motivations rooted in the individual’s conscience.

From this perspective, an important reference, albeit not strictly confined to the military context, is the case of *United States v. Seeger*<sup>68</sup>. In this decision, the Supreme

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<sup>68</sup> See *United States v. Seeger* 380 U.S. 163 (1965). A. Brodie, H.P. Southerland, *Conscience, the Constitution, and the Supreme Court: The Riddle of United States v. Seeger*, in «Wisconsin Law Review», 1966, p. 306 ff., R. L. Rabin, *When Is a Religious Belief Religious United States v. Seeger and the Scope of Free Exercise*, in «Cornell Law Quarterly», vol. 51, 1965, p. 231 ff., C. Marblestone, *A Matter of Conscience: United States v. Seeger and the Supreme Court’s Historical Failure to Define Conscientious*

Court addressed the issue of *conscientious objection* in relation to a case involving three objectors to compulsory military service, who did not formally adhere to a traditional religion but claimed to be motivated by deep ethical convictions. In a ruling that was groundbreaking at the time, the Court recognised that the ‘sincerity’ of personal conviction, and not necessarily religious affiliation, could constitute a sufficient basis for invoking the protection of the First Amendment.

However, this openness has not translated, in strictly operational and military contexts, into widespread acceptance of *defences* based on individual conscience. The jurisprudence of courts-martial has historically maintained a cautious, if not wary, attitude towards the idea that a soldier might disobey an order solely on the basis of their own subjective moral judgement. The fear, highlighted in judgments such as *Parker v. Levy*, which has been analysed previously, is that broad freedom of conscience, if recognised in the military context to the same extent as in civilian life, would compromise the operational efficiency, cohesion and readiness of the armed forces, elements deemed vital to national security.

Even in subsequent cases, such as the aforementioned *Goldman v. Weinberger*<sup>69</sup>, concerning the wearing of Jewish head coverings in uniform, the Court reiterated that, in the military context, constitutional rights may be subject to more stringent restrictions.

Whilst the Supreme Court has recognised the sincerity of personal conviction as a valid criterion for invoking constitutional protection (as in *Seeger*), this standard has not been fully established within the military system, where a functional and collective logic prevails. The result is that the ‘soldier’s subjective conscience’ is recognised within narrow, not necessarily well-defined limits, and can hardly be invoked as an independent basis for justifying disobedience to an order, even if deemed morally unacceptable.

General conscientious objection – that is, the refusal to participate in any war-related activity – is protected more broadly than selective conscientious objection, which refers to disobedience of individual operations or orders on ethical grounds. The latter

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*Objector Status Under the First Amendment*, in «Hastings Constitutional Law Quarterly», vol. 38, 2010, p. 201 ff.

<sup>69</sup> See *Goldman v. Weinberger* 475 U.S. 503 (1986), on which S. J. LEVINE, ‘Untold stories of *Goldman v. Weinberger*: religious freedom confronts military uniformity’, in «Air Force Law Review», vol. 66, 2010, p. 205 ff.

has been recognised only in rare cases, such as in procedures for early discharge on moral grounds. The Supreme Court emphasised in the case of *Gillette v. United States*<sup>70</sup> that selective objection does not fall within the scope of constitutionally protected rights, except in cases where it is explicitly provided for by law.

In military judicial practice, therefore, the *conscience defence* does not automatically apply. A soldier who disobeys must demonstrate that the order was not only contrary to his or her conscience, but manifestly unlawful according to objective standards<sup>71</sup>.

The reflections undertaken in an attempt to outline the constitutional dimension of the issue of disobedience to an unlawful order within the military legal system lead to some brief, and non-conclusive, final considerations.

The theory of the right to resistance and its manifestations help to consolidate, on an axiological level, and provide a robust constitutional foundation for a reconceptualisation of disobedience to an unlawful order not only in terms of a duty of non-compliance in the event of the order's manifest unlawfulness, but also of a right to non-compliance where such unlawfulness constitutes a violation of principles, values and interests attributable to the constitutional system as a whole. This means that an order which infringes, for example, the right to be oneself, personal identity, or which violates fundamental rights, regardless of its classification under the applicable law within the general legal system of reference ( ), can and should be considered sufficient to justify disobedience.

In reality, as demonstrated in the pages of this paper, the history of the right to resistance is a troubled one, and although it may appear to be an implicit or cryptic public law concept at a comparative level, both the legislative and jurisprudential traditions show a certain reluctance to recognise its constitutive value. Conscientious objection, which was mentioned in relation to the North American case, represents a manifestation of resistance (although, as has been emphasised, it is predominantly attributed an

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<sup>70</sup> See *Gillette v. United States*, 401 U.S. 437 (1971); see also J. C. WITT JR, *Gillette v. United States: The End of Selective Conscientious Objection*, op. cit.

<sup>71</sup> For comparative references on the issue of liability arising from the execution of a superior's order and disobedience of an unlawful order in a military context, see D. PROVOLO, *Esecuzione dell'ordine superiore e responsabilità penale*, CEDAM, Padua 2012.



exclusively collective character), but only when *prater legem* or *contra legem* shares its residual nature, and its operation *secundum legem* is, as is obvious, always rather limited.

On the other hand, if the boundaries of the illegality, or criminal nature, of the order are inevitably subject to assessment and, so to speak, measurement, and this significantly affects the subordinate's actual margin of self-determination, determining the actual possibility of evading execution, no less problematic is the mirror-image situation, namely that in which the manifest illegality of the order would require the soldier to refuse, even in the presence of conditions of *entrapment*, to use the category mentioned above.

This aspect, too, is not without constitutional implications. Indeed, it is precisely the 'constitutionalisation' of the military system that appears to be the only instrument truly capable of preventing those forms of psychological and organisational conditioning that risk impeding the individual defence, by those who are hierarchically subordinate within the military, of *the rule of (constitutional) law*.